

2016

Property Law Review  
Issues Paper 4  
*Property Law Act 1974 (Qld) –  
Mortgages, Co-ownership,  
Encroachment and Mistake*

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.

The members of the Centre who authored this paper are:

Professor William Duncan  
Professor Sharon Christensen  
Associate Professor William Dixon  
Megan Window  
Riccardo Rivera

# Property Law Act 1974 (Qld) – Mortgages, Co-ownership, Encroachment and Mistake

---

## Table of Contents

Preface .....	2
How to make a submission .....	10
Disclaimer.....	11
1. Background.....	12
1.1. Review of Queensland Property Laws.....	12
<b>PART 1 – Co-ownership – PLA Part 5.....</b>	<b>13</b>
<b>A. PLA Part 5 Division 1 – General Rules (ss 33-36).....</b>	<b>13</b>
2. Section 33: Forms of co-ownership.....	13
2.1. Overview and purpose .....	13
2.2. Is there a need for reform? .....	14
2.3. Options .....	15
3. Section 34: Power for corporations to hold property as joint tenants .....	16
3.1. Overview and purpose .....	16
3.2. Is there a need for reform? .....	17
3.2.1. Reference to ‘body corporate’ .....	17
3.2.2. Equating ‘dissolution’ with the ‘death’ of a corporation – updating language.....	18
3.2.3. Vesting of property – possible issues between the PLA and the <i>Corporations Act 2001</i> (Cth) .....	18
3.3. Other jurisdictions .....	20
3.3.1. Australia.....	20
3.3.2. New Zealand.....	21
3.4. Options .....	21
3.4.1. Reference to ‘body corporate’ .....	21
3.4.2. Equating ‘dissolution’ with the ‘death’ of a corporation – updating language.....	22
3.4.3. Vesting of corporation property.....	22
4. Section 35: Construction of disposition of property to 2 or more persons together .....	24
4.1. Overview and purpose .....	24
4.1.1. Partnerships.....	26
4.2. Is there a need for reform? .....	26

4.3.	Other jurisdictions .....	26
4.4.	Options .....	27
5.	Section 36 – Tenants in common of equitable estate acquiring the legal estate .....	28
5.1.	Overview and purpose .....	28
5.2.	Is there a need for reform? .....	28
	<b>B. PLA Part 5 Division 2 – Statutory trusts, sale and division (ss 37-43) .....</b>	<b>29</b>
6.	Section 38 – Statutory trusts for sale or partition of property held in co-ownership.....	29
6.1.	Overview and purpose .....	29
6.2.	Is there a need for reform? .....	31
6.2.1.	Defining ‘co-owner’ and ‘co-ownership’ .....	31
6.2.2.	Consistency between section 38 and section 41 of the PLA in relation to chattels.....	31
6.2.3.	Partnership property .....	32
6.2.4.	The court’s discretion .....	33
6.2.5.	Transitional provision .....	34
6.3.	Other jurisdictions .....	34
6.3.1.	Australia.....	34
6.3.1.1.	Reform in Victoria.....	35
6.3.2.	New Zealand .....	36
6.4.	Options .....	37
6.4.1.	Option 1 – Retain section 38 with modifications .....	37
6.4.2.	Option 2 – Amend section 38 to enable the Court to directly order the sale or partition of the property .....	37
7.	Section 42 – Powers of the court .....	38
7.1.	Overview and purpose .....	38
7.2.	Is there a need for reform? .....	39
7.2.1.	Determination of any question of fact and beneficial interests .....	39
7.2.2.	Distribution of net proceeds of sale or retention of the same – express provision required? .....	39
7.3.	Options .....	40
	<b>PART 2 – Mortgages – PLA Part 7 (ss 77-101) .....</b>	<b>42</b>
8.	Mortgages (ss 77-101).....	42
8.1.	Overview and purpose .....	42
8.2.	Is there a need for reform? .....	42
8.3.	Other jurisdictions .....	43

8.3.1.	NSW – Right to early redemption of mortgage.....	43
8.4.	Options .....	44
9.	Section 77 – Definitions for pt 7.....	45
9.1.	Overview and purpose .....	45
9.2.	Is there a need for reform? .....	45
10.	Section 77A – Application of pt 7 .....	46
10.1.	Overview and purpose .....	46
10.2.	Is there a need for reform? .....	47
11.	Section 79 – Variation of mortgage.....	49
11.1.	Overview and purpose .....	49
11.2.	Is there a need for reform .....	50
11.3.	Other jurisdictions .....	50
11.4.	Options .....	50
12.	Section 80 – Inspection and production of instruments .....	51
12.1.	Overview and purpose .....	51
12.2.	Is there a need for reform? .....	53
12.2.1.	As long as the right subsists .....	53
12.2.2.	Meaning of ‘authorised’ .....	53
12.2.3.	Distinction between court and chambers.....	54
12.2.4.	Application to electronic documents .....	54
12.3.	Other jurisdictions .....	54
12.3.1.	New South Wales .....	54
12.3.2.	Victoria and Western Australia .....	55
12.4.	Options .....	55
12.4.1.	Clarify the operation of the provision .....	55
12.4.2.	Remove reference to ‘authorised’ .....	55
12.4.3.	Remove reference to ‘chambers’ .....	56
12.4.4.	Include electronic documents .....	56
13.	Section 82 – Tacking and further advances.....	57
13.1.	Overview and purpose .....	57
13.2.	Is there a need for reform? .....	59
13.2.1.	Timing of the obligation to make further advances.....	59
13.2.2.	Notice .....	60
13.3.	Other jurisdictions .....	60

13.4.	Options .....	60
14.	Section 83 – Powers incident to estate or interest of mortgagee .....	62
14.1.	Overview and purpose .....	62
14.2.	Is there a need for reform? .....	64
14.2.1.	Section 83(1)(a) – co-ordinate or alternative? .....	64
14.2.2.	Minerals apart from the surface .....	64
14.2.3.	Application to mortgages of land and other property .....	64
14.3.	Other jurisdictions .....	65
14.4.	Options .....	65
15.	Section 85 – Duty of mortgagee or receiver as to sale price.....	67
15.1.	Overview and purpose .....	67
15.2.	Is there a need for reform? .....	68
15.3.	Other jurisdictions .....	69
15.4.	Options .....	69
16.	Section 86 – Effect of conveyance on sale .....	71
16.1.	Overview and purpose .....	71
16.2.	Is there a need for reform? .....	71
16.2.1.	Unregistered land – section 86(1) .....	71
16.2.2.	Transfer of land under a power of sale – section 86(2) .....	72
16.3.	Other jurisdictions .....	72
16.4.	Options .....	72
17.	Section 87– Protection of purchasers .....	74
17.1.	Overview and purpose .....	74
17.2.	Is there a need for reform? .....	74
17.2.1.	Limited operation .....	74
17.2.2.	Benefit is no greater than existing protections .....	75
17.3.	Other jurisdictions .....	75
17.4.	Options .....	75
18.	Section 89 – Provisions as to exercise of power of sale .....	77
18.1.	Overview and purpose .....	77
18.2.	Is there a need for reform? .....	78
18.3.	Other jurisdictions .....	78
18.4.	Options .....	78
19.	Section 91 – Amount and application of insurance money .....	79

19.1.	Overview and purpose .....	79
19.2.	Is there a need for reform? .....	80
19.2.1.	Making good vs reinstating .....	80
19.2.2.	Contracting out.....	81
19.3.	Other jurisdictions .....	81
19.4.	Options .....	82
19.4.1.	Modify section 91(5).....	82
19.4.2.	Modify section 91(7).....	83
20.	Section 92 – Appointment, powers, remuneration and duties of receiver .....	84
20.1.	Overview of section .....	84
20.2.	Is there a need for reform? .....	85
20.2.1.	Trigger event.....	86
20.2.2.	The powers of a receiver .....	86
20.3.	Other jurisdictions .....	87
20.3.1.	NSW .....	87
20.4.	Options .....	87
20.4.1.	Appointing a receiver .....	87
20.4.2.	Clarifying the interaction with the <i>Corporations Act 2001</i> (Cth).....	88
21.	Section 95 – Relief against provision for acceleration of payment.....	89
21.1.	Overview of section .....	89
21.2.	Is there a need for reform? .....	90
21.3.	Other jurisdictions .....	91
21.4.	Options .....	91
22.	Section 97 – Interest of mortgagor not seizable on judgment for mortgage debt.....	92
22.1.	Overview of section .....	92
22.2.	Is there a need for reform? .....	93
22.3.	Other jurisdictions .....	93
22.4.	Options .....	93
23.	Section 101 – Facilitation of redemption in case of absent or unknown mortgagee .....	94
23.1.	Overview of section .....	94
23.2.	Is there a need for reform? .....	95
23.2.1.	Applicable categories .....	95
23.2.2.	Unclear wording .....	95
23.2.3.	No mining warden .....	96

23.3.	Other jurisdictions .....	96
23.4.	Options .....	96
<b>PART 3 – Encroachment and mistaken improvements – PLA Part 11</b> .....		<b>97</b>
<b>A. PLA Part 11 Division 1 – Encroachment (ss 182-194)</b> .....		<b>97</b>
24.	Encroachment .....	97
24.1.	Overview and purpose .....	97
24.2.	History of the provisions .....	99
24.3.	Operation of Part 11, Division 1 .....	100
24.4.	Is there a need for reform? .....	103
24.4.1.	Original rationale for encroachment provisions remains valid .....	103
24.4.2.	Calculation of compensation – a matter for the court to determine?.....	104
24.4.3.	‘Subject land’ – does it need a more expansive definition?.....	107
24.4.4.	Combining the encroachment provisions and mistaken improvement into a single provision? .....	108
24.5.	Other jurisdictions .....	109
24.5.1.	Australia.....	109
24.5.2.	New South Wales .....	110
24.5.3.	Northern Territory .....	110
24.5.4.	South Australia .....	110
24.5.5.	Western Australia .....	110
24.5.6.	Victoria .....	111
24.5.7.	New Zealand .....	112
24.6.	Options .....	114
Annexure 1 – <i>Property Law Act 2007</i> (NZ) Encroachment provisions.....		115
Annexure 2 – Victorian Law Reform Commission: Review of Property Law Act 1958 - Final Report Recommendations in relation to building encroachments .....		118
<b>B. PLA Part 11 Division 2 – Improvements under mistake of title (ss 195-198)</b> .....		<b>120</b>
25.	Part 11, Division 2 – Improvements under mistake of title (ss195-198).....	120
25.1.	Overview and purpose .....	120
25.2.	Is there a need for reform? .....	123
25.3.	Other jurisdictions .....	124
25.3.1.	Australia.....	124
25.3.1.1.	Northern Territory .....	124
25.3.1.2.	Western Australia .....	125



25.3.1.3. Victoria .....	125
25.3.2. Other Jurisdictions.....	126
25.3.2.1. New Zealand .....	126
25.3.2.2. Canadian provinces .....	126
25.4. Options .....	127
<b>Resources</b> .....	129
Part 5 – Co-ownership.....	129
Part 7 – Mortgages.....	131
Part 11, Division 1 – Encroachment .....	132
Part 11, Division 2 – Improvements under mistake of title .....	134
Appendix A .....	136
<b>Part 7 Proposed Preliminary Recommendations</b> .....	136

## 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 Parts 5, 7 and 11 of the *Property Law Act 1974* (Qld), 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](mailto: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.

## Disclaimer

The material presented in this publication is distributed by the Queensland Government as an information source only. The Department and the Queensland University of Technology hold no liability for any errors or omissions within this publication. This publication is not intended to provide legal advice and any decisions made by other parties based on this publication are solely the responsibility of those parties. Information contained in this publication is from a number of sources and, as such, does not necessarily represent government or departmental policy. The State of Queensland and the Queensland University of Technology make no statements, representations or warranties about the accuracy or completeness of, and you should not rely on, any information contained in this publication.

The Queensland Government and the Queensland University of Technology disclaim all responsibility and all liability (including, without limitation, liability in negligence) for all expenses, losses, damages and costs you might incur as a result of the information being inaccurate or incomplete in any way, and for any reason.

You should be aware that third party websites referenced in this publication are not under the control of the Department or the Queensland University of Technology. Therefore, the Department and the Queensland University of Technology can make no representation concerning the content of these sites, nor can the fact that these sites are referenced serve as an endorsement by the Department or the University of any of these sites. The Department and the Queensland University of Technology do not warrant, guarantee or make any representations regarding the correctness, accuracy, reliability, currency, or any other aspect regarding characteristics or use of the information presented on third party websites referenced in this publication.

# 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 5 – Co-ownership;
- Part 7 – Mortgages;
- Part 11 – Encroachment and Mistake.

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

# PART 1 – Co-ownership – PLA Part 5<sup>1</sup>

## A. PLA Part 5 Division 1 – General Rules (ss 33-36)

Part 5 of the PLA concerns concurrent interests and co-ownership of property. Part 5 contains two divisions, Division 1 addressing General Rules and Division 2 addressing statutory trusts, sale and division. Division 1 comprises sections 33 to 36 inclusive and Division 2 comprises sections 37 to 43. Part A of this paper considers Division 1 and Part B of the paper reviews Division 2.

## 2. Section 33: Forms of co-ownership

### 2.1. Overview and purpose

#### **33 Forms of co-ownership**

- (1) Any property and any interest, whether legal or equitable, in any property may be held by 2 or more persons –
  - (a) as joint tenants; or
  - (b) as tenants in common.
- (2) Any 2 or more persons acquiring land after the commencement of this Act in circumstances in which, but for the passing of this Act, they would have acquired the land as coparceners shall acquire such land as tenants in common and not as coparceners.

At common law, four forms of co-ownership of property were recognised:

- joint tenancy;
- tenancy at common;
- tenancy by entireties; and
- coparcenary.<sup>2</sup>

Tenancy by entireties existed only in relation to land held by a husband and wife which would have been held jointly as joint tenants if the parties were not married.<sup>3</sup> This type of tenancy was not

---

<sup>1</sup> The Centre gratefully acknowledges the contribution of Stephen Lumb, Barrister (Brisbane) in relation to the review of Part 5 of the *Property Law Act 1974* (Qld). This section of the Issues Paper has been adapted from material prepared by Stephen Lumb on Part 5.

<sup>2</sup> 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) 24.

<sup>3</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 230 [8.180]; 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) 24.

severable which meant it could not qualify as a joint tenancy.<sup>4</sup> Tenancy by entireties ceased to exist in Queensland following the enactment of the *Married Women's Property Act 1890*.<sup>5</sup> Coparcenary is described as 'an unusual form of tenancy in common', with some traits of both a joint tenancy and a tenancy in common.<sup>6</sup> The Queensland Law Reform Commission (QLRC) when considering co-ownership in 1973 noted that:

The extreme rarity of coparcenary does, we consider, justify its abolition as a measure of simplification of the law of real property, such coparcenary taking effect in the future as a tenancy in common.<sup>7</sup>

Section 33 of the PLA was introduced to confirm the position in practice in Queensland that joint tenancy and tenancy in common, in law or equity, are the only forms of co-ownership.<sup>8</sup> The section expressly provides that any property may be held by 2 or more persons as joint tenants or tenants in common. Section 33(2) also removes the concept of coparceners where 2 or more people acquire land after the commencement of the PLA. In that situation the parties are deemed to acquire the land as tenants in common.

A key feature of a joint tenancy is the right of survivorship which means that the interest of another joint tenant who dies passes to the other joint tenant(s) automatically.<sup>9</sup>

## 2.2. Is there a need for reform?

Section 33 of the PLA simply states the position in Queensland in relation to the forms of co-ownership available. The inclusion of section 33(2) of the PLA may be superfluous for the following reason:

As the only possibility for an acquisition as co-parceners immediately prior to the Act was in the case of a fee tail, and as s 22 provides for the conversion of an existing fee tail into a fee simple, the need for an express provision may be doubted.<sup>10</sup>

---

<sup>4</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 230 [8.180]; 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) 24.

<sup>5</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 230 [8.180]; 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) 24.

<sup>6</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 230 [8.180].

<sup>7</sup> 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) 24.

<sup>8</sup> 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) 24.

<sup>9</sup> Charles Harpum, et al, *The Law of Real Property* (Sweet & Maxwell, 6<sup>th</sup> ed, 2000) 476 [9.003].

<sup>10</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.30].

However, the inclusion of the provision does remove any lingering uncertainty and ‘puts the matter beyond doubt.’<sup>11</sup>

### **2.3. Options**

No amendments to section 33 of the PLA are recommended.

---

<sup>11</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.30].

### 3. Section 34: Power for corporations to hold property as joint tenants

#### **34 Power for corporations to hold property as joint tenants**

- (1) A body corporate shall be capable of acquiring and holding any property in joint tenancy in the same manner as if it were an individual, and where a body corporate and an individual or 2 or more bodies corporate become entitled to any property under circumstances or because of any instrument which would, if the body corporate had been an individual, have created a joint tenancy they shall be entitled to the property as joint tenants.
- (1A) However, the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.
- (2) Where a body corporate is a joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.
- (3) This section shall apply in all cases of the acquisition or holding of property after the commencement of this Act.

#### 3.1. Overview and purpose

Section 34 of the PLA addresses the issue associated with the power of corporations to hold property as joint tenants. Subsection 34(1) overcomes the common law rule that a corporation could not acquire or hold property as a joint tenant. A critical feature of a joint tenancy is the right of survivorship. A corporation was not able to be a joint tenant at common law because it 'could not die'.<sup>12</sup> The section now provides that a body corporate is capable of acquiring and holding any property in joint tenancy as if it were an individual. This right of a body corporate to hold property as a joint tenant is subject to the usual restraints and conditions that attach to the acquisition and holding of property by a body corporate singularly.<sup>13</sup> The purpose and effect of subsection 34(2) has been described in the following way:

Subsection (2) accommodates the technical objection arising from the perpetual succession of a corporation by equating the dissolution of a corporation with the death of a natural person for the purposes of survivorship.<sup>14</sup>

---

<sup>12</sup> Charles Harpum, *The Law of Real Property* (Sweet & Maxwell, 6<sup>th</sup> ed, 2000) 476 [9-003].

<sup>13</sup> *Property Law Act 1974* (Qld) s 34(1A).

<sup>14</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.70].



The QLRC indicated that the common law position was a source of ‘some inconvenience’, although it did not expand on the reasons for the inconvenience.<sup>15</sup> The QLRC recommended the adoption of provisions similar to those that existed in New South Wales and Victoria.<sup>16</sup>

It appears from commentary on the equivalent provision in New South Wales<sup>17</sup> that the need for the section arose when corporations increasingly began to undertake work as trustees.<sup>18</sup> Trustees hold property as joint tenants to enable the trust property to automatically pass to the other trustee when a trustee died.<sup>19</sup>

## 3.2. Is there a need for reform?

### 3.2.1. Reference to ‘body corporate’

The term ‘body corporate’ is used throughout section 34 of the PLA. This term is not defined in the PLA nor is it a defined term in the *Acts Interpretation Act 1954 (Qld) (AI Act)*. Schedule 1 of the AI Act defines ‘corporation’ broadly to include a body politic or corporate. Further, under section 32D(2) a number of examples of express references to a corporation are set out, including a reference to a ‘body corporate’. Section 57A of the *Corporations Act 2001 (Cth)* defines ‘corporation’ as follows:

- (1) Subject to this section, in this Act, **corporation** includes:
  - (a) a company; and
  - (b) any body corporate (whether incorporated in this jurisdiction or elsewhere); and
  - (c) an unincorporated body that under the law of its place of origin may sue or be sued, or may hold property in the name of its secretary or of an office holder of the body duly appointed for that purpose.
- (2) Neither of the following is a **corporation**:
  - (a) an exempt public authority;
  - (b) a corporation sole.

---

<sup>15</sup> 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) 24.

<sup>16</sup> 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) 24.

<sup>17</sup> *Conveyancing Act 1919 (NSW)* s 25.

<sup>18</sup> Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) 56 [30451.5].

<sup>19</sup> Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) 56 [30451.5]. The position is the same in the United Kingdom where the *Bodies Corporate (Joint Tenancy) Act 1899* specifies that a body corporate can hold property as a joint tenant. The introduction of this Act was justified on the basis of banks and other corporations increasingly acting as trustees: see Charles Harpum, *The Law of Real Property* (Sweet & Maxwell, 6<sup>th</sup> ed, 2000) 476 [9-003]. Trustee companies that fall within the scope of the *Trustee Companies Act 1968 (Qld)* are subject to section 25 which provides that where property is vested in a trustee company and a private individual or in a trustee company and another body corporate to the intent that they should hold the same jointly in any fiduciary capacity or as mortgagees they shall be deemed to be joint tenants in common.

(3) To avoid doubt, an Aboriginal and Torres Strait Islander corporation is taken to be a **corporation** for the purposes of this Act.

The precise scope of the corporate entities to which section 34 of the PLA is intended to apply is unclear. The New Zealand *Property Law Act 2007* (NZ) defines the word 'company' by referring to the definition of that term in the *Companies Act 1993* (NZ).<sup>20</sup>

### **3.2.2. Equating 'dissolution' with the 'death' of a corporation – updating language**

Section 34(2) of the PLA provides that where a body corporate is a joint tenant of any property, the property shall devolve to the other joint tenant on the body corporate's 'dissolution'. Since 1998, the word 'dissolution' is not used to describe the 'demise' of a company. Under section 601AD(1) of the *Corporations Act 2001* (Cth), a company ceases to exist on deregistration. Commentary on the change in language has noted that:

In the wider law of corporations and in older companies legislation the ending of the life of the corporation is called its dissolution. Statutes outside the *Corporations Act*, such as conveyancing statutes, may be found referring to dissolution. Since amendments made by the *Company Law Review Act 1998* (Cth) the word "dissolution" is not used in relation to a company's demise. A company ceases to exist on deregistration: s 601AD(1).

...

Other legislation may sanction the dissolution of a company. For example, the *Associations Incorporation Act 1981* (Vic) s 10 provides for the dissolution of a company limited by guarantee when it becomes registered under that Act.<sup>21</sup>

Although other Australian jurisdictions with similar provisions also use the term dissolution, consideration should be given to updating the section to reflect the terminology used under the *Corporations Act 2001* (Cth).

### **3.2.3. Vesting of property – possible issues between the PLA and the Corporations Act 2001 (Cth)**

There is a potential issue associated with the interplay between the operation of subsection 34(2) of the PLA and the provisions of the *Corporations Act 2001* (Cth) dealing with the vesting of property on deregistration. Connected to this issue is the availability of a process for reinstating a deregistered corporation and the consequences of the same. Sections 601AD(1A) and (2) of the *Corporations Act 2001* (Cth) provide, inter alia:

*Trust property vests in the Commonwealth*

---

<sup>20</sup> However, section 72 of the *Property Law Act 2007* (NZ) which addresses the issue of joint tenancy and company property uses the term 'body corporate', not company.

<sup>21</sup> *Ford, Austin and Ramsay's Principles of Corporations Law* (online) LexisNexis [27.640].

(1A) On deregistration, all property that the company held on trust immediately before deregistration vests in the Commonwealth. If property is vested in a liquidator on trust immediately before deregistration, that property vests in the Commonwealth. This subsection extends to property situated outside this jurisdiction.

*Other company property vests in ASIC*

(2) On deregistration, all the company's property (other than any property held by the company on trust) vests in ASIC. If company property is vested in a liquidator (other than any company property vested in a liquidator on trust) immediately before deregistration, that property vests in ASIC. This subsection extends to property situated outside this jurisdiction.

Pursuant to these provisions the property of the corporation vests in either the Commonwealth or ASIC as the case may be upon the corporation being deregistered.

Section 601AH of the *Corporations Act 2001* (Cth) provides for a process of reinstatement by ASIC or the court in the circumstances specified. Section 601AH(5) sets out the effect of reinstatement as follows:

If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered. A person who was a director of the company immediately before deregistration becomes a director again as from the time when ASIC or the Court reinstates the company. Any property of the company that is still vested in the Commonwealth or ASIC reverts in the company. If the company held particular property subject to a security or other interest or claim, the company takes the property subject to that interest or claim. [underlining added]

In *Foxman v Credex*,<sup>22</sup> White J observed that it was 'unclear' what would happen to company property held on a joint tenancy if the company was deregistered and then reinstated. This case considered the New South Wales equivalent of section 34 namely, section 25 of the *Conveyancing Act 1919* (NSW). This apparent anomaly was noted, but not answered, by White J.<sup>23</sup>

Under the terms of subsection 34(2), when 'dissolution' (deregistration) occurs, the corporation's joint tenancy interest in property devolves to the other joint tenant (as it would by way of survivorship if the entities were natural persons). However, under s 601AD of the *Corporations Act 2001* (Cth) the property of the corporation is taken to vest in the Commonwealth or ASIC as the case may be. Further, it is not clear how section 601AH of the *Corporations Act 2001* (Cth) interacts with section 34(2) of the PLA in the event of reinstatement. Where reinstatement occurs, the corporation is taken to have continued in existence as if it had not been deregistered.

The threshold question is whether the corporation's interest, as joint tenant, in property would vest in ASIC or the Commonwealth absent subsection 34(2) and the other state equivalents. The cases dealing with the bankruptcy of individuals holding a joint tenancy interest in property do not assist in determining this issue because it is established that the onset of bankruptcy works as a severance of

---

<sup>22</sup> *Foxman v Credex* [2007] NSWSC 1422, [66].

<sup>23</sup> See also D.K. Raphael, 'The *Ius Accrescendi* (Right of Survivorship) and Companies', (2009) 83 *Australian Law Journal* 437 where the issue of the interplay and potential inconsistency between such provisions and section 601AH of the *Corporations Act 2001* (Cth) was also noted, but not answered.

a joint tenancy.<sup>24</sup> In that event, the other joint tenant does not take an entire interest in the property of the individual. Research to date has not revealed any case which establishes that the dissolution or deregistration of a corporation effects a severance of any joint tenancy of property held or owned by the corporation. One possible answer may be found in section 601AD(3) which provides that the Commonwealth or ASIC takes only the same property rights that the corporation itself held. If, by virtue of subsection 34(2) of the PLA, the property devolves to the other joint tenant it could be argued that the corporation's interest in the property ceased simultaneously with its deregistration so that there is no property rights which would vest in the Commonwealth or ASIC.

An additional consideration in this context is whether there is any inconsistency between subsection 34(2) of the PLA and the relevant provisions of the *Corporations Act 2001* (Cth) which would render subsection 34(2) of the PLA constitutionally invalid. Subsection 5E(1) of the *Corporations Act 2001* (Cth) provides that the Corporations legislation is not intended to exclude or limit the concurrent operation of any law of a State or Territory. However, subsection 5E(4) of the Act provides that section 5E does not apply to the law of the State or Territory if there is a 'direct inconsistency' between the Corporations legislation and that law.

The issues identified in the preceding two paragraphs have not been raised as 'live' issues in Queensland or New South Wales to date.<sup>25</sup> Although a corporation is able to hold property as a joint tenant under the PLA, for commercial reasons most corporations may not do so. Further, any consideration of the complex interaction between the PLA and the *Corporations Act 2001* (Cth) potentially raise constitutional issues which would require further specialist consideration beyond the scope of this review.

### 3.3. Other jurisdictions

#### 3.3.1. Australia

All the other Australian jurisdictions have provisions that have a similar effect to section 34 of the PLA.<sup>26</sup> The Victorian Law Reform Commission (**VLRC**) recommended retaining section 28 of the *Property Law Act 1958* (Vic) during its broader review of that Act in 2010.<sup>27</sup>

---

<sup>24</sup> *Peldan v Anderson* (2006) 227 CLR 471, [48].

<sup>25</sup> For further discussion on the potential issues raised from the interaction between the *Corporations Act 2001* (Cth) and the *Property Law Act 1974* (Qld) (and its equivalents in other Australian jurisdictions) see D Raphael, 'The *Ius Accrescendi* (Right of Survivorship) and Companies' (2009) 83 *Australian Law Journal* 437.

<sup>26</sup> New South Wales: *Conveyancing Act 1919* (NSW) s 25; Western Australia: *Property Law Act 1969* (WA) s 29; Australian Capital Territory: *Civil Law (Property) Act 2006* (ACT) s 209; *Law of Property Act* (NT) s 34; Western Australia: *Property Law Act 1969* (WA) s 29; Tasmania: *Conveyancing and Law of Property Act 1884* (Tas) s 62; Victoria: *Property Law Act 1958* (Vic) s 28.

<sup>27</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010) 127.

### 3.3.2. New Zealand

Section 72 of the *Property Law Act 2007* (NZ) addresses the issue of the body corporate acquiring and holding property as a joint tenant. That section provides in summary:

- if a body corporate has power to acquire and hold property, the body corporate may acquire and hold property as a joint tenant;<sup>28</sup>
- if a body corporate is a joint tenant of property, its interests as joint tenant devolve on the surviving joint tenant in the cases specified in subsection 72(2)(a)-(c);<sup>29</sup>
- section 72 of the Act overrides section 324 of the *Companies Act 1993* (NZ). Section 324 provides for the vesting in the Crown of company property not distributed or disclaimed prior to the removal of the property from the company register.<sup>30</sup> The vesting takes effect from the point of removal of the company from the register;
- section 72 will not apply to a company removed from the New Zealand register under section 355 of the *Companies Act 1993* (NZ).<sup>31</sup> That provision of the *Companies Act 1993* (NZ) sets out the process for removal from the registers and specifies the point at which a company is 'removed' from the register.

These provisions avoid the uncertainty regarding the interaction between the property legislation and the company legislation. However, New Zealand does not have the same constitutional complexities as Australia and it is possible to include provisions in its property legislation expressly overriding the *Companies Act 1993* (NZ).

## 3.4. Options

### 3.4.1. Reference to 'body corporate'

As indicated in Part 3.2.1 above, the precise scope of the corporate entities to which section 34 of the PLA applies is unclear. One option is to amend section 34 to refer to a 'corporation' in lieu of 'body corporate' and to define 'corporation' in the Dictionary to the PLA either by reference to the definition in section 57A of the *Corporations Act 2001* (Cth) or to include a separate definition for the purposes of the PLA.

Each State and Territory, apart from the Australian Capital Territory, uses the term 'body corporate'. The term 'corporation' is used in the Australian Capital Territory.

#### Questions

1. Do you think the scope of the corporate entities to which section 34 of the PLA applies requires clarification?

<sup>28</sup> *Property Law Act 2007* (NZ) s 72(1).

<sup>29</sup> *Property Law Act 2007* (NZ) s 72(2).

<sup>30</sup> *Property Law Act 2007* (NZ) s 72(3)(a).

<sup>31</sup> *Property Law Act 2007* (NZ) s 72(3)(b).

