

NOT GOVERNMENT POLICY

2018

Property Law Review
Final Report
Property Law Act 1974 (Qld)

Commercial and Property Law

Research Centre

QUT Law

Preface

The Commercial and Property Law Research Centre (the **Centre**) at the Queensland University of Technology 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 Final Report are:

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

Disclaimer

The material presented in this publication is distributed by the Queensland Government as an information source only. The Department of Justice and Attorney-General (**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.

Property Law Act 1974 (Qld)

Table of Contents

Preface	2
Disclaimer.....	2
Property Law Act 1974 (Qld).....	3
Introduction – Review of the <i>Property Law Act 1974</i>	52
The Recommendations	55
Part 1 – Preliminary	117
1. Sections 1 to 3.....	117
1.1. Overview and purpose	117
1.2. Recommendation.....	117
2. Section 4 – Act not to be taken to confer right to register restrictive covenant.....	118
2.1. Overview and purpose	118
2.2. Issues with the section.....	118
2.3. Other jurisdictions.....	118
2.4. Recommendation.....	119
3. Section 5 – Application of Act	120
3.1. Overview and purpose	120
3.2. Issues with the section.....	121
3.2.1. Clarity required in section 5 of the PLA regarding scope of application.....	121
3.2.2. Inconsistent language within the Act used where provisions are ‘subject to’ other Acts..	121
3.3. Other jurisdictions.....	123
3.3.1. Australia	123
3.3.2. New Zealand	123
3.4. Recommendation.....	124
4. Section 6 – Savings in regard to ss 10-12 and 59	126
Part 2 – General Rules Affecting Property	127
5. Section 7 – Effect of repeal of Statute of Uses	127
5.1. Overview and purpose	127
5.2. Issues with the section.....	129
5.2.1. Sections 7(1) and (2) of the PLA.....	129
5.2.2. Section 7(3) of the PLA – Voluntary conveyances	129
5.3. Other jurisdictions.....	130

5.3.1.	Australia	130
5.3.2.	New Zealand	131
5.4.	Recommendation.....	131
6.	Section 8 – Lands lie in grant only.....	132
6.1.	Overview and purpose	132
6.2.	Issues with the section.....	132
6.3.	Other jurisdictions.....	133
6.3.1.	Australia	133
6.3.2.	New Zealand	133
6.4.	Recommendation.....	133
7.	Section 9 – Reservation of easements etc. in conveyances of land	134
7.1.	Overview and purpose	134
7.2.	Issues with the section.....	135
7.3.	Other jurisdictions.....	135
7.4.	Recommendation.....	135
	Sections relating to writing requirement.....	136
8.	Section 6 – Savings in regard to ss 10-12 and 59.....	136
8.1.	Overview and purpose	136
8.2.	Issues with the section.....	136
8.3.	Other jurisdictions.....	137
8.3.1.	Australia	137
8.3.2.	New Zealand	137
8.4.	Recommendation.....	137
9.	Section 10 – Assurances of land to be in writing	139
9.1.	Overview and purpose	139
9.2.	Issues with the section.....	141
9.2.1.	Section 10 applies only to ‘old system land’	141
9.2.2.	The requirement for an assurance to be made by deed is obsolete	141
9.3.	Other jurisdictions.....	141
9.4.	Recommendation.....	141
10.	Section 11 – Creation or disposal of interest in land to be in writing	143
10.1.	Overview and purpose	143
10.1.1.	Subsection 11(1)(a) – Disposition or creation of interest in land	144
10.1.2.	Subsection 11(1)(b) - Declaration of trust respecting any land	144

10.1.3.	Subsection 11(1)(c) - Disposition of trust or equitable interest	145
10.1.4.	Subsection 11(2) – Exceptions to subsection 11(1)	145
10.2.	Issues with the section.....	145
10.2.1.	Relationship between section 11(1)(a) and section 59 of the PLA.....	145
10.2.2.	Interaction between subsections 11(1)(a), (b) and (c)	149
10.3.	Other jurisdictions.....	149
10.3.1.	Australia	149
10.3.2.	United Kingdom	149
10.3.3.	New Zealand	150
10.4.	Recommendation.....	150
11.	Section 12 – Creation of interests in land by parol.....	153
11.1.	Overview and purpose	153
11.2.	Issues with the section.....	153
11.3.	Other jurisdictions.....	154
11.3.1.	Australia	154
11.3.2.	New Zealand	155
11.4.	Recommendation.....	155
12.	Section 59 - Contracts for the sale of land etc. to be in writing	157
12.1.	Overview and purpose.....	157
12.2.	Issues with the section.....	159
12.2.1.	Criticisms of section 59	159
12.2.2.	Support for retention of section 59	160
12.3.	Other jurisdictions.....	162
12.3.1.	Australia	162
12.3.2.	United Kingdom	162
12.4.	Recommendation.....	165
13.	Section 59 and electronic writing and signature	168
13.1.	Will an electronic communication or contract satisfy the writing requirement in section 59 of the PLA?	168
13.2.	Will an electronic signature satisfy the ‘signing’ requirement in section 59 of the PLA? ..	171
13.3.	Issues identified in relation to electronic signatures and section 59 of the PLA	173
13.3.1.	Application of section 14 of the ETA to electronic documents	173
13.3.2.	Electronic signatures appropriate for land transactions	174
13.4.	Online auctions	176

13.5.	Recommendation.....	177
13.5.1.	Writing	177
13.5.2.	Electronic and digital signatures	178
14.	Section 13 – Persons taking who are not parties.....	180
14.1.	Overview and purpose	180
14.2.	Issues with the section.....	183
14.2.1.	Application and scope of the section.....	183
14.2.2.	Persons taking an interest in land by registration of instruments.....	184
14.2.3.	Persons taking a reversionary interest in land subject to a lease.....	184
14.2.4.	A lessee seeking to enforce a covenant in an easement against the grantor	185
14.2.5.	Interaction with section 55 of the PLA.....	186
14.3.	Other jurisdictions.....	187
14.3.1.	Australia	187
14.3.1.1.	Western Australia	187
14.3.1.2.	Victoria	188
14.3.2.	New Zealand	188
14.4.	Recommendation.....	189
15.	Section 14 – Conveyances by a person to the person etc.	190
15.1.	Overview and purpose	190
15.1.1.	Sections 14(1) and (2)	191
15.1.2.	Section 14(3)	191
15.1.3.	Section 14(4)	191
15.1.4.	Section 14(4A).....	192
15.2.	Issues with the section.....	192
15.3.	Other jurisdictions.....	192
15.3.1.	Australia	192
15.3.2.	New Zealand	193
15.4.	Recommendation.....	193
16.	Section 15 – Rights of husband and wife	195
16.1.	Overview and purpose	195
16.2.	Issues with the section.....	196
16.3.	Other jurisdictions.....	196
16.3.1.	Australia	196
16.4.	Recommendation.....	197

17.	Section 15A – Rights of aliens	198
17.1.	Overview and purpose	198
17.2.	Issues with the section.....	198
17.3.	Other jurisdictions.....	200
17.3.1.	Australia	200
17.3.2.	New Zealand	200
17.4.	Recommendation.....	201
18.	Section 16 – Presumption that parties are of full age	202
18.1.	Overview and purpose	202
18.2.	Issues with the section.....	203
18.3.	Other jurisdictions.....	204
18.3.1.	Australia	204
18.4.	Recommendation.....	205
19.	Section 17 – Merger	206
19.1.	Overview and purpose	206
19.2.	Issues with the section.....	206
19.3.	Other jurisdictions.....	207
19.3.1.	Australia	207
19.3.2.	New Zealand	207
19.4.	Recommendation.....	207
20.	Section 18 – Restrictions on operation of conditions of forfeiture	208
20.1.	Overview and purpose	208
20.2.	Issues with the section.....	210
20.3.	Other jurisdictions.....	211
20.4.	Recommendation.....	212
	Part 3 – Freehold estates	213
21.	Section 19 – Freehold estates capable of creation	213
21.1.	Overview and purpose	213
21.2.	Issues with the section.....	213
21.3.	Other jurisdictions.....	213
21.4.	Recommendation.....	214
22.	Section 20 – Incidents of tenure on grant in fee simple	215
22.1.	Overview and purpose	215
22.2.	Issues with the section.....	218

22.3.	Other jurisdictions.....	218
22.3.1.	Australia	218
22.3.2.	New Zealand	218
22.4.	Recommendation.....	218
23.	Section 21 – Alienation in fee simple.....	221
23.1.	Overview and purpose.....	221
23.2.	Issues with the section.....	222
23.3.	Other jurisdictions.....	223
23.3.1.	Australia	223
23.3.2.	New Zealand	223
23.4.	Recommendations	224
24.	Section 22 – Abolition of estates tail	225
24.1.	Overview and purpose.....	225
24.2.	Issues with the section.....	226
24.3.	Other jurisdictions.....	227
24.3.1.	Australia	227
24.3.2.	New Zealand	228
24.4.	Recommendation.....	228
25.	Section 23 – Abolition of quasi-entails	229
25.1.	Overview and purpose.....	229
25.2.	Issues with the section.....	230
25.3.	Other jurisdictions.....	230
25.4.	Recommendation.....	230
26.	Section 24 – Liability of life tenant for voluntary waste and Section 25 – Equitable Waste ..	231
26.1.	Overview and purpose.....	231
26.1.1.	Section 24 – Voluntary waste	231
26.1.2.	Section 25 – Equitable Waste	232
26.2.	Issues with the sections	232
26.3.	Other jurisdictions.....	233
26.3.1.	Australia	233
26.3.1.1.	Voluntary waste	233
26.3.1.2.	Equitable waste.....	233
26.3.2.	New Zealand	233
26.4.	Recommendation.....	233

27.	Section 26 – Recovery of property on determination of a life or lives.....	235
27.1.	Overview and purpose	235
27.2.	Issues with the section.....	236
27.3.	Other jurisdictions.....	237
27.4.	Recommendation.....	237
28.	Section 27 – Penalty for holding over by life tenant.....	239
28.1.	Overview and purpose	239
28.2.	Issues with the section.....	240
28.2.1.	Establishing that the holding over was ‘wilful’	240
28.2.2.	Calculation of ‘double the yearly value of the land’	240
28.2.3.	Alternative remedy available	241
28.3.	Other jurisdictions.....	241
28.3.1.	Australia	241
28.4.	Recommendation.....	241
28.4.1.	Recommendations with respect to ‘wilful’	242
28.4.2.	Recommendations with respect to ‘double the yearly value’	242
28.4.3.	Recommendations with respect to amount recoverable as a debt	242
28.4.4.	Recommendations with respect to interaction with section 138	242
29.	Section 28 – Abolition of the rule in <i>Shelley’s Case</i>	244
29.1.	Overview and purpose	244
29.2.	Issues with the section.....	245
29.3.	Other jurisdictions.....	246
29.3.1.	Australia	246
29.3.2.	New Zealand	246
29.4.	Recommendation.....	247
30.	Section 29 – Words of limitation	248
30.1.	Overview and purpose	248
30.2.	Issues with the section.....	249
30.3.	Other jurisdictions.....	249
30.3.1.	Australia	249
30.3.2.	New Zealand	250
30.4.	Recommendations	250
	Part 4 – Future Interests	251
31.	Section 30 – Creation of future interests in land	251

NOT GOVERNMENT POLICY

31.1.	Overview and purpose.....	251
31.1.1.	<i>Land Title Act 1994</i> (Qld) and future interests.....	253
31.2.	Issues with the section.....	254
31.3.	Other jurisdictions.....	254
31.3.1.	Australia	254
31.3.2.	New Zealand	254
31.4.	Recommendation.....	255
32.	Section 31 – Power to dispose of all rights and interests in land	256
32.1.	Overview and purpose.....	256
32.2.	Issues with the section.....	257
32.3.	Other jurisdictions.....	257
32.3.1.	Australia	257
32.3.2.	New Zealand	258
32.4.	Recommendation.....	258
33.	Section 32 – Restriction on executory limitations	260
33.1.	Overview and purpose.....	260
33.2.	Issues with the section.....	261
33.3.	Other jurisdictions.....	261
33.3.1.	Australia	261
33.3.2.	New Zealand	261
33.4.	Recommendation.....	262
	Part 5 – Concurrent interest – Co-ownership	264
34.	Section 33: Forms of co-ownership	264
34.1.	Overview and purpose.....	264
34.2.	Issues with the section.....	265
34.3.	Recommendation.....	265
35.	Section 34: Power for corporations to hold property as joint tenants.....	266
35.1.	Purpose and overview	266
35.2.	Issues with the section.....	267
35.2.1.	Reference to ‘body corporate’	267
35.2.2.	Equating ‘dissolution’ with the ‘death’ of a corporation – updating language	268
35.2.3.	Vesting of property – possible issues between the PLA and the <i>Corporations Act 2001</i> (Cth) 268	
35.3.	Other jurisdictions.....	270

35.3.1.	Australia	270
35.3.2.	New Zealand	270
35.4.	Recommendation.....	271
35.4.1.	Reference to ‘body corporate’	271
35.4.2.	Equating ‘dissolution’ with the ‘death’ of a corporation – updating language	271
35.4.3.	Vesting of corporation property	271
36.	Section 35: Construction of disposition of property to 2 or more persons together	273
36.1.	Overview and purpose	273
36.1.1.	Partnerships	274
36.2.	Issues with the section.....	275
36.3.	Other jurisdictions.....	275
36.4.	Recommendation.....	275
37.	Section 36 – Tenants in common of equitable estate acquiring the legal estate.....	276
37.1.	Overview and purpose	276
37.2.	Issues with the section.....	276
37.3.	Recommendation.....	276
	Part 5 Division 2 – Statutory trusts, sale and division	278
38.	Section 37 – Definitions for div 2	279
38.1.	Overview and purpose	279
38.2.	Other jurisdictions.....	280
38.2.1.	Australia	280
38.2.1.1.	New South Wales	280
38.3.	Issues with the section.....	281
38.3.1.	Defining ‘co-owner’ and ‘co-ownership’	281
38.3.2.	Additional definitions needed to aid in interpretation of the Division.....	281
38.4.	Recommendation.....	281
39.	Section 37A and section 37B.....	284
39.1.	Overview and purpose	284
39.2.	Issues with the sections	285
39.3.	Recommendation.....	285
40.	Section 38 – Statutory trusts for sale or partition of property held in co-ownership	286
40.1.	Overview and purpose	286
40.2.	Issues with the section.....	287
40.2.1.	Consistency between section 38 and section 41 of the PLA in relation to chattels	287

NOT GOVERNMENT POLICY

40.2.2.	Partnership property.....	287
40.2.3.	The court’s discretion	288
40.2.4.	Appointment of trustees – undivided shares vest free from encumbrance	290
40.2.5.	Matrimonial property	291
40.2.6.	Appointment of trustees – section 38(3).....	291
40.2.7.	Transitional provisions.....	291
40.2.8.	Language of the Division is outdated and difficult to understand.....	291
40.3.	Other jurisdictions.....	292
40.3.1.	Australia	292
40.3.2.	Reform in Victoria	292
40.3.3.	New Zealand	293
40.4.	Recommendation.....	294
40.4.1.	Retain the effect of Part 5 Division 2	294
40.4.2.	Modernise the language of the division	294
40.4.3.	Provide concise definitions for the division in section 37	294
40.4.4.	Property held on trust for sale or partition	294
40.4.5.	Clarification of effect of vesting.....	295
41.	Section 39 – Trustee in statutory trusts for sale or partition to consult persons interested .	300
41.1.	Overview and purpose.....	300
41.2.	Recommendation.....	301
42.	Section 40 – Right of co-owners to bid at sale under statutory power of sale	302
42.1.	Overview and purpose.....	302
42.2.	Recommendation.....	302
43.	Section 41 – Sale or division of chattels.....	304
43.1.	Overview and purpose.....	304
43.2.	Recommendation.....	304
44.	Section 42 – Powers of the court.....	306
44.1.	Overview and purpose.....	306
44.2.	Issues with the section.....	307
44.2.1.	Determination of any question of fact and beneficial interests.....	307
44.2.2.	Distribution of net proceeds of sale or retention of the same – express provision required? 307	
44.3.	Other jurisdictions.....	308
44.4.	Recommendation.....	308

45.	Section 43 – Liability of co-owner to account.....	309
45.1.	Overview and purpose	309
45.2.	Recommendation.....	309
	Part 6 – Deeds, covenants, instruments and contracts.....	311
46.	Part 6 Division 1 – Deeds and covenants	311
46.1.	Deeds and electronic commerce	312
47.	Section 44 – Description and form of deeds.....	314
47.1.	Overview and purpose	314
47.2.	Issues with the section.....	314
47.3.	Other jurisdictions.....	315
47.3.1.	Australian jurisdictions.....	315
47.3.2.	New Zealand	315
47.4.	Recommendation.....	315
48.	Section 45 – Execution of deeds by individuals	317
48.1.	Overview and purpose	317
48.2.	Issues with the section.....	318
48.2.1.	Deemed sealing.....	318
48.2.2.	Creating deeds electronically.....	319
48.3.	Other jurisdictions.....	320
48.3.1.	United Kingdom	320
48.3.2.	New Zealand	320
48.3.3.	Victoria	320
48.3.4.	Western Australia	320
48.4.	Recommendation.....	320
49.	Section 46 – Execution of deeds by corporations.....	322
49.1.	Overview and purpose	322
49.1.1.	Interaction with the <i>Corporations Act 2001</i> (Cth)	324
49.2.	Issues with the section.....	325
49.2.1.	Protection for honest purchasers	325
49.2.2.	Attestation of the seal	325
49.3.	Other jurisdictions.....	326
49.3.1.	South Australia and Tasmania	326
49.3.2.	New Zealand	326
49.4.	Recommendation.....	327

50.	Section 47 – Delivery of deeds.....	330
50.1.	Overview and purpose	330
50.2.	Issues with the section.....	331
50.3.	Other jurisdictions.....	331
50.3.1.	NSW, ACT and Victoria – delivery under the common law	331
50.3.2.	Western Australia – formal delivery not required.....	331
50.3.3.	Tasmania and South Australia – delivery not required.....	331
50.3.4.	New Zealand	332
50.4.	Recommendation.....	332
51.	Section 48 – Construction of expressions.....	334
51.1.	Overview and purpose	334
51.2.	Issues with the section.....	334
51.3.	Other jurisdictions.....	334
51.4.	Recommendation.....	334
52.	Section 49 – Implied covenants may be negated.....	335
52.1.	Introduction and overview.....	335
52.2.	Issues with the section.....	336
52.3.	Other jurisdictions.....	336
52.4.	Recommendation.....	336
53.	Section 50 – Covenants entered into by a person with himself and others.....	337
53.1.	Overview and purpose	337
53.2.	Issues with the section.....	337
53.3.	Recommendation.....	338
54.	Sections 51 and 52 – Receipt in instrument	339
54.1.	Overview and purpose	339
54.1.1.	Section 51.....	339
54.1.2.	Section 52.....	340
54.2.	Issues with the sections	340
54.3.	Other jurisdictions.....	340
54.4.	Recommendation.....	341
55.	Section 53 – Benefit and burden of covenants relating to land	342
55.1.	Overview and Purpose	342
55.1.1.	Covenant ‘relates to any land’	343
55.1.2.	Section 53(1)	343

55.1.3.	Section 53(2)	344
55.1.4.	Section 53(4)	345
55.2.	Issues with the section.....	345
55.3.	Other jurisdictions.....	346
55.3.1.	Australia	346
55.3.2.	United Kingdom	346
55.3.3.	New Zealand	346
55.3.4.	Reviews and reform in other Australian jurisdictions relevant to section 53 of the PLA... 347	
55.4.	Recommendation.....	347
56.	Reform of rules relating to enforcement of burden of positive covenants in Queensland ... 349	
56.1.	Overview and purpose.....	349
56.1.1.	What is a covenant?.....	349
56.1.2.	Statutory covenants.....	351
56.1.3.	Enforcing the burden of a positive covenant in Queensland	351
56.1.4.	When does the transfer of the burden of a positive covenant become relevant in Queensland?	352
56.1.4.1.	Easements.....	352
56.1.4.2.	Leases.....	353
56.2.	Problems identified with enforcement of the burden of positive covenants in Queensland 353	
56.2.1.	Mechanisms utilised to enforce a positive covenant	353
56.2.1.1.	Contractual or drafting exceptions	354
56.2.1.2.	Judicial exceptions	354
56.2.1.3.	Statutory exceptions.....	356
56.3.	Other jurisdictions.....	356
56.3.1.	New South Wales	357
56.3.2.	Northern Territory	358
56.3.3.	Victoria	359
56.3.4.	United Kingdom	359
56.3.5.	New Zealand	360
56.4.	Interaction with section 62 of the <i>Land Title Act 1994</i> (Qld).....	361
56.5.	Recommendation.....	362
56.6.	Retrospectivity	364
56.7.	Building Management Statements	365
	Part 6 Division 2 – General rules affecting contracts.....	366

57.	Section 54 – Effect of joint contracts and liabilities.....	366
57.1.	Overview and purpose.....	366
57.2.	Issues with the section.....	367
57.2.1.	Application and scope of the section.....	367
57.2.2.	Interaction with the <i>Partnership Act 1891</i>	368
57.3.	Other jurisdictions.....	368
57.3.1.	United Kingdom	368
57.3.2.	Australia	368
57.4.	Recommendation.....	369
58.	Section 55 – Contracts for the benefit of third parties.....	370
58.1.	Overview and purpose.....	370
58.1.1.	Section 55 compared with section 13 of the PLA	371
58.1.2.	Operation of the provision.....	371
58.2.	Issues with the section.....	373
58.2.1.	Section 55 and interest in land	373
58.2.2.	Interaction with <i>Land Title Act 1994</i>	374
58.2.3.	Identified and in existence at the time of the promise	374
58.2.4.	Requirement for acceptance	375
58.3.	Other jurisdictions.....	375
58.3.1.	Australia	375
58.3.1.1.	Western Australia	376
58.3.1.2.	Victoria	376
58.3.1.3.	New South Wales.....	377
58.3.1.4.	New Zealand	377
58.4.	Recommendation.....	378
59.	Section 56 – Guarantees to be in writing.....	381
59.1.	Overview and purpose.....	381
59.2.	Issues with the section.....	382
59.2.1.	Object of the Statute of Frauds is no longer relevant.....	382
59.2.2.	Protecting ‘unsophisticated or inexperienced’ guarantor.....	383
59.2.3.	‘Arbitrary’ distinction between a guarantee and an indemnity	385
59.2.4.	Interpretation issues.....	385
59.3.	Other jurisdictions.....	386
59.3.1.	Australia	386

59.3.2.	United Kingdom	388
59.4.	Recommendation.....	389
60.	Section 57 – Effect of provisions as to conclusiveness of certificates etc.	391
60.1.	Overview and purpose	391
60.2.	Issues with the section.....	393
60.3.	Other jurisdictions.....	393
60.4.	Recommendation.....	393
61.	Section 57A – Effect of Act or Statutory instrument	394
61.1.	Overview and Purpose	394
61.2.	Issues with the section.....	394
61.2.1.	Section 57A(2).....	394
61.2.2.	Section 57A(2) – timing.....	395
61.3.	Recommendation.....	397
62.	Section 58 – Insurance money from burnt building	398
62.1.	Overview and purpose	398
62.2.	Issues with the section.....	399
62.2.1.	Rationale underpinning the original imperial enactment outdated.....	399
62.2.2.	Section limited to fire damage or destruction	399
62.2.3.	Section is not an alternative to buyer obtaining own insurance	400
62.2.4.	Section 58 is effectively obsolete where contract of sale is completed.....	400
62.2.5.	Lessee and mortgagee alternative mechanisms to section 58.....	400
62.2.5.1.	Lessee.....	400
62.2.5.2.	Mortgagee.....	401
62.2.6.	Leases – potential to contract out of section 58 of the PLA.....	401
62.2.7.	<i>Insurance Contracts Act 1984</i> (Cth) potentially covers the field	401
62.2.7.1.	History	401
62.2.8.	Is the ICA an alternative to section 58 of the PLA?.....	402
62.3.	Other jurisdictions.....	404
62.4.	Recommendation.....	404
	Part 6 Division 3 – Sales of land	405
63.	Section 58A – Definitions for div 3.....	405
63.1.	Overview and purpose	405
63.2.	Issues with the section.....	405
63.3.	Recommendation.....	405

64.	Section 58B – Meaning of settlement of a sale of land in an e-conveyance	406
64.1.	Overview and purpose	406
64.2.	Issues with the section.....	406
64.3.	Recommendation.....	406
65.	Section 59 - Contracts for the sale of land etc. to be in writing	407
66.	Section 60 – Sales of land by auction.....	408
66.1.	Overview and purpose	408
66.2.	Issues with the section.....	408
66.2.1.	Section to be read with <i>Property Occupations Regulation 2014</i>	408
66.2.2.	Notification of a seller’s right to bid in the PLA	409
66.3.	Other jurisdictions.....	409
66.4.	Recommendation.....	411
67.	Section 61 – Conditions of sale of land	412
67.1.	Overview and purpose	412
67.2.	Issues with the section.....	413
67.2.1.	Section 61(1)(a) – ‘sufficient particulars of title to enable the purchaser to prepare the appropriate instrument’	413
67.2.2.	Section 61(1)(b) – ‘abstract of any instrument, forming part of the vendor’s title’ represented by a caveat	413
67.2.3.	Section 61(1)(c) – to have relevant certificate of title lodged by the vendor to enable the transfer to be registered.....	414
67.2.4.	Section 61(1)(d) – ‘to have any objection to the registration of the instrument removed by the vendor’	414
67.2.5.	Section 61(1A) – ‘objection which the purchaser ought to have raised on the particulars....the purchaser shall not be entitled to have the same removed except at the purchaser’s own cost’	415
67.2.6.	Section 61(2)(a) – payment or tender by bank cheque or financial institution cheque.....	415
67.2.7.	Section 61(2)(b) – ‘free of encumbrances’	415
67.2.8.	Section 61(2)(c) – place of settlement	416
67.2.9.	Section 61(3) – time of settlement	416
67.2.10.	Section 61(3A) – alternative place/time of settlement	417
67.2.11.	Section 61(4) – application of section.....	417
67.3.	Recommendation.....	417
67.3.1.	Section 61(1)(a).....	417
67.3.2.	Section 61(1)(b).....	418
67.3.3.	Section 61(1)(c)	418

67.3.4.	Section 61(1)(d).....	418
67.3.5.	Section 61(1A).....	419
67.3.6.	Section 61(2)(a).....	419
67.3.7.	Section 61(2)(b).....	419
67.3.8.	Section 61(2)(c).....	419
67.3.9.	Section 61(3) and section 61(3A).....	419
67.3.10.	Section 61(4).....	420
68.	Section 62 – Stipulations not of the essence of the contract.....	423
68.1.	Overview and purpose.....	423
68.2.	Issues with the section.....	424
68.3.	Other jurisdictions.....	424
68.4.	Recommendation.....	424
69.	Section 63 – Application of insurance money on completion of a sale or exchange.....	425
69.1.	Overview and purpose.....	425
69.2.	Issues with the section.....	426
69.2.1.	Section 63 only applies if the seller has insurance.....	426
69.2.2.	Buyers in Queensland generally take out their own insurance.....	427
69.2.3.	Section will not apply if there is a stipulation in the contract to the contrary or the payment by the buyer of the proportionate part of the insurance premium etc.	427
69.2.4.	Section 50 of the <i>Insurance Contracts Act 1984</i> (Cth) - an alternative to section 63 of the PLA?	427
69.2.5.	Applies only to events within a limited time period.....	428
69.2.6.	Section not available where seller receives purchase money and therefore suffers no loss upon completion.....	428
69.3.	Other jurisdictions.....	429
69.4.	Recommendation.....	430
70.	Section 64 – Right to rescind on destruction of or damage to dwelling house.....	431
70.1.	Overview and purpose.....	431
70.1.1.	Applies only to ‘dwelling house’.....	432
70.1.2.	‘Dwelling house’ must be ‘damaged or destroyed’.....	432
70.1.3.	Dwelling house must be ‘unfit for human habitation’ as a result of damage or destruction	433
70.1.4.	Notice in writing rescinding the contract must be given.....	434
70.2.	Issues with the section.....	434
70.2.1.	Application of section limited to ‘dwelling houses’.....	434

70.2.2.	Clarifying the meaning of the term ‘date of completion’	434
70.2.3.	Uncertainty regarding the time for assessment of fitness for occupation	435
70.2.4.	Seller is unable to take any steps under section 64 to avoid rescission	436
70.3.	Other jurisdictions.....	436
70.4.	Recommendation.....	436
71.	Section 65 – Rights of purchasers as to execution of conveyance	439
71.1.	Overview and purpose	439
71.2.	Issues with the section.....	439
71.3.	Recommendation.....	440
72.	Section 66 – Receipt in instrument or endorsed authority for payment	441
72.1.	Overview and purpose	441
72.2.	Issues with the section.....	442
72.3.	Other Australian jurisdictions	443
72.4.	Recommendation.....	443
73.	Section 67 – Restrictions on vendor’s right to rescind on purchaser’s objection	444
73.1.	Overview and purpose.....	444
73.2.	Issues with the section.....	444
73.3.	Recommendation.....	445
74.	Section 67A – When statutory rights of termination end for land sales if e-conveyancing is used 446	
74.1.	Overview and purpose.....	446
74.2.	Issues with the section.....	446
74.3.	Recommendation.....	446
75.	Section 68 – Damages for breach of contract to sell land	447
75.1.	Overview and purpose.....	447
75.2.	Issues with the section.....	448
75.2.1.	Historical circumstances no longer support the need for a provision to address <i>Bain v Fothergill</i> 448	
75.2.2.	Transparency of legal position if repealed.....	449
75.3.	Other Australian jurisdictions	449
75.4.	Recommendation.....	449
76.	Section 68A – Forfeiture of deposit on purchaser’s default.....	451
76.1.	Overview and purpose.....	451
76.2.	Issues with the section.....	451
76.3.	Recommendation.....	451

77.	Section 69 – Rights of purchaser where vendor’s title defective	452
77.1.	Overview and purpose	452
77.2.	Issues with the section.....	454
77.2.1.	Application of rule difficult – what is ‘doubtful’ title?	454
77.2.2.	Application of section limited – expansion required?	454
77.3.	Other jurisdictions.....	456
77.3.1.	The operation of the discretion in New South Wales.....	457
77.3.2.	Review of case law in New South Wales.....	458
77.4.	Recommendation.....	462
78.	Section 70 – Applications to court by vendor and purchaser	463
78.1.	Overview and purpose	463
78.2.	Issues with the section.....	465
78.2.1.	<i>Uniform Civil Procedure Rules 1999 (Qld)</i> - potentially covers the field?	465
78.2.2.	Uncertainty regarding scope of the section based on recent decisions.....	466
78.3.	Other Australian jurisdictions	467
78.4.	Recommendation.....	467
79.	Section 70A – Computers inoperative on day for completion	468
79.1.	Overview and purpose	468
79.2.	Issues with the section.....	469
79.3.	Recommendation.....	470
80.	Inoperative computer systems and electronic conveyancing	471
80.1.	Overview Electronic Conveyancing.....	471
80.2.	Time is of the essence, technical errors and settlement delays in electronic conveyancing environment	472
80.3.	Issues raised	474
80.4.	Recommendation.....	474
Part 6 Division 4 – Instalment sales of land.....		477
81.	Section 71 – Definitions	478
81.1.	Overview and purpose	478
81.2.	Issues with the section.....	480
81.2.1.	Deemed instalment contracts.....	480
81.3.	Recommendation.....	481
82.	Section 71A – Application	483
82.1.	Overview and purpose	483

NOT GOVERNMENT POLICY

82.2.	Issues with the section.....	483
82.2.1.	Binding on the Crown	483
82.2.2.	Elect to perform	484
82.2.3.	Off-the-plan sales.....	484
82.3.	Recommendation.....	485
83.	Section 72 – Restriction on vendor’s right to rescind.....	486
83.1.	Overview and purpose	486
83.2.	Issues with the section.....	486
83.3.	Recommendation.....	487
84.	Section 73 – Land not to be mortgaged by vendor	488
84.1.	Overview and purpose	488
84.2.	Issues with the section.....	488
84.3.	Recommendation.....	489
85.	Section 74 – Purchaser’s right to lodge a caveat	491
85.1.	Overview and purpose	491
85.2.	Recommendation.....	491
86.	Section 75 – Right to require a conveyance	492
86.1.	Overview and purpose	492
86.2.	Issues with the section.....	493
86.3.	Recommendation.....	494
87.	Section 76 – Deposit of title deed.....	496
87.1.	Overview and purpose	496
87.2.	Issues with the section.....	497
87.3.	Recommendation.....	497
Part 7 – Mortgages	498
88.	Section 77 – Definitions for pt 7	500
88.1.	Overview and purpose	500
88.2.	Issues with the section.....	500
88.3.	Recommendation.....	500
89.	Section 77A – Application of pt 7.....	501
89.1.	Overview and purpose	501
89.2.	Issues with the section.....	502
89.2.1.	The PPSA and the PLA	502
89.2.2.	Application to old system land.....	503

89.3.	Recommendation.....	503
90.	Section 78 – Implied obligations in mortgages.....	504
90.1.	Overview and purpose.....	504
90.2.	Issues with the section.....	504
90.3.	Recommendation.....	504
91.	Section 79 – Variation of mortgage.....	505
91.1.	Overview and purpose.....	505
91.2.	Issues with the section.....	505
91.3.	Other jurisdictions.....	506
91.4.	Recommendation.....	506
92.	Section 80 – Inspection and production of instruments.....	507
92.1.	Overview and purpose.....	507
92.2.	Issues with the section.....	508
92.2.1.	As long as the right subsists.....	509
92.2.2.	Meaning of ‘authorised’.....	509
92.2.3.	Distinction between court and chambers.....	509
92.2.4.	Application to electronic documents.....	510
92.3.	Other jurisdictions.....	510
92.3.1.	New South Wales.....	510
92.3.2.	Victoria and Western Australia.....	511
92.4.	Recommendation.....	511
93.	Section 81 – Actions for possession by mortgagors.....	513
93.1.	Overview and purpose.....	513
93.2.	Issues with the section.....	513
93.3.	Recommendation.....	513
94.	Section 82 – Tacking and further advances.....	514
94.1.	Overview and purpose.....	514
94.2.	Issues with the section.....	516
94.2.1.	Timing of the obligation to make further advances.....	516
94.2.2.	Notice.....	516
94.3.	Other jurisdictions.....	517
94.4.	Recommendation.....	517
95.	Section 83 – Powers incident to estate or interest of mortgagee.....	519
95.1.	Overview and purpose.....	519

95.2.	Issues with the section.....	520
95.2.1.	Section 83(1)(a) – co-ordinate or alternative?.....	520
95.2.2.	Minerals apart from the surface	520
95.2.3.	Application to mortgages of land and other property.....	521
95.2.4.	Power to sever and sell fixtures.....	521
95.3.	Other jurisdictions.....	521
95.4.	Recommendation.....	522
96.	Section 84 – Regulation of exercise of power of sale	523
96.1.	Overview and purpose.....	523
96.2.	Issues with the section.....	524
96.2.1.	Property vests in the trustee or comes under the control of a liquidator.....	524
96.2.2.	Disclaimer of onerous property	525
96.2.2.1.	Effect of the disclaimer on secured creditors	525
96.2.2.2.	Does the land vest in the State after disclaimer?	527
96.2.2.3.	What is the doctrine of escheat?	527
96.2.2.4.	Does the land escheat to the State subject to the mortgage?	528
96.2.3.	Can a mortgagee exercise power of sale without a vesting order?.....	530
96.3.	Other jurisdictions.....	532
96.4.	Recommendation.....	532
96.4.1.	Where there is more than one registered owner and one party is bankrupt or in liquidation	533
96.4.2.	Notice to Registrar and other registered owners	534
96.4.3.	Sections 85 and 88 apply to a mortgagee sale after disclaimer	534
97.	Section 85 – Duty of mortgagee or receiver as to sale price	536
97.1.	Overview and purpose.....	536
97.2.	Issues with the section.....	537
97.3.	Other jurisdictions.....	538
97.4.	Recommendation.....	538
98.	Section 86 – Effect of conveyance on sale.....	540
98.1.	Overview and purpose.....	540
98.2.	Issues with the section.....	540
98.2.1.	Old system land – sections 86(1)	540
98.2.2.	Transfer of land under a power of sale – section 86(2).....	541
98.2.3.	Presumption of sale under exercise of the statutory power of sale	541

98.3.	Other jurisdictions.....	541
98.4.	Recommendation.....	541
99.	Section 87– Protection of purchasers.....	543
99.1.	Overview and purpose.....	543
99.2.	Issues with the section.....	543
99.2.1.	Limited operation.....	543
99.2.2.	Benefit is no greater than existing protections	544
99.3.	Other jurisdictions.....	544
99.4.	Recommendation.....	544
100.	Section 88 – Application of proceeds of sale.....	546
100.1.	Overview and purpose.....	546
100.2.	Issues with the section.....	546
100.3.	Recommendation.....	546
101.	Section 89 – Provisions as to exercise of power of sale	548
101.1.	Overview and purpose.....	548
101.2.	Issues with the section.....	548
101.3.	Other jurisdictions.....	549
101.4.	Recommendation.....	549
102.	Section 90 – Mortgagee’s receipts discharges etc.....	550
102.1.	Overview and purpose.....	550
102.2.	Issues with the section.....	550
102.3.	Recommendation.....	550
103.	Section 91 – Amount and application of insurance money.....	551
103.1.	Overview and purpose.....	551
103.2.	Issues with the section.....	552
103.2.1.	Making good vs reinstating.....	552
103.2.2.	Contracting out	553
103.3.	Other jurisdictions.....	553
103.4.	Recommendation.....	554
104.	Section 92 – Appointment, powers, remuneration and duties of receiver	556
104.1.	Overview of section	556
104.2.	Issues with the section.....	557
104.2.1.	Trigger event	557
104.2.2.	The powers of a receiver.....	558

104.3.	Other jurisdictions.....	558
104.3.1.	New South Wales.....	558
104.4.	Recommendation.....	559
105.	Section 93 – Effect of advance on joint account.....	560
105.1.	Overview and purpose.....	560
105.2.	Issues with the section.....	560
105.3.	Recommendation.....	560
106.	Section 94 – Obligation to transfer instead of discharging mortgage.....	562
106.1.	Overview and purpose.....	562
106.2.	Issues with the section.....	562
106.3.	Recommendation.....	562
107.	Section 95 – Relief against provision for acceleration of payment.....	564
107.1.	Overview of section.....	564
107.2.	Issues with the section.....	565
107.3.	Other jurisdictions.....	565
107.4.	Recommendation.....	565
108.	Section 96 – Mortgagee accepting interest on overdue mortgage not to call up without notice	567
108.1.	Overview and purpose.....	567
108.2.	Issues with the section.....	567
108.3.	Other jurisdictions.....	567
108.4.	Recommendation.....	567
109.	Section 97 – Interest of mortgagor not seizable on judgment for mortgage debt.....	569
109.1.	Overview of section.....	569
109.2.	Issues with the section.....	570
109.3.	Other jurisdictions.....	570
109.4.	Recommendation.....	570
110.	Section 98 – Abolition of consolidation of mortgages.....	571
110.1.	Overview and purpose.....	571
110.2.	Issues with the section.....	571
110.3.	Recommendation.....	572
111.	Section 99 – Sale of mortgaged property in action for redemption or foreclosure.....	573
111.1.	Overview and purpose.....	573
111.2.	Issues with the section.....	573

111.3.	Recommendation.....	574
112.	Section 100 – Realisation of equitable charges by the court.....	575
112.1.	Overview and purpose.....	575
112.2.	Issues with the section.....	575
112.3.	Recommendation.....	575
113.	Section 101 – Facilitation of redemption in case of absent or unknown mortgagee.....	576
113.1.	Overview of section	576
113.2.	Issues with the section.....	576
113.2.1.	Applicable categories.....	577
113.2.2.	Unclear wording.....	577
113.2.3.	No mining warden.....	577
113.3.	Other jurisdictions.....	578
113.4.	Recommendation.....	578
	Part 8 – Leases and Tenancies	579
114.	Section 102 – Abolition of interesse termini as to reversionary leases and leases for lives ..	579
114.1.	Overview and purpose.....	579
114.1.1.	Section 102(3) overview and purpose	580
114.2.	Issues with the section.....	581
114.2.1.	Policy underpinning section 102(3) unclear	581
114.2.2.	Practical issues	581
114.2.3.	Possible artificial distinction between an option to renew contained in a lease and a right contained in ‘an instrument purporting to create’ a leasehold?.....	581
114.2.4.	Instruments that create a short lease to commence at a future date	582
114.3.	Other jurisdictions.....	583
114.4.	Recommendation.....	583
115.	Section 103 – [Repealed]	584
	Covenants implied into leases by provisions of the PLA and short form covenants	585
116.	Section 104 – Voluntary waste	586
116.1.	Overview and purpose.....	586
116.2.	Issues with the section.....	586
116.3.	Other jurisdictions.....	586
116.3.1.	Australia	586
116.3.2.	United Kingdom	586
116.3.3.	New Zealand	587

116.4.	Recommendation.....	587
117.	Sections 105 and 106 – Obligations of lessees and lessors	588
117.1.	Overview and purpose	588
117.1.1.	Relationship between sections 105(1)(b) and 106(1)(a)	591
117.2.	Issues with the sections.	591
117.2.1.	‘Purpose of human habitation’	591
117.2.2.	Application of the <i>Residential Tenancy and Rooming Accommodation Act 2008</i> (Qld).	591
117.2.3.	Interaction between the PLA and the RT&RA Act	592
117.2.4.	What is not covered under the RT&RA Act?.....	594
117.3.	Other jurisdictions.....	595
117.4.	Recommendation.....	595
118.	Section 107 – Powers in lessor.....	597
118.1.	Overview and purpose	597
118.1.1.	Power to enter and view section 107(a).....	597
118.1.2.	Power to enter and repair section 107(b)	598
118.1.3.	Power to enter and carry out requirements of public authority, and repair under the lease section 107(c) and (ca).....	598
118.1.4.	Power to re-enter and take possession section 107(d)	598
118.2.	Other jurisdictions.....	599
118.2.1.	Australia	599
118.2.2.	New Zealand	599
118.3.	Recommendation.....	600
119.	Section 108 – Repealed.....	601
120.	Section 109 – Short forms of covenants and obligations of lessees.....	602
120.1.	Overview and purpose	602
120.2.	Issues with the section.....	607
120.3.	Other jurisdictions.....	607
120.4.	Recommendation.....	609
121.	Section 110 – Cases in which statutory obligations or powers not implied	610
121.1.	Overview and purpose	610
121.2.	Issues with the section.....	610
121.3.	Recommendation.....	610
122.	New approach to implied and short-form lease covenants	611
122.1.	Overview and purpose	611

122.2.	Issues with the current approach	611
122.2.1.	The implied covenants are unsatisfactory	611
122.2.2.	Not in line with modern leasing practice	611
122.2.3.	Many short form covenants are outdated.....	611
122.2.4.	Caution is required when using short form leases	612
122.3.	Other jurisdictions.....	612
122.3.1.	New Zealand	612
122.3.2.	Australia	612
122.4.	Recommendation.....	612
123.	Section 111 – Lessee to give notice of ejectment to the lessor.....	617
123.1.	Overview and purpose	617
123.2.	Issues with the section.....	617
123.3.	Other jurisdictions.....	618
123.3.1.	Australia	618
123.3.2.	New Zealand and United Kingdom	618
123.4.	Recommendation.....	618
124.	Section 112 – Provisions as to covenants to repair	619
124.1.	Overview and purpose	619
124.2.	Issues with the section.....	620
124.3.	Other jurisdictions.....	620
124.3.1.	Australia	620
124.3.2.	New Zealand	621
124.4.	Recommendation.....	621
124.4.1.	Amend section 112(1) to modernise the language	621
124.4.2.	Repeal section 112(2) because the effect of this subsection is largely replicated in section 124 of the PLA.....	622
124.4.3.	Repeal section 112(3) and rely on the usual notice provisions in section in section 347 of the PLA	622
124.4.4.	Retain section 112(4)	623
	Part 8 Division 2 – Surrenders, assignments and waiver.....	624
125.	Section 113 – Head leases may be renewed without surrendering under-leases	624
125.1.	Overview and purpose	624
125.2.	Issues with the section.....	625
125.3.	Other jurisdictions.....	625
125.4.	Recommendation.....	625

126.	Section 114 – Provision as to attornments by tenants	626
126.1.	Overview and purpose	626
126.2.	Issues with the section	626
126.3.	Other jurisdictions.....	627
126.3.1.	Australia	627
126.3.2.	New Zealand	627
126.4.	Recommendation.....	628
127.	Section 115 – When reversion on a lease is surrendered etc. the next estate to be deemed the reversion	629
127.1.	Overview and purpose	629
127.2.	Issues with the section	629
127.3.	Other Jurisdictions	630
127.3.1.	Australia	630
127.3.2.	New Zealand	630
127.4.	Recommendation.....	630
128.	Section 116 – Apportionment of conditions on severance	631
128.1.	Overview and purpose	631
128.2.	Issues with the section.....	632
128.3.	Other jurisdictions.....	632
128.3.1.	Australia	632
128.3.2.	United Kingdom	632
128.3.3.	New Zealand	632
128.4.	Recommendation.....	632
129.	Section 117 – Rent and benefit of lessee’s covenants to run with the reversion	634
129.1.	Overview and purpose	634
129.1.1.	Contracting out of section 117	635
129.1.2.	Section 117 and guarantees.....	636
129.1.3.	Section 117 and mortgagees	637
129.2.	Issues with the section.....	637
129.2.1.	Covenants that ‘touch and concern’ the land.....	637
129.2.2.	Inconsistent drafting	639
129.3.	Other jurisdictions.....	640
129.3.1.	Australia	640
129.3.2.	United Kingdom	640

129.3.3.	New Zealand	640
129.4.	Recommendation.....	641
130.	Section 118 – Obligation of lessor’s covenants to run with the reversion	644
130.1.	Issues with the section.....	644
130.1.1.	Covenants that ‘touch and concern’ the land.....	644
130.1.2.	Continuing liability of the lessor/assignor of the reversion.....	645
130.2.	Other jurisdictions.....	645
130.2.1.	Australia	645
130.2.2.	United Kingdom	645
130.2.3.	New Zealand	645
130.3.	Recommendation.....	646
131.	Sections 119 and 120 – Waiver of a Covenant in a Lease and Effect of Licences Granted to Lessees	648
131.1.	Overview and purpose	648
131.2.	Issues with the sections	650
131.2.1.	Are the sections superseded by modern commercial leasing practice?	650
131.2.2.	Uncertainty regarding the scope and purpose of section 120(3) of the PLA	651
131.2.3.	Transparency of legal position if repealed.....	651
131.2.4.	The law has evolved since <i>Dumpor’s Case</i>	651
131.3.	Other jurisdictions.....	652
131.3.1.	Australia	652
131.3.2.	New Zealand	652
131.4.	Recommendation.....	653
132.	Sections 121 – Provisions as to covenants not to assign etc. without licence or consent	655
132.1.	Overview and purpose.....	655
132.1.1.	Section 121(1) of the PLA – leases containing a covenant, condition or agreement against assigning, underletting, charging or parting with possession of premises leased	657
132.1.1.1.	Licence or consent not to be unreasonably withheld (ss 121(1)(a)(i))	657
132.1.1.2.	Lease for a period longer than 40 years and made in consideration of improvement of buildings etc (ss 121(1)(a)(ii)).....	659
132.1.1.3.	No fine payable for the licence or consent (ss 121(1)(b)).....	659
132.1.2.	Section 121(2) – Unreasonably withholding consent to improvement.....	660
132.1.3.	Section 121(3) – Covenant against alteration of user without consent	661
132.2.	Issues with the section.....	662
132.2.1.	Avoidance of section 121(1)(a)(i) in practice	662

132.2.2.	Utility of section 121(1)(a)(ii) – Lease for period longer than 40 years and made in consideration of improvement of buildings etc	663
132.2.3.	Clarifying the meaning of the term ‘improvement’ in section 121(2) and the relevance of ‘reinstatement’ of premises.....	664
132.2.4.	Utility and interpretation of section 121(3) (‘alteration of user’)	665
132.2.5.	Changes in commercial leasing landscape since the enactment of the original provisions upon which sections 121(2) and (3) of the PLA are based	666
132.2.6.	Other issues – written reasons for refusal and lessee access to compensation	666
132.3.	Other jurisdictions.....	667
132.3.1.	Australia	667
132.3.2.	New Zealand	668
132.3.3.	United Kingdom	669
132.4.	Recommendation.....	669
133.	Continuing Liability of an Assignor of a Lease.....	674
133.1.	Overview and purpose.....	674
133.1.1.	Privity of contract – what does it mean to obligations under the lease after disposition? 674	
133.1.2.	Privity of estate – what does it mean to obligations under the lease after disposition? 676	
133.1.3.	What is the current position in Queensland?	677
133.2.	Issues with the current position	678
133.2.1.	Arguments supportive of reform	679
133.2.2.	Arguments supportive of retaining existing position	679
133.3.	Other jurisdictions.....	680
133.3.1.	Australia	680
133.3.2.	New Zealand	680
133.3.3.	United Kingdom	683
133.4.	Recommendation.....	686
133.4.1.	Justice and equity.....	686
133.4.2.	Recommendations provide adequate protection for lessors	686
133.4.3.	Balancing the interests of the parties	686
133.4.4.	Other measures protect lessor	686
133.4.5.	Recommendations compared to retail shop leasing legislation.....	687
133.4.6.	Recourse to previous assignors is uncommon.....	687
133.4.7.	Continuing liability impinges on business.....	688

133.4.8.	Lessors unlikely to agree to release assignors	688
133.4.9.	Abolition of the requirement that covenants ‘touch and concern the land’	688
133.4.10.	UK reform compared	689
133.4.11.	Submissions from the QLS	689
134.	Section 122 – Involuntary assignment no breach of covenant.....	692
134.1.	Overview and purpose	692
134.2.	Recommendation.....	692
Part 8 Division 3 – Relief from forfeiture		693
135.	Section 123 –Definitions for Div 3.....	694
135.1.	Overview and purpose	694
135.2.	Issues with the section.....	694
135.2.1.	Definition of ‘lease’	694
135.2.1.1.	Options to renew	695
135.2.2.	Definition of ‘lessee’ and ‘lessor’	697
135.2.3.	Definition of ‘proceedings’	697
135.2.4.	Definition of ‘under-lease’ and ‘under-lessee’	697
135.2.5.	Definition of ‘covenant or condition’	697
135.3.	Other jurisdictions.....	698
135.3.1.	Australia	698
135.3.2.	New Zealand	698
135.4.	Recommendation.....	698
135.4.1.	Definition of ‘lease’	698
135.4.2.	Definitions to be amended	699
135.4.3.	Definitions to be removed	699
135.4.4.	Definitions to be added.....	699
136.	Section 123A – Application of div 3	701
136.1.	Recommendation.....	701
137.	Section 124 – Restriction on and relief against forfeiture	703
137.1.	Overview and purpose	703
137.2.	Issues with the section.....	705
137.2.1.	‘Reasonable time’ to remedy breach.....	705
137.2.2.	Section 124(5) – recommendation for repeal.....	706
137.2.3.	‘Event of default’ treated as breach of covenant	706
137.2.4.	Defective notices.....	706

137.2.5.	Service of a copy of notice on third parties	707
137.2.6.	Lessee gives up its interest in the land	707
137.2.7.	Time limitations to bring an action for relief against forfeiture	707
137.2.8.	Standing to apply for relief and extension of time	707
137.2.8.1.	Acceptance of rent not a waiver of rights.....	707
137.3.	Overall recommendation	708
138.	Section 125 – Power of court to protect under-lessee on forfeiture of superior leases.....	713
138.1.	Overview and purpose	713
138.2.	Issues with the section.....	714
138.3.	Recommendation.....	714
139.	Section 126 – Costs and expenses	716
139.1.	Overview and purpose	716
139.2.	Issues with the section.....	716
139.3.	Recommendation.....	717
140.	Section 127 – Relief against notice to effect decorative repairs	718
140.1.	Overview and purpose	718
140.2.	Issues with the section.....	718
140.2.1.	Residential leases.....	718
140.2.2.	Commercial leases	719
140.3.	Recommendation.....	719
141.	Section 128 – Relief against loss of lessee’s option.....	720
141.1.	Overview and purpose	720
141.2.	Issues with the section.....	723
141.3.	Other jurisdictions.....	726
141.4.	Recommendation.....	726
141.4.1.1.	Grepo’s case	726
141.4.2.	Application of the section – section 128(1)	727
141.4.3.	Retrospectivity and contracting out	727
141.4.4.	Notice requirements.....	727
141.4.5.	Standing to apply for relief	727
141.4.6.	Time limits.....	728
	Part 8 Division 4 – Termination of tenancies	732
142.	Section 129 – Abolition of yearly tenancies arising by implication of law.....	732
142.1.	Overview and purpose.....	732

142.1.1.	Operation of section 129 of the PLA.....	734
142.2.	Issues with the section.....	735
142.3.	Other jurisdictions.....	737
142.3.1.	Australia	737
142.3.2.	New Zealand	737
142.4.	Recommendation.....	738
143.	Section 130 – Notice of termination of tenancy.....	739
143.1.	Overview and purpose.....	739
143.2.	Other jurisdictions.....	739
143.3.	Issues with the section.....	739
143.4.	Recommendation.....	739
144.	Section 131 – Form and contents of notice	740
144.1.	Overview and purpose.....	740
144.2.	Issues with the section.....	740
144.3.	Recommendation.....	740
145.	Section 132 – Manner of giving notice	741
145.1.	Overview and purpose.....	741
145.2.	Issues with the section.....	741
145.3.	Recommendation.....	742
146.	Section 133 – Notice to terminate weekly tenancy.....	743
146.1.	Overview and purpose.....	743
146.2.	Issues with the section.....	743
146.3.	Recommendation.....	743
147.	Section 134 – Notice to terminate monthly tenancy.....	744
147.1.	Overview and purpose.....	744
147.2.	Issues with the section.....	744
147.3.	Recommendation.....	745
148.	Section 135 – Notice to terminate yearly tenancy	746
148.1.	Overview and purpose.....	746
148.2.	Issues with the section.....	746
148.3.	Recommendation.....	746
149.	Section 136 – Notice to terminate other periodic tenancy	747
149.1.	Overview and purpose.....	747
149.2.	Issues with the section.....	747

149.3.	Recommendation.....	748
150.	Section 137 – Notice to terminate other tenancies.....	749
150.1.	Overview and purpose.....	749
150.2.	Issues with the section.....	749
150.3.	Recommendation.....	749
151.	Section 138 – Tenants and other persons holding over to pay double the yearly value	750
151.1.	Overview and purpose.....	750
151.2.	Issues with the section.....	751
151.2.1.	Establishing that the holding over was ‘wilful’	751
151.2.2.	Calculation of ‘double the yearly value of the land’	751
151.2.3.	Alternative remedy available	752
151.2.4.	The provision is out of step with commercial practice.....	752
151.3.	Other jurisdictions.....	752
151.4.	Recommendation.....	753
152.	Section 139 – Tenant holding over after giving notice to be liable for double rent.....	754
152.1.	Overview and purpose.....	754
152.2.	Issues with the section.....	754
152.2.1.	The provision is out of step with commercial practice.....	754
152.2.2.	Rules of the court more efficient.....	755
152.3.	Other jurisdictions.....	755
152.4.	Recommendation.....	755
153.	Part 8 Division 5 (sections 140 to 152) – Summary recovery of possession.....	756
153.1.	Overview and purpose.....	756
153.1.1.	Scope of Division 5.....	756
153.1.2.	Operation of Division 5	757
153.1.3.	Other provisions of Division 5.....	758
153.2.	Issues with the Division.....	759
153.2.1.	Division 5 is limited in scope.....	759
153.2.2.	Uncertainty regarding whether Division 5 is used in practice	760
153.2.3.	Alternative option for recovery of possession under the <i>Uniform Civil Procedure Rules 1999</i> (Qld)	761
153.2.4.	The process under the UCPR.....	761
153.2.5.	If an order for possession of land is made, how can it be enforced?	762
153.2.6.	In which jurisdiction can the proceedings be brought?.....	762

153.2.7.	Injunctive or declaratory relief not available under Division 5.....	763
153.3.	Recommendation.....	763
154.	Part 8 Division 6 (sections 153 to 167) – Agricultural holdings	764
154.1.	Overview and purpose.....	764
154.1.1.	History.....	764
154.1.2.	Application of provision	766
154.1.3.	How does Division 6 operate?	767
154.1.3.1.	Section 155 – Tenant’s property in fixtures.....	767
154.1.3.2.	Section 156 – Tenant’s right to compensation	768
154.1.3.3.	Section 157 – Intended improvements.....	769
154.1.3.4.	Section 158 – Agreements	769
154.1.3.5.	Section 164 - Contract of tenancy and mortgagee in possession.....	770
154.1.3.6.	Other provisions.....	770
154.2.	Issues with the Division.....	771
154.2.1.	The Division is not known well and relied upon rarely in practice	771
154.2.2.	The Division is out of step with commercial practice	771
154.2.3.	Not all agricultural tenancies are formed with the benefit of legal advice and a detailed agreement	772
154.2.4.	Other issues with Division 6.....	772
154.2.4.1.	Schedule 4 of the PLA requires updating.....	772
154.2.4.2.	Arbitration in the absence of agreement between the parties.....	772
154.2.4.3.	Crops planted towards the end of a tenancy.....	773
154.3.	Other jurisdictions.....	773
154.3.1.	Australia	773
154.3.2.	New Zealand	775
154.4.	Recommendation.....	776
	Part 9 – Powers of attorney.....	777
	Part 10 – Incorporeal hereditaments, appurtenant rights and rights of way.....	778
155.	Sections 176 and 177 – Prohibition Upon Creation of Rent Charges and Release of Part of Land Subject to Rent Charge	779
155.1.	Overview and purpose.....	779
155.2.	Issues with the section.....	780
155.3.	Other jurisdictions.....	780
155.3.1.	Australia	780
155.4.	Recommendation.....	780

156.	Sections 178 and 198A – No Presumption of Right to Access or Use of Light or Air (s 178) and Prescriptive Right of Way Not Acquired By User (s 198A)	782
156.1.	Overview and purpose	782
156.1.1.	Overview of ‘prescription’ and ‘lost modern grant’	782
156.1.2.	Section 178 – No presumption of right to access or use of light or air	784
156.1.3.	Section 198A - Prescriptive right of way not acquired by user	785
156.2.	Issues with the sections	786
156.2.1.	Existence of easements by prescription is inconsistent with Torrens system.....	786
156.2.2.	Certainty of rights necessary in an electronic registration and conveyancing regime... 787	
156.2.3.	Uncertainty regarding right of way by prescription against the Crown	787
156.2.4.	Use of section 180 of the PLA	788
156.3.	Other jurisdictions.....	789
156.3.1.	Australia	789
156.3.1.1.	Light and air.....	789
156.3.1.2.	Prescriptive right of way not acquired by user	789
156.3.1.3.	Prescriptive easements generally	789
156.3.1.3.1.	Tasmania	790
156.3.1.3.2.	South Australia.....	791
156.3.1.3.3.	New South Wales	791
156.3.1.3.4.	Victoria	792
156.3.1.3.5.	Western Australia	793
156.3.1.3.6.	Australian Capital Territory.....	793
156.3.1.3.7.	Northern Territory	793
156.3.2.	New Zealand	793
156.3.2.1.	Light and air.....	793
156.3.2.2.	Easements by prescription.....	794
156.4.	Recommendation.....	794
156.4.1.	Repeal section 178 and section 198A of the PLA.....	794
156.4.2.	No interest created by prescription	794
156.4.3.	Providing in legislation that easements may only be sought under section 180 of the PLA as statutory rights of user.	795
157.	Section 179 – Right to Support of Land and Buildings.....	796
157.1.	Overview and purpose	796
157.2.	Issues with the section.....	798
157.2.1.	Uncertainty regarding the scope of section 179 of the PLA	798

NOT GOVERNMENT POLICY

157.2.2.	Section 179 of the PLA underutilised in practice	801
157.2.3.	Should omissions be covered under section 179 of the PLA?	801
157.2.4.	No concept of ‘reasonableness’ and ‘fault’ in section 179 of the PLA	802
157.2.5.	Should a procedure notifying a neighbouring property of an intention be included in section 179 of the PLA?	803
157.3.	Other jurisdictions.....	804
157.3.1.	Australia	804
157.3.1.1.	New South Wales	804
157.3.1.2.	Western Australia	805
157.3.2.	New Zealand	806
157.4.	Recommendation.....	806
157.4.1.	Retaining walls	807
157.4.2.	Acts and omissions.....	808
157.4.3.	Corresponding duty from owner of the supported land	808
157.4.4.	‘Owner of land’	808
157.4.5.	Contracting out	808
157.4.6.	Abolition of action in nuisance	809
157.4.7.	Rationale for new regime.....	809
158.	Section 180 – Imposition of Statutory Rights of User in Respect of Land	812
158.1.	Overview and purpose	812
158.2.	Issues with the section.....	815
158.2.1.	Is there a need to include the term ‘development’ in section 180(1) of the PLA?.....	815
158.2.2.	Does section 180(4)(a) of the PLA require amendment to clarify the interaction between the words compensation or ‘consideration’?.....	816
158.2.3.	Ordering costs against the servient owner in ‘special circumstances’	817
158.2.4.	Broadening the definition of ‘utility’ to cover ‘cables’	818
158.2.5.	Is there a need to amend the definition of ‘statutory right of user’ in section 180(7) of the PLA to explicitly cover airspace?.....	818
158.3.	Other jurisdictions.....	819
158.3.1.	Australia	819
158.3.2.	New Zealand	819
158.4.	Recommendation.....	819
158.4.1.	Insert the word ‘development’ into section 180(1).....	820
158.4.2.	Benefit to the dominant land as a basis for calculating compensation.....	820
158.4.3.	Costs under subsection 180(6).....	820

158.4.4.	Definition of ‘utility’	820
158.4.5.	Definitions in section 180(7)	820
158.4.6.	Section does not bind the Crown.....	821
158.4.7.	Easements in gross in favour of local governments or other statutory authorities	821
159.	Section 181 – Power to modify or extinguish easements and restrictive covenants	823
159.1.	Overview and purpose	823
159.2.	Issues with the section.....	827
159.2.1.	Section 181(1)(a) – Is it uncertain and inflexible?	827
159.2.2.	Power to ‘modify’	829
159.2.2.1.	Adding terms to existing easements.....	829
159.2.2.2.	Modifying covenants in building management statements	831
159.2.3.	Other issues associated with the operation of section 181 of the PLA	831
159.2.3.1.	Overlap between sections 181(1)(a) and 181(1)(c)	831
159.2.3.2.	Uncertainty regarding whether s 181(1)(d) of the PLA has to be satisfied in addition to one or more of s 181(1)(a)-(c).....	832
159.3.	Other jurisdictions.....	833
159.3.1.	Australia	833
159.3.1.1.	New South Wales	833
159.3.1.2.	Northern Territory	833
159.3.1.3.	Victoria	834
159.3.1.4.	Tasmania	834
159.3.1.5.	Western Australia	835
159.3.1.6.	South Australia.....	835
159.3.2.	New Zealand	836
159.4.	Recommendation.....	836
159.4.1.	‘Obsolete’ requirement should remain	836
159.4.2.	Allow for the addition of new terms and positive covenants to an existing easement	837
159.4.3.	Modification or extinguishment of a BMS	837
159.4.4.	Clarification of operation of 181(a) to 181(d).....	837
	Part 11 – Encroachment and mistaken improvements	839
160.	Part 11 Division 1 – Encroachment (ss 182-194) Encroachment of buildings	839
160.1.	Overview and purpose	839
160.2.	History of the provisions	841
160.3.	Operation of Part 11, Division 1.....	842

160.4.	Issues with the Division.....	845
160.4.1.	Original rationale for encroachment provisions remains valid	845
160.4.2.	Calculation of compensation – a matter for the court to determine?	845
160.4.3.	‘Subject land’ – does it need a more expansive definition?	847
160.4.4.	Combining the encroachment provisions and mistaken improvement into a single provision? 848	
160.5.	Other jurisdictions.....	850
160.5.1.	Australia	850
160.5.2.	New South Wales	850
160.5.3.	Northern Territory	850
160.5.4.	South Australia.....	850
160.5.5.	Western Australia	851
160.5.6.	Victoria	851
160.5.7.	New Zealand	852
160.6.	Recommendation.....	854
161.	Part 11, Division 2 – Improvements under mistake of title (ss 195-198)	856
161.1.	Overview and purpose	856
161.2.	Issues with the Division.....	859
161.3.	Other jurisdictions.....	859
161.3.1.	Northern Territory	859
161.3.2.	Western Australia	860
161.3.3.	Victoria	860
161.3.4.	New Zealand	861
161.3.5.	Canadian provinces.....	861
161.4.	Recommendation.....	862
	Part 11A – Rights of way	863
162.	Section 198A – Prescriptive right of way not acquired by user	863
	Part 12 – Equitable interests and things in action.....	864
163.	Section 199 – Statutory assignments of things in action	864
163.1.	Overview and purpose.....	864
163.2.	Issues with the section.....	865
163.2.1.	<i>Personal Property Securities Act 2009</i> (Cth) and section 199 of the PLA	866
163.2.2.	Electronic communications and section 199 of the PLA.....	866
163.2.3.	Assigning any part of a debt or legal thing in action.....	866

163.2.4.	Equitable thing in action	867
163.2.5.	Assignment of future interests	868
163.3.	Other jurisdictions.....	869
163.3.1.	Australia	869
163.3.2.	New Zealand	869
163.4.	Recommendation.....	870
164.	Section 200 – Efficacy in equity of voluntary assignments.....	872
164.1.	Overview and purpose.....	872
164.2.	Issues with the section.....	873
164.3.	Other jurisdictions.....	873
164.3.1.	Australia	873
164.3.2.	New Zealand	873
164.4.	Recommendation.....	874
	Part 13 – Powers of appointment	875
165.	Section 201 – Application of pt 13	877
165.1.	Overview and purpose.....	877
165.2.	Issues with the section.....	877
165.3.	Recommendation.....	877
166.	Section 202 – Mode of exercise of powers.....	878
166.1.	Overview and purpose.....	878
166.2.	Issues with the section.....	879
166.3.	Other jurisdictions.....	879
166.4.	Recommendation.....	879
167.	Section 203 – Validation of appointments where objects are excluded or take illusory shares 881	
167.1.	Overview and purpose.....	881
167.2.	Issues with the section.....	882
167.3.	Recommendation.....	882
168.	Section 204 – Protection of purchasers claiming under certain void appointments	883
168.1.	Overview and purpose.....	883
168.2.	Issues with the section.....	884
168.3.	Recommendation.....	884
169.	Section 205 – Disclaimer etc. of powers.....	885
169.1.	Overview and purpose.....	885

169.2.	Issues with the section.....	885
169.3.	Other jurisdictions.....	886
169.4.	Recommendation.....	887
Part 14 – Perpetuities and accumulations		888
170.	Section 206 – Definitions for pt 14	891
170.1.	Overview and purpose.....	891
170.2.	Issues with the section.....	891
170.3.	Recommendation.....	891
171.	Section 206A – When disposition in will made.....	892
171.1.	Overview and purpose.....	892
171.2.	Issues with the section.....	892
171.3.	Recommendation.....	892
172.	Section 206B – When person to be treated as member of class.....	893
172.1.	Overview and purpose.....	893
172.2.	Issues with the section.....	893
172.3.	Recommendation.....	893
173.	Section 207 – Application of pt 14.....	894
173.1.	Overview and purpose.....	894
173.2.	Issues with the section.....	894
173.3.	Recommendation.....	895
174.	Section 208 – Powers of appointment.....	896
174.1.	Overview and purpose.....	896
174.2.	Issues with the section.....	897
174.3.	Recommendation.....	897
175.	Section 209 – Power to specify perpetuity period.....	898
175.1.	Overview and purpose.....	898
175.2.	Issues with the section.....	898
175.3.	Other jurisdictions.....	899
175.3.1.	New South Wales.....	899
175.3.2.	South Australia.....	900
175.3.3.	Northern Territory	900
175.3.4.	United Kingdom	901
175.3.5.	New Zealand	901
175.3.6.	Ireland	902

175.3.7. Scotland..... 902

175.4. Recommendation..... 903

176. Section 210 – Wait and see rule 904

176.1. Overview and purpose 904

176.2. Issues with the section..... 905

176.3. Other jurisdictions..... 905

176.4. Recommendation..... 905

177. Section 211 – Power to apply to court for declaration as to validity 906

177.1. Overview and purpose 906

177.2. Issues with the section..... 906

177.3. Recommendation..... 906

178. Section 212 – Presumptions and evidence as to future parenthood 908

178.1. Overview and purpose 908

178.2. Issues with the section..... 909

178.3. Recommendation..... 909

179. Section 213 – Reduction of age and exclusion of class members to avoid remoteness 910

179.1. Overview and purpose 910

179.2. Issues with the section..... 911

179.3. Recommendation..... 911

180. Section 214 – Unborn husband or wife 912

180.1. Overview and purpose 912

180.2. Issues with the section..... 912

180.3. Recommendation..... 912

181. Section 215 – Dependent dispositions..... 914

181.1. Overview and purpose 914

181.2. Issues with the section..... 914

181.3. Recommendation..... 914

182. Section 216 – Abolition of the rule against double possibilities..... 915

182.1. Overview and purpose 915

182.2. Issues with the section..... 915

182.3. Recommendation..... 915

183. Section 217 – Restriction on the perpetuity rule..... 916

183.1. Overview and purpose 916

183.2. Issues with the section..... 916

183.3.	Recommendation.....	917
184.	Section 218 – Options	918
184.1.	Overview and purpose.....	918
184.2.	Issues with the section.....	919
184.3.	Other jurisdictions.....	920
184.3.1.	New South Wales.....	920
184.3.2.	United Kingdom	920
184.4.	Recommendation.....	921
185.	Section 219 – Determinable interests	922
185.1.	Overview and purpose.....	922
185.2.	Issues with the section.....	923
185.3.	Recommendation.....	923
186.	Section 220 – Trustee powers and superannuation funds	924
186.1.	Overview and purpose.....	924
186.2.	Issues with the section.....	924
186.3.	Recommendation.....	925
187.	Section 221 – Non-charitable purpose trusts	926
187.1.	Overview and purpose.....	926
187.2.	Issues with the section.....	926
187.3.	Recommendation.....	926
188.	Section 222 – Accumulation of income	927
188.1.	Overview and purpose.....	927
188.2.	Issues with the section.....	927
188.3.	Recommendation.....	927
	Part 15 – Corporations	929
189.	Section 223 – Devolution of property of corporation sole	929
189.1.	Overview and purpose.....	929
189.2.	Issues with the section.....	930
189.3.	Other jurisdictions.....	931
189.4.	Recommendation.....	931
190.	Section 224 – Vacancy in corporation and section 225 – Transactions with corporations sole 932	
190.1.	Overview and purpose.....	932
190.2.	Issues with the section	934

190.2.1.	Section 224 of the PLA	934
190.2.2.	Section 225 of the PLA	934
190.3.	Other jurisdictions.....	935
190.4.	Recommendation.....	935
191.	Section 226 – Corporation incapable of acting.....	936
191.1.	Overview and purpose.....	936
191.2.	Issues with the section.....	938
191.3.	Recommendation.....	938
192.	Section 227 – Corporate contracts and transactions not under seal	940
192.1.	Overview and purpose.....	940
192.2.	Issues with the section.....	942
192.3.	Other jurisdictions.....	942
192.4.	Recommendation.....	942
	Part 16 – Voidable dispositions.....	943
193.	Section 228 – Voluntary conveyances to defraud creditors voidable	943
193.1.	Overview and purpose.....	943
193.2.	Issues with the section.....	944
193.2.1.	Submissions by the QLS	945
193.3.	Other jurisdictions.....	945
193.3.1.	Australia	945
193.3.2.	New Zealand	946
193.3.3.	United Kingdom	947
193.3.4.	Singapore	947
193.4.	Recommendation.....	948
194.	Section 229 – Voluntary disposition of land how far voidable as against purchasers.....	949
194.1.	Overview and purpose.....	949
194.2.	Issues with the section.....	950
194.3.	Other jurisdictions.....	951
194.3.1.	Australia	951
194.3.2.	New Zealand	951
194.3.3.	United Kingdom	952
194.4.	Recommendation.....	952
195.	Section 230 – Acquisitions of reversions at an under value	953
195.1.	Overview and purpose.....	953

195.2.	Issues with the section.....	954
195.3.	Other jurisdictions.....	954
195.3.1.	Victoria	954
195.3.2.	United Kingdom and New Zealand	955
195.4.	Recommendation.....	955
Part 17 – Apportionment	956
196.	Part 17 – Apportionment (ss 231-233)	956
196.1.	Overview and purpose	956
196.2.	Issues with the sections	958
196.2.1.	Part 17 of the PLA not applicable to rent payable in advance.....	958
196.2.2.	Practical utility of Part 17 of the PLA	959
196.2.3.	Application to dividends and annuities.....	959
196.3.	Other jurisdictions.....	960
196.3.1.	Australia	960
196.3.2.	New Zealand	960
196.4.	Recommendation.....	961
Part 18 – Unregistered Land	963
197.	Part 18 Division 1 – Application of part – interpretation.....	964
197.1.	Overview and purpose	964
197.2.	Issues with the section.....	964
197.3.	Recommendation.....	964
198.	Part 18 Division 2 – Sales and conveyances.....	965
198.1.	Overview and purpose	965
198.2.	Issues with the section.....	965
198.3.	Recommendation.....	965
199.	Part 18 Division 3 – Registration of Deeds.....	966
199.1.	Overview and purpose	966
199.2.	Issues with the section.....	967
199.2.1.	Section 241(1)(a)-(c) – registering, recording deed, conveyance, other instrument, will or devise etc	967
199.2.2.	Section 241(1)(d) – requirement to register or record ‘every Act’	968
199.3.	Recommendation.....	969
200.	Part 18 Division 4 – Compulsory Registration of Title	970
200.1.	Overview and purpose	970

200.2.	Issues with the section.....	971
200.3.	Recommendation.....	971
Part 19 – Property (de facto relationships)		973
201.	De facto relationships – Part 19 (255 to 344).....	973
201.1.	Overview	973
201.1.1.	Federal legislation and Part 19 of the PLA.....	974
201.2.	Issues with the section.....	974
201.3.	Recommendation.....	974
Part 20 – Miscellaneous		976
202.	Section 345 – Protection of solicitors and others adopting this Act	976
202.1.	Overview and purpose.....	976
202.2.	Issues with the section.....	977
202.3.	Other jurisdictions.....	977
202.4.	Recommendation.....	977
203.	Section 346 – Restriction on constructive notice	979
203.1.	Overview and purpose.....	979
203.2.	Issues with the section.....	980
203.3.	Other jurisdictions.....	980
203.4.	Recommendation.....	981
204.	Section 347 – Service of Notices	982
204.1.	Overview and purpose.....	982
204.2.	Issues with the section.....	983
204.2.1.	Does section 347 prevent service of notices using electronic communication?.....	984
204.2.1.1.	Statutory Notices	984
204.2.1.2.	Contractual Notices.....	984
204.2.1.3.	Is section 347 a ‘State law’ to which section 11 ETA applies?.....	985
204.2.2.	Deemed time of receipt	985
204.2.2.1.	By post.....	985
204.2.2.2.	Service ‘by electronic communication’	986
204.2.3.	Making documents available online	987
204.2.4.	Other provisions in the PLA that specify a method of service.....	987
204.3.	Other jurisdictions.....	988
204.3.1.	NSW.....	988
204.3.2.	The <i>Corporations Act 2001</i> (Cth).....	989

204.4.	Recommendation.....	989
204.4.1.	The QLS’s view	989
204.4.2.	The Centre’s view.....	990
205.	Section 348 – Payments into and applications to court	993
205.1.	Overview and purpose	993
205.2.	Issues with the section.....	993
205.2.1.	Section 348(1): Payments into court	993
205.2.2.	Section 348(2)-(6): Application to court	994
205.3.	Other jurisdictions.....	995
205.4.	Recommendation.....	995
206.	Section 349 – Forms.....	996
206.1.	Overview and purpose	996
206.2.	Issues with the section.....	996
206.2.1.	Section 139 of the Real Property Act has been omitted.....	996
206.2.2.	Attestation requirements (PLA s 349(1)(a)).....	996
206.3.	Other jurisdictions.....	998
206.4.	Recommendation.....	998
207.	Section 350 – Approval of forms.....	999
207.1.	Overview and purpose	999
207.2.	Recommendation.....	999
208.	Section 351 – Regulation-making power	1000
208.1.	Recommendation.....	1000
209.	Part 21 to Part 24 (Sections 353 – 357) Transitional Provisions	1001
209.1.	Recommendation.....	1001
	Schedules 1 – 6.....	1002
210.	Schedule 1 – Procedure in cases of <i>bona vacantia</i>	1002
210.1.	Overview and purpose	1002
210.2.	Recommendation.....	1002
211.	Schedule 2.....	1003
212.	Schedule 3 – Short forms of covenants in leases.....	1004
212.1.	Purpose and overview	1004
212.2.	Recommendation.....	1004
213.	Schedule 4 – Improvements by tenant.....	1005
213.1.	Overview and purpose	1005

NOT GOVERNMENT POLICY

213.2.	Recommendation.....	1005
214.	Schedule 5 – Rules as to arbitration	1006
214.1.	Overview and purpose.....	1006
214.2.	Recommendation.....	1006
215.	Schedule 6 – Dictionary	1007
215.1.	Placement of definitions.....	1007
215.2.	Duplication of definitions.....	1007
215.2.1.	Definitions relating to Part 6 Division 3 Sales of land	1007
215.3.	Definitions to be added to Schedule 6.....	1007
215.3.1.	Definition of ‘short lease’	1007
215.3.2.	Definition of ‘intestate’	1008
215.4.	Definitions to be amended	1008
215.4.1.	Definition of ‘disposition’	1008
215.4.2.	Definition of ‘valuable consideration’	1008
215.4.3.	Definition of ‘court’	1008
215.4.4.	Definition of ‘commencement of this Act’	1008
215.4.5.	Definition of ‘mortgage-money’	1009
215.4.6.	Definition of ‘president of the Law Society’	1009
215.4.7.	Definition of ‘sale’	1009
215.4.8.	Definition of ‘rent’	1009
215.5.	Definitions to be repealed	1010
215.5.1.	Definition of ‘assurance’	1010
215.5.2.	Definition of ‘conveyance’	1010
215.5.3.	Definition of ‘encumbrance’ and ‘encumbrancee’	1011
215.5.3.1.	Section 38.....	1011
215.5.3.2.	Section 61.....	1011
215.5.3.3.	Section 63.....	1012
215.5.3.4.	Section 64.....	1012
215.5.3.5.	Section 71.....	1012
215.5.3.6.	Section 82.....	1012
215.5.3.7.	Section 86.....	1012
215.5.3.8.	Section 88.....	1012
215.5.3.9.	Section 94.....	1012
215.5.3.10.	Section 99.....	1013

NOT GOVERNMENT POLICY

215.5.3.11.	Section 100.....	1013
215.5.3.12.	Section 197.....	1013
215.5.3.13.	Bills of encumbrance.....	1013
215.5.3.14.	Conclusion of definition of 'encumbrance'.....	1014
215.5.4.	Definition of 'fine'.....	1014
215.5.5.	Definition of 'Imperial Act'.....	1014
215.5.6.	Definition of 'warden'.....	1014
215.6.	Definitions relating to Part 19.....	1014
215.7.	Definitions already provided by <i>Acts Interpretation Act 1954</i> (Qld).....	1015
215.8.	Recommendations.....	1016

Introduction – Review of the *Property Law Act 1974*

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.

In August 2013, on instructions from the-then Attorney General, Jarrod Bleijie, the Centre commenced a review of the *Property Law Act 1974* (Qld) with the objective of modernisation, simplification, clarification and reform of the Act in light of case law, the operation of other related legislation and changes in practice.

The Review Panel for the Property Law Review comprised Professor Bill Duncan, Professor Sharon Christensen and Associate Professor Bill Dixon all of QUT Law Faculty and the Commercial and Property Law Research Centre for the duration of the review.

Senior Research Associates for the project were Riccardo Rivera (August 2013-December 2017), Megan Window (August 2013-Oct 2016) and Trisch Partridge (March 2017-December 2017).

The Review Panel was asked to make recommendations to modernise the *Property Law Act 1974* (Qld) with particular regard to:

- changes in property transactional processes;
- the advent of electronic conveyancing and contracting;
- the fact that there is now no old system land in Queensland; and
- that Queensland has had an electronic land register since 1994.

The *Property Law Act 1974* (Qld) came into force on 1 December 1975. At that time it was considered one of the major property law reform projects ever undertaken in Queensland. The Act was substantially a product of an extensive enquiry by the Queensland Law Reform Commission that culminated in the publishing of a Working Paper¹ in April 1972 and a final report² in February 1973 containing draft legislation. It took nearly two years to enact the draft which was keenly debated and finally adopted with some changes in 1974 to commence in December 1975.

Since enactment, there have been very few substantive amendments to the Act and no overall review in the forty years since its commencement. Real property law draws heavily upon historical concepts which have their roots in the 18th and 19th century. Consequently many provisions of the *Property Law Act 1974* (Qld) are based upon the *Law of Property Act 1925* (UK) (**1925 Act**) which repealed the effects of Imperial Statutes and other provisions. Many sections of the *Property Law Act 1974* (Qld) remain in the same language as the 1925 Act, or are direct transcripts of the *Conveyancing Act 1919* (NSW). At this point in time, such provisions are at least 90 years old.

¹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Determine the Application of Certain Imperial Statutes*, Working Paper (1972).

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).

Many of the concepts from the 1925 Act, such as those related to old system land and conveyancing no longer have any rational basis for retention in the Queensland context. All land in Queensland is regulated either under the *Land Title Act 1994* (Qld) or *Land Act 1994* (Qld). The Review Panel has recommended the repeal of all provisions related to old system land and conveyancing. Changes to commercial practices driven by the use of technology are also taken into account.

The Recommendations in this Final Report address the need for the legal framework to recognise and facilitate electronic dealings in property, especially in relation to the formation and performance of electronic contracts. To this end, a number of Recommendations aim to create certainty for contracting parties about the validity of electronic land contracts, electronic deeds and the use of electronic means for the giving of notices.

Concepts relevant to modern business and legal transactions are retained but modernised to suit contemporary business processes. For instance, although a perpetuities period has been retained, its application has been greatly simplified and abolished in respect of commercial transactions. Whilst the notion of deeds (as opposed to agreements in writing) has been retained, this Final Report introduces the concept of electronic deeds.

The Review Panel has undertaken an extensive literature and case law review to inform the Recommendations. Reforms to the equivalent property law legislation in England, New Zealand and other Australian jurisdictions over the past 40 years have been reviewed. Particular attention was given to the completely re-enacted New Zealand *Property Law Act 2007* (NZ), which repealed the *Property Law Act 1952* (NZ).

As part of a review of case law we discovered that many sections of the *Property Law Act 1974* (Qld) have never been adjudicated by a Queensland court since commencement, nor indeed a court in any other Australian jurisdiction. In some cases the provisions in the *Property Law Act 1974* (Qld) were unknown or never utilised by practising lawyers. The continuing utility of such provisions has been questioned in the light of changes in other legislation (e.g. the *Land Title Act 1994* (Qld) and *Land Act 1994* (Qld)) and in a number of cases, repeal has been recommended.

This Final Report was preceded by a number of Issues Papers³ calling for comment on all aspects of the legislation. This Final Report contains our final Recommendations in relation to the *Property Law Act 1974* (Qld). For many of our Recommendations, we have provided a draft form of legislation to clarify our reasoning and demonstrate our intention. Where this drafting has been based upon legislation in other jurisdictions, full particulars have been given for reference.

RECOMMENDATION 1. The Centre recommends the repeal of the *Property Law Act 1974* (PLA) and the re-enactment of a new Property Law Act in line with these Recommendations.

³ See <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland> for a full list.

NOT GOVERNMENT POLICY

We have been grateful for the public response, especially from the Queensland Law Society (and its specialist committees), the Real Estate Institute of Queensland and bodies such as the Society of Trust and Estate Practitioners for their valuable input to our deliberations. Submissions to the Property Law Review Issues Papers were received from the following organisations and individuals:

- the Queensland Law Society;
- the Real Estate Institute of Queensland;
- the Residential Tenancies Authority;
- the Society of Trust and Estate Practitioners Queensland;
- the Strata Community Australia;
- Wayne Fellows;
- Martin Punch
- Malcolm Tucker; and
- Daryl Wright.

We would like to thank the many officers of the Queensland Department of Justice and Attorney-General who worked with us over this period to bring the Property Law Review project to fruition. Their advice and assistance has been most appreciated.

W D Duncan
S A Christensen
W M Dixon
R I Rivera
M J Window
T Partridge

December 2017

The Recommendations

RECOMMENDATION 1. The Centre recommends the repeal of the *Property Law Act 1974 (PLA)* and the re-enactment of a new Property Law Act in line with these Recommendations.

PART 1 - PRELIMINARY

RECOMMENDATION 2. Sections 1, 2 and 3 should be retained with modernised language by replacing ‘Crown’ with ‘State’.

RECOMMENDATION 3. The effect of section 4 should be retained with modernised language that removes the reference to ‘registered land’. The section should be relocated to sit with the other provisions relating to covenants in the new PLA.

For example, section 4 could be drafted in the following manner:

Section [4] Act not to be taken to confer right to register restrictive covenant

Nothing in this Act shall be construed as conferring on any person a right to registration of a restrictive covenant.

RECOMMENDATION 4. The effect of section 5 should be retained with modernised language that clarifies the application of the new PLA to other legislation.

For example, using the New Zealand provisions as a guide, section 5 could be drafted in the following manner:

Section [5] Application of Act

- (1) This Act applies to the land, other property, and instruments specified in subsection (2) to the extent that the law of Queensland applies to the land, other property, and instruments.
- (2) The land, other property, and instruments are –
 - (a) land in Queensland;
 - (b) other property whether in or outside Queensland; and
 - (c) instruments whether executed in or outside Queensland.
- (3) If a provision of this Act is inconsistent with a provision in another enactment, the provision in the other enactment prevails.
- (4) Without limiting subsection (3), this Act applies subject to –
 - (a) the *Land Title Act 1994*;
 - (b) the Land Act;
 - (c) the Mineral Resources Act; and
 - (d) the Coal Mining Act.
- (5) This section applies subject to any other provision of this Act or of another enactment providing otherwise.

PART 2 – GENERAL RULES AFFECTING PROPERTY

RECOMMENDATION 5. Section 7 should be repealed.

RECOMMENDATION 6. Section 8 should be repealed.

RECOMMENDATION 7. Section 9 should be repealed.

RECOMMENDATION 8. Section 6 should be repealed. The effect of section 6 should be included in a new provision drafted to replace sections 6, 10, 11, 12 and 59.

RECOMMENDATION 9. Section 10 should be repealed. The effect of the exception in section 10(2)(b) and (c) should be included in a new provision drafted to replace sections 6, 10, 11, 12 and 59.

RECOMMENDATION 10. Section 11 should be repealed. A new provision should be drafted to replace sections 6, 10, 11, 12 and 59.

RECOMMENDATION 11. Section 12 should be repealed and a new provision drafted to replace sections 6, 10, 11, 12 and 59.

RECOMMENDATION 12. Replace sections 6, 10, 11, 12 and 59 with a new section modelled on the New Zealand *Property Law Act 2007* (NZ) and amended definitions of ‘disposition’ and ‘short lease’.

For example, new provisions replacing sections 6, 10, 11, 12 and 59 of the PLA could be drafted in the following manner:

Section [] Contracts for sale or other disposition of land not enforceable unless in writing

- (1) A contract for the sale or other disposition of any interest in land is not enforceable by action unless—
 - (a) the contract, or a some note or memorandum of the contract, is in writing; and
 - (b) that writing is signed by the party against whom the contract is sought to be enforced or that party’s lawfully authorised agent.

Section [] Writing required for the creation of interests in land

- (1) The creation of a legal or equitable interest in land must be in writing and signed by the person creating the interest or by that person’s lawfully authorised agent.
- (2) A trust relating to land or an interest in land must be created in writing and signed by the settlor or the person declaring the trust.
- (3) This section does not affect—
 - (a) the creation or operation of a resulting, implied, or constructive trust;
 - (b) the making or operation of a will;
 - (c) the disposition of any interest in land by operation of law;
 - (d) the application of the law of part performance; or
 - (e) the creation of a short lease.

The schedule 6 Definitions could be drafted in the following manner:

disposition includes:

- (a) a sale;
- (b) a mortgage;
- (c) a transfer;
- (d) a grant;
- (e) a partition;
- (f) an exchange;
- (g) a lease;
- (h) an assignment;
- (i) a vesting instrument;
- (j) a declaration of trust;
- (k) a surrender, disclaimer, or release;
- (l) the creation of an easement, profit á prendre, or any other interest in property; and
- (m) every other assurance of property by an instrument,

but does not include:

- (a) a will;
- (b) a devise;
- (c) a bequest; or
- (d) an appointment of property contained in a will.

short lease is a lease:

- (a) for a term of 3 years or less;
- (b) from year to year or a shorter period; or
- (c) created by parol taking effect in possession, for a term not exceeding 3 years, including any option to renew.

Note: 'taking effect in possession' includes an immediate entitlement to possession.

Note: a short lease creates a legal interest in land.

RECOMMENDATION 13. The Centre recommends the insertion of a provision into the new PLA to clarify that a contract in electronic form will comply with the requirement for writing in the PLA if the criteria in section 11 of the *Electronic Transactions (Queensland) Act 2001* are satisfied.

RECOMMENDATION 14. The Centre recommends the insertion of a provision into the new PLA to clarify that:

- the signing requirement in section 59 can be satisfied by using an electronic signature;
- the mere fact the signature is electronic does not make the execution invalid; and
- the requirements for a valid electronic signature under section 59 are the same as section 14 of the *Electronic Transactions (Queensland) Act 2001*.

RECOMMENDATION 15. Section 13 should be repealed.

RECOMMENDATION 16. Section 14 should be amended to improve clarity.

For example, using the New South Wales provisions as a guide, section 14 could be drafted in the following manner:

Section [14] Transfers to oneself or to oneself and others

A person may transfer property to himself or herself, or to himself or herself and others.

RECOMMENDATION 17. Section 15 should be repealed.

RECOMMENDATION 18. Section 15A should be amended to provide that the section is subject to other legislation that regulates foreign ownership of property in Queensland.

For example, section 15A could be drafted in the following manner:

Section [15A] Foreign ownership

Subject to any other requirements in State or Commonwealth law applying to the acquisition, holding or disposal of property, a person is not prevented from acquiring, holding or disposing of real or personal property in Queensland by reason only that the person is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth).

RECOMMENDATION 19. Section 16 should be repealed.

RECOMMENDATION 20. Section 17 should be retained with modernised language.

RECOMMENDATION 21. Section 18 should be repealed.

PART 3 – FREEHOLD ESTATES

RECOMMENDATION 22. The effect of section 19 should be retained and relocated to ‘Part 1: Preliminary’.

RECOMMENDATION 23. Section 20 should be amend to modernise the language and to expressly state the provisions operate subject to any State or Commonwealth Act. The definition of ‘intestate’ should be relocated to the dictionary.

For example, using the Northern Territory provisions as a guide, section 20 could be drafted in the following manner:

Section [] – Incidents of tenure on grant in fee simple

- (1) On the commencement of this Act, any tenure created by the State on granting an estate in fee simple is to be taken to be in free and common socage without any incident of tenure for the benefit of the State.
- (2) If any quit rent issues to the State out of land, or the residue of any quit rent issues to the State out of land in respect of which quit rent has been apportioned or redeemed, the land or residue is released from quit rent.

Section [] – Abolition of escheat

- (1) In respect of the property of a person dying intestate on or after 16 April 1968:
 - (a) escheat is abolished; and
 - (b) all the property, whether real or personal, is, subject to this section and the *Succession Act 1981*, to be distributed in the manner and to the person or persons provided by that Act.
- (2) Subject to the *Corporations Act 2001* (Cth), the property of a corporation that is dissolved after the commencement of this Act is not to escheat, but the State is

- entitled to take as *bona vacantia* all the property, whether real or personal, that would, but for this Act, be liable to escheat or pass to the State as *bona vacantia*.
- (3) Despite this section, if the State, or it appears to the Minister that the State, has a right to any property by escheat or devolution or as *bona vacantia* on the death intestate of a person (whether the death occurred before or after the commencement of this Act), the Minister, on application being made for the waiver of that right, may, if he or she considers it reasonable to do so, by notice in the *Gazette* waive that right on the terms he or she thinks appropriate (which may include the payment of money) in favour of any of the following persons, whether belonging to the same or a different class:
 - (a) dependents, whether kindred or not, of the intestate;
 - (b) persons for whom the intestate might reasonably have been expected to make provision;
 - (c) persons to whom the State would, if the State's title had been proved by inquisition, have the power to grant the property;
 - (d) any other persons having, in the opinion of the Minister, a just claim to the grant of the property;
 - (e) trustees of persons referred to in paragraphs (a) to (d) inclusive.
 - (4) Subject to subsection (8), on a right of the State being waived under subsection (3), the right vests in the person or persons in favour of whom the waiver is made.
 - (5) For the purpose of giving effect to a waiver under subsection (3) the Minister may, by notice in the *Gazette* :
 - (a) appoint a person the Minister considers suitable to be administrator of the property of the person who has died intestate (***the deceased***);
 - (b) appoint a person to execute a conveyance or other document for the purpose of conveying, under the terms of the waiver, the property the subject of the waiver to the person or persons in whose favour the waiver is made; or
 - (c) specify the terms of the waiver and give the directions that the Minister considers necessary or desirable to give effect to the waiver (which terms and directions are to be complied with).
 - (6) The person appointed under subsection (5)(a) to be administrator may apply to the court for a grant of letters of administration of the property of the deceased, and the letters of administration may be granted accordingly.
 - (7) For the purposes of the grant of the letters of administration and the administration under the grant, the property in respect of which the right of the State has been waived is to be taken to form part of the estate of the deceased to be administered under the terms of the waiver for the benefit of the person or persons in favour of whom the waiver is made.
 - (8) A waiver under subsection (3) is to have the effect of a grant of the land or other property that is the subject of the waiver to the administrator appointed under this section or, if no administrator is appointed, to the person or persons in favour of whom the waiver is made.
 - (9) This section is subject to schedule 1 and all proceedings that may be brought under that schedule.
 - (10) Despite this section and the State's right, because of the death intestate of a person before the commencement of this Act, to any property of the person by escheat or devolution or as *bona vacantia*, the Public Trustee has and is to be taken to always have had (in addition to the powers of the Public Trustee under section 107 of the *Public Trustee Act 1978*) the same power:
 - (a) to obtain from the court or otherwise under the *Uniform Civil Procedure Rules 1999* authority to administer the estate of the person; and

- (b) to deal in due course of administration with the estate of the person, as the Public Trustee has in a case where the State has no right by escheat or devolution or as *bona vacantia*.

RECOMMENDATION 24. Section 21 should be repealed.

RECOMMENDATION 25. Amend sections 24 and 25 into a single provision in a way similar to the approach in section 68 of the *Property Law Act 2007* (NZ).

For example, using the New Zealand provisions as a guide, sections 24 and 25 could be combined into a single provision in the following manner:

Section [] Voluntary waste or equitable waste by life tenant

- (1) A life tenant is liable in damages for voluntary and equitable waste to the person entitled to the remainder expectant on the estate for life.
- (2) A life tenant may commit voluntary waste if it is permitted by an express or implied term in the instrument creating the estate.
- (3) A life tenant may commit equitable waste if it is permitted by an express term in the instrument creating the estate.

RECOMMENDATION 26. Section 26 should be retained with modernised language.

The elements of the section that are to be included in the redrafted provision are:

Where:

- the estate is an estate *pur autre vie*, that is – an estate held for the duration of the life or lives of another person or persons;
- the person or persons for whose life/lives the estate is held die/dies; and
- the person entitled to the estate upon the death of that person or persons (the remainderman) immediately becomes entitled to the property;

Then:

- the person entitled to the estate can bring an action to:
 - recover possession of the property;
 - damages for account of rent and/or profits.

In any action by the remainderman:

- the remainderman may adduce evidence that the person or persons for whose life/lives the estate is held has/have died;
- the holder of the estate *pur autre vie* may produce in court the person or persons for whose life/lives the estate is held, or other evidence that he or she, or they, are living; and
- where the person or persons for whose life/lives the estate is held is/are absent for a period of seven years or more, the court is entitled to draw a presumption that that person or persons has/have died.

Subsequently:

- where the estate *pur autre vie* is brought to an end by court order on the basis that the *cestui que vie* has died, and it transpires that the *cestui que vie* is in fact alive, the court may order such relief as it sees fit to the person who had the estate *pur autre vie*.

RECOMMENDATION 27. Section 27 should be retained with modernised language and amended to:

- remove the reference to ‘wilful’;
- change the rate of rent to be recovered to ‘market rent’;
- specify that the amount owed as a result of the holding over can be recovered as a debt.

For example, section 27 could be amended in the following manner:

Section [27] Penalty for holding over by life tenant

- (1) Where any tenant for life or lives or person who is in or comes into possession of any land by, from or under or by collusion with such tenant, holds over any land after—
 - (a) termination of the tenancy; and
 - (b) demand has been made and notice in writing given for the delivery of possession of the land by the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;
 then, the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of the land, be liable to the person kept out of possession at the rate of market rent of the land so detained for as long as the land shall have been so detained, to be recovered by action in a court of competent jurisdiction.
- (2) The calculation of the market rent for the land will, unless otherwise agreed by the parties, be determined by a suitably qualified valuer acting as an expert appointed by the parties and if the parties cannot agree then appointed by the President of the Law Society.
- (3) The amount of market rent for the land as determined according to subsection (2) is recoverable as a debt.

RECOMMENDATION 28. Sections 22, 23 and 28 should be amended to make it clear that the section abolishes estates tail, quasi-entails and the rule in *Shelley's Case*. Relocate the redrafted sections 22, 23 and 28 to ‘Part 1: Preliminary’.

For example, using the New Zealand provisions as a guide, a new provision replacing sections 22, 23 and 28 could be drafted in the following manner:

Section [] Abolition of obsolete estates and rules

- (1) To remove all doubt the following may not be created or done:
 - (a) estates tail;
 - (b) quasi-entails.
- (2) In an instrument coming into operation on or after 1 December 1975, words which, before that date, would have created an estate tail are to be treated as creating an estate in fee simple.
- (3) The rule known as the rule in *Shelley's Case* is abolished.

RECOMMENDATION 29. Section 29 should be repealed.

PART 4 – FUTURE INTERESTS

RECOMMENDATION 30. Section 30 should be retained. Amend reference to section 22 if required.

RECOMMENDATION 31. Section 31 should be amended to retain the effect of section 31(1) but not section 31(2).

For example, using the New Zealand provisions as a guide, section 31 could be amended in the following manner:

Section [31] Creation and disposition of estates and interests in property

- (1) Every estate, interest, or right in property that can be created or disposed of may be created or disposed of by an individual –
 - (a) during the individual’s lifetime; or
 - (b) by will.
- (2) However, subsection (1) does not make a joint tenancy severable by will.

RECOMMENDATION 32. Section 32 should be amended to provide clarity.

For example, using the New Zealand provisions as a guide, section 32 could be amended in the following manner:

Section [32] When gifts over cease to be capable of taking effect

- (1) This section applies if –
 - (a) a person (**person A**) is entitled to an estate or interest in land; and
 - (b) the estate or interest is subject to a gift over to another person (**person B**) if person A has no issue or no issue of a specified class (whether at any specified time or within any specified period).
- (2) The gift over ceases to be capable of taking effect as soon as there is issue, or a member of the specified class of issue, who attains the age of 18 years.
- (3) Subsection (2) applies even if the issue may subsequently fail.
- (4) In this section, gift over includes a gift over expressed to take effect on the ending of an estate or interest preceding that of the person whose estate or interest is the subject of the gift over.
- (5) This section applies where the executory limitation is contained in an instrument coming into operation after 1 December 1975.

PART 5 – CONCURRENT INTERESTS – CO-OWNERSHIP

RECOMMENDATION 33. Section 33 should be retained.

RECOMMENDATION 34. Section 34 should be amended to remove the words ‘body corporate’ and replace them with ‘corporation’. Section 34(2) should be amended to remove the word ‘dissolution’ and replace it with the word ‘deregistration’. Section 34 should be amended to include a definition of ‘corporation’ for the purposes of the division only.

For example, the word ‘corporation’ could be defined in the following manner:

In this Division ‘corporation’ has the same meaning as section 57A of the *Corporations Act 2001* (Cth).

RECOMMENDATION 35. Section 35 should be retained.

RECOMMENDATION 36. Section 36 should be retained.

RECOMMENDATION 37. Section 37 should be amended to modernise the language and aid in interpretation of the scope of the section. The amended provisions should provide clear and concise definitions for:

- co-owner;
- property; and
- security interest.

For example, using the Victorian provision as a guide, section 37 could be drafted in the following manner:

Division 1 Preliminary

Section [37] Definitions

In this division —

co-owner means a person who has an interest in land or chattels with one or more other persons as—

- (a) joint tenants; or
- (b) tenants in common;

property means—

- (a) real and personal property, including any estate or interest in real or personal property; or
- (b) money; or
- (c) a debt; or
- (d) a thing in action; or
- (e) a right with respect to property;

security interest means an interest in or power over property by way of security for the payment of a debt or other pecuniary obligation and includes, in relation to land, a mortgage, charge or lien, whether or not registered under the *Land Title Act 1994*.

RECOMMENDATION 38. Sections 37A and 37B should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

RECOMMENDATION 39. Part 5 Division 2 should be amended to modernise the language and aid in interpretation of the scope of the provision. The effect of the Division should be retained. The amended provisions should:

- retain the power of the court to make an order appointing a trustee for sale or a trustee for partition and vesting property in same;
- retain the power of the court to order the sale of chattels;
- set out what happens to an encumbrance over an undivided share of land upon vesting in the trustee;
- preserve the rights of parties who hold a security interest over the property that is the subject of an application;
- provide guidance to the court as to which matters it should take into consideration when making orders under this Division;
- provide the court with a broad discretion to make orders to effect a just and fair distribution of property between co-owners, whether by sale or by partition;

- provide the court with the power to stay or adjourn proceedings that should properly be heard in the Family Law jurisdiction;
- rely on the *Trusts Act 1973* with respect to the rules for appointing and removing trustees;
- retain the power of the court to make orders for a co-owner to account to another co-owner;
- modernise the language by replacing the word ‘partition’ with the word ‘division’ (noun) or ‘divide’ (verb).

For example, drawing on parts of the Victorian approach, Part 5 Division 2 could be drafted in the following manner:

Section [37A] Other forms of severance not affected

Nothing in this Part affects or prevents the severing of a joint tenancy by any other means that exist under this Act or any other Act or law.

Section [37B] Security interests not affected

Despite anything to the contrary in any instrument creating a security interest, the severing of a joint tenancy in accordance with this Part—

- (a) does not constitute a breach of the covenants or terms of that instrument; and
- (b) does not affect any existing powers, rights or interests of the holder of a security interest over the property to which that severance relates.

Section [37C] Parties to a proceeding

In addition to any other parties, all co-owners of the land to which the proceeding relates are parties to a proceeding in court under this Division.

Section [37D] Adjournment of hearings or stays of applications—spouses or domestic partners

- (1) The court may stay an application or adjourn its hearing under this Division at any time before it has made a final order under Division 2 or Division 3 if proceedings in relation to property of a co-owner who has made an application under Division 3 are commenced—
 - (a) under the *Family Law Act 1975* (Cth); or
 - (b) under Part 19 of this Act.
- (2) The court may adjourn its hearing at any time before it has made a final order under Division 2 or Division 3 to permit a co-owner of property to commence proceedings in relation to property of the co-owner—
 - (a) under the *Family Law Act 1975* (Cth); or
 - (b) under Part 19 of this Act.
- (3) Nothing in this section limits the power of the court to grant or refuse an adjournment or a stay in relation to any proceeding before it.

Division 2 Sale and division

Section [38] Application for appointment of trustee for sale or division of land

- (1) A co-owner of land may apply to court for an order or orders under this Division to be made in respect of that land.
- (2) In an application under this section the court may order the appointment of a trustee or trustees for —
 - (a) the sale of the land and the division of the proceeds among the co-owners; or
 - (b) the physical division of the land among the co-owners; or
 - (c) a combination of the matters specified in paragraphs (a) and (b).

- (3) A person who makes an application under subsection (1) must give notice of the application to the holder of a security interest over the land to which the application relates.
- (4) In an order under subsection (2) appointing a trustee or trustees for the purposes of the sale of land, the court may make any order it thinks fit to ensure that a just and fair sale of land occurs, including but not limited to orders that—
 - (a) direct the trustee or trustees as to the terms and conditions on which any sale is to be carried out; and
 - (b) direct the trustee or trustees as to the distribution of any proceeds of the sale in any manner specified by the court.
- (5) In an order appointing a trustee or trustees for the purposes of a physical division of land, the court may make any order it thinks fit to ensure that a just and fair division of land occurs, including but not limited to orders that direct the trustee or trustees as to the manner in which the division is to be carried out.
- (6) An order under this section may provide for the remuneration of the trustee or trustees appointed under the order and—
 - (a) if a trustee or trustees are appointed for the purposes referred to in subsection (4), the order may provide that the remuneration of the trustee or trustees be paid from the proceeds of sale; and
 - (b) if a trustee or trustees are appointed for the purposes referred to in subsection (5), the order may provide that the remuneration of the trustee or trustees be paid by such parties to the proceeding as the court considers just and fair in the circumstances.

Section [38A] Property vests in trustee for sale or division

- (1) Upon the appointment of a trustee or trustees for sale or division under this Division, the land that is the subject of the application vests in the trustee or trustees in accordance with section 90 of the *Trusts Act 1973*.
- (2) Where the land is subject to an encumbrance affecting the entirety, then the land vests in the trustee subject to that encumbrance.
- (3) Where an undivided share of the land is subject to an encumbrance, then the land vests in the trustee free of that encumbrance and the interest of the party entitled to the benefit of that encumbrance is converted to an equitable interest in the proceeds of sale that that co-owner might otherwise have been entitled to.

Section [38B] Sale and division of proceeds to be preferred

- (1) If the court determines that an order should be made for the sale and division of land which is the subject of an application under this Division, the court must make an order under section 38(2)(a) unless the court considers that it would be more just and fair to make an order under section 38(2)(b) or section 38(2)(c).
- (2) Without limiting any matter which the court may consider, in determining whether an order under section 38(2)(b) or section 38(2)(c) would be more just and fair, the court must take into account the following—
 - (a) the use being made of the land, including any use of the land for residential or business purposes;
 - (b) whether the land is able to be divided and the practicality of dividing the land;
 - (c) any particular links with or attachment to the land, including whether the land is unique or has a special value to one or more of the co-owners.

Section [39] Court can order sale or division of chattels

- (1) A co-owner of chattels may apply to court for an order or orders under this Division to be made in respect of those chattels.
- (2) In any proceeding under subsection (1), the court may order—
 - (a) the sale of the chattels and the division of the proceeds of sale among the co-owners; or
 - (b) the physical division of the chattels among the co-owners; or
 - (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.
- (3) Without limiting the court's powers, the court may make any other orders under this section it thinks fit to ensure that a just and fair sale or division of chattels occurs.

Section [40] Order varying entitlements to land or chattels

When making an order under this Division, the court, if it considers it just and fair, may order—

- (a) that the land or chattels be physically divided into parcels or shares that differ from the entitlements of each of the co-owners; and
- (b) that compensation be paid by specified co-owners to compensate for any differences in the value of the parcels or shares when the land or the chattels are divided in accordance with an order under paragraph (a).

Section [40B] Other orders the court can make

In any proceeding under this Division, without limiting the orders the court can make, the court may order—

- (a) that the land or chattels be sold by private sale or at auction;
- (b) that the co-owners may purchase the land or chattels at that sale or auction;
- (c) in the case of a private sale, that the sale be at fair market price as determined by an independent valuer;
- (d) in the case of an auction, that the reserve price is the reserve price set by the court;
- (e) that an independent valuation of the land or chattels take place;
- (f) that a sale is to be completed within a specified time;
- (g) that the costs of the sale be met—
 - (i) by one or more of the co-owners; or
 - (ii) from the proceeds of the sale;
- (h) that the sale and division of the proceeds of sale or the physical division of the land or chattels is subject to any terms and conditions which the court considers necessary or desirable in any particular case;
- (i) in the case of land, that any necessary documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively.

Section [41] Orders as to compensation and accounting

- (1) In any proceeding under this Division, the court may order—
 - (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
 - (b) that one or more co-owners account to the other co-owners in accordance with section 43;
 - (c) that an adjustment be made to a co-owner's interest in the land or chattels to take account of amounts payable by co-owners to each other during the period of the co-ownership.
- (2) In determining whether to make an order under subsection (1), the court must take into account the following—

- (a) any amount that a co-owner has reasonably spent in improving the land or chattels;
 - (b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or chattels;
 - (c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or chattels for which all the co-owners are liable;
 - (d) damage caused by the unreasonable use of the land or chattels by a co-owner;
 - (e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;
 - (f) in the case of chattels, whether or not a co-owner who has used the chattels should pay an amount equivalent to rent to a co-owner who did not use the chattels.
- (3) The court must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—
- (a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has occupied the land in relation to the land; or
 - (b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or
 - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner.
- (4) The court must not make an order requiring a co-owner who has used chattels to pay an amount equivalent to rent to a co-owner who did not use the chattels unless—
- (a) the co-owner who has used the chattels is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has used the chattels in relation to the chattels; or
 - (b) the co-owner claiming an amount equivalent to rent has been excluded from using the chattels; or
 - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to use the chattels with the other co-owner.
- (5) This section applies despite any law or rule to the contrary.

Division 3 Accounting

Section [42] Application for order for accounting

- (1) A co-owner of land or chattels may apply to the court for an order under this Division to be made for an accounting in accordance with section 43.
- (2) An application under this section may be made whether or not an application is made under Division 2.

Section [42A] Orders the court can make

- (1) In any proceeding under this Division, the court may make any order it thinks fit to ensure that a just and fair accounting of amounts received by co-owners in respect of the land or chattels occurs.
- (2) Without limiting the court's powers, it may—
 - (a) order a co-owner who has received more than the share of rent or other payments from a third party in respect of the land or chattels to which that co-

- owner is entitled to account for that rent or other payments to the other co-owners; and
- (b) make any order it considers just and fair for the purposes of an accounting by a co-owner who has received more than that co-owner's just and proportionate share to the other co-owners of the land or chattels.

Section [43] Liability of co-owner to account

A co-owner is liable, in respect of the receipt by him or her of more than his or her just or proportionate share according to his or her interest in the property, to account to any other co-owner of the property.

RECOMMENDATION 40. Section 39 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

RECOMMENDATION 41. Section 40 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

RECOMMENDATION 42. Section 41 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

RECOMMENDATION 43. Section 42 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

RECOMMENDATION 44. Section 43 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

PART 6 – DEEDS, COVENANTS, INSTRUMENTS AND CONTRACTS

RECOMMENDATION 45. The limitation period for deeds under the *Limitation of Actions Act 1974* should be the same as the limitation period for contracts. Section 10(3) of the *Limitation of Actions Act 1974* should be amended as follows:

- (3) *An action upon a specialty shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.*

RECOMMENDATION 46. Section 44 should be amended with modernised language so that section 44(1) is removed and section 44(2) does not include the phrase 'whether or not being an indenture'.

RECOMMENDATION 47. Section 45 should be replaced with a new provision dealing with the execution of deeds, combining the requirements for valid execution of deeds by individuals and corporations into a single section. The new provision should remove the requirement for deeds to be written on paper or to be sealed or deemed to be sealed and expressly allow for deeds to be created electronically.

RECOMMENDATION 48. Section 46 should be replaced with a new provision dealing with the execution of deeds by individuals and corporations in a single section. The new provision should expressly remove the requirements for:

- writing on paper; and
- sealing or deemed sealing.

For example, following the New Zealand approach, sections 45 and 46 could be replaced with a combined provision drafted in the following manner:

Section [45] Signing of deeds

- (1) An instrument will take effect as a deed if it is:
 - (a) in writing and contains a conspicuous statement that the instrument takes effect as a deed;
 - (b) signed in accordance with this section; and
 - (c) delivered in accordance with section [47 on delivery].
- (2) An individual may sign an instrument as a deed if:
 - (a) the instrument is signed by the individual or their authorised agent; or
 - (b) where the deed is signed in electronic form, the instrument is signed by the individual or their authorised agent using a method in accordance with section 14 of the *Electronic Transactions (Queensland) Act 2001*.
- (3) A corporation may:
 - (a) sign an instrument as a deed with or without using a common seal if the instrument is signed:
 - (i) by 2 directors of the corporation;
 - (ii) by a director and a secretary of the corporation;
 - (iii) if the corporation has a sole director, by that director; or
 - (iv) by an authorised agent;
 - (b) if the corporation is a statutory corporation, sign an instrument as a deed in a manner authorised by the Act under which the corporation is incorporated or registered; or
 - (c) sign an instrument as a deed in electronic form if the instrument is signed as required by this subsection (3) using a method in accordance with section 14 of the *Electronic Transactions (Queensland) Act 2001*.
- (4) An instrument is signed as a deed if it has been signed in accordance with subsection (2) or (3).
- (5) This section does not limit the ways in which a corporation may sign a deed.
- (6) A corporation not incorporated by or under a law of Australia may sign a deed using any method authorised by the law of the place in which the corporation is incorporated.
- (7) For the avoidance of doubt, an instrument created in accordance with this section will take effect as a deed notwithstanding that:
 - (a) it is not written on paper or a particular substance; and
 - (b) it is not sealed or expressed to be sealed.
- (8) Nothing in this section affects any deed signed before the commencement of this Act.
- (9) In this section –

corporation includes a statutory corporation or a corporation under the *Corporations Act 2001* (Cth).

statutory corporation means a corporation sole or aggregate or any corporation incorporated under the laws of the State of Queensland.

RECOMMENDATION 49. Section 47 should be retained with modernised language.

For example section 47 could be modernised in the following manner:

Section [47] Delivery of deeds

- (1) The execution of an instrument in the form of a deed does not, of itself, import delivery unless a contrary intention is expressed in clear words.
- (2) Subject to subsection (1), delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery.
- (3) In this section—
delivery means the intention to be legally bound either immediately or subject to fulfilment of 1 or more conditions.

RECOMMENDATION 50. Section 48 should retained with modernised language.

RECOMMENDATION 51. Section 49 should retained with modernised language.

RECOMMENDATION 52. Section 50 should retained with modernised language.

RECOMMENDATION 53. Section 51 should be retained with modernised language.

RECOMMENDATION 54. Section 52 should be repealed.

RECOMMENDATION 55. Section 53(1) and (2) should be retained. Section 53(3) should be repealed. Section 53(4) should be amended to read: *‘This section applies only to covenants made after 1 December 1975, but shall take effect subject to the Land Title Act 1994.’*

RECOMMENDATION 56. The new PLA should include provisions which allow the enforcement of certain covenants in registered easements. This should include a definition of ‘covenant’ that applies to the section only. Section 4 should be repealed.

For example, the PLA could include a section drafted in the following manner:

Section [] Enforceability of covenants contained in registered easements

- (1) In this section –
covenant means an obligation (whether positive or negative) in respect of the use, ownership or maintenance of particular land (servient land) that is created for the benefit of other land (dominant land).
- (2) Covenants contained in registered easements are binding upon and enforceable by and against successors in title to the grantor and the grantee.
- (3) Subsection (2) does not apply to covenants that are expressed to be personal to the original grantor or grantee.
- (4) The types of covenants to which subsection (2) applies include, but are not limited to:
 - (a) obligations for the payment of rates and taxes related to the area of the easement;
 - (b) obligations to maintain or repair, or contribute to the maintenance or repair of the easement;
 - (c) obligations to contribute to the building, maintenance or repair of infrastructure used in connection with the easement.
- (5) This section applies to all registered easements regardless of when the instrument was registered.
- (6) The rights created by section [number] are in addition to those rights under the *Land Title Act 1994*.

Section [to replace repealed section 4] Act not to be taken to confer right to register restrictive Covenant

Nothing in this Act shall be construed as conferring on any person a right to registration of a restrictive covenant.

RECOMMENDATION 57. Section 54 should be retained with modernised language.

RECOMMENDATION 58. Section 55 should be amended to provide clear language to aid in application and interpretation of the section. The Centre recommends the following:

- remove the requirement for ‘acceptance’ but retain the requirement that any corresponding obligations on the beneficiary be imposed, should the promise be enforced;
- retain the broad effect of the definition of beneficiary that includes a beneficiary not identified or in existence at the time the promise was made and expand this to include classes of persons to remove any doubt that the section applies to successors in title and assigns.
- amend section 55(5) to provide clarity and remove the reference to an interest in land created under any other Act because it is clear in section 5 that the PLA operates subject to the *Land Title Act 1994*.

For example, using the Western Australian provision as a guide, section 55 could be drafted in the following manner:

Section [55] Persons taking who are not parties

- (1) A promisor who, for a consideration moving from the promisee, promises to do or refrain from doing an act or acts for the benefit of a beneficiary shall be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Unless the contract referred to in subsection (1) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the beneficiary has adopted it either expressly or by conduct.
- (3) Where a contract referred to in subsection (1) expressly in its terms purports to confer a benefit directly on a beneficiary who is not named as a party to the contract, the contract is enforceable by the beneficiary in his own name but —
 - (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
 - (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
- (4) This section applies to promises for the creation of an interest in land, subject to section [new sections replacing 6, 10,11, 12 and 59].
- (5) This section applies to promises made after the commencement of this Act.
- (6) In this section-

beneficiary includes a person designated by name, description or class and who may or may not have been identified and in existence at the time the promise was made.

Alternative wording

Section [55] Persons taking who are not parties

- (1) A promisor who promises to do or refrain from doing an act or acts:
 - (a) for the benefit of a beneficiary;
 - (b) after the commencement of this Act; and
 - (c) for consideration moving from the promisee,
 shall be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Unless the contract referred to in subsection (1) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the beneficiary has adopted it either expressly or by conduct.
- (3) A contract referred to in subsection (1) is enforceable by the beneficiary in the beneficiary's own name if the contract expressly in its terms purports to confer a benefit directly on a beneficiary who:
 - (a) is not named as a party to the contract;
 - (b) is designated by name, description or class; and
 - (c) may or may not have been identified and in existence at the time the promise was made.
- (4) In an action brought by a beneficiary described in subsection (3):
 - (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
 - (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
- (5) This section applies to promises for the creation of an interest in land, subject to section [new sections replacing 6, 10,11, 12 and 59].

RECOMMENDATION 59. Section 56 should be amended to include indemnities. Provisions should be inserted that allow for a contract of guarantee and indemnity to be formed electronically if the contract complies with the requirements of sections 11 and 14 of the *Electronic Transactions (Queensland) Act 2001*, subject to exceptions in the *National Credit Code*.

RECOMMENDATION 60. Section 57 should be retained with modernised language.

RECOMMENDATION 61. Section 57A(2) should be amended. The amendments should state that where a statute provides for certificates, consents or approvals to be obtained before the contract is entered into, unless specified to the contrary, the contract will not be void or unenforceable provided the certificate, consent or approval is obtained before settlement. If this approach is adopted, subparagraphs (a) to (d) in the current section are not required and should be repealed.

RECOMMENDATION 62. Section 58 should be repealed.

RECOMMENDATION 63. Section 58A should be retained.

RECOMMENDATION 64. Section 58B should be retained.

RECOMMENDATION 65. Section 60 should be repealed on the basis that the same or similar provision is inserted in the *Property Occupations Act 2014*.

RECOMMENDATION 66. The Centre makes the following recommendations with respect to section 61:

- repeal section 61(1)(a);
- retain 61(1)(b) but modify the language slightly by removing the words ‘forming part of the vendor’s title’ and replacing them with words to the effect of ‘which is within the seller’s possession’;
- repeal section 61(1)(c);
- retain section 61(1)(d);
- repeal section 61(1A);
- amend section 61(2)(a) to make it clear that the subsection does not apply to electronic conveyancing;
- retain section 61(2)(b);
- amend section 61(2)(c) to make it clear that the subsection does not apply to electronic conveyancing;
- amend sections 61(3) and 61(3A) in terms of the proposed draft provided below;
- retain section 61(4);
- bring provisions about time (i.e. section 61(3), 61(3A) and 70A) together under section 62; and
- add a section that deals with the situation where a party is unable to attend a place for settlement because of a natural disaster-type event in terms of the proposed draft provided below.

For example, sections 61(3) and 61(3A) could be redrafted in the following manner:

- (3) Where in any contract for the sale of any land the date for settlement is a day which not a business day in the place for settlement in the contract or as determined by section 61(2)(c), unless the contract designates such day as a Saturday, a Sunday, or by the name of the public holiday, settlement shall take place:
- (a) on a day agreed by the parties or their solicitors; or
 - where no such agreement is made, then
 - (b) on the next business day in the place for settlement.