2. If clarification is required, should the definition of the term be referenced to the definition in section 57A of the *Corporations Act 2001* (Cth) or should it be separately defined for the purposes of the PLA?

### 3.4.2. Equating 'dissolution' with the 'death' of a corporation – updating language

Section 34(2) warrants amendment by using the term 'deregistration'. Whether the reference to 'dissolution' should also be retained will depend upon the intended scope of the new definition of 'corporation' for the purposes of section 34 as discussed in Part 3.2.2 above.

#### Question

3. Do you see any potential issues with the use of the term 'deregistration' either in addition to, or instead of the term 'dissolution'?

### 3.4.3. Vesting of corporation property

It is clear from the discussion in Part 3.2.3 above that there are a number of potential complexities associated with the interaction between section 34(2) of the PLA and provisions of the *Corporations Act 2001* (Cth), specifically in relation to the reinstatement of a corporation that has been deregistered. One commentator has indicated that 'the problem is likely to emerge as anything but a theoretical exercise at some time in the near future.'<sup>32</sup> As indicated above, the constitutional issues raised should be considered by appropriate bodies with expertise in that area if further consideration of the interplay between subsection 34(2) of the PLA and sections 601AD and 601AH of the *Corporations Act 2001* (Cth) is warranted. Some of the factors that may be relevant to this consideration include:

- that deregistration can occur in circumstances other than in the event of insolvency;
- that there is scope for reinstatement in which event the company is effectively revived from 'death'; and
- the effect on section 34(2) of the PLA of the *Corporations Act* provisions vesting the property in ASIC or the Commonwealth upon deregistration of a corporation.

Some possible options for reform may include:

- omitting section 34(2) from the PLA;

---

<sup>32</sup> D K L Raphael, 'The *Ius Accrescendi* (Right of Survivorship) and Companies (2009) 83 *Australian Law Journal* 437, 439.

- expressly providing that deregistration works as severance of the joint tenancy either in cases of deregistration consequent upon insolvency or, alternatively, in any circumstance of deregistration;
- retaining section 34(2) of the PLA and clarifying the interrelation with the *Corporations Act 2001* (Cth) provisions discussed above.

If further consideration of this issue is undertaken then the matter should be considered by specialists in constitutional law.

#### **Questions**

- 4. Do you think the issues raised above in relation to the interaction between the PLA and *Corporations Act 2001* (Cth) are likely to arise in practice?**
- 5. How regularly would section 34 be relied upon in practice?**

## 4. Section 35: Construction of disposition of property to 2 or more persons together

### 4.1. Overview and purpose

#### 35 Construction of dispositions of property to 2 or more persons together

- (1) A disposition of the beneficial interest in any property, whether with or without the legal interest, to or for 2 or more persons together beneficially shall be construed as made to or for them as tenants in common, and not as joint tenants.
- (2) This section does not apply –
  - (a) to persons who by the terms or by the tenor of the disposition are executors, administrators, trustees, or mortgagees, nor in any case where the disposition provides that persons are to take as joint tenants or tenants by entireties; and
  - (b) to a disposition for partnership purposes in favour of persons carrying on business in partnership.
- (3) Subject to the provisions of the *Partnership Act 1891*, a disposition for partnership purposes of an interest in any property in favour of persons carrying on business in partnership shall, unless a contrary intention appears, be construed as –
  - (a) a disposition (if any) of the legal interest to those persons as joint tenants; and
  - (b) a disposition (if any) of the beneficial interest to those persons as tenants in common.
- (4) This section applies to any disposition made after the commencement of this Act.
- (5) In this section –

**disposition** includes a disposition which is wholly or partly oral.

Prior to the introduction of section 35 of the PLA, the common law presumed that a grant or devise of a legal interest in land to two or more persons created a joint tenancy.<sup>33</sup> The presumption of a joint tenancy was rebuttable in limited circumstances including where one of the four unities was absent, words of severance were used in the grant or an intention to create a tenancy in common could be discerned.<sup>34</sup> In terms of the beneficial interest in the property, equity generally followed the law in terms of presuming a joint tenancy. However, there were a number of exceptions which reflected the preference of equity to 'regard parties as tenants in common of the beneficial interest in property'<sup>35</sup> even where the legal interest was a joint tenancy. The exceptions included where:

<sup>33</sup> Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) [1414].

<sup>34</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010) 225 [8.110].

<sup>35</sup> Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 229 [1415].



- purchase money was provided in unequal shares. Even though the contributors held the legal estate as joint tenants, the equitable interest was viewed as being held as tenants in common in proportion to the contribution made by each person;<sup>36</sup>
- money was advanced on a mortgage;<sup>37</sup>
- partners in a partnership or people in a joint business venture contributed money to acquire the property as part of the business.<sup>38</sup>

The effect of section 35(1) of the PLA is to reverse the legal presumption of joint tenancy where a disposition has been made to two or more persons. The provision now provides that a disposition of the beneficial interest in any property, with or without the legal estate, to two or more persons is made to them as tenants in common, unless one of the exceptions in section 35(2) of the PLA applies. The provision applies to a disposition that occurs after 30 November 1975.<sup>39</sup> The term 'disposition' is defined broadly in the PLA and includes a conveyance, vesting instrument, declaration of trust, disclaimer and release.<sup>40</sup> The section also covers a disposition which is wholly or partly oral.<sup>41</sup> The application of the section is not just restricted to the beneficial interest in any property. It has been interpreted as also applying to the legal interest.<sup>42</sup> In this respect:

...in cases where equity would find that co-owners held as joint tenants because there was no warrant for departing from the common law presumption favouring a joint tenancy (as in the case of purchasers who made equal contributions), the indirect effect of the section is to require it to be held that the co-owners hold as tenants in common.<sup>43</sup>

However, section 35(2) of the PLA expressly provides that the presumption in section 35(1) of a tenancy in common does not apply to:

- dispositions that provide that a joint tenancy is created;
- persons who are executors, administrators, trustees or mortgagees<sup>44</sup> pursuant to the terms 'or the tenor' of the disposition;
- dispositions made for partnership purposes where made in favour of people carrying on partnership business.

---

<sup>36</sup> Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 229 [1415].

<sup>37</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.90].

<sup>38</sup> Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 230 [1415].

<sup>39</sup> *Property Law Act 1974* (Qld) s 35(4).

<sup>40</sup> *Property Law Act 1974* (Qld) sch 6.

<sup>41</sup> *Property Law Act 1974* (Qld) s 35(5).

<sup>42</sup> *Delehunt v Carmody* (1986) 161 CLR 464, 471-72. This case considered the equivalent provision in New South Wales, section 26 of the *Conveyancing Act 1919* (NSW). See also Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 231 [1418].

<sup>43</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.100].

<sup>44</sup> Mortgagees in this situation are dealt with in section 93 of the *Property Law Act 1974* (Qld).

### 4.1.1. Partnerships

The position in relation to partnerships is expressly set out in section 35(3) of the PLA. A partnership is not a separate legal entity which means that land or other partnership assets are usually registered in the names of the members of the partnership rather than the name of the partnership itself. The effect of section 35(3) is that a disposition for partnership purposes will be construed as a disposition of the:

- legal interest to those persons as joint tenants; and
- beneficial (or equitable) interest to those persons as tenants in common.

The construction of these dispositions in this way is subject to the provisions of the *Partnership Act 1891* (Qld) and a contrary intention. The purpose of section 35(3) of the PLA has been described as ensuring a convenient outcome for partners so that if one of the partners dies, the 'survivors can deal with the legal estate with little inconvenience.'<sup>45</sup>

### 4.2. Is there a need for reform?

The effect of the section 35(1) is clear and there are no decisions in Queensland directly raising the operation of section 35 of the PLA as an issue. This subsection was modelled on section 26 of the *Conveyancing Act 1919* (NSW), with a number of variations. The New South Wales provision does not include any subsection dealing with the construction of dispositions involving partnership property. This is left to the provisions of the *Partnership Act 1892* (NSW)<sup>46</sup> which have the effect that, at law, land held for partnership purposes by partners is held as joint tenants.<sup>47</sup> In Queensland, section 35(3) of the PLA was included by the QLRC in an attempt to avoid an outcome similar to the one in the 1955 Supreme Court decision of *Re Livanos*.<sup>48</sup> In that case the partnership property (a farm) was vested in the partners (two brothers) as tenants in common. One of the partners died intestate and because there was no automatic right of survivorship where property is held as tenancy in common, the legal estate in the land devolved to the Public Curator (as it was called at that time),<sup>49</sup> producing an impractical outcome for the surviving partner.<sup>50</sup>

### 4.3. Other jurisdictions

Section 26 of the *Conveyancing Act 1919* (NSW) was used as a base model for the purposes of section 35 of the PLA, however, the Queensland section includes provisions expressly dealing with

---

<sup>45</sup> MacDonald, Carmel, et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010) 228 [8.140].

<sup>46</sup> *Partnership Act 1892* (NSW) ss 20 and 22.

<sup>47</sup> Peter Young, et al, *Annotated Conveyancing and Real Property Legislation (NSW)* (Butterworths, 2012) 57 [30455.35].

<sup>48</sup> *Re Livanos* [1955] St R Qd 362.

<sup>49</sup> See also *Partnership Act 1891* (Qld) s 23(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) 26.

<sup>50</sup> See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.140].

partnerships which are not incorporated into the New South Wales Act. The Australian Capital Territory provision is drafted in a similar way to the New South Wales Act.<sup>51</sup> The Northern Territory provision is in the same form as section 35 of the PLA.<sup>52</sup> Western Australia, South Australia and Tasmania do not appear to have similar provisions.

#### **4.4. Options**

No amendments to section 35 of the PLA are recommended.

---

<sup>51</sup> *Civil Law (Property) Act 2006* (ACT) s 210.

<sup>52</sup> *Law of Property Act* (NT) s 35.

## 5. Section 36 – Tenants in common of equitable estate acquiring the legal estate

### 5.1. Overview and purpose

#### 36 Tenants in common of equitable estate acquiring the legal estate

Where 2 or more persons entitled beneficially as tenants in common to an equitable estate in any property are or become entitled in their own right, whether as joint tenants or tenants in common, to the legal estate in such property equal to and coextensive with such equitable estate both the legal and equitable estates shall be held by them as tenants in common unless such persons otherwise agree.

Section 36 of the PLA was introduced to address a position which had arisen as a result of two cases. The first case held that when legal and equitable estates are coextensive and equal the equitable estate is absorbed into the legal estate.<sup>53</sup> This view was then extended in another case which held that a joint tenancy at law was ‘co-extensive with a tenancy in common in equity’ and the latter interest was extinguished with the parties holding as joint tenants at law and in equity.<sup>54</sup> Section 36 was included in the PLA to overcome this position. The effect of the section is to make it clear that:

- where parties hold the equitable interest in property as tenants in common; and
- the parties become entitled as joint tenants or tenants in common to the legal estate in the property; and
- the legal estate is equal to and coextensive with the equitable estate,

both estates (legal and equitable) will be held by the parties as tenants in common. This position is subject to the parties agreeing otherwise.<sup>55</sup> Section 36 was adopted directly from the same provision in section 27 of the *Conveyancing Act 1919* (NSW).<sup>56</sup>

### 5.2. Is there a need for reform?

This section does not appear to have been the subject of judicial consideration in Queensland. No reform in relation to this section is recommended.

---

<sup>53</sup> *Selby v Alston* (1797) 3 Ves. Jr. 339; 30 ER 1042.

<sup>54</sup> *Re Selous* [1901] 1 Ch 921 as discussed in Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.240].

<sup>55</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.250].

<sup>56</sup> The reasons for this are set out in 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) 27.

## B. PLA Part 5 Division 2 – Statutory trusts, sale and division (ss 37-43)

Part 5, Division 2 of the PLA is directed at the process for terminating joint tenancies and tenancies in common by either the sale of the relevant property or the partitioning of it. This Division effectively replaced the *Partition Act 1911* (Qld) for a variety of reasons including concerns that it was ‘unnecessarily cumbersome’ and the absence of any ‘rational justification’ requiring a co-owner to incur the costs and ‘formality’ of a Supreme Court action in order to sell the co-owned property.<sup>57</sup> The *Partition Act 1911* (Qld) had originally been introduced to overcome problems with proceedings for partitioning at common law (and in equity) where sixteenth century English partition legislation was interpreted by the courts as not providing any discretion to refuse an application for partition.<sup>58</sup>

Division 2 comprises the following sections:

- section 37 – Definitions;
- section 37A – Property held on statutory trust for sale;
- section 37B – Property held on statutory trust for partition;
- section 38 – Statutory trusts for sale or partition of property held in co-ownership;
- section 39 – Trustee on statutory trusts for sale or partition to consult persons interested;
- section 40 – Right of co-owners to bid at sale under statutory power of sale;
- section 41 – Sale or division of chattels;
- section 42 – Powers of the court;
- section 43 – Liability of co-owner to account.

Part B of this Paper only considers those sections in Division 2, Part 5 which may potentially require amendment.

## 6. Section 38 – Statutory trusts for sale or partition of property held in co-ownership

### 6.1. Overview and purpose

#### **38 Statutory trusts for sale or partition of property held in co-ownership**

- (1) Where any property (other than chattels personal) is held in co-ownership the court may, on the application of any 1 or more of the co-owners, and despite any other Act, appoint trustees of the property and vest the same in such trustees, subject to encumbrances

<sup>57</sup> 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) 28.

<sup>58</sup> 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) 27. The Queensland Act was based on the early English partition legislation, the *Partition Act 1868* and *Partition Act 1876*. See also Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 265 [1495].

affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.

.....

- (9) This section does not apply to property in respect of which a subsisting contract for sale (whether made under an order in a suit for partition, or by or on behalf of all the co-owners) is in force at the commencement of this Act, if the contract is completed in due course, nor to land in respect of which a suit for partition is pending at such commencement if a decree for a partition or sale is subsequently made in such suit.

Section 38 of the PLA provides the court with the power to appoint trustees to oversee and manage the sale or partitioning of property (other than chattels) held in co-ownership. The process in section 38 is initiated when 1 or more of the co-owners apply to the court. Only co-owners can apply for an order under Division 2 for the appointment of trustees to partition or sell. This is a threshold requirement which must be satisfied before the operative provisions of the Division can be relied upon. The terms 'co-ownership' and 'co-owners' are defined in the PLA in the following way:<sup>59</sup>

**co-owner** has a corresponding meaning and includes an encumbrancee of the interest of a joint tenant or a tenant in common.

**co-ownership** means ownership whether at law or in equity in possession by 2 or more persons as joint tenants or as tenants in common.

The reference to 'corresponding meaning' in the definition of 'co-owner' is intended to refer to the definition of 'co-ownership' in section 37 of the PLA. The property which is vested in the trustees appointed is subject to encumbrances affecting the entirety but free from encumbrances affecting undivided shares.

Section 38(1) of the PLA expressly provides that the property is held by the trustees on trust for sale or on statutory trust for partition. Sections 37A and 37B of the PLA set out what it means for the co-owned property to be held on trust in these ways. In the case of property held on a statutory trust for sale, the trustee will sell the property and the proceeds of sale, after expenses and costs have been paid, will be divided in accordance with the rights of the co-owners.<sup>60</sup> Where the property vests in the trustee as a statutory trust for partition, the trustee is required to transfer the property to the co-owners and make payment of equality money, if necessary. The trustees of either form of trust are required, as far as practicable, to consult with the persons entitled to the income of the property. Where it is consistent with the general interest of the trust, the trustees must give effect to the wishes of the persons consulted as set out in the provision.<sup>61</sup>

<sup>59</sup> *Property Law Act 1974 (Qld)* s 37.

<sup>60</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010) 254 [8.500].

<sup>61</sup> *Property Law Act 1974 (Qld)* s 39.

The jurisdiction under section 38 is very broad and encompasses any 'property' which is widely defined in the AI Act.<sup>62</sup> The provision does not cover chattels.

## 6.2. Is there a need for reform?

There are a number of issues in section 38 which may require further consideration and amendment.

### 6.2.1. Defining 'co-owner' and 'co-ownership'

The current way in which 'co-owner' is defined in section 37 of the PLA is confusing. The term 'co-owner' is defined to have a 'corresponding meaning' but it is not clear whether this is a corresponding meaning to 'co-ownership' or to Division 1, Part 5. The New South Wales equivalent provision defines the terms in the same way but places 'co-ownership' above 'co-owner' which makes the reference to 'corresponding meaning' clear. The definition of the term 'co-owner' should either be self-contained or, if the current form is preferred, then 'co-owner' should be moved to below 'co-ownership' in section 37 of the PLA.

#### Question

6. Do you agree that the definition of 'co-owner' should be clarified?

### 6.2.2. Consistency between section 38 and section 41 of the PLA in relation to chattels

Section 38 of the PLA refers to 'chattels personal' whereas section 41 simply refers to 'chattels'. There is no definition of 'chattels personal' or 'chattels' in the PLA or the *Acts Interpretation Act 1954* (Qld). The reference to the word 'personal' in 'chattels personal' in section 38 is possibly redundant for the purposes of Division 2 of Part 5.

#### Questions

7. Do you see any issues arising from referring only to 'chattels' in section 38 of the PLA?
8. Should 'chattel' be defined in order to avoid any uncertainty regarding the scope of the property that is excluded from the scope of section 38 of the PLA?

---

<sup>62</sup> The term 'property' is defined in the *Acts Interpretation Act 1954* (Qld) to mean 'any legal or equitable estate or interest (whether present or future, vested or contingent, or tangible or intangible) in real or personal property of any description (including money), and includes things in action: Schedule 1.

### 6.2.3. Partnership property

It is not clear whether section 38 of the PLA applies to partnership property. For the reasons explained below, the better view is that section 38 of the PLA does apply to partnership property but the court may refuse to exercise its discretion to grant relief under section 38 in some circumstances involving partnership property.

The issue in relation to the application of the section to partnership property arose in the case of *Re Bolous*.<sup>63</sup> In that case, Ryan J refused to make an order under section 38 of the PLA and said:

In my opinion, the fact that the property is being used for partnership purposes, and that it may be partnership property, are circumstances which make it inappropriate to make an order for the appointment of statutory trustees for sale of the property. The parties have agreed to conduct a business in partnership on the property and they have agreed on the terms upon which one partner may retire from the partnership, and they have also agreed as to the distribution of the assets upon determination of the partnership. An authorisation for sale of the property would or at least could be inconsistent with the rights of the parties under the partnership agreement. Accordingly, I refuse to make the order sought by the summons.<sup>64</sup>

These observations were made following his Honour's reference to the discretionary character of the court's power. Although the first sentence in the passage cited above creates some doubt, it seems sufficiently clear from his Honour's reasons, read in their totality, that he considered section 38 to empower the court to make an order appointing a statutory trustee for sale of partnership property but that, in his discretion, he declined to do so. This refusal occurred particularly in light of the fact that the partnership agreement contained an option to purchase in the event of either party retiring from the partnership and giving the requisite notice in writing.<sup>65</sup>

There appears to be no doubt in New South Wales that the equivalent of section 38 of the PLA, section 66G of the *Conveyancing Act 1919* (NSW), applies to partnership property.<sup>66</sup>

#### Question

**9. Do you think section 38 of the PLA should be amended to clarify that it does apply to partnership property?**

---

<sup>63</sup> *Re Bolous* [1985] 2 Qd R 165.

<sup>64</sup> *Re Bolous* [1985] 2 Qd R 165, 167.

<sup>65</sup> This is how Daubney J in *Official Trustee in Bankruptcy v Cameron* [2008] QSC 89 at [24] subsequently treated Ryan J's observations in *Re Bolous*.

<sup>66</sup> See *Stone v Stone* [2014] NSWSC 1655. In that case, Darke J considered an argument that s 66G of the *Conveyancing Act 1919* (NSW) had no application to partnership property but rejected the contention. In his judgment, his Honour noted that the New South Wales Supreme Court had on numerous occasions made orders under s 66G in relation to land that is partnership property (at [33]).



## 6.2.4. The court's discretion

Under section 38(1) the court 'may' appoint trustees for sale or partition. One issue arising from the provision is the scope of the discretion which is provided to the court, specifically whether the discretion is a 'limited' one.<sup>67</sup> The Queensland Full Court confirmed that there is a residual discretion in the court to refuse to make an order under section 38 of the PLA.<sup>68</sup> In that decision Connolly J (with whom Moynihan J agreed) indicated:

It may be seen therefore that in modern times there are few defences to partition proceedings based merely on the circumstances of the parties. To say therefore that the exercise of the jurisdiction is virtually mandatory is an adequate statement for most cases but it is, in my opinion, not strictly the law and should be avoided.<sup>69</sup>

Kelly SPJ in the same decision indicated that there was a limited discretion in the court to refuse to make an order under section 38(1) of the PLA.<sup>70</sup> In his view, the question which remained at large was the circumstances in which the discretion should be exercised. This approach was followed in the New South Wales decision of *Ngatoo v Ford*.<sup>71</sup> Needham J in that case indicated that:

It is not, I think, desirable that one should attempt to define exhaustively the circumstances in which an order may be refused; judicial experience is that such matters should be resolved on a case by case basis.<sup>72</sup>

In this respect, hardship or unfairness is not generally a reason for refusing an application for sale.<sup>73</sup> A number of decisions have also identified various grounds upon which a court may be entitled to exercise its discretion to refuse an application under section 38 of the PLA (or its equivalent New South Wales provision). One of these is where the order would be inconsistent with some proprietary right, or some contractual or fiduciary obligation.<sup>74</sup>

Some other specific bases considered to be relevant to the exercise of the discretion include the following:

- conventional estoppel;<sup>75</sup>
- equitable estoppel;<sup>76</sup>

---

<sup>67</sup> *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314, 317.

<sup>68</sup> *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314.

<sup>69</sup> *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314, 321.

<sup>70</sup> *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314, 317. The limited scope of the discretion was also noted by McPherson J (as he then was) in an earlier case, *Ex parte Eimbart* [1982] Qd R 398, 402.

<sup>71</sup> *Ngatoo v Ford* (1990) 19 NSWLR 72, 76-77. This decision was followed in *Pennie v Pennie* [2010] NSWSC 1070, [9] where Hammerschlag J confirmed that relief under the equivalent provision, section 66G(1) of the *Conveyancing Act 1919* (NSW) is 'not as of right' and that the Court is not prevented from 'examining the circumstances to determine whether it is appropriate in any particular case to make an order.'

<sup>72</sup> *Ngatoo v Ford* (1990) 19 NSWLR 72, 77.

<sup>73</sup> See for example *Pascoe v Dyason* [2011] NSWSC 1217, [6]; *Harris v Harris* [2014] NSWSC 1766, [20].

<sup>74</sup> *Re McNamara and the Conveyancing Act* (1961) 78 WN (NSW) 1068; *Williams v Legg* (1993) 29 NSWLR 687, 693.

<sup>75</sup> *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR 14,685, 14,701.

<sup>76</sup> *Stone v Stone* [2014] NSWSC 1655, [37].

- a claimed constructive trust over the half share (as tenant in common) of the other party by reason of the common intention of the respondent and her husband with respect to the purchase and holding of the property as the family home and contributions made by the respondent for the upkeep and maintenance of the property;<sup>77</sup>
- a claimed charge over the entirety of the half share (as tenant in common) of the other party based on an equity of exoneration.<sup>78</sup>

Relief under section 38(1) of the PLA is 'not as of right'.<sup>79</sup> There will be situations where the court refuses the relief sought by the applicant. These circumstances are evolving and will be determined on a case by case basis by the court after taking into account all the relevant circumstances. Clarification of the scope of the discretion is probably not necessary in section 38(1) of the PLA.

#### Question

**10. Have you encountered any situations in practice where an issue regarding the scope of the discretion in section 38(1) has been raised?**

### 6.2.5. Transitional provision

Two transitional provisions, subsections 38(8) and 38(9) were included in section 38 of the PLA when it was enacted. Subsection 38(9) is probably obsolete in light of the passage of time which has passed since the commencement of the PLA. That section provides section 38 does not apply to property in respect of which a subsisting contract for sale is in force at the commencement of the PLA if the contract is completed in due course or to land in respect of which a suit for partition is pending at such commencement if a decree for a partition or sale is subsequently made in such suit.

#### Question

**11. Do you see any problems with repealing section 38(9) of the PLA?**

## 6.3. Other jurisdictions

### 6.3.1. Australia

The approach in Queensland to terminating co-ownership is based on the New South Wales model. The Northern Territory legislation is in similar form to Queensland and New South Wales.<sup>80</sup> The legislation in South Australia, Western Australia, the Australian Capital Territory and Tasmania are

<sup>77</sup> *Official Trustee in Bankruptcy v Cameron* [2008] QSC 89 [5], [30].

<sup>78</sup> *Official Trustee in Bankruptcy v Cameron* [2008] QSC 89 [5], [29].

<sup>79</sup> *Pennie v Pennie* [2010] NSWSC 1070 [9]

<sup>80</sup> *Law of Property 2010* (NT) Pt 5, Div 2.

derived from the English *Partition Act 1868*.<sup>81</sup> Tasmania still has in place the *Partition Act 1869* (Tas) which also mirrors the English Act. Victoria repealed these older provisions in Part IV of the *Property Law Act 1958* (Vic) in 2005 and replaced the Part with provisions which provide VCAT with a broad discretion in relation to ordering the sale or division of co-owned property. These provisions are discussed in more detail below.

### 6.3.1.1. Reform in Victoria

In 2001, the VLRC undertook a broad review of co-ownership in Victoria, including the current legislative arrangements in place for ending co-ownership of land. The rules in relation to co-ownership at that time under Part IV of the *Property Law Act 1958* (Vic) were described by the VLRC as ‘complex and expensive’.<sup>82</sup> The Part was based on the English partition legislation. Two possible alternative approaches were considered by the VLRC which were:

- the Queensland and New South Wales approach under which the court has the power to appoint trustees to manage and oversee the sale or partition of the co-owned property; and
- giving the court a broad discretion to order the sale or partition of property.<sup>83</sup>

The VLRC identified a number of advantages and disadvantages of the New South Wales and Queensland approach. The advantages included:

- simpler provisions than the ones which applied at that time (2001) in Victoria; and
- making trustees responsible for administering the sale or division of property potentially reduces disputes between co-owners in relation to details associated with the sale or division.<sup>84</sup>

The disadvantages of the approach which were identified by the VLRC included:

- increased complexity for sale or partitioning of property which may be unnecessary in many instances. However, the VLRC could not see the rationale for the appointment of trustees in every case of partition or sale; and
- in some cases the appointment of trustees was an additional step which may ultimately delay the ‘realisation’ of the property.<sup>85</sup>

The second option identified by the VLRC was based on recommendations made by the British Columbia Law Reform Commission in 1988.<sup>86</sup> These included providing the court with a broad discretion to take into account any relevant factor when considering an application.<sup>87</sup> Under this proposal, co-owners would apply to the court for an order that land be sold or divided. Further, the

---

<sup>81</sup> *Law of Property Act 1936* (SA) s 69-71; *Property Law Act 1969* (WA) s 126; *Civil Law (Property) Act 2006* (ACT) s 244; *Partition Act 1869* (Tas) ss 3-5.

<sup>82</sup> Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 48 [4.2].

<sup>83</sup> Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 51-52, [4.13]-[4.14].

<sup>84</sup> Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 52 [4.16].

<sup>85</sup> Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 53 [4.17].

<sup>86</sup> Law Reform Commission of British Columbia, *Report on Co-Ownership of Land*, LRC 100 (1988).

<sup>87</sup> Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 54 [4.21].

court could order compensation if the land was divided in a way which was not consistent with the actual interests in the property held by the co-owners.<sup>88</sup> The VLRC did not identify any disadvantages of the approach and suggested that it was simpler than the framework in New South Wales and Queensland. A key advantage identified was the level of flexibility provided to the court. The VLRC held the view that this was likely to lead to a fairer outcome.<sup>89</sup>

The Victorian Parliament ultimately repealed Part IV of the *Property Law Act 1958* (Vic) in 2005.<sup>90</sup> The Part was replaced with new provisions with the following effect:

- VCAT now has the jurisdiction to hear matters, although the Supreme Court and County Court can hear some applications in very limited circumstances;<sup>91</sup>
- VCAT has a broad discretion on the application of a co-owner to 'make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs';<sup>92</sup>
- sale and division of the property is the preferred order unless an order for division or a combination of sale or division would be more just and fair;<sup>93</sup>
- VCAT can appoint trustees to manage and run the sale or division of property;<sup>94</sup>
- a process is set out for VCAT to make orders regarding compensation and accounting between co-owners.<sup>95</sup>

### 6.3.2. New Zealand

The provisions which govern the termination of co-ownership in New Zealand are set out in sections 339 to 343 of the *Property Law Act 2007* (NZ). These provisions replace section 140 of the *Property Law Act 1952* (NZ) which also originated from the earlier English partition legislation. The Supreme Court in New Zealand is given a broad discretion to order:

- the sale of the property (and division of proceeds among the co-owners); or
- the division of property in kind among the co-owners; or
- one or more co-owners to purchase the share in the property of one or more co-owners at a fair and reasonable price.<sup>96</sup>

The court, when making one of the orders above may make a number of additional orders such as requiring the payment of compensation by one or more of the co-owners to the other co-owners and/or directing how proceeds of any sale of the property and any interest on the purchase amount are to be divided or applied.<sup>97</sup> The court is required to have regard to a number of factors when

---

<sup>88</sup> Law Reform Commission of British Columbia, *Report on Co-Ownership of Land*, LRC 100 (1988) 49-51.

<sup>89</sup> Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 54 [4.20].

<sup>90</sup> *Property (Co-Ownership) Act 2005* (Vic).

<sup>91</sup> *Property Law Act 1958* (Vic) s 234C(4) and (5).

<sup>92</sup> *Property Law Act 1958* (Vic) s 228.

<sup>93</sup> *Property Law Act 1958* (Vic) s 229.

<sup>94</sup> *Property Law Act 1958* (Vic) s 231.

<sup>95</sup> *Property Law Act 1958* (Vic) s 233.

<sup>96</sup> *Property Law Act 2007* (NZ) s 339(1).

<sup>97</sup> *Property Law Act 2007* (NZ) ss 339(4) and 343.

making an order under section 339(1) (and any related order under section 339(4)).<sup>98</sup> The relevant matters are:

- the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made;
- the nature and location of the property;
- the number of other co-owners and the extent of their shares;
- the hardship caused to the applicant by refusal of the order, compared to the hardship that would be caused to any other person by making the order;
- the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property;
- any other matters the court considers relevant.

## 6.4. Options

Feedback is required from stakeholders in response to the questions raised above before specific reform options can be put forward. However, an overview of some general reform options is set out below.

### 6.4.1. Option 1 – Retain section 38 with modifications

There is no suggestion that section 38 of the PLA should be repealed. However, at the very least, the language of the section probably needs to be modernised and simplified. Other amendments to the section may be required depending on the responses to the questions set out under Part 6.2 above.

### 6.4.2. Option 2 – Amend section 38 to enable the Court to directly order the sale or partition of the property

This option would involve adopting an approach similar to Victoria where the court has a broad discretion to order the sale or partition of the co-owned property without needing to appoint trustees and going through the statutory trust for sale or partition process. However, the trustee process would still be available to the court if it was required in the particular circumstances of the case. Part 6.3.1.1 above provides more detail of this approach.

#### Questions

- 12. Do you think the approach in section 38 of the PLA should remain the same as it is currently, with some amendment to rectify the issues identified in Part 6.2?**
- 13. Do you see any benefit in altering the current approach in section 38 of the PLA so that the court is provided with a broad discretion to directly order the sale or partition of the co-owned property, as described in Option 2 above?**

---

<sup>98</sup> *Property Law Act 2007* (NZ) s 342.

## 7. Section 42 – Powers of the court

### 7.1. Overview and purpose

#### 42 Powers of the Court

In proceedings under section 38 or 41 the court may on the application of any party to the proceedings or of its own motion -

(a) determine any question of fact arising (including questions of title) in the proceedings or give directions as to how such questions shall be determined; and

(b) direct that such inquiries be made and such accounts be taken as may in the circumstances be necessary for the purpose of ascertaining and adjusting the rights of the parties.

Prior to the introduction of section 42 of the PLA, courts would not under either section 38 or 41 of the PLA decide disputes regarding entitlements between co-owners. Generally, other proceedings were required to determine the relevant entitlements and the partition and sale proceedings would be adjourned and completed after the determination of the other issues. The rationale for this approach is described below:

The reason for this stand by the courts was that partition and similar proceedings assumed that entitlements were known, and were directed simply to the extrication of the parties from co-ownership if they could not agree on that matter among themselves.<sup>99</sup>

Section 42 provides the court with greater flexibility than the common law position in deciding whether the court should determine questions of fact and direct inquiries or whether the matter should be adjourned until the relevant issues between the co-owners are determined.<sup>100</sup> Section 42 of the PLA is unique to Queensland.

Section 42(a) of the PLA allows the court in a proceeding under section 38 or 41 to determine any questions of fact arising in the proceedings or give directions as to how such questions should be determined. The provision was applied in the decision of *Raymond v Zielonkowsky*<sup>101</sup> where Mullins J indicated that section 42 of the PLA gave the court additional jurisdiction in an application under section 38 of the PLA to:

determine any question of fact arising in the proceeding or give directions as to how such questions should be determined and direct that such inquiries be made and such accounts be taken as may in the circumstances be necessary for the purpose of ascertaining and adjusting the rights of the parties.<sup>102</sup>

---

<sup>99</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.680].

<sup>100</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [5.690].

<sup>101</sup> *Raymond v Zielonkowsky* [2006] QSC 265.

<sup>102</sup> *Raymond v Zielonkowsky* [2006] QSC 265, [25].

In this respect, the applicant in the case sought a declaration from the court of the extent of the parties' interests in the property, on the basis that their beneficial entitlements differed from the co-owners' registered interests as joint tenants. Mullins J made this determination relying on the 'additional jurisdiction' under section 42 of the PLA.<sup>103</sup>

Subsection 42(b) provides for the court to direct that enquiries be made and accounts be taken as may, in the circumstances, be necessary for the purpose of ascertaining and adjusting the rights of the parties.

## **7.2. Is there a need for reform?**

### **7.2.1. Determination of any question of fact and beneficial interests**

Section 42(a) refers to the determination of any 'question of fact'. The question of whether one co-owner has a greater beneficial interest in the property in question may turn on a mixed question of fact and law. There is also the broader issue of whether the express powers of the court under section 42 should be wider so that it may deal with any substantive matters raised by the respondent in the originating application brought by the applicant (subject to the making of any directions thought necessary).

#### **Questions**

- 14. Do you think section 42(a) should be amended to add the words 'or any question concerning the beneficial or equitable ownership of the respective co-owners' in order to avoid any doubt regarding the scope of the provision?**
- 15. Do you think the express powers of the court should be expanded so that the court may deal with any substantive matters raised by the respondent in the originating application brought by the applicant (subject to the making of any directions thought necessary)?**

### **7.2.2. Distribution of net proceeds of sale or retention of the same – express provision required?**

Section 42(b) of the PLA does not expressly provide for the court to give directions in relation to the distribution of the net proceeds of sale or to order the retention, by the applicant or the trustees, of part of the net proceeds pending the determination of disputed questions between the parties.

The Queensland Court of Appeal in *Re Wlodarczyk*<sup>104</sup> varied an order made under section 38 of the PLA for the sale of the property by adding a term that the applicant executor was to retain \$12,000 of the proceeds of sale to meet such claims as the respondent might bring against the applicant

---

<sup>103</sup> *Raymond v Zielonkowsky* [2006] QSC 265 [36], [41].

<sup>104</sup> *Re Wlodarczyk* [2000] 2 Qd R 216.

(provided that the proceeding was brought within 3 months).<sup>105</sup> The Court did not refer to the power relied upon to make such an order. The Court observed that even when there are strongly arguable claims to entitlement that may take some time to resolve, circumstances may still make it desirable to proceed to sale immediately, for example where there is a wasting asset. In those circumstances the Court said that the proceeds might be the subject of a 'preservation order' to abide the result of pending or threatened litigation.<sup>106</sup>

In another Queensland Court of Appeal decision,<sup>107</sup> the Court also varied an order by the primary judge made under section 38 of the PLA by ordering that the trustees were to pay 75% of the proceeds (net) to the respondents under section 38 and to hold the remaining 25% on trust pending a further order of a judge of the trial division of the Supreme Court. The primary judge had ordered the net proceeds to be paid out to the respondents in the proportion of 19/20 and to the appellant in the proportion of 1/20.

In Victoria, the powers of VCAT are broad and the Tribunal can make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.<sup>108</sup> This may include orders for the sale of land and the division of proceeds of sale among co-owners.<sup>109</sup> Further if VCAT orders the appointment of trustees for the purpose of selling land then it may direct the distribution of any proceeds of the sale in any manner specified.<sup>110</sup> Similarly, the court has equally broad powers in New Zealand. Section 434 of the *Property Law Act 2007* (NZ), in addition to an order for sale or division made under section 339(1), enables the court to direct how proceeds of any sale of the property (and interest) are to be divided or applied and any other matters or steps the court considers necessary or desirable as a consequence of the making of an order of sale or division of co-owned property.<sup>111</sup>

### 7.3. Options

Consideration should be given to expanding section 42 of the PLA to make express provision for the court to order the retention of moneys by the trustees or by one of the parties or to order the payment into court by the trustees or one of the parties. Additionally, in order to supplement subsection 42(a), provision could be made for the distribution of the proceeds of sale by the trustees in such proportions as the court may order.

---

<sup>105</sup> *Re Wlodarczyk* [2000] 2 Qd R 216, 220-221.

<sup>106</sup> *Re Wlodarczyk* [2000] 2 Qd R 216, 218.

<sup>107</sup> *Ranger & Anor v Ranger* [2009] QCA 226.

<sup>108</sup> *Property Law Act 1958* (Vic) s 228(1).

<sup>109</sup> *Property Law Act 1958* (Vic) s 228(2)(a).

<sup>110</sup> *Property Law Act 1958* (Vic) s 231(2)(b).

<sup>111</sup> *Property Law Act 2007* (NZ) s 343(c).



### Questions

16. Do you think section 42 should be amended to expressly provide for the court to order the retention of moneys by the trustees or by one of the parties or to order the payment into court by the trustees or one of the parties?
17. Do you think section 42 should include a provision which enables the court to order the distribution of proceeds of sale by the trustees in such proportions as the court determines?

## PART 2 – Mortgages – PLA Part 7 (ss 77-101)

### 8. Mortgages (ss 77-101)

#### 8.1. Overview and purpose

Part 7 of the PLA deals with mortgages of land and other property. Some of the provisions apply to all mortgages and some apply subject to the terms in the instrument of mortgage itself. It has been noted that much of the law of mortgages is outside of the property legislation.<sup>112</sup> This means that a full review of all of the laws relating to mortgages is outside the scope of this review. Despite this, Part 7 of the PLA can benefit from a thorough review with a goal of modernising, streamlining and updating the provisions.

#### 8.2. Is there a need for reform?

Part 7 contains 26 sections covering a broad range of topics. A number of these sections are generally well known, understood in practice and supported by significant case law. The Centre suggests that, other than modernising the language of these sections, there is no demonstrated need for reform. These sections are mentioned briefly in the table below and are listed in Appendix A.

SECTION	TITLE
78	Implied obligations in mortgages
81	Actions for possession by mortgagors
84	Regulation of exercise of power of sale
88	Application of proceeds of sale
90	Mortgagee's receipts discharges etc.
93	Effect of advance on joint account
94	Obligation to transfer instead of discharging mortgage
96	Mortgagee accepting interest on overdue mortgage not to call up without notice
98	Abolition of consolidation of mortgages
99	Sale of mortgaged property in action for redemption or foreclosure
100	Realisation of equitable charges by the court

The remaining sections of Part 7 may benefit from more detailed consideration. Several sections require only minor amendment to address changes in terminology, references to paragraphs or to remove ambiguity in phrasing. Other sections may require more significant amendment, or at least significant consideration prior to being amended. Paragraphs 9 to 23 below discuss the remaining sections of part 7.

---

<sup>112</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (April 2010) at 15, [2.48]. See also Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (September 2010) at 135.

### Question

**18. Are there any issues with the above provisions that should be considered by the Centre in this review?**

## **8.3. Other jurisdictions**

The other states and territories in Australia have legislation that is largely similar to Queensland as the provisions are generally derived from the *Law of Property Act 1925* (UK). There are, however, some notable differences between jurisdictions. To the extent relevant, if a different approach is taken in another state or territory as compared to Queensland, the difference is discussed under the relevant section of this Issues Paper below. In some instances, the equivalent provisions (or lack thereof) in other jurisdictions are not relevant to the issues raised in this Review. In these situations, the approach in other jurisdictions is not discussed in any detail. In other circumstances, the provisions in other jurisdictions may be relevant to this Review and are discussed accordingly.

However, there are some differences that do not directly correspond to Queensland and deserve mentioning on their own.

### **8.3.1. NSW – Right to early redemption of mortgage**

In New South Wales the *Conveyancing Act 1919* (NSW)<sup>113</sup> provides mortgagors with a statutory right to redeem the mortgage even if the time for redemption under the mortgage has not arrived. The mortgagor must still pay to the mortgagee the interest for the unexpired portion of the term.<sup>114</sup>

In its 1973 report, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*<sup>115</sup> (**Report No 16**) the QLRC included such a clause. However, the clause was removed before the bill was passed as the *Property Law Act 1974* (Qld).<sup>116</sup> There was some concern that it would be unfair to require a mortgagor to pay interest on the total principal sum for the total period even if the mortgage is paid off early.

---

<sup>113</sup> *Conveyancing Act 1919* (NSW) s 93.

<sup>114</sup> Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (LexisNexis, 2012), 175 [32318.5].

<sup>115</sup> 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 44.

<sup>116</sup> Queensland, *Parliamentary Debates*, 23 October 1974, 1564-1566.

## 8.4. Options

There is a question as to whether the PLA should provide a right to early redemption of mortgages. Under federal law, the *National Credit Code*<sup>117</sup> provides that a person who is liable to pay a debt is entitled to pay out the credit contract at any time. The amount for pay-out includes the amount of the credit, interest charges and all other fees payable up to the date of termination, reasonable enforcement expenses and (if applicable) early termination charges. The *National Credit Code* applies where the debtor is a natural person and the loan is for domestic purposes<sup>118</sup> which means that it will apply to most mortgages of residential property in Queensland. However, the *National Credit Code* does not apply where the mortgagor (debtor) is a company. If the PLA were to include a right of early redemption of a mortgage, it would be of most application in the context of commercial mortgages.

### Question

**19. Should the Queensland provisions give mortgagors a statutory right to early redemption of the mortgage along the lines of the provision in NSW?**

---

<sup>117</sup> *National Credit Code* s 82. The *National Credit Code* is Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth).

<sup>118</sup> *National Credit Code* s 5.

## 9. Section 77 – Definitions for pt 7

### 9.1. Overview and purpose

#### 77 Definitions for pt 7

In this part—

**instrument of mortgage** includes an instrument or memorandum of mortgage under the Land Act, the *Land Title Act 1994* or the Mineral Resources Act.

**principal money** includes any annuity, rent charge or principal money secured or charged by an instrument of mortgage registered under the *Land Title Act 1994*.

Section 77 defines the term ‘*instrument of mortgage*’ to include an instrument or memorandum of mortgage under the *Land Act 1994* (Qld), the *Land Title Act 1994* (Qld) or the *Mineral Resources Act 1989* (Qld). The phrase ‘memorandum of mortgage’ appeared in a now repealed version of the Mining Regulations.<sup>119</sup> The phrase no longer appears in any of the relevant legislation.

### 9.2. Is there a need for reform?

The Centre suggests that the existing reference to *instrument of mortgage* is broad enough to encompass any memorandum of mortgage still in operation. As such, reference to a memorandum of mortgage is no longer required.

#### Questions

20. Given that the term ‘memorandum of mortgage’ is no longer current, do you support deleting it from the definition of instrument of mortgage in section 77?

21. If the phrase memorandum of mortgage were to be deleted from section 77, do you agree that such a memorandum still in existence would fall within the scope of the term instrument of mortgage?

---

<sup>119</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.06].

## 10. Section 77A – Application of pt 7

### 10.1. Overview and purpose

#### 77A Application of pt 7

- (1) This part—
- (a) applies to unregistered land and to any mortgage of such land; and
  - (b) applies to land and any mortgage of land which is subject to the provisions of—
    - (i) the *Land Title Act 1994*; or
    - (ii) the *Land Act*; or
    - (iii) the *Mineral Resources Act*; or
    - (iv) the *Housing Act*; or
    - (v) any other Act, and any repealed Act which continue to apply to such land or mortgage made before that Act was repealed; and
  - (c) subject to any other Act, applies to any other mortgage whether of land or any other property.

Part 7 applies to land and any mortgage of land under the following Acts:

- the *Land Title Act 1994* (Qld);
- the *Land Act 1994* (Qld);
- the *Mineral Resources Act 1989* (Qld);
- the *Housing Act 2003* (Qld);
- any other Act (even if repealed) which continues to apply to the land or mortgage made before the Act was repealed.<sup>120</sup>

Part 7 also applies, subject to any other Act, to other mortgages of land or any other property.<sup>121</sup>

The QLRC, in Report No 16, noted that the law of mortgages was complicated due to the variety of forms of title to land. The QLRC intended Part 7 to simplify the law of mortgages into ‘a uniform set of provisions applicable to all mortgages of land’.<sup>122</sup>

Part 7 is also intended to apply to mortgages of chattels, although the QLRC noted that some provisions, by their terms, context, nature or subject matter, are not applicable or appropriate to a

---

<sup>120</sup> *Property Law Act 1974* (Qld) s 77A(1)(b).

<sup>121</sup> *Property Law Act 1974* (Qld) s 77A(1)(c).

<sup>122</sup> 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 58.

mortgage of chattels.<sup>123</sup> Other provisions, the QLRC noted, ‘may conveniently be so applied.’<sup>124</sup> Some of the sections in Part 7 are expressly limited to land or mortgages of land.<sup>125</sup>

At the time the PLA was drafted, mortgages of chattels and other personal property were generally covered under the *Bills of Sale and Other Instruments Act 1955* (Qld). From 30 January 2012, most security interests in personal property are now covered under the *Personal Property Securities Act 2009* (Cth) (PPSA).

## 10.2. Is there a need for reform?

Despite the QLRC’s comment that some sections of part 7 are not applicable to mortgages of chattels, and the introduction of the PPSA, part 7 continues to apply to real and personal property.

As the name implies, the PPSA applies to personal property such as motor vehicles, household goods, business inventory, intellectual property and company shares.<sup>126</sup> Personal property under the PPSA does not include land or statutory rights granted under a law of the Commonwealth, a state or a territory government (if the law granting that right declares it not to be personal property for the PPSA).<sup>127</sup> Other interests, even if they may be an interest in personal property are excluded from the PPSA.<sup>128</sup>

Under the PPSA, however, if the same obligation is secured by a security interest in personal property and an interest in land, the secured party may elect to enforce the security interest under the PPSA or under the PLA.<sup>129</sup>

However, there is some conflicting authority<sup>130</sup> as to how some of the provisions of the PLA apply when a mortgage covers both real and personal property. In *Re JB Davies Enterprises Pty Ltd*<sup>131</sup> it was held that the phrase ‘an instrument of mortgage of land’<sup>132</sup> did not include a mortgage of land and other property. However in *St George Bank Ltd v Perpetual Nominees Limited*<sup>133</sup> it was held that the phrase could include a mortgage over land and other property.

---

<sup>123</sup> 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 59-60.

<sup>124</sup> 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 60.

<sup>125</sup> For example, *Property Law Act 1974* (Qld) ss 78(1)(b), s 79, 80(2), 81, 82(5), 86.

<sup>126</sup> *Personal Property Securities Act 2009* (Cth) s 3.

<sup>127</sup> *Personal Property Securities Act 2009* (Cth) s 10 (definition of ‘personal property’).

<sup>128</sup> *Personal Property Securities Act 2009* (Cth) s 8.

<sup>129</sup> *Personal Property Securities Act 2009* (Cth) s 117.

<sup>130</sup> This issue is discussed further at 14.2.3 below.

<sup>131</sup> [1990] 2 Qd R 129.

<sup>132</sup> *Property Law Act 1974* (Qld) s 83(4)(a).

<sup>133</sup> [2010] QSC 57.

### Questions

22. Should part 7 of the PLA continue to apply to mortgages of land and other property or should other property be excluded?
23. Should part 7 of the PLA exclude interests in personal property that are covered by the PPSA?



## 11. Section 79 – Variation of mortgage

### 11.1. Overview and purpose

#### 79 Variation of mortgage

- (1) A mortgage evidenced by an instrument of mortgage in respect of land may be varied by a memorandum of variation, which may—
  - (a) increase or reduce the rate of interest payable in respect of the debt or obligation secured by the mortgage; or
  - (b) increase or reduce the amount secured by the mortgage; or
  - (c) shorten, extend or renew the term or currency of the mortgage; or
  - (d) vary any condition, covenant or other provision of the instrument of mortgage; or
  - (e) provide for any 1 or more of the matters mentioned in paragraphs (a) to (b).
- (2) A memorandum of variation may be registered and, if registered, must be in the approved form, with such variations or additions as circumstances may require.
- (3) The power of and procedure for variation provided by this section shall be in addition to any other such power existing at law.

Section 79 of the PLA provides that an existing mortgage may be varied without the need to discharge the existing mortgage and execute a fresh one. A mortgage may be expressly varied in terms of:

- the rate of interest; or
- the amount of money secured by the mortgage; or
- the term of the loan; or
- the conditions, covenants, or other provisions.<sup>134</sup>

Generally, the initial mortgage will provide for particular types of variation, such as fluctuation in interest rates or to allow further advances.<sup>135</sup> Variation of the mortgage without the discharge and execution of a fresh mortgage is desirable as such discharge and execution may affect the priority of subsequent mortgages.<sup>136</sup> The equivalent provision in NSW<sup>137</sup> was the basis for this provision in Queensland.<sup>138</sup>

---

<sup>134</sup> *Property Law Act 1974* (Qld) s 79(1)(a) to (d).

<sup>135</sup> Discussed at part 13 below.

<sup>136</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, Federation Press, 2013), 213-214.

<sup>137</sup> *Conveyancing Act 1919* (NSW) s 91(1).

<sup>138</sup> 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 60.

## 11.2. Is there a need for reform

Section 79(1)(e) provides that a variation of the mortgage in the form of a memorandum of variation may provide for any one or more of the matters mentioned in items (a) and (b) above. However, it is suggested that section 79(1)(e) should refer to 'paragraphs (a) to (d)' rather than just to 'paragraphs (a) to (b)'.

## 11.3. Other jurisdictions

In most cases, the instrument of mortgage itself will provide for the variation. A number of jurisdictions<sup>139</sup> have provisions that allow the variation or amendment of the instrument of mortgage. In some jurisdictions, the statute just provides for the renewal or extension of the mortgage.<sup>140</sup>

## 11.4. Options

As currently drafted, a variation to a mortgage to increase the interest rate, decrease the amount secured by the mortgage and to shorten the term of the loan would require the registration of two separate memoranda.

There seems to be little reason why a memorandum of variation should be able to vary both the interest payable and the amount secured but that a separate memorandum of variation would be required if the term is extended or shortened. It seems more likely that the reference in section 79(1)(e) should include sections 79(1)(a) to 79(1)(d).

### Question

**24. Should section 79(1)(e) refer to 'paragraphs (a) to (d)' rather than just paragraphs (a) to (b)?**

---

<sup>139</sup> *Conveyancing Act 1919* (NSW) s 91(1); *Transfer of Land Act 1958* (Vic) s 75A; *Land Titles Act 1980* (Tas) s 88(1); *Law of Property Act* (NT) s 81.

<sup>140</sup> *Real Property Act 1886* (SA) s 153; *Transfer of Land Act 1893* (WA) s 105A.

## 12. Section 80 – Inspection and production of instruments

### 12.1. Overview and purpose

#### **80 Inspection and production of instruments**

- (1) A mortgagor, as long as the mortgagor's right to redeem subsists, shall because of this Act be entitled from time to time at reasonable times on the mortgagor's request and at the mortgagor's own cost and on payment or tender of the mortgagee's proper costs and expenses in that behalf, by the mortgagor or the mortgagor's solicitor or conveyancer, to inspect and to make or be supplied with copies or abstracts of, or extracts from, the documents of title or other documents relating to the mortgaged property in the possession, custody or power of the mortgagee.
- (2) Subject to any other Act, where in the case of a mortgage of land the mortgagor executes any instrument or other document subsequent to that mortgage in relation to—
- (a) any authorised dealing with the land; or
  - (b) a second or subsequent mortgage;
- the mortgagee or other person holding the relevant certificate of title, instrument of lease or other documents of title shall—
- (c) upon being requested in writing so to do by the mortgagor or a person entitled to the benefit of the subsequent instrument or document; and
  - (d) at the cost of the person making that request; and
  - (e) upon payment or tender to that mortgagee or other person of the person's proper costs and expenses in that behalf;
- produce the document or documents of title for lodgment in the land registry so that the subsequent instrument or document may be registered.
- (2A) If the mortgagee or other person refuses or neglects to comply with a request made under subsection (2), the mortgagor or person entitled to the benefit of the subsequent instrument or document concerned may make application to a judge of the Supreme Court in chambers for an order directed to that mortgagee or other person to show cause why the document or documents of title should not be produced under subsection (2).
- (2B) If the mortgagee or other person neglects or refuses to attend before the judge of the Supreme Court in chambers at the time appointed in the order, the judge may issue a warrant authorising and directing some person to be named in the warrant to apprehend and arrest the person so ordered to show cause and bring the person before a judge of the Supreme Court in chambers for examination.
- (2C) Upon the appearance before the judge of any person under subsection (2A) or (2B) and after examining that person upon oath the judge may—
- (a) order that person to deliver up the document or documents of title; or
  - (b) order the registrar or warden to dispense with production of the document or documents of title to enable the subsequent instrument or document to be registered.
- (3) A certificate of title, instrument of lease, or other document of title lodged in terms of subsection (2)—

- (a) shall, when the dealing or mortgage referred to in that subsection has been registered, be redelivered to the mortgagee or other person authorised by the mortgagee to take delivery of the dealing or mortgage; and
  - (b) shall not whilst so lodged, be used or available for the purpose of registering any instrument, dealing, or mortgage other than those referred to in subsection (2).
- (3A) Subsection (3)(a) does not apply to a certificate of title or other document of title if, under the *Land Title Act 1994*, it must be cancelled and not be redelivered to the mortgagee.
- (4) The execution or attempted execution of a second or subsequent mortgage shall not—
- (a) constitute a breach of any term, covenant, condition or proviso for re-entry contained in the mortgage; or
  - (b) occasion any forfeiture or penalty; or
  - (c) render payable or accelerate the time for payment of any sum or sums which, if such mortgage had not been executed or if the attempt to execute such mortgage had not been made, would not have been payable or would not have been payable at that time.
- (5) A mortgagee, whose mortgage is surrendered, discharged or otherwise extinguished, shall not be liable on account of delivering documents of title in the mortgagee's possession to the person not having the best right to the mortgage, unless the mortgagee has notice of the right or claim of a person having a better right, whether because of a right to require a surrender, discharge or reconveyance or otherwise.
- (6) This section shall apply to mortgages made after but not before the commencement of this Act and shall have effect despite any stipulation to the contrary in any mortgage.

Section 80 gives the mortgagor a right to inspect and obtain copies of documents in the mortgagee's possession. The section allows the mortgagor to require that the mortgagee produce relevant documents in order to facilitate the registration of a subsequent mortgage or dealing with the Titles Registry. The section also provides that the mortgagor has a right to register second and subsequent mortgages against the land (even without the consent of the mortgagee).

The right has generally been used to allow the mortgagor to compel the mortgagee to produce the title deeds.<sup>141</sup> Section 80 may not be particularly relevant for land under the *Land Title Act 1994* (Qld) as the current practice is that a certificate of title is not issued unless the mortgagee expressly consents to the issue.<sup>142</sup> However, the section will apply to other documents in the mortgagee's possession. This may include collateral securities and guarantees.<sup>143</sup>

---

<sup>141</sup> Under old system land, the right to possession of the title deeds goes with the legal estate: WD Duncan & WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), 108.

<sup>142</sup> *Land Title Act 1994* (Qld) s 42(2). Also discussed in Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.450], [7.480].

<sup>143</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), 108-109.

## 12.2. Is there a need for reform?

Section 80 may require reform in at least several respects. The first two relate to the meaning of words used in section. The third relates to changes in court practices that commenced with the *Uniform Civil Procedure Rules 1999 (UCPR)*. Finally, the application of this section in an age of electronic conveyancing and dealings by electronic documents must be considered.

### 12.2.1. As long as the right subsists

The first area where reform may be required relates to the phrase ‘*as long as the mortgagor’s right to redeem subsists*’ in section 80(1). On a literal reading, the phrase may be taken to mean that the right to inspect and obtain copies of documents will not be available if the mortgagor’s right to redeem has been postponed.<sup>144</sup> However, it is likely that this is an unsupportable position as the right to redeem ultimately subsists.<sup>145</sup> It has been suggested that the wording could be changed to reflect the fact that the right remains so long as the mortgage is current.

### 12.2.2. Meaning of ‘authorised’

A second area where reform may be required relates to the use of the word ‘authorised.’ Section 80(2)(a) requires the mortgagee to produce the document of title to allow the mortgagor to register any authorised dealing with the land. On the basis of the decision in *Holley v Metropolitan Permanent Building Society*,<sup>146</sup> the word *authorised* means ‘authorised by the mortgage or some other provision of the law (if any) authorising a dealing and overriding a limitation imposed by the mortgage.’<sup>147</sup>

Based on this interpretation, the combined effect of sections 80(2) and (4) is that a mortgagor can effect not only a second or subsequent mortgage without the mortgagee’s consent but also any other dealing authorised by the mortgage.<sup>148</sup> In practice, this includes any other dealing to which the mortgagee consents as most mortgages contain a prohibition on dealings by the mortgagor without the mortgagee’s consent.<sup>149</sup>

---

<sup>144</sup> For example, by a term of the mortgage that is not a clog on the equity of redemption. See Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.460].

<sup>145</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.460].

<sup>146</sup> [1983] 2 Qd R 786.

<sup>147</sup> *Holley v Metropolitan Permanent Building Society* [1983] 2 Qd R 786 at 791.

<sup>148</sup> *Holley v Metropolitan Permanent Building Society* [1983] 2 Qd R 786 at 790.

<sup>149</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.500].

### 12.2.3. Distinction between court and chambers

The third area for reform is relatively minor. The UCPR<sup>150</sup> removed the distinction between ‘court’ and ‘chambers’ so the references in sections 80(2A) and 80(2B) are out-of-date.

### 12.2.4. Application to electronic documents

As already noted, the certificate of title is less relevant for land under the *Land Title Act 1994* (Qld). As electronic conveyancing becomes more widespread, the application of section 80 of the PLA to electronic documents is important to understand.

It is unclear to what extent the right to require the production of documents will include electronic documents that may be within the possession, custody or power of the mortgagee. ‘Document’ is defined quite broadly to include ‘*any material from which sounds, images, writings or messages are capable of being produced or reproduced (with or without the aid of another article or device)*’.<sup>151</sup> This means it is very likely that the section would apply to electronic documents.

## 12.3. Other jurisdictions

Section 80 contains two substantive parts. The first gives the mortgagor the right to inspect and make copies of documents in the possession of the mortgagee (the **inspection right**). The second gives the mortgagor the right to require the mortgagee or relevant person holding the documents to produce the documents to facilitate the registration of any authorised dealing or a second or subsequent mortgage (the **production right**). As part of the production right, the PLA explicitly states that registration of a second or subsequent mortgage is not a breach of the first mortgage.

### 12.3.1. New South Wales

In NSW, the *Conveyancing Act 1919* (NSW)<sup>152</sup> gives the mortgagor both the inspection right and the production right. The relevant provision in NSW requires production of documents to facilitate the registration of any authorised dealing. NSW has followed Queensland’s approach in relation to the meaning of ‘authorised dealings’ by holding that the phrase refers to dealings authorised as between the mortgagor and the mortgagee.<sup>153</sup>

However, unlike the PLA, the *Conveyancing Act 1919* (NSW) does not expressly allow a mortgagor to register second and subsequent mortgages without the consent of the first mortgagee.

---

<sup>150</sup> *Uniform Civil Procedure Rules 1999* (Qld).

<sup>151</sup> *Acts Interpretation Act 1954* (Qld) sch 1 (definition of ‘document’).

<sup>152</sup> *Conveyancing Act 1919* (NSW) s 96.

<sup>153</sup> *Hypac Electronic Pty Ltd (In Liq) v Registrar-General* [2003] NSWSC 1213 at [33].