For example, a section that deals with the situation where a party is unable to attend a place for settlement because of a natural disaster-type event could be drafted in the following terms:

Section [61A] Adverse event preventing attendance at place of settlement

- (1) In this section –
- (a) a seller or a buyer includes their solicitors and agents;
 - (b) **adverse event** means an event that causes a serious disruption to a community and includes, but is not limited to:
 - (i) cyclone;
 - (ii) seismic event;
 - (iii) flood;
 - (iv) storm;

- (v) storm tide;
 - (vi) tsunami;
 - (vii) tornado;
 - (viii) fire;
 - (ix) landslide;
 - (x) civil commotion;
 - (xi) act of terrorism;
 - (xii) riot or public disturbance;
 - (xiii) war or war-like activity whether or not war is declared;
 - (xiv) explosion;
 - (xv) sudden impact of objects such as aircraft or spacecraft.
- (c) **disruption period** means the time during which the seller or the buyer is prevented from physically attending settlement as a result of an adverse event.
- (d) **business day** means a day other than:
- (i) a Saturday or Sunday;
 - (ii) a public holiday; or
 - (iii) a day in the period 27 to 31 December.
- (2) This section applies to a contract of sale if:
- (a) time is of the essence; and
 - (b) the buyer or the seller, without fault on their part, are unable as a result of an adverse event, to attend settlement on the day and time determined in accordance with the contract or under this Act.
- (3) Time ceases to be of the essence of the contract.
- (4) For the disruption period a failure by the buyer or the seller to attend settlement in the place for settlement in the contract or as determined by section 61(2)(c), at the time for settlement as determined in the contract or otherwise agreed by the parties, will not be a breach of the contract.
- (5) The party that is unable to attend the time and place for settlement as a result of the adverse event must:
- (a) as soon as is practical notify the other party to the contract by any means about the adverse event and how it prevents them from attending settlement at the time and place for settlement;
 - (b) take reasonable steps to mitigate the effect of the adverse event with respect to attending the time and place for settlement;
 - (c) as soon as is practical give a written notice to the other party advising that the disruption period is over and include in that notice a specific time and date for settlement being not less than 5 business days and not more than 10 business days from the date of service of that notice.
- (6) Upon service of the notice described in [61A](5)(c) time is again of the essence.

RECOMMENDATION 67. Section 62 should be retained. The provisions that relate to time should be brought together within the new PLA, i.e. sections 61(3), 61(3A) and 70A.

RECOMMENDATION 68. Section 63 should be repealed.

RECOMMENDATION 69. Section 64 should be amended to allow the buyer the right to rescind the contract while the dwelling remains unfit for occupation, up until the date for settlement and if the buyer has not rescinded the contract before settlement or before the dwelling is once again fit for occupation, then the seller is bound by the contract and must proceed to settlement. The

amendment should be made to clarify the meaning of ‘date of completion’ as the date of actual completion, taking into account any extensions by agreement or by operation of the Act.

RECOMMENDATION 70. Section 65 should be repealed.

RECOMMENDATION 71. Section 66 should be amended to provide greater clarity about the operation of the section.

For example, the section could be drafted in the following manner:

- (1) Written directions given by a seller’s solicitor to the buyer or their solicitor, or financial institution manager in relation to the payment of any money under the contract is sufficient discharge of the purchaser in respect of the payment of money.
- (2) In this section –
 - financial institution manager*** means the person performing the function of general manager or manager of a financial institution, and includes an agent of the financial institution manager.
 - solicitor*** includes the agent of the solicitor.

RECOMMENDATION 72. Section 67 should be repealed.

RECOMMENDATION 73. Section 67A should be retained.

RECOMMENDATION 74. Section 68 should be amended.

For example, using the New South Wales legislation as a guide, section 68 could be drafted in the following terms:

Section [68] Damages for breach of contract for sale

- (1) The rule of law known as the rule in *Bain v Fothergill* is abolished in relation to contracts for the sale or other disposal of registered land or any interest in registered land made after the commencement of this section.
- (2) The court may award damages for loss of bargain against a seller who cannot perform such a contract because of a defect in the seller’s title.
- (3) This section shall not affect any right, power or remedy which, apart from this section, may be available to a buyer in respect of the failure of a seller to show or make good title or otherwise perform a contract for the sale of land.

RECOMMENDATION 75. Section 68A should be retained with modernised language.

RECOMMENDATION 76. Section 69 should be amended in the following manner:

- remove the words ‘or doubt’ from section 69(1) and (2); and
- expand the section to give the courts a general discretion to return deposits in certain circumstances.

For example, using the New South Wales legislation as a guide, section 69 could be expanded by the inclusion of a subsection drafted in the following manner:

Section [69] [subsection number]

Where the court refuses to grant specific performance of a contract against a buyer or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.

RECOMMENDATION 77. Section 70 should be repealed.

RECOMMENDATION 78. Section 70A should be retained.

RECOMMENDATION 79. Insert provisions in the new PLA that will address the issue of inoperative computer systems on the day of settlement.

For example, adopting the approach in the REIQ standard for contract for sale of land, the provision could be drafted in the following way:

Section [] Computer systems inoperable or unavailable at settlement

- (1) In this section –
 - business day** means a day other than:
 - (a) a Saturday or Sunday;
 - (b) a public holiday; or
 - (c) a day in the period 27 to 31 December.
 - electronic lodgement** means lodgement of a document in the Titles Registry in accordance with the Electronic Conveyancing National Law.
 - electronic settlement** means financial settlement and electronic lodgement in the land registry facilitated by an ELN.
 - settlement date** is the date for settlement as agreed by the parties, or by operation of this section.
- (2) This section applies:
 - (a) to contract for the sale of land where time is of the essence; and
 - (b) where an electronic settlement cannot occur by 4pm on the settlement date because of an inoperative computer system operated by:
 - (i) Titles Registry;
 - (ii) Office of State Revenue;
 - (iii) Reserve Bank;
 - (iv) a financial institution; or
 - (v) an ELN.
- (3) If subsection (2) applies then:
 - (a) no party is in default;
 - (b) the settlement date is deemed to be the next business day; and
 - (c) time remains of the essence;
- (4) If the subsection (3) applies, then parties must do everything required in the electronic lodgement network to enable settlement to occur on the settlement date.

RECOMMENDATION 80. Section 71 should be amended with modernised language to provide that an instalment contract is not created merely by payments from the buyer to, or at the direction of, the seller between contract date and settlement. This will include payments: for rent and outgoings; to maintain the land; of interest on the balance of the purchase price; for an extension of time; for rates and taxes; or any other similar payment.

For example, section 71 could be drafted in the following manner:

Section [] Definitions for division

In this division—

buyer includes any person from time to time deriving an interest under an instalment contract from the original seller under the contract.

contract for the sale of land does not include a contract for the sale of a proposed lot.

deposit means a sum not exceeding 10% of the purchase price—

- (a) paid or payable in 1 or more amounts to secure the buyer’s performance of the contract; and
- (b) refundable to the buyer on breach of contract by the seller or for non-fulfilment of a contingent condition of the contract.

instalment does not include –

- (a) an option fee;
- (b) payments by the buyer between contract date and settlement for:
 - (i) rent and outgoings;
 - (ii) maintenance of the land;
 - (iii) interest on the balance of the purchase price;
 - (iv) an extension of time to complete the contract;
 - (v) rates and taxes relating to the land; or
 - (vi) any similar payment.

instalment contract means a contract for the sale of land in terms of which the buyer is bound to make a payment or payments by instalment of the purchase price (other than a deposit) without becoming entitled to receive a transfer of the title in registrable form in exchange for the payment or payments.

payment includes a payment made to any person in discharge of a debt of the seller or in reimbursement of the seller.

proposed lot means—

- (a) a proposed lot within the meaning of the *Land Sales Act 1984*; or
- (b) a proposed lot within the meaning of the *Body Corporate and Community Management Act 1997*; or
- (c) land that will be shown as a lot on a building units plan or group titles plan registered under the *Building Units and Group Titles Act 1980*; or

Note—

There is limited scope for the registration of new building units plans and group titles plans under the *Building Units and Group Titles Act 1980*—see section 5A of that Act.

- (d) a proposed lot within the meaning of the *South Bank Corporation Act 1989*, section 97B.

sale includes an agreement for sale.

seller includes any person to whom the rights of a seller under an instalment contract have been assigned with the consent of the buyer under section 73.

RECOMMENDATION 81. Section 71A should be amended with modernised language so that section 71A(1) is repealed and section 71A(2) is amended as follows:

Where a contract for the sale of land may at the election of the buyer be performed in a manner which would constitute an instalment contract, it will not be presumed to be an instalment contract until the buyer elects in writing to perform it in that manner.

Section 71A(3) and (4) should be retained.

RECOMMENDATION 82. Section 72(1), 72(2) and 72(3) should be retained with modernised language and section 72(4) should be repealed.

RECOMMENDATION 83. The effect of section 73 should be retained and amended with modernised language to:

- allow the seller to void the contract at any time before settlement if the land the subject of the instalment contract is mortgaged or sold in contravention of the section; and
- provide that a seller may not rely on a buyer’s consent to the mortgage or sale of the land the subject of the instalment contract if the consent is given in advance to the terms of the mortgage or sale being known.

For example, section 73 could be amended in the following manner:

Section [73] Land not to be mortgaged or sold by the seller

- (1) A seller under an instalment contract may not, without the consent of the buyer, mortgage or sell the land the subject of the contract.
- (2) The consent of a buyer is of no effect if the consent is given in advance of the terms of the sale or the mortgage being provided to the buyer.
- (3) If the land is sold or mortgaged in contravention of this section the instalment contract is voidable by the buyer at any time before completion of the contract.
- (4) Where an instalment contract has been voided under subsection (3), the buyer will be entitled to recover the deposit and the instalment payments as a debt.
- (5) Nothing in this section affects any other right or remedy the buyer may have at law or under the instalment contract.

RECOMMENDATION 84. Section 74 should be retained with modernised language.

RECOMMENDATION 85. Section 75 should be amended to remove:

- the one-third threshold before a buyer can call for the seller to transfer the land; and
- the seller’s ability to require the buyer to accept a transfer of the land.

For example, section 75 could be drafted in the following manner:

Section [75] Right to require transfer

- (1) A buyer who is not in default under an instalment contract may require the seller to transfer the land to the buyer by giving the seller at least 3 months notice in writing of that intention.
- (2) The notice must —
 - (a) state that the buyer is requiring the seller to transfer the land to the buyer subject to terms to be agreed between the parties, and
 - (b) nominate the date for settlement of the transfer as no earlier than 3 months from the date of receipt of the notice by the seller.
- (3) Where the parties cannot agree on the terms in subsection (2)(a), the transfer will be subject to the performance of the obligations of the buyer under the instalment contract up to and including the date of settlement.
- (4) Where notice has been given in accordance with subsection (1) and (2) above, failure to transfer the land or execute any instrument required to give effect to the transfer will be deemed a breach of contract.

RECOMMENDATION 86. Section 76 should be repealed.

PART 7 – MORTGAGES

RECOMMENDATION 87. Section 77 should be retained with modernised language including removal of the term ‘*memorandum of mortgage*’.

RECOMMENDATION 88. Section 77A should be retained with modernised language and amended to remove reference to old system land.

RECOMMENDATION 89. Section 78 should be retained with modernised language.

RECOMMENDATION 90. Section 79 should be retained with modernised language and updated so that it is clear a single variation of mortgage may vary any of the following:

- the interest rate payable;
- the secured amount;
- the term of the mortgage; and
- any other condition, covenant or provision in the instrument of mortgage.

RECOMMENDATION 91. Section 80 should be amended with modernised language to:

- focus on giving mortgagors a right to register second and subsequent mortgages without in any way breaching the terms of the mortgage, and despite anything to the contrary in the instrument of mortgage itself; and
- apply the inspection and production rights to electronic documents in the mortgagee’s possession that may be required to enable the registration of a registrable instrument dealing with the land.

RECOMMENDATION 92. Section 81 should be repealed.

RECOMMENDATION 93. Section 82 should be retained with modernised language and amended to provide that in the section, notice means actual notice and does not include constructive notice. Section 82(1)(c) should be amended to provide that further advances from a prior mortgagee will rank in priority to a subsequent mortgage if, immediately prior to the creation of the subsequent mortgage, the prior mortgage (or an instrument secured by the prior mortgage) requires the prior mortgagee to make such further advances.

RECOMMENDATION 94. Section 83 should be retained with modernised language and amended to:

- clarify that the mortgagee’s powers under the section include a power to vary any contract of sale or to buy in at auction;
- clarify that the power to sell any mines or mineral apart from the surface is subject to the fact that the mines or minerals may be vested in the Crown; and
- provide mortgagees with a statutory power to sever and sell fixtures apart from the land.

RECOMMENDATION 95. Section 84 should be retained with modernised language and amended to deal with the issue of disclaimer of property by a Trustee in Bankruptcy or a liquidator under the *Bankruptcy Act 1966* (Cth) and or the *Corporations Act 2001* (Cth).

For example, section 84 could be amended to contain additional provisions drafted in the following manner:

Section [84] Regulation of exercise of power of sale

...

- (6) Subsections (7)-(8) apply if property is subject to a registered mortgage and the Trustee in Bankruptcy or liquidator disclaims the property under the *Bankruptcy Act 1966* (Cth) or *Corporations Act 2001* (Cth).
- (7) The State holds the property as trustee subject to the rights of the mortgagee under the mortgage.
- (8) Subsections (1)-(3) do not apply to the registered mortgagee who may exercise the power of sale conferred by this Act if:
 - (a) disclaimer of the property by the Trustee in Bankruptcy or liquidator has been notified to the Registrar of Titles;
 - (b) the mortgagee has given notice, in the approved form, to the Registrar of Titles and all other registered owners of the property, notifying the mortgagee's intention to exercise power of sale after 30 days; and
 - (c) a period of 30 days has passed and no interested party has applied for an order of the court under the *Bankruptcy Act 1966* (Cth) or *Corporations Act 2001* (Cth) to vest the property in that party.

RECOMMENDATION 96. Section 85 should be retained with modernised language and clarified to provide that:

- the mortgagee's duty to take reasonable care to ensure that the property is sold at the market value also applies to a receiver exercising a power of sale; and
- where the power of sale is exercised by a receiver, the receiver must comply with the obligation to give the mortgagee notice of the sale in the approved form.

RECOMMENDATION 97. Section 86 should be repealed.

RECOMMENDATION 98. Section 87 should be retained with modernised language but amended so that the protection given to buyers applies:

- to any exercise of a power of sale by a mortgagee or receiver; and
- to a person who purchases from a mortgagee or receiver.

For example, using the New Zealand provision as a guide, section 87 could be drafted in the following manner:

Section [87] Protection of purchasers

- (1) A person who purchases mortgaged property from a mortgagee or a receiver exercising a power of sale:
 - (a) is not answerable for the loss, misapplication, or non-application of the purchase money paid for the property; and
 - (b) need not inquire whether—
 - (i) a case has arisen to authorise the sale; or
 - (ii) due notice was given; or
 - (iii) the leave of the court, when so required, was obtained; or
 - (iv) the power of sale was otherwise improperly or irregularly exercised.

- (2) Any person who suffers loss or damage by an unauthorised, or improper, or irregular exercise of a power of sale will have a remedy in damages against the person exercising the power.

RECOMMENDATION 99. Section 88 should be retained with modernised language and amended to deal with the issue of a surplus (should one arise) as a result of a sale of disclaimed property.

For example, section 88 could be amended to contain an additional provision drafted in the following manner:

Section [88] Application of proceeds of sale

- ...
- (1A) A mortgagee exercising power of sale under section [84(8)] must apply the money realised from sale according to subsection (1)(a), (b) and (c) and pay the residue (if any) into court and any person with a claim to some or all of that money may make an application to the court to recover that money.

RECOMMENDATION 100. Section 89 should be retained with modernised language and amended to refer to the person for the time being entitled to receive and give a release of the mortgage.

For example, section 89(1) could be amended in the following manner:

Section [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 mortgage money or give a release of the mortgage.

RECOMMENDATION 101. Section 90 should be retained with modernised language.

RECOMMENDATION 102. Section 91 should be retained with modernised language but amended so that:

- the language used in relation to the purpose of the insurance is consistent; and
- the mortgagee may only require insurance money to be paid toward the discharge of the mortgage if this is expressly authorised by the instrument of mortgage and the mortgagee has not required the mortgagor to effect, or consented to the mortgagor effecting, such insurance.

For example, section 91(5) could be amended with additional wording in the following manner:

Section [91] Amount and application of insurance money

- ...
- (5) 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.

RECOMMENDATION 103. Section 92 should be retained with modernised language but amended to provide that:

- the statutory power to appoint a receiver may be exercised at any time after the mortgagee has become entitled to enter upon and take possession of the land subject to the mortgage; and
- the person appointed as a receiver must be suitably qualified.

RECOMMENDATION 104. Section 93 should be retained with modernised language.

RECOMMENDATION 105. Section 94 should be retained with modernised language.

RECOMMENDATION 106. Section 95 should be retained with modernised language and clarified so that the mortgagor is relieved of the obligation to pay the accelerated sum.

RECOMMENDATION 107. Section 96 should be retained with modernised language.

For example, using the New Zealand provision as a guide, section 96 could be drafted in the following manner:

Section [96] Mortgagee accepting interest after expiry of term not to call up without notice

- (1) This section applies if—
 - (a) the term of a mortgage over property, or any period for which the term has been renewed or extended, has expired; and
 - (b) the principal amount secured by the mortgage has not been repaid; and
 - (c) the mortgagee has, after the date of expiry, accepted interest on the principal amount (except by entering into possession of the property or appointing a receiver) for a period not shorter than 3 months after that date; and
 - (d) the mortgagor has observed all covenants under the mortgage instrument except the covenant to repay the principal amount on the due date.
- (2) The mortgagee must not call up as payable the principal amount unless—
 - (a) the mortgagee has served on the current mortgagor a notice of the intention to do so at the expiry of the period specified in the notice; and
 - (b) that period has expired.
- (3) The period specified in the notice under subsection (2) must not be shorter than 60 working days after the date of service of the notice.
- (4) A notice under subsection (2) may be given in accordance with the notice provision of this Act [i.e. s 347].

RECOMMENDATION 108. Section 97 should be retained with modernised language but amended to clarify that the interest of the mortgagor in any mortgaged property (where the mortgagor may have granted more than one mortgage to a mortgagee) may not be taken in execution of the judgment.

RECOMMENDATION 109. Section 98 should be retained with modernised language.

RECOMMENDATION 110. Section 99 should be retained with modernised language.

RECOMMENDATION 111. Section 100 should be retained with modernised language.

RECOMMENDATION 112. Section 101 should be retained with modernised language and 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;
- remove the out-of-date reference to the mining warden; and
- remove reference to old system land.

PART 8 – LEASES AND TENANCIES

RECOMMENDATION 113. Section 102(3) should be repealed. The balance of the provision should be retained with modernised language.

RECOMMENDATION 114. The effect of section 104 should be retained but relocated to schedule 3 as an implied covenant in all leases subject to a contrary intention

RECOMMENDATION 115. The effect of sections 105 and 106 should be retained but relocated to schedule 3 as an implied covenant in all leases subject to a contrary intention.

RECOMMENDATION 116. The effect of section 107 should be retained but relocated to schedule 3 as an implied covenant in all leases subject to a contrary intention.

RECOMMENDATION 117. Section 109 should be repealed. The effect of some of the relevant short-form covenants should be retained but relocated to schedule 3 as implied covenants in all leases subject to a contrary intention.

RECOMMENDATION 118. Section 110 should be repealed on the basis that the recommendations in respect of section 105 and 109 are adopted.

RECOMMENDATION 119. The Centre makes the following recommendations with respect to implied covenants and short-form covenants:

Sections to be repealed

- repeal section 104;
- repeal section 105;
- repeal section 106;
- repeal section 107; and
- repeal section 109.

Section to be added:

Section [] Covenants, conditions and powers implied into all leases

- (1) Subject to subsection (2), the covenants, conditions and powers set out in Part 1 of schedule 3 are implied into every lease:
 - (a) subject to this Act and any other Act; and
 - (b) unless otherwise agreed by the parties.
- (2) The covenants in Item 3 of Part 1 of schedule 3 are not implied into short leases.

- (3) The covenants in Part 2 of schedule 3 are implied into all short leases subject to this Act and any other Act.

Amend Schedule 3 in the following terms:

Schedule 3 Part 1

1. Payment of rent

The lessee will pay the rent payable under the lease when it falls due.

2. Payment of taxes, rates, etc.

The lessee will pay all taxes, rates and assessments of any kind which are charged or chargeable upon the land or upon the lessor, in respect of the leased premises for the term of the lease in the proportion that the area of the leased premises bears to the land subject to the assessment.

3. Maintain and leave the premises in good repair **option 1 wording*

- (1) Subject to subclause (2), during the term of the lease the lessee will maintain, repair and keep the premises in good condition.
- (2) In fulfilment of the obligation in subclause (1), regard is to be had to the condition of the leased premises at the commencement of the lease and excepting reasonable wear and tear, and any damage caused by fire, flood or storm occurring during the lease term.
- (3) At the end of the lease, whether by expiration of the lease term or otherwise, the lessee will surrender and yield up the premises to the lessor in good and substantial repair including all:
 - (a) appurtenances;
 - (b) buildings;
 - (c) erections; and
 - (d) fixtures.

3. Maintain and leave the premises in good repair **option 2 alternative wording**

- (1) The lessee will:
 - (a) at all times during the currency of the lease, keep the leased premises in the same condition that they were in when the term of the lease began; and
 - (b) at the termination of the lease, yield the leased premises in that condition.
- (2) However, the lessee is not bound to repair any damage to the leased premises caused by:
 - (a) reasonable wear and tear; or
 - (b) any of the following:
 - (i) fire, flood, or explosion (whether or not the fire, flood, or explosion is caused or contributed to by the lessee's negligence);
 - (ii) lightning, storm or earthquake; or
 - (iii) any other cause the risk for which the lessor has insured the premises.
- (3) Despite subclause (2)(b), the lessee is not excused from liability to repair any damage caused by any of the events referred to in that paragraph if, and to the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of:
 - (a) the lessee;
 - (b) the lessee's agent, contractor, or invitee; or
 - (c) any other person under the lessee's direction or control.

4. Abatement of rent if premises is destroyed or damaged

- (1) If the leased premises or any part of them are destroyed or damaged by any of the causes specified in subclause (2) to the extent that they become unfit for occupation and use by the lessee, the rent and any contribution payable by the lessee to the outgoings on those premises will abate, in fair and just proportion to the destruction or damage, until those premises:
 - (a) have been repaired and reinstated; and
 - (b) are again fit for occupation and use by the lessee.
- (2) The causes referred to in subclause (1) are:
 - (a) fire, flood, or explosion (whether or not the fire, flood or other inundation of water, or explosion is caused, or contributed to, by the lessee's negligence);
 - (b) lightning, storm or earthquake; or
 - (c) any other cause the risk for which the lessor has insured the premises.
- (3) Despite subclause (1), the lessee is not entitled to the abatement referred to in that subclause if, and to the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of:
 - (a) the lessee;
 - (b) the lessee's agent, contractor, or invitee; or
 - (c) any other person under the lessee's direction or control.

5. Assignment of the lease

- (1) The lessee may not assign the lease without first obtaining the lessor's written consent, which will not be unreasonably withheld.

6. Alteration of buildings

- (1) The lessee will not, without the consent of the lessor, alter any building that comprises, or is part of, the leased premises.
- (2) The lessor will not unreasonably withhold consent under subclause (1).*
**Note that subclause (2) is only required if the recommendations for section 121 are adopted. If the recommendations for section 121 are not adopted then delete subclause (2).*

7. Noxious or offensive acts or things

- (1) The lessee will not do, or permit to be done, on the leased premises any of the things specified in subclause (2) to:
 - (a) the lessor; or
 - (b) the other lessees of the lessor; or
 - (c) the owners or occupiers of neighbouring properties.
- (2) The things referred to in subclause (1) are:
 - (a) any noxious or offensive act or thing; or
 - (b) any act or thing that is, or is likely to be, a nuisance or that causes, or is likely to cause, any nuisance, damage, or disturbance.

8. Commission of waste

The lessee will not commit, or permit any of the lessee's agents, contractors, or invitees to commit, voluntary waste in relation to the leased premises.

9. Lessee entitled to quiet enjoyment

- (1) The lessee and all persons claiming under the lessee will be able quietly to enjoy the leased premises without disturbance by:
 - (a) the lessor;
 - (b) the lessor's agent, contractor or invitee; or
 - (c) any other person under the lessee's direction or control.
- (2) The lessor will not derogate from the lease.

10. Change of use

- (1) The lessee must not use the premises for any other purpose other than the permitted purpose unless the lessor consents to the change of use.
- (2) The lessor will not unreasonably withhold consent to a request from the lessee for a change in use of the premises.

11. Power to inspect premises

- (1) The lessor may at all reasonable times, either personally or by the lessor's agent, enter the leased premises for the purpose of:
 - (a) inspecting their state of repair; or
 - (b) carrying out repairs; or
 - (c) complying with the requirements of:
 - (i) any enactment or bylaw; or
 - (ii) any notice issued by a competent authority.
- (2) The lessor will not unreasonably interfere with the lessee's occupation and use of the leased premises in the exercise of the power conferred by subclause (1).

12. Power to terminate lease for non-payment of rent or other breach

- (1) The lessor may terminate the lease if:
 - (a) any rent is unpaid for 1 calendar month after the due date for payment (whether or not a demand for payment has been made to the lessee by written notice signed by the lessor or the lessor's agent); or
 - (b) the lessee has failed, for a period of 2 calendar months, to observe or perform any other covenant, condition, or stipulation on the part of the lessee expressed or implied in the lease.
- (2) The lessee is not released from liability for the payment of any unpaid rent or for the breach or non-observance of any other covenant, condition, or stipulation referred to in subclause (1) if the lessor terminates the lease.
- (3) If the lessor terminates the lease under subclause (1) or (2), then the lessor may re-enter and take possession of the leased premises or any representative part of those premises subject to [sections replacing section 124 at Recommendation 134].

13. Lessee may remove lessee's fixtures

- (1) Prior to or at the end of the lease, whether by expiration of the lease term or otherwise, the lessee must remove and take away from the premises all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes and other items owned by the lessee.
- (2) The lessee will repair any damage caused to the premises by the removal of the items mentioned in subclause (1).
- (3) If the lessee does not comply with subclause (1) or (2) within one month of the expiry of the lease term then the items mentioned in subclause (1) are deemed to be abandoned items and the lessor is entitled to remove, sell or otherwise dispose of the abandoned items.
- (4) The lessor may recover from the lessee any loss or damages incurred in exercising its rights under subclause (3).

Schedule 3 Part 2

Covenant implied in short leases

14. Lessee to use premises reasonably

- (1) Subclauses (2) and (3) apply to a lease:
 - (a) for a term of 3 years or any less term; and
 - (b) of a premises principally for the purpose of human habitation.

- (2) The lessor will maintain the leased premises in a condition reasonably fit for human habitation.
- (3) The lessee will:
 - (a) care for the premises in a manner of a reasonable tenant; and
 - (b) repair damage to the premises caused by the lessee or their agents, licensees or invitees.

RECOMMENDATION 120. Section 111 should be retained with modernised language.

RECOMMENDATION 121. The Centre recommends amending section 112 in the following way:

- amend section 112(1) to limit recovery of damages for breach of repair covenant to the lesser of the diminution in value of the premises, or the actual cost of repair, and modernise the language;
- repeal section 112(2) on the basis that the effect of this subsection is largely replicated in section 124 (and the redrafted provisions set out at Recommendation 134);
- repeal section 112(3) and rely on the usual notice provisions in section in section 347 (as modified by Recommendation 205); and
- retain section 112(4).

For example, using the Northern Territory provisions as a guide, the sections could be drafted in the following manner:

Section [112] Provisions as to covenants to repair

- (1) This section applies to a claim to recover damages for breach of a covenant, obligation or agreement, whether express or implied or general or specific, to:
 - (a) keep or put premises in good repair during the currency of a lease; or
 - (b) leave or put premises in good repair at the termination of a lease.
- (2) Where subsection (1) applies, the amount of damages recoverable is limited to the lesser of the amount of:
 - (a) the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished; or
 - (b) the actual amount required to repair the premises.
- (3) Damages are not recoverable for a breach of a covenant, obligation or agreement to leave or put premises in good repair at the termination of a lease if it is shown that at or shortly after the termination of the lease:
 - (a) the premises, in whatever state of repair they might be, will be or have been demolished; or
 - (b) structural alterations would be or have been made to the premises that would render valueless the repairs covered by the covenant, obligation or agreement.
- (4) This section applies whether the lease was created before or after the commencement of this Act.

RECOMMENDATION 122. Section 113 should be repealed.

RECOMMENDATION 123. The effect of section 114(1) and (1A) should be retained and the subsection redrafted to modernise language. The provisions should be relocated to sit with the proposed redrafted section 117. Section 114(2) and (2A) should be repealed.

For example, using the New Zealand the provisions as a guide, the section could be drafted in the following manner:

Section [114] Effect of payment by lessee to assignor of reversion

- (1) This section applies to a lease if the lessor has transferred or assigned the reversion expectant on the lease.
- (2) A lessee who pays all or part of the rent or other amounts due under the lease to the transferor or assignor of that reversion is discharged to the extent of that payment if the lessee had no actual notice of the transfer or assignment.
- (3) For the purposes of subsection (2), the registration of a transfer of the reversion is not, in itself, actual notice to the lessee of the transfer, despite anything to the contrary in any other enactment.

RECOMMENDATION 124. Section 115 should be retained with modernised language.

RECOMMENDATION 125. Section 116 should be retained with modernised language.

For example, using the New Zealand provision as a guide, the section could be drafted in the following manner:

Section [116] Rights and obligations under lease after severance

- (1) This section applies to a lease if the reversion expectant on the lease is divided into different parts, and different persons are entitled to the income of those different parts (that is, a severance of the reversion as regards the land).
- (2) The obligations referred to in section [proposed amended section 118] and the rights and remedies to which section [proposed amended section 117] applies —
 - (a) must be apportioned; and
 - (b) to the extent required by that apportionment, must remain attached, as the case requires, to—
 - (i) each part of the reversion; or
 - (ii) that part of the land for which the lease has not been terminated; and
 - (c) may, to that extent, be—
 - (i) enforced by the person entitled to enforce those obligations under section [proposed amended 118]; or
 - (ii) exercised by the person entitled to exercise those rights and remedies under section [proposed amended section 117].

RECOMMENDATION 126. Section 117 should be retained with modernised language and amended to remove inconsistencies and provide that all covenants run with the land unless expressed to be personal.

For example, following the approach in the New Zealand, the provisions could be drafted in the following manner:

Section [1] Rights under lease to which section [3] applies

- (1) Section [2] applies to all or any of the following rights under a lease:
 - (a) the right to enforce every covenant of the lessee;
 - (b) the right to enforce any guarantee of the performance of all or any covenants of the lessee; and

- (c) all rights and remedies of the lessor.
- (2) This section applies to all leases entered into after the commencement of this Act.

Section [2] Benefit of lessee’s covenants to run with reversion

- (1) If the reversion expectant on the lease ceases to be held by the lessor whether by transfer or assignment, the rights to which this section applies—
 - (a) run with the reversion; and
 - (b) may be exercised by the person who is from time to time entitled to the income of the land, whether or not the lessee has acknowledged that person as lessor (that is, with or without attornment by the lessee).
- (2) Subsection (1) applies unless:
 - (a) the covenant is expressed in the lease to be personal; or
 - (b) this section is expressed in the lease not to apply in whole or in part.

Section [3] When rights arising from covenants may be exercised

- (1) A person who is entitled under section [2](1) to exercise a right to which that section applies—
 - (a) may exercise that right even though the basis for doing so first arose or accrued before the time at which that person became so entitled; and
 - (b) is the only person entitled to exercise that right.
- (2) Subsection (1)(a) applies unless—
 - (a) the right was waived; or
 - (b) the lessee was released from the obligation to which the right relates.
- (3) Subsection (1)(b) applies unless the person who becomes entitled to exercise the right has agreed to the exercise of that right by some other person (in which case the right may be exercised by the other person to the extent so agreed).

RECOMMENDATION 127. Section 118 should be amended to modernise the language, and aid in interpretation of the section. The amended provisions should remove the ‘touch and concern’ requirement and stipulate that all covenants in leases run with the reversion, unless expressed to be personal.

For example, following the position in the New Zealand, section 118 could be drafted in the following manner:

Section [118] Burden of lessor’s covenants to run with reversion

- (1) If the reversion expectant on a lease ceases to be held by the lessor (former lessor) whether by transfer or assignment the obligations imposed by every covenant of the lessor –
 - (a) run with the reversion; and
 - (b) may be enforced by the person who is from time to time entitled to the leasehold estate or interest against the person who is from time to time entitled to the reversion.
- (2) Subsection (1) applies unless:
 - (a) the covenant is expressed in the lease to be personal; or
 - (b) the section is expressed in the lease not to apply in whole or in part.
- (3) This section applies to all leases entered into after the commencement of this Act.
- (4) The former lessor remains liable for all breaches of the lease covenants committed by the former lessor.

RECOMMENDATION 128. Section 120(3) should be repealed. The balance of sections 119 and 120 should be amended into a single provision modelled on the *Property Law Act 2007* (NZ).

For example, using the New Zealand provisions as a guide, the section could be drafted in the following manner:

Section [120] Effect of waiver

- (1) A waiver by a lessor of the benefit of any covenant or condition of a lease –
 - (a) extends only to the instance or breach to which the waiver particularly relates; and
 - (b) is not to be taken as a general waiver.
- (2) Subsection (1) applies unless the contrary intention appears.

RECOMMENDATION 129. Section 121 should be amended to:

- modernise and simplify the language and operation of section 121;
- exclude the exception in relation to building leases (section 121(1)(a)(ii));
- provide a simpler model for issues regarding ‘improvements’, structural alterations and alterations to user (section 121(2) and (3));
- impose a requirement on the lessee to provide all of the information about the proposed assignee to allow the lessor to make a sound commercial decision about whether or not to consent to the assignment;
- impose a requirement on the lessor to notify the lessee in writing within 14 days that the consent is withheld and the reasons for doing so; and
- enable a lessee to recover damages from a lessor where consent is unreasonably withheld.

For example, using the New Zealand provisions as a guide, the provisions could be drafted in the following manner:

Section [] Lessee cannot assign or transfer without consent of the lessor

- (1) This section applies:
 - (a) to all leases;
 - (b) where the lessor receives after the commencement of this Act a notice from a lessee requesting the lessor’s consent to transfer or assign the lease; and
 - (b) if there is a covenant in a lease that the lessee will not, without the consent of the lessor, assign or transfer the lease to a third party.
- (2) The lessee must –
 - (a) provide to the lessor sufficient information about that third party in order for the lessor to make a sound commercial decision about whether or not to consent to the assignment or transfer of the lease; and
 - (b) comply with any other obligation to provide information provided for in a covenant in the lease.
- (3) The lessor –
 - (a) must not unreasonably withhold consent to assign the lease to a third party (whether or not the covenant expressly provides that consent must not unreasonably be withheld); and
 - (b) must, within 14 business days of receipt of the information set out in subsection (2),—
 - (i) give the consent; or

- (ii) give the lessee a notice that states that the consent is withheld and the reasons why the consent is withheld.
- (4) If the lessor unreasonably withholds consent then the lessee may assign without the consent of the lessor.
- (5) If the lessor does not give the lessee the notice in subsection (3)(b), or if the notice does not set out the reasons for withholding consent then the lessee may assign without consent.

Section [] Damages may be recovered from lessor if consent is unreasonably withheld

- (1) A person specified in subsection (2) who suffers loss because the lessor unreasonably withholds consent to an assignment may recover from the lessor compensation for any loss suffered because that consent was withheld.
- (2) The persons referred to in subsection (1) are—
 - (a) the lessee; or
 - (b) any assignee, sublessee, mortgagee, or person in possession of the leased premises.

Section [] Consent to sublease etc.

- (1) This section applies:
 - (a) to all leases;
 - (b) where the lessor receives after the commencement of this Act a notice from a lessee requesting the lessor’s consent to:
 - (i) enter into a sublease;
 - (ii) part with possession of the leased premises;
 - (iii) change the use of the leased premises from a use that is permitted under the lease;
 - (iv) create a mortgage over the leasehold estate or interest;
 - (v) do any of the things referred to in subparagraph (b)(i) to (iv) in relation to any part of the leased premises or for any part of the term of the lease;
 - (c) if there is a covenant in a lease that the lessee will not, without the consent of the lessor, do any of the things in subsection (2).
- (2) The lessor—
 - (a) must not unreasonably withhold consent to do any of the things in subsection (1)(b) whether or not the covenant expressly provides that consent must not unreasonably be withheld; and
 - (b) must, within 14 business days of receipt of the notice from a lessee requesting the lessor’s consent,—
 - (i) give the consent; or
 - (ii) give the lessee a written notice that states that the consent is withheld.

RECOMMENDATION 130. The Centre recommends the addition of provisions within the new PLA that modify the common law position to the extent that an assignor of a lease will remain liable for breaches of lease covenants for the immediate assignee only, and the lessee is not liable for breaches of the lease covenants for any subsequent assignees.

For example, following the position in the United Kingdom, the provisions could be drafted in the following way:

[PART NUMBER]

Section [] Covenants to which this part applies.

- (1) This part applies to a covenant in a lease—
 - (a) whether or not the covenant has reference to the subject matter of the lease, and
 - (b) whether the covenant is express, implied or imposed by law.

Section [] Transmission of benefit and burden of covenants.

- (1) The benefit and burden of all covenants in leases shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.
- (2) Where the assignment is by the lessee under the lease, then as from the assignment the assignee of the lease—
 - (a) becomes bound by the covenants in the lease to the extent that the assignor was bound by them immediately before the assignment; and
 - (b) becomes entitled to the benefit of the covenants in the lease to the extent that the lessor was bound by them immediately before the assignment.
- (3) Where the assignment is of the reversion by the lessor, then as from the assignment the assignee of the reversion—
 - (a) becomes bound by the covenants in the lease to the extent that the assignor was bound by them immediately before the assignment; and
 - (b) becomes entitled to the benefit of the covenants in the lease to the extent that the lessor was bound by them immediately before the assignment.
- (4) In determining for the purposes of subsection (2) or (3) whether any covenant bound the assignor immediately before the assignment, any covenant which (in whatever terms) is expressed to be personal to the assignor shall be disregarded.
- (5) Any covenant in the lease which is restrictive of the user of land shall, as well as being capable of enforcement against an assignee, be capable of being enforced against any other person who is the owner or occupier of any demised premises to which the covenant relates, even though there is no express provision in the lease to that effect.
- (6) Nothing in this section shall operate in the case of a covenant which (in whatever terms) is expressed to be personal to any person, to make the covenant enforceable by or (as the case may be) against any other person

DIVISION []

Section [] Application of this division

- (1) This division applies to leases:
 - (a) entered into after (date of commencement of this provision); and
 - (b) despite any other provision of this Act or any agreement to the contrary.

Section [] Definitions for Division [number]

In this division:

date of assignment is the date the assignee enters into possession of the land under the lease.

lease includes the original term of the lease and any options for further terms that have been exercised.

subsequent assignee is a party who is assigned a lease from a party to whom that same lease had previously been assigned.

subsequent assignment is an assignment of a lease by a subsequent assignee.

Section [] Effect of an assignment of a lease by a lessee

At the date of assignment of a lease by an assignor to an assignee, the assignor and any guarantor remain liable to the lessor for any defaults or breaches of the covenants under that lease by that assignee to the extent that that assignor was liable immediately before the assignment.

Section [] Release of assignor upon subsequent assignment

At the date of assignment that is a subsequent assignment of a lease by an assignee to a subsequent assignee, the assignor and any guarantor of the assignor are released from any liability to the lessor for any defaults or breaches of the covenants under that lease by the subsequent assignee.

RECOMMENDATION 131. Section 122 should be retained with modernised language.

RECOMMENDATION 132. Section 123 should be amended in the following terms:

- remove the words ‘where the lessee has become entitled to have the lease granted’ in the definition of ‘lease’;
- remove the definition of ‘proceedings’, ‘under-lease’ and ‘under-lessee’;
- add a definition of ‘agreement for lease’, ‘covenant or conditions’, ‘interested person’ and ‘reasonable compensation’.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, section 123 could be amended in the following terms:

Definitions for division 3:

In this division –

agreement for lease means an agreement to grant a lease that creates an interest in land.

covenant or condition includes a covenant or condition implied by statute.

interested person means—

- (a) a sub-lessee; or
- (b) a mortgagee of the estate or interest of a lessee or sub-lessee; or
- (c) a receiver appointed in respect of the estate or interest of a lessee or sub-lessee.

lease includes a lease or sub-lease, and an agreement for lease.

lessee includes a lessee or sub-lessee, their executors, administrators, assigns and successors in title, or a lessee or sub-lessee under an agreement for lease and their executors, administrators, assigns and successors in title.

lessor includes a sub-lessor, a lessor’s or sub-lessor’s executors, administrators, assigns and successors in title, or a lessor or sub-lessor under an agreement for lease and their executors, administrators, assigns and successors in title.

reasonable compensation may include reimbursement of the lessor’s reasonable expenses—

- (a) in giving a notice to remedy breach under section [2](1);
- (b) legal costs or other professional costs incurred for ascertaining the extent of the breach of the lease covenant or condition giving rise to the notice to remedy breach under section [2](1); and
- (c) in doing anything else that the lessor has reasonably done in relation to the breach including taking steps to mitigate loss caused by the breach.

RECOMMENDATION 133. Section 123A should be amended to include the *Residential Tenancies and Rooming Accommodation Act 2008* as an exclusion from the operation of the section.

The section should stipulate that the Division applies to all leases, regardless of when the lease was made, and that the Division cannot be contracted out of.

The section should also state that leases for a term of less than one year are not covered by section 124, that is, relief against forfeiture of the lease is not available in those circumstances.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [1] Application of division 3

- (1) This division does not apply to leases under the following Acts—
 - (a) Coal Mining Act;
 - (b) Land Act;
 - (c) Mineral Resources Act
 - (d) Housing Act;
 - (e) *Residential Tenancies and Rooming Accommodation Act 2008*;
- (2) Where a lease is for a term of 1 year or less:
 - (a) the remedy of relief against forfeiture of the lease for breach of a covenant or condition is not available; however
 - (b) the lessee may apply to court for relief against forfeiture of an option to renew the lease and forfeiture of an option to purchase the reversion.
- (3) Subject to subsection (1), this division applies notwithstanding anything in the lease to the contrary and applies to all leases made before or after the commencement of this Act.

RECOMMENDATION 134. Section 124 should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [2] Lessor must serve notice to remedy breach for breach of covenant or condition

- (1) A lessor may exercise a right to re-enter the premises under a covenant or condition in a lease for breach of a covenant or condition only if—
 - (a) the lessor has served on the lessee a notice in the approved form:
 - (i) specifying the particular breach;
 - (ii) if the breach is capable of remedy, requiring the lessee to remedy that breach;
 - (iii) informing the lessee of the lessor’s intention to terminate the lease if the breach is not remedied within a specified period; and
 - (iv) if the lessor claims compensation for the breach, requiring the lessee to pay a specified amount of compensation and a time period for that payment; and
 - (b) at the expiry of any period specified in the notice, the breach has not been remedied, or the compensation has not been paid to the lessor.
- (2) Subsection (1) shall apply where a lessor is seeking to exercise a right of re-entry upon the occurrence of an event which, if it occurs, is treated in the lease as being a default

by the lessee that gives rise to a right of re-entry in the lessor, as if that occurrence was a breach of covenant or condition in the lease.

- (3) When specifying the time period referred to in subsection (1)(a)(iii) or subsection (1)(a)(iv), the lessor must specify a time period that is reasonable in the circumstances and must have regard to the type of breach and the requirements to remedy that breach.

Section [3] Defects that do not invalidate notice to remedy breach

- (1) The notice to remedy breach required by section [2](1) is not invalid merely because the lessor—
 - (a) may not have specified that the breach is capable of being remedied by the payment of reasonable compensation; or
 - (b) may have specified an amount of compensation that is unreasonable; or
 - (c) may have specified that the breach would be capable of being remedied by the payment of reasonable compensation, but without specifying the amount that the lessor considers reasonable.
- (2) None of the matters set out in subsection (1)(a) to (c) prevents a lessee from offering an amount that the lessee considers to be reasonable compensation for the breach.

Section [4] Lessor must serve a copy of the notice to remedy breach on other parties

- (1) A lessor who has served a notice to remedy breach on a lessee in accordance with section [2](1) shall as soon as practicable, serve a copy of the notice on all of the following whose names and addresses are known to the lessor:
 - (a) any mortgagee or receiver of the leasehold estate or interest;
 - (b) any guarantor under the lease;
 - (c) any sub-lessee of the lease; and
 - (d) any mortgagee or receiver of the estate or interest of a sub-lessee.
- (2) The lessor's failure to comply with subsection (1) does not, in itself, prevent the lessor from exercising a right to terminate the lease.

Section [5] Where the lessee has given up possession of the leased premises

- (1) Despite section [2], if the lessor believes on reasonable grounds that the lessee has given up possession of the leased premises (whether or not the lessee has actually done so) the lessor:
 - (a) does not need to serve a notice to remedy breach under section [2](1) on the lessee;
 - (b) must serve a notice in writing stating that the lessor intends to re-enter the property without first serving a notice in writing demanding possession of the leased premises on all of the following whose names and addresses are known to the lessor:
 - (i) any mortgagee or receiver of the leasehold estate or interest;
 - (ii) any guarantor under the lease;
 - (iii) any sub-lessee of the lease; and
 - (iv) any mortgagee or receiver of the estate or interest of a sub-lessee.
- (2) Subsection (1) applies whether or not there are breaches of other covenants or conditions of the lease and all of the lessor's rights to recover damages and seek compensation for any or all breaches of the lease covenants and conditions are preserved.

Section [6] Lessor may re-enter or make an application for possession

- (1) If the lessee fails to remedy the breach and/or pay the compensation specified in a notice to remedy breach under section [2](1), a lessor may exercise the right of re-entry by –
 - (a) making a demand for possession in writing if the lessee is in possession of the leased premises;
 - (b) peaceably re-entering if the lessee has given up possession of the leased premises; or
 - (c) applying to a court for an order for possession of the leased premises if the lessee refuses to give up possession of the leased premises upon written demand as set out in subsection (1)(a).
- (2) If the lessor applies to a court for an order for possession of the leased premises for the purpose of forfeiture of a lease, the forfeiture takes effect—
 - (a) on the making of the order; or
 - (b) on any later date that is specified in the order.
- (3) Re-entry of the leased premises under section [5] or [6] by a lessor does not effect a surrender of the lease by operation of law.

Section [7] Acceptance of rent and outgoings by lessor is not a waiver of lessor's rights

- (1) If a lessor accepts any payments of rent or outgoings after a notice under section [2](1) is served on the lessee, the lessor's acceptance of the rent does not operate as a waiver of the lessor's right under section [6].
- (2) Subsection (1) applies unless the lessor, in accepting the rent or outgoings, causes the lessee reasonably to believe that the lessor no longer intends to exercise the right under section [6].

Section [8] Powers of court in making order for possession

- (1) On an application to a court for an order for possession of the leased premises under section [6](1)(c), the court may make the order for possession of the leased premises and terminate the lease.
- (2) Without limiting the order the court can make – if the court makes the order for possession of the lease premises and terminates the lease under subsection (1), it may also do all or any of the following:
 - (a) order the lessee to pay the rent and outgoings up to the date of forfeiture or any later date on which the lessee yields up possession;
 - (b) order the lessee to pay reasonable compensation for the breach;
 - (c) impose on the lessee or the lessor any other conditions that it thinks fit.

Section [9] Lessor can claim damages

The rights and powers conferred by this section are in addition to and not in derogation of any right to relief or power to grant relief had apart from this section.

Section [10] Relief against forfeiture of lease for breach of covenant or condition

- (1) All or any of the following persons may apply to a court for relief against the forfeiture, or proposed forfeiture, of a lease on the ground of a breach of a covenant or condition of the lease:
 - (a) the lessee;
 - (b) a mortgagee of the leasehold estate or interest;
 - (c) a receiver appointed in respect of the leasehold estate or interest;

- (d) if 2 or more persons are entitled to the leasehold estate or interest, 1 or more of those persons.
- (2) If an application made in accordance with subsection (1)(d) is not made by all of the joint tenants, the application must be served on every owner of the reversion who is not already a party, unless the court orders otherwise.
- (3) Relief may be sought in—
 - (a) a proceeding brought by the lessor for an order for possession of the leased premises under section [6](1)(c); or
 - (b) a proceeding brought for the purpose of seeking the relief.
- (4) A proceeding referred to in subsection (3)(b) must be brought—
 - (a) before an order for possession of the leased premises is made in a proceeding referred to in subsection (3)(a); or
 - (b) subject to section [11], if the lessor has re-entered the leased premises, not later than 1 month after the date the date of re-entry.

Section [11] Mortgagee or receiver may apply for extension of time for bringing proceedings

- (1) This section applies to a mortgagee or receiver of a leasehold estate or interest, or a receiver appointed in respect of that estate or interest, who has been prejudiced—
 - (a) by not being served under section [4] with a copy of a notice to remedy breach that is required to be given under section [2](1); or
 - (b) by not being served at a time that is reasonable in the circumstances (whether or not by reason of the failure of the lessor to comply with the relevant section).
- (2) A person to whom this section applies may apply to a court for an extension of—
 - (a) the time specified in section [10](4)(b) for the bringing of a proceeding for relief against the forfeiture, or proposed forfeiture, of the lease; or
 - (b) the time within which to make an application for relief in the lessor's proceeding for an order for possession of the leased premises.
- (3) The court may grant the application for an extension of time on any conditions that it thinks fit.

Section [12] Application for relief not to constitute admission

- (1) This section applies to an application for relief against the forfeiture, or proposed forfeiture, of a lease.
- (2) The application is not, in itself, to be taken as an admission by the person making it—
 - (a) that there has been a breach of a covenant or condition of the lease by the lessee; or
 - (b) that, because of the breach, the lessor has the right to terminate the lease; or
 - (c) that a notice has been duly served on the applicant in accordance with section [2](1); or
 - (d) that, at the time when the lessor applied to the court for an order for possession of the leased premises or peaceably re-entered the leased premises, the period for the remedying of the breach specified in a notice served in accordance with section [2](1) had expired.
- (3) The court may grant relief against the forfeiture of the lease without determining all or any of the things set out in subsection (2).

Section [13] Powers of court on application for relief

- (1) Without limiting the orders the court can make, in determining an application for relief against the forfeiture, or proposed forfeiture, of a lease, under section [10], a court may grant the relief sought on any conditions (if any) as to expenses, damages, compensation, or any other relevant matters that it thinks fit.

- (2) The court may grant relief against the forfeiture, or proposed forfeiture, of a lease whether or not—
 - (a) the forfeiture is for a breach of an essential term of the lease; or
 - (b) the breach is not capable of being remedied.

RECOMMENDATION 135. Section 125 should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [14] Protection of sub-lessee on forfeiture of superior lease

- (1) If a lessor exercises, or is proposing to exercise, a right to forfeit a lease because of a breach by the lessee of a covenant or condition of the lease, any interested person may apply to a court for relief in—
 - (a) a proceeding brought by the lessor for an order for possession of the leased premises; or
 - (b) a proceeding brought by the interested person for the purpose of seeking the relief.
- (2) A proceeding referred to in subsection (1)(b) must be brought—
 - (a) before an order for possession has been made in a proceeding referred to in subsection (1)(a); and
 - (b) subject to section [15], if the lessor has re-entered the leased premises, not later than 1 month after the date of re-entry.

Section [15] Interested person may apply for extension of time for bringing proceedings

- (1) This section applies to an interested person who has been prejudiced—
 - (a) by not being served under section [4] with a copy of a notice to remedy breach that is required to be given under section [2](1); or
 - (b) by not being served under section [4] with a copy of a notice to remedy breach at a time that is reasonable in the circumstances (whether or not by reason of the failure of the lessor to comply with that section).
- (2) An interested person to whom this section applies may apply to the court for an extension of—
 - (a) the time specified in section [14](2)(b) for the bringing of a proceeding for relief under section [14](1); or
 - (b) the time within which to make an application for relief in the lessor’s proceeding for an order for possession.
- (3) The court may grant the application for an extension of time on any conditions that it thinks fit.

Section [16] Powers of court on application for relief by sub-lessee

- (1) Without limiting the orders the court can make, on an application for relief made under section [14], the court may order the lessor to enter into a lease of the whole or any part of the land with the interested person.
- (2) An order under subsection (1)—
 - (a) may specify a lease for a term—
 - (i) not earlier than the date on which the lessor peaceably re-entered the leased premises or the date on which the forfeiture of the lease took

effect under an order for possession of the land in favour of the lessor; and

(ii) expiring on or before a date not later than the date on which the original sublease would have expired; and

(b) may be made on any conditions the court thinks fit, having regard to the covenants and conditions (if any) in the original sub-lease.

(3) An order may be made under subsection (1) even though the lessee is not a party to the proceeding.

*Note at Recommendation 132 the definition of ‘interested person’ is to be inserted as follows:
interested person means—

(a) a sub-lessee; or

(b) a mortgagee of the estate or interest of a lessee or sub-lessee; or

(c) a receiver appointed in respect of the estate or interest of a lessee or sub-lessee.

RECOMMENDATION 136. Section 126(1) should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

Section 126(2) serves no purpose and should be repealed.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be repealed on the basis that a definition of ‘reasonable compensation’ be included in the redrafted section 123(1) (set out at Recommendation 132) in the following terms:

reasonable compensation may include reimbursement of the lessor’s reasonable expenses—

- (a) in giving the notice to remedy breach under section [2](1);
- (b) including legal costs or other professional costs incurred for ascertaining the extent of the breach of the lease covenant or condition giving rise to the notice to remedy breach under section [2](1); and
- (c) in doing anything else that the lessor has reasonably done in relation to the breach including taking steps to mitigate loss caused by the breach.

This, coupled with the operation of the proposed section ‘*Section [13] Powers of court on application for relief*’ (set out at Recommendation 134) will replicate the operation of section 126(1):

- (1) Without limiting the orders the court can make, in determining an application for relief against the forfeiture, or proposed forfeiture, of a lease, under section [10], a court may grant the relief sought on any conditions (if any) as to expenses, damages, compensation, or any other relevant matters that it thinks fit.

RECOMMENDATION 137. Section 127 should be repealed.

RECOMMENDATION 138. Section 128 should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

The Centre recommends adopting provisions that:

- negate the effect of Grepo’s case by amending the section to state that the section applies to breaches after the notice of exercise of option, as well as those before (see draft section [18](2) and (3));
- redraft section 128(1) but retain its effect (see draft section [17]);
- repeal section 128(2) on the basis that the operation of the section is absorbed by the proposed re-drafted section 123A;

- redraft section 128(3) but retain the effect of the provision requiring the lessor to serve notice of refusal to allow exercise of option (see draft section [18]);
- add further notice requirements on the lessor so that other parties who have an interest in the lease option receive a copy of the notice (see draft section [19]);
- give standing to apply for relief against forfeiture of the option to a mortgagee, receiver or joint tenant of the lease interest (see draft section [20]);
- redraft section 128(4) to clarify the language and operation of the provision, but retain the effect (see draft section [18]);
- redraft section 128(5) to clarify the language and operation of the provision, but retain the effect (see draft section [20]);
- redraft section 128(6) to clarify the language and operation of the provision, but retain the effect (see draft section [22]);
- retain section 128(7) except for paragraph (e) (see draft section [22](3));
- redraft section 128(8) to clarify the language and operation of the provision, but retain the effect (see draft section [22](1) and (2));
- redraft section 128(9) to (13) to simplify the language and operation of the subsections (see draft section [23]).

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [17] Relief from forfeiture of lessee’s option to renew or purchase

- (1) This section applies to a lease if—
 - (a) the lessor has covenanted in writing with the lessee that,—
 - (i) on the expiry of the term of the lease, the lessee has an option to renew the lease, of all or part of the premises to the lessee; or
 - (ii) on the expiry of the term of the lease, or at some earlier time, the lessee has an option to purchase the reversion; and
 - (b) the exercise of an option referred to in paragraph (a) is conditional on—
 - (i) the fulfilment of any condition or the performance of any covenant or condition of the lessee; or
 - (ii) the lessee giving notice, within a specified time or in a specified manner, of the intention to exercise the option; and
 - (c) the lessee has failed to fulfil any condition or is in breach of any covenant.
- (2) Despite any provision of the kind referred to in subsection (1)(b), no breach of any relevant covenant or condition mentioned precludes the lessee’s right to exercise the option unless:
 - (a) the lessor serves a notice in the approved form on the lessee; and
 - (b) the lessee’s rights are extinguished in relation to the notice.

Section [18] Lessor must give notice

- (1) The notice referred to in section [17](2) must:
 - (a) inform the lessee that the lessee does not have the right to exercise the option to renew the lease, or transfer the reversion, as the case may be, because of a breach or breaches of covenants or conditions;
 - (b) set out the details of breach or breaches of covenants or conditions the lessor intends to rely;
 - (c) state that the lessee, mortgagee or receiver may apply to a court for relief against the refusal;

- (d) state that the right to apply for such relief lapses if the application is not made to the court within 1 month of the date of service of the notice; and
 - (e) state that it is advisable for the lessee, mortgagee or receiver to seek legal advice on the exercise of the right to apply to a court for relief against the refusal.
- (2) If the breach of covenant or condition that the lessor intends to rely on occurred before the time the lessee gave notice of intention to exercise an option mentioned in subsection [17](1)(b)(ii) the lessor must give notice in the approved form within 14 days of receiving the notice to exercise option.
- (3) If the breach of covenant or condition that the lessor intends to rely on occurred between the time the lessee gave notice of intention to exercise an option mentioned in subsection [17](1)(b)(ii) and the expiry of the lease the lessor must give notice in the approved form within 14 days of that breach.

Section [19] Lessor must serve a copy of the notice on other parties

A lessor who has served a notice on a lessee in accordance with section [18](1) must, as soon as practicable, serve a copy of the notice on any mortgagee or receiver of the leasehold estate or interest, if known to the lessor.

Section [20] Parties who can apply for relief from forfeiture of lessee's option to renew or purchase

- (1) Any of the following persons may apply to a court for relief from forfeiture of the lessee's option to renew the lease or purchase the reversion:
- (a) the lessee;
 - (b) a mortgagee of the leasehold estate or interest;
 - (c) a receiver appointed in respect of the leasehold estate or interest;
 - (d) if 2 or more persons are entitled to the leasehold estate or interest as joint tenants, 1 or more of those persons on behalf of the other joint tenants.
- (2) If an application made in accordance with subsection (1)(d) is not made by all of the joint tenants, the application must be served on every joint tenant who is not already a party, unless the court orders otherwise.

Section [21] Relief may be sought in proceedings brought by lessor or lessee

An application for relief from forfeiture of lessee's option to renew the lease or purchase the reversion—

- (a) may be made to the court in any proceeding:
 - (i) brought by the lessor for an order for possession of the land; or
 - (ii) brought by the lessee, mortgagee or receiver for the purpose of seeking relief; and
- (b) must be made not later than 1 month after the date on which the lessor serves a notice on the lessee under section [18], and on any mortgagee or receiver under section [19].

Section [22] Relief court may grant on application

- (1) Without limiting the orders the court can make, on an application under section [20], the court may grant relief against the refusal of the lessor to renew the lease, or transfer the reversion, as the case may be.
- (2) In particular, the court may—
- (a) do either of the following:
 - (i) order the lessor to renew the lease with the lessee, mortgagee, or receiver; or

- (ii) order the lessor specifically to perform the lessor’s covenant or agreement to transfer the reversion, and to execute all necessary assurances for that purpose; and
- (b) grant relief under paragraph (a)(i) or (ii) on any conditions (if any) the court thinks fit including the payment of compensation.
- (3) When considering an application for relief under section [20], the court make take into consideration any or all of the following:
 - (a) the nature of the breach complained of;
 - (b) the extent to which, at the date of the institution of proceedings, the lessor was prejudiced by the breach;
 - (c) the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice;
 - (d) the rights of persons other than the lessor and the lessee;
 - (e) anything else the court considers relevant.

Section [23] Lease remains in place while application is determined

Where a lease would expire by effluxion of time while an application under section [20] is being determined, the lease is deemed to continue on the same terms and conditions as at the date the application was made to the court until the court makes an order under section [22].

RECOMMENDATION 139. Section 129 should be retained with modernised language.