This means that in NSW, the mortgagee can be compelled to produce the certificate of title and other documents in the mortgagee's possession to allow the mortgagor to register any subsequent dealing expressly permitted, or at least not expressly prohibited, by the instrument of mortgage.<sup>154</sup>

### **12.3.2. Victoria and Western Australia**

The word 'authorised' is not found in the Victorian<sup>155</sup> or Western Australian<sup>156</sup> provisions.<sup>157</sup> In those jurisdictions a mortgagee is obliged to produce the certificate of title to the Registrar to enable any instrument subsequent to the mortgage to be registered if so requested by the mortgagor.<sup>158</sup> In Victoria, this has been interpreted to mean that a mortgagee must produce the certificate of title regardless of whether the mortgagor's subsequent dealing is in breach of the mortgage.<sup>159</sup> In Western Australia, the legislation was recently amended to provide that the registration of a subsequent mortgage does not require the consent of the existing mortgagee and is not a breach of the existing mortgage.<sup>160</sup>

## **12.4. Options**

### **12.4.1. Clarify the operation of the provision**

One option is to clarify the intent of the provision. For example, section 80(1) could be amended to refer to 'while the mortgage is current' or to refer to the mortgagor's proprietary interest subsisting. Such an amendment could clarify that the rights granted by section 80 are available to mortgagors while the mortgage is in effect. This would make it unnecessary to determine whether a mortgagor's right to redeem subsists.

### **12.4.2. Remove reference to 'authorised'**

Section 80(2) could be amended to remove the word 'authorised'. This would have the effect of eliminating arguments as to whether authorised refers to authorised by the system of title in question or authorised by the instrument of mortgage. While there is judicial authority that 'authorised' means permitted or not forbidden as between the mortgagor and the mortgagee, it is also conceded that both views are valid.<sup>161</sup>

---

<sup>154</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), 112.

<sup>155</sup> *Property Law Act 1958* (Vic) s 96 gives the mortgagor the right to inspect documents. For other land, see *Transfer of Land Act 1958* (Vic) s 86, which requires the mortgagee to produce the title or give an administrative notice so that the mortgagor can register a later instrument.

<sup>156</sup> *Transfer of Land Act 1893* (WA) s 127.

<sup>157</sup> See *Hypec Electronics Pty Ltd (In Liq) v Registrar-General* (2005) 64 NSWLR 679 at 683-685 for a discussion of the Victorian and Western Australia provisions.

<sup>158</sup> *Transfer of Land Act 1958* (Vic) s 86; *Transfer of Land Act 1893* (WA) s 127.

<sup>159</sup> *Vasiliou v Marchesi* (2006) 157 FCR 252 at [4] – [5].

<sup>160</sup> *Transfer of Land Act 1893* (WA) s 127A which was introduced in 2014.

<sup>161</sup> *Hypec Electronics Pty Ltd (In Liq) v Registrar-General* (2005) 64 NSWLR 679 at [27].

One way to remove the ambiguity may be to follow the approach in Victoria and Western Australia so that the word 'authorised' does not appear.

### **12.4.3. Remove reference to 'chambers'**

Given that there is no longer a difference between an application in court and an application in chambers, section 80 should be amended to remove the out of date language.

### **12.4.4. Include electronic documents**

The right to demand production of documents to facilitate registration of subsequent dealings is already less relevant than it may have once been due to practical changes such as restricting the use of paper certificates of title. However, as the practice of electronic conveyancing becomes widespread, the reliance on electronic documents may be of greater relevance.

#### **Questions**

- 25. Do you support amending section 80(1) to replace the reference to 'as long as the mortgagor's right to redeem subsists' with wording such as while the mortgage is current or while the mortgagor's proprietary interest subsists?**
- 26. Do you support amending section 80(2)(a) to delete the word 'authorised'?**
- 27. With the distinction between 'court' and 'chambers' having been abolished upon the commencement of the UCPR, should the references to 'chambers' in section 80(2A) and (2B) be the subject of amendment?**
- 28. Should section 80(1) be amended to clarify that the documents 'in the possession, custody or power of the mortgagee' include electronic documents?**



## 13. Section 82 – Tacking and further advances

### 13.1. Overview and purpose

#### 82 Tacking and further advances

- (1) After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable)—
  - (a) if an arrangement has been made to that effect with the subsequent mortgagees; or
  - (b) if the mortgagee had no notice of such subsequent mortgages at the time when the further advance was made by the mortgagee; or
  - (c) if the mortgagee's mortgage imposes on the mortgagee an obligation to make such further advances.
- (2) Nothing in subsection (1) affects the right of a prior mortgagee to rank in priority to subsequent mortgagees in respect of expenses properly incurred in preserving the mortgaged property.
- (3) In relation to the making of further advances after the commencement of this Act a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered under an Act providing for registration of mortgages or deeds, if it was not so registered at the time when the original mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.
- (3A) Subsection (3) applies only where the prior mortgage was made expressly for securing a current account or other further advances.
- (4) Save in regard to the making of further advances as mentioned in subsection (1), the right to tack is abolished.
- (4A) However, nothing in this Act shall affect any priority acquired before the commencement of this Act by tacking, or in respect of further advances made without notice of a subsequent encumbrance or by arrangement with the subsequent encumbrancee.
- (5) This section applies to mortgages of land made whether before or after the commencement of this Act.

Section 82 deals with tacking and further advances. The section is drawn from equivalent provisions in the United Kingdom<sup>162</sup> and prevents a practice known as tacking. Under the general law, tacking occurred in two basic ways:<sup>163</sup> firstly under the doctrine known as *tabula in naufragio*; and secondly in relation to further advances. In both cases, the third mortgage (or subsequent advances on the

---

<sup>162</sup> *Law of Property Act 1925* (15 Geo 5, c 20) s 94.

<sup>163</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed), Federation Press, 176-177.

first mortgage) is added, or tacked on, to the first mortgage, effectively squeezing out the second mortgagee's priority.<sup>164</sup>

The most important application of the doctrine of *tabula in naufragio* ('the plank in the shipwreck') arose in the context of legal mortgages of unregistered land. If a legal mortgage of unregistered land by conveyance had been followed by further mortgages (which could only be equitable in nature) the priority of subsequent equitable mortgages was generally decided by the maxim *qui prior est tempore, potior est jure* (the person who is earlier in time is stronger in law) so that the second mortgage ranked in priority to the third mortgage and so on.

However, this order of priorities could be altered if the third mortgagee acquired the legal estate by transfer from the first mortgagee, provided the third mortgagee did not have notice of the second mortgage when the third mortgage was created, and further provided that the transfer by the first mortgagee did not constitute a breach of trust by the first mortgagee of which the third mortgagee had notice.<sup>165</sup> The third mortgagee was then allowed priority in repayment of the moneys secured by the first and third mortgages over the second mortgage. The justification for this result under the general law was that the transfer to the third mortgagee converted the third mortgage in effect from an equitable to a legal mortgage. This device, whereby the third mortgage was 'tacked' onto the first mortgage effectively 'squeezed out' the second mortgagee in terms of priority.

Section 82 affects the law of tacking in both of its branches. The section permits a mortgagee to make further advances to rank in priority to subsequent mortgagees in three specified circumstances. This can be done only where:

- the second mortgagee agrees to the subsequent advances from the first mortgagee; or
- the first mortgagee had no notice of the second mortgage when making the subsequent advance; or
- the first mortgage obliges the mortgagee to make the subsequent advances.<sup>166</sup>

The section abolishes the right to tack<sup>167</sup> except in these three specified circumstances.

To understand the reasoning behind section 82 of the PLA, it is necessary to first consider the case history. The English case of *Hopkinson v Rolt*<sup>168</sup> held that if the mortgage provides that the mortgage is to operate as security for further advances, the prior mortgagee could claim priority for those

---

<sup>164</sup> 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 63.

<sup>165</sup> If the subsequent mortgagee acquires the legal estate in a conveyance that is a breach of trust by the first mortgagee of which the subsequent mortgagee has notice, then tacking is not allowed. See ELG Tyler, PW Young, and CE Croft, *Fisher & Lightwood's Law of Mortgage* (3<sup>rd</sup> ed, 2013, Lexis Nexis Butterworths), 25.2, 25.4.

<sup>166</sup> *Property Law Act 1974* (Qld) s 82(1)(a)-(c).

<sup>167</sup> 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) at 63-64 where it was noted that tacking in the first form could safely be abolished in Queensland since it could only be capable of affecting old system land.

<sup>168</sup> (1861) 9 HLC 514, cited in Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.880].

advances ahead of a subsequent mortgagee provided the prior mortgagee did not have notice of the subsequent mortgage at the time of the further advance.

In a subsequent case, *West v Williams*,<sup>169</sup> it was held that the *Hopkinson* principle still applied. It was held that if the first mortgagee's mortgage *required* further advances to be made and the first mortgagee had notice of the subsequent mortgage, the first mortgagee was released from the obligation to make further advances because the mortgagor had executed a subsequent mortgage. Once the first mortgagee had notice of the subsequent mortgage any further advances under the first mortgage made by the first mortgagee were voluntary in character and did not take priority over the subsequent mortgage.

Section 82(1)(c) is intended to reverse the result in *West v Williams*<sup>170</sup> but doubt has been raised whether the provision in its present form achieves this result.<sup>171</sup>

## 13.2. Is there a need for reform?

### 13.2.1. Timing of the obligation to make further advances

It is unclear whether section 82(1)(c) (when taken literally) actually reverses the decision in *West v Williams*.<sup>172</sup> It would seem that the object sought to be achieved by the subsection is to reverse the decision not only in result but also in its reasoning; that is, to produce the position that a subsequent mortgage by a mortgagor does not release the prior mortgagee from an obligation in the first mortgage to make further advances and does not prevent the prior mortgagee (even with notice of the subsequent mortgage) from tacking a further advance to the first mortgage.

The issue relates to the time at which the mortgage imposes an obligation to make further advances. If the section requires that the mortgage imposes the obligation to make further advances at the time the first mortgage is made, then the provision does have the effect of reversing the rule in *West v Williams*.<sup>173</sup> However, if the provision only requires that the mortgage impose this obligation at the time the further advance is made, then the mortgagee may not be allowed to tack against a subsequent mortgagee in accordance with the result in *West v Williams*.<sup>174</sup>

To put this issue beyond doubt it may be appropriate to add certain words of qualification to the existing provision. This is discussed further at section 13.4 below.

---

<sup>169</sup> [1899] 1 Ch 132, cited in WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), 184.

<sup>170</sup> [1899] 1 Ch 132.

<sup>171</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.1040].

<sup>172</sup> [1899] 1 Ch 132.

<sup>173</sup> [1899] 1 Ch 132.

<sup>174</sup> [1899] 1 Ch 132.

### 13.2.2. Notice

The issue of what constitutes notice for the purposes of section 82 may be unclear. The word 'notice' is defined in the PLA to include constructive notice.<sup>175</sup> However, it has been argued that section 82 refers to actual notice.<sup>176</sup>

Section 82(3) clearly provides that registration of a subsequent mortgage is not sufficient to give the first mortgagee notice of the second mortgage. This is because the first mortgagee cannot be expected to search the register prior to making subsequent advances on the first mortgage.

It has been suggested that whether constructive notice is sufficient or whether actual notice is required has not been authoritatively settled in Australia.<sup>177</sup> Judicial authority indicates a preference for actual notice so that the responsible person (for example the loan officer in a large bank) who is in a position to make a decision about the mortgage has received the notice (rather than it just being given to a clerical person at the bank).<sup>178</sup>

### 13.3. Other jurisdictions

Victoria,<sup>179</sup> Tasmania<sup>180</sup> and New Zealand<sup>181</sup> have followed the UK<sup>182</sup> example and abolished the right to tack, except in circumstances prescribed by the relevant legislation.

In NSW, the rules relating to tacking further advances have been found to be based on considerations of justice and fair dealing between the mortgagor and the mortgagee. In *Matzner v Clyde Securities Ltd*<sup>183</sup> it was held that the first mortgagee could claim priority over subsequent mortgagees even though the first mortgagee had notice of the subsequent mortgages. The further advances in *Matzner* were designed to increase the value of the property.

### 13.4. Options

An amended version of the statutory provision may appear at section 82(1)(c) as follows:

*'if, immediately prior to the creation of the subsequent mortgage, the mortgagee's mortgage (or an instrument secured by the mortgagee's mortgage) imposes on the mortgagee an obligation to make such further advances.'*

---

<sup>175</sup> *Property Law Act 1974* (Qld) sch 6.

<sup>176</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), at 183 citing *Beachquest Pty Ltd v Interstate Mortgage and Investments Pty LTD* [2003] 2 Qd R 586 at 593 per White J.

<sup>177</sup> Peter Butt, *Land Law* (6<sup>th</sup> ed, 2010, Lawbook Co) at 694 [18 204].

<sup>178</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), 179-180.

<sup>179</sup> *Property Law Act 1958* (Vic) s 94(3). However, this provision does not apply to mortgages under the *Transfer of Land Act 1958* (Vic): *Property Law Act 1958* (Vic) s 86.

<sup>180</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 38.

<sup>181</sup> *Property Law Act 2007* (NZ) ss 89-94.

<sup>182</sup> *Law of Property Act 1925* (15 Geo 5, c 20) s 94.

<sup>183</sup> [1975] 2 NSWLR 293.

The suggested amendment is intended to make it clear that for further advances to take priority over a subsequent mortgage, the original mortgage must impose the obligation to make further advances at the time the mortgage is made. This will allow the prior mortgagee to tack the further advances to the prior mortgage and obtain priority as against the subsequent mortgagee (thus reversing the result in *West v Williams* as intended by the QLRC).

The suggested addition of the further words 'or an instrument secured by the mortgagee's mortgage' will serve to put it beyond doubt that the provision will cover a relatively common situation where the mortgage secures an obligation created by another instrument and it is that instrument, rather than the mortgage, which imposes the obligation to make further advances.

#### Questions

**29. Do you support amending section 82(1)(c) so that it provides to the effect of the following:**

**'if, immediately prior to the creation of the subsequent mortgage, the mortgagee's mortgage (or an instrument secured by the mortgagee's mortgage) imposes on the mortgagee an obligation to make such further advances.'**

**30. Should the PLA clarify whether 'notice' for the purposes of section 82 includes constructive notice or should it be restricted to actual notice?**

## 14. Section 83 – Powers incident to estate or interest of mortgagee

### 14.1. Overview and purpose

#### 83 Powers incident to estate or interest of mortgagee

- (1) A mortgagee, where the mortgage is made by instrument, shall, because of this Act, have the following powers, to the like extent as if they had in terms been conferred by and were contained in the instrument of mortgage, but not further, namely—
- (a) a power to sell, or to concur with any other person in selling, the mortgaged property, or any part of the mortgaged property, either subject to prior charges or not, and either together or in lots, in subdivision or otherwise, by public auction or by private contract, and for a sum payable either in 1 sum or by instalments, subject to such conditions respecting title, or evidence of title, or other matters as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned by the exercise of the power, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances may require and the mortgagee thinks fit;
  - (b) a power, at any time after the date of the instrument of mortgage, to insure and keep insured against loss or damage by fire and by storm and tempest any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property which or an estate or interest in which is mortgaged, and the premiums paid for any such insurance shall be a charge on the mortgaged property or estate or interest, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money;
  - (c) a power to appoint a receiver of the income of the mortgaged property, or any part of the mortgaged property or, if the mortgaged property consists of an interest in income, or of a rent charge or an annual or other periodical sum, a receiver of that property or any part of that property;
  - (d) a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding 12 months from the making of the contract;
  - (e) a power to sell any easement, right or privilege of any kind over or in relation to the mortgaged property.
- (2) The power of sale includes the following powers as incident to the sale, namely—
- (a) a power to impose or reserve or make binding, as far as the law permits, by covenant, condition, or otherwise, on the unsold part of the mortgaged property or any part of it, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working of the land, or with respect to any other thing;
  - (b) a power to sell the mortgaged property, or any part of it, or all or any mines and minerals apart from the surface—

- (i) with or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part of it, or to any property sold; and
  - (ii) with or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements and rights and privileges for or connected with mining purposes in relation to the property remaining unsold or any part of it, or to any property sold; and
  - (iii) with or without covenants by the purchaser to expend money on the land sold.
- (3) The provisions of this Act relating to the powers mentioned in subsections (1) and (2), comprised either in this section, or in any other section regulating the exercise of those powers, may be varied or extended by the instrument of mortgage.
- (4) This section applies only—
- (a) to an instrument of mortgage of land executed whether before or after the commencement of this Act; and
  - (b) if and so far as a contrary intention is not expressed in the instrument of mortgage and has effect subject to the terms of the instrument and to the provisions expressed in it.
- (5) The provisions of this Act relating to the powers mentioned in subsections (1) and (2) comprised in this section, or in any other section regulating the exercise of those powers, apply to mortgages of land under the Land Act or the Mineral Resources Act, but subject to and to the extent only that the provisions of this Act are consistent with those provisions.

Section 83 of the PLA gives every mortgagee a number of powers under an instrument of mortgage of land.<sup>184</sup> These powers include:

- a very broad power of sale (including powers incident to the power of sale);<sup>185</sup>
- a power to insure the property;
- a power to appoint a receiver;
- a power (while the mortgagee is in possession) to cut and sell timber and other trees; and
- a power to sell an easement, right or privilege over the mortgaged property.<sup>186</sup>

These powers are subject to the terms of the mortgage itself, the provisions of any other Act that applies to the mortgage of the property, and the general law.

<sup>184</sup> See discussion at 14.2.3 for discussion of whether this includes a mortgage of land and other property.

<sup>185</sup> *Property Law Act 1974* (Qld) s 83(2).

<sup>186</sup> *Property Law Act 1974* (Qld) s 83(1)(a)-(e).

## 14.2. Is there a need for reform?

### 14.2.1. Section 83(1)(a) – co-ordinate or alternative?

Section 83(1)(a) confers a power to sell and includes a ‘power to vary any contracts for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell...’ (emphasis added). However, it has been noted that the power to vary any contract for sale and a power to buy in at auction are distinct and separate powers.<sup>187</sup> Duncan and Vann argue that to be more accurate, the clause should read ‘or’, not ‘and.’<sup>188</sup>

### 14.2.2. Minerals apart from the surface

Section 83(2)(b) gives the mortgagee certain powers as incident to the power of sale. This includes ‘a power to sell the mortgaged property, or any part of it, or all or any mines and minerals apart from the surface...’.<sup>189</sup> It has been noted that this assumes the minerals will be vested in the mortgagor. However, this will rarely be correct in Queensland as minerals are generally vested in the Crown.<sup>190</sup>

### 14.2.3. Application to mortgages of land and other property

Section 83(4) provides that section 83 only applies to ‘an instrument of mortgage of land executed before or after the commencement of the Act.’ However, as mentioned above<sup>191</sup> there are competing decisions in relation to whether this encompasses a mortgage of land and other property.

Duncan and Vann have considered the meaning of the phrase ‘instrument of mortgage of land’ in the context of section 83(4)<sup>192</sup> and argue that the phrase could mean that the powers in section 83 apply:

- only to instruments of mortgage which include land and no other property; or
- only to instruments of mortgage which include land and no other property but the power to insure applies both to such instruments and to instruments of mortgage of land and other property; or
- to instruments of mortgage which include land and other property but only the insurance power operates on the land and the other property; or

---

<sup>187</sup> R Lowenstern, ‘Sales by Mortgagees – the power to buy in at auction’, (1928) 2 *Australian Law Journal* 7.

<sup>188</sup> See Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.1310].

<sup>189</sup> *Property Law Act 1974* (Qld) s 83(2)(b).

<sup>190</sup> *Mineral Resources Act 1989* (Qld) s 8.

<sup>191</sup> At paragraph 10.2 above.

<sup>192</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.1320] and [7.1520]. Note the discussion in Duncan and Vann relates to the meaning of the phrase ‘instrument of mortgage of land’ in s 83(4) in the context of a power to insure (in s 83(1)(b)) but the discussion is relevant to all the powers conferred by section 83.



- to instruments of mortgage which include land and other property and that all such powers apply to both forms of property.

This reasoning was considered in *Re JB Davies Enterprises Pty Ltd*<sup>193</sup> and it was held that the phrase in section 83(4) excluded mortgages of land and other property (so that a power of sale was not implied into a mortgage by section 83 when the mortgage is over land and other property). However, in *St George Bank Ltd v Perpetual Nominees Limited*<sup>194</sup> Wilson J relied on section 5(2) and held that a mortgage over land and other property was caught by section 83.

### 14.3. Other jurisdictions

Legislation in the other Australian jurisdictions<sup>195</sup> is largely similar to that in Queensland. All have provisions that are based on the equivalent provision in the UK.<sup>196</sup> This means that subject to the terms in the instrument of mortgage itself, mortgagees are given the powers to sell, insure and to appoint a receiver. Some jurisdictions give the mortgagee additional powers, such as to cut and sell timber and to sell an easement, right or privilege over the mortgaged property.<sup>197</sup> NSW<sup>198</sup> and the Northern Territory<sup>199</sup> give the mortgagee a statutory power to sever and sell fixtures. Mortgagees are also given other powers incidental to the power of sale.<sup>200</sup>

Notably, all of the jurisdictions (except the Northern Territory)<sup>201</sup> contain the word ‘and’ after the phrase ‘power to vary any contracts for sale’ but before the phrase ‘to buy in at an auction, or to rescind any contract for sale...’.

### 14.4. Options

The issues identified above in relation to sections 83(1) and 83(2) may be addressed by re-drafting the provisions.

Section 83(4) may benefit from amendment to remove any ambiguity as to whether an instrument of mortgage of land includes an instrument of mortgage of land and other property.

A further option in relation to this section is to consider whether the PLA should provide mortgagees with a power to sever and sell fixtures apart from the balance of the mortgaged or charged property, similar to the power in NSW.<sup>202</sup>

---

<sup>193</sup> [1990] 2 Qd R 129.

<sup>194</sup> [2010] QSC 57.

<sup>195</sup> *Conveyancing Act 1919* (NSW) s 109; *Property Law Act 1958* (Vic) s 101 (although only the power to appoint receivers applies under the *Transfer of Land Act 1958* (Vic)); *Law of Property Act 1936* (SA) s 47; *Conveyancing and Law of Property Act 1884* (Tas) s 21; *Law of Property Act* (NT) s 86.

<sup>196</sup> *Law of Property Act 1925* (15 Geo 5, c 20) s 101.

<sup>197</sup> For example, *Conveyancing Act 1919* (NSW) s 109(1)(d) and (f); *Law of Property Act* (NT) s 86(d) and (g).

<sup>198</sup> *Conveyancing Act 1919* (NSW) s 109(1)(e).

<sup>199</sup> *Law of Property Act* (NT) s 86(1)(d).

<sup>200</sup> *Conveyancing Act 1919* (NSW) s 110; *Property Law Act 1958* (Vic) s 101(2); *Law of Property Act 1936* (SA) s 47(2); *Law of Property Act* (NT) s 87.

<sup>201</sup> The provision in the NT has a comma in place of the ‘and’: *Law of Property Act* (NT) s 86(a).

### Questions

- 31. Do you support the suggested amendment to section 83(1)(a) such that the word 'and' as it appears after the words 'with power to vary any contract of sale,' is amended to 'or'?**
- 32. Should section 83(2) be redrafted so that the underlying assumptions are correct?**
- 33. Do you support an amendment of section 83(4)(a) to provide that it extends to an instrument of mortgage of land and other property?**
- 34. Should the PLA provide mortgagors exercising a power of sale with the ability to sever and sell fixtures?**

---

<sup>202</sup> *Conveyancing Act 1919* (NSW) s 109(1)(e).

## 15. Section 85 – Duty of mortgagee or receiver as to sale price

### 15.1. Overview and purpose

#### 85 Duty of mortgagee or receiver as to sale price

- (1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.
- (1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse—
- (a) adequately advertise the sale; and
  - (b) obtain reliable evidence of the property's value; and
  - (c) maintain the property, including by undertaking any reasonable repairs; and
  - (d) sell the property by auction, unless it is appropriate to sell it in another way; and
  - (e) do anything else prescribed under a regulation.

Maximum penalty—

- (a) if the contravention of duty relates only to paragraph (e)—20 penalty units; or
- (b) otherwise—200 penalty units.

- (2) Within 28 days from completion of the sale, the mortgagee shall give to the mortgagor notice in the approved form.
- (3) The title of the purchaser is not impeachable on the ground that the mortgagee or receiver has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.
- (4) A mortgagee who, without reasonable excuse, fails to comply with subsection (2) commits an offence.

Maximum penalty—2 penalty units.

- (5) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee or receiver from the duty imposed by this section.
- (6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee to account to the mortgagor.
- (7) Nothing in sections 83(1)(a), 89(3) and 92(2) affects the duty imposed by this section.
- (8) Nothing in this section affects the operation of a law of the Commonwealth, including, for example, the Corporations Act, section 420A.
- (9) This section applies to mortgages whether made before or after the commencement of this Act but only to a sale in the exercise of a power arising upon or in consequence of a default occurring after the commencement of this Act.

(10) In this section—

***prescribed mortgage*** means a mortgage of a kind prescribed under a regulation.

Section 85 prescribes the duty of a mortgagee or receiver as to the sale price of property sold under an exercise of the power of sale<sup>203</sup> and contains a number of ancillary provisions. The duty of the mortgagee or receiver is to take reasonable care to ensure that the property is sold at market value. In the case of a prescribed mortgage,<sup>204</sup> the mortgagee or receiver must (unless they have a reasonable excuse): adequately advertise the sale; obtain reliable evidence of the property's value; maintain the property; sell the property by auction; and do anything else prescribed under a regulation. A remedy in damages is conferred upon any person damaged by the mortgagee's or receiver's breach of any duty imposed by the section.

Section 85 was the subject of significant amendments in 2008 with a view to avoiding 'fire sales' and other inappropriate practices that arose in the context of the global financial crisis.<sup>205</sup> The duty imposed by section 85 on mortgagees was extended to receivers selling the property under a delegated power. This was achieved by the amendment of section 85(1) to refer to '*a receiver acting under a power delegated to the receiver by a mortgagee.*'

## 15.2. Is there a need for reform?

A dictionary definition of a 'delegate' is 'one delegated to act for or represent another.'<sup>206</sup> On this basis, to be acting under a delegation from the mortgagee would require the receiver to be acting for or representing the mortgagee. However, a receiver is generally an agent of the mortgagor rather than the mortgagee.

At common law, a mortgagee in possession is obliged to account not only for what the mortgagee had received but what the mortgagee should have received.<sup>207</sup> As a result, secured lenders invented a contractual device of making any receiver appointed by the secured lender an agent of the mortgagor (as debtor) rather than an agent of the secured mortgagee (as lender), with the relevant clause often expressly providing that the mortgagor is responsible for the receiver's actions and defaults. This artificial device or 'contrivance' has been recognised and accepted with the courts steadfastly refusing to dismiss the agency as a legal fiction.<sup>208</sup> For this reason, almost invariably,

---

<sup>203</sup> This section applies to an exercise of the power of sale regardless of whether it is a power in the instrument of mortgage itself or granted under the *Property Law Act 1974* (Qld) or another Act: *Property Law Act 1974* (Qld) s 85(1).

<sup>204</sup> Prescribed mortgage is a mortgage prescribed under a regulation: *Property Law Act 1974* (Qld) s 85(10). A prescribed mortgage is where the mortgage is over residential land and the mortgagor's home is on the land: *Property Law Regulation 2013* (Qld) s 3.

<sup>205</sup> Explanatory Notes, Property Law (Mortgagor Protection) Amendment Bill 2008 (Qld), 1.

<sup>206</sup> *Macquarie Australian Dictionary*

<sup>207</sup> See WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), at 9.4-9.5, referring to *Trimelston (Lord) v Hamill* (1810) 1 Ball & B 377 at 385.

<sup>208</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), at 11.7.4.

both the mortgage instrument and the appointment document will specify that the receiver is appointed as the agent of the mortgagor.<sup>209</sup>

Under the PLA, mortgagees have a statutory right to appoint a receiver.<sup>210</sup> A receiver appointed under the statutory power is deemed to be an agent of the mortgagor. Section 92(2) of the PLA relevantly provides:

*A receiver appointed under the powers conferred by this Act, shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the instrument of mortgage otherwise provides.*<sup>211</sup>

The appointment of a receiver does not affect the duty of the mortgagee with respect to sale price.<sup>212</sup> As demonstrated, a receiver, either by way of private or statutory appointment, is the agent of the mortgagor, rather than the mortgagee.

As the mortgagor's agent, it would not usually be considered that a receiver was acting for or representing the mortgagee in the manner of a delegate, notwithstanding that the appointment is made by the mortgagee. Further, any receiver that may be appointed will exercise powers as a receiver rather than the mortgagee's delegate. Accordingly, in making reference to 'a receiver acting under a power delegated to the receiver by a mortgagee', there must be some doubt if section 85(1) achieves its desired objective.

### 15.3. Other jurisdictions

The common law and relevant statutes in other jurisdictions impose a similar duty on mortgagees in respect of sale price when exercising a power of sale. However, it is unclear to what extent the duty on mortgagees is transferred to a receiver appointed by a mortgagee.

### 15.4. Options

It may be desirable to clarify that rather acting under a delegation from the mortgagee a receiver is acting under an appointment by a mortgagee. This could be achieved by amending section 85(1) to refer to a receiver *appointed by a mortgagee*, rather than acting under a power delegated by a mortgagee.

---

<sup>209</sup> However, the receiver will continue to have certain duties toward the mortgagor: *Expo International Pty Ltd v Chant* [1979] 2 NSWLR 820, cited in WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), at 11.13.1.

<sup>210</sup> *Property Law Act 1974* (Qld) s 83(1)(c).

<sup>211</sup> *Property Law Act 1974* (Qld) s 92(2).

<sup>212</sup> *Property Law Act 1974* (Qld) s 85(7) provides that nothing in section 92(2) affects the duty imposed by s 85 (Duty of mortgagee or receiver as to sale price).

**Question**

**35. Would section 85(1) be more appropriately drafted by simply making reference to 'a receiver appointed by a mortgagee'?**

## 16. Section 86 – Effect of conveyance on sale

### 16.1. Overview and purpose

#### 86 Effect of conveyance on sale

- (1) A mortgagee exercising the power of sale conferred by this Act has, in the case of unregistered land, power by deed or instrument in writing to convey to and vest in the purchaser the property sold for all the estate (including the legal estate) and interest in it which the original mortgagor had power to dispose of freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage.
- (2) A mortgagee exercising the power of sale conferred by this Act has, in the case of land the subject of an instrument of mortgage registered under the *Land Title Act 1994*, power to sell and, subject to any prior registered encumbrance, transfer the land mortgaged and all the interest in the land mortgaged of the mortgagor.
- (3) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Act unless a contrary intention appears.
- (4) This section shall not apply to a transfer in the exercise of the power of sale conferred on a mortgagee under the Land Act or Mineral Resources Act.

Section 86(1) relates to a mortgagee exercising a power of sale over unregistered land. The section provides that such a sale is free from the mortgagor's right of redemption. At general law a mortgagee had a power to sell and convey property but that did not extinguish the mortgagor's interest in the property (which required foreclosure to be eliminated.)

Section 86(2) confirms that a mortgagee of land subject to an instrument of mortgage registered under the *Land Title Act 1994* (Qld) has power to transfer the mortgaged property subject to prior registered encumbrances.

### 16.2. Is there a need for reform?

#### 16.2.1. Unregistered land – section 86(1)

As section 86(1) relates only to unregistered land, the Centre is of the view that it should be repealed, subject to a state-wide approach to unregistered land. The Centre is of the view that for all practical purposes, there is no unregistered land remaining in Queensland. To the extent any unregistered land is found to exist, that land should be brought under the *Land Title Act 1994* (Qld) by administrative action of the Registrar of Titles.

## 16.2.2. Transfer of land under a power of sale – section 86(2)

*Shapowloff v Lombard Australia Limited*<sup>213</sup> confirmed that section 86(2) is intended to ‘confer protection upon a non-fraudulent purchaser prior to registration’. Duncan and Vann question if this is correct, as sections 85(3) and 87 deal with protecting purchasers.<sup>214</sup> The object of the section could be to confer a general power on the mortgagee to convey free of the mortgagor’s and subsequent mortgagee’s interests. The QLRC stated that section 86(2) is ‘intended to confirm the existing power of the mortgagee to sell all or part of the estate or interest of the mortgagee in the mortgaged land.’<sup>215</sup> This power is also provided for in the *Land Title Act 1994* (Qld)<sup>216</sup> (mortgages of land under the *Land Title Act 1994* (Qld) are included under part 7 of the PLA).<sup>217</sup>

It has been suggested that the section does nothing more than confirm what is already provided for in existing sections of the PLA<sup>218</sup> and under the *Land Title Act 1994* (Qld).<sup>219</sup>

## 16.3. Other jurisdictions

The other jurisdictions in Australia all have provisions virtually identical to those contained in sections 86(1) and 86(2). However, the issues for consideration in this part of the Issues Paper make discussion of the equivalent provisions unnecessary.

## 16.4. Options

On the assumption that there is for all practical purposes no unregistered land remaining in Queensland, the Centre supports the repeal of section 86(1) subject to administrative action by the Registrar of Titles.

If section 86(2) is merely confirming other statutory provisions, there may be little reason to retain the subsection. Conversely, if the provision serves a separate purpose, it may be desirable to amend the provision to express that purpose clearly.

---

<sup>213</sup> [1980] Qd R 517.

<sup>214</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.2340].

<sup>215</sup> 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 69.

<sup>216</sup> Section 79.

<sup>217</sup> *Property Law Act 1974* (Qld) s 77A(1)(b)(i), which provides that Part 7 applies to mortgages of land under the *Land Title Act 1994* (Qld).

<sup>218</sup> Such as *Property Law Act 1974* (Qld) s 77A(1)(b)(i).

<sup>219</sup> *Land Title Act 1994* (Qld) ss 78(1), 79.



### Questions

36. Given that the utility of section 86(1) is limited to circumstances involving a mortgagee sale of unregistered land, do you support its repeal?
37. Does section 86(2) serve any separate purpose or is it merely confirming what is already provided for by existing statutory provisions?

## 17. Section 87– Protection of purchasers

### 17.1. Overview and purpose

#### 87 Protection of purchasers

- (1) Where a conveyance is made in exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground—
- (a) that no case had arisen to authorise the sale; or
  - (b) that due notice was not given; or
  - (c) that leave of the court, when so required, was not obtained; or
  - (d) whether the mortgage was made before or after the commencement of this Act, that the power was otherwise improperly or irregularly exercised;
- and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given or the power is otherwise properly and regularly exercised, but any person damnified by an unauthorised, or improper, or irregular exercise of power shall have a remedy in damages against the person exercising the power.
- (2) This section shall not apply to a transfer made in exercise of the power of sale conferred on a mortgagee under the Land Act or Mineral Resources Act, except that where, after the commencement of this Act, a transfer is so made the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, and the purchaser is not, either before or on conveyance, concerned to see whether a case has arisen to authorise the sale, but any person damnified by an unauthorised exercise of such power of sale shall have a remedy in damages against the person exercising the power.

Section 87 provides protection for a purchaser buying from a mortgagee exercising a power of sale even where the power of sale was improperly exercised by the mortgagee. It gives the mortgagor a right to damages for an unauthorised, improper or irregular exercise of the power of sale.

### 17.2. Is there a need for reform?

#### 17.2.1. Limited operation

While section 87 is intended to operate as a statutory form of a buyer protection clause, it is submitted that the effect is ‘extremely limited indeed.’<sup>220</sup> The provision applies only to an exercise

---

<sup>220</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.2480].

of the power of sale conferred by the PLA.<sup>221</sup> It does not operate in relation to a conveyance made in an exercise of a power of sale contained in the instrument of mortgage itself.

The provision is also limited in scope because it applies only to the circumstances listed in the section. These include unauthorised sale and sale without due notice.<sup>222</sup>

### **17.2.2. Benefit is no greater than existing protections**

In relation to land under the *Land Title Act 1994* (Qld), it is submitted by Duncan and Vann<sup>223</sup> that the time of 'conveyance' for the purposes of section 87(1) is the date of registration of the transfer. If this is correct, the protections afforded a buyer in relation to title under section 87(1) would seem to be no greater than the benefits of indefeasibility conferred by the *Land Title Act 1994* (Qld).

Additionally, while a buyer is relieved by section 87(1) of certain obligations to inquire, a buyer is not relieved of the consequences of having notice of a defect in the mortgagee's exercise of power of sale where the defect is such as to justify the setting aside of the sale. This means that if the purchaser has notice of a defect in the conveyance, the mortgagee may be able to have the conveyance set aside.

Finally, while it is made clear that the mortgagor cannot obtain damages against the buyer (as this remedy is only available against the person exercising the power of sale) it is extremely doubtful that the position would be any different under the general law.

### **17.3. Other jurisdictions**

Across Australian jurisdictions<sup>224</sup> the relevant property legislation contains a provision identical, or nearly identical, to section 87. For the purposes of the discussion here, there is no substantial difference in the way the provisions operate.

### **17.4. Options**

There are effectively two options for addressing the issues raised. The first is to repeal section 87(1). The section is limited in that it only applies where a mortgagee exercises the statutory power of sale contained in the PLA. While the PLA deems a sale by a mortgagee to be an exercise of the statutory power unless a contrary intention appears,<sup>225</sup> it is understood that most mortgages contain an express power of sale in the instrument of mortgage itself.

---

<sup>221</sup> *Property Law Act 1974* (Qld) s 83(1).

<sup>222</sup> *Property Law Act 1974* (Qld) s 87(1)(a) to (d).

<sup>223</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.2500].

<sup>224</sup> *Conveyancing Act 1919* (NSW) s 112(3); *Property Law Act 1958* (Vic) s 104(2); *Law of Property Act 1936* (SA) s 49(2).

<sup>225</sup> *Property Law Act 1974* (Qld) s 86(3).

The second option is to modify the provision. It could be modified so that the protection applies to any exercise of a power of sale by a mortgagee (or receiver appointed by the mortgagee). This would significantly expand the effect of the provision.

The provision could also be modified to clarify the time from which it operates so that it is made clear when it takes effect. The phrase 'where a conveyance is made' as it appears in section 87(1) could be modified so that it is clear the protection operates from the time the contract is entered into. This would give the purchaser protection prior to the registration of the transfer.

#### **Questions**

- 38. Given its limited utility, should section 87(1) be retained?**
- 39. If section 87(1) should be retained, should it be expanded to apply to any exercise of a power of sale (not just a power of sale granted by the PLA)?**
- 40. If the provision should be retained, should it be modified so that it applies before registration of the transfer?**

## 18. Section 89 – Provisions as to exercise of power of sale

### 18.1. Overview and purpose

#### 89 Provisions as to exercise of power of sale

- (1) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.
- (2) The power of sale conferred by this Act does not affect the right of foreclosure.
- (3) The mortgagee shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act, or of any trust connected with it, or of any power or provision contained in the instrument of mortgage.
- (4) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, lien, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title to the property, which a purchaser under the power of sale would be entitled to demand and recover from the person.

Section 89 provides for powers that are incidental to the mortgagee's power of sale, including that:

- the power of sale conferred by the Act may be exercised by any person entitled to receive and give a discharge for the mortgage money;
- the power of sale conferred by the Act does not affect the right of foreclosure;
- the mortgagee is not liable for any involuntary loss from the exercise of the power of sale; and
- the person entitled to exercise the power of sale may demand documents from another party that the purchaser would be entitled to (except documents from a prior mortgagee).<sup>226</sup>

Strictly speaking, section 89(1) is not necessary as the power of sale in the PLA<sup>227</sup> is conferred on the mortgagee, which is defined as including any person from time to time deriving title to the mortgage under the original mortgagee.<sup>228</sup> It has been argued<sup>229</sup> that section 89(1) actually substitutes a slightly different definition of mortgagee as the statutory power of sale may be exercised by the person entitled to receive and give a discharge for the mortgage money.

---

<sup>226</sup> *Property Law Act 1974* (Qld) s 89.

<sup>227</sup> *Property Law Act 1974* (Qld) s 83(1)(a).

<sup>228</sup> *Property Law Act 1974* (Qld) schedule 6 (definition of 'mortgagee').

<sup>229</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.3030].

## 18.2. Is there a need for reform?

A mortgage consists of a mortgage debt and a mortgage security. Section 89(1) refers only to the person entitled to give a discharge for the mortgage money. It is at least possible (although unlikely) that the mortgage debt could be vested in a different person to the title to the mortgage security.<sup>230</sup> The section generally assumes that no separation has occurred. It may be preferable for the section to be amended to refer to both the mortgage debt and the mortgage security.

Section 89(3) provides that the mortgagee is not liable for involuntary loss happening in or about the exercise or execution of the power of sale under the Act, or of any trust, or of any power or provision contained in the instrument of mortgage. It has been argued that the provision does little more than express a principle which is part of the general law as to a mortgagee's duties.<sup>231</sup>

## 18.3. Other jurisdictions

Across Australian jurisdictions<sup>232</sup> and in the UK<sup>233</sup>, the relevant property legislation contains a provision identical, or nearly identical, to section 89. For the purposes of the discussion here, there is no substantial difference in the way the provisions operate.<sup>234</sup>

## 18.4. Options

The issues raised above can be addressed by amending the section, if this is required. It is noted that, while it is theoretically possible that the mortgage debt and the mortgage security could be vested in different people, this is unlikely and it may be that no amendment is required.

Additionally, although section 89(3) may only express a position that is part of the general law, it is unlikely that leaving the provision in place will cause much of an issue.

### Questions

**41. Should section 89(1) be amended to refer to both the mortgage debt and the mortgage security?**

**42. Is there any utility in retaining section 89(3) or should it be repealed?**

<sup>230</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.3030].

<sup>231</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.3120]. See also, Peter Butt, 'The Mortgagee's duty on sale' (1979) 53 *Australian Law Journal* 172 at 183.

<sup>232</sup> *Conveyancing Act 1919* (NSW) s 112(5)-(8); *Property Law Act 1958* (Vic) s 106; *Law of Property Act 1936* (SA) s 51; *Property Law Act 1969* (WA) s 62; *Law of Property Act* (NT) s 94; *Conveyancing and Law of Property Act 1884* (Tas) s 23(4)-(6).

<sup>233</sup> *Law of Property Act 1925* (UK) s 106.

<sup>234</sup> In NSW, the provision equivalent to section 89(1) refers to the person entitled to receive and give a discharge of the 'mortgage money or the money secured by the charge': *Conveyancing Act 1919* (NSW) s 112(5).

## 19. Section 91 – Amount and application of insurance money

### 19.1. Overview and purpose

#### 91 Amount and application of insurance money

- (1) The amount of an insurance effected by a mortgagee against loss or damage by fire or otherwise under the power in that behalf conferred by this Act shall not exceed such amount as is specified in the mortgage, or, if no amount is specified, the full insurable value of the buildings upon the mortgaged land or the amount owing to the mortgagee in respect of the mortgage.
- (2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases, namely—
  - (a) where there is a declaration in the instrument of mortgage that no insurance is required;
  - (b) where an insurance is kept up by or on behalf of the mortgagor in accordance with the instrument of mortgage;
  - (c) where the instrument of mortgage contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor with the consent of the mortgagee to the amount to which the mortgagee is by this Act authorised to insure.
- (3) All money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act or on an insurance for the maintenance of which the mortgagor is liable under the instrument of mortgage, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.
- (4) If and so far as a contrary intention is not expressed in the instrument of mortgage, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire, or otherwise effected under this Act, or on an insurance for the maintenance of which the mortgagor is liable under the instrument of mortgage, shall be applied in or towards the discharge of the mortgage money.
- (5) Despite subsection (4) where a mortgagee requires a mortgagor to effect, or consents to a mortgagor effecting, insurance for the reinstatement or replacement value of the mortgaged property, and the mortgagor so insures, the mortgagor may require that all money received or payable on such insurance be applied in reinstating or replacing the mortgaged property.
- (6) Any obligation of a mortgagor to insure or continue to insure mortgaged property on a reinstatement or replacement basis shall be suspended if, and for as long as, it ceases—
  - (a) to be possible to effect the reinstatement or replacement of the mortgaged property; or
  - (b) to be lawful to use the mortgaged property for a use to which, prior to such reinstatement or replacement, such property was being put; or
  - (c) to be lawful to use the mortgaged property for such use without the approval of the local government, or other authority having power to grant or withhold approval to such use, and such approval is withheld.

- (6A) But subsection (6) shall not relieve a mortgagor of an obligation of insuring mortgaged property against the risk of destruction or damage by fire to an extent not exceeding the current market value of such property as might be destroyed or damaged by fire.
- (7) This section applies to mortgages whether made before or after the commencement of this Act and shall have effect despite any stipulation to the contrary.

Section 91 provides for the amount of an insurance policy effected by a mortgagee<sup>235</sup> and the application of moneys received under an insurance policy. Where the mortgaged property is insured against loss or damage by fire or otherwise effected under the PLA, or where the mortgagor is liable to maintain the insurance under the instrument of mortgage, the mortgagee may require all money received to be:

- spent to make good the loss or damage in respect of which the money is received;<sup>236</sup> or
- applied in or towards the discharge of the mortgage money (so long as a contrary intention is not expressed in the instrument of mortgage).<sup>237</sup>

Despite this, if the mortgagee requires (or consents to) a mortgagor effecting insurance for the reinstatement or replacement value of the mortgaged property, the mortgagor may require that all money received or payable on such insurance be applied in reinstating or replacing the mortgaged property.<sup>238</sup>

There are also provisions that relieve the mortgagor of the obligation to insure the property on a full replacement value when it is not possible to effect insurance due to specific reasons.<sup>239</sup>

## 19.2. Is there a need for reform?

There are at least two aspects of section 91 that may require reform. The first relates to the consistency of the wording used to effect the reinstatement or replacement of the mortgaged property. The second relates to an apparent contradiction between the terms of the subsections.

### 19.2.1. Making good vs reinstating

Both sections 91(3) and 91(5) are directed at the replacement of the insured property. However, the language used is not consistent. In relation to insurance effected by the mortgagor of the mortgaged property for loss or damage by fire, section 91(3) provides that the mortgagee may require the money 'be applied by the mortgagor in making good the loss or damage in respect of which the money is received.' In relation to insurance for the reinstatement or replacement value of the mortgaged property effected as required by, or with the consent of, the mortgagee, section

<sup>235</sup> *Property Law Act 1974* (Qld) s 83(1)(b).

<sup>236</sup> *Property Law Act 1974* (Qld) s 91(3).

<sup>237</sup> *Property Law Act 1974* (Qld) s 91(4).

<sup>238</sup> *Property Law Act 1974* (Qld) s 91(5).

<sup>239</sup> As set out in *Property Law Act 1974* (Qld) s 91(6).



91(5) provides that the mortgagor may require that all money received or payable be applied 'in reinstating or replacing the mortgaged property'.

To eliminate arguments about whether insurance has been effected for the reinstatement/replacement value of the mortgaged property or to make good the mortgaged property, and to promote consistency of wording (with not only section 91(3) but also section 91(4)), it may be considered preferable for section 91(5) to adopt the same form of wording employed in section 91(3). For example, section 91(5) could be worded as follows:

*Despite subsection (4) where a mortgagee requires a mortgagor to effect, or consents to a mortgagor effecting, insurance of the mortgaged property against loss or damage by fire or otherwise, or for the reinstatement or replacement value of the mortgaged property, and the mortgagor so insures, the mortgagor may require that all money received or payable on such insurance be applied in making good the loss or damage in respect of which the money is received or reinstating or replacing the mortgaged property as the case may be.*

### 19.2.2. Contracting out

Section 91(7) provides that section 91 applies to all mortgages and will have effect despite any stipulation to the contrary, such as a stipulation contained in the instrument of mortgage itself. However, section 91(4) is stated to apply 'if and so far as a contrary intention is not expressed in the instrument of mortgage.' On a plain language interpretation, the two subsections appear contradictory. Arguably, section 91(4) as the more particular provision should prevail. If correct, then it may be possible to stipulate in the instrument of mortgage that a mortgagee may *not* require that insurance money received for loss or damage by fire be applied toward the discharge of the mortgage money.

However, there is no ability to contract out of the other parts of section 91. It may be desirable to remedy this apparent inconsistency.

### 19.3. Other jurisdictions

A number of jurisdictions in Australia have provisions that are similar to the Queensland position. These provisions are drawn from the equivalent UK legislation.<sup>240</sup> Under the relevant provisions<sup>241</sup> (as in Queensland) the mortgagee:

- cannot effect insurance greater than the amount specified in the mortgage, or if no amount is stated, the full insurable value of the buildings on the mortgaged land or the amount owing under the mortgage;<sup>242</sup>

---

<sup>240</sup> *Law of Property Act 1925* (UK) s 108.

<sup>241</sup> *Conveyancing Act 1919* (NSW) s 114; *Property Law Act 1958* (Vic) s 108; *Property Law Act 1969* (WA) s 64; *Conveyancing and Law of Property Act 1884* (Tas) s 25.

<sup>242</sup> In the UK and Tasmania, if no amount is specified, the amount is limited to two-thirds of the amount to restore the property: *Law of Property Act 1925* (UK) s 108(1); *Conveyancing and Law of Property Act 1884* (Tas) s 25(1).

- cannot effect insurance in specified circumstances (such as no insurance is required under the mortgage or the mortgagor is required to maintain insurance); and
- has the option, when insurance money is received, to require that the money is applied either to make good the damage or loss or to discharge the amount owing under the mortgage.<sup>243</sup>

As initially proposed by the QLRC, section 91 was virtually identical<sup>244</sup> to the provisions described above. However, sections 91(5) to 91(7) were subsequently added to the provision. It has been noted<sup>245</sup> that it is only in Queensland that, where the mortgagee requires the mortgagor to effect reinstatement or replacement insurance in the mortgagor's own name, that the mortgagor then has the right to require that money received on that insurance is used to reinstate or replace the property.<sup>246</sup>

As the other jurisdictions do not have the equivalent of sections 91(5) and 91(7), they are of little assistance in regards to the options for amendment in Queensland.

## 19.4. Options

### 19.4.1. Modify section 91(5)

Section 91(5) applies only where the mortgagee has required the mortgagor to effect, or consented to the mortgagor effecting, insurance and the mortgagor does so insure. Section 91(5) overrides the right of the mortgagee to require that insurance money is used to discharge the mortgage<sup>247</sup> but only if the insurance is for reinstatement or replacement.

Section 91(3) refers to insurance for loss or damage by fire or otherwise. It has been noted that this may be limited to loss or damage caused by similar types of natural agents such as storm and tempest.<sup>248</sup> Section 91(5) refers to insurance for the reinstatement or replacement value of the mortgaged property. While it may be possible that sections 91(3) and 91(5) relate to different types of insurance, it appears to be the case that both sections are directed to achieve the same outcome, that is, the application of insurance money to restoring the mortgaged property.

If this is in fact the case, it may be desirable for the same wording to be used in each section so that section 91(5) refers to using any money received under insurance for reinstatement or repair of the mortgaged property to make good the mortgaged property.

---

<sup>243</sup> Unlike the other jurisdictions, in WA the relevant provision does not give the mortgagee the ability to require the money received be used to discharge the mortgage: *Property Law Act 1969* (WA) s 64(3).

<sup>244</sup> 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 40 of the draft bill.

<sup>245</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), at 211.

<sup>246</sup> *Property Law Act 1974* (Qld) s 91(5).

<sup>247</sup> *Property Law Act 1974* (Qld) s 91(4).

<sup>248</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press), at 210.

### **19.4.2.      Modify section 91(7)**

The wording of section 91(7) makes it clear that the instrument of mortgage cannot displace the right of the mortgagor in section 91(5) to require insurance money to be used to reinstate or replace mortgaged property. However, as discussed above, section 91(7) also would apply to section 91(4), which states that the provision applies only 'if and so far as a contrary intention is not expressed in the instrument of mortgage'. This creates an apparent contradiction between the paragraphs that may need to be remedied in order to provide greater certainty for mortgagors and mortgagees.

#### **Questions**

- 43. Do you support amending section 91(5) to refer to making good the loss or damage rather than reinstating the property?**
  
- 44. Does the inconsistency between s 91(4) and s 91(7) need to be remedied?**

## 20. Section 92 – Appointment, powers, remuneration and duties of receiver

### 20.1. Overview of section

#### **92 Appointment, powers, remuneration and duties of receiver**

- (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until the mortgagee has become entitled to exercise the power of sale conferred by this or any other Act, but may then appoint such person as the mortgagee thinks fit to be receiver.
- (1A) However, for a mortgage registered under the Land Act or the Mineral Resources Act a mortgagee entitled to appoint a receiver may appoint a receiver at any time after the mortgagee has become entitled to enter upon and take possession of the land subject to the mortgage.
- (2) A receiver appointed under the powers conferred by this Act, shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the instrument of mortgage otherwise provides.
- (3) The receiver shall have power to demand and recover all the income of which the receiver is appointed receiver, by action or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to the receiver by the mortgagee under this Act.
- (4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.
- (5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing.
- (6) The receiver shall be entitled to retain out of any money received by the receiver, for the receiver's remuneration, and in satisfaction of all costs, charges and expenses incurred by the receiver as receiver, a commission at such rate, not exceeding 5% on the gross amount of all money received, as is specified in the receiver's appointment, and if no rate is so specified, then at the rate of 5% on that gross amount, or at such other rate as the court thinks fit to allow, on application made by the receiver for that purpose.
- (7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent (if any) to which the mortgagee might have insured, and keep insured against loss or damage by fire, or by storm and tempest out of the money received by the receiver, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.
- (8) Subject to this Act as to the application of insurance money, the receiver shall apply all money received by the receiver as follows, namely—
  - (a) in discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property;
  - (b) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right of which the receiver's is receiver;

(c) in payment of the receiver's commission, and of the premiums on fire, life, or other insurances (if any) properly payable under the instrument of mortgage or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;

(d) in payment of the interest accruing due in respect of any principal money due under the mortgage;

(e) in or towards discharge of the principal money if so directed in writing by the mortgagee; and shall pay the residue (if any) of the money received by the receiver to the person who, but for the possession of the receiver, would have been entitled to receive the income of which the receiver is appointed receiver, or who is otherwise entitled to the mortgaged property.

(9) The appointment of a receiver or of a new receiver under this section shall be made by the mortgagee by writing in the approved form.

Section 92 deals with the appointment, powers, remuneration and duties of a receiver appointed by the mortgagee (and deemed to be an agent of the mortgagor). Today it is common for instruments of mortgage to contain a clause that allows a receiver to be appointed by the mortgagee. However, prior to the PLA, if the instrument of mortgage did not contain a power to appoint a receiver, the mortgagee would have to apply to the court for such an order.<sup>249</sup>

The statutory power to appoint a receiver is not triggered until the mortgagee is entitled to exercise the power of sale conferred by the Act<sup>250</sup> (i.e. after default, service of notice and 30 days continuance of default).<sup>251</sup> Alternatively, if the mortgage is a mortgage under the *Land Act 1994* (Qld) or the *Mineral Resources Act 1989* (Qld), the power to appoint a receiver is triggered when the mortgagee has become entitled to enter upon and take possession of the lands subject to the mortgage.

## 20.2. Is there a need for reform?

There are two aspects in which the section may require reform. The first relates to the trigger event before the statutory right to appoint a receiver can be exercised and the second relates to the powers of the receiver.

---

<sup>249</sup> 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 72.

<sup>250</sup> *Property Law Act 1974* (Qld) s 83(1)(a).

<sup>251</sup> *Property Law Act 1974* (Qld) s 84.

### 20.2.1. Trigger event

The statutory power to appoint a receiver cannot be exercised until the mortgagee is able to exercise the statutory power of sale. There seems to be no rationale as to why the statutory power of sale is the trigger event (as opposed to the power of sale in the instrument of mortgage). The trigger event before the statutory power to appoint a receiver becomes exercisable can be varied under the instrument of mortgage.<sup>252</sup>

The statutory power of sale can be excluded by the mortgage instrument and if there is no variation to the event upon which the statutory power to appoint a receiver becomes exercisable,<sup>253</sup> the mortgagee will never be able to exercise the power to appoint a receiver because the statutory power of sale will never become exercisable.<sup>254</sup>

It has been suggested that for mortgages under the *Land Title Act 1994* (Qld) the statutory right to appoint a receiver under the PLA should arise when the mortgagee has become entitled to enter upon and take possession of the land subject to the mortgage (unless there is an express statutory limitation on the appointment). This would align with the position under the *Land Act 1994* (Qld) and the *Mineral Resources Act 1989* (Qld).<sup>255</sup>

### 20.2.2. The powers of a receiver

Section 92(1) provides that the mortgagee may appoint such persons as it thinks fit to be a receiver. There are no qualifications required to be appointed as a receiver under the PLA. However, this statement is misleadingly broad.<sup>256</sup> The *Corporations Act 2001* (Cth) restricts who may act as a receiver in the case of a corporation.<sup>257</sup>

It has been noted that there is a significant difference between the role of a receiver under the *Corporations Act 2001* (Cth) and the role of a receiver under the PLA.<sup>258</sup> Duncan and Vann note that the powers under the PLA are suited to a 'traditional passive concept of a receiver who merely collects and distributes income.'<sup>259</sup> If the parties to a mortgage require a more active figure, additional powers may be conferred by the instrument of mortgage.<sup>260</sup>

---

<sup>252</sup> *Property Law Act 1974* (Qld) s 83(3).

<sup>253</sup> As allowed by *Property Law Act 1974* (Qld) s 83(3).

<sup>254</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.3610].

<sup>255</sup> *Property Law Act 1974* (Qld) s 92(1A).

<sup>256</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.3620].

<sup>257</sup> *Corporations Act 2001* (Cth) s 418.

<sup>258</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.3680].

<sup>259</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.3680].

<sup>260</sup> *Property Law Act 1974* (Qld) s 83(3).

Despite the fact that the parties can modify the powers available to a receiver under the instrument of mortgage, it has been suggested that the powers available to receivers under the *Corporations Act 2001* (Cth) should also be available under the statutory power to appoint a receiver under the PLA.

## 20.3. Other jurisdictions

Victoria,<sup>261</sup> Western Australia,<sup>262</sup> South Australia<sup>263</sup> and Tasmania<sup>264</sup> all have the same requirement as Queensland. These jurisdictions have all been based on the UK position.<sup>265</sup>

### 20.3.1. NSW

Under the statutory power to appoint a receiver in NSW, a receiver may be appointed when there has been a default<sup>266</sup> in respect of the mortgage or charge, but the powers of a receiver cannot be exercised in respect of the mortgaged property unless there has been a default and the appointment of the receiver has been made in writing and is registered.<sup>267</sup> A receiver cannot exercise a power of sale over mortgaged land unless the mortgagee is entitled to exercise the power of sale.<sup>268</sup>

## 20.4. Options

### 20.4.1. Appointing a receiver

As noted, the statutory power to appoint a receiver is only relevant if there is no power to appoint a receiver in the instrument of mortgage itself. As most instruments of mortgage today will contain a power to appoint a receiver, this means it is very unlikely that a mortgagee will resort to the statutory power when appointing a receiver. Despite this, there is good reason to make the legislation consistent, regardless of the Act under which the mortgage has been registered. In Queensland, this would mean amending the trigger event to appoint a receiver under the statutory power to be when the mortgagee has become entitled to enter upon and take possession of the land.

---

<sup>261</sup> *Property Law Act 1958* (Vic) s 109(1).

<sup>262</sup> *Property Law Act 1969* (WA) s 65.

<sup>263</sup> *Law of Property Act 1936* (SA) s 53.

<sup>264</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 26.

<sup>265</sup> *Law of Property Act 1925* (UK) s 109.

<sup>266</sup> *Conveyancing Act 1919* (NSW) s 115A(1) (definition of 'default').

<sup>267</sup> *Conveyancing Act 1919* (NSW) s 115A(2)(c). However, registration is only required where the appointment of the receiver is not pursuant to a power in the instrument of mortgage itself. See Matthew Bransgrove and Marcus Young, *The Essential Guide to Mortgage Law in Australia* (2<sup>nd</sup> ed, 2014, Lexis Nexis Butterworths) at [7.23]. The QLRC recommended that Queensland include a requirement for registration (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) at 42 of draft bill), however this was not included in the when the *Property Law Act 1974* (Qld) was passed.

<sup>268</sup> *Conveyancing Act 1919* (NSW) s 115A(3).

## **20.4.2. Clarifying the interaction with the *Corporations Act 2001* (Cth)**

As discussed above, the *Corporations Act 2001* (Cth) restricts who may operate as a receiver of property of a corporation. It has been suggested that the PLA could be amended to clarify that there are in fact qualifications necessary to be appointed as a receiver.