For example, using the New Zealand provisions as a guide, the provision could be drafted in the following manner:

Section [129] Abolition of yearly tenancies by implication of law

- (1) This section applies to a lease if—
 - (a) the lessee is in possession of the land, although the lessor and the lessee have not agreed, expressly or by implication, on the duration of the term of the lease; or
 - (b) the lessee remains in possession of the land with the lessor’s consent, although the term of the lease has expired and the lessor and the lessee have not agreed, expressly or by implication that the lessee may continue in possession for some other period.
- (2) A lease to which this section applies—
 - (a) is terminable at will; and
 - (b) may be terminated, at any time, by the lessor or the lessee giving not less than 20 days’ written notice to the other party to the lease.

RECOMMENDATION 140. Section 130 should be retained with modernised language.

RECOMMENDATION 141. Section 131 should be retained with modernised language.

RECOMMENDATION 142. Section 132 should be retained with modernised language.

RECOMMENDATION 143. Section 133 should be retained with modernised language.

RECOMMENDATION 144. Section 134 should be retained with modernised language.

RECOMMENDATION 145. Section 135 should be retained with modernised language.

RECOMMENDATION 146. Section 136 should be retained with modernised language.

RECOMMENDATION 147. Section 137 should be retained with modernised language.

RECOMMENDATION 148. Section 138 should be repealed.

RECOMMENDATION 149. Section 139 should be repealed.

RECOMMENDATION 150. Part 8 Division 5 (sections 140 to 152) should be repealed.

RECOMMENDATION 151. Part 8 Division 6 (sections 153 to 167) should be repealed.

PART 10 – INCORPOREAL HEREDITAMENTS AND APPURTENANT RIGHTS

RECOMMENDATION 152. Section 176 should be repealed.

RECOMMENDATION 153. Section 177 should be repealed.

RECOMMENDATION 154. Section 178 should be repealed.

RECOMMENDATION 155. Section 198A should be repealed.

RECOMMENDATION 156. Insert provisions that:

- declare that no interest under either the *Land Title Act 1994* or the *Land Act 1994* can be created by prescription or through the fiction of lost modern grant irrespective of when created, from the time the amendment is passed; and
- declare that easements that may previously have been created by prescription (long user) or by the fiction of lost modern grant may only be sought under section 180 as statutory rights of user.

RECOMMENDATION 157. Section 179 should be repealed and replaced with provisions that provide for a duty of care/negligence regime to regulate support for land.

For example, using the New South Wales provisions as a guide, the section could be drafted in the following manner:

Section [179] Duty of care in relation to support for land

(1) In this section –

occupier includes a lessee or a mortgagee in possession, if that mortgagee in possession has the exclusive management and control of the land.

owner includes an occupier of the land.

structure includes buildings and other improvements on the land.

supporting land is the land and any structure on the supporting land that provides support to other land and includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.

supported land is land and any structures on the land that are provided with support by supporting land.

- (2) This section applies –
 - (a) notwithstanding the supporting land and supported land may not share a common boundary;
 - (b) to any support, including provided by structures anywhere on the land or common boundaries.
- (3) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land such that:
 - (a) the owner of supporting land owes a duty of care to the owner of supported land not to do any acts or omissions that adversely affects the support provided by the supporting land; and
 - (b) the owner of supported land owes a duty of care to the owner of supporting land not to do any acts or omissions that adversely affects the support provided by the supporting land.
- (4) A reference in this section to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support.
- (5) The duty of care in relation to support for land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed.
- (6) Any agreement referred to in subsection (5):
 - (a) has effect in relation to any agent of the person on whom the duty lies; and
 - (b) can take the form of an easement; and
 - (c) if the easement referred to in subsection (6)(b) is registered then it is binding on successors in title.
- (7) Any right at common law to bring an action in nuisance for acts or omissions that adversely affect the support provided by supporting land is abolished.
- (8) Any action in negligence that is commenced after the commencement of this section may be wholly or partly based on something that was done before the commencement of this section.

RECOMMENDATION 158. Section 180 should be amended in the following terms:

- amend subsection (1) to insert the word ‘development’: ‘*Where it is reasonably necessary in the interests of effective use and development in any reasonable manner...*’
- amend the definition of ‘utility’ in subsection (7) to include ‘cables’;
- amend the definition of ‘owner’ in subsection (7) to read ‘means any person with a legal or equitable estate in the land’;
- consider repealing subsection (8) so that the Crown is bound by the section; and
- add a subsection that allows for a party to apply under this section for an easement in gross in favour of a local authority, thus broadening the scope of the section.

For example, a subsection to broaden the scope of the section to include applications for an easement in gross in favour of a local authority could be drafted in the following manner:

- (1A) On the application of an owner of the dominant land but subject to this section, the court may:
 - (a) take into account the conditions of any approved plan for development of the dominant land; and
 - (b) make an order that an easement in gross be granted in favour of a public utility provider under section 81A of the *Land Title Act 1994* or schedule 6 of the Land Act.

- (1B) In making an order under subsection (1A), the court must be satisfied that:
- (a) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
 - (b) either –
 - (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner’s refusal is in all the circumstances unreasonable; or
 - (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.

RECOMMENDATION 159. Section 181 should be amended in the following terms:

- retain the requirement that an easement or restriction be deemed ‘obsolete’ before modification or extinguishment;
- include a subsection in section 181 that allows the court to modify an easement to include new terms of use (*proposed drafting is set out below*);
- allow for the court to make orders for the modification or extinguishment of a building management statement (**BMS**) in circumstances where the existing process cannot be used because the signatures of all of the existing lot owners cannot be obtained and where the modification or extinguishment is reasonably necessary in the circumstances.

The *Land Title Act 1994* should be amended to note that a BMS can be the subject of an application under section 181 and modified or extinguished in circumstances where such modification is reasonably necessary and all of the lot owners’ signatures cannot be obtained in accordance with section 54E of the *Land Title Act 1994*.

For example, with respect to the recommendation at paragraph 159.4.2, using the Northern Territory provisions as a guide, a subsection could be added to section 181 drafted in the following manner:

- (xx) The power of the court to make an order modifying an easement or covenant includes power to amend the instrument creating the easement or covenant to include new terms as to the use, ownership or maintenance of the servient land.

PART 11 – ENCROACHMENT AND MISTAKE

RECOMMENDATION 160. Part 11 Division 1 (sections 182 to 194) should be retained with modernised language, and minor amendments including:

- the term ‘unimproved capital value’ should be updated to ‘market value’ or a similar term; and
- the definition of ‘subject land’ be expanded to accommodate land ‘reasonably required as curtilage and for access’ to the encroachment.

RECOMMENDATION 161. Part 11 Division 2 (sections 195 to 198) should be retained with modernised language. Consider adding an additional subsection that provides the Division does not apply to fencing.

PART 11A – RIGHTS OF WAY (SEE RECOMMENDATION 155)

PART 12 – EQUITABLE INTEREST AND THINGS IN ACTION

RECOMMENDATION 162. Section 199 should be amended to modernise the language and to allow for the assignment at law of a partial debt or other legal thing in action.

For example, using the Western Australian provision as a guide, the section could be drafted in the following manner:

Section [199] Assignment of debts and choses in action

- (1) Subject to subsection (2), any absolute assignment of any debt or other legal chose in action, is effectual in law, to pass and transfer from the date of the notice —
 - (a) the legal right to that debt or chose in action;
 - (b) all legal and other remedies for the debt or chose in action; and
 - (c) the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.
- (2) An assignment under subsection (1):
 - (a) to be effective, requires express notice in writing to be given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim that debt or chose in action;
 - (b) must be made in writing and signed by the assignor;
 - (c) must not purport to be by way of charge only; and
 - (d) is subject to equities having priority over the right of the assignee.
- (3) Where the debtor, trustee, or other person liable in respect of the debt or chose in action referred to in subsection (1) has notice—
 - (a) that the assignment so referred to is disputed by the assignor, or any person claiming under him or her; or
 - (b) of any other opposing or conflicting claims, to the debt or chose in action, he or she may, if he or she thinks fit, either call upon the persons making claim thereto to interplead concerning the debt or chose in action, or pay the debt or other chose in action into court, under the provisions of the *Trusts Act 1973*.
- (4) For the purposes of this section **any debt or other legal chose in action** includes a part of any debt or other legal chose in action.

RECOMMENDATION 163. Section 200 should be retained.

PART 13 – POWERS OF APPOINTMENT

RECOMMENDATION 164. Section 201 should be retained with modernised language.

RECOMMENDATION 165. Section 202 should be retained with modernised language.

RECOMMENDATION 166. Section 203 should be retained with modernised language.

RECOMMENDATION 167. Section 204 should be retained with modernised language.

RECOMMENDATION 168. Section 205 should be retained with modernised language.

PART 14 – PERPETUITIES AND ACCUMULATIONS

RECOMMENDATION 169. The rule against perpetuities should be replaced with a single perpetuity period of up to 125 years for dispositions of an interest in property that take effect after the commencement of the new provisions. Existing dispositions of property should remain subject to the perpetuity period in place at the time the disposition took effect, subject an ability to ‘opt-in’ to the longer perpetuity period in specified circumstances.

RECOMMENDATION 170. The provisions dealing with powers of appointment, perpetuities and accumulations should be removed and placed in a stand-alone Act or in the *Trusts Act 1973*.

RECOMMENDATION 171. The effect of section 206 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 172. The effect of section 206A should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 173. The effect of section 206B should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 174. The effect of section 207 should be retained with modernised language so that the new perpetuity period applies to all dispositions of property made after the commencement of the new provisions. Further, trusts that are already in existence should have the ability to opt-in to the new perpetuity period.

RECOMMENDATION 175. The effect of section 208 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 176. Section 209 should be repealed and replaced as part of the larger change to the operation of the perpetuity period in Queensland. The replacement provision should provide for a perpetuity period of up to 125 years.

RECOMMENDATION 177. Section 210 should be repealed and replaced with a provision which states that a disposition of property is not invalid because it may vest at a date that is remote from the date of the disposition provided it may vest within the perpetuity period.

Should the interest fail to vest in the perpetuity period, default vesting rules will be applied.

RECOMMENDATION 178. The effect of section 211 should be retained with modernised language so that the power of the court is expanded to allow the court to make orders:

- extending the perpetuity period for trusts that pre-date the commencement of the new provisions; and
- for the vesting of property that has not or will not vest within the 125 year period.

RECOMMENDATION 179. Section 212 should be repealed.

RECOMMENDATION 180. The effect of section 213 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 181. Section 214 should be repealed.

RECOMMENDATION 182. The effect of section 215 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 183. Section 216 should be repealed.

RECOMMENDATION 184. The effect of section 217 should be retained so that specified powers, rights and interests are excluded from the perpetuity period.

RECOMMENDATION 185. Section 218 should be amended so that options and rights of pre-emption are not caught by the perpetuity period.

For example, section 218 could be re-drafted along the lines of the New South Wales provision in the following manner:

Section [218] Options

The rule against perpetuities does not apply to:

- (a) any option to renew a lease of property;
- (b) any option to acquire a reversionary interest in property comprised in a lease;
- (c) any right of pre-emption given for valuable consideration or by will in respect of property; or
- (d) any other option given for valuable consideration or by will to acquire an interest in property.

RECOMMENDATION 186. The effect of section 219 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 187. The effect of section 220 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 188. The effect of section 221 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

RECOMMENDATION 189. The effect of section 222 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

PART 15 – CORPORATIONS

RECOMMENDATION 190. Section 223 should be retained with modernised language.

RECOMMENDATION 191. Sections 224 and 225 should be retained with modernised language and combined into a single section.

RECOMMENDATION 192. Section 226 should be retained with modernised language.

RECOMMENDATION 193. Section 227 should be retained with modernised language.

PART 16 – VOIDABLE DISPOSITIONS

RECOMMENDATION 194. Section 228 should be retained with modernised language but amended to replace the reference to alienation of property with disposition of property.

RECOMMENDATION 195. Section 229 should be repealed.

RECOMMENDATION 196. Section 230 should be repealed.

PART 17 -- APPORTIONMENT

RECOMMENDATION 197. Part 17 should be retained with modernised language and amended to exclude dividends and annuities.

For example, the provisions in Part 17 could be re-drafted along the lines of the New Zealand legislation in the following manner:

Section [] Apportionments in respect of time

- (1) This section applies to a payment of rent in respect of a fixed or ascertainable period (whether the payment is reserved or made payable under an instrument or not).
- (2) The payment must be regarded as accruing from day to day, and is apportionable in respect of time accordingly, as to both—
 - (a) the liability to make the payment; and
 - (b) the right to receive it.
- (3) Subsection (2) does not apply if a contrary intention is expressed in an instrument.

Section [] Payment and recovery of apportioned part of payment of rent

- (1) An apportioned part of a payment of rent is payable and recoverable—
 - (a) for a continuing right to a payment, only when the entire payment becomes payable and recoverable;
 - (b) for a payment the continuing right to which has ceased because of death, re-entry, or another cause, only when the entire payment would have become payable and recoverable if the continuing right to the payment had not ceased.
- (2) A person entitled to an apportioned part of a payment of rent—
 - (a) has, when the entire payment becomes payable and recoverable, the same remedies for recovering the apportioned part as would have been available in respect of the entire payment; but
 - (b) must bear a proportionate part of any allowance which should properly be made in respect of the entire payment.

PART 18 – UNREGISTERED LAND

RECOMMENDATION 198. Division 1 of Part 18 (sections 234-234A) should be repealed.

RECOMMENDATION 199. Division 2 of Part 18 (sections 235-240) should be repealed.

RECOMMENDATION 200. Division 3 of Part 18 (sections 241-249) should be repealed.

RECOMMENDATION 201. Division 4 of Part 18 (sections 250-254A) should be repealed and replaced with a simplified process to provide for the registration of old system land (to the extent any may be identified in the future).

To the extent that any old system land is identified in Queensland, the process to convert that land to registered land under the *Land Title Act 1994* should involve public notification of the land with a specified period for interested parties to claim a legitimate interest in the land.

To the extent no meritorious claims are received, the land should be declared unallocated state land. To the extent a claimant makes a successful claim, the claimant should be registered as the owner of the land under the *Land Title Act 1994*.

PART 19 – PROPERTY (DE FACTO RELATIONSHIPS)

RECOMMENDATION 202. The necessity for retaining Part 19 should be reviewed with a view to repeal if it is found to no longer be of utility.

PART 20 – MISCELLANEOUS

RECOMMENDATION 203. Section 345 should be repealed.

RECOMMENDATION 204. Section 346 should be repealed.

RECOMMENDATION 205. Section 347 should amended to:

- remove the requirement to use registered post;
- allow for notices to be sent using electronic communication (e.g. via fax, email or by making the notice available electronically); and
- provide a deemed time of receipt for notices sent via post or electronic communication.

For example, using section 600G of the *Corporations Act 2001* (Cth) as a guide, section 347 could be drafted in the following manner:

Section [347] Service of notices

- (1) Where this Act, or any instrument or agreement that relates to property requires or authorises a notice to be served on a person, the notice may be served:
 - (a) on a person, by:
 - (i) delivering the notice to the person personally; or
 - (ii) leaving it for the person at the person’s usual or last known place of residence; or
 - (iii) posting it to the person as a letter addressed to the person at the person’s usual or last known place of residence; or
 - (b) if the person is in business as a principal, by:
 - (i) delivering the notice to the person at the person’s usual or last known place of business; or

- (ii) posting it to the person as a letter addressed to the person at the person's usual or last known place of business; or
 - (c) if the person is a corporation, by:
 - (i) leaving the notice; or
 - (ii) posting it as a letter addressed to the corporation; at its registered office or principal place of business in the State; or
 - (d) by electronic communication to the electronic address nominated by the person or corporation for the purpose of receiving notices under the Act, instrument or agreement.
- (2) If the person is:
- (a) absent from the State; or
 - (b) deceased;
- the notice may be delivered as provided in subsection (1) to the person's agent in the State or to the person's personal representative.
- (3) If the person is:
- (a) not known, or is absent from the State and has no known agent in the State; or
 - (b) deceased and has no personal representative;
- the notice must be delivered in such manner as may be directed by an order of the court.
- (4) Despite anything in subsections (1) to (3), the court may make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery of any notice.
- (5) This section does not apply to notices served in proceedings in the court, nor where the person serving the notice prevents its receipt by the person on whom the notice is intended to be served.
- (6) A notice is validly served by electronic communication if:
- (a) the notice in the form required by the Act, instrument or contract is attached to the electronic communication; or
 - (b) the content of the notice as required by the Act, instrument or agreement is included in the electronic communication; or
 - (c) a link to the content or form required by the Act, instrument or agreement is included in the electronic communication and the content or form is accessible by the recipient for a reasonable time; and
 - (d) the electronic communication is sent to the electronic address nominated by the recipient for the purpose of notices under the Act, instrument or contract.
- (7) A notice given by post is taken to be received, unless the contrary is shown, 5 business days after being sent.
- (8) A notice given by an electronic communication in accordance with subsection (6) is taken to be received, unless the contrary is shown:
- (a) if sent before 4pm on a business day – on the same business day it is sent; or
 - (b) if sent after 4pm on a business day – on the next business day; or
 - (c) if sent on a day that is not a business day – on the next business day.
- (9) This section applies unless a contrary method of service of notices is provided in the instrument or agreement or by this Act.

RECOMMENDATION 206. Section 348 should be repealed.

RECOMMENDATION 207. Section 349 should be repealed.

RECOMMENDATION 208. Section 350 should be retained.

RECOMMENDATION 209. Section 351 should be retained.

SCHEDULES

RECOMMENDATION 210. Schedule 1 should be retained with modernised language.

RECOMMENDATION 211. Schedule 3 should be amended in accordance with recommendation 119.

RECOMMENDATION 212. Schedule 4 should be repealed.

RECOMMENDATION 213. Schedule 5 should be repealed.

RECOMMENDATION 214. The new PLA should contain a schedule that provides a dictionary of terms to be defined for application to the whole Act. The overarching drafting principles that should be applied are:

- where possible, put definitions together in the schedule and do not duplicate them within the Act;
- locate definitions in the schedule where those definitions have general application;
- only embed definitions within the sections, Parts or Divisions when the definition is specific to that section, Part or Division and does not have general application to the entire Act; and
- where the *Acts Interpretation Act 1954* provides a suitable definition, do not define that term in the new PLA, and instead rely on the definition provided in that Act.

RECOMMENDATION 215. The definitions in schedule 6 that direct the reader back to section 58A should be repealed.

RECOMMENDATION 216. The definition of ‘disposition’ in schedule 6 should be amended in the following terms:

disposition includes:

- (a) a sale;
- (b) a mortgage;
- (c) a transfer;
- (d) a grant;
- (e) a partition;
- (f) an exchange;
- (g) a lease;
- (h) an assignment;
- (i) a vesting instrument;
- (j) a declaration of trust;
- (k) a surrender, disclaimer, or release;
- (l) the creation of an easement, profit á prendre, or any other interest in property; and
- (m) every other assurance of property by an instrument,

<p>but does not include:</p> <ul style="list-style-type: none"> (a) a will; (b) a devise; (c) a bequest; or (d) an appointment of property contained in a will.
<p>RECOMMENDATION 217. A definition of ‘intestate’ should be added to schedule 6 in the following terms:</p> <p><i>intestate</i> has the same meaning as in section 5 of the <i>Succession Act 1981</i>.</p>
<p>RECOMMENDATION 218. A definition of ‘short lease’ should be added to schedule 6 in the following terms:</p> <p><i>short lease</i> is a lease:</p> <ul style="list-style-type: none"> (a) for a term of 3 years or less; (b) from year to year or a shorter period; or (c) created by parol taking effect in possession, for a term not exceeding 3 years, including any option to renew. <p><i>Note:</i> ‘taking effect in possession’ includes an immediate entitlement to possession. <i>Note:</i> a short lease creates a legal interest in land.</p>
<p>RECOMMENDATION 219. The definition of ‘rent’ in schedule 6 should be amended in the following terms:</p> <p><i>rent</i> includes rent payable in advance.</p>
<p>RECOMMENDATION 220. The definition of ‘valuable consideration’ in schedule 6 should be amended in the following terms:</p> <p><i>valuable consideration</i> does not include a nominal consideration in money.</p>
<p>RECOMMENDATION 221. The definition of ‘court’ in schedule 6 should be amended in the following terms:</p> <p><i>court</i> means the Supreme Court.</p>
<p>RECOMMENDATION 222. The definition of ‘commencement of this Act’ in schedule 6 should be amended as appropriate.</p>
<p>RECOMMENDATION 223. The definition of ‘mortgage-money’ in schedule 6 should be amended to remove the hyphen.</p>
<p>RECOMMENDATION 224. The definition of ‘president of the Law Society’ in schedule 6 should be amended in the following terms:</p> <p><i>president of the Law Society</i> means the president for the time being of the Queensland Law Society Incorporated constituted under the <i>Legal Profession Act 2007</i>.</p>
<p>RECOMMENDATION 225. The definition of ‘sale’ in schedule 6 should be amended in the following terms:</p> <p><i>sale</i> means a transfer for valuable consideration.</p>

RECOMMENDATION 226. The definition of ‘assurance’ in schedule 6 should be repealed.

RECOMMENDATION 227. The definition of ‘conveyance’ in schedule 6 should be repealed.

RECOMMENDATION 228. The definition of ‘encumbrance’ and ‘encumbrancee’ in schedule 6 should be repealed.

RECOMMENDATION 229. The definition of ‘fine’ in schedule 6 should be repealed.

RECOMMENDATION 230. The definition of ‘Imperial Act’ in schedule 6 should be repealed.

RECOMMENDATION 231. The definition of ‘warden’ in schedule 6 should be repealed.

RECOMMENDATION 232. The definitions of ‘instrument’, ‘mortgagee in possession’ and ‘possession’ in schedule 6 should be repealed on the basis that the *Acts Interpretation Act 1954* already provides a definition that is suitable for the purposes of the PLA.

For example, based on the recommendations made by the Centre, the dictionary could be drafted in the following way:

bankruptcy includes any act or proceeding in law having under any Act or Commonwealth Act effects or results similar to those of bankruptcy, and includes the winding-up of an insolvent company.

Coal Mining Act means the *Coal Mining Safety and Health Act 1999*.

commencement of this Act [*amend as appropriate*].

court means the Supreme Court.

deed includes an instrument having under this or any other Act the effect of a deed.

disposition includes:

- (a) a sale;
- (b) a mortgage;
- (c) a transfer;
- (d) a grant;
- (e) a partition;
- (f) an exchange;
- (g) a lease;
- (h) an assignment;
- (i) a vesting instrument;
- (j) a declaration of trust;
- (k) a surrender, disclaimer, or release;
- (l) the creation of an easement, profit á prendre, or any other interest in property; and
- (m) every other assurance of property by an instrument,

but does not include:

- (a) a will;
- (b) a devise;
- (c) a bequest; or
- (d) an appointment of property contained in a will.

District Court means the District Court or a District Court judge.

Housing Act means the *Housing Act 2003* [subject to this Act remaining current].

income when used with reference to land, includes rents and profits.

intestate has the same meaning as in section 5 of the *Succession Act 1981*.

Land Act means the *Land Act 1994*.

land under the provisions of the Land Act or any equivalent expression, means estates, interests, or any other rights in or in respect of land, granted, leased, or granted in trust or reserved and set aside under that Act but does not include registered land or unregistered land.

Mineral Resources Act means the *Mineral Resources Act 1989*.

mortgage includes a charge on any property for securing money or money's worth.

mortgagee includes any person from time to time deriving title to the mortgage under the original mortgagee.

mortgage money means money or money's worth secured by a mortgage.

mortgagor includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to the mortgagor's estate, interest, or right in the mortgaged property.

notice includes constructive notice.

order includes judgment and decree of a court.

president of the Law Society means the president for the time being of the Queensland Law Society Incorporated constituted under *Legal Profession Act 2007*.

purchaser means a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property.

registered means the making or recording by proper authority in the appropriate register (if any) or other book, instrument or document of such entries, endorsements, particulars or other information as may be requisite for recording a dealing or other transaction with respect to land.

registered land means land under the provisions of the *Land Title Act 1994*.

registrar means the registrar of titles.

rent includes rent payable in advance.

sale means a transfer for valuable consideration.

securities include stocks, funds and shares.

short lease is a lease:

- (a) for a term of 3 years or less;
- (b) from year to year or a shorter period; or
- (c) a lease created by parol taking effect in possession, for a term not exceeding 3 years, including any option to renew.

Note: 'taking effect in possession' includes an immediate entitlement to possession.

Note: a short lease creates a legal interest in land.

title deed includes a certificate of title to, or deed of grant in respect of, registered land.

trustee corporation means the public trustee and any corporation authorised by the *Trustee Companies Act 1968* to administer the estates of deceased persons and other trust estates.

valuable consideration does not include a nominal consideration in money.

unregistered land means land that has been granted in fee simple and is not registered land or land granted in trust under the Land Act.

Part 1 – Preliminary

1. Sections 1 to 3

1 Short title

This Act may be cited as the *Property Law Act 1974*.

2 Act binds Crown

This Act, except where otherwise provided, binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

3 Dictionary

The dictionary in schedule 6 defines particular words used in this Act.

1.1. Overview and purpose

Sections 1, 2 and 3 of Part 1 of the PLA are standard provisions which deal with mechanical aspects of the PLA. These include: the short title of the Act (section 1); confirming that the PLA binds the Crown (section 2); and providing that the dictionary appears in schedule 6 (section 3).

1.2. Recommendation

The Centre does not propose any changes in relation to the operation of these provisions. The Centre recommends modernising the language of section 2, and the balance of the PLA, by replacing the word ‘Crown’ with the word ‘State’. Modernising the language of the Act is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 2. Sections 1, 2 and 3 should be retained with modernised language by replacing ‘Crown’ with ‘State’.

2. Section 4 – Act not to be taken to confer right to register restrictive covenant

2.1. Overview and purpose

4 Act not to be taken to confer right to register restrictive covenant

Nothing in this Act shall be construed as conferring on any person a right, in respect of registered land, to registration of a restrictive covenant.

The general approach in Queensland to restrictive covenants is that they are not able to be registered on the land register. There is no express provision in the *Land Title Act 1994* (Qld) for the registration of restrictive covenants. Section 4 of the PLA operates to make it clear that there is nothing in the PLA which could be interpreted as conferring a right to register a restrictive covenant. Section 4 was not the subject of any consideration by the Queensland Law Reform Commission (QLRC) in its 1973 report and was a late inclusion in the Act prior to its passage through Parliament.

2.2. Issues with the section

As indicated in paragraph 2.1 above, restrictive covenants are not registrable in Queensland. However, certain statutory covenants in favour of the State or a local government and covenants in a building management statement may be registered in limited situations under the *Land Title Act 1994* (Qld).⁴ The only other provision in the PLA which refers to restrictive covenants is section 181 which enables the Supreme Court to order the modification or extinguishment (whole or partial) of an easement or restrictive covenant on the application of any person interested in the relevant land. However, there is nothing contained in that provision which would suggest in any way that a restrictive covenant could be registered.

The reason for the inclusion of section 4 of the PLA is unclear.⁵ It may be presumed that the intention was to reinforce the accepted position in Queensland that restrictive covenants are not registrable and to avoid any suggestion that the PLA altered this position.

2.3. Other jurisdictions

In South Australia, the Northern Territory and the Australian Capital Territory there are no provisions in the Torrens legislation relating to notification or registration of restrictive covenants.⁶ In the remaining four jurisdictions legislation expressly authorises the Registrar of Titles to enter notification of restrictive covenants on the certificate of title.⁷ Section 4 of the PLA is unique to Queensland.

⁴ The limited situations in which restrictive covenants can be registered are set out in sections 54A and 97A of the *Land Title Act 1994* (Qld). All freehold land in Queensland is registered under the *Land Title Act 1994* (Qld). That Act does not provide for the registration of restrictive covenants. See Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [15.370].

⁵ The Hansard relevant to the passage of the Property Law Bill provides no assistance in clarifying the purpose of section 4. The section was amended by the *Statute Law Revision Act (No. 2) 1995* (Qld).

⁶ For further information on the position in other Australian jurisdictions see Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 796-798 [19.100].

⁷ See *Conveyancing Act 1919* (NSW) s 88(3)(a); *Transfer of Land Act 1958* (Vic) s 88; *Transfer of Land Act 1893* (WA) s 129A; *Land Titles Act 1980* (Tas) s 102-104.

2.4. Recommendation

The Centre recommends that the effect of section 4 should be retained but with modernised language removing the reference to ‘registered land’ (as this is now superfluous, given that for all intents and purposes, there is no old system land remaining in Queensland). The status of old system land is discussed at paragraph 5.2.1. Submissions received from the Queensland Law Society (QLS) support the retention of the provision. Modernising the language of the PLA is in line with the overarching principles that inform these recommendations.

The Centre further recommends that the provision be relocated to sit together with other provisions in the PLA relating to covenants, which are discussed in detail at paragraph 56. This recommendation is made on the basis that this is a more appropriate location for the provision.

RECOMMENDATION 3. The effect of section 4 should be retained with modernised language that removes the reference to ‘registered land’. The section should be relocated to sit with the other provisions relating to covenants in the new PLA.

For example, section 4 could be drafted in the following manner:

Section [4] Act not to be taken to confer right to register restrictive covenant

Nothing in this Act shall be construed as conferring on any person a right to registration of a restrictive covenant.

3. Section 5 – Application of Act

3.1. Overview and purpose

5 Application of Act

- (1) This Act shall -
- (a) apply to unregistered land; and
 - (b) apply to land under the provisions of the *Land Title Act 1994*, including any lease of such land, but subject to that Act; and
 - (c) apply to estates, interests, and any other rights in or in respect of land, granted, created or taking effect under any Act or any repealed Act provisions of which continue to apply with respect to this Act, but subject to the provisions of such Act; and
 - (d) without limiting the generality of paragraph (c) –
 - (i) subject to the provisions of the Coal Mining Act, apply to land under that Act; or
 - (ii) subject to the provisions of the Land Act, apply to land under that Act; or
 - (iii) subject to the provisions of the Mineral Resources Act, apply to leases, and any other rights in or in respect of land, granted, created or taking effect under that Act.
- (2) Where by this Act, including this section, a provision is expressed to apply to land or interests in land under the provisions of a particular Act, such expression shall not be construed to mean that the provision –
- (a) applies exclusively to such land; or
 - (b) does not apply to property other than land.

Some of the goals of the PLA are to ‘simplify, as well as to codify and amend, the law of property’⁸ in addition to assimilating to the extent possible the ‘rules of law applying to land, whether it be freehold or leasehold and whether registered or unregistered’ in Queensland.⁹ However, the QLRC noted in relation to the proposed section 5 that:

In order, however, to preserve the peculiar requirements of particular statutes, the provisions of the proposed Act will, unless otherwise provided, apply subject to the provisions of the statute under which the land is held, e.g. Land Act, or The Miners’ Homestead Leases Act.¹⁰

Section 5(1) of the PLA clearly states that the PLA applies to:

- unregistered land;
- land under the provisions of the *Land Title Act 1994* (Qld), including any lease of such land;
- estates, interests and other rights in or in respect of land, granted, created or taking effect under any Act or any repealed Act which provisions continue to apply with respect to the PLA; and

⁸ 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) 2.

⁹ 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) 5.

¹⁰ 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) 5.

- land under the Coal Mining Act¹¹ or the *Land Act 1994* (Qld) or leases, and any other rights in or in respect of land, granted, created or taking effect under the *Mineral Resources Act 1989* (Qld).

However, the broad application of the PLA is expressly made subject to the provisions of the various other Acts which apply to the specific tenure in question.¹² The PLA is subject to the *Land Act 1994* (Qld) for land to which the *Land Act 1994* (Qld) applies.¹³

Section 5(2) of the PLA has the effect that where a section in the PLA provides that it applies to land or interests in land under the provisions of a particular Act, the expression in the section is not to be construed to mean that the section:

- applies exclusively to such land; or
- does not apply to property other than land.

3.2. Issues with the section

3.2.1. Clarity required in section 5 of the PLA regarding scope of application

Section 5 of the PLA makes it clear that the PLA is an Act of general application. However, the section is framed in a way that is arguably complex and convoluted. The equivalent provision in New Zealand was recently redrafted to provide clarity. Under the New Zealand¹⁴ approach, the section:

- clearly identifies at the start of the section the land, other property and instruments the Act applies to;
- indicates what happens in the event of any inconsistency with a provision in the New Zealand Act and another enactment;
- states that the *Property Law Act 2007* (NZ) applies subject to the *Land Transfer Act 1952* (NZ); and
- makes it clear that the section applies subject to any other provision in the *Property Law Act 2007* (NZ) or any other enactment providing otherwise.

3.2.2. Inconsistent language within the Act used where provisions are 'subject to' other Acts

Section 5 of the PLA makes it clear that the broad application of the PLA is subject to a number of other Acts. However, in addition to section 5 there are a number of other sections of the PLA which specifically limit or exclude the operation of the PLA in more precise terms.¹⁵ These sections make specific divisions or Parts of the Act subject to other Acts such as the *Land Act 1994* (Qld) and the *Land Title Act 1994* (Qld).

¹¹ The Coal Mining Act is defined in Sch 6 of the *Property Law Act 1974* (Qld) to mean the *Coal Mining Safety and Health Act 1999* (Qld).

¹² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.5.30].

¹³ *Property Law Act 1974* (Qld) s 5(1)(d)(ii).

¹⁴ *Property Law Act 2007* (NZ) s 8.

¹⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.5.30].

The approach adopted in these sections varies. Some other provisions provide that the relevant Part or section is 'subject to' the other Act.¹⁶ For example, section 113(4) provides that:

(4) For a registered lease of registered land, this section is **subject to** the Land Title Act 1994.

This approach is consistent with section 5 of the PLA.

The phrase, 'shall not apply' is also used in other sections in the PLA.¹⁷ For example, section 86(4) provides that:

(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.

A number of provisions provide that the relevant section 'does not affect' how something is done under another Act. For example, section 46(7) of the PLA provides:¹⁸

(7) This section does not affect how instruments are validly executed under the Land Title Act 1994.

There are also sections in the PLA which expressly provide that the relevant division applies despite the provisions of any other Act.¹⁹ For example, both Divisions 1 and 2 of Part 11 of the Act which address encroachment and mistake apply despite the provisions of any other Act.²⁰ This is set out in sections 183 and 195 of the PLA which are in the same terms and provide:

'This division applies despite the provisions of any other Act.'

Similarly, Part 7 of the PLA which deals with mortgages expressly provides that the Part 'applies to land and any mortgage of land which is subject to the provisions' of:

- the *Land Title Act 1994* (Qld); or
- the *Land Act 1994* (Qld); or
- the *Mineral Resources Act 1989* (Qld); or
- the *Housing Act 2003* (Qld); or
- any other Act, and any repealed Act which continue to apply to such land or mortgage made before that Act was repealed.²¹

Part 7 also applies, subject to any other Act, to any other mortgage whether of land or any other property.²²

There are instances in the PLA where it is clear that a provision of the PLA will not apply to another Act because of the subject matter of the sections. However, often in these cases the relevant PLA provision does not expressly state that the provision is subject to that other Act. For example, sections

¹⁶ For example, *Property Law Act 1974* (Qld) ss 77A(1)(c), 80(2), 115(2).

¹⁷ For example, *Property Law Act 1974* (Qld) ss 87(2), 123A, 200(2), 84(5).

¹⁸ See also *Property Law Act 1974* (Qld) s 73(3) which provides that 'Nothing in this section affects....(b) the *Land Title Act 1994*'.

¹⁹ For example, *Property Law Act 1974* (Qld) s 106(2).

²⁰ For example, *Property Law Act 1974* (Qld) ss 183 and 195 which are in the same terms and provide: *'This division applies despite the provisions of any other Act.'*

²¹ *Property Law Act 1974* (Qld) s 77A(1)(b).

²² *Property Law Act 1974* (Qld) s 77A(1)(c).

116 to 118 of the PLA clearly would not apply in respect of a lease from the State under the *Land Act 1994* (Qld) as no reversionary estate is retained by the State. A user of the PLA would need to rely on section 5(1)(d) and make an assessment as to whether the PLA provision applied to land or an interest under the *Land Act 1994* (Qld). This approach could be perceived as creating uncertainty in the application of the PLA.

However, the PLA is an Act of broad application to a wide range of real and other property interests. It would not be practical to identify with accuracy all the relevant provisions of other legislation which the PLA may be subject to, particularly as those provisions may be fluid and subject to change over time. The primary objective of section 5 is to make it clear that the PLA does not apply in isolation of other legislation. The approach is to highlight that the application of the PLA is subject to those Acts.

3.3. Other jurisdictions

3.3.1. Australia

A number of other Australian jurisdictions include an application section.²³ The precise language in the application sections of each jurisdiction varies. One common feature is that each jurisdiction makes the relevant property legislation subject to the applicable Torrens legislation in the relevant State or Territory. For example, in New South Wales, the *Conveyancing Act 1919* (NSW)²⁴ provides:

6. Application of Act to Real Property Act 1900 and other Acts

- (1) Except as hereinafter provided, this Act, so far as inconsistent with the Real Property Act 1900, shall not apply to lands, whether freehold or leasehold, which are under the provisions of that Act.

The wording of the South Australian and the Australian Capital Territory provisions is very similar to the New South Wales section. There are also specific provisions in different parts of the legislation in these other jurisdictions which identify particular instances where a provision may be subject to another Act or where the operation of the other Act is expressly excluded.

3.3.2. New Zealand

The New Zealand property legislation provides an example of a slightly different drafting approach, although with similar effect to section 5 of the PLA. Section 8 of the *Property Law Act 2007* (NZ) provides:

- (1) This Act applies to the land, other property, and instruments specified in subsection (2) to the extent that the law of New Zealand applies to the land, other property, and instruments.
- (2) The land, other property, and instruments are –
 - (a) land in New Zealand;
 - (b) other property whether in or outside New Zealand; and
 - (c) instruments whether –
 - (i) executed in or outside New Zealand; and
 - (ii) coming into operation before, on, or after 1 January 2008.
- (3) This Act does not apply to Maori customary land within the meaning of Te Ture Whenua Maori Act 1993.

²³ See for example: *Conveyancing Act 1919* s 6(1); *Law of Property Act 1936* (SA) s 6; *Property Law Act 1969* (WA) s 6(1); *Civil Law (Property) Act 2006* (ACT) s 5(1).

²⁴ *Conveyancing Act 1919* (NSW) s 6(1).

- (4) If a provision of this Act is inconsistent with a provision in another enactment, the provision in the other enactment prevails.
- (5) Without limiting subsection (4), this Act applies subject to –
 - (a) the Land Transfer Act 1952; and
 - (b) the Land Transfer (Computer Registers and Electronic Lodgement Amendment Act 2002).
- (6) This section applies subject to any other provision of this Act or of another enactment providing otherwise.

The Law Commission (NZ) in its 1994 report acknowledged that it is important that the relationship between the new property Act and other Acts is ‘well understood’.²⁵ The approach adopted in New Zealand by the Commission is that where there is a conflict between a provision in the new legislation and any other Act, the section in the other Act will prevail except as otherwise provided by the *Property Law Act 2007* (NZ) or any other enactment.²⁶ The Law Commission (NZ) noted in its report:

So, for example, the rules in the new Act concerning land must be read subject to the provisions of the Land Transfer Act 1952, unless it is otherwise stated in the section where any of those rules are found. When the new Act says that something can be done in a particular way, it has to be remembered that the prescribed method may be sufficient as between the parties to the transaction but may very well have to be formalised by execution and registration of a document in compliance with the Land Transfer Act 1952. Likewise, the Act applies to transactions relating to Maori land but, as an overriding requirement, those transactions must be carried out in compliance with Te Ture Wehua Maori Act 1993 or other applicable statutes.²⁷

Further, when discussing the application of the Act to the Crown, the Law Commission (NZ) indicated that it was necessary to have regard to other legislation which may override the proposed new Act in relation to dealings by the Crown.²⁸ Further, that:

It is obviously impractical, and could be dangerous to try to list these (ever changing) situations in the new Act. The Law Commission emphasises that where there is a conflict between the provisions of the new Act and any other Act, the other Act prevails except as otherwise expressly provided...²⁹

3.4. Recommendation

The Centre recommends that the effect of section 5 of the PLA be retained but the language should be modernised and provide clarity. This is in line with the overarching principles that inform the recommendations made by the Centre. The actual form of the section and any subsequent provisions in which the application of a Part or Division of the PLA is restated in more precise terms should be determined by the Office of the Queensland Parliamentary Counsel, however the Centre is of the view that the New Zealand drafting forms an appropriate basis for the new drafting. This approach is also supported in submissions made by the QLS.

RECOMMENDATION 4. The effect of section 5 should be retained with modernised language that clarifies the application of the new PLA to other legislation.

²⁵ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 2 [5].

²⁶ *Property Law Act 2007* (NZ) ss 8(4) and (6).

²⁷ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 2 [5].

²⁸ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 5 [13].

²⁹ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 5 [13].

For example, using the New Zealand provisions as a guide, section 5 could be drafted in the following manner:

Section [5] Application of Act

- (1) This Act applies to the land, other property, and instruments specified in subsection (2) to the extent that the law of Queensland applies to the land, other property, and instruments.
- (2) The land, other property, and instruments are –
 - (a) land in Queensland;
 - (b) other property whether in or outside Queensland; and
 - (c) instruments whether executed in or outside Queensland.
- (3) If a provision of this Act is inconsistent with a provision in another enactment, the provision in the other enactment prevails.
- (4) Without limiting subsection (3), this Act applies subject to –
 - (a) the *Land Title Act 1994*;
 - (b) the Land Act;
 - (c) the Mineral Resources Act; and
 - (d) the Coal Mining Act.
- (5) This section applies subject to any other provision of this Act or of another enactment providing otherwise.

4. Section 6 – Savings in regard to ss 10-12 and 59

Section 6 of the PLA is considered together with sections 10 to 12 and 59. As discussed below at paragraphs 8 to 12, the Centre recommends that sections 6, 10 to 12 and 59 be replaced with a new provision that addresses the issues that have been identified.³⁰

³⁰ This was presented as an option in Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) Sales of Land and Other Related Provisions*, 28, [3.4.3].

Part 2 – General Rules Affecting Property

Part 2 of the PLA comprises sections 7 to 18.

5. Section 7 – Effect of repeal of Statute of Uses

5.1. Overview and purpose

7 Effect of repeal of Statute of Uses

- (1) Interest in land which under the Statute of Uses could before the commencement of this Act have been created as legal interests shall after the commencement of this Act be capable of being created as equitable interests.
- (2) Despite subsection (1), an equitable interest in land shall, after the commencement of this Act, only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement.
- (3) In a voluntary conveyance executed after the commencement of this Act a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

The *Statute of Uses 1535 (Statute of Uses)* was introduced to address the doctrine of use which had evolved to overcome some of the limitations of existing laws in relation to land tenure.³¹ A use operated by the freeholder conveying the subject land to another person on the basis that the land is held by that person for the use and enjoyment of the grantor, rather than the grantee.³² A practical example of a use provided in commentary is:

Thus, for example if B, the holder of a fee simple estate conveyed his interest 'to A and his heirs to the use of B and his heirs', A was the feoffee to uses and B was the cestui que use.³³

A 'feoffee' as the recipient, was essentially the trustee of the land and the 'cestui que use' as the grantor of the land was the beneficiary. There were many benefits of this type of arrangement including that the payment of feudal taxes upon the death of B was avoided.³⁴ The introduction of the Statute of Uses in 1535 had the effect of vesting legal estate and seisin in the grantor with the effect that on the death of the grantor, feudal taxes would be payable again.³⁵ In the context of the example above, this meant that B took the legal fee simple and A obtained nothing.³⁶ This has been described as the 'execution of the use' by the Statute of Uses.³⁷ Although the aim of the legislation was to completely abolish uses, this outcome was not fully achieved.³⁸

³¹ For a detailed discussion of these issues and the development of the use and the trust more generally see Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 66-74 [2.255]-[2.355].

³² Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 68 [2.280].

³³ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 68 [2.280].

³⁴ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 68 [2.285]. For a detailed discussion of the advantages and disadvantages of uses see [2.285] – [2.290].

³⁵ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 70 [2.305].

³⁶ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 70 [2.305].

³⁷ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 70 [2.305].

³⁸ This is discussed in detail in Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 70 [2.305] – [2.325].

The Statute of Uses has been repealed in Queensland by the PLA.³⁹ The Statute was only applicable to old system land.⁴⁰

The QLRC described the effect of the proposed section 7(1) and (2) as 'enabling conveyances of old system land to proceed by direct grant', rendering 'it unnecessary to resort to the conveyancing devices evolved out of the Statute of Uses.'⁴¹ The provisions are also directed at clarifying that future interests should not be capable of being created at law.⁴²

Section 7(3) of the PLA is directed at voluntary conveyances and provides that a resulting trust for the grantor is not implied merely because the property is not expressed to be conveyed for the use or benefit of the grantee. An example of a voluntary transfer of property (or gift) arises where 'A makes a gift of property to B, a presumption of resulting trust may arise that B holds the property on trust for A.'⁴³

Prior to the Statute of Uses the position was that 'on a voluntary conveyance in fee simple by A to B in which no use was expressed, there was a presumption of a resulting use to the grantor of the whole estate granted.'⁴⁴ The introduction of the Statute of Uses removed this resulting use as a presumption. However, a separate issue arose regarding whether a voluntary grant using the words 'unto and to the use of B' created a resulting trust in equity in favour of the grantor.⁴⁵ The concern of the QLRC was that:

Since the repeal of the Statute of Uses would restore the pre-1535 doctrine of resulting uses or trusts on a voluntary conveyance, s 60(3) of the Law of Property Act expressly precludes the implication of resulting trusts merely from the fact that a conveyance fails to express a use or benefit in favour of the grantee.⁴⁶

Section 7(3) of the PLA was introduced to prevent such a presumption arising in the circumstances specified.⁴⁷

³⁹ See *Property Law Act 1974* (Qld) as enacted, s 3, Sch 6. The Statute of Uses was repealed in New South Wales in 1969 by the *Imperial Acts Application Act 1969* (NSW) s 8 and in Victoria by the *Imperial Acts Application Act 1980* (Vic) s 5.

⁴⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.7.30].

⁴¹ 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) 6.

⁴² 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) 6.

⁴³ Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (Butterworths, 2010) 419 [19.73].

⁴⁴ Charles Harpum, et al, *The Law of Real Property* (Thomson, 2008) 413 [11.012] and Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (Butterworths, 2010) 419-420 [19.74].

⁴⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.7.60].

⁴⁶ 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) 7.

⁴⁷ 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) 7.

5.2. Issues with the section

5.2.1. Sections 7(1) and (2) of the PLA

The purpose and ongoing utility of section 7(1) and (2) is unclear. The provisions are directed at old system land and this view is supported by the comments of the QLRC in its 1973 report which noted:

By enabling conveyances of old system land to proceed by direct grant clause 7 will render it unnecessary to resort to the conveyancing devices evolved out of the Statute of Uses.⁴⁸

Subject to the odd sliver of land, it is generally accepted that there is no longer any old system land in Queensland of any significance. The extent of old system land in Queensland, if any at all, is limited. The QLS, in its submissions to the Centre, asserts that there has been old system land identified in Queensland from time to time and therefore it cannot be said that, in the absence of a mechanism to deal with the registration of old system land, sections dealing with old system land have absolutely no utility. However, the QLS concedes that there are ‘no significant parcels of old system land in Queensland.’

The Centre has consulted with the Registrar of Titles on the issue of how any (if indeed there is any) old system land would be dealt with once it was identified. After this consultation process, the Centre formed the view that any dealings in old system land would not be possible until the land is registered in accordance with the *Land Title Act 1994* (Qld), thus changing the land from old system land to registered land. Given this, the utility of sections that deal exclusively with old system land, including sections 7(1) and (2), in a modern PLA is doubtful.

5.2.2. Section 7(3) of the PLA – Voluntary conveyances

Section 7(3) of the PLA is directed at a ‘voluntary conveyance’. The term ‘conveyance’ is defined in the PLA to include:

A transfer of an interest in land, and any assignment, lease, settlement, or other assurance in writing of any property.⁴⁹

It is not clear whether the section is intended to cover both realty and personalty. However, the Victorian Law Reform Commission (**VLRC**) when considering an identical provision in Victoria⁵⁰ recommended that it be retained but for old system land only.⁵¹ The rationale for the VLRC recommendation is unclear, however, the intent may be to clarify the uncertainty regarding the scope of the application of the Victorian provision.⁵²

However, a key difference in Queensland is the absence of old system land. As discussed above, it is generally accepted that there is no remaining old system land of significance in Queensland. The ongoing utility of section 7(3) of the PLA is questionable.

⁴⁸ 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) 7.

⁴⁹ *Property Law Act 1974* (Qld) s 3, schedule 6. However, note the recommendation at paragraph 215.8.

⁵⁰ *Property Law Act 1958* (Vic) s 19A is identical to *Property Law Act 1974* (Qld) s 7(3).

⁵¹ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 126.

⁵² *Property Law Act 1958* (Vic) s 19A(3). ‘Conveyance’ is broadly defined in section 18 of the *Property Law Act 1958* (Vic).

5.3. Other jurisdictions

5.3.1. Australia

Victoria⁵³ and the Northern Territory⁵⁴ have provisions similar to section 7 of the PLA. The Victorian provision was reviewed in 2010 by the VLRC. The Commission made a number of recommendations including repealing section 19A(1) and (2) but with a savings provision. The rationale for the recommendation is that:

The section was added when the Statute of Uses was repealed in 1980. The purpose of subsections (1) and (2) is obscure. Leading texts say the subsections are redundant because interests capable of creation as legal interests were always capable of creation as equitable interests. It is doubtful that the provision has any application to registered land.⁵⁵

In New South Wales, section 44 of the *Conveyancing Act 1919* (NSW) was drafted long before the Statute of Uses was repealed. This is reflected in the differences between section 44(2) and subsections 7(1) and (2) of the PLA and has created uncertainty regarding the function of section 44(2) in New South Wales.⁵⁶

Section 44(1) of the *Conveyancing Act 1919* (NSW) has a similar effect to section 7(3) of the PLA. However, it is drafted differently to Queensland and specifically refers to ‘conveyances of land’. The Commissioner’s Report into the Law of Property in 1918 explained the subsection in the following way:

Subclause (10) of cl 44 alters the old implication of a resulting use to a settlor from a simple conveyance of land, without consideration and without the declaration of any use or a trust. As a result of this section, a conveyance purporting to be made by A to B, without more, will pass to B the whole estate of A.⁵⁷

In the case of New South Wales there is a separate issue regarding the effect of section 44(2) of the Act since the repeal of the Statute of Uses which occurred on 1 January 1971. When the section was originally considered in 1918, the Statute of Uses was also intended to be repealed at that time. However, opposition by the legal profession to this proposal resulted in the Commissioner undertaking the drafting exercise to adopt the ‘middle course’ so that the section ‘permits every limitation which might be made by way of a use operating under the statute to be made by direct conveyance without the intervention of uses.’⁵⁸

⁵³ *Property Law Act 1958* (Vic) s 19A.

⁵⁴ *Law of Property Act* (NT) s 6.

⁵⁵ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 126.

⁵⁶ For further discussion on the interpretation to be given to section 44(2) of the *Conveyancing Act 1919* (NSW) since the repeal of the Statute of Frauds in New South Wales see Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) and Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) including the Commissioners Report extracted at [35102].

⁵⁷ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) [35102].

⁵⁸ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) [35102].

5.3.2. New Zealand

In New Zealand, the *Statute of Uses 1535* was repealed in 1905.⁵⁹ There is no provision in New Zealand equivalent to section 7 of the PLA.

5.4. Recommendation

The Centre recommends section 7 of the PLA be repealed. The Centre is of the view that the section only applies to old system land and that it is generally accepted that there is no remaining old system land of significance in Queensland, as discussed above at paragraph 5.2.1. To the extent any old system land is identified, it must be brought under the *Land Title Act 1994* (Qld) before it may be dealt with. Given this, the ongoing utility of section 7 is questionable.

In line with the overarching principles that inform these Recommendations, the Centre is of the view that the section can be repealed as it serves no purpose. This recommendation is supported by the QLS.

RECOMMENDATION 5. Section 7 should be repealed.

⁵⁹ G W Hinde, et al, *Land Law in New Zealand* (Butterworths, 1997) 40 [1.044]. The Statute of Uses 1535 was repealed by the *Property Law Act 1905* (NZ) (repealed) s 121, Sch 5.

6. Section 8 – Lands lie in grant only

6.1. Overview and purpose

8 Lands lie in grant only

- (1) All lands and all interests in land shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale, or by lease and release, and a conveyance of an interest in land may operate to pass the possession or right to possession of land, without actual entry, but subject to all prior rights to the land.
- (2) The use of the word 'grant' is not necessary to convey land or to create an interest in the land.

The purpose of this section was to remove 'archaic common law modes of conveying land'.⁶⁰ When considering the inclusion of this section the QLRC acknowledged that the discussion about the proposed section was:

... relevant only to the small area of unregistered land remaining in Queensland. By far the great majority of titles to freehold land are registered under The Real Property Acts. These will not be affected by the proposed clause but will continue to be transferable only by registered instrument of transfer in accordance with s 43 of those Acts.⁶¹

6.2. Issues with the section

In Queensland, it is generally accepted that there is no remaining old system land of significance. As such, the section no longer has any application or relevance. This is discussed at paragraph 5.2.1. There is a separate issue regarding whether the section was drafted in a way which achieved the purpose of actually abolishing the common law rule. If it does not, then there is risk that its repeal may have the unintended consequence of reinstating the common law rule, irrespective of the section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld).⁶²

This issue is discussed in more detail in relation to sections 22 to 23 (discussed in detail at paragraph 24-25) and 28 (discussed in detail at paragraph 29). However, section 8 of the PLA can be distinguished from these other provisions on the basis that the subject matter to which the section is directed no longer exists in Queensland. Given this, the very low risk that the common law position could be reinstated is irrelevant if there is no old system land to which it could apply.

⁶⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 129. Section 51 of the *Property Law Act 1958* (Vic) is in identical terms to section 8 of the *Property Law Act 1974* (Qld).

⁶¹ 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) 7-8.

⁶² Section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) states: 'The repeal or amendment of an Act does not ... revive anything not in force or existing at the time the repeal or amendment takes effect...'

6.3. Other jurisdictions

6.3.1. Australia

Other Australian jurisdictions have equivalent or similar provisions.⁶³ The VLRC recommended the retention of the equivalent provision in the *Property Law Act 1958* (Vic) but with redrafting for clarity. However, the VLRC provided no details regarding the rationale for the retention of the section.⁶⁴

6.3.2. New Zealand

In New Zealand the *Property Law Act 2007* (NZ)⁶⁵ abolishes a number of obsolete estates and rules. Section 58(1)(c) of that Act provides that the passing of the legal estate in any land by a covenant to stand seized, livery of seisin or a contract for the sale and purchase of land may not be created or done. This section was drafted in a way which expressly abolished the common law rule as the Law Commission (NZ) held the view that section 15 of the now repealed *Property Law Act 1952* (NZ) was not couched as a direct abolition despite the section headings.⁶⁶ That section provided:

15 Certain forms of assurance abolished

The legal estate in any land shall not pass by a covenant to stand seized, or by any contract for the sale and purchase of land, or by livery of seisin.

The Law Commission (NZ) indicated that sections such as section 15 were ‘best dealt with by restating the abolition in direct language.’⁶⁷

6.4. Recommendation

Given that there are limited ways to create an interest in freehold land in Queensland under the *Land Title Act 1994* (Qld) (by way of registration of instrument) the Centre is of the view that section 8 has no utility. The Centre recommends section 8 of the PLA be repealed on the basis that it applies to old system land only. This recommendation is supported by the QLS.

RECOMMENDATION 6. Section 8 should be repealed.

⁶³ See *Conveyancing Act 1919* (NSW) s 14; *Property Law Act 1958* (Vic) s 51; *Law of Property Act 1936* (SA) ss 8 and 9; *Property Law Act 1969* (WA) s 32; *Conveyancing and Law of Property Act 1884* (Tas) s 59; *Law of Property Act* (NT) s 7.

⁶⁴ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 129. There is no analysis of this section in the Report and as a result, the rationale for the recommendation is not clear. However, Victoria does still have some remaining old system land.

⁶⁵ *Property Law Act 2007* (NZ) s 58.

⁶⁶ Law Commission (NZ), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 43 [134].

⁶⁷ Law Commission (NZ), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 43 [134].

7. Section 9 – Reservation of easements etc. in conveyances of land

7.1. Overview and purpose

9 Reservation of easements etc. in conveyances of land

- (1) In a conveyance of land a reservation of any easement, right, liberty, or privilege not exceeding in duration the estate conveyed in the land, shall operate without any execution of the conveyance by the grantee of the land out of which the reservation is made, or any regrant by the grantee, so as to create the easement, right, liberty or privilege, and so as to vest the same in possession in the person (whether or not the person be the grantor) for whose benefit the reservation was made.
- (2) This section applies only to reservations made after the commencement of this Act.

At common law, an easement and other incorporeal hereditaments lay in grant only.⁶⁸ An easement could be created ‘by reservation of rights in a conveyance of land’ but would only take effect if the conveyance was also executed by the grantee for the reservation.⁶⁹ It would then operate as a regrant by the grantee.⁷⁰ Butt notes that:

In reality, the grantor does not grant a fee simple from which an easement has been subtracted. Rather, two steps are involved, though in practice fused into one. First, the grantor (A) conveys or transfers the (unencumbered) fee simple to B; and secondly, B grants (or ‘regrants’) an easement to A.⁷¹

In the case of old system land, the purchaser would not normally execute the deed for conveyance and without this, the re-grant or reservation of the easement was not ‘effective’ at common law.⁷² Section 9 of the PLA has the effect of overcoming the common law rule so that it is possible to enable the reservation of an easement (or other incorporeal hereditament) without the need to re-grant by execution.⁷³ The provision only applies to reservations made after the commencement of the PLA on 1 December 1975.⁷⁴

⁶⁸ 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) 8.

⁶⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.9.30].

⁷⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.9.30].

⁷¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [16 34]; See also Peter Young, et al, *Annotated Conveyance & Real Property Legislation* (Butterworths, 2012) 83 [30747], however note section 45A of the *Conveyancing Act 1919* (NSW).

⁷² Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [16 34]; See also Peter Young, et al, *Annotated Conveyance & Real Property Legislation* (Butterworths, 2012) 83 [30747].

⁷³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.9.30].

⁷⁴ *Property Law Act 1974* (Qld) s 9(2).

7.2. Issues with the section

In Queensland, the section only has relevance to old system land. As discussed above at paragraph 5.2.1 there is no remaining old system land of significance in Queensland. In relation to registered land in Queensland, the *Land Title Act 1994* (Qld) specifies the requirements for the creation of easements.⁷⁵ The *Land Act 1994* (Qld) contains a separate processes for reservations.⁷⁶

7.3. Other jurisdictions

New South Wales, Victoria, Northern Territory and Tasmania all have sections which have a similar effect to section 9 of the PLA.⁷⁷ Section 45A of the *Conveyancing Act 1919* (NSW) explicitly refers to profits a prendre which are not included in the PLA but is otherwise in identical form to section 9 of the PLA.

The Victorian provision uses the term ‘legal estate’. The VLRC, when reviewing the *Property Law Act 1958* (Vic), recommended the retention and redrafting of its equivalent provision for clarity.⁷⁸ The Commission also suggested that the provision be expanded to include ‘interest’ in addition to ‘legal estate’ to accommodate the proposed repeal of a section which allowed express reservation of an easement by way of use.⁷⁹ Further, the VLRC recommended that the section should apply to registered and unregistered land.⁸⁰ The rationale for this recommendation is unclear.

South Australia and Western Australia do not have equivalent legislative provisions and commentary indicates that the common law rule applies which means that the ‘reservation still has to be included in the conveyance and signed by the purchaser.’⁸¹

7.4. Recommendation

Section 9 of the PLA, like section 8 discussed above at paragraph 6, has no utility because the only possible way to create an easement is by complying with the *Land Title Act 1994* (Qld) or the *Land Act 1994* (Qld). The Centre recommends repealing section 9 of the PLA on the basis that it does not appear to have any current purpose in Queensland as it applies to old system land only. This recommendation is supported by the QLS.

RECOMMENDATION 7. Section 9 should be repealed.

⁷⁵ *Land Title Act 1994* (Qld) see ss 82-83.

⁷⁶ The *Land Act 1994* (Qld) Chapter 2, Part 2.

⁷⁷ See *Conveyancing Act 1919* (NSW) s 45A; *Property Law Act 1958* (Vic) s 65; *Law of Property Act* (NT) s 8; *Civil Law (Property) Act 2006* (ACT) s 224; *Conveyancing and Law of Property Act 1884* (Tas) s 34C.

⁷⁸ *Property Law Act 1958* (Vic) s 65; Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 131.

⁷⁹ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 131.

⁸⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 131.

⁸¹ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 756 [18.190].