### **Questions**

- 45. Should the mortgagee's statutory right to appoint a receiver be amended to arise at any time after the mortgagee has become entitled to enter upon and take possession of the land subject to the mortgage unless there is an express statutory limitation upon the appointment?**
  
- 46. Should a rider be added to section 92(1) such that the mortgagee's right to appoint as a receiver such person as the mortgagee thinks fit is expressly subject to relevant statutory requirements?**



## 21. Section 95 – Relief against provision for acceleration of payment

### 21.1. Overview of section

#### 95 Relief against provision for acceleration of payment

- (1) Where default has taken place—
- (a) in payment of any instalment due of principal or interest under a mortgage; or
  - (b) in the observance of any covenant or obligation in a mortgage;
- and under the terms of the mortgage an accelerated sum may or has, because of such default or of the exercise upon such default of any option or election conferred by the mortgage, become due and payable, the mortgagor shall be entitled to relief under this section.
- (2) A mortgagor who, at any time before sale by the mortgagee or before the commencement of proceedings to enforce the rights of the mortgagee—
- (a) performs the covenant or obligation in respect of which the default has taken place; and
  - (b) tenders to the mortgagee, who accepts payment of, the amount of the instalment in respect of which the default has taken place and any reasonable expenses incurred by the mortgagee;
- is relieved from the consequences of such default.
- (3) The mortgagor, in any proceedings brought to enforce the rights of the mortgagee or brought by the mortgagor, may—
- (a) upon undertaking to the court to perform any such covenant or obligation; and
  - (b) upon tender or payment into court of such instalment;
- apply to the court for relief from the consequences of such default, and the court may grant or refuse relief (whether by staying proceedings brought by the mortgagee or otherwise) as the court, having regard to the conduct of the parties and to all other circumstances, thinks fit, and in the case of relief may grant it on such terms (if any) as to payment of any reasonable expenses of the mortgagee and as to the costs or otherwise as the court in the circumstances thinks fit.
- (4) Where in granting relief under subsection (3) the court stays proceedings for the enforcement of the rights of the mortgagee, the court may on application remove the stay if default takes place in carrying out the undertaking referred to in subsection (3).
- (5) This section applies to mortgages of any property whether made before or after the commencement of this Act, but only to a default occurring after the commencement of this Act, and shall have effect despite any stipulation to the contrary.
- (6) In this section—
- accelerated sum** means the whole or part of principal or interest secured by the mortgage other than the instalment referred to in subsection (1)(a).

Section 95 provides relief for a mortgagor who, due to a default in a payment or compliance with a covenant or obligation under the mortgage, has triggered an accelerated payment or given the mortgagee an option to cause acceleration to occur. An acceleration occurs where an instrument of mortgage provides that a default or non-compliance with a clause or obligation in the mortgage means that the payments due under the mortgage are accelerated. For example, the instrument of mortgage may provide that the entire mortgage is due if a single payment is one day late. Section 95 is designed to overcome the injustice that can be done to the mortgagor if an acceleration clause is particularly onerous.

Relief will be possible where three requirements are satisfied. First, there must be a default of the type specified in section 95(1)(a) or (b). Secondly, under the terms of the mortgage acceleration must occur or the mortgagee must have the option to cause acceleration to occur. Thirdly, the acceleration or possibility of acceleration must arise under the terms of the mortgage by reason of the default.

## 21.2. Is there a need for reform?

It has been suggested that there is some ambiguity with the scope of relief available under this section. When the conditions in the section are met, the mortgagor is 'relieved from the consequences of such default.'<sup>269</sup> These words are very broad and arguably may be interpreted in a way that gives a mortgagor relief not only against the acceleration clause but against the consequences of default in general.<sup>270</sup> Consider a scenario where a mortgage contains an acceleration clause and:

- the mortgagor has defaulted;
- the mortgagee has given the required notice; and
- the 30 day time period has passed without any action to remedy the default by the mortgagor.<sup>271</sup>

In this scenario, it is arguable that the mortgagor has a right under section 95(2) to remedy the default at any point after the 30 day period up until the day of sale.<sup>272</sup> It may be that the remedy is designed to give relief against the harsh application of the acceleration clause but the section provides for a remedy against the consequences of such default.

Rather than relying on contextual arguments, it may be preferable for an amendment to the section to make it clear that relief is only given against the effect of the acceleration clause.

---

<sup>269</sup> *Property Law Act 1974* (Qld) s 95(2).

<sup>270</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.4340].

<sup>271</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.4340].

<sup>272</sup> Duncan and Vann, however, submit that such an interpretation is incorrect as it amounts to relief from mortgagee's power of sale rather than relief from the acceleration clause: Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.4340].

### 21.3. Other jurisdictions

The Northern Territory<sup>273</sup> is the only other jurisdiction in Australia that has an equivalent clause in its property legislation. However, the common law operates in other Australian jurisdictions and will not generally allow an acceleration clause where the accelerated payments appear as a penalty.<sup>274</sup>

### 21.4. Options

Section 95(2) could be amended to clarify any confusion that may arise over the relief that is granted by the section. As an example, the section could be amended to refer to relief from the consequences of the acceleration rather than relief from the consequences of such default. The goal of any amendment would be to clarify that the section provides relief only against the acceleration of amounts owed, not relief against other consequences of default, such as an exercise of the power of sale.

#### Question

**47. Do you support an amendment of section 95(2) to make it clear that relief is only given against the effect of the acceleration clause?**

---

<sup>273</sup> *Law of Property Act (NT)* s 105.

<sup>274</sup> WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2<sup>nd</sup> ed, 2013, Federation Press) at [4.6.1].

## 22. Section 97 – Interest of mortgagor not seizable on judgment for mortgage debt

### 22.1. Overview of section

#### **97 Interest of mortgagor not seizable on judgment for mortgage debt**

- (1) On a judgment of any court for a debt secured by mortgage of any property, the interest of the mortgagor in that property shall not be taken in execution.
- (2) This section applies to execution on a judgment whether obtained before or after the commencement of this Act, and applies despite any stipulation to the contrary in the mortgage.

Where the mortgagee sues on the personal covenant in the mortgage and obtains a judgment debt, the mortgaged property is not available to satisfy the debt. Section 97 provides that the mortgagor's interest in that property (the mortgagor's equity of redemption) cannot be taken in execution of the judgment.

The section is designed to overcome the injustice that may be caused to the mortgagor if the property is taken and the mortgagor is still left with liability for the mortgage debt. In the case of *Simpson v Forrester*,<sup>275</sup> Forrester purchased a lease from Simpson for \$75,000. The terms of the sale provided for a down payment of \$20,000 and a mortgage back to Simpson for the remaining \$55,000. When Forrester defaulted on the mortgage repayments, Simpson sued on the personal covenant in the mortgage and obtained a judgment for \$60,000. As a result of the judgment, the property was sold by the sheriff at auction. Simpson, the only bidder, bought the property for \$20,000. Forrester sued Simpson to recover the \$20,000.

It was held that the purchaser/ mortgagee Simpson owed an indemnity to the mortgagor Forrester equal to the amount of the debt *after* the sale by the sheriff. Simpson ended up with the property back and with the \$20,000 purchase price returned to him (as enforcement creditor). Forrester lost his initial deposit and although he did not owe anything further under the mortgage, he also lost the interest in the lease. The perceived injustice of this case led to the implementation of section 97.<sup>276</sup>

---

<sup>275</sup> (1973) 132 CLR 499.

<sup>276</sup> Section 97 was not included in the draft prepared by the QLRC. 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).

## 22.2. Is there a need for reform?

Duncan and Vann<sup>277</sup> comment that in simple mortgages, the operation of section 97 is clear in providing that if the mortgagee wishes to have recourse to the mortgaged property, the mortgagee will have to rely on the remedies of foreclosure or sale.<sup>278</sup>

However, if there are separate mortgages secured on separate properties between a lender and a borrower, there is nothing to stop the lender from getting a judgment for the debt secured by mortgage A and then taking the property covered by mortgage B in execution of the judgment.<sup>279</sup>

## 22.3. Other jurisdictions

Only NSW<sup>280</sup> and the Northern Territory<sup>281</sup> have a provision that is equivalent to section 97 of the PLA.

## 22.4. Options

In order to extend the protection afforded by the operation of section 97(1) to situations where there are separate mortgages secured on separate properties between a lender and a borrower, it may be appropriate to amend the provision in such a way that the interest of the mortgagor in any mortgaged property shall not be taken in execution.

### Question

**48. Should the reference in section 97(1) to 'the interest of the mortgagor in that property' be amended to make it clear that the interest of the mortgagor in any mortgaged property (where the mortgagor may have granted more than one mortgage to a mortgagee) shall not be taken in execution?**

---

<sup>277</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.4620].

<sup>278</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.4620].

<sup>279</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.4620].

<sup>280</sup> *Conveyancing Act 1919* (NSW) s 102.

<sup>281</sup> *Law of Property Act* (NT) s 107.

## 23. Section 101 – Facilitation of redemption in case of absent or unknown mortgagee

### 23.1. Overview of section

#### 101 Facilitation of redemption in case of absent or unknown mortgagees

- (1) When any person entitled to receive or alleged to have received payment of any money secured by mortgage is out of the jurisdiction, cannot be found, or is unknown, or it is uncertain who is so entitled, the court, upon the application of the person entitled to redeem the mortgaged premises, may order the amount of such debt to be ascertained in such manner as the court thinks fit, and direct the amount so ascertained and not paid (if any) to be paid into court.
- (2) A certificate of the registrar of the court that such payment was directed and has been made or that no amount remains payable under the mortgage, shall operate to discharge the mortgage debt, but, as between the mortgagor and the person so entitled to receive payment, any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due or payable over and above the amount so paid shall continue to be a debt due under the mortgage.
- (3) The court shall order the amount so paid into court to be paid to the person entitled, upon the application of such person, and on proof that the deed or instrument of mortgage, and all the title deeds which were delivered by the mortgagor to the mortgagee on executing the same, or in connection with the execution, have been delivered up to the person by whom the amount was so paid into court, or the person's executors, administrators, or assigns, or have been otherwise satisfactorily accounted for.
- (4) The certificate referred to in subsection (2)—
  - (a) shall, in the case of a mortgage of unregistered land, upon registration of the certificate under this Act operate in favour of a purchaser of the land as a discharge of the land as from the date of the certificate and as a reconveyance of the estate and interest of the mortgagee of and in the mortgaged property to the person who at the date of the certificate is entitled to the equity of redemption according to the person's interest in the mortgaged property; and
  - (b) shall, in the case of a mortgage of registered land, be registrable in the manner prescribed under the *Land Title Act 1994* and upon registration shall have effect as a discharge under that Act; and
  - (c) shall, in the case of a mortgage registered under the Land Act, be registered in the manner of a discharge of mortgage under that Act and upon registration shall have effect accordingly; and
  - (d) shall, in the case of a mortgage registered under the Mineral Resources Act, be delivered to the warden and have effect under that Act as a certificate signed by the mortgagee to the effect that the debt secured has been paid or discharged.
- (5) For the purpose of effecting registration under subsection (4)(b), the registrar may dispense with production of a certificate of title or other instrument and with the publication of any notice or the doing of any other act required by the *Land Title Act 1994*.
- (6) Nothing in this section affects the *Public Trustee Act 1978*, section 61.

This section allows a court to facilitate redemption of the mortgage in the case of unknown, uncertain or absent mortgagees. The application to the court may be made by a person entitled to redeem the mortgaged premises. An application may be made both where there is money still owing under the mortgage and where the mortgage has been fully paid.

## 23.2. Is there a need for reform?

There are three aspects of the section that may require amendment. The first relates to the categories that the person entitled to receive the money must fit into. The second relates to phrasing used in the section. The final issue relates to the use of the term 'warden' in section 101(4)(d).

### 23.2.1. Applicable categories

Section 101 will apply if the person entitled to receive or alleged to have received money secured by the mortgage falls into one of three categories:

- the person is out of the jurisdiction;
- the person cannot be found or is unknown; or
- it is uncertain who is so entitled.

It has been submitted that where the mortgagee has died and it is certain that someone will be appointed, but it is uncertain who that person will be, then the mortgagee will not be unknown or uncertain and none of the categories will apply.<sup>282</sup>

Duncan and Vann suggest that section 101 can benefit by adding a fourth category to cover the situation when a mortgagee has died but no legal representative has been appointed.<sup>283</sup>

### 23.2.2. Unclear wording

The applicant under the section (the person entitled to redeem the mortgaged premises) is entitled to a certificate from the Registrar of the court that the amount outstanding has been paid or that no amount is outstanding. Section 101(2) provides that any amount 'eventually shown... to have been in fact due or payable over and above the amount so paid' will continue to be a debt.

The subsection will operate to keep alive a debt when payment has been made to the court and such payment is later proved to be insufficient. However, taken literally, the section will not apply to keep alive a debt if it was incorrectly ascertained that no amount remained payable under the mortgage and it is later shown that an amount is payable. It is submitted that if no payment is made

---

<sup>282</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.5040] referring to *In the Application of Priomalli* [1977] 1 NSWLR 39 at 41 (which considered the NSW equivalent of section 101).

<sup>283</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.5040]. Waddell J in *In the Application of Priomalli* [1977] 1 NSWLR 39 at 41 notes it is surprising that the provision does not cover such a situation.

to the court and a certificate is issued to that effect, there can be no amount that is over and above the 'amount so paid' as no amount has been paid.<sup>284</sup>

### 23.2.3. No mining warden

The 'warden' in the context of the *Mineral Resources Act 1989* (Qld) has been replaced and the position is now described with the term 'mining registrar'. While it is clear that the use of the word warden refers to the mining registrar, if the section is being amended there is no reason not to use the new term.

## 23.3. Other jurisdictions

The provision in Queensland was based on a similar provision in NSW.<sup>285</sup> In 2010, the NSW legislation was amended to include situations where the person entitled to receive the mortgage money 'is dead and no personal representative has been or is likely to be appointed for the person or if it is uncertain who the personal representative is.'<sup>286</sup>

## 23.4. Options

The section could be amended to:

- include the situation where a mortgagee has died but no representative has been appointed;
- remove the ambiguity in relation to whether a debt is kept alive if it is incorrectly certified that no amount remains payable under the mortgage; and
- remove the out-of-date reference to the mining warden.

### Questions

- 49. Do you support amending section 101(1) to include a fourth category dealing with the death of the mortgagee to address the present deficiency of the section as outlined in the case law?**
- 50. Do you support amending section 101(2) in order to clarify that the mortgage debt is kept alive where it is incorrectly certified that no amount remains payable under the mortgage?**
- 51. Should the reference to the 'warden' in section 101(4)(d) be changed to the 'mining registrar' in accordance with the current provisions of the *Mineral Resources Act 1989* (Qld)?**

<sup>284</sup> Duncan and Vann note that this problem may be overcome using the UCPR: see Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [7.5100] at footnote 29.

<sup>285</sup> *Conveyancing Act 1919* (NSW) s 98.

<sup>286</sup> *Conveyancing Act 1919* (NSW) s 98(1) as amended by *Statute Law (Miscellaneous Provisions) Act (No 2) 2010* (NSW) schedule 1.7.



# PART 3 – Encroachment and mistaken improvements – PLA

## Part 11

### A. PLA Part 11 Division 1 – Encroachment (ss 182-194)

## 24. Encroachment

### 24.1. Overview and purpose

Part 11, Division 1 of the PLA comprises sections 182 to 194. The key provisions are extracted below.

#### **182 Definitions for div 1**

In this division –

**adjacent owner** means the owner of land over which an encroachment extends.

**boundary** means the boundary line between contiguous parcels of land.

**building** means a substantial building of a permanent character, and includes a wall.

**encroaching owner** means the owner of land contiguous to the boundary beyond which an encroachment extends.

**encroachment** means encroachment by a building, including encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil.

**owner** means any person entitled to an estate of freehold in possession –

(a) whether in fee simple or for life or otherwise; or

(b) whether at law or in equity; or

(c) whether absolutely or by way of mortgage, and includes a mortgage under a registered mortgage of a freehold estate in possession in land under the *Land Title Act 1994*.

**subject land** means that part of the land over which an encroachment extends.

#### **183 Application of div 1**

This division applies despite the provisions of any other Act.

#### **184 Application for relief in respect of encroachments**

(1) Either an adjacent owner or an encroaching owner may apply to the court for relief under this division in respect of any encroachment.

(2) This section applies to encroachments made either before or after the commencement of this Act.

#### **185 Powers of court on application for relief in respect of encroachment**

(1) On an application under section 184 the court may make such order as it may deem just with respect to –

(a) the payment of compensation to the adjacent owner; and

(b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and

(c) the removal of the encroachment.

(2) The court may grant or refuse the relief or any part of the relief as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider, amongst other matters –

(a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be; and

(b) the situation and value of the subject land, and the nature and extent of the encroachment; and

(c) the character of the encroaching building, and the purposes for which it may be used; and

(d) the loss and damage which has been or will be incurred by the adjacent owner; and

(e) the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment; and

(f) the circumstances in which the encroachment was made.

**186 Compensation**

(1) The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant under section 185 to the encroaching owner shall, if the encroaching owner satisfies the court that the encroachment was not intentional and did not arise from negligence, be the unimproved capital value of the subject land, and in any other case 3 times such unimproved capital value.

(2) In determining whether the compensation shall exceed the minimum and if so by what amount, the court shall have regard to –

(a) the value, whether improved or unimproved, of the subject land to the adjacent owner; and

(b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner; and

(c) the circumstances in which the encroachment was made.

**187 Charge on land**

(1) The order for payment of compensation may be registered in the land registry in such manner as the registrar determines and shall, except so far as the court otherwise directs, upon registration operate as a charge upon the land of the encroaching owner, and shall have priority to any charge created by the encroaching owner or the encroaching owner's predecessor in title.

(2) In this section, the land of the encroaching owner means the parcel of land contiguous to the boundary beyond which the encroachment extends, or such part of the land as the court may specify in the order.

.....

## 194 Costs

In any application under this division the court may make such order as to payment of costs, (to be taxed as between solicitor and client or otherwise), charges, and expenses as it may deem just in the circumstances and may take into consideration any offer of settlement made by either party.

## 24.2. History of the provisions

Legislation has been in place in Queensland since 1955 to provide a procedure to address the issue of buildings encroaching on adjoining land. The *Encroachment of Buildings Act 1955* (Qld) essentially replicated the New South Wales legislation, the *Encroachment of Buildings Act 1922* (NSW). The QLRC reviewed the operation of the Act in 1973 and formed the view that the provisions ‘worked reasonably well, and few practical problems seem to have arisen in its application and enforcement.’<sup>287</sup> The PLA adopted the provisions of the *Encroachment of Buildings Act 1955* (Qld) into Part 11, Division 1 ‘without material alteration.’<sup>288</sup>

The rationale for the introduction of encroachment legislation in the New South Wales context has been described in the following way:

The *Encroachment of Buildings Act 1922* was passed in New South Wales as remedial legislation to overcome a problem where innocent and in some cases not so innocent people were being held to blackmail by neighbours as a result of faulty surveys that were carried out earlier this century and by other surveying errors or building errors which were not their fault. I have been referred to the second reading speech and committee debate on the Act pursuant to s 34 of the *Interpretation Act 1987* and it would seem that there were quite a few cases in the early part of this century where children had moved surveyor’s pegs or builder’s pegs or otherwise monuments were in the wrong place without any real fault on anyone where the legal owner was exacting unconscionable compensation or alternatively refusing to accept compensation and insisting on demolition. The Act was passed to enable the Court to adjust rights in that situation. Although there was some legislation before that in other parts of the British Commonwealth, it would appear that the New South Wales legislation was the first comprehensive piece of legislation on the subject.<sup>289</sup>

The rationale in Queensland appears to be similar. At common law, an unauthorised encroachment by a sign or building is a trespass which can be restrained by injunction and the owner of the land

---

<sup>287</sup> 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) 104.

<sup>288</sup> 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) 104.

<sup>289</sup> *Hardie v Cuthbert* (1988) 65 LGRA 5, 6. The decision of Justice Young was overturned in *Cuthbert v Hardie* (1989) 17 NSWLR 321. However, the appeal decision was focused on determining what constituted a ‘building’ under the legislation and there was no suggestion that the historical context provided in the trial decision was incorrect.

which has been encroached is entitled to any encroachment if it is affixed to the land.<sup>290</sup> The QLRC noted that as boundaries were not always well defined or marked, serious consequences could flow from the common law rule for individuals who mistakenly or inadvertently extend beyond their boundaries when building on their land.<sup>291</sup>

### 24.3. Operation of Part 11, Division 1

The provisions in the PLA apply to any ‘encroachment’ which is defined in the Act to mean:

**encroachment** means encroachment by a building, including encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil.<sup>292</sup>

A ‘building’ is defined in the PLA to mean ‘a substantial building of a permanent character and includes a wall.’<sup>293</sup> Ultimately, whether a structure is a building for the purposes of section 184 of the PLA is a matter of fact, determined on a case by case basis. Carter J considered the definition in *Ex parte Van Achterberg* and explained it in the following way:

[T]he intention of the legislature is clear in my view, that it is intended to deal with an encroachment which is man-made with the building materials of the day, which is of a substantial and lasting character, which is brought into existence for domestic or industrial purposes and which is of such a kind that the legal rights of those affected by it may best be adjusted by permitting it to remain in place rather than by ordering its removal on the ground that it is merely a trespassing encroachment upon the land of another.<sup>294</sup>

In that case, a weldmesh fence set in concrete foundations of up to ‘two feet deep and one foot wide’ was held to be a ‘building’ for the purposes of section 183 of the PLA. The Court, however, emphasised that not every ‘encroaching picket fence or the proverbial tin shed’ will qualify as a building under the Act.<sup>295</sup> The definition of building has been interpreted broadly and has included a concrete driveway,<sup>296</sup> concrete block wall, retaining wall and protruding floor beams.<sup>297</sup> However, structures such as an extension of tiling around a swimming pool, a swimming pool pump and filter<sup>298</sup> or courtyard paving have been held not to be a building.<sup>299</sup> Where the encroachment falls

---

<sup>290</sup> 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) 104.

<sup>291</sup> 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) 104.

<sup>292</sup> *Property Law Act 1974* (Qld) s 182.

<sup>293</sup> *Property Law Act 1974* (Qld) s 182.

<sup>294</sup> *Ex parte Van Achterberg* [1984] 1 Qd R 160, 162.

<sup>295</sup> *Ex parte Van Achterberg* [1984] 1 Qd R 160, 162.

<sup>296</sup> *Clark v Wilkie* (1977) 17 SASR 134 and *Gladwell v Steen* [2000] SASC 143 applying *Clarke v Wilkie*.

<sup>297</sup> See commentary and cases referred to in Carmel MacDonald et al, *Real Property Law in Queensland* (3<sup>rd</sup> ed, 2010, LawBook Co), 107 [4.160].

<sup>298</sup> *Cuthbert v Hardie* [1989] 17 NSWLR 321, 324. The swimming pool pump house in this case was a very small structure separated from the swimming pool and readily removed. On the basis of its size and nature, Hope AJA did not consider that it was a substantial building of a permanent character for the purposes of the *Encroachment of Buildings Act 1922* (NSW).

outside the scope of the definition of 'building' the provisions of the PLA will not apply and the parties are then left with common law processes to resolve any dispute.<sup>300</sup>

The encroachment provisions in the PLA will not apply to a 'dividing fence' which falls within the scope of the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld).<sup>301</sup> However, a fence can be an encroachment and subject to Part 11, Division 1 of the PLA if it can be classified as a 'building' under section 182 of the PLA.<sup>302</sup>

Part 11, Division 1 has the following features:

- the Division applies despite the provision of any other Act.<sup>303</sup> This means, for example, that where an order is made for the creation of an easement or the transfer of property, the validity of the order is not dependent on obtaining approval from a local authority;
- an adjacent owner (the owner of land over which an encroachment extends) or an encroaching owner may apply to the court for relief in respect of any encroachment.<sup>304</sup> The term 'owner' is defined in section 182 and covers any person entitled to an estate of freehold in possession whether in fee simple or for life, at law or in equity or absolutely or by way of mortgage;
- an encroachment under the Act is an encroachment by a building 'that traverses the boundary between the contiguous parcels of land';<sup>305</sup>
- the court is able to make a number of different orders including:
  - the payment of compensation to the adjacent owner;
  - the conveyance, transfer, or lease of the subject land to the encroaching owner (or the grant to that owner of an interest in the land or easement etc.);
  - the removal of the encroachment;<sup>306</sup>
- the court also has the discretion to refuse to grant relief. In exercising its discretion it is entitled to consider a number of matters including:
  - who made the application for relief; and
  - the situation and value of the relevant land and the nature and extent of the encroachment; and

---

<sup>299</sup> See commentary and cases referred to in Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010), 107 [4.160].

<sup>300</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010), 106 [4.160].

<sup>301</sup> A 'dividing fence' is defined under that Act to mean 'a fence on the common boundary of adjoining lands': s 12(1). Note also that a fence separating the land of adjoining owners which is constructed on a line other than the common boundary is still a dividing fence if natural physical features prevent the construction of the fence entirely on the common boundary or the adjoining land includes 1 or more parcels of pastoral land separated by a watercourse, lake etc. insufficient to stop the passage of stock at all times: s 12(2).

<sup>302</sup> See for example *Ex parte Van Achterberg* [1984] 1 Qd R 160 where the weldmesh fence was held to be a building.

<sup>303</sup> *Property Law Act 1974* (Qld) s 183.

<sup>304</sup> *Property Law Act 1974* (Qld) s 184(1).

<sup>305</sup> *Property Law Act 1974* (Qld) s 182. The High Court in *Amatek v Googoorewon* (1993) 176 CLR 471 confirmed this in the context of the similarly framed New South Wales legislation, the *Encroachment of Buildings Act 1922* (NSW).

<sup>306</sup> *Property Law Act 1974* (Qld) s 185(1).

- the character of the encroaching building and the purposes for which it may be used; and
- the loss and damage which has been or will be incurred by the adjacent owner; and
- the loss and damage to the encroaching owner if required to remove the encroachment; and
- the circumstances in which the encroachment was made;<sup>307</sup>
- the minimum amount of compensation payable to the adjacent owner in respect of a conveyance, transfer, lease etc. is the unimproved capital value of the subject land. This is payable if the encroaching owner satisfies the court that the encroachment is unintentional and did not arise from negligence;
- where the court determines that the encroachment was intentional and arose from negligence the minimum compensation payable is 3 times the improved capital value;<sup>308</sup>
- in determining if the compensation should exceed this minimum amount the court must have regard to:
  - the value, whether improved or unimproved, of the subject land to the adjacent owner; and
  - the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and the orders proposed to be made in favour of the encroaching owner; and
  - the circumstances in which the encroachment was made;<sup>309</sup>
- the order for compensation may be registered in the land registry and operate as a charge;<sup>310</sup>
- the court has the power to ‘restrain an action at law’ if the court considers that the matter can be dealt with more conveniently under Part 11, Division 1;<sup>311</sup>
- the parties can apply for determination of the true boundary where this arises as a question;<sup>312</sup>
- the court may require that notice of the application be given to any person interested and that any person who is or appears interested shall be made a party to the application;<sup>313</sup>
- the court can make an order as to costs as it deems just in the circumstances and may take into consideration any offer of settlement made by either party.<sup>314</sup> This provision inevitably has the effect of encouraging settlement.<sup>315</sup>

There is a clear distinction between encroachments and improvements made under mistake of title under the PLA. An encroachment can only occur in relation to contiguous lots of land. Further,

---

<sup>307</sup> *Property Law Act 1974* (Qld) s 185(2).

<sup>308</sup> *Property Law Act 1974* (Qld) s 186(1),

<sup>309</sup> *Property Law Act 1974* (Qld) s 186(2).

<sup>310</sup> *Property Law Act 1974* (Qld) s 187(1).

<sup>311</sup> *Property Law Act 1974* (Qld) s 192; Carmel MacDonald et al, *Real Property Law in Queensland* (3<sup>rd</sup> ed, 2010, LawBook Co), 107 [4.160].

<sup>312</sup> *Property Law Act 1974* (Qld) s 191(1).

<sup>313</sup> *Property Law Act 1974* (Qld) s 193.

<sup>314</sup> *Property Law Act 1974* (Qld) s 194.

<sup>315</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [11.10].

applicants seeking relief are limited to adjacent or encroaching owners of those contiguous lots (or their successors in title).<sup>316</sup> The encroachment provisions are unavailable where a building is constructed entirely on the wrong land.<sup>317</sup> This can be compared to a mistaken improvement which can occur on any land owned by another person and an application for relief can be made by a wider number of potential applicants.<sup>318</sup>

## 24.4. Is there a need for reform?

### 24.4.1. Original rationale for encroachment provisions remains valid

A key reason for the introduction of encroachment legislation generally was to provide relief where buildings encroached onto adjoining properties inadvertently, often as a result of poorly marked boundaries. Submissions made to the VLRC review of encroachments suggest that building encroachments are more common as a result of the 'higher coverage of sites by buildings' and property owners constructing buildings very close to the boundary of a property.<sup>319</sup> The Commission noted that:

Building encroachments are of particular concern because a highly valuable building might encroach by a very small amount into a neighbouring property. In some cases the loss or detriment which would result from removal or alteration of the building would far exceed the value of any loss or detriment to the owner of the adjacent land from the continuation of the encroachment.<sup>320</sup>

When considering both the content and form of possible encroachment provisions in Victoria, the VLRC identified the following two key objects for the enactment of such provisions:

- providing a disincentive to 'deliberate or careless encroachment'; and
- providing a mechanism to 'control rent seeking and minimise losses by limiting the power of adjacent owners to require the removal of a building.'<sup>321</sup>

These underlying policy reasons for the encroachment provisions remain equally applicable and valid in Queensland.<sup>322</sup>

---

<sup>316</sup>Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [11.10].

<sup>317</sup>Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake' (2006) 33 *University of Western Australia Law Review* 31, 57.

<sup>318</sup>For the list of possible applicants see *Property Law Act 1974* (Qld) s 198(1).

<sup>319</sup>Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.35] referring to a submission made by Surveying and Spatial Sciences Institute.

<sup>320</sup>Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.36].

<sup>321</sup>Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.63].

<sup>322</sup>O'Connor indicates that the building encroachment provisions are not restitutionary and applied 'in a cost-minimising manner which is directed to finding the cheapest and fairest outcome in the circumstances of each case.' See Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake' (2006) 33 *University of Western Australia Law Review* 31, 60.