Sections relating to writing requirement

8. Section 6 – Savings in regard to ss 10-12 and 59

Section 6 of the PLA is considered together with sections 10 to 12 and 59. As discussed below, the Centre recommends that sections 6, 10 to 12 and 59 be replaced with a new provision that addresses the issues that have been identified.⁸² It is important to understand the relationship between the provisions and how they interact so that the effect of the Recommendation is appreciated. Due to the interrelationship between these provisions, Recommendation 12 applies to these sections together. If the Recommendation is not accepted and implemented then the Centre advises that none of the sections 6, 10, 11, 12 and 59 can be repealed.

Recommendation 12 given at paragraph 12.4 applies to each of section 6, 10, 11, 12 and 59 of the PLA.

8.1. Overview and purpose

6 Savings in regard to ss 10-12 and 59

Nothing in section 10 to 12 or 59 –

- (a) invalidates any disposition by will; or
- (b) affects any interest validly created before the commencement of this Act; or
- (c) affects the right to acquire an interest in land because of taking possession; or
- (d) affects the law relating to part performance; or
- (e) affects a sale by the court.

The inclusion of section 6 in the PLA was justified by the QLRC on the following basis:

This clause simply expresses the existing law in preserving from the ‘Statute of Frauds’ provisions, various interests and powers which have never been regarded as within its scope.⁸³

Following the discussion of section 6, the operation of sections 10, 11, 12 and 59 of the PLA are discussed below at paragraphs 9 to 12 below.

8.2. Issues with the section

The primary issue in relation to section 6 of the PLA is its location in Part 1 of the Act when it is a savings provision relating to sections in Part 2 and Part 6. Some of the particular categories set out in section 6 are dealt with under different mechanisms and therefore not affected by sections 10, 11, 12 or 59 in any event. For example, a sale by a court will not be affected by these sections. Similarly,

⁸² This was presented as an option in Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) Sales of Land and Other Related Provisions*, 28, [3.4.3].

⁸³ 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) 5. The form of the provision was originally proposed in the earlier QLRC review of the *Statute of Frauds: Queensland Law Reform Commission, A Review of – The Statute of Frauds 1677; The Statute of Frauds Amendment Act 1828; The Statute of Frauds and Limitations of 1867 (Qld); And The Sale of Goods Act 1896 (Qld)* Report No. 6 (1970) clause 8, 26.

section 6(c) of the PLA relates to the acquisition of an interest in land by adverse possession which is addressed under the *Limitation of Actions Act 1974* (Qld) and the *Land Title Act 1994* (Qld).⁸⁴

8.3. Other jurisdictions

8.3.1. Australia

New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Northern Territory each have a provision which is equivalent to section 6 of the PLA.⁸⁵ In New South Wales, section 23E of the *Conveyancing Act 1919* (NSW) is in similar terms to section 6 of the PLA and is located in the part relevant to the writing requirement provisions (sections 23B, 23C and 23D). This is consistent with the approach in the other jurisdictions, apart from the Northern Territory which is located in the preliminary part of the Northern Territory legislation.

8.3.2. New Zealand

The approach adopted in the *Property Law Act 2007* (NZ) is to include the relevant ‘savings’ provision in the body of the substantive provision or as a stand-alone section. These provisions are sections 24, 25 and 26 and provide:

- section 24 sets out the requirements for writing before an action can be brought for the sale or other disposition of land or other interest in land. Section 24(2)(b) of the *Property Law Act 2007* (NZ) expressly provides that a ‘disposition’ for the purposes of the section does not include a sale of land by order of a court or through the Registrar;
- section 25 provides that a disposition of three specified categories of interests in land must be in writing and signed by the person making the disposition. However, section 25(4) expressly provides that the section does not affect:
 - the creation or operation of a resulting, implied, or constructive trust; or
 - the making or operation of a will; or
 - the disposition of any interest in land by operation of law;
- section 26 provides that sections 24 and 25 do not affect the operation of the law relating to part performance.

8.4. Recommendation

In order to avoid any unnecessary consequences, the effect of section 6 of the PLA should be retained but incorporated into the relevant provisions to which the section refers. The Centre therefore recommends that the effect of section 6 is retained in new sections that would collectively replace sections 6, 10, 11, 12 and 59. This approach is supported in submissions made by the QLS. The Centre has provided an example of a drafting approach at Recommendation 12 at paragraph 12.4.

⁸⁴ Section 13 of the *Limitation of Actions Act 1974* (Qld) provides that an action to recover land shall not be brought after the expiration of 12 years. Section 24 of the same Act provides that the title of the rightful owner is extinguished after 12 years.

⁸⁵ See *Conveyancing Act 1919* (NSW) s 23E; *Property Law Act 1958* (Vic) s 55; *Law of Property Act 1936* (SA) s 31; *Property Law Act 1969* (WA) s 36; *Conveyancing and Law of Property Act 1884* (Tas) s 60(5); *Law of Property Act* (NT) s 5; *Civil Law (Property) Act 2006* (ACT) s 203.

RECOMMENDATION 8. Section 6 should repealed. The effect of section 6 should be included in a new provision drafted to replace sections 6, 10, 11, 12 and 59.

9. Section 10 – Assurances of land to be in writing

9.1. Overview and purpose

10 Assurances of land to be in writing

- (1) No assurance of land shall be valid to pass an interest at law unless made by deed or in writing signed by the person making such assurance.
- (2) This section does not apply to –
 - (a) a disclaimer made under any law relating to bankruptcy in force before or after the commencement of this Act or not required to be evidenced in writing; or
 - (b) a surrender by operation of law, including a surrender which may, by law, be effective without writing; or
 - (c) a lease or tenancy or other assurance not required by law to be made in writing; or
 - (d) a vesting order; or
 - (e) an assurance taking effect under any Act or Commonwealth Act.

The QLRC considered the introduction of this provision as part of a review undertaken in 1970 of a number of Imperial Acts in force in Queensland for the dual purpose of:

- identifying archaic and unnecessary provisions for repeal; and
- reinstating in a modern form the provisions considered to still be useful.⁸⁶

The proposed section was intended to state in ‘modern language’ the effect of section 3 of the *Statute of Frauds 1677 (Statute of Frauds)* which required ‘any assignment, grant or surrender of an interest in land to be in writing and signed by the assignor, grantor, etc.’⁸⁷ The purpose of section 3 of the Statute of Frauds was described by the QLRC as follows:

Speaking generally, the purpose of s 3 of the Statute of Frauds was to deny effect at law to a grant of an interest in land unless the statutory requirement of writing was complied with, with the result that the common law conveyance by livery of seisin alone would not suffice in the absence of writing.⁸⁸

The underlying objective of the Statute of Frauds more generally was to prevent fraud caused by perjury – that is, to ensure that legal effect should not be given to transactions that were never entered into and parties should not be made to comply with agreements that were not actually

⁸⁶ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 2.

⁸⁷ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 8.

⁸⁸ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970). ‘Livery of seisin’ was the dominant method of transferring land for many centuries. The livery of seisin was a public handing over of the land to the new owner. This facilitated the actual physical ‘delivery up’ of the land. For further information on livery of seisin and the evolution of this practice see: C F Kolbert and N A M Mackay, *History of Scots and English Land Law* (Geographical Publications Limited, 1977) 238-245.

made.⁸⁹ The impetus for the Statute arose from the social and legal conditions at the time of its introduction which included the:

- ‘uncontrolled discretion of the jury’ in civil proceedings;
- exclusion of the parties to the transaction as ‘competent’ witnesses;
- ‘immaturity’ of the law of contract.⁹⁰

Section 10 of the PLA is modelled on section 52 of the *Law of Property Act 1952* (UK) and section 23B of the *Conveyancing Act 1919* (NSW). The Queensland section differs from these in that it also covers an assurance made in writing, as well as one made by deed.⁹¹ The New South Wales and United Kingdom provisions require an assurance of land to be made by deed. The QLRC justified making this addition on the basis that it was consistent with the original section of the Statute of Frauds which referred to both ‘deed’ and ‘note in writing’ and to avoid the unnecessary complexity that had arisen as a result of the ‘introduction by the more modern property statutes of the requirement of a deed for this purpose’.⁹²

The effect of the section is that no conveyance of land will legally pass an interest unless it is either made by deed or in writing signed by the relevant person making the assurance.⁹³ The key terms in section 10 of the PLA are defined under the Act as follows:

- ‘assurance’ includes a conveyance and a disposition made otherwise than by will;⁹⁴
- ‘conveyance’ includes a transfer of an interest in land, and any assignment, appointment, lease, settlement, or other assurance in writing of any property.⁹⁵

Certain transactions are excluded from the operation of the section including, amongst others:

- an assurance which takes effect under any Act or Commonwealth Act such as the *Land Act 1994* (Qld) or *Land Title Act 1994* (Qld);
- a lease or tenancy or other assurance not required by law to be made in writing;
- a vesting order.⁹⁶

⁸⁹ G.H.L. Fridman, ‘The Necessity for Writing in Contracts within the Statute of Fraud’ (1985) 35 *University of Toronto Law Journal* 43, 47.

⁹⁰ G.H.L. Fridman, ‘The Necessity for Writing in Contracts within the Statute of Fraud’ (1985) 35 *University of Toronto Law Journal* 43, 47.

⁹¹ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 8.

⁹² See *Statute of Frauds 1677* s 3 as extracted in Appendix B of the Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 16. The Queensland Law Reform Commission referred to issues in New South Wales in relation to leases.

⁹³ *Property Law Act 1974* (Qld) s 10(1).

⁹⁴ *Property Law Act 1974* (Qld) sch 6. The term ‘disposition’ is defined in the *Property Law Act 1974* (Qld) to include, amongst other things, a conveyance, vesting instrument, declaration of trust, disclaimer and release.

⁹⁵ *Property Law Act 1974* (Qld) sch 6.

⁹⁶ *Property Law Act 1974* (Qld) s 10(2).

9.2. Issues with the section

9.2.1. Section 10 applies only to ‘old system land’

As discussed at paragraph 5.2.1, it is generally accepted that there is no longer any old system land in Queensland of any significance. Any old system land in Queensland could not be dealt with until it was registered in accordance with the *Land Title Act* (Qld), thus changing it from old system land to registered land.

An assurance taking effect under ‘any Act or Commonwealth Act’ is expressly excluded from the scope of section 10(1) of the PLA.⁹⁷ The reference to ‘any Act’ would encompass both the *Land Act 1994* (Qld) and the *Land Title Act 1994* (Qld) which means conveyances, dispositions or other types of assurances provided for under those Acts will not be subject to section 10(1) of the PLA. Importantly, this means that the section does not apply to registered land.

Support for this interpretation is found in section 23B of the *Conveyancing Act 1919* (NSW) which includes an equivalent provision but also a subsection which expressly excludes land ‘under the provisions of the *Real Property Act 1900*’.⁹⁸ Section 52 of the *Property Law Act 1952* (Vic) is drafted in a similar way to Queensland. Commentary on that section indicates that ‘it is thought’ that the provisions of section 52 do not apply to registered land.⁹⁹

9.2.2. The requirement for an assurance to be made by deed is obsolete

The requirement for an assurance to be made is only applicable to old system land. Where the land being conveyed is old system land, it is the assurance which actually passes title to the land and all assurances of land must be by deed.¹⁰⁰ This is not relevant to registered land which, under the *Land Title Act 1994* (Qld) and *Land Act 1994* (Qld), requires that an instrument (or document) must be registered before an interest is transferred or created at law.¹⁰¹

9.3. Other jurisdictions

All other jurisdictions, apart from the Australian Capital Territory, have a similar provision to section 10 of the PLA.¹⁰²

The proposed draft of the replacement provisions for sections 6, 10, 11, 12 and 59 is provided in Recommendation 12 at paragraph 12.4.

9.4. Recommendation

As section 10 is directed at old system land, it has questionable continuing utility. As discussed above at paragraph 5.2.1, if any old system land is identified in the future that land must be registered under

⁹⁷ *Property Law Act 1974* (Qld) s 10(2)(e).

⁹⁸ *Conveyancing Act 1919* (NSW) s 23B(3).

⁹⁹ Stanley Robinson, *The Property Law Act Victoria* (Lawbook Co, 1992) 100 (which referred to the *Transfer of Land Act 1958* (Vic)).

¹⁰⁰ *Conveyancing Service: New South Wales* (eds) PW Young, AF Cahill and GD Newton, Lexisnexis Butterworths (looseleaf) [11-301].

¹⁰¹ See *Land Title Act 1994* (Qld) s 181 and *Land Act 1994* (Qld) s 301.

¹⁰² See *Conveyancing Act 1919* (NSW) s 23B; *Property Law Act 1958* (Vic) s 52; *Law of Property Act 1936* (SA) s 28; *Property Law Act 1969* (WA) s 33; *Conveyancing and Law of Property Act 1884* (Tas) s 60; *Law of Property Act* (NT).

the *Land Title Act 1994* (Qld) or *Land Act 1994* (Qld) before any sale, disposition or other dealing may be affected. Judicial consideration of section 10 in Queensland is limited and fails to justify retention of the section where other provisions, such as sections 11 and 12 of the PLA are applicable.¹⁰³

As set out fully at Recommendation 12 below at paragraph 12.4, the Centre is of the view that the exception in section 10(2)(b) and (c) should be included in a new provision drafted to replace sections 6, 10-12 and 59. The QLS supports the retention of these exceptions. Otherwise, the balance of section 10 should be repealed.

RECOMMENDATION 9. Section 10 should be repealed. The effect of the exception in section 10(2)(b) and (c) should be included in a new provision drafted to replace sections 6, 10, 11, 12 and 59.

¹⁰³ *Ozibar Unit Trust v Laroar Holdings Pty Ltd* [2016] QSC 82 – application of s 10 to express surrender of a lease.

10. Section 11 – Creation or disposal of interest in land to be in writing

10.1. Overview and purpose

11 Instruments required to be in writing

- (1) Subject to this Act with respect to the creation of interests in land by parol –
- (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same or, by the person’s agent lawfully authorised in writing, or by will, or by operation of law; and
 - (b) a declaration of trust respecting any land must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person’s will; and
 - (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be manifested and proved by some writing signed by the person disposing of the same, or by the person’s agent lawfully authorised in writing, or by will.
- (2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

Section 11 is another provision in the PLA that is re-enacted from the Statute of Frauds.¹⁰⁴ The QLRC reviewed sections 3, 7, 8 and 9 of the Statute of Frauds in its 1970 report and indicated that the requirement for instruments to be in writing is concerned broadly with the ‘effect of equitable dispositions of land, and follows section 23C of the *Conveyancing Act* of New South Wales...’¹⁰⁵ The QLRC noted in its later 1973 report when referring to section 4 of the Statute of Frauds and the instruments in writing provisions that:

These provisions are identical with those proposed by the Commission in its Report (QLRC 6) on the Statute of Frauds. As pointed out in that Report, the reform of these statutory provisions is an essential aspect of the reform of property law as a whole. Their proper place is in an enactment such as the present, which is where they are located in the legislation of England and of the Australian States.¹⁰⁶

The QLRC reports did not canvass in any detail the role of the instrument provisions or their purpose. Section 11 of the PLA was reconsidered as part of the QLRC’s review of the PLA in 1986 and 1987.¹⁰⁷ However, the interest in section 11 was limited primarily to section 11(1)(c) as the QLRC considered that most of the problems of interpretation ‘revolve around s 11(1)(c)’.¹⁰⁸ Some of the problems identified at the time included the scope of its coverage (equitable interests in personalty as well as

¹⁰⁴ See *Statute of Frauds 1677* ss 3, 7, 8 and 9.

¹⁰⁵ 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) 10. The Queensland Law Reform Commission noted one difference between the New South Wales provision and the proposed Queensland provision related to section 23(1)(c) and the requirement in that provision that the disposition of the relevant interest must be in writing as opposed to being ‘manifested and proved by some writing signed by the disporner’.

¹⁰⁶ 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) 8.

¹⁰⁷ See Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986) and Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1986*, Report No. 37 (1987).

¹⁰⁸ Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1986*, Report No. 37 (1987) 18.

land and whether it extended to a contract for disposition of an equitable interest). The QLRC recommended that section 11(1)(c) be repealed and that the requirement of writing should be confined to the other two categories in section 11.¹⁰⁹ The recommendation to repeal section 11(1)(c) was not implemented.

An overview of the operation of the section is below.¹¹⁰

10.1.1. Subsection 11(1)(a) – Disposition or creation of interest in land

This subsection covers the creation of any legal interest in land (possibly also extending to equitable interests)¹¹¹ and the disposition of existing interests. The term ‘disposition’ is broadly defined in schedule 6 of the PLA to include:

a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will.

There is ongoing uncertainty regarding the interaction between sections 11(1)(a) and 59 of the PLA. This issue is discussed in detail at paragraph 10.2.1 below. Disposition or creation of an interest in land at law is also subject to the requirements of the *Land Title Act 1994* (Qld) relating to registration.¹¹²

10.1.2. Subsection 11(1)(b) - Declaration of trust respecting any land

This subsection sets out the formalities required for the declaration of a trust. The requirement for writing was, historically, to ‘show proof of the trust’¹¹³ and is evidentiary in purpose.¹¹⁴ The subsection is not concerned with the creation or validity of the actual instrument which declared the trust.¹¹⁵

¹⁰⁹ Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1986*, Report No. 37 (1987) 18, 19. For a fuller discussion of the problems identified by the Queensland Law Reform Commission in relation to section 11(1)(c) see pp 18-19 of the Report.

¹¹⁰ Although the intention of the section may have been to cover different categories of transactions, there is potential for overlap between the provisions depending on the relevant transaction. For a detailed discussion on this issue see: New South Wales Conveyancing Law and Practice (ed) Geoff Lindsay, CCH (looseleaf) [690]; H W Tebbutt, ‘Moot Point’ (1974) 48 *Australian Law Journal* 322, 323 and RP Meagher, JD Heydon and MJ Leeming, *Meagher, Gummow & Lehane’s Equity Doctrines & Remedies* (Butterworths, 4th ed, 2002).

¹¹¹ It will not apply to the creation of an equitable interest in land arising from the creation of a trust as this is addressed in s 11(1)(b) and would result in s 11(1)(b) being ‘otiose’ if any other interpretation was adopted: see Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.11.120]. See also *Adamson v Hayes* (1972) 130 CLR 276.

¹¹² Refer to *Land Title Act 1994* (Qld) s 181.

¹¹³ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.11.240].

¹¹⁴ New South Wales Conveyancing Law and Practice (ed) Geoff Lindsay, CCH (looseleaf) CCH [690].

¹¹⁵ New South Wales Conveyancing Law and Practice (ed) Geoff Lindsay, CCH (looseleaf) CCH [690].

10.1.3. Subsection 11(1)(c) - Disposition of trust or equitable interest

This subsection covers the dispositions of equitable interests in land, trusts or personal property¹¹⁶ which exist at the time of the disposition. It does not apply to the creation of these interests or to dispositions of legal interests.¹¹⁷

10.1.4. Subsection 11(2) – Exceptions to subsection 11(1)

This subsection excludes the creation or operation of resulting, implied or constructive trusts from the requirements in subsections 11(1)(a), (b) and (c).

10.2. Issues with the section

There have been ongoing difficulties associated with the interpretation of section 11 (and its equivalent in other jurisdictions). The interpretation problems stem from both the interaction between subsection 11(1)(a) and section 59 of the PLA and the interaction between subsections 11(1)(a), (b) and (c). These problems are discussed in more detail below.

10.2.1. Relationship between section 11(1)(a) and section 59 of the PLA

There is ongoing uncertainty regarding the interaction between section 11(1)(a) and section 59 of the PLA.

Section 59 of the PLA provides:

No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised.

A comparison of the key components of subsection 11(1)(a) and section 59 is below.

Section 11(1)(a)	Section 59
'interest in land'	'land or any interest in land'
'created or disposed of'	'contract for the sale or other disposition'
'except by writing signed'	'contract upon which such action is brought, or some memorandum or note of the contract, is in writing and signed'
Signed 'by the person creating or conveying or by the person's agent lawfully authorised in writing.....'	Signed 'by the party to be charged, or by some person by the party lawfully authorised'

On the face of the provisions, the key differences include:

- section 11(1)(a) covers both the creation and disposition of an interest in land whereas section 59 refers to a contract for sale or other disposition;
- section 11(1)(a) does not require the creation or disposition to be in the form of a contract or some memorandum or note of the contract which is required under section 59;

¹¹⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.11.120].

¹¹⁷ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.11.120].

- where an agent is signing the relevant 'written' document, the authorisation allowing the agent to do so must be in writing under section 11(1)(a).¹¹⁸ There is no similar requirement that the agent's authorisation be in writing under section 59. The reason for this difference is not clear other than section 3 of the Statute of Frauds, which subsection 11(1)(a) is based on included this writing requirement and section 4 did not;
- section 59 does not expressly require the relevant contract to be in writing but the absence of writing means the arrangement is not enforceable. Section 11 requires the creation or disposition of the interest to be in writing and the issue of enforceability of agreements is not directly covered.¹¹⁹

The VLRC directly considered the interaction between the equivalent provisions, section 53 of the *Property Law Act 1958* (Vic) and section 126 of the *Instruments Act 1958* (Vic), in 1988.¹²⁰ The VLRC noted that:

- section 126 requires an agreement relating to land to be merely evidenced by writing if the agreement is to be enforceable;¹²¹
- section 53(1)(a) applies to the creation or transfer of an equitable interest in land which generally occurs when a contract is made between the seller and buyer;¹²²
- the majority of the area covered by the section in relation to land is also covered by section 53(1)(a) of the *Property Law Act 1958* (Vic);¹²³
- the more stringent requirement of section 53(1)(a) automatically satisfies the lesser requirement of a note or memorandum evidencing the agreement in section 126.¹²⁴

Although the VLRC proposed the repeal of section 126 of the *Instruments Act 1958* (Vic), its final report in 1989¹²⁵ indicated that it was not advocating repealing the writing requirement for land sale contracts in its entirety but that there was no need for two separate Acts. In this respect, its final recommendation was that section 126 of the *Instruments Act 1958* (Vic) should be repealed but that section 53 of the *Property Law Act 1958* (Vic) should be amended to incorporate the requirement that a contract for the sale of land must be in writing to be enforceable.¹²⁶ The recommendation was not implemented.

¹¹⁸ The origins of the requirement for the authorisation of an agent to be in writing derives from section 3 of the *Statute of Frauds 1677* which section 11(1)(a) is based on. That provision required agents to be lawfully authorised by writing.

¹¹⁹ Nicholas Seddon, 'Contracts for the Sale of Land: Is a Note or Memorandum Sufficient?' (1987) 61 *Australian Law Journal* 406, 413.

¹²⁰ See Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No. 8 (1988). Section 53(1)(a) of the *Property Law Act 1958* (Vic) is in identical form to section 11(1)(a) of the *Property Law Act 1974* (Qld) and section 126 of the *Instruments Act 1958* (Vic) is the equivalent provision to section 59, with some slight differences as it also incorporates the requirement for writing in relation to guarantees.

¹²¹ Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No. 8 (1988) 5.

¹²² Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No. 8 (1988) 5.

¹²³ Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No. 8 (1988) 6.

¹²⁴ Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No. 8 (1988) 6.

¹²⁵ Victorian Law Reform Commission, *Sale of Land*, Report No. 20 (June 1989).

¹²⁶ Victorian Law Reform Commission, *Sale of Land*, Report No. 20 (June 1989) 9-10.

The issue was reconsidered in 2010 when the VLRC undertook a review of the *Property Law Act 1958* (Vic) and produced a Consultation Paper and Final Report.¹²⁷ The VLRC appeared to allocate separate and distinct functions to the two provisions and noted that:

- section 126 of the *Instruments Act 1958* (Vic) is concerned with the enforcement of land contracts, while section 53 prescribed formalities of writing for the creation or transfer of interests in land and personal property;
- the requirement of writing in section 126 of the *Instruments Act 1958* (Vic) is evidentiary, while the requirements of writing in sections 52 and 53 of the *Property Law Act 1958* (Vic) are substantive requirements for the disposition of interests.¹²⁸

The VLRC held the view that there was no basis for the evidentiary and substantive requirements for disposition of interests in land to be in different statutes and recommended that a provision setting out section 126(1) (excluding guarantees) be inserted into the new Property Law Act.¹²⁹ The recommendation has not, to date, been adopted.

Recent decisions in New South Wales, Queensland and the United Kingdom have attempted to identify the differences in the application of the two sections (and their equivalent in those other jurisdictions). However, it appears that despite these decisions, where an issue arises which may potentially involve the application of both sections, it is likely to be determined on a case by case basis rather than the application of any general principles. The issue has been described as ‘difficulties in harmonising the application of sections 11 and 59 to any fact situation.’¹³⁰ A summary of the courts’ approach to interpreting and distinguishing the two sections includes:

- subsection 11(1)(a) and section 59 of the PLA set out different formal requirements for transactions that fall within the scope of the provisions. These requirements distinguish between:
 - the creation or disposition of interests in land (ss 11(1)(a)); and
 - contracts for the sale or other disposition of land (s 59);¹³¹
- ‘a contract for sale’ as required in section 59 ‘consists of executory promises to sell or otherwise dispose of an interest in land in the future’;¹³²
- a ‘disposition of’ an interest in land under section 11(1)(a) of the PLA is not executory in nature and will arise at the ‘stage of performance of an agreement or where there is no prior

¹²⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010) and Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No. 20 (2010).

¹²⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No. 20 (2010) 32.

¹²⁹ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No. 20 (2010) 33.

¹³⁰ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, [looseleaf] [PLA.11.60].

¹³¹ *Duff v Blinco (No.2)* (2007) 1 Qd R 407 at 414 per Keane J. See also *McLaughlin v Duffill* [2010] Ch 1, 8-9, which considered the equivalent provisions under section 53 of the *Law of Property Act 1925* (UK) and section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK), and *Theodore v Mistford* (2005) 219 ALR 296, 303. Keane J noted in *Duff v Blinco (No.2)* (2007) 1 Qd R 407, 415 that it is possible that some transactions may be regulated by both provisions referring to the Queensland Court of Appeal decision of *Theodore v Mistford Pty Ltd* [2003] QCA 580. The Court of Appeal decision was the subject of a High Court appeal and decision, *Theodore v Mistford Pty Ltd* (2005) 219 ALR 296, which did not consider this issue.

¹³² *Duff v Blinco (No.2)* (2007) 1 Qd R 407, 415. See also *McLaughlin v Duffill* [2010] Ch 1, 8-9.

agreement in relation to the creation of an interest in land.¹³³ It will not apply if there is no more than an agreement to 'assure property in the future';¹³⁴

- section 59 does not require a note or memorandum of an agreement which effects the 'creation' of an interest in land, 'no doubt because any mischief that might arise by reason of the absence of documentary proof of the creation of interests in land is thought to be sufficiently addressed by section 11 of the *Property Law Act*'.¹³⁵ Further, it is not possible to dispose of land or an interest in land unless it has been created;
- there is case law support for the position that the creation of an interest in land is not a disposition.¹³⁶

The authorities tend to support the position that section 11(1)(a) (and its equivalent in other Australian and United Kingdom jurisdictions) does not have any application to a contract for the sale of land under section 59.¹³⁷ This is consistent with the approach advocated by Seddon that '[t]he legislative requirement that "no interest in land can be created or disposed of except by writing..." should not apply to contracts for the sale of land.'¹³⁸ However, what the authorities indicate with certainty is that each case where sections 11 and 59 are raised requires careful consideration of the nature of the transaction. A framework for this consideration includes the following inquiries:

- What is the nature of the property? Is it a legal or equitable interest in property or personalty?
- Is the interest in the property being created or disposed of?¹³⁹
- Is the agreement immediately creating an equitable interest in land or evidencing an oral agreement previously created?
- Is the agreement disposing of or selling an interest in land already created?
- Is the agent lawfully authorised in writing or merely lawfully authorised?¹⁴⁰

¹³³ W D Duncan, 'An Agreement to Create an Interest or a Disposal of an Interest?' (2007) 21(9) *Australian Property Law Bulletin (newsletter)* and *Theodore v Misford Pty Ltd* (2005) 221 CLR 612, 623.

¹³⁴ *Conveyancing Service: New South Wales* (eds) PW Young, AF Cahill and GD Newton, LexisNexis Butterworths (online) [10-451].

¹³⁵ *Duff v Blinco (No.2)* (2007) 1 Qd R 407, 415.

¹³⁶ *Duff v Blinco (No.2)* (2007) 1 Qd R 407, 415 where Keane J made a statement along these lines but indicated that the issue was not the question in the case before him and referred to the comments made in *Baloglow v Konstantinidis* (2001) 11 BPR 20,721, 20,750-1.

¹³⁷ W D Duncan, 'An Agreement to Create an Interest or a Disposal of an Interest?' (2007) 21(9) *Australian Property Law Bulletin (newsletter)*. See *McLaughlin v Duffill* [2010] Ch 1 [20] – [21]; *Duff v Blinco (No.2)* (2007) 1 Qd R 407, 414- 415; *Theodore v Mistford Pty Ltd* (2005) 219 ALR 296, 303 [29]; *Baloglow v Konstantinidis* (2001) 11 BPR 20,721, 20763 [191].

¹³⁸ Nicholas Seddon, 'Contracts for the Sale of Land: Is a Note or Memorandum Sufficient?' (1987) 61 *Australian Law Journal* 406, 413. This paper was written at a time when a series of Western Australian decisions raised the possibility that contracts for the sale or lease of land had to comply with section 4 (s 59 of the PLA) of the Statute of Frauds and the section 3 equivalents (s 11 of the PLA). One of the arguments raised by Seddon to support the exclusion of s 3 of the Statute of Frauds to contracts for the sale of land was that the legislative intent could not have been to cover the 'creation' of an interest in land through the operation of the equitable doctrine of specific performance. In his article Seddon noted the QLRC recommendation that section 11(1)(c) be repealed but considered that an additional measure was needed to make it clear in all jurisdictions that contracts for the sale of land did not need to be in writing but rather needed only be evidenced in writing (at 414).

¹³⁹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.11.90].

¹⁴⁰ W D Duncan, 'An Agreement to Create an Interest or a Disposal of an Interest?' (2007) 21(9) *Australian Property Law Bulletin (newsletter)*.

10.2.2. Interaction between subsections 11(1)(a), (b) and (c)

Section 11(1) and equivalent provisions in other jurisdictions have raised a number of interpretation issues as a result of potential overlap, ambiguity and lack of consistency in some instances between the subsections.¹⁴¹ An overview of some of the main interpretation issues include:

- uncertainty regarding the scope of section 11(1)(a) in relation to section 11(1)(c). If section 11(1)(a) encompasses equitable interests in land, then it is not clear what work section 11(1)(c) undertakes. The term 'interest in land' in section 11(1)(a) is defined in the *Acts Interpretation Act 1954* (Qld) to mean a legal or equitable interest in the land or a right, power or privilege over, or in relation to, the land;¹⁴²
- inconsistent references to authority being required in writing between the subsections. Section 11(1)(a) requires the creation or disposition to be in writing, while subsections 11(1)(b) and 11(1)(c) require written evidence of the declaration of trust or disposition of an equitable interest or trust which is a lower standard of formality than section 11(1)(a).¹⁴³

10.3. Other jurisdictions

10.3.1. Australia

All other Australian jurisdictions have an equivalent to section 11 of the PLA in substantially the same terms.¹⁴⁴

10.3.2. United Kingdom

The position in the United Kingdom is the same as in Queensland. The requirement for instruments to be in writing is set out in section 53 of the *Law of Property Act 1925* (UK). The section is in almost identical terms to section 11 of the PLA.

¹⁴¹ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010) 55.

¹⁴² *Acts Interpretation Act 1954* (Qld) s 36 and Sch 1.

¹⁴³ The Northern Territory is the only other jurisdiction apart from Queensland which requires a disposition of an equitable interest or trust to be manifested in writing. All other Australian jurisdictions (and the United Kingdom) require a disposition of an equitable interest or trust to be 'in writing'. See for example *Conveyancing Act 1919* (NSW) s 23C(1)(c) and *Property Law Act 1958* (Vic) s 53(1)(c).

¹⁴⁴ *Conveyancing Act 1919* (NSW) s 23C; *Property Law Act 1958* (Vic) s 53; *Law of Property Act 1936* (SA) s 29; *Law of Property Act* (NT) s 10; *Conveyancing and Law of Property Act 1884* (Tas) s 60; *Civil Law (Property) Act 2006* (ACT) s 201; *Property Law Act 1969* (WA) s 34.

10.3.3. New Zealand

New Zealand repealed and replaced its provisions corresponding to section 11 and section 59 following a number of reviews by the Law Commission.¹⁴⁵ These are now set out in sections 24 and 25 of the *Property Law Act 2007* (NZ). Prior to the introduction of the *Property Law Act 2007* (NZ), sections 24 and 25 were located in two different Acts. Section 24 was found in subsection 2(2) of the *Contracts Enforcement Act 1956* (NZ) (now repealed) which was in substantially the same form as section 59 of the PLA. Section 25 was located in section 49A of the *Property Law Act 1952* (NZ) (now repealed). That section was in substantially the same form as section 11 apart from:

- section 49A(1) of the *Property Law Act 1952* (NZ) referred to ‘legal’ interest – section 11(1)(a) does not;
- the declaration of trust provision (s 11(1)(b) equivalent) extending to ‘any land or any interest in land’;
- the inclusion of sections 1 and 2 from the Statute of Frauds; and
- requiring that a disposition (and those interests that are created) must be in writing, rather than ‘manifested and proved’ in writing.

Section 25 of the *Property Law Act 2007* (NZ) no longer requires dispositions of an equitable interest in personal property to be in writing, although it still requires writing if there is the disposition of an equitable interest in a ‘mixed fund’ comprising partly land and partly personal property. The New Zealand Act defines ‘disposition’ to include the creation of specified interests such as an easement, profit a prendre or any other interest in property.¹⁴⁶

10.4. Recommendation

As discussed at paragraph 12.4 below, the Centre recommends repealing sections 6, 10, 11, 12 and 59 and replacing them with an updated provision drafted to:

- retain, subject to existing exceptions, the requirement that the creation or disposition of an interest in land must be in writing;
- clarify the ongoing uncertainties about interpretation of the provisions;
- clarify the issue of ‘creation’ and ‘disposition’ in section 11(1)(a);
- address the issues raised in relation to subsection 11(1)(a) and section 59 (but retain the requirement that creation or disposition of an interest in property must in writing and signed, subject to existing exceptions);
- clarify the scope of subsections 11(1)(a) and (b); and
- remove the requirement for writing in section 11(1)(c) for the creation or disposition of an equitable interest in personalty.

¹⁴⁵ See Law Commission (NZ), *The Property Law Act 1952*, Preliminary Paper (1991); Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994); Law Commission (NZ), *Repeal of the Contracts Enforcement Act 1956*, Preliminary Paper No. 30 (2007); Explanatory Note, Property Law Bill 2007 (NZ).

¹⁴⁶ The term ‘property’ is defined broadly in s 4 of the *Property Law Act 2007* (NZ) to mean ‘everything that is capable of being owned, whether it is real or personal property, and whether it is tangible or intangible property; and includes any estate or interest in property...’.

The Centre has provided example drafting of a provision to replace sections 6, 10, 11, 12 and 59 with Recommendation 12 below at paragraph 12.4.

The repeal and redrafting of section 11 and section 59 is supported by the QLS. The QLS supports the use of the New Zealand legislation (sections 24 and 25 of the *Property Law Act 2007* (NZ)) as a 'starting point' for the redrafting.

If the section (and related sections) is not repealed and redrafted, the issues identified above in relation to the interaction between sections 11(1)(a) and 59 and the interpretation of section 11(1) more generally, will persist.

The Centre acknowledges that, as discussed above at Part 10.2.1, the recent case law appears to have navigated through the provisions by considering the nature of the transaction in question and assessing it against sections 11 and 59 to identify which provision may be relevant. Ultimately, whether or not any concerns arise in relation to the application of the provisions will depend on the nature of the particular transaction and will be considered on a case by case basis.

The cases have arguably not provided sufficient guidance to continue this approach. The Centre therefore remains of the view that the benefits of repealing and redrafting the provisions related to the requirement for writing far outweigh any benefit that could be derived from leaving the provisions as they are.

The Centre's recommendation that the requirement for writing generally be retained is supported by the QLS although no specific submissions were received with respect to the repeal of section 11(1)(c) which would remove the requirement for writing when creating or disposing of an equitable interest in personalty. It remains the position of the Centre that the repeal of the provision is nevertheless appropriate.

Removing the need to create or dispose of an equitable interest in personalty by repealing section 11(1)(c) is in line with the QLRC recommendation from 1987 that section 11(1)(c) be repealed and that the requirement of writing should be confined to the other two categories in section 11.¹⁴⁷ The recommendation to repeal section 11(1)(c) was not implemented at the time, however the Centre is of the view that the requirement for writing when dealing with an equitable interest in personal property is not necessary. This view is formed on the basis that any dealings in a legal interest in personalty are not required in writing.

The Centre's recommendation is also in line with the position in New Zealand where the requirement for a disposition of an equitable interest in personalty to be in writing was described as 'odd' when a legal interest in the same property was not required to be in writing.¹⁴⁸

The VLRC, in support of its recommendation to remove the requirement for formalities for dispositions of personal property, noted:

¹⁴⁷ Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1986*, Report No. 37 (1987) 18, 19. For a fuller discussion of the problems identified by the Queensland Law Reform Commission in relation to section 11(1)(c) see pp 18-19 of the Report.

¹⁴⁸ See Law Commission (NZ), *The Property Law Act 1952*, Preliminary Paper (1991) 28.

NOT GOVERNMENT POLICY

Personal property is a highly diverse category, and includes chattels which can be transferred by delivery, things in action which require signed writing under section 134, and other forms of property which may be subject to special formalities under other statutes.¹⁴⁹

Further, the Centre recommends amending the definition of 'disposition' in schedule 6. The proposed redrafted definition is broader than the existing definition and will resolve uncertainty about which transactions come within the ambit of the provisions. The proposed drafting for a new definition of 'disposition' is included with Recommendation 12 at paragraph 12.4.

RECOMMENDATION 10. Section 11 should be repealed. A new provision should be drafted to replace sections 6, 10, 11, 12 and 59.

¹⁴⁹ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010) 57.

11. Section 12 – Creation of interests in land by parol

11.1. Overview and purpose

12 Creation of interests in land by parol

- (1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by the person's agent lawfully authorised in writing, shall have, despite any consideration having been given for the same, the force and effect of interests at will only.
- (2) Nothing in this Act shall affect the creation by parol of a lease taking effect in possession for a term not exceeding 3 years, with or without a right for the lessee to extend the term for any period which with the term would not exceed 3 years.

Section 12 of the PLA has its origins in sections 1 and 2 of the Statute of Frauds.¹⁵⁰ The substance of these Imperial legislative provisions has been preserved in section 12. The effect of section 12(1) of the PLA is that the creation of an interest in land by parol which is not in writing or signed, only creates an interest at will. This means that the interests can be determined at the will of either party. However, the exception to this general rule is set out in section 12(2) of the PLA which enables a legal leasehold interest to be created by parol. In order to fall within the scope of section 12(2):

- the lease must take effect in possession. The term 'possession' is defined in the PLA to include, when used with reference to land, the receipt of income from land;¹⁵¹
- there must be clear evidence of intention to create a lease for an actual term;
- the term of the lease and any option periods must not exceed three years in duration.¹⁵²

11.2. Issues with the section

Section 12 of the PLA is a well understood provision. There has been some academic discussion regarding the meaning of the phrase 'taking effect in possession' in section 12(2) of the PLA and the equivalent section in New South Wales.¹⁵³ A lease which commences at a future date and gives no immediate right to possession is not a lease which 'takes effect in possession' and will not fall within the scope of section 12(2) of the PLA.¹⁵⁴ However, one area of uncertainty is whether the phrase means a lease that requires the lessee to take possession as soon as the term commences or a lease that gives the lessee a right to take immediate possession which may or may not be exercised.¹⁵⁵ The rationale for this latter approach proceeds on the basis that 'an interest "in possession", strictly speaking, is an interest that *entitles* its holder to the immediate benefits of the interest, but does not

¹⁵⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 10.

¹⁵¹ *Property Law Act 1974* (Qld) s 3, Sch 6.

¹⁵² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.12.90].

¹⁵³ *Conveyancing Act 1919* (NSW) s 23D(2).

¹⁵⁴ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1550].

¹⁵⁵ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1550] prefers this view. Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.12.90]. For a detailed analysis regarding this issue see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.12.90].

compel the holder to take actual possession.¹⁵⁶ Further support for this interpretation is found in the definition of ‘possession’ in schedule 6 of the PLA which includes the ‘receipt of income from the land’.¹⁵⁷ Receiving income does not require the lessee to have actual possession of the property. Further, there is case law in the United Kingdom considering the equivalent provision to section 12(2) of the PLA which confirms an interpretation that an ‘immediate right to take possession’ is sufficient to satisfy the ‘taking effect in possession’ requirement.¹⁵⁸

In Queensland, there is an additional issue with the language in section 12(2) of the PLA and the terminology used in the *Land Title Act 1994* (Qld). A ‘short-term’ lease under the *Land Title Act 1994* (Qld) means a lease for a term of 3 years or less.¹⁵⁹ The Act then defines the word ‘term’ to mean a:

... period beginning when the lessee is first entitled to possession of a lot or part of a lot under the lease and ending when the lessee is last entitled to possession, even if the lease consists of 2 or more discontinuous periods.¹⁶⁰

The effect of this is that for the purposes of the *Land Title Act 1994* (Qld), a short-term lease ‘takes effect’ when the lessee is first entitled to possession under the lease. It is undesirable to have significant differences in language in provisions in different Acts addressing similar subject matter.

11.3. Other jurisdictions

11.3.1. Australia

Each Australian jurisdiction has a provision similar to section 12 of the PLA.¹⁶¹ In South Australia, New South Wales and Victoria, the term ‘at the best rent which can be reasonably obtained’ is included in the equivalent provision to section 12(2) of the PLA.¹⁶²

In Victoria, the VLRC appears to view the equivalent provision in section 54 of the *Property Law Act 1958* (Vic) to mean that ‘the lease must commence immediately upon the making of the agreement.’¹⁶³ This is suggestive of a requirement that the ‘creation of the lease and the taking of possession must be synchronous, that is, occur at the same time.’

¹⁵⁶ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1550].

¹⁵⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.12.90]).

¹⁵⁸ See *Long v Tower Hamlets London Borough Council* [1996] 2 All ER 683, 699-701.

¹⁵⁹ The term also means a lease from year to year or a shorter period: *Land Title Act 1994* (Qld) Sch 2.

¹⁶⁰ *Land Title Act 1994* (Qld) Sch 2.

¹⁶¹ See *Conveyancing Act 1919* (NSW) s 23D; *Property Law Act 1958* (Vic) s 54; *Law of Property Act 1936* (SA) s 30; *Property Law Act 1969* (WA) s 35; *Conveyancing and Law of Property Act 1884* (Tas) ss 60(3) and (4); *Law of Property Act* (NT) s 11.

¹⁶² See *Law of Property Act 1936* (SA) s 30(2); *Conveyancing Act 1919* (NSW) s 23D(2); *Property Law Act 1958* (Vic) s 54(2).

¹⁶³ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 129.

11.3.2. New Zealand

In New Zealand, section 10 of the now repealed *Property Law Act 1952* (NZ) provided:

10 Partitions, exchanges, etc.

No partitions, exchange, lease, assignment, or surrender (other-wise than by operation of law) of any land shall be valid at law unless the same is made by deed, except a lease for a term not exceeding a tenancy of one year, which lease may be made either by writing or by parol.

The Law Commission (NZ) acknowledged in 1991 that deed land had ‘all but disappeared’ in New Zealand and any parcels that remained were ‘small and unlikely to be of much importance.’ The Commission noted:

It is almost inconceivable that anyone will knowingly try to convey or mortgage them without first bringing them within the Land Transfer Act. It is therefore tempting to suggest that the sections simply be repealed. However, to guard against the (theoretical) possibility that they may be needed in some unexpected situation we suggest retaining the sections, despite the repeal of the 1952 Act, but without repeating them in the new statute. The new Act could provide simply that in the case of deeds system land the section in question in the 1952 Act should continue to apply.¹⁶⁴

The relevant provisions, including section 10, were ultimately included in schedule 6 of the *Property Law Act 2007* (NZ). Section 351 of that Act specifies that schedule 6 only applies to land (and instruments relating to land) that is not owned by the Crown and is not under the *Land Transfer Act 1952*. Section 1 of schedule 6 is in a similar form to section 10 of the 1952 Act but uses the term ‘short-term leases’ when excluding these from the requirement that to be valid, a lease must be made by deed.

Leases of land, including short-term leases, are now governed by Part 4 of the *Property Law Act 2007* (NZ). A ‘short-term lease’ is defined to mean:

an unregistered lease –

- (a) that has a term that commences not later than 20 working days after the date of the contract to lease; and
- (b) that is –
 - (i) a lease for a term of 1 year or less; or
 - (ii) a periodic tenancy for periods of 1 year or less; or
 - (iii) a statutory tenancy.¹⁶⁵

Further, section 208 specifies that a short-term lease can be made orally or in writing and that a lessee that occupies land under a short-term lease has a legal interest in the land, subject to the *Land Transfer Act 1952* (NZ).

11.4. Recommendation

Section 12 is still relevant in Queensland and the Centre does not propose to alter the current legal position – that the creation of an interest in land must be in writing and signed by the party creating the interest, subject to an exception for leases taking effect in possession for three years or less. The Centre notes there is some overlap in practical effect between section 12(1) and section 11(1)(a) PLA. The Centre recommends the repeal of section 12 and in conjunction with the repeal of sections 6, 10,

¹⁶⁴ Law Commission (NZ), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 6-7 [15].

¹⁶⁵ *Property Law Act 2007* (NZ) s 207.

11 and 59 of the PLA subject to the replacement with a new provision as set out in Recommendation 12 at paragraph 12.4.

The Centre recommends that the replacement provision include wording to clarify the generally accepted position that the phrase ‘taking effect in possession’ includes an entitlement to possession upon commencement of the lease. Thus, the interests of a short lease holder would be protected as a legal interest from the time the lease commenced although they may not at that stage have entered into possession. The section has effect without the necessity for the lessee to take actual possession, in line with the existing lease law. This will also ensure that definition of ‘short lease’ in the replacement provisions is consistent with the *Land Title Act 1994* (Qld).

The proposed draft of the replacement provisions for sections 6, 10, 11, 12 and 59 is provided in Recommendation 12 at paragraph 12.4.

The recommendation for the repeal of section 12 is made on the basis that:

- the effect of section 12(1) is retained in the proposed drafting of the provisions to replace sections 6, 10, 11, 12 and 59; and
- the dictionary in schedule 6 be amended to include a definition of ‘short lease’ to replace section 12(2), but retain the effect of the provision.

RECOMMENDATION 11. Section 12 should be repealed and a new provision drafted to replace section 6, 10, 11, 12 and 59.

12. Section 59 - Contracts for the sale of land etc. to be in writing

12.1. Overview and purpose

59 Contracts for sale etc. of land to be in writing

No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract, is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised.

Section 59 preserves the Statute of Frauds provision dealing with the sale or other disposition of land.¹⁶⁶ The primary objective of the Statute of Frauds was to prevent fraud and perjury by ensuring it was not possible to prove the contents of an agreement by oral evidence only. Under the Statute an agreement needed to be in writing with the essential terms included and signed by the defendant in order to be enforceable.¹⁶⁷

The Statute was introduced during a time when there were restrictions on the admissibility of oral evidence from the parties or people interested in the result of the action.¹⁶⁸ The strict application of the requirement was relaxed by the doctrine of part performance in order to address unfair outcomes.¹⁶⁹ The doctrine of part performance is underpinned by the principle that 'equity will not allow a statute to be used as an instrument of fraud.'¹⁷⁰ As the doctrine is equitable any remedy is at the discretion of the court.¹⁷¹

The practical effect of section 59 is that a contract for the sale or other disposition of land is unenforceable if it does not comply with the requirements of the section. The two key requirements are that:

- the contract, or some memorandum or note of the contract, should be in writing; and
- the contract, memorandum or note should be signed by the party charged or by a 'lawfully authorised agent' of the party.

Contracts which do not comply with the requirements of the section are not void, but are unenforceable by action. A strict application of section 59 of the PLA has the effect that oral evidence cannot be relied upon alone to establish an agreement or to enforce it. As indicated above, the doctrine of part performance developed over time to enable parties to enforce a contracts in certain

¹⁶⁶ See section 4 of the *Statute of Frauds 1677* which was reproduced in Queensland in section 5 of the *Statute of Frauds and Limitations of 1867*.

¹⁶⁷ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 182.

¹⁶⁸ United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land*, Working Paper No. 92 (1985) 5. Clearly these restrictions on the admissibility of evidence no longer apply.

¹⁶⁹ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 182.

¹⁷⁰ United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land*, Working Paper No. 92 (1985) 9.

¹⁷¹ United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land*, Working Paper No. 92 (1985) 10.

circumstances, despite non-compliance with the requirements in section 59. The equitable relief usually granted if sufficient acts of part performance are established is specific performance of the contract.¹⁷² Section 6(d) of the PLA expressly preserves the law relating to part performance. The effect of section 6(d) is retained in the recommendations set out below at paragraph 12.4.

In 1970 the QLRC reviewed and reported on a number of the Imperial statutes in force in Queensland (**QLRC Report No. 6**).¹⁷³ The QLRC Report No. 6 set out a proposed Bill to repeal, amongst other things, the Statute of Frauds.¹⁷⁴ The QLRC also recommended the retention of the requirement for writing in relation to contracts for the sale or other disposition of land.¹⁷⁵ The rationale for the retention of the writing requirement included:

- the recognition of the formality, seriousness and sometimes the complexity of land transactions which justified the requirement of a written memorandum;¹⁷⁶
- the application of the doctrine of part performance which addressed many of the worst features of the legislation;¹⁷⁷
- maintaining consistency with the position adopted in other jurisdictions to retain the provision including the United Kingdom and New South Wales.¹⁷⁸

In 1972 the QLRC undertook a broader review of Queensland property laws and produced a Working Paper which included a proposed Property Law Bill (**Working Paper Bill**).¹⁷⁹ The Working Paper Bill was circulated to the legal profession and other interested persons and organisations. The Working Paper Bill included a proposed section 59 in substantially the same form as the current section 59 of the PLA.

¹⁷² Lionel Bentley 'Informal Dealings with Land After Section 2' (1990) 10 *Legal Studies* 325, 327.

¹⁷³ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970).

¹⁷⁴ The Bill entitled the *Statute of Frauds 1970* also repealed the *Statute of Frauds Limitations of 1867* and section 7 of the *Sale of Goods Act 1896*.

¹⁷⁵ Note that the proposal in relation to section 4 of the Statute of Frauds and section 5 of the Queensland equivalent was the repeal of both sections in their entirety and the partial re-enactment to preserve the requirement for writing in relation to contracts for the sale and disposition of land: see Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) Appendix A.

¹⁷⁶ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 7.

¹⁷⁷ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 7- 8.

¹⁷⁸ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 9.

¹⁷⁹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Determine the Application of Certain Imperial Statutes*, Working Paper (1972).

The feedback from the Working Paper Bill was included in the subsequent QLRC Report produced in 1973.¹⁸⁰ Proposed section 59 was not altered and the rationale for the retention of section 59 replicated the reasons set out in the QLRC Report No. 6.¹⁸¹ The PLA was subsequently enacted in 1974 and section 59 has remained in substantially the same form since that time.¹⁸²

12.2. Issues with the section

12.2.1. Criticisms of section 59

There are a number of criticisms that have been levelled against the requirements in section 4 of the Statute of Frauds (and as a consequence, at section 59 of the PLA). A brief overview of some of the general criticisms of the writing requirement for contracts for the sale of land is set out below. Some of these overlap with the same criticisms in relation to section 56 of the PLA (discussed at paragraph 59):

- the principal object of the Statute of Frauds is no longer relevant. As discussed in greater detail in paragraph 12.1 above, one of the primary objectives of the Statute of Frauds was to prevent fraud and perjury which arose partly from the inability of the parties to a claim to enforce a contract to provide evidence in the proceedings.¹⁸³ At the time the Statute of Frauds was introduced factual decisions were made by juries who were still entitled to ‘act on their own knowledge of the facts in dispute’.¹⁸⁴ The requirement that certain categories of contract be proved by signed writing was a mechanism to overcome potentially spurious claims. Clearly, this rationale is no longer relevant as the rules of evidence have changed;
- the section can cause hardship and is unjust in its operation. This criticism relates to the possible injustice suffered by a party who is unable to enforce a legal right because of a technicality. For example, a defendant enters into an oral agreement expecting to fulfil the obligations under the agreement but later relies on the absence of writing to prevent the contract being enforced against him/her.¹⁸⁵ In those types of cases, section 59 of the PLA could be used as a ‘technical defence’ to an otherwise potentially ‘meritorious claim’.¹⁸⁶ Zelling J in his minority report on the repeal of the South Australian section 59 equivalent provision indicated:

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).

¹⁸¹ 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) 49.

¹⁸² A minor amendment was made by the *Property Law Act Amendment Act 1985* (Qld) s 4.

¹⁸³ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 376 [11.1] and Gerwyn Griffiths, ‘A Ten Year Miscellany’ (2000) 8 (1) *Australian Property Law Journal* 49, 49.

¹⁸⁴ British Columbia Law Reform Commission, *Report on the Statute of Frauds LRC 33* (1977) 55; G.H.L. Fridman, ‘The Necessity for Writing in Contracts within the Statute of Fraud’ (1985) 35 *University of Toronto Law Journal* 43, 47; Law Commission (NZ), *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 2.

¹⁸⁵ British Columbia Law Reform Commission, *Report on the Statute of Frauds LRC 33* (1977) 56.

¹⁸⁶ Law Commission (NZ), *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 5.

The only value of this section is to aid the dishonest man who thinks after concluding his bargain that he can in fact get a higher price for his land elsewhere and so he does not wish to be bound to his word. All other objections can be met under other areas of the law;¹⁸⁷

- there are interpretation issues. Although there is a large body of case law interpreting section 59 of the PLA (including earlier versions of that provision) there is still some uncertainty in relation to the interpretation of some aspects of the provision including the interaction between the section and section 11(1)(a). This issue is discussed in more detail in paragraph 10.2.1;¹⁸⁸
- the operation of the section undermines the reputation of the legal system as an efficient and rational process for determining disputes. Where the absence of writing is raised as a defence in proceedings, time and cost is spent on 'an artificial procedural issue (is the signed writing satisfied)' instead of the substantive issue between the parties regarding whether a concluded contract exists.¹⁸⁹

12.2.2. Support for retention of section 59

There are a number of factors which support the retention of section 59 of the PLA and the requirement for writing in relation to transactions for the sale of land. These are discussed below.

- There is a large body of established case law interpreting section 59 of the PLA (and equivalent provisions in the other jurisdictions) and the doctrine of part performance. The provision and associated case law is well known to practitioners who are generally in a position to be able to advise clients about the section with a reasonable degree of certainty.
- Retaining section 59 in its current form means that the position in Queensland will remain consistent with every other State and Territory in Australia. In this respect, section 59 can be distinguished from section 56 of the PLA in that there are three jurisdictions that have repealed the equivalent section 56 provision with, on the face of it, limited impact.¹⁹⁰ Unlike the requirement for writing in relation to guarantees, there has been no indication from the other Australian jurisdictions that the equivalent provisions to section 59 of the PLA are likely to be reviewed any time in the near future.

¹⁸⁷ South Australia Law Reform Committee, *34th Report Relating to the Repeal of the Statute of Frauds and Cognate Enactments in South Australia*, Report (1975) 11. Zelling J was expressing a minority view regarding the repeal of section 26 of the *Law of Property Act 1936* (SA). The majority of the Committee recommended the retention of the provision on the basis that it serves a valuable purpose [8].

¹⁸⁸ Law Commission (NZ), *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 8.

¹⁸⁹ Law Commission (NZ), *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 8.

¹⁹⁰ New South Wales, South Australia and the Australian Capital Territory no longer have any formality requirements in relation to guarantees.

- The formalities reflect the ‘seriousness’ and often ‘complexity’ of land transactions. The sale or disposition of land is arguably a different category of transactions to some of the other ones set out in the Statute of Frauds. Requiring a sale of land contract to be in writing in order to be enforceable reflects the seriousness of the undertaking entered into between the parties and provides an element of consumer protection by requiring the parties to make any agreement in writing. The requirement for writing also provides a ‘cautionary’ function as it provides parties to properly consider the transaction they intend to enter into.¹⁹¹
- Reform in the United Kingdom has raised other issues associated with the requirement for writing. The Law Commission in the United Kingdom undertook an extensive review of the equivalent section 40 of the *Property Law Act 1925* (UK) and identified a variety of problems with the provision. The Commission’s view and feedback from consultation with relevant stakeholders resulted in reform which still retained the formality requirement (although in a different form). The illustration provided by the experience in the United Kingdom under section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK) of an alternative approach to drafting formality requirements has raised a different set of issues and arguably has not provided improved certainty or workability of the requirement for writing.¹⁹² Some of the key issues arising from section 2 include:
 - ongoing uncertainty arising from the effect of non-compliance with section 2(1) of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK).¹⁹³ For example, there is uncertainty regarding how the courts will approach a claim for proprietary estoppel where an agreement is void because of section 2 – that is, the extent to which proprietary estoppels can be used to ‘save’ an informal agreement. Two House of Lords decisions¹⁹⁴ in 2008 and 2009 highlight the uncertainty regarding the availability of proprietary estoppel and constructive trust, although whether the transaction is commercial as opposed to a non-commercial transaction may have some impact;¹⁹⁵
 - it is potentially easier for individuals to ‘escape’ their contractual obligations by identifying expressly agreed terms that were not included in the final contract.¹⁹⁶ Related to this issue is the extent to which ‘deliberately’ excluded terms actually form part of the land contract;¹⁹⁷

¹⁹¹ M G Bridge, ‘The Statute of Frauds and Sale of Land Contracts’ *The Canadian Bar Review* 64 (1986) 58, 101.

¹⁹² Gerwyn Griffiths, ‘A Ten Year Miscellany’ (2000) 8 (1) *Australian Property Law Journal* 49. One commentator has stated that ‘it is well known that s 2(1) LP(MP) A 1989 is not much loved. It expresses a need for certainty that, undoubtedly, has caught out others in addition to these parties, and will do so again.’: See Martin Dixon ‘To Write or Not to Write?’ (2013) *The Conveyancer and Property Lawyer* 1, 3.

¹⁹³ Mark Pawlowski, ‘Oral Agreements: Estoppels, Constructive Trusts and Restitution’ (2008) *Landlord & Tenant Review* 163, 163.

¹⁹⁴ *Cobbe v Yeoman’s Row Management Ltd* [2008] UKHL 55; [2008] 1 WLR 1752 and *Thorner v Major* [2009] UKHL 18; [2009] 1 WLR 776.

¹⁹⁵ For a detailed analysis of the issues associated with proprietary estoppels, constructive trusts and section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK) see: Owen Gwilyn and Osian Rees, ‘Section 2(5) of the Law of Property (Miscellaneous Provisions) Act 1989: A Misconceived Approach?’ (2011) *Conveyancer and Property Lawyer* 495; Martin Dixon, ‘To Write or Not to Write?’ (2013) *The Conveyancer and Property Lawyer* 1; Mischa Balen and Christopher Knowles, ‘Failure to Estop: Rationalising Proprietary Estoppels Using Failure of Basis’ 3 (2011) *Conveyancer and Property Lawyer* 176, 176-190.

¹⁹⁶ *North Eastern Properties Ltd v Coleman* (CA) [2010] 1 WLR 2715, 2724-2725.

¹⁹⁷ *North Eastern Properties Ltd v Coleman* (CA) [2010] 1 WLR 2715, 2724-2725.

- a broader concern about the section relates to the balance between certainty of knowing whether a contract exists and fairness. The section is clear about when a binding contract is made and what the terms are, however, there will always be situations where unfair advantage is taken by one party over another or where informal agreements are made.¹⁹⁸

A further issue to consider is that the legal landscape in the United Kingdom which gave rise to uncertainty associated with the scope of the doctrine of part performance in the context of section 40 of the *Law of Property Act 1925* (UK) and the enforceability of oral agreements arising from two Court of Appeal decisions is not replicated in Australia.

12.3. Other jurisdictions

12.3.1. Australia

All States and Territories in Australia require contracts for the sale of land to be in writing in order to be enforceable.¹⁹⁹ Western Australia retained the relevant part of section 4 of the Statute of Frauds but the other States repealed section 4 and replaced it with similar provisions. The terms of each provision is in substantially the same form as section 59 of the PLA, although the Australian Capital Territory and Victoria require that an agent must be authorised in writing to sign the contract or memorandum.²⁰⁰

There does not appear to be any move in these jurisdictions to review or alter these provisions.

12.3.2. United Kingdom

Prior to 1989, section 40 of the *Law of Property Act 1925* (UK) was the operative provision setting out the requirements for an enforceable contract for sale or other disposition of land. This provision was in substantially the same form as section 59 of the PLA. Section 40 of the *Law of Property Act 1925* (UK) was repealed by the *Law of Property (Miscellaneous Provisions) Act 1989* (UK) and replaced by section 2 of that Act.

In summary section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK) has the following effect:

- a contract for the sale or other disposition of land must be in writing and comply with the other requirements in section 2 in order to be valid and enforceable;²⁰¹
- failure to comply with section 2 means that any non-complying contract is void;²⁰²

¹⁹⁸ Martin Dixon, 'To Write or Not to Write?' (2013) *The Conveyancer and Property Lawyer* 1, 2.

¹⁹⁹ *Conveyancing Act 1919* (NSW) s 54A; *Instruments Act 1958* (Vic) s 126(1); *Law of Property Act 1936* (SA) s 26; *Law of Property Act* (NT), s 64; *Conveyancing and Law of Property Act 1884* (Tas) s 36; *Civil Law (Property) Act 2006* (ACT) s 204; *Statute of Frauds 1677* (Imp) (WA) s 2.

²⁰⁰ *Property Law Act 1974* (Qld) sub-s 11(1)(a) which requires the creation and dispositions of land to be in writing also requires an agent to be authorised in writing in order to create or dispose of an interest in land.

²⁰¹ In the case of exchanged contracts, the agreed terms must be in each document.

²⁰² See Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 629.

NOT GOVERNMENT POLICY

- a contract can no longer be valid but unenforceable because it did not comply with the statutory requirements of writing (as was the case under section 40).²⁰³ Therefore, where section 2 has not been complied with, the doctrine of part performance is no longer available as no contractual obligation exists to enforce;²⁰⁴
- three categories of contract (short leases, sales at public auction and contracts regulated under the United Kingdom *Financial Services Act 1986* (UK)) are expressly excluded under section 2(5). Other categories have been excluded by the courts on policy grounds. For example, compulsory purchase where a notice to treat has been served and the parties have agreed the price is excluded from the operation of the section.²⁰⁵

Consideration of the issues associated with the formalities for land contracts and possible changes to these requirements initially began in the United Kingdom in 1973 when the Law Commission was asked to look at a proposed amendment to section 40 to assess whether there was a better alternative.²⁰⁶ However, it was not until 1985 that the Law Commission published Working Paper No. 92 *Transfer of Land Formalities for Contracts for Sale etc. of Land* which comprehensively reviewed the operation of section 40 of the *Law of Property Act 1925* (UK) and considered possible options for reforming the section.²⁰⁷ The Working Paper was followed by a Final Report by the Law Commission in 1987 which recommended that section 40 be repealed and replaced with a provision requiring all contracts for the sale or other disposition of an interest in land to be made in writing and signed in order to be valid. The Law Commission further recommended that failure to comply with the formalities requirements would render the contract void, rather than unenforceable.²⁰⁸

²⁰³ Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 629.

²⁰⁴ Under section 40 of the *Law of Property Act 1925* (UK), the doctrine of part performance was preserved and available as an equitable remedy to enforce an oral contract if there were sufficient acts of part performance of that contract: See Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 629.

²⁰⁵ Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 633-634.

²⁰⁶ For a detailed discussion of the history to the review of section 40 see United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land* Working Paper No. 92 (1985) 1 – 4. The Law Commission in its Final Report indicated that it approached the task of reviewing and reforming section 40 using the following three general principles as the underpinning rationale to guide the reform process:

- no reform should increase the likelihood of contracts for the sale (or other disposition) of land becoming binding before the parties have been able to obtain legal advice;
- if any reform is unable to reduce the risk of injustice, the reform should at least not increase it. In particular, the imposition of any formal requirements should not be so inflexible that hardship or unfairness is perceived in cases of minor non-compliance;
- any reform should simplify, or at least not complicate, conveyancing.

²⁰⁷ These options included repealing section 40 with no replacement, make no changes to section 40, require that all contracts relating to land be in writing: United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land* Working Paper No. 92 (1985) 3.

²⁰⁸ This was intended to make the doctrine of part performance obsolete: see United Kingdom Law Commission *Transfer of Land Formalities for Contracts for Sale etc. of Land* Final Report (1987) 23.

The rationale for the recommendation that the provision be repealed included:

- ongoing uncertainty about the enforceability of oral agreements arising from two Court of Appeal decisions which adopted different positions in relation to the sufficiency of the statement 'subject to contract' as evidence supporting an enforceable agreement;²⁰⁹
- difficulties with the interpretation of section 40 of the *Law of Property Act 1925* (UK). The Law Commission's concern was that as a result of the body of case law that had built up in relation to the section, it had acquired a 'thick crustation of legal authority and judicial gloss, much of it inconsistent and unsupported by the enactment itself.'²¹⁰ Some of the interpretation issues included:
 - the word 'agreement' having a number of different meanings;
 - uncertainty regarding what was actually covered by the phrase 'or any interest in land';
 - the creation of a number of extensions or exceptions (aside from part performance) to enable the enforcement of contracts that were valid but lacked sufficient 'memorandum';
 - ongoing uncertainty regarding what constitutes a signature. For example, is it sufficient that there is a name alone or will initials be acceptable as a signature?;
- other issues which had arisen related to how to manage alterations to documents after a signature had been obtained;
- concerns about the scope of the doctrine of part performance in the context of section 40 arising from a House of Lords decision which held that payment of a sum of money in the circumstances of that case could amount to a sufficient act of part performance to make the contract enforceable in the absence of writing.²¹¹ The case did not involve the sale of land, however, the House of Lords did suggest that in the case of a contract for the sale of land, sufficient acts of part performance could be found in the act of the purchaser instructing solicitors to prepare and submit a draft conveyance or transfer. The effect would be that an oral contract for sale could be unilaterally rendered enforceable and the 'provisions of section 40 left to beat the air.'²¹²

²⁰⁹ United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land* Working Paper No. 92 (1985) 2. See also *Law v Jones* [1974] Ch 112 CA where the Court of Appeal supported the position that a solicitor's letter marked 'subject to contract' may be evidence of an enforceable oral agreement sufficient to satisfy section 40. Compare that decision to the Court of Appeal decision in *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146 which adopted the opposite approach. In that case, the court held that a 'subject to contract' statement in a solicitor's letter would prevent it being relied upon as evidence of an oral agreement and that a section 40 memorandum must 'acknowledge a contract, whereas the words 'subject to contract' deny a contract.': as extracted in United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report (1987) 2; United Kingdom Law Commission *Transfer of Land Formalities for Contracts for Sale etc. of Land* Working Paper No. 92 (1985) 3.

²¹⁰ United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land* Working Paper No. 92 (1985) 22.

²¹¹ *Steadman v Steadman* [1976] AC 536 referred to in the United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land* Working Paper No. 92 (1985) 2.

²¹² United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report (1987) 3. The Law Commission Working Paper No. 92 (1985) considered that the House of Lords decision left the scope of the doctrine of part performance in an uncertain state.

The rationale for the recommendation that the requirement for writing be retained in the form set out in section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK) included:²¹³

- ensuring that contractual certainty was maintained in order to minimise disputes. A contract in writing will provide reliable evidence of the existence and terms of a transaction, if required. This will also assist with the prevention of fraud as the parties will not be bound in the absence of an actual agreement;
- providing a consumer protection function so that consumers are aware of the seriousness of the transaction;
- ensuring the parties are not bound by a contract by accident or too early in what they may consider to be the negotiating phase. It also enables parties to identify when a contract is entered into;²¹⁴
- recognition that land transactions are in a more ‘serious’ category of transactions and therefore require formalities to reflect this;
- consistency with other jurisdictions which also require more formality for contracts relating to land than other types of sales.

In response to concerns about the inability to rely on the doctrine of part performance, the Law Commission noted that there were other remedies available through the various forms of estoppel to achieve very similar results where appropriate to those of part performance.²¹⁵ The Law Commission considered that the equitable doctrines were already sufficiently strong and developed to enable the court to require that land be transferred.²¹⁶

12.4. Recommendation

The Centre recommends repealing the section and redrafting it to:

- retain the requirement, subject to existing exceptions, that a contract for the sale of an interest in land must be in writing;
- clarify the ongoing uncertainties about interpretation of the provisions; and
- address the issues raised in relation to subsection 11(1)(a) and section 59 (but retain the requirement that creation or disposition of an interest in property must in writing and signed, subject to existing exceptions).

The repeal and redrafting of section 11 and section 59 is supported in submissions received from the QLS. There is further support from the QLS for the use of the New Zealand legislation (sections 24 and 25 of the *Property Law Act 2007* (NZ)) as a ‘starting point’ for the redrafting.

²¹³ United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 6.

²¹⁴ United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 7.

²¹⁵ United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 18.

²¹⁶ United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 18.

The Centre has included example drafting of a provision to replace sections 6, 10, 11, 12 and 59 with Recommendation 12 below.

Although the discussion above has highlighted some issues generally with the current rationale for the writing requirement, the position in Queensland in relation to the interpretation and application of section 59 of the PLA is reasonably settled. The Centre does not recommend that the position with respect to the enforceability or validity of a contract of sale of land be altered. The status quo in Queensland should remain the same – that contracts for the sale of land which are not in writing, or sufficiently recorded in some note or memorandum, and signed by the party to be charged, are valid but not enforceable. This is supported in submissions received from the QLS.

The Centre does however recommend that the language of the section be modernised, noting that there is a large volume of case law with respect to ‘some memorandum or note of the contract’ and that this is a well settled area of law. In these circumstances, the Centre recommends that any redrafting of the provision should adopt that particular phrase so as to ensure the application of that case law to the new provisions.

If the section (and related sections) is not repealed and redrafted, the issues identified above in relation to the interaction between sections 11(1)(a) and 59 will persist. The Centre acknowledges that the recent case law appears to have navigated through the provisions by considering the nature of the transaction in question and assessing it against sections 11 and 59 to identify which provision may be relevant.

Ultimately whether or not any concerns arise in relation to the application of the provisions will depend on the nature of the particular transaction and will be considered on a case by case basis. The cases have arguably provided sufficient guidance to enable this approach. However, the Centre remains of the view that the benefits of repealing and redrafting the provisions related to the requirement for writing far outweigh any benefit that could be derived from leaving the provisions as they are.

RECOMMENDATION 12. Replace sections 6, 10, 11, 12 and 59 with a new section modelled on the New Zealand *Property Law Act 2007* (NZ) and amended definitions of ‘disposition’ and ‘short lease’.

For example, new provisions replacing sections 6, 10, 11, 12 and 59 of the PLA could be drafted in the following manner:

Section [] Contracts for sale or other disposition of land not enforceable unless in writing

- (1) A contract for the sale or other disposition of any interest in land is not enforceable by action unless—
 - (a) the contract, or a some note or memorandum of the contract, is in writing; and
 - (b) that writing is signed by the party against whom the contract is sought to be enforced or that party’s lawfully authorised agent.

Section [] Writing required for the creation of interests in land

- (1) The creation of a legal or equitable interest in land must be in writing and signed by the person creating the interest or by that person's lawfully authorised agent.
- (2) A trust relating to land or an interest in land must be created in writing and signed by the settlor or the person declaring the trust.
- (3) This section does not affect—
 - (a) the creation or operation of a resulting, implied, or constructive trust;
 - (b) the making or operation of a will;
 - (c) the disposition of any interest in land by operation of law;
 - (d) the application of the law of part performance; or
 - (e) the creation of a short lease.

The schedule 6 Definitions could be drafted in the following manner:

disposition includes:

- (a) a sale;
- (b) a mortgage;
- (c) a transfer;
- (d) a grant;
- (e) a partition;
- (f) an exchange;
- (g) a lease;
- (h) an assignment;
- (i) a vesting instrument;
- (j) a declaration of trust;
- (k) a surrender, disclaimer, or release;
- (l) the creation of an easement, profit à prendre, or any other interest in property; and
- (m) every other assurance of property by an instrument;

but does not include:

- (a) a will;
- (b) a devise;
- (c) a bequest; or
- (d) an appointment of property contained in a will.

short lease is a lease:

- (a) for a term of 3 years or less;
- (b) from year to year or a shorter period; or
- (c) created by parol taking effect in possession, for a term not exceeding 3 years, including any option to renew.

Note: 'taking effect in possession' includes an immediate entitlement to possession.

Note: a short lease creates a legal interest in land.

13. Section 59 and electronic writing and signature

The key issue in relation to electronic communications and the formality requirements set out in section 59 of the PLA is whether an electronic communication or a contract in electronic form satisfies the requirement for a contract or memorandum of that contract to be:

- in writing; and
- signed by the party.²¹⁷

13.1. Will an electronic communication or contract satisfy the writing requirement in section 59 of the PLA?

The PLA does not define the word ‘writing’. However, it is defined broadly under the *Acts Interpretation Act 1954* (Qld)²¹⁸ to include ‘any mode of representing or reproducing words in a visible form’. Based on this definition, an email, a document reproduced on a computer screen or another electronic format that is visible and can be read will satisfy the requirement for writing in section 59 of the PLA.²¹⁹ On the basis of this view, it is unnecessary for the parties to rely upon the *Electronic Transactions (Queensland) Act 2001* (Qld) (ETA) to validate the contract.

Electronic transactions legislation has been introduced throughout Australia, including at the Commonwealth level. One of the objectives of the legislation is to ‘facilitate the use of electronic transactions’²²⁰ and generally promote commercial certainty in an electronic environment.²²¹ Section 11 of the ETA provides:

If, under a State law, a person is required to give information in writing, the requirement is taken to have been met if the person gives the information by an electronic communication in the circumstances stated in subsection (2).²²²

In the context of contract formality provisions, the ETA will only be relevant where parties enter into a contract using electronic communication, for example, by email. The ETA, section 11 applies if under a State law a person is required to give information in writing. The requirement to give information in writing is taken to have been met if the person gives the information by means of an electronic communication. The term ‘electronic communication’ is defined in the ETA to mean:

²¹⁷ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 392-393 [11.240].

²¹⁸ See Sch 1 of the Act.

²¹⁹ This is consistent with the view expressed in case law. See for example *McGuren v Simpson* [2004] NSWSC 35.

²²⁰ *Electronic Transactions (Queensland) Act 2001* (Qld) s 3(b).

²²¹ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) [11.250].

²²² The circumstances set out in section 11(2) of the *Electronic Transactions (Queensland) Act 2001* (Qld) are that (a) at the time the information was given, it was reasonable to expect the information would be readily accessible so as to be useable for subsequent reference; and (b) the person to whom the information is required to be given consents to the information being given by an electronic communication.

NOT GOVERNMENT POLICY

- (a) a communication of information in the form of data, text or images by guided or unguided electromagnetic energy; or
- (b) a communication of information in the form of sound by guided or unguided electromagnetic energy, if the sound is processed at its destination by an automated voice recognition system.²²³

Clearly, the definition of electronic communication includes an email, but the broader application of the definition and therefore section 11 of the ETA may be limited to contract terms or a contract attached to an email. In *Conveyor & General Engineering Pty Ltd v Bastec Services Pty Ltd*,²²⁴ McMurdo J considered whether material uploaded to Dropbox formed part of an electronic communication (in this case email) for the purposes of section 11 of the ETA. In His Honour's view, material contained within the Dropbox was not part of an electronic communication because:

None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in other words communicated 'by guided or unguided electromagnetic energy'. Rather, there was an electronic communication of the means by which other information in electronic form could be found, read and downloaded at and from the Dropbox website.²²⁵

The decision highlights a significant limitation in the application of section 11 of the ETA. The section facilitates the sending of electronic documents via email but does not apply if the email contains a link to an electronic document in a repository, such as Dropbox or DocuSign.²²⁶

In addition other interpretative issues arise with the interaction between section 11 of the ETA and section 59. Section 59 PLA does not 'require' a contract or note or memorandum of that contract to be in writing, but rather provides that a contract will not be enforceable if it is not in writing (and signed).²²⁷ There is limited case law on the term 'required' as set out in section 59 of the PLA (and the formality legislation in other jurisdictions).²²⁸ There is some support for a broader interpretation of the term 'required' with the effect that a signature or writing would be required if failure to do so under the applicable legislation would result in an adverse consequence.²²⁹ In the case of section 59 of the PLA this would mean that the contract for sale is required to be in writing as the failure to do so would result in an unenforceable agreement.²³⁰ This has been addressed in respect of section 14

²²³ *Electronic Transactions (Queensland) Act 2001* (Qld) Sch 2.

²²⁴ [2014] QSC 30.

²²⁵ *Conveyor & General Engineering Pty Ltd v Bastec Services Pty Ltd* [2014] QSC 30, [28].

²²⁶ There are a number of other electronic repositories.

²²⁷ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 395 [11.260].

²²⁸ Note that South Australia has expressly preserved the requirement for writing in relation to sale (and other dispositions of land): *Electronic Transactions Regulations 2002* (SA) sub-cl 5(1) for contracts dealing with the disposition of land.

²²⁹ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 395 [11.260].

²³⁰ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 395 [11.260]. This interpretation is based on the decision in *Faulks v Cameron* (2004) 32 Fam LR 417 at 426 and an application of the reasoning in this decision to the formalities legislation. The case before the Supreme Court arose under the *De Facto Relationships Act 1991* (NT) in relation to an adjustment of property application. The Act did not expressly require the property agreement to be in writing or signed but provided that the court could not make order that was inconsistent with the terms of the agreement if it was satisfied that the agreement was in writing and signed. The court applied section 9 of the *Electronic Transactions (Northern Territory) Act 2000* (NT) to the agreement which is the equivalent provision to section 11 of the

of the ETA which relates to electronic signatures. Section 14(2) makes it clear that a law that provides consequences for the absence of a signature is captured by the word 'required'.

Despite the possibility that the term 'required' in section 59 of the PLA (and other formalities legislation) may be interpreted broadly, in the absence of any definitive judicial authority the position in relation to the applicability of section 11 of the ETA to section 59 remains uncertain. Victoria has resolved this uncertainty beyond doubt through legislation.²³¹ The sale of land formality provision in Victoria is set out in section 126(1) of the *Instruments Act 1958* (Vic). The effect of the provision is the same as section 59 of the PLA, although the wording differs. In 2004, an additional subsection was added to section 126 as follows:

- (2) It is declared that the requirements of subsection (1) may be met in accordance with the Electronic Transactions (Victoria) Act 2000.

The amendment to section 126 occurred as part of the broader introduction of electronic conveyancing into Victoria. The inclusion of subsection 126(2) was aimed at removing any doubts about the 'application of the *Electronic Transactions (Victoria) Act 2000* (Vic) to instruments affecting land.'²³² Accordingly, in Victoria electronic instruments or agreements formed by email are capable of satisfying the requirements of section 126(1), if the ETA is satisfied.²³³ Equivalent clarification has not been enacted in the other States and Territories.²³⁴

There is further potential uncertainty regarding the extent to which section 11 of the ETA will apply to section 59 transactions because of the way the section is drafted. The section operates where a 'person is required to give information in writing'. There is a broad definition of 'give information' in section 10 of the ETA which is not exhaustive. The examples given are:

- (a) make an application;
- (b) make or lodge a claim;
- (c) give, send or serve a notification;
- (d) lodge a return;
- (e) make a request;
- (f) make a declaration;
- (g) lodge or issue a certificate;
- (h) make, vary or cancel an election;
- (i) lodge an objection;
- (j) give a statement of reasons.

Electronic Transactions (Queensland) Act 2001 (Qld) and was satisfied that the agreement was 'signed' [426 of decision].

²³¹ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 396 [11.268].

²³² Explanatory Memorandum, *Transfer of Land (Electronic Transactions) Bill* (Vic), cl 1.

²³³ See Second Reading Speech, *Transfer of Land (Electronic Transactions) Bill 2004* (Vic) 7-8. The prerequisites in section 8 of the *Electronic Transactions (Victoria) Act 2000* (Vic) must also be met.

²³⁴ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 395 [11.260].

None of these examples suggest that the creation of a 'contract or memorandum' falls within the scope of section 11.²³⁵ It is therefore arguable that the ETA does not apply to the section 59 'writing' requirement and that reliance only on the definition of 'writing' in the *Acts Interpretation Act 1954* (Qld) is correct. If this is the case, where contracts are formed by email or similar, then the other requirements for 'writing' (being the accessibility of the information (section 11(2)(a) and consent to the information being given by an electronic communication (section 11(2)(b)) do not have to be proved. This conclusion is consistent with the case law to date. No party to a dispute involving a sale of land or agreements for lease has succeeded in arguing that an electronic contract attached to an email or the terms of an agreement within an email do not satisfy the requirement of writing.²³⁶ Most judges appear to have assumed this is the case and considered it unnecessary to rely upon the Electronic Transactions legislation. The disadvantage of this approach is that little consideration is given to the format in which the contract is stored and the continued accessibility and readability of the contract.

13.2. Will an electronic signature satisfy the 'signing' requirement in section 59 of the PLA?

The second requirement imposed by section 59 of the PLA is that the contract or memorandum must be signed by the party to be charged or their lawfully authorised agent. A failure to sign the contract will render the contract unenforceable. The purpose²³⁷ of signing a contract of sale is to:

- identify the signing party;
- indicate that the signing party adopts or approves the contents of the signed document;
- indicate an intention to be bound while 'guarding against later fraudulent attribution of the transaction to the party'; and
- provide integrity for the document, ensuring the reliability and admissibility of a document in court.²³⁸

The term 'signature' is not defined in legislation but under the *Acts Interpretation Act 1954* (Qld)²³⁹ the word 'sign' includes 'the attaching of a seal and the making of a mark.' Judicial consideration about whether an electronic signature meets the requirement of a signature under section 59 PLA or

²³⁵ Sharon Christensen, WM Dixon, WD Duncan and Stephen Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 195.

²³⁶ *McGuren v Simpson* [2004] NSWSC 35; *Faulks v Cameron* (2004) 32 Fam LR 417 where emails were accepted as writing without the need to see the *Electronic Transactions (Northern Territory) Act 2000* (NT); *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119; *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2]* [2015] WASC 220.

²³⁷ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 196.

²³⁸ S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic Transactions (Qld) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/>.

²³⁹ *Acts Interpretation Act 1954* (Qld) Sch 1.

its equivalent sections in other Australian jurisdictions is limited.²⁴⁰ In *McGuren v Simpson*²⁴¹ this issue was considered in the context of the *Limitation Act 1969* (NSW) and one of the issues in the case was whether an email was sufficient to satisfy an acknowledgment that was required to be in writing and 'signed' for the purposes of that Act. The court held that the plaintiff's type written name was sufficient to satisfy the signature requirement relying on the 'authenticated signature fiction' doctrine. This doctrine operates where the name of the party to be charged appears on the relevant note or memorandum (for example because it has been typed by the other party) and the party to be charged acknowledges (either expressly or impliedly) the 'writing as an authenticated expression of the contract so that the typed words will be deemed to be his or her signature.'²⁴² However, it is uncertain whether this approach would be followed more generally within Australia in the context of transactions subject to the *Statute of Frauds* requirements.²⁴³

In most cases a contracting party will seek to take advantage of the provisions in the ETA which facilitate the use of electronic signatures in commercial transactions. Section 14(1) of the ETA provides, inter alia, that if under a State law a person's signature is 'required', the requirement is taken to have been met for an 'electronic communication' if the following conditions are satisfied:

- the signature method must identify the person and indicate the person's intention in relation to the information;
- the signature method must be as reliable as was appropriate for the purposes for which the information was communicated; and
- consent to the relevant method must be given by the person to whom the signature is required to be given.

One of the potential uncertainties about the application of section 14 of the ETA to the formalities requirements in the PLA was addressed by the addition of section 14(2) in 2013:

- (2) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature.

The suite of amendments to the ETA in 2013 (including section 14) were made to 'implement model provisions to modernise electronic commerce laws.'²⁴⁴ The effect of section 14(2) is to overcome

²⁴⁰ Although in the United States a line of authorities has accepted that typing a name in an email is capable of satisfying the Statute of Frauds. See for example *Dow Chemical Company v GE* US Dist LEXIS 40866 (ED Mich 2005); *Bazak International Corp v Tarrant Apparel Group* US Dist LEXIS 14674 (SDNY 2005); *Lamle v Mattel Inc* US App LEXIS 217 (Fed Cir 2005); *Roger Edwards LLC v Fiddes & Sons* 245 FSupp 2d 251 (D Me 2003); *Rosenfeld v Zerneck* 4 Misc 3d 193, 776 NYS2d 458, 2004 NY Misc LEXIS 497 (2004); *Cloud Corporation v Hasbro Inc* 314 F 3d 289 (7th Cir Ill 2002); *Shattuck v Klotzbach* 14 Mass L Rep 260 (Mass Super Ct 2001).

²⁴¹ [2004] NSWSC 35. See also further commentary on this case in Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 398 [11.723] and S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 203. S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic Transactions (Qld) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/>.

²⁴² *McGuren v Simpson* [2004] NSWSC 35, [22].

²⁴³ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 203.

²⁴⁴ Explanatory Notes, Justice and Other Legislation Amendment Bill 2013 (Qld) 2.

uncertainty about the meaning of 'require' and makes it clear that section 14 will apply where there are consequences for the failure to sign.²⁴⁵ Two main uncertainties remain:

1. does an electronic contract in contrast to an email fall within the meaning of 'electronic communication' in section 14 ETA?
2. what types of signature methods will comply with the requirements of section 14? Are these signature methods suitable for execution of land contracts?

However, the ETA does not resolve all issues associated with the application of section 14 of the ETA to electronic contracts, as opposed to electronic communications and the types of electronic signatures that will fulfil the statutory requirements of section 59 of the PLA.

13.3. Issues identified in relation to electronic signatures and section 59 of the PLA

There are still a number of issues with electronic signatures that are potentially not addressed by the ETA or under the general law. These issues relate to the application of section 14 to electronic documents and secondly to the form of electronic signature that should be used to meet the requirements. Ideally the form of signature acceptance for a land contract should be functionally equivalent to a 'manuscript signature under the common law.'²⁴⁶

13.3.1. Application of section 14 of the ETA to electronic documents

Section 14 of the ETA deems a signature requirement under a State law to be met for an 'electronic communication' if certain criteria are satisfied. If the decision in *Conveyor & General Engineering Pty Ltd v Bastec Services Pty Ltd*,²⁴⁷ is applied the reference to an electronic communication in section 14 will clearly include an email but may not include an electronic document. As discussed at paragraph 13.1, McMurdo J adopted the view that an electronic communication is data text or images that are communicated by 'guided or unguided electromagnetic energy' and distinguished that from 'other information in electronic form [that] could be found, read and downloaded'.²⁴⁸ The application of section 14 of the ETA or its equivalents in other jurisdictions is yet to be judicially considered in the context of an electronic document. Notably the only reported decision where the validity of an electronic signature was questioned did not involve any consideration of the Electronic Transactions legislation.²⁴⁹ Judicial consideration to date has been limited to the status of typed signatures on email communications used to form a contract of sale or lease.²⁵⁰

²⁴⁵ This amendment to section 14 of the ETA essentially adopts the broader interpretation of 'require' touched on in *Faulks v Cameron* (2004) 32 Fam LR 417 discussed above. The other Australian jurisdictions have incorporated a similar subsection into the equivalent signature provisions. See for example *Electronic Transactions (Victoria) Act 2000* (Vic) s 9(3).

²⁴⁶ S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic Transactions (Qld) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/93>.

²⁴⁷ [2014] QSC 30.

²⁴⁸ *Conveyor & General Engineering Pty Ltd v Bastec Services Pty Ltd* [2014] QSC 30, [28].

²⁴⁹ See *Williams Group Pty Ltd v Crocker* [2016] NSWCA 265.

²⁵⁰ See for example *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119; *Claremont 24-7 Pty Ltd v Invox Pty Ltd [No 2]* [2015] WASC 220.

13.3.2. Electronic signatures appropriate for land transactions

For an electronic signature to meet the requirements of section 14 of the ETA it is required that the signature:

1. identify the signing party;
2. indicate the intention of the signing party in relation to the document;
3. be as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement; and
4. has received the consent of the party receiving the signed electronic communication to the use of the signature method.

When compared to a manuscript signature, there is some correlation between these criteria and the purpose of a manuscript signature outlined at paragraph 13.2. In both cases the method of signing should identify the party and their intention to be bound by the contents. The main question from a policy perspective is whether the common electronic signatures used by contracting parties are 'as reliable as appropriate' for the purpose of a contract of sale. An assessment of the reliability of an electronic signature is complicated by a lack of judicial guidance about the meaning of reliability.

A manuscript signature is affixed to a paper contract in a way that is difficult to remove or alter undetected by another party. The integrity of a document signed using a manuscript signature is difficult to impeach and experts can determine if the signature is forged. An electronic signature, such as a typed name or email address, has little evidentiary integrity. Both may be altered without a record of the alteration appearing on the document. A digital signature where a document is signed and encrypted with a private key is more reliable and alterations can be detected by the other party to the contract when using the public key. Digital forms of signature are also available commercially through DocuSign and HelloFax. These systems offer a service for executing documents within their system which tracks access to the system and time, date and place of signing.

Whilst digital signatures may be considered more reliable than a typed name the signatures are still open to challenge as demonstrated by the dispute in *Williams Group Pty Ltd v Crocker*.²⁵¹ The integrity of the signature relies upon the proper use of passwords and a robust verification of identity process when signing parties first join the system.

A key issue to consider is whether the PLA should specify more particularly the types of electronic signatures a party may use to sign a land contract and further whether a presumption of execution by the named party (unless evidence to the contrary is produced) should be created to enhance reliability of the signature.

The ETA does not prescribe any specific form of technology. The advantage of this approach is that parties can make an assessment of which method is appropriate for use in relation to a particular transaction.²⁵² One disadvantage is the potential for disputes where parties are unclear about

²⁵¹ [2016] NSWCA 265.

²⁵² S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 205 citing A De Zilva. 'Electronic Transactions Legislation: An Australian Perspective' (2003) 37 *The International Lawyer* 1009.

whether a particular method of signing is reliable in a given context.²⁵³ Some commentators have suggested that more specific criteria for the type of signature which will be effective in the ETA would assist with this issue²⁵⁴ as well as criteria for reliability.

In contrast, the UNCITRAL Model Law on Electronic Signatures (**MLES**) 'establishes criteria of technical reliability for the equivalence between electronic and hand-written signatures as well as basic rules of conduct that may serve as guidelines for assessing duties and liabilities for the signatory, the relying party and trusted third parties intervening in the signature process'.²⁵⁵

The MLES adheres to the principle of technology-neutrality which means in practice the legislation may recognize both digital signatures based on cryptography (such as public key infrastructure – PKI) and electronic signatures using other technologies. The MLES does not recognise a typed name in an email as an 'electronic signature' but other forms of electronic signatures that fulfil the functions of a signature as set out in the MLES which use authentication in the form of passwords, PINs or digitized versions of signatures may be acceptable.

The provisions of the MLES are based upon the functions of a manuscript signature as being to:

- (i) identify a person;
- (ii) provide certainty as to the personal involvement of that person in the act of signing; and
- (iii) associate that person with the content of a document.

The definition of an electronic signature in the MLES²⁵⁶ is:

Article 2(a) Electronic signature

Electronic signature' means data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.²⁵⁷

The elements of an 'electronic signature' under the MLES are:

- the signature is data in an electronic form;
- there must be a link between the electronic signature data and the data message so that it is 'in, affixed to or logically associated with' that data message; and
- the signature must indicate the signatory's approval of the information in the data message.²⁵⁸

²⁵³ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 205.

²⁵⁴ See also S Christensen, 'The Statute of Frauds in the Digital Age – Maintaining the Integrity of Signatures' 10(4) (2003) *Murdoch University Electronic Journal of Law* 1 [62].

²⁵⁵ UNCITRAL Model Law on Electronic Signatures (2001).

²⁵⁶ UNCITRAL Model Law on Electronic Signatures, adopted by the Commission on 5 July 2001, United Nations, New York, 2001.

²⁵⁷ UNCITRAL Model Law on Electronic Signatures, adopted by the Commission on 5 July 2001, United Nations, New York, 2001.

²⁵⁸ Stephen Mason, *Electronic Signatures in Law* (Institute of Advanced Legal Studies, 4th ed., London, 2016) 103.

According to Article 6, an electronic signature fulfils the requirements of a manuscript signature if it 'is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement'.

Article 6(3) provides that a signature is as reliable as appropriate if:

- (a) the signature creation data²⁵⁹ are, within the context in which they are used, linked to the signatory and to no other person;
- (b) the signature creation data were, at the time of signing, under the control of the signatory and of no other person;
- (c) any alteration to the electronic signature, made after the time of signing, is detectable; and
- (d) where a purpose of the legal requirement for a signature is to provide assurance as to the integrity of the information to which it relates, any alteration made to that information after the time of signing is detectable.

The reliability criteria are clearly linked to the key functions of a signature:

- identify a person;
- provide certainty as to the personal involvement of that person in the act of signing; and
- associate that person with the content of a document.

A clear justification for the approach adopted by the MLES is that in an electronic environment, the original of a message is indistinguishable from a copy, bears no handwritten signature, and is not on paper. The potential for fraud is considerable, due to the ease of intercepting and altering information in electronic form without detection, and the speed of processing multiple transactions.

13.4. Online auctions

Other recent developments in land sales relate to online auctions. Ray White has recently established 'Ray White Live Online Auctions' which enable buyers to view and bid on properties in real-time at the same time that the properties are being auctioned at auction rooms.²⁶⁰

At this stage, under the model currently adopted, a successful online bidder is contacted by the agent listing the property following the auction to organise the signing of contracts and the payment of deposit. An alternative model is offered by AuctionWorks, which is a complete online auction process.²⁶¹ Agents and potential bidders must register and agree to relevant terms and conditions. A successful bidder has until 5pm the next day to exchange contracts and pay the deposit. In both examples, the contract for sale of land is not signed electronically, although this is likely to be the next logical step.

These developments increase the likelihood that electronic contracts of sale will become more common. The availability of electronic signing systems, such as DocuSign will also facilitate the move to online contracting. The identified uncertainties in the current legislative framework will eventually act as a barrier to complete take up of electronic contracting unless clarified.

²⁵⁹ Signature creation data is the mechanism a signer uses to create the signature.

²⁶⁰ See <https://www.raywhite.com/liveauctions/faq/> accessed December 2017.

²⁶¹ See <https://www.auctionworksonline.net.au/> accessed December 2017.

13.5. Recommendation

13.5.1. Writing

The Centre recommends the insertion of a provision into the PLA to clarify that a contract in electronic form will comply with the requirement for writing if the criteria in section 11 of the ETA are satisfied.

Although the definition of writing in the *Acts Interpretation Act 1954* (Qld) is broad and is defined to mean any electronic contract in a visible electronic form will satisfy the writing requirement, there are still uncertainties about whether an electronic document displayed on a screen is ‘in writing’ for the purposes of the PLA. Electronic contracts, by their nature, do not exist in a physical form. Some commentators note that an electronic document is merely a series of electronic bits in a microchip or some other medium.²⁶² What is displayed on the screen is merely a representation or reproduction of what is contained in that data or code.²⁶³

The *Acts Interpretation Act 1954* (Qld) requires ‘visibility’ and one view propounded is that an electronic document, in its digital form, cannot be in writing.²⁶⁴ This view has been rejected in England.²⁶⁵ In Australia, commentators suggest:

it is possible to conclude having regard to current judicial opinion that the concept of writing could incorporate electronic communication which are capable of being displayed on a screen or transmitted as files of digital information including email and website trading.²⁶⁶

The prevailing view in Australian Courts²⁶⁷ is consistent with the English Courts. In most cases, an electronic document that is represented on a computer screen is accepted as meeting the requirement for writing without resort to section 11 of the ETA or its equivalents.

If section 11 of the ETA were to apply to a land contract, then:

[a contract] could be considered to be in writing, provided it is capable of retrieval and reproduction in a visible form and irrespective of whether the electronic document it ultimately printed by the parties or remains totally electronic.²⁶⁸

²⁶² Macdonald E & Poyton L ‘A particular problem for e-commerce: Section 3 of the Unfair Contracts Terms Act 1977’ [2000] 3 *Web JCL* and Reed C ‘What signature?’ 2000 (3) *Journal of Information, Law and Technology* located at <http://elj.warwick.ac.uk/jilt/00-3/reed.html>.

²⁶³ Macdonald E & Poyton L ‘A particular problem for e-commerce: Section 3 of the Unfair Contracts Terms Act 1977’ [2000] 3 *Web JCL* and Reed C ‘What signature?’ 2000 (3) *Journal of Information, Law and Technology* located at <http://elj.warwick.ac.uk/jilt/00-3/reed.html>.

²⁶⁴ S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic Transactions (Qld) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/43>.

²⁶⁵ Law Commission for England and Wales, ‘Electronic commerce: formal requirements in commercial transactions – Advice from the Law Commission’ December 2001, [3.12-3.23] located at <http://www.lawcom.gov.uk>.

²⁶⁶ S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic Transactions (Qld) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/44>.

²⁶⁷ See for example *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119.

²⁶⁸ S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic*

Adding this element to a consideration of whether a land contract is in writing ensures that an electronic contract is 'in writing' not only if it is visible at the time of formation but also at a later date and can be produced as evidence, if necessary.²⁶⁹ If an electronic document is incapable of being read due to a corruption in the file it should not satisfy the requirement of writing. A further benefit in adopting this criteria is that a transient form of electronic communication such as Twitter, SnapChat or a text is unlikely to be readily accessible for subsequent reference and therefore will not meet the requirement of writing for section 59 of the PLA.

13.5.2. Electronic and digital signatures

The Centre recommends the insertion of a provision into the PLA to clarify that:

- (i) the signing requirement in section 59 of the PLA can be satisfied by using an electronic signature;
- (ii) the mere fact the signature is electronic does not make the execution invalid; and
- (iii) the requirements for a valid electronic signature under section 59 of the PLA are the same as section 14 of the ETA.

It is clear that a party seeking to enforce an electronic contract for the sale of land will need to rely upon section 14 of the ETA to satisfy the signing requirements of section 59 of the PLA.

The key policy question is whether the PLA should go further than section 14 of the ETA and restrict the types of electronic signatures a party may use to sign a land contract and further whether more specific criteria should be adopted to ensure the reliability of an electronic signature.

Under the current provisions of the ETA, courts have accepted that electronic communications which bear the typed name of a party may satisfy the requirement for 'signed' under the PLA.²⁷⁰ Other forms of electronic signature have been accepted by courts in other contexts such as clicking 'I agree' or signing with a special pen and digital forms of signature.

If a definition similar to the MLES were adopted, it would necessarily restrict acceptable electronic signatures to those consisting of data. A typed name on an email would not satisfy this requirement. Obviously, these types of signature have a higher level of integrity and reliability achieved through the use of various security devices within the control of the signer, such as PINs or biometrics. Assuming the signer takes reasonable steps to maintain security, these types of signatures should provide more reliable evidence of identity, personal involvement of the signer in the act of signing and intent to be bound.

The QLS, in its submissions on the topic states that 'signing should involve more than clicking "I accept"...'. The Centre agrees that it is desirable in the context of a land contract for the electronic signature used to sign the contract to have a higher level of reliability so as to meet the same functional purpose as a manuscript signature. If this view is accepted consideration may be given in the future

Transactions (Qld) Act 2001 (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/44>.

²⁶⁹ S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic Transactions (Qld) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/44>.

²⁷⁰ See for example *Stellard Pty Ltd and Anor v North Queensland Fuel Pty Ltd* [2015] QSC 119.

to adopting a framework similar to the MLES. This would involve developing a definition of electronic signature and providing more detailed criteria for reliability than currently appears in the ETA. As a starting point the criteria for reliability in MLES Article 6(3) should be considered.

The Centre is of the view that clarity about the legal validity and reliability of an electronic signature in the context of a land contract is desirable. However, any recommended solution will need to balance a desire for legal clarity and validity with current commercial practices which have received endorsement from the courts. Any future legislative provisions should aim to:

- provide a set of rules relating to electronic signatures to apply to the law of real property transactions, within the PLA;
- be cast broadly enough to allow such provisions be applied to future technologies, the nature of which cannot be anticipated;
- create certainty regarding the forms of signature that will satisfy requirements for documents to be 'signed' by parties in an electronic environment; and
- foster efficiency in an electronic environment in particular by taking into account the differences between the physical, paper-based systems and electronic data.

RECOMMENDATION 13. The Centre recommends the insertion of a provision into the new PLA to clarify that a contract in electronic form will comply with the requirement for writing in the PLA if the criteria in section 11 of the *Electronic Transactions (Queensland) Act 2001* are satisfied.

RECOMMENDATION 14. The Centre recommends the insertion of a provision into the new PLA to clarify that:

- the signing requirement in section 59 can be satisfied by using an electronic signature;
- the mere fact the signature is electronic does not make the execution invalid; and
- the requirements for a valid electronic signature under section 59 are the same as section 14 of the *Electronic Transactions (Queensland) Act 2001*.

14. Section 13 – Persons taking who are not parties

14.1. Overview and purpose

13 Persons taking who are not parties

- (1) In respect of an assurance or other instrument executed after the commencement of this Act, a person may take –
- (a) an immediate or other interest in land; or
 - (b) the benefit of any condition, right of entry, covenant or agreement over or respecting land; even though the person may not have executed the assurance or other instrument, or may not be named as a party to the assurance or other instrument, or may not have been identified or in existence at the date of execution of the assurance or other instrument.
- (2) Such person may sue, and shall be entitled to all rights and remedies in respect of the assurance or other instrument, as if the person had been named as a party to and had executed the assurance or other instrument.

The doctrine of privity of contract has been described as operating such that ‘only a person who was party to a contract can sue on it. Our law knows nothing of a *jus quaesitum tertio* arising by way of contract.’²⁷¹ Commentators explain the doctrine as meaning:

while performance of a contract may in the circumstances result in a benefit or burden as a matter of *fact* upon a third party to the contract, as a matter of law, a third party cannot enforce the contract nor be subject to liabilities imposed by the contract.²⁷²

The operation of the doctrine of privity of contract is often described as harsh²⁷³ and as causing ‘manifest injustice’ when rigidly applied. Some exceptions to the rule developed over time but these were limited and ‘not always on logical grounds.’²⁷⁴ This led to calls for statutory reform of the common law rule.²⁷⁵ In 1937 the Law Revision Committee wrote the ‘Sixth Interim Report’²⁷⁶ and recommended the law in this area be modified to allow a third party to enforce the contract where a benefit is directly conferred on him or her, subject to any valid defences that would have been available to the contracting parties.²⁷⁷ Changes in the United Kingdom were finally enacted in 1999.²⁷⁸

In all Australian jurisdictions ‘statutory provisions have modified the rigid common law rules that a stranger to a contract cannot enforce it even though the sole purpose of the contract may be to confer

²⁷¹ *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 853 per Viscount Haldane LC.

²⁷² Lindy Willmott, Sharon Christensen, Des Butler and WM Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013), 426 [references omitted].

²⁷³ Explanatory Memorandum *Property Law Bill 1969* (WA) which enacted clause 11 of the Western Australian Act, which later became section 11 of the *Property Law Act 1969* (WA) cited by Le Miere J in *Jaddcal Pty Ltd v Minson (No 3)* [2011] WASC 362.

²⁷⁴ Explanatory Memorandum *Property Law Bill 1969* (WA) which enacted clause 11 of the Western Australian Act, which later became section 11 of the *Property Law Act 1969* (WA) cited by Le Miere J in *Jaddcal Pty Ltd v Minson (No 3)* [2011] WASC 362; see for example *Trident General Insurance Co Ltd v McNiece Bros Ltd* [1988] 165 CLR 107.

²⁷⁵ Explanatory Memorandum *Property Law Bill 1969* (WA) which enacted clause 11 of the Western Australian Act, which later became section 11 of the *Property Law Act 1969* (WA) cited by Le Miere J in *Jaddcal Pty Ltd v Minson (No 3)* [2011] WASC 362.

²⁷⁶ Cmd 5449.

²⁷⁷ Law Revision Committee, *Sixth Interim Report* (1937) Cmd 5449, [48].

²⁷⁸ *Contracts (Rights of Third Parties) Act 1999* (UK) s 1.

benefits on that person.²⁷⁹ Section 13 of the PLA relates to third parties taking an interest in land and section 55 of the PLA addresses third parties to contracts and applies to both real and personal property.

As set out above, at common law under the doctrine of privity of contract, only a person named as a party to a deed could sue to enforce a covenant contained in a deed or take an immediate interest in land under a deed.²⁸⁰ So if, for example a covenantee (the party that enjoys the benefit of a promise) sells the land to which the promise relates (for example, a covenant in an easement or a lease) then only the covenantee can enforce that covenant against the covenantor (the party who made the promise).

Section 13 of the PLA was introduced to overcome this common law rule.²⁸¹ Relying on section 13, a third party who received the benefit of a covenant relating to land in an instrument (such as a deed) would be able to sue the covenantor, notwithstanding that the third party was not a party to the instrument.

Under section 13 of the PLA, the covenant that provides the benefit to the third party can be contained in a deed or 'any other instrument' such as a contract.²⁸² The section covers a broad range of transactions as the word 'assurance' is defined to include a conveyance and a disposition made otherwise than by will.²⁸³ 'Conveyance' and 'disposition' are in turn broadly defined²⁸⁴ as follows:

conveyance includes a transfer of an interest in land, and any assignment, appointment, lease, settlement, or other assurance in writing of any property.

disposition includes a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will.

The QLRC when considering the introduction of this provision noted:

Clearly, the old rule should be abrogated that an executing party to an indenture inter partes is not entitled to enforce a benefit thereby conferred on him simply because he is not expressed to be or named as a party thereto. Likewise it is plainly desirable that in Queensland the law should go at least as far as it does in England and Victoria in enabling a person to whom a benefit purports to be given by a covenant or condition relating to real property, to enforce the same even though he is not an executing party to the instrument in question, although it will be necessary to ensure by express provision that the principle of paramountcy of title under The Real Property Acts is not disturbed.²⁸⁵

²⁷⁹ *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 861 [9.12].

²⁸⁰ *Anne Wallace, et al, Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [17.100].

²⁸¹ *Peter Young, et al, Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) 70 [30569.1].

²⁸² *Property Law Act 1974* (Qld) s 13(1).

²⁸³ *Property Law Act 1974* (Qld) s 3, Sch 6 (definition of 'assurance').

²⁸⁴ *Property Law Act 1974* (Qld) s 3, Sch 6 (definitions of 'conveyance' and 'disposition').

²⁸⁵ 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) 10.

The QLRC discussed whether the reform should extend beyond real property. The QLRC indicated that if its recommendations in relation to the proposed section 55 of the PLA were adopted then it would not be necessary to extend section 13 in this way and it would be 'appropriate to restrict the operation of cl 13 to land, leaving it to cl 55 to regulate the general enforcement of contracts for the benefit of third parties.'²⁸⁶ Section 55 of the PLA relates to enforcement of contracts by third parties and is discussed fully at paragraph 58.

Section 13 of the PLA (along with section 55 of the PLA) was adapted from a similar provision in the United Kingdom, section 56(1) of the *Property Law Act 1925* (UK), originally section 5 of the *Real Property Act 1845* with some variations and as a consequence is broader.²⁸⁷ Commentary on the English provision states that the section is 'not concerned with the *passing* of a benefit of a covenant. It is concerned with the *giving* of a benefit of a covenant at the time, when the covenant is created, to a person other than a covenantee.'²⁸⁸

Section 13 operates in the following way:

- it covers an 'assurance or other instrument' executed on or after 1 December 1975. An 'assurance' is defined in the PLA to include 'a conveyance and a disposition made otherwise than by will';²⁸⁹
- it enables a person to take:
 - an immediate or other interest in land; or
 - the benefit of any condition, right of entry, covenant or agreement over or respecting land;even though the person may not have:
 - executed the assurance or other instrument; or
 - may not be named as a party to the assurance or other instrument; or
 - may not have been identified or in existence at the date of execution of the assurance or other instrument;
- the person who takes the relevant interest or benefit is treated as though he or she had been named as a party to and had executed the assurance or other instrument. This means that the person is entitled to all rights and remedies in respect of the assurance or other instrument.

²⁸⁶ 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) 10.

²⁸⁷ The provision in the United Kingdom legislation does not extend to a beneficiary who may not have been identified or in existence at the date that the instrument is executed. The Queensland provision covers this category.

²⁸⁸ E H Burn, *Cheshire and Burn's Modern Law of Real Property* (Butterworths, 13th ed., 1982) 593.

²⁸⁹ *Property Law Act 1974* (Qld) s 3, Sch 6.

14.2. Issues with the section

14.2.1. Application and scope of the section

There has been some debate regarding the possible limits of section 13 of the PLA and its equivalent in other jurisdictions. Some of the possible limits include the section only applying to deeds or deeds inter partes and only to covenants that run with land.²⁹⁰ However, in Queensland the reference to ‘assurance’, ‘instrument’ and ‘agreement’ are not consistent with the limits.²⁹¹

A more relevant issue is the limited application of the section and whether the section still has any utility. The section was enacted first in 1845 in England²⁹² and related to old system land. Under old system land successors in title to the original parties would have to rely on covenants relating to land set up through original deeds to which they were not parties. Section 13 permitted the enforcement of the benefit of covenants to later successors in title under old system land. Old system land is discussed at paragraph 5.2.1. This section as it stands has very limited utility, if any, under the Torrens system. This is discussed further below at paragraph 14.2.2.

There is also uncertainty as to the scope of section 13 of the PLA. Like the equivalent provision in the Northern Territory,²⁹³ section 13 of the PLA is cast in wider terms than other jurisdictions where the equivalent provisions do not extend to individuals who are not in existence and identifiable at the time the covenant is entered into.²⁹⁴

By removing the requirement that the third party be in existence and identifiable when the covenant is made, section 13 of the PLA is cast in much broader terms than the other State’s counterparts, except for the Northern Territory, which also removes this requirement.²⁹⁵ Section 12 of the *Law of Property Act* (NT) is in a similar form to section 13 of the PLA and also extends to individuals who are not in existence and identifiable at the time the covenant is entered into.²⁹⁶

In drafting the provision in such wide terms, the QLRC did not discuss how this would impact on covenants relating to land, but some commentators say the implications could be ‘far reaching’.²⁹⁷ However, the Centre is of the view that the provision will have little application in view of the operation of section 62 of the *Land Title Act 1994* (Qld) and section 117 and 118 of the PLA. Further, the Centre is of the view that the party seeking to enforce the covenant would have to have the *same* interest as that party’s predecessor. This is discussed at paragraph 14.2.4.

The provisions in other Australian jurisdictions also refer to taking an interest ‘in land or other property’ whereas in Queensland, section 13 is clearly limited to land only. The QLRC indicated that it was ‘appropriate’ to restrict section 13 to land and leave it to section 55 to ‘regulate the general

²⁹⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.13.60].

²⁹¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.13.60].

²⁹² *Real Property Act 1845* (UK) s 5 (repealed).

²⁹³ *Law of Property Act 2000* (NT) s 11.

²⁹⁴ See discussion at paragraph 14.3 for details on other jurisdiction’s equivalent provisions.

²⁹⁵ *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 861 [9.12]

²⁹⁶ *Law of Property Act* (NT) s 12.

²⁹⁷ *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 861 [9.12].

enforcement of contracts for the benefit of third parties.²⁹⁸ Section 55 is discussed fully at paragraph 58.

A review of the case law on the section has not revealed any circumstances in which the section has been litigated. The situations in which enforceability of covenants contained in contracts relating to land by third parties may arise are discussed in turn below.

14.2.2. Persons taking an interest in land by registration of instruments

Section 13(1)(a) of the PLA refers to a person who takes an 'immediate or other interest in land'. A person is not able to take 'an immediate or other interest' in registered land. In the Torrens System, the interest is created upon registration of an instrument. A party would not rely on section 13 because situations where there is an instrument creating the interest in the land is dealt with by the *Land Title Act 1994* (Qld).

Section 62(1) of the *Land Title Act 1994* (Qld) clearly provides that the effect of registration of an instrument of transfer in a lot is that all the 'rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.' The effect of this is that successors in title would be subject to, and benefit from, covenants in registered instruments such as leases and easements. There has been some suggestion that this is limited to covenants that 'touch and concern the land'. However, the better view is that the only requirement is that the covenant be a covenant in respect of land.²⁹⁹

Section 13 has no application in the case of registered instruments as the PLA operates subject to the *Land Title Act 1994* (Qld)³⁰⁰ and section 62 of that Act is the applicable law in these cases. For example, a purchaser of land that is subject to an easement does not rely on section 13 of the PLA to enforce the covenants contained therein. The right to enforce the covenants arises as a function of being registered as the owner of the land, subject to any registered instruments. The problem of the lack of privity between the grantor and the purchaser of the dominant tenement is cured by the effect of section 62(1) of the *Land Title Act 1994* (Qld). Similarly, a purchaser of a land that is subject to a registered lease will also receive the benefit, and be subject to the burdens, of the covenants in that lease that touch and concern the land.

14.2.3. Persons taking a reversionary interest in land subject to a lease

Section 117 of the PLA was enacted to deal with the situation where the freehold was transferred, subject to a lease, to a third party who was not a party to the lease and thus had no relationship of either privity of estate or privity of contract with the lessees. At common law, the transferee (usually called the assignee of the reversion) was not able to enforce the covenants in the lease, save and except for the payment of rent.³⁰¹ Section 117 has the effect of making all covenants in the lease that

²⁹⁸ 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) 10.

²⁹⁹ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [17.100]; see also Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.13.60].

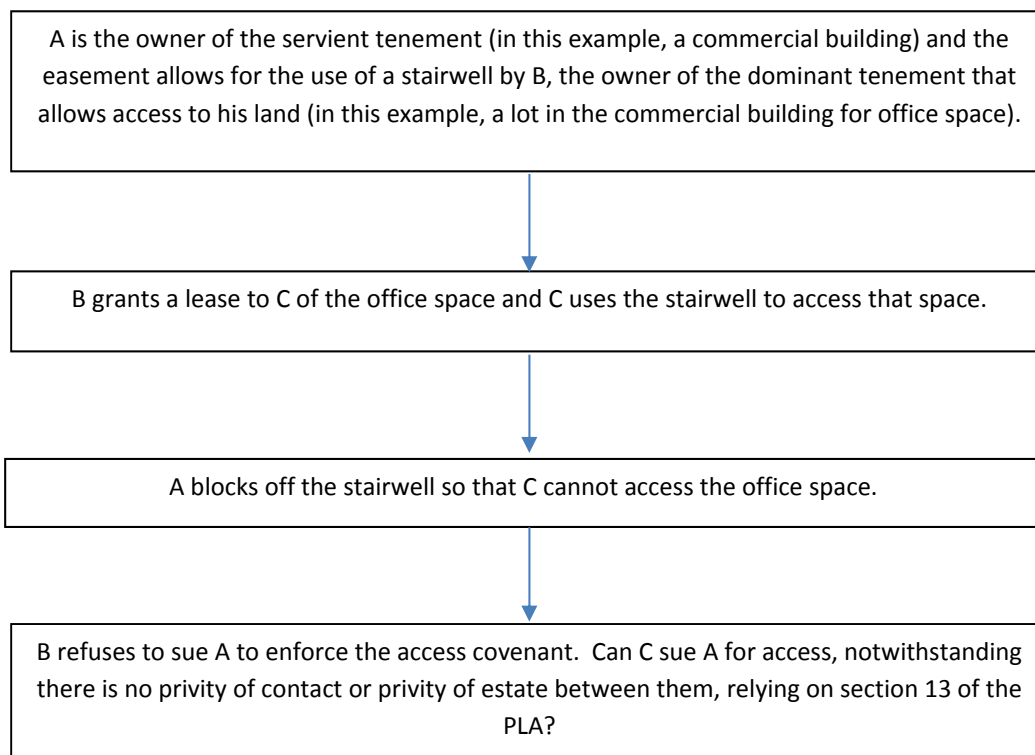
³⁰⁰ *Property Law Act 1974* (Qld) s 5.

³⁰¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.30].

‘touch and concern the land’ enforceable by the assignee of the reversion as against the lessee.³⁰² Conversely, section 118 of the PLA gives the lessee the same rights it had against the original lessor against the assignee of the reversion, notwithstanding the lack of privity of estate and privity of contract. These sections are discussed in detail at paragraph 129- 130. Therefore, where there is an assignment of the reversion of a lease, the parties will rely on sections 117 and 118 of the PLA and section 13 of the PLA has no application.

14.2.4. A lessee seeking to enforce a covenant in an easement against the grantor

The situation in which section 13 *may* have some application is where a lessee of land that is a dominant tenement wants to enforce a covenant in an easement, say for example, a right of entry or use of stairs or similar.



In the above scenario, C is not a party named in the instrument creating the easement. Section 13 of the PLA clearly states that a person may sue in respect of the instrument as if they had been a party to that instrument, notwithstanding that they may not have been identified or in existence at the date of the execution of the instrument.

The better view is that C cannot rely on section 13 to sue A to enforce the covenant in the easement. It is apparent that, in the Torrens system of land, C does not have the same interest as B. The leasehold is a lesser interest that is ‘carved out’ of the freehold and granted to C by B. In order to rely on section 13 of the PLA, the party seeking to enforce the covenant would have to have the same interest as that party’s predecessor. The Centre is of the view that the rights of a party seeking to enforce rights in an

³⁰² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.30].

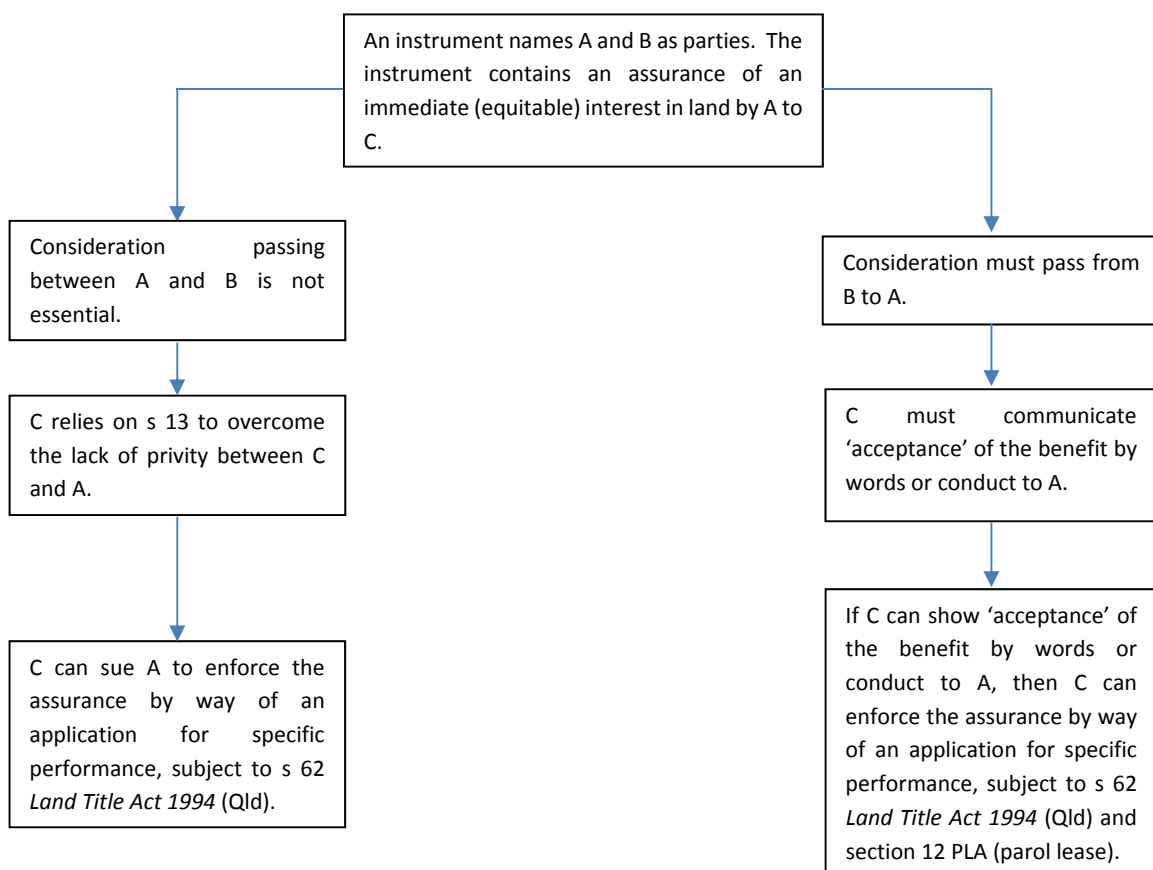
instrument, if not named or identified, would have to have the same interest, or be a member of a class of persons, as that expressly mentioned in the original instrument. For example, if C was named, either personally, or as a class of person that the instrument might say ‘grant to B and his lessees or licensees’ for example, then C may be able to rely on section 13 of the PLA. However, if the land was registered under the *Land Title Act 1994* (Qld), any rule would apply subject to that Act.