### Question

**52. Do you think the rationale for the encroachment provisions in Queensland remain valid? If not, why not?**

#### **24.4.2. Calculation of compensation – a matter for the court to determine?**

The court has a wide discretion regarding whether it will grant relief in relation to an encroachment. Relief may include the payment of compensation to the adjacent owner.<sup>323</sup> The minimum compensation payable in Queensland is set at the unimproved capital value of the subject land. However, where the encroachment was intentional and arose from negligence, the minimum compensation is set at 3 times the unimproved capital value of the subject land.<sup>324</sup> Where the court is considering exceeding those minimum amounts, section 186(2) sets out the matters the court must have regard to in making that determination including the value of the land (whether improved or unimproved) to the adjacent owner and the circumstances in which the encroachment occurred. The ‘subject land’ is that part of the land over which the encroachment extends.<sup>325</sup> The setting of minimum compensation measured by the unimproved capital value of the subject land is the same approach adopted in equivalent provisions in New South Wales, South Australia and the Northern Territory.

The provisions in Western Australia set out a slightly different approach to the other Australian jurisdictions. Under section 122 of the *Property Law Act 1969* (WA) an encroaching owner is prevented from obtaining any relief unless the owner establishes that the encroachment was not:

- intentional and did not arise from gross negligence; or
- erected by the encroaching owner.

The Western Australian approach has been identified by one commentator as a ‘preferable provision’ to the provisions in other Australian jurisdictions.<sup>326</sup> If relief is granted under one of the categories in section 122(2)(a) to (c), one of the terms of the order can also include the payment by the encroaching owner of any sum of money on such terms as the court thinks fit.<sup>327</sup> The Act does not include a mandatory penalty provision.

The issues associated with the imposition of ‘penalty’ compensation have been described in the following way:

This civil penalty provision has caused difficulties in several jurisdictions. The mandatory trebling of compensation is excessive and arbitrary, and the provision is cast in such broad terms that it makes the encroaching owner liable to the penalty, whether the encroachment was caused by his or her

---

<sup>323</sup> *Property Law Act 1974* (Qld) s 185(1)(a).

<sup>324</sup> *Property Law Act 1974* (Qld) s 186(1).

<sup>325</sup> See Part 24.4.3 below for a discussion of the scope of this term.

<sup>326</sup> Pamela O’Connor, ‘An Adjudication Rule for Encroachment Disputes: Adverse Possession or a Building Encroachment Statute?’ (2007) 4 *Modern Studies in Property Law* 197, 214.

<sup>327</sup> *Property Law Act 1969* (WA) s 122(4).



own intentional or negligent act or that of a predecessor in title or independent contractor. The existence of the penalty provision may discourage courts from awarding compensation, since the penalty provision does not apply unless an award of compensation is made.<sup>328</sup>

The VLRC when considering the introduction of encroachment provisions in Victoria indicated that the mandatory requirement to award three times the unimproved value 'can cause injustice in some cases.'<sup>329</sup> The Commission used the example of a previous adjacent landowner who had allowed or encouraged the construction of the encroachment to illustrate the point and noted that:

An equity might have arisen against that owner by equitable estoppel, which is not enforceable against a subsequent registered owner of the adjacent land. In this example, the encroachment was intentional but it may be unjust in the circumstances to require payment of compensation at three times the value.<sup>330</sup>

The potential unfairness of imposing such an amount on a successor in title who was unaware of the encroachment and the circumstances of its construction has been discussed in a number of cases.<sup>331</sup>

The VLRC recommended that it should be left to the discretion of the court to determine in each individual case whether it is 'just and equitable' in the circumstances that the encroaching owner should pay compensation at the higher rate, not exceeding three times the unimproved capital value.<sup>332</sup>

The approach in New Zealand in relation to building encroachments and compensation was the same as Western Australia until the introduction of the *Property Law Act 2007* (NZ). The new provisions now effectively combine encroachments and improvements made by mistake into the category of a 'wrongly placed structure'. These provisions are extracted at **Annexure 1**. The court has broad discretion to grant relief if it considers it just and equitable in the circumstances that relief should be granted.<sup>333</sup> If an order is made for relief under section 325(2)(a)-(e) of the Act, the court can also require the payment of reasonable compensation as determined by the Court.<sup>334</sup> The compensation payable is not linked to any prescribed method of calculation.

The PLA has a number of other sections where compensation can form part of the relief granted by the court. These provisions include restriction on and relief against forfeiture, relief against loss of lessee's option and imposition of statutory rights of user in respect of land.<sup>335</sup> The calculation of

---

<sup>328</sup> Pamela O'Connor, 'An Adjudication Rule for Encroachment Disputes: Adverse Possession or a Building Encroachment Statute?' (2007) 4 *Modern Studies in Property Law* 197, 214.

<sup>329</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.67].

<sup>330</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.67].

<sup>331</sup> See *Gladwell v Steen* (2000) 77 SASR 310 [21]; *Re Melden Homes No. 2 Pty Ltd's Land* [1976] Qd R 79, 81 (this case considered the *Encroachment of Buildings Act 1955* (Qld), which is in substantially the same form as the provisions in *Property Law Act 1974* (Qld), Part 11, Division 1); *Carlin v Mladenovic* (2002) 84 SASR 155 (SC of SA, Full Court).

<sup>332</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.69] and Recommendation 20, 59.

<sup>333</sup> *Property Law Act 2007* (NZ) s 323(2).

<sup>334</sup> *Property Law Act 2007* (NZ) s 325(1)(f). The previous provisions were under the *Property Law Act 1952* (NZ), s 129. An order for the payment of compensation is made where relief is granted under the other paragraphs (a) to (e) of section 325(2).

<sup>335</sup> See for example, *Property Law Act 1974* (Qld) ss 124(1) and (2), 125(1), 128(8) and 180(4).

compensation in these cases is left to the discretion of the court. The compensation provisions in relation to agricultural holdings under Part 8, Division 6 of the PLA currently lay down a separate process involving an arbitrator where agreement cannot be reached between the parties.<sup>336</sup>

#### Questions

53. Do you think the use of a minimum compensation measure which is calculated on the basis of the unimproved capital value of the subject land is still valid for the purposes of the PLA? Please provide your reasons for your view.
54. Do you think imposing a penalty amount of three times the unimproved capital value of the subject land where the encroaching owner cannot satisfy the court that the encroachment was not intentional and did not arise from negligence is appropriate? Please provide your reasons for your view.
55. If the measure of compensation is retained, do you think the term 'unimproved capital value' should be updated to 'market value' or a similar term to reflect the current measure of property value?
56. Do you think the compensation provision should expressly clarify the position in relation to the payment of compensation where the encroachment was not erected by the encroaching owner? Please provide your reasons for your view.
57. Do you think the court should simply be provided with a broad discretion to order the payment of compensation at an amount determined by the court? For example, under the Western Australian legislation, the payment of 'any sum or sums of money' as the court thinks fit. In New Zealand reasonable compensation can be ordered as determined by the court where one or more other relief options have been ordered.
58. How much guidance do you think the encroachment compensation provision should provide to the court when exercising its discretion to order compensation?
59. Is there a case for a consistent approach to the calculation of compensation more generally under the PLA?
60. Are you aware of any particular reasons arising from your practical experience with the encroachment provisions which would support a change to the current legislative approach to calculating compensation?

---

<sup>336</sup> Note that *Issues Paper 3: Property Law Act 1974 (Qld) - Sales of Land and Other Related Provisions* discusses the appropriateness of appointing an arbitrator in relation to determining the compensation payable in relation to improvements of agricultural holdings by a tenant.

### 24.4.3. 'Subject land' – does it need a more expansive definition?

Under sub-section 185(1)(b) of the PLA, the court is empowered under the PLA to grant to the encroaching owner any easement in relation to the subject land. The term 'subject land' is defined in section 182 of the PLA to mean 'that part of the land over which an encroachment extends.' Commentary on the meaning of this term suggests that the statutory power to grant relief such as easements and transfers under section 185(2)(b) is limited to the portion of the land which is encroached upon. In the Court of Appeal case of *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No. 5157*<sup>337</sup> (**Tallon case**) one of the issues was whether the court should order the transfer of the land over which the encroachment stood but also reasonable curtilage. The Court took a narrow view of the power to order the transfer of land and noted that:

We were referred to various other provisions of the Act, but none of them is capable of extending the power given by s 185(1)(b) in such a way as to enable the Court to order transfer of land other than that over which an encroachment extends. It may be that in many circumstances the Court may think it convenient to require transfer to the encroaching owner of additional land, for one purpose or another, but the statutory power to require transfer is confined as we have indicated; we think the confinement to be unambiguous.<sup>338</sup>

The interpretation of 'subject land' and its scope in the Tallon case is consistent with the view of the High Court in *Amatek Ltd v Googoorewon Pty Ltd*.<sup>339</sup> Although the High Court decision did not directly consider this issue, the Court did discuss the scope of 'subject land' and described it as 'the land vertically under the encroachment.'<sup>340</sup>

The potential issue with the language of the legislation is that there may be situations where access to the encroachment requires access to land that extends beyond the 'subject land'. Commentary on this issue suggests that the power to grant easements and transfer land under section 185(b) of the PLA should be 'expanded to beyond 'the subject land' which severely limits the practical effect of the wide discretion of the court.'<sup>341</sup>

The New Zealand legislation appears to accommodate this type of situation. As discussed in detail in Part 24.5.7 below, Part 6, Subpart 2 applies to wrongly placed structures. This encompasses a structure that is situated on or over land affected. The term 'land affected' means any land on which a structure is actually situated and 'land' is defined broadly and includes:

(c) in the case of land actually occupied by a wrongly placed structure, also includes any land reasonably required as curtilage and for access to the structure.<sup>342</sup>

---

<sup>337</sup> *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No. 5157* [1997] 1 Qd R 102.

<sup>338</sup> *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No. 5157* [1997] 1 Qd R 102, 107.

<sup>339</sup> *Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471.

<sup>340</sup> *Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471, 477.

<sup>341</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [11.90].

<sup>342</sup> *Property Law Act 2007* (NZ) s 312.

The definition addresses the issues identified above and enables vesting of land or granting of an easement in New Zealand to extend beyond the area taken up by the wrongly placed structure and enables additional land to be included in the relief granted.<sup>343</sup>

#### Question

**61. Do you think the definition of ‘subject land’ needs to be expanded to accommodate land ‘reasonably required as curtilage and for access’ to the encroachment? Please provide reasons for your view.**

#### **24.4.4. Combining the encroachment provisions and mistaken improvement into a single provision?**

Currently in Queensland, relief for encroachment and mistaken improvements are addressed in two different divisions of the PLA. In New Zealand the *Property Law Act 2007* (NZ) combines sections 129 (encroachments) and 129A (buildings erected on the wrong land) under the now repealed *Property Law Act 1952* (NZ) into a single subpart and describes these as ‘wrongfully placed structures’.<sup>344</sup> The operation of the New Zealand provisions are discussed in detail in Part 24.5.7 below. There is no clear statement which comprehensively explains the rationale for the approach in New Zealand of combining the provisions. The New Zealand Law Commission preliminary paper in 1991 discussed the issue and it appears that there may have been some uncertainty regarding the scope of section 129A and the need to clarify in the section that it did not address an encroachment or straddling situation.<sup>345</sup> A number of options were discussed to address the uncertainty including removing section 129 and amending section 129A so that it covered a situation of ‘straddling’ or encroachment and mistake.<sup>346</sup> An alternative option proposed was to amend section 129A to make it clear that it applied to buildings ‘entirely’ built on the wrong land. However, the Law Commission indicated that the preferred approach was to preserve both sections, ‘while at the same time making it clear that one applies in the case of encroachments and the other in the case of a building which is entirely on the wrong land.’<sup>347</sup>

The subsequent final report by the Law Commission in 1994 attached a draft Property Law Act which combined sections 129 and 129A of the former 1952 Act into Part 6, subpart 2. The commentary in the report indicates that:

---

<sup>343</sup> *Property Law Act 2007* (NZ) s 325.

<sup>344</sup> See *Property Law Act 2007* (NZ) Part 6, subpart 2. Section 129A of the *Property Law Act 1952* (NZ) has been described as being limited to mistakes of identity only, rather than title. Mistakes of identity covered buildings erected on the wrong land because of mistakes regarding boundaries or the identity of a piece of land: see Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010), 77 [12.14].

<sup>345</sup> Law Commission (New Zealand), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (July 1991), 202 [629].

<sup>346</sup> Law Commission (New Zealand), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (July 1991), 202 [630].

<sup>347</sup> Law Commission (New Zealand), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (July 1991), 202 [630].

The subpart will confer a discretionary jurisdiction upon the court to make orders for restitutionary relief when the expectations of an application in relation to the siting of a structure have been defeated in whole or in part and the land owner has been unjustifiably enriched.<sup>348</sup>

It is likely that the provisions were included in the same subpart and combined as ‘wrongly placed structures’ for the purpose of providing a consistent remedial approach to affected land owners and in recognition that despite some differences, both provisions are directed at addressing the erection of a structure in the wrong location.

The main differences in Queensland between encroachment and mistaken improvement under the PLA include:

- the encroachment must be over adjacent contiguous land. There is no similar requirement for a lasting improvement so that the improvement can be placed on any land owned by another person; and
- the placement of a lasting improvement on the wrong land must occur by mistake as to title or identity. The reason for the encroachment is not relevant for the purposes of the legislation.

However, reduced to the most basic principles both provisions share similar objectives of:

- providing remedies for the presence of improvements or buildings placed on the wrong land – either over adjoining land or entirely on the wrong land;
- ensuring the relevant land owner over which a structure has been placed is not unjustifiably enriched; and
- providing a compensation process, where appropriate.

#### Question

**62. Do you think there is any benefit in adopting an approach similar to Part 6, subpart 2 of the *Property Law Act 2007* (NZ), which creates a single category of ‘wrongfully placed structures’ and a single, consistent approach to providing relief to the affected land owners? Please provide your reasons for your answer.**

## 24.5. Other jurisdictions

### 24.5.1. Australia

There are four other Australian jurisdictions that have enacted specific provisions addressing the encroachment of buildings. The Northern Territory and South Australian legislation, like Queensland, are modelled on the New South Wales legislation. The Western Australian legislation is based on the *Property Law Act 1952* (NZ) which is now repealed and has been replaced with the *Property Law Act 2007* (NZ). Victoria, Tasmania and the Australian Capital Territory do not have any encroachment provisions in place, although the position in Victoria was reviewed in 2010. A brief

---

<sup>348</sup> Law Commission (New Zealand), *A New Property Law Act Report No 29* (June 1994), 27-28 [102].

summary of the legislation in each of these jurisdictions and the recommendations made by the VLRC in 2010 is set out below.

### **24.5.2. New South Wales**

The *Encroachment of Buildings Act 1922* (NSW) was the first building encroachment legislation enacted in Australia. As indicated above, the original legislation in Queensland, the *Encroachment of Buildings Act 1955* (Qld), was based on the New South Wales legislation and the provisions in Part 11, Division 1 of the PLA were not altered in any substantial way. The form and content of the New South Wales Act is generally in similar terms to the Queensland provisions, although the Land and Environment Court has the relevant jurisdiction to deal with encroachment applications in New South Wales.<sup>349</sup>

### **24.5.3. Northern Territory**

The *Encroachment of Buildings Act 1982* (NT) is in similar form to the Queensland provisions in relation to encroachment. The Northern Territory legislation also incorporates provisions which provide relief in the case of buildings erected under mistake of title. The sections which relate to encroachment are in similar form to the Queensland provisions. One point of difference between the two jurisdictions is that the term 'unimproved capital value' in relation to land is defined in section 3 of the *Encroachment of Buildings Act* (NT) to mean 'the unimproved capital value of that land ascertained in accordance with section 9 of the *Valuation of Land Act*.'

### **24.5.4. South Australia**

The *Encroachment Act 1944* (SA) is also similar to Part 11, Division 1 of the PLA. Applications under the South Australian legislation are made to the Land and Valuation Court.<sup>350</sup> The legislation does not make any specific provision for costs, unlike in Queensland and other jurisdictions.<sup>351</sup>

### **24.5.5. Western Australia**

In Western Australia, section 122 of the *Property Law Act 1969* (WA) sets out the process for applying for relief in cases of building encroachments. The provision differs from the other jurisdictions. The scope of the relief which can be granted is worded differently, although its effect may ultimately be similar. The court can:

- vest in the encroaching owner (or other person) any estate or interest in any part of the adjoining land;
- create in favour of the encroaching owner an easement over any part of the adjoining land;

---

<sup>349</sup> *Encroachment of Buildings Act 1922* (NSW) s 2 where 'Court' is defined to mean the Land and Environment Court.

<sup>350</sup> *Encroachment Act 1944* (SA) s 3.

<sup>351</sup> *Property Law Act 1974* (Qld) s 194. See also *Encroachment of Buildings Act 1922* (NSW) s 14 and *Encroachment of Buildings Act 1982* (NT) s 17.

- give the encroaching owner or any other person the right to retain possession of any part of the adjoining land.

There are no statutory criteria set out in the Act to identify the things which the court can consider for the purpose of granting relief. The legislation in Queensland, New South Wales, Northern Territory and South Australia contains a non-exhaustive list of matters which the court may consider when determining whether or not to exercise its discretion.<sup>352</sup> The court in Western Australia is unable to make an order under section 122 of the *Property Law Act 1969* (WA) without the prior consent of the Western Australian Planning Commission and the local government of the district in which the relevant land is located.<sup>353</sup> Further, under the Western Australian legislation, the court cannot grant relief unless satisfied that the encroachment was not intentional and did not arise from gross negligence or that the building was not actually erected by the encroaching owner and it is just and equitable to grant relief.<sup>354</sup>

#### 24.5.6. Victoria

There is no statutory provision in Victoria which governs the encroachment of buildings. There is capacity under legislation for the Registrar of Titles to alter boundaries in certain limited circumstances.<sup>355</sup> The law relating to encroachments in Victoria was considered as part of the broader review of the *Property Law Act 1958* (Vic) undertaken by the VLRC. Under the current law in Victoria, the owner of a building which encroaches on property owned by another person is committing trespass to land.<sup>356</sup> The adjacent owner is able to apply to the court and seek an injunction to require the removal of the encroachment or for an award of damages. The Victorian Law Reform Commission noted that the remedies available at common law do not give 'courts the full range of powers needed to resolve encroachment problems.'<sup>357</sup> For example, encroaching owners cannot initiate proceedings nor are they able to request that the court grant them a property right in the land over which their building is encroaching.<sup>358</sup>

The Commission consulted on whether Victoria should have a discretionary relief provision for building encroachments.<sup>359</sup> In its final report, the VLRC recommended that the new Property Law Act should include 'provisions empowering the Supreme Court, the County Court and the

---

<sup>352</sup> *Property Law Act 1974* (Qld) s 185(2); *Encroachment of Buildings Act* (NT) s 6(2); *Encroachments Act 1944* (SA) s 4(3); *Encroachment of Buildings Act 1922* (NSW) s 3(3).

<sup>353</sup> *Property Law Act 1969* (WA) s 122(6).

<sup>354</sup> *Property Law Act 1969* (WA) s 122(2).

<sup>355</sup> See *Transfer of Land Act 1958* (Vic) ss 99-101 which enable a proprietor to apply for amendment of the folio of the Register in certain limited circumstances and *Property Law Act 1958* (Vic) s 271 where the Registrar can alter Crown survey boundaries in certain limited circumstances. The position is similar in Tasmania where there are no encroachment provisions or legislation. However, the Recorder is able to amend the relevant title documents to address boundary issues or erroneous boundaries: see *Land Titles Act 1980* (Tas) s 142.

<sup>356</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.37].

<sup>357</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.38].

<sup>358</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.38].

<sup>359</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010), 82 [12.52].

Magistrates' Court to grant discretionary relief in respect to an encroachment by a building.<sup>360</sup> The Commission noted in its final report that 'adopting a building encroachment provision would promote harmonisation of Victorian law with that of other Australian States and Territories.'<sup>361</sup> The recommendations made by the Commission in relation to the proposed new provision are at **Annexure 2**. Subject to the comment below, the proposed provision is broadly similar in form to New South Wales and Queensland.

One point of difference is Recommendation 22 which recommends the preservation and co-existence of the rule known as 'part parcel adverse possession' in Victoria.<sup>362</sup> Currently in Victoria, if the trespass of the encroaching building continues and the limitation period for bringing a claim has expired, the encroaching owner can apply to the Registrar for an order vesting title to the land portion in that owner and have that portion consolidated into his or her own land.<sup>363</sup> In Queensland, an application can be made to register titles acquired by adverse possession under the *Land Title Act 1994* (Qld). However, section 98 of that Act expressly excludes an application being made if it relates to possession arising out of an encroachment.

The recommendations of the VLRC have not been implemented to date.

#### 24.5.7. New Zealand

Subpart 2 of Part 6 of the *Property Law Act 2007* (NZ) sets out the provisions relevant to structures that have been placed wrongly on land. The Act uses the term 'wrongly placed structures' which is defined to mean:

...a structure that –

- (a) is situated on or over the land affected, not being the land intended for the structure (whether or not the land intended adjoins the land affected); or
- (b) is situated on or over the land affected but not placed there –
  - (i) by, on behalf of, or in the interest of a person who was, at the time, the owner of the land affected; or
  - (ii) under a contract made with, or by way of a gift made to, a person who was, at the time, the owner of the land affected.<sup>364</sup>

---

<sup>360</sup>Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 58 [4.77] Recommendation 15.

<sup>361</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 53 [4.42].

<sup>362</sup> For a detailed discussion on part parcel adverse possession in Victoria see Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010), 80-82 [12.38] – [12.49] and Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 54-55 [4.47] – [4.60].

<sup>363</sup> This is available under *Limitations of Actions Act 1958* (Vic) s 18. For a detailed discussion on part parcel adverse possession in Victoria see Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010) 80-82 [12.38] to [12.49] and Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 20 (2010), 54-55 [4.47] – [4.60].

<sup>364</sup> *Property Law Act 2007* (NZ) s 321.



The term 'structure' is defined in Part 6 of the Act as 'any building, driveway, path, retaining wall, fence, plantation, or other improvement'. The meaning is extended under section 321 of the *Property Law Act 2007* (NZ) to include a partially built structure, and any part of a structure.

As discussed in Part 24.4.4 of this paper, the provision appears to cover both encroachments and mistaken placement of structures onto land. However, the relief available under the Act is not dependent on any such distinctions and the application of the Act simply depends on whether the structure in question qualifies as a 'wrongly placed structure'. It is not necessary under the provision to establish that the encroachment was not intentional or the result of negligence (or gross negligence) in order to obtain relief.<sup>365</sup> The persons who may apply for relief are set out in the Act and they comprise a much broader category than the 'adjacent owner' or 'encroaching owner' which is the position in Queensland.<sup>366</sup> The Supreme Court can grant relief if it considers it is just and equitable to do so.<sup>367</sup> Under the New Zealand provisions the application must be served by the applicant on each person who could have made an application unless the court directs otherwise.<sup>368</sup> In Queensland, the giving of notice of the application is discretionary.<sup>369</sup>

The relief which can be granted under the New Zealand legislation ranges from an order requiring the relevant land to be vested in a specified person, giving the owner the right to possession of the whole or part of the structure, allowing the removal of the wrongly placed structure and granting an easement over any land specified in the order for the benefit of the land affected by, or the land intended for the wrongly placed structure.<sup>370</sup> This is generally consistent with the approach under the PLA. The New Zealand legislation provides some guidance to the court in determining an application for relief and sets out some matters that the court may have regard to including the reasons why the wrongly placed structure was placed on or over the land affected, the conduct of the parties and the extent to which any person has been unjustifiably enriched at the expense of the person seeking relief in the circumstances set out in the section.<sup>371</sup> The court can grant compensation under the New Zealand legislation which is not linked to the unimproved capital value of the land. The court is given a broad discretion to require any person to whom relief is granted to 'pay any person specified in the order reasonable compensation as determined by the court.'<sup>372</sup>

Fences are expressly excluded from the scope of the section. A court is not able to grant relief if the wrongly placed structure for which relief is sought is a fence and all questions and disputes regarding the fence can be resolved under section 24 of the *Fencing Act 1978* (NZ).<sup>373</sup> The Act also expressly provides that the granting of relief does not deprive a person of any claim for damages that the person would otherwise have against any other person for any deliberate or negligent act or

---

<sup>365</sup> Note that relief is available in circumstances where a structure has been built deliberately on another person's land: *Property Law Act 2007* (NZ) s 324(2). The court, however, may also have regard to the reasons and the conduct of the parties when granting relief: *Property Law Act 2007* (NZ) ss 324(1)(a) and (b).

<sup>366</sup> *Property Law Act 2007* (NZ) s 322(1).

<sup>367</sup> *Property Law Act 2007* (NZ) s 323(2).

<sup>368</sup> *Property Law Act 2007* (NZ) s 322(3).

<sup>369</sup> *Property Law Act 1974* (Qld) s 193.

<sup>370</sup> *Property Law Act 2007* (NZ) s 325.

<sup>371</sup> *Property Law Act 2007* (NZ) s 324(1).

<sup>372</sup> *Property Law Act 2007* (NZ) s 325(1)(f).

<sup>373</sup> *Property Law Act 2007* (NZ) s 323(3).

omission in relation to the placing of a wrongly placed structure or the fixing or ascertaining of any boundary of the land affected by the structure or the land intended for the structure.<sup>374</sup> However, in making an award of damages the court must take into account any relief granted under section 323 of the *Property Law Act 2007* (NZ).<sup>375</sup>

The new provisions relating to wrongly placed structures also include a provision enabling the vesting of curtilage and for access to the structure.<sup>376</sup>

## 24.6. Options

It is clear that the rationale remains for the inclusion of an encroachment provision. Whether Division 1 requires more significant changes than simply redrafting for clarity and updating the language of the sections will depend on the feedback received as part of the consultation process. If substantial redrafting is contemplated, one option may be to consolidate the encroachment provisions with the mistaken improvement sections to simplify the framework in the PLA. The New Zealand approach discussed in Part 24.5.7 above may provide an example of one model that could be adapted to Queensland.

---

<sup>374</sup> *Property Law Act 2007* (NZ) s 323(4).

<sup>375</sup> *Property Law Act 2007* (NZ) s 323(5).

<sup>376</sup> *Property Law Act 2007* (NZ) s 321.

# Annexure 1 – Property Law Act 2007 (NZ) Encroachment provisions

## Subpart 2—Wrongly placed structures

### 321 Interpretation

In this subpart,—

**land—**

- (a) means any piece or area of land; and
- (b) includes the airspace over that land; and
- (c) in the case of land actually occupied by a wrongly placed structure, also includes any land reasonably required as curtilage and for access to the structure

**land affected** means any land on which a structure is actually situated

**land intended** means any land on which a structure was intended to be situated

**structure** includes—

- (a) a partially built structure; and
- (b) any part of a structure

**wrongly placed structure** means a structure that—

- (a) is situated on or over the land affected, not being the land intended for the structure (whether or not the land intended adjoins the land affected); or
- (b) is situated on or over the land affected but was not placed there—
  - (i) by, on behalf of, or in the interest of a person who was, at the time, the owner of the land affected; or
  - (ii) under a contract made with, or by way of a gift made to, a person who was, at the time, the owner of the land affected.

### 322 Certain persons may apply for relief for wrongly placed structure

(1) The following persons may apply to a court for relief, under section 323, for a wrongly placed structure:

- (a) the owner, occupier, or mortgagee of, or the holder of any other encumbrance over, the land affected by the wrongly placed structure:
- (b) the owner, occupier, or mortgagee of, or the holder of any other encumbrance over, the land intended for the wrongly placed structure:
- (c) any person by whom, or on whose behalf, or in whose interest the wrongly placed structure was placed on or over the land affected:
- (d) any person who has an interest in the wrongly placed structure:
- (e) the relevant territorial authority.

(2) The application may be made whether the wrongly placed structure was placed on or over the land affected—

- (a) before or after any boundary of that land or of the land intended for the structure was fixed; or
- (b) before or after this Act comes into force.

(3) Unless the court directs otherwise, the application must be served by the applicant on each person who could have made an application under subsection (1).

### **323 Court may grant relief for wrongly placed structure**

(1) A court may grant relief for a wrongly placed structure—

- (a) to any person entitled to apply for relief under section 322; or
- (b) to any other party to the proceeding for relief.

(2) The court may grant relief if the court considers it is just and equitable in the circumstances that relief should be granted.

(3) However, the court must not grant relief if the wrongly placed structure for which relief is sought is a fence and all questions or disputes concerning it can be resolved by an exercise of the jurisdiction conferred by section 24 of the Fencing Act 1978.

(4) The granting of relief does not deprive any person of any claim for damages that the person would otherwise have against any other person for any deliberate or negligent act or omission in relation to—

- (a) the placing of a wrongly placed structure; or
- (b) the fixing or ascertaining of any boundary of the land affected by the structure or the land intended for the structure.

(5) In making any award of damages, the court must take into account any relief granted under this section.

### **324 Matters court may consider in determining application for relief**

(1) In determining an application, under section 322, for relief under section 323, the court may have regard to—

- (a) the reasons why the wrongly placed structure was placed on or over the land affected; and
- (b) the conduct of the parties; and
- (c) the extent to which any person has been unjustifiably enriched at the expense of the person seeking relief because the owner of the land affected has become the owner of the wrongly placed structure.

(2) Subsection (1) does not prevent the court from granting relief merely because the person seeking relief knew of the true boundaries or ownership of the land affected at the time that the structure was placed there, or at the time when that person became the owner of, or acquired an estate or interest in, the land affected, the land intended, or the structure.

### **325 Orders court may make**

(1) In granting relief under section 323 on an application under section 322, the court may make 1 or more orders to the following effect:

- (a) requiring any land specified in the order to be vested in the owner of the land affected by, or the land intended for, the wrongly placed structure, or in any other person with an estate or interest in either of those pieces of land;
- (b) granting an easement over any land specified in the order for the benefit of the land affected by, or the land intended for, the wrongly placed structure:

(c) giving the owner of the land affected by, or the land intended for, the wrongly placed structure, or any other person with an estate or interest in either of those pieces of land, the right to possession of any land specified in the order for the period and on the conditions that the court may specify:

(d) giving the owner of the land affected by the wrongly placed structure, or any other person having an estate or interest in that piece of land, the right to possession of the whole or any part of the structure that is specified in the order:

(e) allowing or directing any person specified in the order to remove the whole or any specified part of a wrongly placed structure and any specified fixtures or chattels from any land specified in the order:

(f) requiring any person to whom relief is granted under paragraphs (a) to (e) to pay to any person specified in the order reasonable compensation as determined by the court.

(2) In an order under subsection (1)(a), the court may—

(a) declare any land that is to be vested in any person to be free from any mortgage or other encumbrance; or

(b) vary, to the extent that the court considers necessary, any mortgage, lease, or contract relating to that land.

(3) An order under subsection (1) may be made on any conditions the court thinks fit concerning—

(a) the execution of any instrument; or

(b) the doing of any other thing necessary to give effect to the order.