Clearly the above scenario is very unique and the frequency with which it might arise is likely to be rare. In any event, in the above scenario, C’s remedy is by way of action against B for derogation of grant and B would be forced to sue A for breach of the covenant. Clearly, A and B enjoy privity of contract so there is no issue of standing in this regard.

14.2.5. Interaction with section 55 of the PLA

As stated above at paragraph 14.1, section 55 of the PLA was also based on section 56 of the *Law of Property Act 1925* (UK) and alters the common law doctrine of privity with respect to contracts for the benefit of third parties. Section 55 can apply to a benefit that creates an interest in land.³⁰³ However, the main difference between the sections is that section 55 requires consideration to pass and acceptance of the benefit by the third party by words or conduct, communicated to the promisor.

For example:



³⁰³ *Property Law Act 1974* (Qld) s 55(5).

Clearly, C can rely on section 13 in the above scenario. Equally, C could rely on section 55 of the PLA notwithstanding that it is an assurance in respect of land, however C would have to be able to meet the extra requirement of 'acceptance' if C intends to rely on section 55. Note that in the Torrens system C's interest would be an equitable interest in the land, unless and until that interest is entered on the freehold land register. As discussed above at paragraph 14.2.2, any interest created would be subject to the *Land Title Act 1994* (Qld) section 62. Equitable interests that are 'off the register' would not displace a registered interest.

14.3. Other jurisdictions

14.3.1. Australia

Victoria, South Australia, New South Wales, Tasmania and Western Australia have very similar provisions which adopt the drafting approach in section 56 of the *Law of Property Act 1925* (UK).³⁰⁴ There are some significant differences between the Queensland (and Northern Territory) provision and the Victorian, South Australian, New South Wales, Tasmanian and Western Australian provisions.

Firstly, in Queensland under section 55 of the PLA, the beneficiary does not have to be identified or in existence at the time of the execution of the assurance or other instrument. This difference is significant³⁰⁵ and as stated above at paragraph 14.2.1, the QLRC did not discuss how this would impact on covenants relating to land.

Secondly, the other jurisdictions, except the Northern Territory, conflate the law in respect of land and property into one section. As discussed, Queensland has section 13 of the PLA in respect to a third party taking an interest in land, and section 55 which applies generally to parties taking a benefit of a promise in a contract or deed.

14.3.1.1. Western Australia

In Western Australia for example, section 11 of the *Property Law Act 1969* (WA) conflates the modification of the doctrine of privity with respect to both land and personal property. Section 11 is also confined to persons who are in existence and identifiable when the covenant is made. The section is set out in the following terms:

11 Persons taking who are not parties

- (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.
- (2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but —
 - (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;

³⁰⁴ *Property Law Act 1958* (Vic) s 56(1); *Law of Property Act 1936* (SA) s 34(1); *Conveyancing Act 1919* (NSW) s 36C; *Conveyancing and Law of Property Act 1884* (Tas) s 61(1)(c); *Property Law Act 1969* (WA) s 11(1).

³⁰⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.13.90]).

- (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
- (3) Unless the contract referred to in subsection (2) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct.

14.3.1.2. Victoria

In Victoria, the VLRC recommended that section 56(1) of the *Property Law Act 1958* (Vic) be amended to confirm 'its meaning as interpreted by the courts' as follows:

- clarifying that an interest in personal property does not fall within the scope of the section; and
- providing that a covenant 'under an instrument made *inter partes* may be enforced by a person who, although not named, is a person to whom the conveyance or other instrument purports to grant something, provided that the person was in existence and identifiable at the time the covenant was made.'³⁰⁶

14.3.2. New Zealand

Section 7 of the *Property Law Act 1952* (NZ) provided that:

Any person may take an immediate benefit under a deed, although not named as a party thereto.

This provision was repealed by the *Contracts (Privity) Act 1982* (NZ) with the effect that it did not apply to any deeds made on or after 1 April 1983.³⁰⁷

The *Contracts (Privity) Act 1982* (NZ) section 4 provides:

Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise: provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

In relation to deeds made after this date the position has been described in the following way:

Section 4 *Contracts (Privity) Act 1982*, which applies to deeds made on or after 1 April 1983, provides that, where a promise contained in a deed or contract confers or purports to confer a benefit on a person designated in the deed or contract by name, description, or reference to a class (but who is not a party to a deed or contract), that promise is enforceable at the suit of that person against the promisor. Deeds made before 1 April 1983 are subject to s 7 *Property Law Act 1952*,

³⁰⁶ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 43 Recommendation 10.

³⁰⁷ *Contracts (Privity) Act 1982* (NZ) s 13.

which provides that any person may take an immediate benefit under a deed although not named as a party thereto. In effect, the position in respect of deeds is the same under both provisions.³⁰⁸

14.4. Recommendation

The Centre recommends the repeal of section 13 on the basis that it applies to old system land. Further, the operation of the section is subsumed by the operation of section 62 of the *Land Title Act 1994* (Qld), section 117 and 118 of the PLA.

Section 55 of the PLA, like section 13, modifies the common law doctrine of privity of contract, allowing enforcement of contracts by third parties beneficiaries. Section 55 of the PLA can apply to land,³⁰⁹ however, there are other requirements relating to acceptance of the benefit that are not elements of section 13 of the PLA. The Centre is of the view that the acceptance of the interest or benefit is an unnecessary requirement demonstrated by the case law to be an impediment to the application and the objectives of this section, and section 55 of the PLA. The requirement for acceptance should be removed from the amendments to section 55, in line with other jurisdictions. This is discussed fully at paragraph 58.

RECOMMENDATION 15. Section 13 should be repealed.

³⁰⁸ Tom Bennion et al, *New Zealand Land Law* (Bookers Ltd, 2nd ed, 2009) [10.18.02] 893-894.

³⁰⁹ See for example *Re Davies* [1989] Qd R 48.

15. Section 14 – Conveyances by a person to the person etc.

15.1. Overview and purpose

14 Conveyances by a person to the person etc.

- (1) In conveyances and leases made after 28 December 1867, personal property, including chattels real, may be conveyed or leased by a person to the person jointly with another person by the like means by which it might be conveyed or leased by the person to another person.
- (2) In conveyances or leases made after the commencement of this Act freehold land, or a thing in action, may be conveyed or leased by a person to the person jointly with another person, by the like means by which it might be conveyed or leased by the person to another person, and may, in like manner, be conveyed or leased by a husband to his wife, and by a wife to her husband, alone or jointly with another person.
- (3) After the commencement of this Act a person may convey or lease land to or vest land in the person but may not convey to or vest in the person an estate in fee simple absolute in such land.
- (4) Two or more persons (whether or not being trustees or personal representatives) may convey or lease, and shall be deemed always to have been capable of conveying or leasing, any property vested in them to any 1 or more of themselves in like manner as they could have conveyed or leased such property to a third party.
- (4A) However, if the persons in whose favour the conveyance or lease is made are, because of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance or lease shall be liable to be set aside.
- (5) In subsection (4) –
or more of themselves includes all the persons by whom the conveyance or lease is or has been made.

At common law, a person was not permitted to convey any interest in property to him or herself.³¹⁰ This rule impacted on relationships such as a husband and wife or joint tenants where the common law only regarded the joint arrangements as one person or as a single owner in the case of the joint tenancy. In the case of a husband and wife, this meant that a wife was unable to convey any interest to her husband and vice versa. Similarly, a joint tenant was unable to convey 'directly to him or herself and another or others jointly.'³¹¹ Different methods were used to overcome this restriction including the use of the Statute of Uses 1535. In the case of personal property which did not fall within the scope of the 1535 legislation, 'two conveyances were necessary'.³¹² Despite these alternative mechanisms to avoid the rule, some legislative changes were made to address the problems which the rule created.³¹³ In Queensland, section 1 of *The Mercantile Acts 1867-1896* abrogated the rule to some extent by allowing any person to have power to assign personal property directly to 'himself and another person or other persons or corporation by the like means he might assign the same to another.'³¹⁴

³¹⁰ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) [30445.1].

³¹¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.14.30].

³¹² See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.14.30] for further detail about these types of conveyances.

³¹³ For an overview of the relevant legislative changes see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.14.30] –[PLA.14.60].

³¹⁴ *The Mercantile Acts 1867-1896* s 1.

The QLRC recommended the adoption of section 72 of the *Law of Property Act 1925* (UK) with some amendments to clarify that in Queensland, individuals and co-owners can lease to themselves.³¹⁵ This variation to section 72 of the English legislation was to address the House of Lords decision of *Rye v Rye*³¹⁶ which held that a lease by a person to himself and another (including a lease by two co-owners to themselves) was not permitted.³¹⁷

A summary of the effect of section 14 of the PLA is below.

15.1.1. Sections 14(1) and (2)

Section 14(1) applies to personal property, including 'chattels real'. The provision allows for the conveyance or lease of personal property by a person to the person jointly with another person. The provision applies to conveyances and leases made after 28 December 1867.

Section 14(2) applies to freehold land or a thing in action. The provision permits the conveyance or lease of freehold land or a thing in action by:

- a person to the person jointly with another person;
- by a husband to his wife and by a wife to her husband, alone or jointly with another person.

15.1.2. Section 14(3)

Section 14(3) applies to land and enables a person to convey or vest land in the person. However, the provision expressly prevents the person from conveying or vesting in the person an estate in fee simple absolute in the land. This means that the person is only able to convey to the person 'lesser interests than a fee simple absolute.'³¹⁸ The qualification in the subsection has been explained in the following way:

The prohibition in the section applies only to the conveyance or vesting of an estate in fee simple absolute in land and therefore, if the joint tenancy is of a lease, a life estate, or other lesser interest, then that joint tenancy could be severed by one joint tenant transferring her or his interest to her or himself.³¹⁹

15.1.3. Section 14(4)

Section 14(4) of the PLA is directed at any property vested in two or more persons, whether or not they are trustees or personal representatives. The provision enables two or more persons to convey or lease any property vested in them to one or more of themselves. The phrase 'or more of themselves' is clarified in section 14(5) of the PLA to include 'all the persons by whom the conveyance or lease is or has been made.'

³¹⁵ 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) 11.

³¹⁶ *Rye v Rye* [1962] AC 492.

³¹⁷ 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) 10.

³¹⁸ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) [12.250] 465.

³¹⁹ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [8.370]. For a discussion of the *Land Title Act 1994* (Qld) statutory regime allowing severance by a joint tenant see [8.370].

15.1.4. Section 14(4A)

Section 14(4A) of the PLA is a limitation imposed on the operation of the section. Commentary on the section indicates that:

The limitation contained in subs (4A) makes clear that the subsection has no effect on the equitable principles as to setting aside dealings by a fiduciary with trust property in his own favour.³²⁰

15.2. Issues with the section

Section 14 was drafted to overcome the common law rule which prevented a person conveying an interest in property to the person. The form of the section is complicated and lacking in clarity. Some of the issues raised by the current drafting of section 14 include:

- section 14(1) is directed at conveyances and leases made after 28 December 1867, the date on which The Mercantile Acts commenced in Queensland. The reference to that date is arguably no longer relevant;
- the specific reference in section 14(2) which recognises a husband and wife as separate entities is arguably unnecessary since section 18 of the *Law Reform Act 1995* (Qld) which expressly provides that a married person has a legal personality that is independent, separate and distinct from the legal personality of the person's husband or wife. Further, under section 18(2) of that Act, a married person has the same legal capacity that the person would have if the person were unmarried;
- the separation of the different categories of property in sections 14(1) and (2) is unnecessary if the date in section 14(1) is removed;
- section 14(3) is the only Australian jurisdiction apart from the Northern Territory which expressly states that the fee simple cannot be conveyed. This is arguably implicit and does not need to be expressly included.

The section could benefit from significant redrafting to simplify the provisions.

15.3. Other jurisdictions

15.3.1. Australia

Section 24 of the *Conveyancing Act 1919* (NSW) is a short provision which provides:

24. A person may assure property to himself or herself, or to himself or herself and others.

This provision consolidated section 34 of the *Conveyancing and Law of Property Act 1898* (NSW) and widened the scope of the provision to include real estate as it previously only applied to personal property.³²¹ The current provision is very broad as the term 'property' includes 'real and personal property, and any estate or interest in any property real or personal, and any debt, and anything in

³²⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.14.90]).

³²¹ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths) 2012) (looseleaf online) 'Commissioner's Report into Conveyancing Act' [35102] clause 24. The original provision in the *Conveyancing and Law of Property Act 1898* (NSW) provided: 'Any person may assign personal property now by law assignment, including chattels real, directly to himself and another person by the like means as he might assign same to another.'

action, and any other right or interest.³²² The terms ‘conveyance’ and ‘assurance’ are defined broadly as well and a conveyance will include a lease.³²³

In both Western Australia and the Australian Capital Territory, the relevant sections are in a similarly short form to the New South Wales provision.³²⁴ The provisions in Tasmania, Victoria, South Australia and the Northern Territory are in a similar form to section 14 of the PLA.³²⁵ However, the key difference is that in section 14(3) of the PLA and the equivalent provision in the Northern Territory, the ability to convey or lease land to oneself is qualified by only being able to do so in relation to lesser interests than fee simple absolute. The rationale for the inclusion of this qualification is not clear in the Queensland context.

In Victoria, the VLRC recommended that section 72 of the *Property Law Act 1958* (Vic) be retained and re-drafted for clarity.³²⁶ The other recommendations include:

In order to clarify the meaning and overcome the restrictive interpretation in *Rye v Rye*, the section should be amended by adding the words shown in italics;

- section 72(3) should provide that a person may ‘convey *or lease* land’.
- The words ‘or all’ should be added to s 72(4) so that it relevantly reads ‘Two or more persons....may convey....any property vested in them to any one or more *or all* of themselves.’³²⁷

There is no rationale provided in the VLRC report for the recommendation.

15.3.2. New Zealand

Section 56 of the *Property Law Act 2007* (NZ) provides:³²⁸

56 Person may dispose of property to himself, herself, or itself

- (1) A person may dispose of an estate or interest in property to himself, herself, or itself, alone or jointly with some other person.
- (2) A disposition to which subsection (1) applies is enforceable in the same manner as a disposition to another person.

A similar provision was included in the earlier property law legislation in New Zealand.³²⁹

15.4. Recommendation

The Centre recommends section 14 be retained but amended to improve its clarity. This is in line with the overarching principles that inform these recommendations. It is recommended that this be achieved by adopting a drafting approach similar to New South Wales as discussed above. The QLS agrees that the section should be retained but redrafted because the section is complicated and lacks

³²² *Conveyancing Act 1919* (NSW) s 7.

³²³ See *Conveyancing Act 1919* (NSW) s 7.

³²⁴ See *Property Law Act 1969* (WA) s 44 and *Civil Law (Property) Act 2006* (ACT) s 208.

³²⁵ See *Property Law Act 1958* (Vic) s 72; *Law of Property Act 1936* (SA) s 40; *Conveyancing and Law of Property Act 1884* (Tas) s 62; *Law of Property Act* (NT) s 13.

³²⁶ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 132.

³²⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 132.

³²⁸ The previous provision set out in section 49 of the *Property Law Act 1952* (NZ) provided that ‘A person may convey or mortgage property for any estate or interest to himself or to himself jointly with another or others.’

³²⁹ See *Property Law Act 1905* (NZ).

clarity. The QLS prefers the drafting in terms of the New Zealand legislation (as set out above at paragraph 15.3.2), however the Centre is of the view that the New South Wales provision (as set out in paragraph 15.3.1) is simpler and has the same effect. The Centre therefore prefers the drafting in the recommendation below.

RECOMMENDATION 16. Section 14 should be amended to improve clarity.

For example, using the New South Wales provisions as a guide, section 14 could be drafted in the following manner:

Section [14] Transfers to oneself or to oneself and others

A person may transfer property to himself or herself, or to himself or herself and others.

16. Section 15 – Rights of husband and wife

16.1. Overview and purpose

15 Rights of husband and wife

A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of the Act, be treated as 2 persons.

Section 15 of the PLA has the effect of reversing the common law position applying where real or personal property was owned, or held in trust, by a husband and wife and a third party. The position at common law in that scenario was that the husband and wife counted as one person so that the third party received a half share in the property and the husband and wife received the other half share. This position reflected the common law doctrine of unity which meant that a husband and wife became one person when entering into a marriage.³³⁰ In practice, this meant that a married woman did not have contractual capacity as she had no legal identity separate from her husband.³³¹ Section 15 of the PLA alters this distribution so the husband and wife are treated as 2 persons. This means that the husband, wife and third party will all receive one third share each.

Part of the QLRC's justification for the inclusion of this provision was that the abolition of tenancies by entireties³³² in Queensland by the *Married Women's Property Act 1884*:

...did not affect the independent rule of construction, based upon the legal entity of husband and wife, that a conveyance to a husband and wife and third parties, whether as joint tenants or tenants in common, vested in the husband and wife only one actual or potential share between them, the other share or shares being taken by third party or parties.³³³

The QLRC noted that the rule was abrogated in New South Wales in 1901 but the common law remained in Queensland.³³⁴

³³⁰ Western Australia Hansard, *Acts Amendment (Equality of Status) Bill 2002* Introduction and First Reading Speech [1].

³³¹ Western Australia Hansard, *Acts Amendment (Equality of Status) Bill 2002* Introduction and First Reading Speech [1].

³³² The common law position that a husband and wife were regarded as one person and a tenancy by entireties was a 'species of joint tenancy which could exist only between a husband and wife but which neither spouse could sever': see Adrian Bradbrook, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 432 [12.75].

³³³ 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) 11

³³⁴ 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) 11. The common law rule was abrogated in New South Wales in *The Married Women's Property Act of 1884* (NSW) s 26. It was retained in *Married Persons (Equality of Status) Act 1996* (NSW) s 9.

16.2. Issues with the section

Section 15 of the PLA alters the common law position in relation to the status of a husband and wife from one person to two for the purposes of the distribution of property between a husband, wife and third party. However, the ongoing necessity for, and the contemporary relevance of, such a provision is doubtful. The *Law Reform Act 1995* (Qld) clarified the legal capacity of persons whose relationship is husband and wife. Section 18 of that Act provides:

Capacity

- (1) A married person has a legal personality that is independent, separate and distinct from the legal personality of the person's husband or wife.
- (2) A married person has the same legal capacity that the person would have if the person were unmarried.

The inclusion of this provision arguably removes the need for the clarification of the position in section 15 of the PLA.

There are other presumptions regarding co-ownership which apply in Queensland also in relation to registered land which implicitly recognise that the legal capacity of a husband and wife is no different to an unmarried individual. For example, section 56 of the *Land Title Act 1994* (Qld) provides that in registering an instrument transferring an interest to co-owners, the registrar must also register the co-owners as holding their interests as tenants in common or joint tenants. Where this is not specified on the instrument, the registrar is required to register the interest as tenants in common.

There appears to be no current rationale for the retention of section 15 of the PLA.

16.3. Other jurisdictions

16.3.1. Australia

Victoria, South Australia and the Northern Territory have similar provisions.³³⁵ In New South Wales, a similar provision is located in the *Married Persons (Equality of Status) Act 1996* (NSW). Section 9 of that Act provides:

A husband and wife are to be treated as two separate persons for the purposes of the construction of a will, trust, or other instrument in relation to a gift or other disposition of real or personal property to the husband and wife, unless a contrary intention appears.³³⁶

The section in Western Australia is in similar terms to the provision in section 18 of the *Law Reform Act 1995* (Qld).³³⁷ However, the Western Australian legislation in section 2 also expressly abolishes the doctrine of unity in the following way:

The common law doctrine of unity of spouses is abolished.³³⁸

In 2010, the VLRC recommended the retention of the equivalent provision in section 21 of the *Property Law Act 1958* (Vic). The rationale for the retention of the provision appears to be based on concerns

³³⁵ *Property Law Act 1958* (Vic) s 21; *Law of Property Act 1936* (SA) s 95A; *Law of Property Act* (NT) s 14.

³³⁶ This section follows the previous provision in New South Wales set out in section 26 of the *Married Persons (Property and Torts) Act 1901* (NSW). See: Explanatory Note, *Married Persons (Equality of Status) Bill 1996*.

³³⁷ See *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 3.

³³⁸ *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 2.

that the repeal of the provision could ‘create unnecessary uncertainty as to the share of a husband and wife in co-ownership with a third person.’³³⁹ The Commission held concerns about the effect of section 14(2)(c) of the *Acts Interpretation Act (Vic)* which provides that unless the contrary intention expressly appears, the repeal of an Act or provision does not revive ‘anything not in force or existing at the time that the repeal becomes operative.’ The main concern was whether the section applied to a ‘rule for the construction of instruments.’³⁴⁰ The VLRC argued that retaining the provision made the law clear.³⁴¹

16.4. Recommendation

The Centre is of the view that section 15 has no contemporary relevance and recommends it be repealed. If there are ongoing concerns that section 18 of the *Law Reform Act 1995 (Qld)* is not explicit enough in terms of abolishing the common law doctrine of unity, then a clear provision similar to the one in Western Australia in section 2 of the *Law Reform (Miscellaneous Provisions) Act 1941 (WA)* could be enacted in Queensland. However, the Centre remains of the view that this is overly cautious and, in the circumstances, unnecessary. The QLS agrees that the provisions of section 18 of the *Law Reform Act 1995 (Qld)* are sufficient to abolish the doctrine of unity and agree that the section 15 can be repealed.

RECOMMENDATION 17. Section 15 should be repealed.

³³⁹ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 95 [6.109].

³⁴⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 95 [6.110].

³⁴¹ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 95 [6.111].

17. Section 15A – Rights of aliens

17.1. Overview and purpose

15A Rights of aliens

- (1) An alien may take, give, buy or sell property as if the alien were an Australian citizen.
- (2) The application of succession laws to a person is not different merely because the person is an alien.
- (3) This section does not entitle an alien to any right as an Australian citizen other than a right given by this section.
- (4) In this section –
property means any interest in real, personal, movable or immovable property.

Section 15A of the PLA was inserted into the Act in 1994 under the same legislation which repealed the *Aliens Act 1965* (Qld).³⁴² Section 2 of the *Aliens Act 1965* (Qld) provided:

2. Notwithstanding any provision of any Act or law an alien shall and may take, acquire, hold and dispose of any property in all respects as if he were an Australian citizen; and a title to property may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to an Australian citizen.

Section 15A of the PLA effectively replicates the earlier Act and provides that:

- an ‘alien’ may take, give, buy or sell property as if the person was an Australian citizen;³⁴³ and
- succession laws do not apply any differently to an ‘alien’.³⁴⁴

The section expressly provides that it does not give an alien any right as an Australian citizen other than what is provided for in the section.³⁴⁵ The provision is intended to override the common law rule that an alien cannot acquire, hold or transfer land.³⁴⁶

17.2. Issues with the section

Section 15A of the PLA has existed in one form or another in Queensland for an extended period of time.³⁴⁷ Clearly there is now greater clarity at the Commonwealth level in relation to citizenship under the *Australian Citizenship Act 2007* (Cth). However, that Act does not address the issue of property acquisition or holdings by non-citizens. Another Commonwealth Act, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**),³⁴⁸ regulates actions involving the acquisition of land interests and foreign acquisition and control of certain businesses, enterprises and mineral rights by foreign

³⁴² See Sch 5 of the *Land Act 1994* (Qld) (Act No. 81 s 527) which inserted section 15A of the PLA and section 524 which repealed the *Aliens Act 1965* (Qld).

³⁴³ *Property Law Act 1974* (Qld) s 15A(1).

³⁴⁴ *Property Law Act 1974* (Qld) s 15A(2).

³⁴⁵ *Property Law Act 1974* (Qld) s 15A(2).

³⁴⁶ See Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 91 [6.81].

³⁴⁷ In Queensland, prior to the enactment of the *Aliens Act 1965* (Qld) the relevant Imperial legislation in place was the *Aliens Act of 1867* (31 Vic No. 28): See *Aliens Act 1965* (Qld) s 3.

³⁴⁸ Substantial amendments were made to the Act by the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) which commenced on 1 December 2015. For a detailed discussion of the changes made to the foreign investment regime see: Bill Dixon, ‘Land Transactions and the New Foreign Investment Regime’ (2016) 25(1) *Australian Property Law Journal* 55.

persons³⁴⁹ in Australia. In the case of residential real estate, all foreign persons must get approval to acquire an interest irrespective of the value of the property.³⁵⁰ The FATA expressly indicates that it is not intended to exclude or limit the operation of a State or Territory law which can operate concurrently with it.³⁵¹

The VLRC indicated that the FATA does not cover the field and that it does not apply to foreign nationals who are permitted to stay indefinitely in Australia such as New Zealand citizens.³⁵² The FATA now expressly provides that in relation to the acquisition of residential real estate, New Zealand citizens and holders of a permanent visa are exempt from the requirement to seek approval for an acquisition.³⁵³ On this basis it is arguable that section 15A of the PLA may be of ongoing relevance.

Section 15A(2) of the PLA provides that the operation of succession laws is not different merely because an individual is an 'alien'. The original section in the 1965 Act, extracted in paragraph 17.1 above, is directed at clarifying that an alien's title to property can be obtained through succession laws in the same way it can in the case of an Australian citizen. It is not clear from the wording of the current section 15(2) whether this is still the purpose of the provision or whether it is intended to be broader and cover both acquisition of property under a will and also the right of the 'alien' to make a will in Queensland (or elsewhere) in relation to property. Irrespective of the intended effect of section 15A(2) of the PLA, the terms of the *Succession Act 1981* (Qld) govern the succession process in Queensland and would apply if there was any inconsistency with the PLA. The *Succession Act 1981* (Qld) is broad in its application and recognises the validity of wills executed internationally in the circumstances specified in the relevant Division.³⁵⁴

³⁴⁹ A 'foreign person' will cover an individual who is not ordinarily a resident in Australia, a foreign government or foreign government investor or a corporation where an individual not ordinarily a resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20 percent: see Treasurer, *Australian's Foreign Investment Policy* (1 July 2016) 3 (<https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>) accessed December 2017.

³⁵⁰ For further information on this legislation and the Commonwealth Government's approach to foreign investment see Treasurer, *Australian's Foreign Investment Policy* (1 July 2016) (<https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>) and other explanatory material on the Foreign Investment Review Board website: www.firb.gov.au.

³⁵¹ *Foreign Investment and Acquisition Act 1975* (Cth) s 34. There are separate obligations imposed on a 'foreign person' in Queensland under the *Foreign Ownership of Land Register Act 1988* (Qld). The definition of 'foreign person' is slightly different in Queensland to the Commonwealth definition in the *Foreign Investment and Acquisition Act 1975* (Cth). The Act establishes the Foreign Ownership of Land Register (see Part 2). Part 3 of the Act imposes notification obligations on foreign persons to lodge the required forms to notify the registrar of any legal estate of an interest in land which exists or is acquired by the foreign person (ss 17 and 18). A disposal of a registered interest in land is also required to be notified on the register (s 18A).

³⁵² See Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 92 [6.93] referring to section 5A(1) of the *Foreign Investment and Acquisition Act 1975* (Cth).

³⁵³ The relevant section in FATA was repealed in 2015 but replaced with section 5 which is similar in effect.

³⁵⁴ *Succession Act 1981* (Qld) s 33YE and see Div 6A. There are separate issue of the relevant law which applies where a person dies with properties located in different jurisdiction or dies in Queensland but usually resident in another jurisdiction where he or she may have a valid will in place under the laws of that other jurisdiction: [1.130] 14.

17.3. Other jurisdictions

17.3.1. Australia

All other Australian jurisdictions, apart from the Northern Territory and Western Australia have similar provisions to section 15A of the PLA. Tasmania has retained its 1913 legislation, the *Aliens Act 1913* (Tas). The relevant section in South Australia is set out in section 24 of the *Law of Property Act 1936* (SA). In New South Wales, section 146A was inserted into the *Conveyancing Act 1919* (NSW) in 1985. The section originated from section 4 of the *Naturalization and Denization Act 1898* (NSW) which was repealed at the same time.³⁵⁵

In Victoria, section 27 of the *Property Law Act 1958* (Vic) expressly allows for an ‘alien’ to acquire, hold or dispose’ of property.³⁵⁶ This provision was reviewed by the VLRC in 2010 and the Commission noted that:

The provision has appeared in Victorian legislation substantially unchanged for 120 years. In the meantime, the Commonwealth of Australia was formed, the concept of Australian citizenship evolved, and foreign investment in property has become increasingly regulated by the Commonwealth Government.³⁵⁷

The VLRC concluded that the provision is ‘arcane’ and requires updating.³⁵⁸ The final recommendation in relation to this provision is:

45. Section 27, concerning the property rights of alien friends, should be replaced by a provision in the New Property Law Act which:
 - (a) provides that a person is not prevented from acquiring, holding or disposing of real or personal property in Victoria by reason only that the person is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth);
 - (b) includes a note stating that investment by foreign persons is regulated by the Commonwealth under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

17.3.2. New Zealand

In New Zealand, the equivalent provision is set out in section 23 of the *Citizenship Act 1977* (NZ) and provides:

Subject to subsection (2) and to any other enactment, every person who is not a New Zealand citizen shall be entitled to take, acquire, hold, and dispose of real or personal property in the same manner in all respects as if he were a New Zealand citizen.

New Zealand also has an Overseas Investment Office which regulates a narrow category of foreign acquisitions categorised as ‘sensitive’ New Zealand assets such as high value businesses (more than \$100 million), fishing quotas and ‘sensitive’ land.³⁵⁹

³⁵⁵ *Statute Law (Miscellaneous Provisions) Act 1985* (NSW) Sch 3; Explanatory Note, *Statute Law (Miscellaneous Provisions) Bill 1985* 2.

³⁵⁶ *Property Law Act 1958* (Vic) s 27.

³⁵⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 91 [6.82].

³⁵⁸ See Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 91 [6.83].

³⁵⁹ See *Overseas Investment Act 2005* (NZ).

17.4. Recommendation

The Centre recommends section 15A of the PLA be redrafted in the terms proposed below. The proposed drafting highlights the existence of other legislation. For example, the *Duties Act 2001* (Qld), and the FATA both regulate foreign ownership of property in Queensland. FATA expressly provides that it operate alongside State legislation, without excluding or limiting same. Further, the *Foreign Ownership of Land Register Act 1988* (Qld) requires the Registrar to maintain a register called the Foreign Ownership of Land Register.³⁶⁰

The proposed drafting is not cast in the positive with respect to citizenship (that is, not ‘a person is an alien’, but rather ‘is not an Australian citizen’) because of inconsistencies in the various State laws about exactly who is an ‘alien’.

Submissions received from the QLS question the necessity of any provision to this effect. As set out above, the provision is included to override the common law rule that an alien cannot acquire, hold or transfer land.³⁶¹ This is set out above at paragraph 17.1. On that point, the QLS agrees that the term ‘alien’ is archaic and should be replaced.

The proposed drafting is intended clarify the scope and application of the section, but does not change its effect. The proposed drafting modernises the language and this is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 18. Section 15A should be amended to provide that the section is subject to other legislation that regulates foreign ownership of property in Queensland.

For example, section 15A could be drafted in the following manner:

Section [15A] Foreign ownership

Subject to any other requirements in State or Commonwealth law applying to the acquisition, holding or disposal of property, a person is not prevented from acquiring, holding or disposing of real or personal property in Queensland by reason only that the person is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth).

³⁶⁰ *Foreign Ownership of Land Register Act 1988* (Qld) Part 2; s 11(1).

³⁶¹ See Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 91 [6.81].

18. Section 16 – Presumption that parties are of full age

18.1. Overview and purpose

16 Presumption that parties are of full age

The persons expressed to be parties to any conveyance shall, until the contrary is proved, be presumed at the date of such conveyance to be of full age or of such other lesser age as to have capacity to give effect to the conveyance.

The effect of section 16 of the PLA is to provide a rebuttable presumption that the parties to a conveyance are of full age or of ‘such lesser age’ as to have capacity to give effect to the conveyance. The position at common law in relation to the capacity of minors to contract depends on the particular transaction involved. In terms of contracts involving something of a permanent nature such as purchasing an interest in land, the common law position is that it is binding on the minor unless the contract is repudiated within a reasonable time of reaching the age of 18.³⁶² Section 16 does not alter that common law position. It is essentially a declaratory provision which enables a contracting party to assume that the other party to a conveyance is not a minor and is able to enter into an agreement, subject to the contrary position being established.

A ‘conveyance’ under the PLA is defined broadly as:

includes a transfer of an interest in land, and any assignment, appointment, lease, settlement or other assurance in writing of property.³⁶³

The QLRC noted that the utility of a section such as section 16 is greater in the case of unregistered rather than registered land.³⁶⁴ In the case of registered land, the QLRC indicated that ‘the fact and effect of registration is virtually if not completely conclusive.’³⁶⁵ However, the QLRC stated:

Nevertheless, questions as to the validity of a conveyance by or to a person whose age is not readily discoverable may arise in relation to land which is not under The Real Property Acts, e.g. a transfer of a Crown lease under the Land Act, where a provision in the form of s 15 might provide useful.³⁶⁶

The QLRC indicated that because of section 111A of the *Real Property Act* and section 15(2) of the *Land Act 1962* (Qld) in place in Queensland at the time, the presumption proposed in clause 16 needed

³⁶² S A Christensen, W M Dixon, W D Duncan and S E Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 148 [3.4.1.4].

³⁶³ *Property Law Act 1974* (Qld) s 3, Sch 6 (definition of ‘conveyance’). The term ‘assurance’ is also defined in Sch 6.

³⁶⁴ 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) 11.

³⁶⁵ 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) 11.

³⁶⁶ 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) 11.

to be extended 'to such other lesser age as to have capacity to give effect to conveyance.'³⁶⁷ Section 15(2) of the *Land Act 1962* (Qld) for example, appeared to lower the age of majority from 21 to 18 in relation to the property dealings set out in that section. Further, section 111A of the *Real Property Acts* provided that any person of the age of 18 years but under the age of 21 years may acquire, transfer, mortgage or otherwise deal with any estate or interest in land under the Real Property Acts as if the person were 21 years of age.³⁶⁸ At the time of the introduction of the PLA, the age of majority was 21 and the inclusion of 'other lesser age' in the section appears to have been to ensure that the section reflected other exceptions to the age of majority rule in other Acts. That inclusion was probably unnecessary as the *Age of Majority Act 1974* (Qld) reduced the age of majority from 21 to 18 years of age. The age of majority is now expressly set out in section 17 of the *Law Reform Act 1995* (Qld) and is 18 years.³⁶⁹

18.2. Issues with the section

The section arguably only applies to old system land which is virtually non-existent in Queensland. The issues of the continued existence of old system land is discussed at paragraph 5.2.1. The application of the section to old system land is made clear in the QLRC comments and is consistent with the approach under the *Land Title Act 1994* (Qld) which has specific provisions dealing with the issue of minors or individuals lacking capacity. For example, where the Act requires or permits an act to be done by a person and that person is a minor and there is no person with authority under an Act to act for that minor, section 136(2) enables a person 'suitably authorised by a court of competent jurisdiction' to act for the relevant person.³⁷⁰ Section 137 of the Act also allows a qualified person to act for another person lacking capacity, subject to the operation of the *Guardianship and Administration Act 2000* (Qld). The Registrar is required to record on the register that a person with an interest is a minor.³⁷¹

In the case of land under the *Land Act 1994* (Qld), section 142 of the Act expressly provides that only an adult is eligible to apply for, buy or hold land under the Act.

³⁶⁷ 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) 11.

³⁶⁸ Extracted from Law Reform Commission (NSW) *Infancy in Relation to Contracts and Property* No. 6 (1969) 21 [22].

³⁶⁹ The *Age of Majority Act 1974* (Qld) was repealed by the *Statute Law Revision Act (No. 2) 1995* (Qld).

³⁷⁰ The Land Title Practice Manual expressly provides in the commentary on transfers of fee simple that 'There is no authority for a minor (a person who has not yet reached 18 years of age) to execute a transfer. Accordingly, a transfer by a minor, either as a sole transferor or as one of several transferors is not acceptable unless a Court Order authorises a person to execute the transfer on behalf of the minor (s 136 of the *Land Title Act 1994*): see Department of Natural Resources and Mines, *Land Title Practice Manual (Queensland)* [1-2060] https://www.dnrm.qld.gov.au/__data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf accessed December 2017.

³⁷¹ *Land Title Act 1994* (Qld) s 28.

18.3. Other jurisdictions

18.3.1. Australia

The Northern Territory has an equivalent provision to section 16 of the PLA, although the term ‘adult’ is used instead of ‘full age’ in the Northern Territory legislation.³⁷² Victoria is the only other Australian jurisdiction with a similar section located in a property law specific Act.³⁷³ The VLRC, when reviewing the *Property Law Act 1958* (Vic) in 2010, recommended that the section be retained.³⁷⁴ However, the Commission did not provide a rationale for its recommendation.

New South Wales has effectively codified the laws relating to minors and contracts in the *Minors (Property and Contracts) Act 1970* (NSW). The Act provides that a person aged 18 years or above is of full age and an adult.³⁷⁵ Section 20 of the Act provides that a disposition of property made for consideration by a minor or a disposition made to a minor for consideration is ‘presumptively’ binding on the minor in the circumstances specified in the section.³⁷⁶ The Act provides for court approval of a disposition of property made by or to the minor³⁷⁷ and certification of dispositions prior to the actual disposition.³⁷⁸ However, a minor is still entitled to repudiate the relevant dispositions at any time while he or she remains a minor and after turning 18 can still repudiate up until before turning 19.³⁷⁹

In South Australia the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) also specifically addresses issues relating to minors and contracts. The starting point in South Australia is that contracts should not be enforceable against infants. This is different to the New South Wales position where there is a presumption that it is binding. Section 4 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) provides that:

Where a person has entered into contract that is, by reason of his minority at the time of entering into the contract, unenforceable against him, the contract shall remain unenforceable against him unless it is ratified by him, in writing, on or after the day on which he attains his majority.

However, a contract with a minor can have effect in South Australia, if before entering into the contract, its terms were approved by a court.³⁸⁰ A minor in South Australia can also apply for restitution if the minor has avoided the contract on the ground of minority and before the avoidance, the property passed to some other contracting party.³⁸¹

³⁷² *Law of Property Act* (NT) s 15.

³⁷³ However, section 26 of the *Property Law Act 1958* (Vic) does not include the second part of section 16 of the PLA which states ‘or of such lesser age as to have capacity to give effect to the conveyance’.

³⁷⁴ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 20 (2010) Appendix A 127.

³⁷⁵ *Minors (Property and Contracts) Act 1970* (NSW) s 9.

³⁷⁶ The same presumption is made in relation to the disposition of property as a gift which is reasonable at the time when it is made: *Minors (Property and Contracts) Act 1970* (NSW) s 21.

³⁷⁷ *Minors (Property and Contracts) Act 1970* (NSW) s 27.

³⁷⁸ *Minors (Property and Contracts) Act 1970* (NSW) ss 28 and 29.

³⁷⁹ *Minors (Property and Contracts) Act 1970* (NSW) s 31. There is a process which must be followed before a repudiation is effective, including providing a written and signed notice (s 33).

³⁸⁰ *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) s 6.

³⁸¹ *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) s 6.

The legislation in both New South Wales and South Australia followed recommendations made in reports completed by the relevant law reform bodies in those jurisdictions.³⁸² The Law Reform Committee in South Australia noted that the issue of minors and contracts had been considered by a number of international law reform bodies and had been considered in New South Wales also.³⁸³ In this respect, the Committee acknowledged that there had been a lack of consistency in terms of the legislative reform ultimately adopted in these jurisdictions. The Committee noted that the law was generally complex in this area but despite this, it had caused 'little difficulty in practice for many years.'³⁸⁴

The Law Commission of Western Australia considered minors' contracts in 1988 and made a number of recommendations including that a statutory regime should be implemented in Western Australia.³⁸⁵ However, these recommendations were not adopted and the position in relation to contracts and minors in Western Australian, as with some other Australian jurisdictions, is primarily governed by common law.

18.4. Recommendation

The Centre recommends that section 16 be repealed. Section 16 of the PLA sets out a rebuttable presumption that a person entering into a conveyance is of full age and is therefore able to enter into the transaction. The provision was primarily intended to address old system conveyances where the age of the parties may not have always been obvious. The section was not intended to make any significant alterations to the common law and does not appear to alter the common law rules in relation to minors entering into agreements. The current utility of the provision in circumstances where there is effectively no old system land in existence in Queensland is questionable. Queensland has not implemented any significant reforms in relation to minors and contracts in the same way that New South Wales and South Australia have.

The QLS agrees that section 16 can be repealed.

RECOMMENDATION 19. Section 16 should be repealed.

³⁸² New South Wales Law Reform Commission, *Infancy in Relation to Contracts and Property* Report No. 6 (1969) and Law Reform Committee (SA) *Report Relating to the Contractual Capacity of Infants* No. 41 (1977).

³⁸³ Law Reform Committee (SA) *Report Relating to the Contractual Capacity of Infants* No. 41 (1977) 4-6.

³⁸⁴ Law Reform Committee (SA) *Report Relating to the Contractual Capacity of Infants* No. 41 (1977) 6.

³⁸⁵ Law Reform Commission of Western Australia, *Minor's Contracts* Project No. 25 – Part II Report (1988) 101.

19. Section 17 – Merger

19.1. Overview and purpose

17 Merger

An estate does not merge by operation of law only if the beneficial interest in the estate would not be merged or extinguished in equity.

At common law, merger occurred automatically where a lesser and a greater estate vested in the same person in the 'same right'.³⁸⁶ Merger occurred irrespective of the person's intention. An example of the operation of merger at common law includes:

if the reversion and the leasehold vest in the one person, the lesser interest (the leasehold) 'merges' in the greater (the reversion) and is destroyed.³⁸⁷

The position was different at equity where there was no merger unless this was intended by the party acquiring both the lease and the reversion.³⁸⁸ Section 5(4) of the *Judicature Act 1876* altered the common law rule by specifying that the equitable rule regarding merger prevailed. The QLRC when considering the inclusion of section 17 of the PLA noted that the provision should be included in property legislation which was the practice in Victoria and the United Kingdom.³⁸⁹ Further, the form of the Queensland provision adopted reflected recommendations made in Northern Ireland in relation to the equivalent provision which was aimed at providing greater clarity to the provision.³⁹⁰

The effect of section 17 of the PLA is to abrogate the common law rule that merger occurred irrespective of the intention of the person acquiring both estates. The section now reflects the position in equity in relation to merger.

19.2. Issues with the section

Section 17 of the PLA is a necessary provision which is applicable in current legal practice. The provision is well understood and the cases which have applied the provision have not highlighted any significant issues of interpretation.

³⁸⁶ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths) 2012) (looseleaf) [30310.5].

³⁸⁷ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 237]. For further examples of mergers see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.17.90].

³⁸⁸ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [14.1050].

³⁸⁹ 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) 12.

³⁹⁰ 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) 12.

19.3. Other jurisdictions

19.3.1. Australia

Each Australian jurisdiction has a provision equivalent to section 17 of the PLA.³⁹¹ The VLRC considered section 185 of the *Property Law Act 1958* (Vic) as part of its broader review of the Act in 2010. The Commission recommended that the section be retained and that:

provision should be made in the *Transfer of Land Act 1958* for the Registrar, upon the application of the proprietor of interests or estate in the land, to record the merger of the interests or estates.³⁹²

The rationale for the inclusion of this latter part of the recommendation is explained by the VLRC as follows:

Since the application can be made after the greater interest has been registered, the provision will avoid any need to delay registration of dealings to determine whether merger is intended.³⁹³

The proposal was modelled on section 12(1)(i) of the *Real Property Act 1900* (NSW).

19.3.2. New Zealand

In New Zealand, the merger provision was set out in section 30 of the *Property Law Act 1952* (NZ). The Law Commission (NZ) in its preliminary report indicated that the provision may be superfluous as it was sufficiently covered by section 99 of the *Judicature Act 1908*. Section 30 of the now repealed 1952 Act no longer has an equivalent provision in the *Property Law Act 2007* (NZ).

19.4. Recommendation

The Centre recommends section 17 of the PLA be retained but with modernised language on the basis that the operation of the section is necessary and still applicable to current legal practice. The provision is well understood and the case law on the section does not show any issues with interpretation. The QLS agrees that the section should be retained, but the language modernised. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 20. Section 17 should be retained with modernised language.

³⁹¹ *Conveyancing Act 1919* (NSW) s 10; *Property Law Act 1958* (Vic) s 185; *Law of Property Act 1936* (SA) s 13; *Property Law Act 1969* (WA) s 18; *Law of Property Act* (NT) s 16; *Civil Law (Property) Act 2006* (ACT) s 206; *Supreme Court Civil Procedure Act 1932* (Tas) s 11(4).

³⁹² Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report, 89 Recommendation 43.

³⁹³ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report, 89.

20. Section 18 – Restrictions on operation of conditions of forfeiture

20.1. Overview and purpose

18 Restrictions on operation of conditions of forfeiture

- (1) Where there is a person entitled to income (including an annuity or other periodical income) or any other property, subject to a condition of forfeiture on alienation, whether voluntary or involuntary, and whether with or without words of futurity, then –
- (a) unless the instrument containing the condition expressly provides to the contrary, no alienation, whether by way of charge or otherwise, of the income or other property, made or occurring before the person becomes entitled to receive payment of the income, or to call for a conveyance or delivery of the other property, shall operate to create forfeiture under the condition unless the alienation is in operation at the time the person becomes so entitled; and
 - (b) despite any stipulation to the contrary in the instrument containing the condition no voluntary alienation made by the person, with the sanction of the court, shall operate to create forfeiture under the condition.
- (2) This section applies where the condition of forfeiture is contained in an instrument executed, made, or coming into operation before or after the commencement of this Act, but only in cases where such person becomes entitled to receive payment of the income, or to call for an assurance or delivery of the other property, or where the alienation with the sanction of the court is made, after such commencement.

Section 18 of the PLA was enacted to resolve a conflict between an English Court of Appeal decision, *In re Forder*³⁹⁴ and a decision of the Australian High Court in *McQuade v Morgan*.³⁹⁵ The factual scenario from the High Court decision is summarised below:

- a daughter had a power of appointment under the will of her father. The daughter executed a deed poll in which she directed trustees to hold her property on trust for her four children for their maintenance while they were still minors. Once they turned 21, the trustees were required to pay them the whole of the income in equal shares;³⁹⁶
- however, the deed poll included a provision for the determination of the share of any child who becomes ‘bankrupt or do, or suffer any act or thing whereby the said income or his or her interest therein or any part thereof shall be charged or encumbered or become vested in or payable to any other person’;
- a number of years before the death of the appointor, one of the adult children charged his interest as collateral security for a loan but this charge was released well before the death of the appointor.

³⁹⁴ *In re Forder* [1927] 2 Ch 291.

³⁹⁵ 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) 12. The High Court decision was *McQuade v Morgan* (1927) 39 CLR 222.

³⁹⁶ H Ford and WA Lee, *Principles of the Law of Trusts* (Lawbook Co, 2nd ed, 1990) 271 [719].

The issue in the High Court case was whether the appellant had incurred a forfeiture of the interest appointed to him by virtue of charging his interest, despite the fact that no charge existed at the time of the death of the appointor. The majority of the High Court agreed that the appellant had forfeited his interest and relied on the construction of the provision in the instrument. The court disagreed with the generally accepted rule that 'no forfeiture is incurred if the charge is got rid of before the interest falls into possession' as to widely stated and did not think the rule was applicable 'where no ambiguity can be found in the forfeiture clause.'³⁹⁷ Isaacs J dissented and while he accepted the general proposition that the instrument must be interpreted by its own words he also made it clear that the rules of law and construction must have their force also.³⁹⁸

An English Court of Appeal decision, *In re Forder*,³⁹⁹ in the same year reached the contrary position to the High Court decision. In *McQuade v Morgan*, Isaac J's dissenting views were consistent with the Court of Appeal in approach that no forfeiture occurs if the charge is removed before the interest falls into possession.

Section 18 of the PLA is taken directly from section 29C of the *Conveyancing Act 1919* (NSW) which was inserted into that Act in 1930 in response to the uncertainty regarding the appropriate approach in these situations. The section clarifies the position following the High Court case and essentially adopts the English Court of Appeal approach and the minority approach of Isaacs J in *McQuade v Morgan*. Commentary on section 29C of the *Conveyancing Act 1919* (NSW) explains the principle in the following way:

The principle applicable to clauses of forfeiture on alienation in wills and settlements is that although an interest subject to forfeiture is actually alienated, that is, by an act purporting to alienate it, yet if the alienation be got rid of before the interest falls into possession, no forfeiture takes place. Consequently if a charge, or a bankruptcy, or any other impediment to the personal reception of the income or enjoyment of the property has been created or has occurred, but has been validly extinguished before the period of distribution or the period at which the right to receive any portion of the money or to enjoy the property has accrued, there is no forfeiture.⁴⁰⁰

Section 18 of the PLA operates in the same way so that an alienation which has taken place and been reversed before the interest falls into possession is disregarded.⁴⁰¹ This means that if a scenario similar to the one in *McQuade v Morgan*⁴⁰² was raised again, the outcome is likely to be different, unless there is a contrary intention expressly provided for in the relevant instrument.

The term 'instrument' is defined in the schedule 6 of the PLA to include 'deed, will, and Act.'⁴⁰³

³⁹⁷ *McQuade v Morgan* (1927) 39 CLR 222, 231 per Knox CJ and Rich J.

³⁹⁸ *McQuade v Morgan* (1927) 39 CLR 222, 231.

³⁹⁹ *In re Forder* [1927] 2 Ch 324.

⁴⁰⁰ G P Stuckey, *The Conveyancing Act 1919-1969 and Regulations* (Lawbook Co, 2nd ed, 1970) 61 [192].

⁴⁰¹ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths) 2012) (looseleaf online) [30497.1].

⁴⁰² (1927) 39 CLR 222.

⁴⁰³ *Property Law Act 1974* (Qld) Sch 6.

20.2. Issues with the section

Forfeiture on alienation clauses are ordinarily used in ‘protective trusts’. Protective trusts are ‘a variety of discretionary trust used to “protect” property from dissipation by an extravagant beneficiary.’⁴⁰⁴ The unit trust instruments examined by the Centre do not have restrictions on the transfer or charging of interests, and given the commercial nature of such trusts,⁴⁰⁵ they are unlikely to contain such restrictions. Beneficiaries of a discretionary trust do not have a proprietary interest in the trust property and are unable to alienate their rights to same. A discretionary beneficiary has only ‘a hope or expectation that they will be considered in the trustee’s exercise of discretion.’⁴⁰⁶ The Centre therefore concludes that this provision applies only to protective trusts.

Given the limited application of section 18 of the PLA to protective trust only, the section has little current relevance. Submissions received from the QLS helpfully directed the Centre to section 64 of the *Trusts Act 1973* (Qld) which provides a mechanism for dealing with trust income of a protective trust where the trust fails for any reason. This is broader than the operation of section 18 of the PLA which provides only for the situation where:

- the trust instrument does not contain an express condition that the beneficiary of the trust will forfeit his or her interest in the trust upon alienation of same; and
- the alienation continues at the time the beneficiary’s interest falls into possession – that is, they become entitled to the trust property.

The QLRC interim report about its review of the *Trusts Act 1973* (Qld)⁴⁰⁷ discusses the operation of section 64 of the *Trusts Act 1973* (Qld) and ultimately recommends that the provision be repealed. This recommendation is made on two bases:

- firstly, because the preferred trust structure in contemporary practice is a discretionary trust and the protective trust has been described as ‘old-fashioned and have significant disadvantages’⁴⁰⁸; and
- the operation of the provision has been ousted by the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**).

⁴⁰⁴ Halsbury Laws of Australia, *Trusts: Protective trusts are a variety of discretionary trust used to ‘protect’ property from dissipation by an extravagant beneficiary* [15.13.1300] (online via Westlaw AU) current as at 1 October 2014, accessed December 2017.

⁴⁰⁵ Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (Butterworths, 2010) 294.

⁴⁰⁶ Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (Butterworths, 2010) 457.

⁴⁰⁷ Queensland Law Reform Commission, *A review of the Trusts Act 1973 (Qld) Interim Report WP No 71 June 2013*.

⁴⁰⁸ Queensland Law Reform Commission, *A review of the Trusts Act 1973 (Qld) Interim Report WP No 71 June 2013* citing J Kessler QC and M Flynn, *Drafting trusts & Will Trusts in Australia* (Lawbook, 2008) [4.15-[4.20] and *Australian Encyclopedia of Forms and Precedents* which suggests that ‘the discretionary trust may well be preferable to the protective trust’: LexisNexis, *The Australian Encyclopedia of forms and Precedents* (at November 2011) [510-716].

With respect to the first point, the QLRC further states that in submissions it received from both the QLS and the Public Trustee, it was generally accepted that protective trusts have been largely replaced by discretionary trusts.⁴⁰⁹ In his submissions on section 64 to the QLRC, Professor WA Lee from the TC Bernie School of Law at the University of Queensland, agreed that use of discretionary trusts is the current practice, and not protective trusts.⁴¹⁰

With respect to the second point, section 302B(1) of the Bankruptcy Act provides that certain provisions in trust instruments are void. Provisions that have the effect of ‘cancelling, reducing or qualifying a beneficiary’s’ interest under the trust’ in the event the beneficiary becomes bankrupt are not effective so that the operation of such clauses cannot defeat the object of the bankruptcy laws in Australia. Professor Lee agreed that section 302B of the Bankruptcy Act ousted the operation of section 64 upon bankruptcy.⁴¹¹

It is clear then that the operation of section 64 of the *Trusts Act 1973* (Qld), and section 18 of the PLA are restricted to alienations other than those that arise upon bankruptcy. Further, the practice of using the protective trust vehicle has largely diminished in practice. This is likely to significantly reduce the circumstances in which section 18 is required. In cases other than bankruptcy, the Centre is of the view that any sophisticated party considering accepting as security a charge over an interest in a protective trust would require a copy of the instrument and would quickly conclude that such a security is essentially useless if the forfeiture clause is enlivened.

It is unclear whether section 18 is currently relied upon to any extent. The High Court decision of *McQuade v Morgan*⁴¹² does not appear to have been overturned or altered in any way.⁴¹³ In this respect, section 18 of the PLA sets out the preferred approach in Queensland which is not the approach adopted in the High Court decision of *McQuade*. However, in Queensland, section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) expressly provides that the repeal or amendment of an Act does not revive anything not in force or existing at the time the repeal or amendment takes effect.⁴¹⁴

20.3. Other jurisdictions

As indicated above, the Queensland provision is based on section 29C of the *Conveyancing Act 1919* (NSW). The Northern Territory is the only other jurisdiction that has an equivalent provision and this is set out in section 17 of the *Law of Property Act* (NT). The other Australian jurisdictions do not appear to have enacted similar provisions.

⁴⁰⁹ Queensland Law Reform Commission, *A review of the Trusts Act 1973 (Qld) Interim Report WP No 71 June 2013*, 444.

⁴¹⁰ Queensland Law Reform Commission, *A review of the Trusts Act 1973 (Qld) Interim Report WP No 71 June 2013*, 444.

⁴¹¹ Queensland Law Reform Commission, *A review of the Trusts Act 1973 (Qld) Interim Report WP No 71 June 2013*, 444.

⁴¹² (1927) 39 CLR 222.

⁴¹³ 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) 12.

⁴¹⁴ *Property Law Act 1974* (Qld) s 20(2)(a). The word ‘Act’ under section 20 includes a provision of an Act: see *Acts Interpretation Act 1954* (Qld) s 20(1).

20.4. Recommendation

The Centre recommends section 18 of the PLA be repealed on basis that it has little or no application in modern trust law practice. Protective trusts are no longer commonly used and discretionary trusts are the preferred vehicle. Further, as stated above at paragraph 20.2, in Queensland, section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) expressly provides that the repeal or amendment of an Act does not revive anything not in force or existing at the time the repeal or amendment takes effect.⁴¹⁵ Finally, the operation of the section in respect of the alienation by bankruptcy is ousted by the Bankruptcy Act in any event.

RECOMMENDATION 21. Section 18 should be repealed.

⁴¹⁵ The word 'Act' under section 20 includes a provision of an Act: see *Acts Interpretation Act 1954* (Qld) s 20(1).

Part 3 – Freehold estates

21. Section 19 – Freehold estates capable of creation

21.1. Overview and purpose

19 Freehold estates capable of creation

After the commencement of this Act the following estates of freehold shall be capable of being created and, subject to this Act, of subsisting in land –

- (a) estate in fee simple;
- (b) estate for life or lives.

Prior to the introduction of the PLA the three principal forms of freehold estates in existence were:

- estates in fee simple;
- estates tail; and
- life estates.

Estates in fee simple and life estates were originally recognised at common law, while estates tail were created under a thirteenth century statute.⁴¹⁶ The QLRC recommended the abolition of estates tail (and quasi-entails) as those estates had ‘long since ceased to be of any legal or social significance’.⁴¹⁷ The effect of section 19 of the PLA is to limit the freehold estates that may be created to estates in fee simple and life estates in Queensland from 1 December 1974.⁴¹⁸

21.2. Issues with the section

The Centre has not identified any issues with the section. Although it is probably implicit as a result of the abolition of the other estates in sections 22 and 23 that the only remaining estates in Queensland are estates in fee simple or life estates, the retention of section 19 of the PLA puts the position beyond doubt.

21.3. Other jurisdictions

The Northern Territory is the only other jurisdiction that has a provision equivalent to section 19 of the PLA.⁴¹⁹

⁴¹⁶ The relevant statute was the *Statute De Donis Conditionalibus 1285*. The QLRC also recommended the repeal of this Statute in its report. 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) 12.

⁴¹⁷ 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) 12.

⁴¹⁸ 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) 13.

⁴¹⁹ See *Law of Property Act* (NT) s 18 which is in identical terms to section 19 of the *Property Law Act 1974* (Qld).

21.4. Recommendation

The Centre recommends retaining section 19 of the PLA. The QLS agrees that the section should be retained. The Centre also recommends the relocation of section 19 to 'Part 1: Preliminary'. This section will then sit with other sections that perform related functions, that is amended sections 22, 23 and 28 which make it clear that the section abolishes estates tail, quasi entails and the rule in *Shelley's Case*⁴²⁰ (discussed at paragraph 29). This recommendation is discussed fully at paragraph 29.4.

RECOMMENDATION 22. The effect of section 19 should be retained and relocated to 'Part 1: Preliminary'.

⁴²⁰ *Shelley's Case* (1581) 1 Co. Rep. 88b.

22. Section 20 – Incidents of tenure on grant in fee simple

22.1. Overview and purpose

20 Incidents of tenure on grant in fee simple

- (1) All tenures created by the Crown upon any grant of an estate in fee simple made after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown.
- (2) Where any quit rent issues to the Crown out of any land, or the residue of any quit rent issues to the Crown out of any land in respect of which quit rent has been apportioned or redeemed, such land or residue is released from quit rent.
- (3) In respect of property of any person dying intestate on or after 16 April 1968—
 - (a) escheat is abolished; and
 - (b) all such property, whether real or personal, shall, subject to this section, be distributed in the manner and to the person or persons provided by the *Succession Act 1981*, but subject to the provisions (including part 4) of that Act.
- (4) Subject to any other Act, property of any corporation dissolved after the commencement of this Act shall not escheat, but the Crown shall be entitled to and take as *bona vacantia* all such property, whether real or personal, as would apart from this Act be liable to escheat or pass to the Crown as *bona vacantia*.
- (5) Despite this section, where the Crown, or it is made to appear to the Minister that the Crown, has a right to any property, by escheat or devolution or as *bona vacantia*, on the death intestate of any person, whether the death occurred before or after the passing of this Act, the Minister, upon application being made for the waiver of that right, may by gazette notice waive such right on such terms (if any), whether for the payment of money or otherwise, in favour of any 1 or more of the following persons, whether belonging to the same or to different classes—
 - (a) any dependants, whether kindred or not, of the intestate;
 - (b) any other persons for whom the intestate might reasonably have been expected to make provision;
 - (c) any persons to whom the State would, if the State's title had been duly proved by inquisition, have the power to grant such property;
 - (d) any other persons having in the opinion of the Minister a just claim to the grant of the property;
 - (e) the trustees of any person as mentioned in paragraphs (a) to (d); as to the Minister seems reasonable.
- (6) Upon a waiver made under subsection (5), the right of the State so waived, subject to subsection (10), shall vest in the person or persons in favour of whom the waiver is made.
- (7) For the purpose of giving effect to any waiver under subsection (5) the Minister, by gazette notice or a further gazette notice, may do all or any of the following things—
 - (a) appoint such person as the Minister considers suitable to be administrator of the property of the person who has died intestate (***the deceased***);
 - (b) appoint a person to execute any conveyance or transfer or other document for the purpose of conveying or transferring under the terms of the waiver to the person or persons in whose favour the waiver is made the right of the State so waived;
 - (c) give directions that the Minister considers necessary or desirable to give effect to the waiver (including the terms of the waiver) and the directions are to be given effect.
- (8) The person appointed under subsection (7)(a) to be administrator may apply to the Supreme Court for a grant of letters of administration of the property of the deceased and such letters of administration may be granted accordingly.
- (8A) For the purposes of the grant of the letters of administration and the administration under the grant, the property in respect of which the right of the State has been waived shall be deemed to form part of the estate of the deceased to be administered under the terms of the waiver for the benefit of the person or persons in favour of whom the waiver is made.
- (9) A waiver under subsection (5) shall have the effect of a grant of the land or other property of whatever kind the subject of the waiver or any part of the waiver, and in the case of land in fee simple or for any

less estate, to the administrator appointed under this section or to any person or persons in favour of whom the waiver is made.