(4) Part 10 of the Resource Management Act 1991 does not apply to a transfer or other disposition of land giving effect to an order of the court under subsection (1).

(5) Section 348 of the Local Government Act 1974 does not apply to any easement granted in an order of the court under subsection (1).

(6) An order under subsection (1) may be registered as an instrument under, as the case requires,—

(a) the Land Transfer Act 1952; or

(b) the Deeds Registration Act 1908; or

(c) the Crown Minerals Act 1991.

## **Annexure 2 – Victorian Law Reform Commission: Review of Property Law Act 1958 - Final Report Recommendations in relation to building encroachments.<sup>377</sup>**

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

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

- (a) An encroachment arises when a building straddles a boundary line and is partly on a lot owned by one party (the 'encroaching owner') and partly on an adjacent lot owned by another party (the 'adjacent owner').
- (b) A building means a substantial building of permanent character.
- (c) The encroachment may be by overhang of any part of a building as well as by intrusion of any part of a building in the soil.
- (d) The portion of the lot over which the encroachment extends is the 'subject land'.

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

- (a) Either the encroaching owner or the adjacent owner should be able to apply to a court for relief under the provision.
- (b) An owner means a person who holds an estate in freehold in possession and includes a mortgagee in possession.
- (c) The applicant should be required to give notice of the application to a mortgagee, lessee or any other person who has an estate or interest in the subject land, or any other person to whom the court directs that notice should be given.
- (d) On an application for relief the court should have power to make one or more of the following orders:
  - (i) the payment of compensation by the encroaching owner to the adjacent owner;
  - (ii) that the subject land be included in the title to the encroaching owner's lot by amendment of a boundary;
  - (iii) that the adjacent owner lease the subject land to the encroaching owner;
  - (iv) that the adjacent owner grant to the encroaching owner any easement right or privilege in relation to the subject land specified in the order;
  - (v) that the encroaching owner remove the encroachment.

18. In exercising its discretion under the building encroachment provisions the court should have power to grant or refuse such relief as it thinks just and equitable and to consider:

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

---

<sup>377</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 58-59.

19. Where, in an application for building encroachment relief, the court makes an order that the subject land is to be included in the title to the encroaching owner's lot, it should have power to direct the Registrar to make all entries on the folio of the register relating to any lot necessary to give effect to the order.

20. In determining the compensation to be paid under the building relief provisions to the adjacent owner in respect of any lease or grant to the encroaching owner or any amendment of a boundary line, the court should have power to determine an amount up to but not exceeding three times the unimproved value of the subject land.

21. In determining whether the compensation for building encroachment should exceed the value of the subject land, the court should have regard to:

- (a) the value, whether improved or unimproved, of the subject land to the adjacent owner;
- (b) the loss or damage which has been incurred by the adjacent owner by reason of the encroachment;
- (c) the loss or damage which will be incurred by the adjacent owner through the orders which the court proposes to make in favour of the encroaching owner;
- (d) the circumstances in which the encroachment was made.

22. It should be provided that nothing in the building encroachment relief provisions affects the operation of Part 1, Division 3 of the *Limitation of Actions Act 1958*.

## **B. PLA Part 11 Division 2 – Improvements under mistake of title (ss 195-198)**

### **25. Part 11, Division 2 – Improvements under mistake of title (ss195-198)**

#### **25.1. Overview and purpose**

Part 11, Division 2 of the PLA comprises sections 195 to 198. These sections are extracted below.

#### **195 Application of div 2**

This division applies despite the provisions of any other Act.

#### **196 Relief in case of improvements made by mistake**

Where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that –

- (a) such land is the person’s property; or
- (b) such land is the property of a person on whose behalf the improvement is made or intended to be made;

application may be made to the court for relief under this division.

#### **197 Nature of relief**

- (1) If in the opinion of the court it is just and equitable that relief should be granted to the applicant or to any other person, the court may if it thinks fit make any 1 or more of the following orders -

(a) vesting in any person or persons specified in the order the whole or any part of the land on which the improvement or any part of the improvement has been made either with or without any surrounding or contiguous or other land;

(b) ordering that any person or persons specified in the order shall or may remove the improvement or any part of the improvement from the land or any part of it;

(c) ordering that any person or persons specified in the order pay compensation to any other person in respect of –

- (i) any land or part of the land; or
- (ii) any improvement or part of the improvement; or
- (iii) any damage or diminution in the value caused or likely to be caused by or to result from any improvement or order made under this division;

(d) ordering that any person or persons specified in the order have or give possession of the land or improvement or part of the improvement for such period and upon such terms and conditions as the court may specify.

- (2) An order under this division, and any provision of the order, may –

(a) include or be made upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs (to be taxed as between solicitor and client or otherwise), or the execution by any person of any



mortgage, lease, easement, contract or other instrument or otherwise; and

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

(c) direct that any person or persons execute any instrument or instruments in registrable or other form necessary to give effect to the declaration or order of the court; and

(d) 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

(e) direct a survey to be made of any land and a plan of survey to be prepared.

**198 Right to apply or be served**

(1) Application for relief under this division may be made by -

(a) any person who made or who is for the time being in possession of any improvement referred to in section 196; and

(b) any person having any estate or interest in the land or any part of the land upon which such improvement has been made; and

(c) any person claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract or other instrument relating to such land or improvement; and

(d) the successor in title to, or mortgagee or lessee of, any person upon whose land the improvement or any part of the improvement was intended to be made; and

(e) the local government within whose area the land or improvement or any part of the land or improvement is situated.

(2) In any application under this division the court may require –

(a) that notice of the application be given to any of the persons referred to in subsection (1) and to any other person who is or appears to be interested in or likely to be affected by an order made under this division; and

(b) that any such person be made a party to the application.

In certain circumstances at common law, structures or physical objects when attached to land are regarded as being part of the land. These are known as fixtures and belong to the owner of the relevant land.<sup>378</sup> The common law position can create unjust results where the physical object is mistakenly placed on land that does not belong to the person responsible for its placement.<sup>379</sup> In that situation, the owner of the land on which the fixture is located is 'enriched' by any benefit arising from the placement of the object and is not required to compensate the person responsible

<sup>378</sup> Carmel MacDonald et al, *Real Property Law in Queensland* (3<sup>rd</sup> ed, 2010, LawBook Co), 111 [4.210].

<sup>379</sup> 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) 105. For an example of an unjust result see *Brand v Chris Building Co Pty Ltd* [1957] VR 625.

for the placement. The QLRC considered the issue of improvements under mistake of title in 1973 and observed that:

the incidence of building on one allotment in mistake for another is surprisingly large, most practising members of the profession having encountered it on one or more occasions, and such errors are likely to recur as long as there is large-scale development of new residential subdivisions which in their undeveloped condition often make it difficult to identify a particular allotment or to distinguish from one another. Legislation on this topic is, in our opinion, therefore not only justified but necessary.<sup>380</sup>

The sections in Part 11, Division 2 of the PLA are based on provisions in legislation from both Western Australia and Ontario, Canada.<sup>381</sup> The Division comprises sections 195 to 198 and operates in the following way:

- the division applies despite the provisions of any other Act;<sup>382</sup>
- an application can be made to the Supreme Court where a person makes a ‘lasting improvement’ on land owned by another in the genuine but mistaken belief that:
  - such land is the person’s property; or
  - such land is the property of a person on whose behalf the improvement is made or intended to be made;<sup>383</sup>
- the term ‘lasting improvement’ is not defined in the PLA. The term is derived from the Ontario legislation. Fencing work on buildings and making land ready for cultivation has been held to be a lasting improvement whereas fencing generally, scrubbing and clearing bushes from the land is not a lasting improvement;<sup>384</sup>
- the improver of the land must have a genuine but mistaken belief. The requirement that the belief is genuine is present only in the Queensland provision and the equivalent legislation in the Northern Territory. The belief needs to be bona fide and the term ‘genuine’ has been interpreted in Queensland to import a more subjective test.<sup>385</sup> In this respect, Carter J in the Supreme Court decision of *Ex parte Karynette Pty Ltd*<sup>386</sup> indicated that for relief to be granted ‘the mind of the applicant must genuinely, that is really and truly mistakenly, believe that the property in question is his.’<sup>387</sup> If the improver discovers the mistake and continues

---

<sup>380</sup> 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) 105.

<sup>381</sup> *Property Law Act 1969* (WA) s 123 and *Conveyancing and Law of Property Act*, RSO 1970 c 85, s 38. This Act has been replaced with the *Conveyancing and Law of Property Act*, RSO 1990, c 34, s 37.

<sup>382</sup> *Property Law Act 1974* (Qld) s 195.

<sup>383</sup> *Property Law Act 1974* (Qld) s 196.

<sup>384</sup> Canadian case law has been the primary source of judicial interpretation of this term. For further discussion on its meaning, see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [11.450].

<sup>385</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [11.460].

<sup>386</sup> *Ex parte Karynette Pty Ltd* [1984] 2 Qd R 211.

<sup>387</sup> *Ex parte Karynette Pty Ltd* [1984] 2 Qd R 211, 212.

to make the improvement, in some cases the improver will still be able to obtain relief for all the improvements made;<sup>388</sup>

- there is a broad group of applicants specified in the Act who may potentially apply for relief including:<sup>389</sup>
  - any person having an estate or interest in the land where the improvement is located;
  - any person entitled to any benefit under any mortgage, lease or easement etc.;
  - the relevant local government responsible for the area in which the land is situated;
- if the court considers it is just and equitable that relief be granted it may order:<sup>390</sup>
  - that the land (whole or part) on which the improvement stands be vested in any person;
  - removal of the improvement;
  - the payment of compensation to any person;
  - that a person has or gives possession of the land or improvement (or part of the same) for a specified period and on specified terms and conditions.
- the order can also include terms and conditions as the court thinks fit, such as the payment of any sum of money and a direction that any person or persons execute any instrument in registrable or other form necessary to give effect to the declaration or order of the court.

There have been some decisions in Queensland where relief has been successfully obtained under section 196 of the PLA.<sup>391</sup>

## 25.2. Is there a need for reform?

Historically, there has been debate about whether a person should be compensated for placing an improvement on another person's land by mistake.<sup>392</sup> The argument against providing relief relates to ensuring the owner of the improved land is not disadvantaged by making restitution for an improvement that the owner did not want.<sup>393</sup> Mistaken improvement provisions were introduced

---

<sup>388</sup> See *Oakwood Constructions Pty Ltd v Wyndon Properties Pty Ltd* [2010] QCA 323 where the improver builder was contracted separately to complete the erection of a dwelling house on the property. The builder discovered that the land was not owned by the party to whom the builder was contracted part way through the build but continued to complete the work. The court allowed relief for all of the improvements made despite some being made after the builder had discovered the mistake and the identity of the owner.

<sup>389</sup> *Property Law Act 1974* (Qld) s 198.

<sup>390</sup> *Property Law Act 1974* (Qld) s 197(1).

<sup>391</sup> See for example, *Ex parte Karynette Pty Ltd* [1984] 2 Qd R 211, 212 and *Oakwood Constructions Pty Ltd v Wyndon Properties Pty Ltd* [2010] QCA 323. The decision in *Ex parte Goodlet & Smith Investments Pty Ltd* [1983] 2 Qd R 792 is related to *Ex parte Karynette*. The former decision determined the issue of whether making an application for relief under section 196 of the *Property Law Act 1974* (Qld) provided a sufficient interest in the relevant land for the purpose of lodging a caveat. The Supreme Court determined that the making of the application itself under section 196 did not provide sufficient interest to enable the applicant to support a caveat but if under section 197 of the Act an order was made vesting the land in the applicant that order would give rise to an estate or interest, thereby enabling the lodgement of a caveat.

<sup>392</sup> S J Stoljar, 'Mistaken Improvement of Another's Property' (1980) 14(3) *Western Australian Law Review* 199, 199.

<sup>393</sup> S J Stoljar, 'Mistaken Improvement of Another's Property' (1980) 14(3) *Western Australian Law Review* 199, 199, 200.

initially into the United States and Canadian provinces. The historical context and purpose of these statutes have been described in the following way:

The statutes provide relief to a person who makes improvements on land owned by another in the mistaken belief that the land was his or her property. The statutes are primarily restitutionary in purpose, providing discretionary relief against the unjust enrichment of the landowner who benefits from the improver's mistake. They date from early colonial times in North America and were introduced to encourage the settlement and development of new lands, at a time when land records and surveys were poorly organised.<sup>394</sup>

Division 2, Part 11 was introduced into the PLA to overcome the rigid application of the common law position which denies relief in circumstances where improvement is made to another person's property and the owner of that property has not acquiesced or conducted him or herself inequitably. One of the main rationales for the inclusion of the Division was concern on the part of the QLRC that the incidence of mistaken improvements in Queensland was, as at 1973, 'surprisingly large'.<sup>395</sup> The Queensland cases which have considered sections 196 and 197 do not appear to raise any significant issues associated with the interpretation of the provisions.

A key issue for consideration during consultation is the extent to which the original rationale for the mistaken improver provisions in Queensland remains valid. Assuming it is still relevant, consideration will then need to be given to whether or not Division 2, Part 11 requires amendment. This will largely be guided by responses received to the questions listed in this paper. However, some possible amendment options are discussed further in Part 25.4 below.

## 25.3. Other jurisdictions

### 25.3.1. Australia

New South Wales, South Australia, Tasmania and the Australian Capital Territory do not have any legislation which addresses the issue of improvements made by mistake. Western Australia and the Northern Territory do have statutory provisions addressing mistaken improvement. In Victoria, recommendations were made in 2010 by the VLRC for the introduction of a mistake provision. These jurisdictions are discussed in further detail below.

#### 25.3.1.1. Northern Territory

The improvement by mistake provisions in the Northern Territory are set out in sections 13 to 15 of the *Encroachment of Buildings Act 1982* (NT). Although the provisions operate in a similar way to the Queensland provisions and the nature of the mistaken belief required is the same, there are some differences including:

---

<sup>394</sup> Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake' (2006) 33 *University of Western Australia Law Review* 31, 40-41.

<sup>395</sup> 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) 105.

- the sections apply to buildings which are erected on land owned by another. The term ‘building’ is defined in the Northern Territory legislation to mean ‘a substantial building of a permanent character and includes a wall.’<sup>396</sup> In Queensland, the term ‘lasting improvement’ is used. The Northern Territory provision is arguably narrower in application than Queensland;
- the court in the Northern Territory needs to hold the opinion that relief should be granted. In Queensland, the court must hold the opinion that it is just and equitable that relief be granted.

The relief the Court can order is the same as the relief available under the Queensland provisions.

### 25.3.1.2. Western Australia

Section 123 of the *Property Law Act 1969* (WA) sets out the relief available where a person has erected a building on another person’s land because of a mistake as to the boundary of the land or the identity of the original piece of land.<sup>397</sup> The court can order relief if it considers it is just and equitable in the circumstances. The relief can include vesting the part of the land wrongly built upon in another person or allowing the removal of the building.<sup>398</sup> The provision expressly requires that an order cannot be made by the court (apart from ordering the removal of the building) without the prior consent of the Western Australia Planning Commission and the local government of the district in which the land is located.

### 25.3.1.3. Victoria

In Victoria, the common law applies to improvements made on the wrong land. The improvements become fixtures on the land and the ‘mistaken improver generally loses all rights to use or remove them, while the land owner receives an undeserved windfall.’<sup>399</sup> The VLRC indicated that it would be unlikely that a mistaken improver ‘who makes unsolicited improvements to the land of another under a mistake would succeed in a claim for compensation on the basis of unjust enrichment or estoppel.’<sup>400</sup>

The VLRC consulted broadly on this issue and sought feedback on its proposal that a mistaken improver relief provision be introduced into Victoria.<sup>401</sup> The Commission in its Final Report recommended that such a provision be available in Victoria. Some features of the proposed provision include:

---

<sup>396</sup> *Encroachment of Buildings Act 1982* (NT) s 3.

<sup>397</sup> The substantive provision does not define the term ‘building’, although section 122 which addresses encroachments defines the term for the purposes of that section to include any structure: see *Property Law Act 1969* (WA) s 122.

<sup>398</sup> *Property Law Act 1969* (WA) s 123(2)(a) and (b).

<sup>399</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 58-59.

<sup>400</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010), [12.8] 76.

<sup>401</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010), [12.8] 77.

- that it is broad enough to cover both mistakes as to the identity of the land and mistakes as to title to the land;<sup>402</sup>
- it will apply to lasting improvements made upon land owned by another;<sup>403</sup>
- defining the term ‘improvement’ as a ‘fixture’ for the purposes of the section. The rationale for defining the term this way is to limit the application of the Act to ‘instances where the operation of the doctrine of fixtures has created the underlying problem’;<sup>404</sup>
- the court should have broad discretion and powers to make an order that is just and equitable in each case;<sup>405</sup>
- the determination of the amount of any compensation payable should be left to the court;
- the Commission viewed the Queensland provisions as providing a good example of the kinds of relief that a court should be able to grant;<sup>406</sup>
- the Supreme Court, the County Court and the Magistrates’ Court should all be empowered to grant discretionary relief, rather than VCAT.<sup>407</sup>

## 25.3.2. Other Jurisdictions

### 25.3.2.1. New Zealand

Subpart 2 of Part 6 of the *Property Law Act 2007* (NZ) sets out the provisions relevant to structures that have been placed wrongly on land. The provision in New Zealand does not expressly refer to mistaken improvements and is directed at ‘wrongly placed structures’. The New Zealand regime is discussed in detail in Part 24.5.7.

### 25.3.2.2. Canadian provinces

As indicated above, Division 2, Part 11 was based partially on legislation in effect in Ontario. A number of other provinces in Canada have statutory provisions to address improvements made on land under mistake.<sup>408</sup> There is similarity between the provisions in each of the Canadian provinces. These are summarised below:

- each statutory provision is directed at ‘lasting improvements’;
- the nature of the belief that is required to be held is that the land was the person’s own. The provisions do not include the term ‘genuine’ in conjunction with ‘belief’;

<sup>402</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 62 [4.99].

<sup>403</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 63 Recommendation 23.

<sup>404</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 62 [4.99].

<sup>405</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 61 [4.95].

<sup>406</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 62 [4.97].

<sup>407</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 63 [4.106] and Recommendation 23.

<sup>408</sup> See Saskatchewan: *Improvements Under Mistake of Title Act*, RSS 1978 c I-1, s 2; Nova Scotia: *Land Registration Act*, SNS 2001, c 6, s 76; Alberta: *Law of Property Act*, RSA 2000, c L-7, s 69; Manitoba: *The Law of Property Act*, C.C.S.M 1987, c L-90, s 27. British Columbia has a statutory provision which deals with encroachment rather than mistake. This is set out in the *Property Law Act*, RSBC 1996, c 399, s 36(2).

- only Nova Scotia explicitly indicates that an application for relief is made to court. The other jurisdictions do not expressly specify an application process, although it is implicit that an application would need to be made in order to obtain the relief specified in the sections;
- there is consistency across the provinces that the person who can make the application for relief is the person making the improvement or the person's assigns. In Nova Scotia the person to whom the land belongs can also make an application for relief;
- there is no obligation to provide notice of the application to any party;
- in the case of Saskatchewan, Ontario, Alberta and Manitoba, the relief which can be granted by the relevant courts is a lien upon the land to the extent of the amount by which its value is enhanced by improvements or retention of the land accompanied by the payment of compensation. In the case of Nova Scotia, the relief available includes requiring the improver to:
  - remove or abandon the improvement;
  - acquire an easement either limited in time or not from the land owner;
  - require the person making the improvement to acquire the land on which it was made from the person to whom the land belongs;
  - require the person who owns the land to compensate the person making the improvement.<sup>409</sup>

## 25.4. Options

There do not appear to be any significant issues with the operation of Division 2, Part 11 of the PLA. The Division will require some redrafting for the purpose of modernising and simplifying its language. Consideration should also be given to whether the section could be enhanced with some additional provisions. The final approach in relation to the mistaken improver provisions will be informed by the submissions made in response to the questions set out below.

### Questions

- 63. Do you think the mistaken improver provisions in sections 196 to 198 of the PLA should be retained?**
- 64. Is it the case that the incidence of building on one allotment in mistake for another (particularly in the case of large scale developments) remains common?**
- 65. Are you aware of how regularly issues which would fall within scope of sections 196 to 198 of the PLA arise in practice?**
- 66. Do you think there is any benefit in adding further guidance within Division 2, Part 11 in terms of what the court may have regard to when determining whether or not it will make an order for relief?**
- 67. Do you think the meaning of a 'lasting improvement' is clear under Division 2, Part 11 of the PLA?**

---

<sup>409</sup> The relevant Nova Scotia provision also deals with encroachment on adjoining land: see s 76(3).

**68. What is covered by the term 'lasting improvement'?**

**69. Should the term 'lasting improvement' be defined in the PLA in a non-exclusive way? For example, to clarify that fences are not intended to be an improvement?**



# Resources

## Part 5 – Co-ownership

### *Articles/Books/Reports*

Bennion, Tom, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2009)

Butt, Peter, *Land Law* (Lawbook Co., 6<sup>th</sup> ed, 2010)

Conway, Heather, 'All Good Things Must Come to an End': Terminating Co-Ownership Under the 'Old' Partition and Sale Rules' (2013) 12 *Australian Property Law Journal* 227

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Harpum, Charles, Malcolm Grant and Stuart Bridge, *The Law of Real Property* (Sweet & Maxwell, 6<sup>th</sup> ed, 2000)

Harpum, Charles, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012)

Law Reform Commission of Western Australia, *Joint Tenancy and Tenancy in Common*, Report No. 78 (November 1994)

Law Reform Commission of British Columbia, *Report on Co-Ownership of Land*, LRC 100 (1988)

MacDonald, Carmel, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (3<sup>rd</sup> ed, 2010, LawBook Co)

New South Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy*, Report 73 (1994)

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)

Queensland Law Reform Commission, *The Law Relating to Trusts, Trustees, Settled Land and Charities*, Report No. 8 (1971)

Raphael, D, 'The Ius Accrescendi (Right of Survivorship) and Companies' (2009) 83 *Australian Law Journal* 437

Victorian Law Reform Commission, *Disputes Between Co-owners*, Report (2002)

Victorian Law Reform Commission, *Co-ownership*, Discussion Paper (2001)

Victorian Law Reform Commission, *Disputes Between Co-owners*, Discussion Paper (2001)

## **B. Legislation**

*Acts Interpretation Act 1954* (Qld)

*Bodies Corporate (Joint Tenancy) Act 1899* (UK)

*Civil Law (Property) Act 2006* (ACT)

*Conveyancing Act 1919* (NSW)

*Conveyancing and Law of Property Act 1884* (Qld)

*Corporations Act 2001* (Cth)

*Law of Property Act 2010* (NT)

*Law of Property Act 1936* (SA)

*Partnership Act 1891* (Qld)

*Partnership Act 1892* (NSW)

*Property Law Act 1958* (Vic)

*Property Law Act 1969* (WA)

*Property Law Act 1974* (Qld)

*Property Law Act 2007* (NZ)

*Trustee Companies Act 1968* (Qld)

## **C. Cases**

*Browne v Commissioner of State Revenue* [2004] 1 Qd R 116

*Delehunt v Carmody* (1986) 161 CLR 464

*Ex parte Eimbart* [1982] Qd R 398,

*Muller v Zielonkowsky* [2006] QSC 265

*Ngatoa v Ford* (1990) 19 NSWLR 72

*Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 116 ALR 34

*Pennie v Pennie* [2010] NSWSC 1070

*Ranger & Anor v Ranger* [2009] QCA 226

## Part 7 – Mortgages

### A. *Articles/Books/Reports*

Peter Butt, *Land Law* (6th ed, 2010, Lawbook Co)

WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press)

Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf)

Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (LexisNexis, 2012)

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)

Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010)

Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010)

ELG Tyler, PW Young, and CE Croft, *Fisher & Lightwoods' Law of Mortgage* (3rd ed, 2014, Butterworths)

Lowenstern, R, 'Sales by Mortgagees – The Power to Buy in at Auction', (1928) 2 *Australian Law Journal* 7

### B. *Legislation*

*Acts Interpretation Act 1954* (Qld)

*Conveyancing Act 1919* (NSW) s 93

*Conveyancing and Law of Property Act 1884* (Tas)

*Land Title Act 1994* (Qld)

*Land Titles Act 1980* (Tas)

*Law of Property Act* (NT)

*Law of Property Act 1925* (UK)

*Mineral Resources Act 1989* (Qld)

*National Consumer Credit Protection Act 2009* (Cth)

*National Credit Code*

*Personal Property Securities Act 2009* (Cth)

*Property Law Act 1974* (Qld)

*Property Law Act Regulation 2013* (Qld)

*Real Property Act 1886* (SA)

*Transfer of Land Act 1958* (Vic)

*Transfer of Land Act 1893* (WA)

*Uniform Civil Procedure Rules 1999* (Qld)

### **C. Cases**

*Holley v Metropolitan Permanent Building Society* [1983] 2 Qd R 786

*Hypac Electronic Pty Ltd (In Liq) v Registrar-General* [2003] NSWSC 1213

*Matzner v Clyde Securities Ltd* [1975] 2 NSWLR 293

*Re JB Davies Enterprises Pty Ltd* [1990] 2 Qd R 129

*Shapowloff v Lombard Australia Limited* [1980] Qd R 517

*St George Bank Ltd v Perpetual Nominees Limited* [2010] QSC 57

*Vasiliou v Marchesi* (2006) 157 FCR 252

### **D. Other**

Explanatory Notes, Property Law (Mortgagor Protection) Amendment Bill 2008 (Qld)

Parliamentary Debates, 23 October 1974

Macquarie Australian Dictionary

## **Part 11, Division 1 – Encroachment**

### **A. Articles/Books/Reports**

Bennion, Tom, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2009)

Butt, Peter, *Land Law* (2010, 6<sup>th</sup> ed, LawBook Co)

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Harpum, Charles, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012)

Kull, Andrew, 'Mistaken Improvements and the Restitution Calculus' in Johnston, David and Reinhard Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002)

Law Commission (New Zealand), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991)

Law Commission (New Zealand) *A New Property Law Act*, Report No. 29 (1994)

MacDonald, Carmel, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010)

New Zealand Parliament, *Property Law Bill 2007* Explanatory Note

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

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

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)

Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010)

Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010)

## **B. Legislation**

*Encroachments Act 1944* (SA)

*Encroachment of Buildings Act 1922* (NSW)

*Encroachment of Buildings Act 1982* (NT)

*Land Titles Act 1980* (Tas)

*Limitations of Actions Act 1958* (Vic)

*Neighbourhood Disputes (dividing Fences and Trees) Act 2011* (Qld)

*Property Law Act 2007* (NZ)

*Property Law Act 1974* (Qld)

*Property Law Act 1969* (WA)

*Property Law Act 1958* (Vic)

*Transfer of Land Act 1958* (Vic)

**C. Cases**

*Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471

*Clark v Wilkie* (1977) 17 SASR 134

*Cuthbert v Hardie* [1989] 17 NSWLR 321

*Ex parte Van Achterberg* [1984] 1 Qd R 160

*Gladwell v Steen* (2000) 77 SASR 310

*Hardie v Cuthbert* (1988) 65 LGRA 5

*Re Melden Homes No. 2 Pty Ltd's Land* [1976] 79

*Tallon v The Proprietors of Metropolitan Towers Building Units Plan No. 5157* [1997] 1 Qd R 102

## **Part 11, Division 2 – Improvements under mistake of title**

**A. Articles/Books/Reports**

Bennion, Tom, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2009)

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Harpum, Charles, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012)

Kull, Andrew, 'Mistaken Improvements and the Restitution Calculus' in Johnston, David and Reinhard Zimmermann, *Unjustified Enrichment: Key Issues in Comparative Perspective* (Cambridge University Press, 2002)

MacDonald, Carmel, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010)

O'Connor, Pamela, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake' (2006) 33 *University of Western Australian Law Review* 31

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)

Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010)

Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010)

Young, P, 'Restitution: House Build on Land Not Owned by Proprietor' (2011) 85 *Australian Law Journal* 86

Stoljar, S J, 'Mistaken Improvement of Another's Property' (1980) 14(3) *Western Australian Law Review* 199

## **B. Legislation**

*Conveyancing and Law of Property Act*, RSO 1990 C34

*Conveyancing and Law of Property Act* RSO 1970 C 85

*Encroachment of Buildings Act* (NT)

*Property Law Act 1958* (Vic)

*Property Law Act 1969* (WA)

*Property Law Act 1974* (Qld)

*Property Law Act 2007* (NZ)

*The Improvements Under Mistake of Title Act* RSS 1978 cl-L s 2

*Land Registration Act* SNS 2001, c6, s 76

*Law of Property Act*, RSA 2000 c-L 7

*The Law of Property Act* C.C.S.M 1987 c L90

## **C. International Legislation**

*The Improvements Under Mistake of Title Act* RSS 1978 cl-L

*Land Registration Act* SNS 2001 c6

*Law of Property Act*, RSA 2000 c-L 7

*Law of Property Act* C.C.S.M 1987 c L90

*Property Law Act* RSBC 1996

## **D. Cases**

*Brand v Chris Building Co Pty Ltd* [1957] VR 625

*Ex parte Goodlet & Smith Investments Pty Ltd* [1983] 2 Qd R 792

*Ex parte Karynette Pty Ltd* [1984] 2 Qd R 211

*Oakwood Constructions Pty Ltd v Wyndon Properties Pty Ltd* [2010] QCA 323

## Appendix A

### Part 7 Proposed Preliminary Recommendations

PROPERTY LAW ACT 1974 (QLD)		
PART 7 MORTGAGES		PROPOSED APPROACH
78	Implied obligations in mortgages	Retain and redraft for clarity and simplified language.
81	Actions for possession by mortgagors	Repeal. This provision is obsolete as it only refers to unregistered land
84	Regulation of exercise of power of sale	Retain and redraft for clarity and simplified language.
88	Application of proceeds of sale	Retain and redraft for clarity and simplified language.
90	Mortgagee's receipts discharges etc.	Retain and redraft for clarity and simplified language.
93	Effect of advance on joint account	Retain and redraft for clarity and simplified language.
94	Obligation to transfer instead of discharging mortgage	Retain and redraft for clarity and simplified language.
96	Mortgagee accepting interest on overdue mortgage not to call up without notice	Retain and redraft for clarity and simplified language.
98	Abolition of consolidation of mortgages	Retain and redraft for clarity and simplified language.
99	Sale of mortgaged property in action for redemption or foreclosure	Retain and redraft for clarity and simplified language.
100	Realisation of equitable charges by the court	Retain and redraft for clarity and simplified language.