- (10) This section shall be subject to schedule 1 and all proceedings by way of writ of inquisition or otherwise may be had under that schedule.
- (11) Despite this section and that because of the death intestate of any person the State has a right to any property of that person by escheat or devolution or as *bona vacantia* the public trustee shall have and shall be deemed always to have had the same power—
- (a) to obtain from the court or otherwise under the *Public Curator Act 1915* or the *Public Trustee Act 1978* authority to administer the estate of such person; and
 - (b) to deal in due course of administration with the estate of such person; as the public trustee has in a case where the State has no such right.
- (12) In this section—
intestate has the meaning given by the *Succession Act 1981*, section 5.

The historical basis of English land law is the doctrine of tenure which provides that ultimate ownership of all land vests in the Crown.⁴²¹ In turn the Crown granted land upon certain conditions such as the payment of rent or the performance of service to the Crown.⁴²² The *Tenures Abolition Act 1660*⁴²³ abolished these incidents of tenure so that payments and services were not required in relation to grants of freehold land. However, two incidents of tenure, escheat and quit rent, remained.⁴²⁴ The 1660 Act also converted all free tenures into free and common socage and prohibited the creation of other types of tenure in the future.⁴²⁵

The position in Queensland prior to the introduction of the PLA was that:

... all alienated Crown land in Queensland was by virtue of the *Tenures Abolition Act 1660*, held in free and common socage, attended by the incidents of quit rent and escheat.⁴²⁶

Section 20 of the PLA operates in the following way:

- section 20(1) preserves the substance of the *Tenures Abolition Act 1660* by providing that all tenures created by the Crown upon any grant of estate in fee simple shall be taken to be in free and common socage. The section applies to any grants on or after 1 December 1975. The provision also removes any remaining incidents of tenure for the benefit of the Crown – that is, quit rent or escheat;

⁴²¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.PT.3.30].

⁴²² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.20.30].

⁴²³ *Tenures Abolition Act 1660* (12 Car 2, c 24).

⁴²⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.20.30]. Escheat is a feudal rule where real property would revert to the Crown if the owner of the property dies intestate or if the holder 'grossly breached his or her feudal bond.': see New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* Report 116 (2007) 176 FN 1; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [4 46].

⁴²⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.20.30].

⁴²⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.20.30].

- section 20(2) is intended to abolish any quit rent out of any land in Queensland and releases any land from further payment;⁴²⁷
- section 20(3) was included to address a ‘somewhat confused position’ which existed in Queensland in relation to persons dying intestate after 16 April 1968. The position under this section now is that in respect of property of any person dying after 16 April 1968 escheat is abolished⁴²⁸ and all affected property (real or personal) is to be distributed to the person or persons provided by the *Succession Act 1981* (Qld). The section has a retrospective effect;⁴²⁹
- section 20(4) effectively abolishes escheat upon the dissolution of any corporation on or after 1 December 1975. The section also provides that the Crown shall be entitled to take as *bona vacantia*⁴³⁰ all real or personal property which, but for the PLA, be liable to escheat or pass to the Crown as *bona vacantia*. The *Corporations Act 2001* (Cth) deals with the distribution of property where a registered company is deregistered.⁴³¹ Section 20(4) of the PLA clearly states that it is ‘subject to any other Act’ and the subsection will not apply to corporations registered under the *Corporations Act 2001* (Cth) provisions. The QLRC indicated that corporations not registered under *The Companies Acts* in force in 1973 remained subject to escheat on dissolution and their personalty passed to the Crown as *bona vacantia*;⁴³²
- section 20(5) has the effect that despite section 20, where the Crown has (or appears to have) a right to any property by escheat, devolution or as *bona vacantia* on the death of a person intestate, before or after 1 December 1975, it can waive that right in favour of certain specified categories of persons;
- section 20(6) provides that where the Crown waives the right specified in section 20(5), the right shall vest in the person or persons in whom favour the waiver is made. This section is subject to section 20(10) which provides that section 20 is subject to schedule 1 of the PLA which sets out the procedure for cases falling under section 20 including the writ of inquisition process;
- section 20(7) sets out the process for giving effect to any waiver by the Crown under section 20(5) including the requirement for a gazettal notice which may appoint an administrator of the property;
- the appointed administrator may apply to the Supreme Court for a grant of letters of administration of the property of the deceased and to have these granted;⁴³³
- section 20(11) retains the power of the Public Trustee to administer the estate of an intestate person. The section enables the property of the intestate person to vest in the Public Trustee for the purpose of administering it.⁴³⁴

⁴²⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.20.30].

⁴²⁸ *Property Law Act 1974* (Qld) s 20(3)(a).

⁴²⁹ *Property Law Act 1974* (Qld) s 20(3)(b). This subsection is subject to the provisions of the *Succession Act 1981* (Qld).

⁴³⁰ *Bona vacantia* means ‘ownerless goods’.

⁴³¹ See *Corporations Act 2001* (Cth) Part 5A.1.

⁴³² 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) 15-16.

⁴³³ *Property Law Act 1974* (Qld) s 20(8).

⁴³⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.20.150].

22.2. Issues with the section

Section 20 of the PLA still serves a current purpose and should be retained. However, the provision is complex and difficult to understand. The section can be divided into those provisions that deal with free and common socage and the abolition of quit rent or escheat in Queensland and those provisions that address the issue of persons dying intestate and *bona vacantia*. While the latter part also abolishes escheat, it is restricted to property of any person dying intestate on or after 16 April 1968. Section 20(4) of the PLA should be amended to expressly make it subject to the *Corporations Act 2001* (Cth). This will assist to avoid any possible confusion regarding the applicability of the PLA provision.

22.3. Other jurisdictions

22.3.1. Australia

The Northern Territory is the only other Australian jurisdiction which has provisions in the same form as section 20 of the PLA. Section 19 of the *Law of Property Act* (NT) is equivalent to sections 20(1) and (2) of the PLA. Section 20 of the Northern Territory Act includes equivalent provisions to section 20(3) to (11) of the PLA.

The Centre has not been able to locate any equivalent provisions to section 20 of the PLA in the property law legislation of other jurisdictions. In New South Wales, section 37 of the *Imperial Acts Application Act 1969* (NSW) is in similar form to section 20(1) of the PLA. Quit rents ceased to exist in New South Wales some time ago.⁴³⁵

All jurisdictions, apart from the Australian Capital Territory, have provisions which specify that where there is an estate with no one entitled to take possession, it passes to the Crown.⁴³⁶ These are primarily located in succession related legislation. In Victoria, *bona vacantia* is treated as ‘unclaimed property’ under the *Financial Management Act 1994* (Vic).⁴³⁷ A number of jurisdictions have in place procedures for the Crown’s waiver of its rights of *bona vacantia*.⁴³⁸

22.3.2. New Zealand

In New Zealand, section 57(1) of the *Property Law Act 2007* (NZ) provides:

A Crown grant of land, or a certificate of title or computer register having the force and effect of a Crown grant of land, whether issued before, on, or after 1 January 2008, for an estate in fee simple confers on the person named in the Crown grant or certificate of title or computer register a right of freehold tenure (free and common socage) without any incident of tenure for the benefit of the Crown.

22.4. Recommendation

The Centre recommends section 20 of the PLA be retained with some amendment to modernise and simplify the provision. In order to assist with clarity in relation to section 20, the Centre recommends dividing the section into two separate provisions dealing with the separate subject matter, similar to

⁴³⁵ See Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [4 46] and *Wills, Probate and Administration Act 1898* (NSW).

⁴³⁶ See for example *Administration and Probate Act 1958* (Vic) s 55; *Succession Act 2009* (NSW) s 136;

⁴³⁷ See Victorian Law Reform Commission, *Succession Laws Consultation Paper* (2013).

⁴³⁸ See for example, *Financial Management Act 1994* (Vic) s 58(3); *Law of Property Act 1936* (SA) s 115; *Succession Act 2009* (NSW) s 137.

the approach that was adopted in the Northern Territory. This re-drafting to modernise language and aid in interpretation should also extend to schedule 1 of the PLA (Procedure in cases of *bona vacantia*). The Centre further recommends the provisions be amended to expressly make it subject to the *Corporations Act 2001* (Cth). These recommendations are largely supported by the QLS.

RECOMMENDATION 23. Section 20 should be amend to modernise the language and to expressly state the provisions operate subject to any State or Commonwealth Act. The definition of ‘intestate’ should be relocated to the dictionary.

For example, using the Northern Territory provisions as a guide, section 20 could be drafted in the following manner:

Section [] – Incidents of tenure on grant in fee simple

- (1) On the commencement of this Act, any tenure created by the State on granting an estate in fee simple is to be taken to be in free and common socage without any incident of tenure for the benefit of the State.
- (2) If any quit rent issues to the State out of land, or the residue of any quit rent issues to the State out of land in respect of which quit rent has been apportioned or redeemed, the land or residue is released from quit rent.

Section [] – Abolition of escheat

- (1) In respect of the property of a person dying intestate on or after 16 April 1968:
 - (a) escheat is abolished; and
 - (b) all the property, whether real or personal, is, subject to this section and the *Succession Act 1981*, to be distributed in the manner and to the person or persons provided by that Act.
- (2) Subject to the *Corporations Act 2001* (Cth), the property of a corporation that is dissolved after the commencement of this Act is not to escheat, but the State is entitled to take as *bona vacantia* all the property, whether real or personal, that would, but for this Act, be liable to escheat or pass to the State as *bona vacantia*.
- (3) Despite this section, if the State, or it appears to the Minister that the State, has a right to any property by escheat or devolution or as *bona vacantia* on the death intestate of a person (whether the death occurred before or after the commencement of this Act), the Minister, on application being made for the waiver of that right, may, if he or she considers it reasonable to do so, by notice in the *Gazette* waive that right on the terms he or she thinks appropriate (which may include the payment of money) in favour of any of the following persons, whether belonging to the same or a different class:
 - (a) dependents, whether kindred or not, of the intestate;
 - (b) persons for whom the intestate might reasonably have been expected to make provision;
 - (c) persons to whom the State would, if the State's title had been proved by inquisition, have the power to grant the property;
 - (d) any other persons having, in the opinion of the Minister, a just claim to the grant of the property;
 - (e) trustees of persons referred to in paragraphs (a) to (d) inclusive.
- (4) Subject to subsection (8), on a right of the State being waived under subsection (3), the right vests in the person or persons in favour of whom the waiver is made.
- (5) For the purpose of giving effect to a waiver under subsection (3) the Minister may, by notice in the *Gazette* :

- (a) appoint a person the Minister considers suitable to be administrator of the property of the person who has died intestate (*the deceased*);
 - (b) appoint a person to execute a conveyance or other document for the purpose of conveying, under the terms of the waiver, the property the subject of the waiver to the person or persons in whose favour the waiver is made; or
 - (c) specify the terms of the waiver and give the directions that the Minister considers necessary or desirable to give effect to the waiver (which terms and directions are to be complied with).
- (6) The person appointed under subsection (5)(a) to be administrator may apply to the court for a grant of letters of administration of the property of the deceased, and the letters of administration may be granted accordingly.
- (7) For the purposes of the grant of the letters of administration and the administration under the grant, the property in respect of which the right of the State has been waived is to be taken to form part of the estate of the deceased to be administered under the terms of the waiver for the benefit of the person or persons in favour of whom the waiver is made.
- (8) A waiver under subsection (3) is to have the effect of a grant of the land or other property that is the subject of the waiver to the administrator appointed under this section or, if no administrator is appointed, to the person or persons in favour of whom the waiver is made.
- (9) This section is subject to schedule 1 and all proceedings that may be brought under that schedule.
- (10) Despite this section and the State's right, because of the death intestate of a person before the commencement of this Act, to any property of the person by escheat or devolution or as *bona vacantia*, the Public Trustee has and is to be taken to always have had (in addition to the powers of the Public Trustee under section 107 of the *Public Trustee Act 1978*) the same power:
- (a) to obtain from the court or otherwise under the *Uniform Civil Procedure Rules 1999* authority to administer the estate of the person; and
 - (b) to deal in due course of administration with the estate of the person, as the Public Trustee has in a case where the State has no right by escheat or devolution or as *bona vacantia*.

23. Section 21 – Alienation in fee simple

23.1. Overview and purpose

21 Alienation in fee simple

Land held of the Crown in fee simple may be assured in fee simple without licence and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect.

Section 21 of the PLA is essentially a re-enactment of a part of the Statute of *Quia Emptores 1290* (18 Edw 1, c 1, 2, 3). This statute was introduced in an attempt to address some of the complexities associated with the feudal tenure system, including the inability of a landholder to alienate land by transfer to a third party.⁴³⁹ The only form of alienation permitted was by a process called subinfeudation which enabled a landholder ‘to carve a smaller estate out of her or his holding and to grant it to another.’⁴⁴⁰ In that situation, the grantee became the tenant of the grantor not the lord that may have originally granted the tenure. These kinds of grants could occur many times over. Property could not be disposed of by will which meant that if the landholder died, his or her interest would pass by law to his or her heirs.⁴⁴¹

The Statute of *Quia Emptores 1290* applied only to grants in fee simple and altered the legal position in a number of ways including:

- enabling a person to alienate the whole or part of land without obtaining the consent of the relevant lord; and
- prohibiting subinfeudation with the effect that:

If A held the land from a lord X and alienated part or all of the land to B, B stood in A’s shoes: no new subtenancy between A and B could be created. A substitution only was permitted.⁴⁴²

The Statute was still in force in Queensland until the enactment of the PLA. Commentary on the Statute of *Quia Emptores 1290* suggests that:

This statute more than any other, including the *Tenures Abolition Act 1660*, was instrumental in dismantling the feudal landowning system and was directly responsible for the development of the situation existing today, that all land is held mediately or immediately from the Crown, which is the source of all title.⁴⁴³

The term ‘assurance’ in section 21 is defined to include a conveyance and a disposition made otherwise than by will.⁴⁴⁴

⁴³⁹ Adrian J Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 36-37 [2.15].

⁴⁴⁰ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [1.110]. That person then held the land by way of tenure from the ‘grantor’: [1.110].

⁴⁴¹ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [1.110].

⁴⁴² Adrian J Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 36-37 [2.15].

⁴⁴³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.21.30].

⁴⁴⁴ *Property Law Act 1974* (Qld) s 3, Sch 6 (definition of ‘assurance’).

23.2. Issues with the section

Section 21 of the PLA is essentially declaratory in nature and its ongoing utility is uncertain. The *Land Act 1994* (Qld) deals with the grant in fee simple of unallocated State land which is subject only to Crown reservations set out in that Act.⁴⁴⁵

Section 14 of the *Land Act 1994* (Qld) provides:

14 Governor in Council may grant land

- (1) The Governor in Council may grant, in fee simple, unallocated State land, an operational reserve, rail land or approved land.
- (2) The Governor in Council may also grant, in fee simple in trust, unallocated State land for use for a community purpose.
- (3) A grant under subsection (1) or (2) may not be made for land that adjoins a tidal boundary or right line tidal boundary of other land.
- (4) A grant of rail land under subsection (1) may be made only to the State.
- (5) Subsection (3) does not stop land that is on the seaward side of a tidal boundary or right line tidal boundary from being granted in fee simple if it is the subject of a reclamation mentioned in section 127.
- (6) A grant of approved land under subsection (1) may be made only to the person the subject of the application.
- (7) In this section—
approved land means land the subject of an application approved by the chief executive under the *Aboriginal Land Act 1991*, section 32C or the *Torres Strait Islander Land Act 1991*, section 28C.

Once granted, it is registered without any conditions under the *Land Title Act 1994* (Qld).

Section 47 of the *Land Title Act 1994* (Qld) provides:

47 Alienated State land to be registered

- (1) As soon as practicable after land is alienated from the State—
 - (a) if the deed of grant for the land takes effect on delivery to the grantee – notice that the deed has been delivered to the grantee must be given to the registrar; or
 - (b) otherwise—the deed of grant for the land must be lodged in the land registry.
- (2) The registrar must register the deed of grant by recording the particulars of the grant in the freehold land register.
- (3) On the registration of the deed of grant, an indefeasible title is created for the relevant lot.

In light of the provisions above, section 21 of the PLA has no function to serve.

⁴⁴⁵ *Land Act 1994* (Qld) s 14 and Ch 2, Pt 2.

23.3. Other jurisdictions

23.3.1. Australia

The Statute of *Quia Emptores 1290* was part of the law in Australia at settlement⁴⁴⁶ and remains the law.⁴⁴⁷ However, New South Wales,⁴⁴⁸ Victoria⁴⁴⁹ and the Northern Territory⁴⁵⁰ have repealed the statute but re-enacted the key aspects of the enactment.⁴⁵¹

The VLRC recommended in 2010 that section 18A of the *Property Law Act 1958* (Vic), the equivalent provision to section 21 of the PLA, be retained but that it be redrafted for clarity.⁴⁵² In this respect, the VLRC referred to the equivalent provision in New Zealand as a possible example.

23.3.2. New Zealand

Section 57 of the *Property Law Act 2007* (NZ) deals with the Statute of *Quia Emptores 1290* in the following way:

57. Feudal incidents of estate in fee simple abolished

- (1) A Crown grant of land, or a certificate of title or computer register having the force and effect of a Crown grant of land, whether issued before, on or after 1 January 2008, for an estate in fee simple confers on the person named in the Crown grant or the certificate of title or computer register a right of freehold tenure (free and common socage) without any incident of tenure for the benefit of the Crown.
- (2) An estate in fee simple is transferable, and has always been transferable, without the permission of the Crown or the need to make any payment to the Crown.
- (3) An instrument purporting to create, transfer, or assign an estate in fee simple in any land subject to the reservation to the person executing the instrument of an estate in fee simple (subinfeudation) continues to create, transfer, or assign an estate in fee simple without any such reservation.

Section 57 replaced the Statute of *Quia Emptores 1290* in New Zealand.⁴⁵³ The Law Commission (NZ) indicated that section 57 contained a number of declarations which had the following effect:

- all such estates granted by the Crown at any time confer freehold tenure without obligations in the form of services to the Crown;
- fee simple estates are freely transferable; and
- subinfeudation of an estate in fee simple is prohibited: therefore, any attempt to create a fee simple out of a fee simple operates as a conveyance of the fee simple without any reservation.⁴⁵⁴

⁴⁴⁶ *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 176 [3.3].

⁴⁴⁷ *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 176 [3.3].

⁴⁴⁸ *Imperial Acts Application Act 1969* (NSW) s 36.

⁴⁴⁹ *Property Law Act 1958* (Vic) s 18A.

⁴⁵⁰ *Law of Property Act* (NT) s 21.

⁴⁵¹ The Statute is no longer in force in the Australian Capital Territory: see *Imperial Acts (Substituted Provisions) Act 1986* (rep) Sch 2 Pt 1 which re-enacted the Statute, which was then repealed by the *Law Reform (Abolitions and Repeals) Act 1996* (rep). There is now only leasehold land in the Australian Capital Territory and as a result there was no requirement for the key provisions under the Statute.

⁴⁵² Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Vic) Final Report (2010) 125.

⁴⁵³ Law Commission (NZ), *A New Property Law Act Report 29* (1994) 270 [190].

⁴⁵⁴ Law Commission (NZ), *A New Property Law Act Report 29* (1994) 270 [190].

23.4. Recommendations

The Centre recommends section 21 of the PLA be repealed. In submissions received from the QLS, the repeal of the section was not supported. The QLS considered that the provision should be retained but redrafted. However, the Centre remains of the view that section 21 of the PLA has no ongoing utility, particularly given the effect of section 14 of the *Land Act 1994* (Qld) and section 47 of the *Land Title Act 1994* (Qld).

RECOMMENDATION 24. Section 21 should be repealed.

24. Section 22 – Abolition of estates tail

24.1. Overview and purpose

22 Abolition of estates tail

- (1) In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been enacted, would have created an estate tail (legal or equitable) in any land in favour of any person shall be deemed to create an estate in fee simple (legal or equitable as the case may be) in that land in favour of that person to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail and to the exclusion of all estates or interests in reversion on any such estate tail.
- (2) Where at or after the commencement of this Act any person is entitled, or would, but for subsection (1), be entitled, to an estate tail (legal or equitable) and whether in possession, reversion, or remainder, in any land, that person, subject to subsection (2A), shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in that land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of the estate tail and to the exclusion of all estates or interests in reversion on the estate tail.
- (2A) Where any such person is an infant and such land for any estate or interest would pass to any other person in the event of the death of the infant before attaining full age and without issue, then in such case, the infant shall be deemed to take an estate in fee simple with an executory limitation over of such estate or interest on the happening of such event in favour of such other person.
- (3) In this section —
estate tail includes that estate in fee into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred, also an estate in fee voidable or determinable by the entry of the issue in tail, but does not include the estate of a tenant in tail after possibility of issue extinct.
- (4) The registrar is authorised, on a request in the approved form, to make the recordings in the register necessary to give effect to this section.

Estates tail were estates of inheritance limited to lineal descendants.⁴⁵⁵ The estates have a long history but the *Statute De Donis Conditionalibus 1285* and its interpretation by the courts established some of the key features of estates tail. These features included:

- any succession to an estate tail was restricted to the original donee's lineal descendants; and
- the holder of an estate tail could not alienate for a period longer than his or her life.⁴⁵⁶

The estate tail essentially inhibited the alienation of land.⁴⁵⁷

The *Statute De Donis Conditionalibus 1285* was part of the law of New South Wales and, as a result, became part of the law of Queensland.⁴⁵⁸ The PLA enacted section 22 of the PLA in addition to abolishing the *Statute De Donis Conditionalibus 1285*.⁴⁵⁹

⁴⁵⁵ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 51 [2.100].

⁴⁵⁶ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.130]. For a detailed discussion of the history of estates tail see Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 50-52 [2.90]-[2.115]; Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.110]-6.140] and Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [9 01]-[9 14].

⁴⁵⁷ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 51 [2.100].

⁴⁵⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.22.90].

⁴⁵⁹ *Property Law Act 1974* (Qld) No. 76 (as enacted) s 3 Sch 6.

Section 22 of the PLA has the following effect:

- any instrument coming into operation on or after 1 December 1975 that would have granted a fee tail estate is deemed to grant an estate in fee simple. This section covers both legal and equitable estates in land;⁴⁶⁰
- existing legal or equitable estates tail are converted into fee simple estates (legal or equitable).⁴⁶¹

In the case of a minor, the remainder interest is preserved.⁴⁶²

24.2. Issues with the section

The QLRC, when considering the issue of estates tail, indicated that:

Estates tail have always been rare in Queensland, and, although a legal institution of long standing ought not to be too readily abolished, such estates have ceased to have any real social or legal utility.⁴⁶³

It is likely that the intent of section 22 of the PLA is to abolish estates tail in Queensland.⁴⁶⁴ The practical effect of the section is that since 1 December 1975 no new estates tail can be created in Queensland and any existing at that time should have automatically been converted under section 22(2) of the PLA to an estate in fee simple (equitable or legal). However, the section is framed in a way which deems an intended fee tail (coming into operation after 1 December 1975) to be a fee simple estate, rather than expressly providing that fee tails are abolished or that they cannot be created. Although it is highly unlikely that any person would want to create an estate in fee tail, the repeal of section 22 of the PLA, in the absence of a savings provision, may have an unintended consequence of allowing such estates to be created once the section is repealed.

In Queensland, section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) expressly provides that the repeal or amendment of an Act does not revive anything not in force or existing at the time the repeal or amendment takes effect.⁴⁶⁵ Further, it also does not affect the previous operation of the Act or anything suffered, done or begun under the Act⁴⁶⁶ or affect a right, privilege or liability acquired, accrued or incurred under the Act.⁴⁶⁷ The application of the *Acts Interpretation Act 1954* (Qld) may be displaced, wholly or partly, by a contrary intention appearing in any Act.⁴⁶⁸ If there is uncertainty regarding whether section 22 of the PLA is a provision of abolition, then repealing it may have an unintended consequence of facilitating the creation of estates tail in Queensland. This is because

⁴⁶⁰ *Property Law Act 1974* (Qld) s 22(1); Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.160].

⁴⁶¹ *Property Law Act 1974* (Qld) s 22(2).

⁴⁶² *Property Law 1974* (Qld) s 22(2A).

⁴⁶³ Queensland Law Reform Commission 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* Report No. 16 (1973) 17.

⁴⁶⁴ This is reflected in the heading 'Abolition of estates tail': *Acts Interpretation Act 1954* (Qld) s 35C(1).

⁴⁶⁵ *Property Law Act 1974* (Qld) s 20(2)(a). The word 'Act' under section 20 includes a provision of an Act: see *Acts Interpretation Act 1954* (Qld) s 20(1).

⁴⁶⁶ *Property Law Act 1974* (Qld) s 20(2)(b).

⁴⁶⁷ *Property Law Act 1974* (Qld) s 20(2)(c).

⁴⁶⁸ *Acts Interpretation Act 1954* (Qld) s 4.

section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) may not be relevant if estates tail still existed in Queensland but were simply deemed to be estates in fee simple.

The Law Commission (NZ) expressed concern that section 16 of the *Property Law Act 1952* (NZ), which was in similar terms to section 22 of the PLA, was not a clear abolition of the rule. This is discussed in more detail in paragraph 24.3.2. The approach adopted in New Zealand to address this concern was to include a provision in the new legislation which expressly abolishes the rule and clearly states that any estates which would have created an estate tail after the enactment of the new Act are deemed to create an estate in fee simple.⁴⁶⁹

24.3. Other jurisdictions

24.3.1. Australia

Estates tail cannot be created in New South Wales, Victoria, Western Australia and the Northern Territory.⁴⁷⁰ New South Wales, Northern Territory and Western Australia all have provisions which convert any estates tail to fee simple estates. Victoria does not have a provision which does this. In South Australia, estates tail remain and there is some suggestion that these estates may still be created over Torrens land and any remaining old system land.⁴⁷¹

The VLRC considered estates tail in its 2010 review of the *Property Law Act 1958* (Vic). It has not been possible to create an estate tail in Victoria since 1886 but, unlike New South Wales, Queensland, the Northern Territory and Western Australia, Victoria had not taken the additional step of converting existing fee tails to fee simple estates.⁴⁷² The VLRC noted that:

[T]he legislation in these jurisdictions operates to automatically convert the ‘base fee’ to a fee simple estate as there is still a possibility of issue to stop the reversion or remainder interests from vesting. However, the legislation protects the position of the vested future interests by excluding from the conversion provisions the estate of a tenant in tail where there is no possibility of a succeeding heir (or ‘after possibility of issue extinct’)⁴⁷³

The VLRC recommended the adoption of a model similar to Western Australia or Queensland. This recommendation has not been implemented in Victoria to date.⁴⁷⁴

⁴⁶⁹ *Property Law Act 2007* (NZ) s 58(1)(a) and s 22(2).

⁴⁷⁰ *Conveyancing Act 1919* (NSW) ss 19 and 19A; *Property Law Act 1958* (Vic) s 249; *Transfer of Land Statute Amendment Act 1885* (Vic); *Property Law Act 1969* (WA) s 23; *Law of Property Act* (NT) s 22.

⁴⁷¹ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 52 [2.110]. However, the *Estates Tail Act 1881* (SA) provides a mechanism ‘by which the holder of an estate tail can bar the entail’: [2.110]. Details on the position in Tasmania are set out in Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 52 [2.110].

⁴⁷² Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 80 [6.3]-[6.4].

⁴⁷³ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 82 [6.16].

⁴⁷⁴ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 82 [6.18].

24.3.2. New Zealand

Section 58(1)(a) of the *Property Law Act 2007* (NZ) abolishes estates tail in New Zealand and section 58(2) provides that any instrument which comes into operation on or after 1 January 1953 which would have created an estate tail are to be treated as creating an estate in fee simple. Under the previous property law legislation, section 16 was in a similar form to section 22 of the PLA.⁴⁷⁵ However, the Law Commission (NZ) was concerned that although section 16 abolished estates tail, it went on to 'make provision for what should happen if anyone thereafter tries to rely upon the abolished rule.'⁴⁷⁶ An express statement regarding the abolition of estates tail was included in section 58 to address this concern.

Section 58 of the *Property Law Act 2007* (NSW), as it is relevant to estates tail, provides:

58 Abolition of obsolete estates and rules

- (1) The following may not be created or done:
 - (a) Estates tail and estates wrong;
-
- (2) In an instrument coming into operation on or after 1 January 1953, words which, before that date, would have created an estate tail are to be treated as creating an estate in fee simple.
- (3)

24.4. Recommendation

The recommendation for section 22 is combined with recommendations for sections 23 and 28 as the sections all serve related functions and should be dealt with together. Sections 23 and 28 are addressed in detail at paragraph 25 and paragraph 29 respectively.

The Centre recommends amending sections 22, 23 and 28 in terms similar to the New Zealand provisions to make it clear that the section abolishes estates tail, quasi-entails and the rule in *Shelley's Case*.⁴⁷⁷ The Centre further recommends the relocation of the redrafted sections 22, 23 and 28 to 'Part 1: Preliminary'. These recommendations are largely supported by the QLS.

The proposed drafting for sections 22, 23 and 28 is set out at paragraph 29.4 below.

⁴⁷⁵ *Property Law Act 1952* (NZ) s 16.

⁴⁷⁶ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 43 [134].

⁴⁷⁷ *Shelley's Case* (1581) 1 Co. Rep. 88b.

25. Section 23 – Abolition of quasi-entails

25.1. Overview and purpose

23 Abolition of quasi-entails

In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been passed, would have created in favour of any person a quasi-entail (legal or equitable) in respect of any estate for life or lives of another or others shall be deemed to create in favour of that person an estate (legal or equitable as the case may be) for the life or lives of that other.

Life estates are another category of freehold estates. Two types of life estate exist - estates for the life of the tenant and an estate *pur autre vie*.⁴⁷⁸ The latter estate was one which was granted for the life of someone other than the actual tenant. A quasi-entail existed when an estate *pur autre vie* was limited to a person and the heirs of his body. The *Statute De Donis Conditionalibus 1285* was not applicable to these as an estate *pur autre vie* was not a hereditament.⁴⁷⁹ The QLRC justified the inclusion of section 23 in the PLA on the following grounds:

The prospect of a quasi-entail being created in Queensland is so remote as to be virtually capable of being ignored, but, as a measure of simplification of real property law, it is desirable that interests in this form cease to be capable of being created.⁴⁸⁰

The QLRC noted the ‘extreme rarity’ of the estate *pur autre vie* which in its view, made it ‘virtually certain’ that no quasi-entails existed in Queensland.⁴⁸¹ Pursuant to section 23 of the PLA, if an instrument came into operation after 1 December 1975 and would have created a legal or equitable quasi-entail in respect of any estate for life, that instrument will be deemed to create a legal or equitable estate for the life of that other person.⁴⁸² The QLRC did not see any need for a section which abolished any existing quasi-entails in Queensland because of their rarity and, to the extent some may exist, they would ‘expire in the natural course of events at most within the period of a life or lives after the passing of the Act.’⁴⁸³

⁴⁷⁸ Charles Harpum, et al, *Megarry & Wade The Law of Real Property* (Thomson, 7th ed, 2008) 77 [3-085].

⁴⁷⁹ Queensland Law Reform Commission 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* Report No. 16 (1973) 17.

⁴⁸⁰ Queensland Law Reform Commission 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* Report No. 16 (1973) 18.

⁴⁸¹ Queensland Law Reform Commission 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* Report No. 16 (1973) 18.

⁴⁸² The Queensland Law Reform Commission also identified two Imperial enactments directed at preventing the barring of quasi-entails: 32 Hen. 8, c. 31 (1540) and 14 Eliz. 1 c.8 (1572). These were also repealed by the *Property Law Act 1974* (Qld) as enacted, s 3(1) Sch 6.

⁴⁸³ Queensland Law Reform Commission 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* Report No. 16 (1973) 18.

25.2. Issues with the section

The QLRC recognised in 1973 the unlikelihood of quasi-entails existing or being created in Queensland and included section 23 of the PLA as a precaution only.⁴⁸⁴ It is highly doubtful that the position in Queensland has altered in the more than 40 years since the QLRC proposed section 23. The provision is drafted as a deeming provision in a similar way to section 22 of the PLA. The same uncertainty and issues identified in relation to estates tail applies in the case of section 23. However, one point of difference is the nature of quasi-entails and the unlikelihood that they are still able to be created in Queensland if section 23 is repealed.

25.3. Other jurisdictions

The Northern Territory appears to be the only other Australian jurisdiction which has an equivalent provision to section 23 of the PLA.

25.4. Recommendation

The recommendation for section 22 is combined with recommendations for sections 23 and 28 as the sections all serve related functions and should be dealt with together. Sections 23 and 28 are addressed in detail at paragraph 25 and paragraph 29 respectively.

The Centre recommends amending sections 22, 23 and 28 in terms similar to the New Zealand provisions to make it clear that the section abolishes estates tail, quasi-entails and the rule in *Shelley's Case*.⁴⁸⁵ The Centre further recommends the relocation of the redrafted sections 22, 23 and 28 to 'Part 1: Preliminary'. These recommendations are largely supported by the QLS.

The proposed drafting for sections 22, 23 and 28 is set out at paragraph 29.4 below.

⁴⁸⁴ Queensland Law Reform Commission 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* Report No. 16 (1973) 18.

⁴⁸⁵ *Shelley's Case* (1581) 1 Co. Rep. 88b.

26. Section 24 – Liability of life tenant for voluntary waste and Section 25 – Equitable Waste

26.1. Overview and purpose

24 Liability of life tenant for voluntary waste

- (1) A tenant for life or lives shall not commit voluntary waste.
- (2) Nothing in subsection (1) applies to any estate or tenancy without impeachment of waste, or affects any licence or other right to commit waste.
- (3) A tenant who infringes subsection (1) is liable in damages to the tenant's person in remainder or reversioner, but this section imposes no criminal liability.

25 Equitable waste

An estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate.

26.1.1. Section 24 – Voluntary waste

Historically, a number of restrictions were imposed on a life tenant in terms of how he or she could treat the land. The doctrine of waste developed to prevent a person with a limited interest from damaging the land in order to protect the interests of any individuals with a reversionary interest or an interest in the remainder.⁴⁸⁶ The term ‘voluntary waste’ is intended to cover the commission of positive acts which harm or damage the land or ‘spoil’ it in some way.⁴⁸⁷ Examples of voluntary waste include demolishing internal walls and fittings and, as a result, altering the ‘character’ of the property, cutting timber and opening and working on a mine on the relevant land.⁴⁸⁸ There was no common law rule in relation to waste and the *Statute of Marlborough 1267* 52 Henry III c 23 was introduced in order to impose liability on tenants for waste. Under this Statute, tenants were liable for waste, subject to the contrary intention in the relevant instrument conferring the interest.⁴⁸⁹

The *Statute of Marlborough 1267* was received as part of the law in New South Wales and was re-enacted in an amended form in section 32 of the *Imperial Acts Application Act 1969* (NSW).⁴⁹⁰ Section 24 of the PLA was modelled on the New South Wales provision. The effect of section 24 of the PLA is that a life tenant is not permitted to commit voluntary waste.⁴⁹¹ However, this prohibition does not apply where an estate or tenancy has a licence or other right to commit waste.⁴⁹² A life tenant is liable

⁴⁸⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.24.30]; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [10 28].

⁴⁸⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.24.30].

⁴⁸⁸ See Charles Harpum, et al, *Megarry & Wade: The Law of Real Property* (Thomson, 7th ed, 2008) 79-80 [3-094] and Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [10 31].

⁴⁸⁹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [10 29].

⁴⁹⁰ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [10 29]; see also the New South Wales Law Reform Commission, *Report on the Application of Imperial Acts* (LRC 4) (1967) 48-49.

⁴⁹¹ *Property Law Act 1974* (Qld) s 24(1).

⁴⁹² *Property Law Act 1974* (Qld) s 24(2).

in damages to his or her reversioner or remainderman.⁴⁹³ There is no criminal liability if a tenant contravenes section 24(1) of the PLA.⁴⁹⁴

26.1.2. Section 25 – Equitable Waste

Equitable waste is a serious category of waste which comprises acts of ‘flagrant or wanton destruction’ to the property.⁴⁹⁵ It arises only where a life tenant has permission to commit voluntary waste but the tenant causes flagrant destruction or damage to the property. In that situation, the tenant may be restrained in equity from committing acts which constitute equitable waste.⁴⁹⁶ Examples of acts of equitable waste include pulling down a house or destroying timber.⁴⁹⁷ An instrument conferring the relevant interest on the tenant can permit the tenant to commit equitable waste only if such permission is unequivocal.⁴⁹⁸

The QLRC indicated that the proposed section 25 was a ‘rescript’ of section 5(3) of the *Judicature Act 1876*.⁴⁹⁹ The inclusion of the section in the PLA was justified on the basis of completeness with the aim that all relevant statutory provisions relevant to life tenancies were included in a single Act.⁵⁰⁰

Under section 25 of the PLA a life tenant is not exempt from liability for equitable waste even if the instrument has granted the estate for life permitting the voluntary waste. This rule is subject to the relevant instrument expressly conferring such a right.

26.2. Issues with the sections

As life tenancies can still be created in Queensland, section 24 of the PLA still has a purpose and should remain. There is an equally valid case for the retention of section 25. However, section 25 of the PLA requires re-drafting for clarity. In New Zealand, the *Property Law Act 2007* (NZ) has adopted an approach of combining voluntary waste and equitable waste into a single provision. The advantage of this approach is that:

- waste for life tenants is addressed in a single section; and
- the interrelatedness of voluntary waste and equitable waste is clearly identified in the provision.

⁴⁹³ *Property Law Act 1974* (Qld) s 24(3).

⁴⁹⁴ *Property Law Act 1974* (Qld) s 24(3).

⁴⁹⁵ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [10 32]; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 25.30].

⁴⁹⁶ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [10 32].

⁴⁹⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.25.30].

⁴⁹⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.25.30]; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [10 32].

⁴⁹⁹ 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) 18.

⁵⁰⁰ 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) 18.

26.3. Other jurisdictions

26.3.1. Australia

26.3.1.1. Voluntary waste

As indicated above, the voluntary waste provision is re-enacted in New South Wales in section 32 of the *Imperial Acts Application Act 1969* (NSW). The Northern Territory has included a provision in the same terms as section 24 of the PLA in the *Law of Property Act* (NT).⁵⁰¹

26.3.1.2. Equitable waste

The majority of Australian jurisdictions each have a statutory provision in similar form to section 25 of the PLA.⁵⁰² Tasmania does not appear to have any legislation in place addressing equitable waste.

26.3.2. New Zealand

Section 68 of the *Property Law Act 2007* (NZ) provides:

68 Voluntary waste or equitable waste by life tenant or lessee

- (1) A life tenant or a lessee of land is liable in damages for the tort of voluntary waste and the tort of equitable waste to the person entitled to the reversion or remainder expectant on the estate for life or the lease.
- (2) Subsection (1) applies unless the liability is excluded by an express or implied term of the grant of the estate for life or the lease.
- (3) However, liability for equitable waste –
 - (a) is not excluded by the exclusion of waste or voluntary waste; but
 - (b) is excluded only if expressly excluded.

The *Property Law Act 1952* (NZ) (repealed) did not have a voluntary waste provision although it did have an equitable waste provision which was in similar form to section 25 of the PLA.⁵⁰³ The Law Commission (NZ) described the effect of the new section in the following way:

This new section renders a life tenant or a lessee of land liable to pay damages to the person entitled to the reversion or remainder for the torts of voluntary waste and equitable waste unless the grant of the life estate or lease provides otherwise.⁵⁰⁴

26.4. Recommendation

The Centre recommends sections 24 and 25 of the PLA be retained with amendment to clarify the effect of section 25. Combining the sections into a single provision in a way similar to the approach in section 68 of the *Property Law Act 2007* (NZ) is recommended. However, the New Zealand provisions apply also to lessees. The Centre does not recommend including lessees in the amended provision as lessees are dealt with elsewhere. The provision should be limited to life tenants only.

The QLS submitted that there should be a further section to address permissive waste, which it describes as ‘allowing a house to fall for want of necessary repairs’. The Centre is of the view that permissive waste in this regard is captured within the common law meaning of voluntary waste.

⁵⁰¹ *Law of Property Act* (NT) s 24.

⁵⁰² *Conveyancing Act 1919* (NSW) s 9; *Property Law Act 1958* (Vic) s 133; *Law of Property Act 1936* (SA) s 12; *Property Law Act 1969* (WA) s 17; *Civil Law (Property) Act 2006* (ACT) s 207; *Law of Property Act* (NT) s 25.

⁵⁰³ *Property Law Act 1952* (NZ) s 29.

⁵⁰⁴ Law Commission (NZ), *A New Property Law Act Report No. 29* (1994) 274 [211].

RECOMMENDATION 25. Amend sections 24 and 25 into a single provision in a way similar to the approach in section 68 of the *Property Law Act 2007* (NZ).

For example, using the New Zealand provisions as a guide, sections 24 and 25 could be combined into a single provision in the following manner:

Section [] Voluntary waste or equitable waste by life tenant

- (1) A life tenant is liable in damages for voluntary and equitable waste to the person entitled to the remainder expectant on the estate for life.
- (2) A life tenant may commit voluntary waste if it is permitted by an express or implied term in the instrument creating the estate.
- (3) A life tenant may commit equitable waste if it is permitted by an express term in the instrument creating the estate.

27. Section 26 – Recovery of property on determination of a life or lives

27.1. Overview and purpose

26 Recovery of property on determination of a life or lives

- (1) Every person having any estate or interest in any property determinable upon a life or lives who, after the determination of such life or lives without the express consent of the person next immediately entitled upon or after such determination, holds over or continues in possession of such property estate or interest, or of the rents, profits or income of the property, shall be liable in damages or to an account for such rents and profits, or both, to the person entitled to such property, estate, interest, rents, profits or income after the determination of such life or lives.
- (2) Where a reversion, remainder, or other estate or interest in any property is expectant upon the determination of a life or lives, the reversioner, person in remainder, or other person entitled to such reversion, remainder, or estate or interest may in any proceeding claiming relief on the basis that such life or lives has or have determined, adduce evidence of belief that such life or lives has or have been determined and of the grounds of such belief, and the court may in its discretion order that, unless the person or persons on whose life or lives such reversion, remainder, or other estate or interest is expectant is or are produced in court or is or are otherwise shown to be living, such person or persons shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.
- (3) If in such proceedings a person in respect of whom it is material that the person be shown to be living or not is shown to have remained beyond Australia, or otherwise absented himself or herself from the place in which if in Australia the person might be expected to be found, for the space of 7 years or upwards, such person, if not proved to be living, shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.
- (4) If in any such proceedings judgment has been given against the plaintiff, and afterwards such plaintiff brings subsequent proceedings upon the basis that such life has determined, the court may make an order staying such proceedings permanently or until further order or for such time as may be thought fit.
- (5) If in consequence of the judgment given in any such proceedings, any person having any estate or interest in any property determinable on such life or lives has been evicted from or deprived of any property or any estate or interest in the property, and afterwards it appears that such person or persons on whose life or lives such estate or interest depends is or are living or was or were living at the time of such eviction or deprivation, the court may give such relief as is appropriate in the circumstances.

As discussed in above, life estates are another category of freehold estates. Two types of life estate exist - estates for the life of the tenant and an estate *pur autre vie*.⁵⁰⁵ The latter estate was one which was granted for the life of someone other than the actual tenant. The *cestui que vie* is the person whose life is used to measure when an estate *pur autre vie* ends. However, as a result of circumstances of the time, there were difficulties in determining whether the *cestui que vie* was alive or dead. Imperial Statutes were introduced to address this issue.⁵⁰⁶

The object of section 26 of the PLA has been described as allowing remaindermen to ‘prove the death of the *cestui que vie* in order that they may show that the life estate has determined and that they are entitled to possession.’⁵⁰⁷ The section operates as follows:

⁵⁰⁵ Charles Harpum, et al, *Megarry & Wade The Law of Real Property* (Thomson, 7th ed, 2008) 77 [3-085].

⁵⁰⁶ See *Cestui que Vie Acts (18 & 19) Car. 2, c 11 of 1666 and 6 Anne c 72 (or c 18) of 1707*.

⁵⁰⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.26.30].

- if a person who has an estate *pur autre vie* holds over when the other dies, the remainderman immediately entitled to the property is provided with a cause of action in damages for an account of rent and profits or both;⁵⁰⁸
- the person entitled to the estate upon the determination of the estate may adduce evidence to the court of the death of the *cestui que vie*. The court has the discretion to order that the relevant person is dead, unless the person is produced in court or otherwise shown to be living;⁵⁰⁹
- the court is entitled to draw a presumption of death if the *cestui que vie* is absent for a period of seven years;⁵¹⁰
- a court is able to stay a subsequent action because a life estate has determined;⁵¹¹
- the court can give relief as appropriate in the circumstances if a person presumed dead proves to be alive.⁵¹²

27.2. Issues with the section

The QLRC in its discussion of the proposed section 26 noted that estates *pur autre vie* were very rare in Queensland.⁵¹³ Despite this, the QLRC still thought it was ‘advisable’ to adopt the clause. The position now has not altered significantly. Life estates, including estates *pur autre vie*, are capable of being created in Queensland. While section 26 does have ongoing utility, the language used is archaic and difficult to understand.

Section 26(4) is particularly problematic. The effect of the subsection is difficult to understand but appears to be:

- the person entitled to possession of the land brings an action to recover the land on the basis that he believes the *cestui que vie* has died;
- that action is not successful;
- the person entitled to possession of the land brings a fresh action to recover the land, perhaps because he now has more or better evidence of the death of the *cestui que vie*; then
- the court has the power to stay the second proceedings on the basis that the person was not successful at the first proceeding.

⁵⁰⁸ *Property Law Act 1974* (Qld) s 26(1).

⁵⁰⁹ *Property Law Act 1974* (Qld) s 26(2).

⁵¹⁰ *Property Law Act 1974* (Qld) s 26(3).

⁵¹¹ *Property Law Act 1974* (Qld) s 26(4) and S Robinson, *The Property Law Act Victoria* (Lawbook Co, 1992) 506.

⁵¹² *Property Law Act 1974* (Qld) s 26(5).

⁵¹³ 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) 18.

It is uncertain why the section would be cast in such terms. It seems that the effect of the provision is to give the court the power to ‘punish’ the applicant for not succeeding in court on the first application. This is especially difficult to understand considering that when the provision was originally drafted, over two centuries ago, it was much harder to prove the death of a person. Further, a court has an inherent jurisdiction to hear, stay or dismiss proceedings. The Centre is therefore of the view that subsection (4) is both undesirable and unnecessary.

27.3. Other jurisdictions

Section 26 of the PLA was adopted from section 38 of the *Imperial Acts Application Act 1969* (NSW) which remains in force in New South Wales.

In Victoria, section 274 of the *Property Law Act 1958* (Vic) addresses the issue of holding over by a life tenant and provides that the relevant person shall be liable in damages or to an account of rents and profits. The VLRC, as part of the review into the *Property Law Act 1958* (Vic), recommended that the section be retained but simplified.⁵¹⁴

27.4. Recommendation

The Centre recommends section 26 of the PLA be retained but amended to provide simplified language to replace the current language which is complex and archaic. This approach is supported by the QLS.

Although it is highly unlikely that an estate *pur autre vie* would be created, it is still an available form of life estate and therefore the effect of the section should be retained, save and except for subsection (4).

The Centre recommends that the effect of section 26(4) be removed for policy reasons of fairness. Further, a court has an inherent justification to hear, stay or dismiss proceedings. The Centre therefore is of the view that subsection (4) is both undesirable and unnecessary.

The Centre further recommends that the effect of subsection (3) should be retained and the timeframe of seven years continues to be appropriate. Seven years remains the common law standard after which the court is likely to grant an application for a declaration of death.⁵¹⁵

⁵¹⁴ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 146. The Commission also noted in its recommendation that the: ‘provision applies in the rare case of an overholding by a legal life tenant of a life estate *pur autre vie*. If, as we propose, all life estates will in future exist in equity only, (recommendation 32) the provision will have transitional application only, to legal life estates already existing’ [at 146].

⁵¹⁵ *Axon v Axon* (1937) 59 CLR 395; Anna Gunning-Stevenson, Sara Ser and Valentine Dubois, *Gone Missing*, (Alternative Law Journal 40(1)) 2015.

RECOMMENDATION 26. Section 26 should be retained with modernised language.

The elements of the section that are to be included in the redrafted provision are:

Where:

- the estate is an estate *pur autre vie*, that is – an estate held for the duration of the life or lives of another person or persons;
- the person or persons for whose life/lives the estate is held die/dies; and
- the person entitled to the estate upon the death of that person or persons (the remainderman) immediately becomes entitled to the property;

Then:

- the person entitled to the estate can bring an action to:
 - recover possession of the property;
 - damages for account of rent and/or profits.

In any action by the remainderman:

- the remainderman may adduce evidence that the person or persons for whose life/lives the estate is held has/have died;
- the holder of the estate *pur autre vie* may produce in court the person or persons for whose life/lives the estate is held, or other evidence that he or she, or they, are living; and
- where the person or persons for whose life/lives the estate is/are held is absent for a period of seven years or more, the court is entitled to draw a presumption that that person or persons has/have died.

Subsequently:

- where the estate *pur autre vie* is brought to an end by court order on the basis that the *cestui que vie* has died, and it transpires that the *cestui que vie* is in fact alive, the court may order such relief as it sees fit to the person who had the estate *pur autre vie*.

28. Section 27 – Penalty for holding over by life tenant

28.1. Overview and purpose

27 Penalty for holding over by life tenant

Where any tenant for life or lives or person who is in or comes into possession of any land by, from or under or by collusion with such tenant, wilfully holds over any land after—

- (a) termination of the tenancy; and
- (b) after demand has been made and notice in writing given for the delivery of possession of the land by the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;

then, the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of the land, be liable to the person kept out of possession at the rate of double the yearly value of the land so detained for as long as the land shall have been so detained, to be recovered by action in a court of competent jurisdiction.

Section 27 of the PLA originated from section 1 of the *Landlord and Tenant Act 1730* which was held to apply in Queensland.⁵¹⁶ Section 1 of that Act applied also to yearly tenants which is now covered in section 138 of the PLA, as discussed at paragraph 151. The QLRC decided to separate the holding over provisions relevant to life tenancies and yearly tenancies on the basis that a life tenancy is a freehold estate and more appropriately addressed in the freehold land part of the PLA.⁵¹⁷ The purpose of section 1 of the *Landlord and Tenant Act 1730* was to 'discourage tenants from holding over after determination of their lease or tenancy by penalising them at the rate double the yearly value of the premises.'⁵¹⁸

Section 27 of the PLA applies where there is a life tenancy and the life tenant wilfully holds over any land after:

- the termination of the tenancy; and⁵¹⁹
- after demand has been made and notice in writing given for delivery of possession by the remainderman or reversioner or his or her lawfully authorised agent.⁵²⁰

The effect of the section is that where the threshold matters above are satisfied, the life tenant is liable during the period of holding over to the remainderman or reversioner or lawfully authorised agent at double the yearly value of the land.

⁵¹⁶ See *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28 and *Trivett v Hurst* [1937] St R Qd 265 referred to 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) 90-91.

⁵¹⁷ 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) 19.

⁵¹⁸ 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) 90.

⁵¹⁹ *Property Law Act 1974* (Qld) s 27(a).

⁵²⁰ *Property Law Act 1974* (Qld) s 27(b).

28.2. Issues with the section

A number of the issues with section 27 of the PLA overlap with the matters raised in the discussion of section 138 of the PLA. The provisions are framed in similar terms but apply to different types of tenancies. These issues are discussed in further detail below.

28.2.1. Establishing that the holding over was ‘wilful’

Determining whether there has been a ‘wilful’ holding over can be difficult as it is difficult to obtain evidence that establishes ‘wilfulness’ on the part of the tenant. For example, it is arguably simple to raise a bona fide right to possession through other mechanisms such as obtaining legal advice to that effect. This occurred in the case of *Grainger v Williams*⁵²¹ where the Supreme Court considered the equivalent provision to section 138 of the PLA found in the Imperial Statute, 4 Geo 2, c 28 (1731), section 1 in force in Western Australian. In that case the tenant allegedly ‘holding over’ had received legal advice which led them to believe that they had a right to do so.⁵²² Simmonds J concluded on that basis that there could not be wilfulness in those circumstances and that the claim under the Imperial Statute could not be justified.⁵²³

The phrase ‘a contumacious act of the lessee’ has been used by the courts to describe what is meant by ‘wilful’.⁵²⁴ However, Paull J in *French v Elliott*⁵²⁵ considered the full term ‘wilfully holds over’ and noted:

It has been held that ‘wilfully’ means ‘contumaciously’, but I can see no reason why the old English word ‘wilfully’ does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumacious tenant. It deals only with the moment of time when the tenancy comes to end. At that moment of time a tenant may say ‘I shall stay on. I think I have the right to do so.’ His staying on is not wilful. On the other hand, a tenant may say: ‘I will stay on, although I know I have no right to do so.’ That is will, and well illustrates the now sometimes forgotten distinction between ‘I shall’ and the insistent ‘I will’. In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place.⁵²⁶

Ultimately, whether or not the holding over of a life tenant is ‘wilful’ will depend on the relevant factual circumstances of each individual case.

28.2.2. Calculation of ‘double the yearly value of the land’

There have also been difficulties associated with determining how ‘double the yearly value of the land’ is calculated. The phrase has been interpreted in a number of different ways. The first approach is that it means double the value of the premium on the lease – that is, what the lease is worth.⁵²⁷ The alternative approach is to calculate it as double the yearly rent.⁵²⁸ A more recent approach is set out

⁵²¹ [2005] WASC 286.

⁵²² *Grainger v Williams* [2005] WASC 286, [22].

⁵²³ *Grainger v Williams* [2005] WASC 286, [23].

⁵²⁴ *Trivett v Hurst* [1937] St R Qd 265, 271.

⁵²⁵ *French v Elliott* [1959] 3 All ER 886, 874. This case considered section 1 of the *Landlord and Tenant Act 1730* (the equivalent provision to section 138 of the PLA).

⁵²⁶ *French v Elliott* [1959] 3 All ER 886, 874.

⁵²⁷ *Trivett v Hurst* [1937] St R Qd 265 at 275.

⁵²⁸ *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28.

in the decision of Simmonds J in *Grainger v Williams*.⁵²⁹ Although the relevant provision of the Imperial statute was held not to apply, Simmonds J still considered the issue of the 'yearly value' on the basis that some of the issues that arose were also relevant to the alternative claims made for damages for trespass and for mesne profits.⁵³⁰ Simmond J's approach is described below:

That 'double yearly value' was in the nature of damages which might have been received for 'the use of the freehold and everything connected with it during the time possession was withheld' (at [25]) equating the damages concept with mesne profits being damages for trespass payable by a lessee in possession after forfeiture of a lease (at [52]).⁵³¹

28.2.3. Alternative remedy available

A person in possession of land not paying rent or remaining upon land without a legal right would be a trespasser and liable to damages for trespass which is generally calculated at the rate of the rental.⁵³² Those damages can only be claimed from the time when the 'defendant ceased to hold as tenant and became a trespasser.'⁵³³ The Centre has not located any cases dealing with section 27 of the PLA.

28.3. Other jurisdictions

28.3.1. Australia

Tasmania and the Northern Territory have provisions which address the issue of life tenants holding over. Section 9 of the *Landlord Tenant Act 1935* (Tas) is framed in a similar way to the existing section 27 of the PLA, although it extends to tenancies of years also. Under the Northern Territory provision in section 27(1) of the *Law of Property Act* (NT) the penalty for holding over is calculated at double the market rent for the land detained.

28.4. Recommendation

Section 27 of the PLA still has ongoing relevance as life estates can still be created and still exist in Queensland. The Centre recommends making some significant amendments to clarify the operation of the section and to change the rules with respect to:

- over the 'wilful' element of the holding over;
- how much rent is recoverable in the event of a holding; and
- recovery of the amount as a debt.

These concerns are similar to those raised in relation to section 138 of the PLA, which is discussed below at paragraph 151.

⁵²⁹ *Grainger v Williams* [2005] WASC 286.

⁵³⁰ *Grainger v Williams* [2005] WASC 286 at [24].

⁵³¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace Wallace (eds) (looseleaf) Thomson Reuters [PLA.27.60].

⁵³² Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) [2.6], [17.17]. Damages for trespass are known as 'mesne profits'.

⁵³³ Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) [17.17]. See also *Grainger v Williams* [2005] WASC 286, [57].

28.4.1. Recommendations with respect to ‘wilful’

The Centre recommends removing the word ‘wilfully’ from section 27 of the PLA. As discussed above at paragraph 28.2.1, determining whether the holding over has been ‘wilful’ is difficult from an evidentiary perspective. Putting the onus on the person entitled to possession of the property to prove that a holding over was ‘wilful’ may raise some policy considerations with respect to the fairness of the operation of the section. The concept of ‘wilful’ is so subject as to put an unreasonable burden on the person entitled to possession of the property. On that basis the Centre recommends the element of ‘wilfulness’ be removed. This approach is supported by the QLS.

28.4.2. Recommendations with respect to ‘double the yearly value’

The Centre recommends amending section 27 of the PLA so that the amount recoverable is the market rent only. The lack of clarity in the current drafting about how ‘double the yearly value’ should be calculated is problematic. A further problem with this concept is that ‘double the yearly value’ does not reflect the actual loss incurred by the person entitled to possession after the lease is determined. The actual loss, in most circumstances, will be the market rent that person could have received but for the holding over by the life tenant. There is therefore an argument that ‘double the yearly value’ is a penalty because it does not reflect the actual loss. The QLS agrees that the calculation seems arbitrary and may be unjust. Further, the QLS agrees that the calculation of the compensation should be based on loss or detriment.

28.4.3. Recommendations with respect to amount recoverable as a debt

The Centre recommends amending section 27 of the PLA to specify that the amount recoverable from the holding over can be recovered as a debt. This will assist the person entitled to possession of the property in any court proceedings as the amount can be claimed as liquidated damages, and the amount does not have to be proved in court.

28.4.4. Recommendations with respect to interaction with section 138

The Centre recommends that any amendment to this section be consistent with amendments made to section 138 of the PLA to ensure a consistent approach to penalties for holding over within the Act. However, note that the Centre has recommended section 138 of the PLA be repealed on the basis that it is out of step with current commercial leasing practices so this will only be a consideration if it is decided that the section should be retained.

RECOMMENDATION 27. Section 27 should be retained with modernised language and amended to:

- remove the reference to ‘wilful’;
- change the rate of rent to be recovered to ‘market rent’;
- specify that the amount owed as a result of the holding over can be recovered as a debt.

For example, section 27 could be amended in the following manner:

Section [27] Penalty for holding over by life tenant

- (1) Where any tenant for life or lives or person who is in or comes into possession of any land by, from or under or by collusion with such tenant, holds over any land after—
 - (a) termination of the tenancy; and
 - (b) demand has been made and notice in writing given for the delivery of possession of the land by the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;then, the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of the land, be liable to the person kept out of possession at the rate of market rent of the land so detained for as long as the land shall have been so detained, to be recovered by action in a court of competent jurisdiction.
- (2) The calculation of the market rent for the land will, unless otherwise agreed by the parties, be determined by a suitably qualified valuer acting as an expert appointed by the parties and if the parties cannot agree then appointed by the President of the Law Society.
- (3) The amount of market rent for the land as determined according to subsection (2) is recoverable as a debt.

29. Section 28 – Abolition of the rule in *Shelley's Case*

29.1. Overview and purpose

28 Abolition of the rule in *Shelley's Case*

Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the rule in *Shelley's Case*, and independently of section 22, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate as words of purchase and not of limitation, and shall be construed and have effect accordingly.

The rule in *Shelley's Case*⁵³⁴ is a common law rule which applied to dispositions by deed and will.⁵³⁵ The rule arose where there was a disposition of freehold estate followed by a limitation, mediately or immediately in the following terms:

Situation 1: To A for life, remainder to his heirs.

Situation 2: To A for life, remainder to the heirs of his body.⁵³⁶

The effect of the rule in Situation 1 was that the transaction created a fee simple in A and in Situation 2 a fee tail in A was created. This occurred despite the intention of the person making the grant that A in both situations was only obtaining a life estate and that the remainder in fee simple or fee tail was to be vested in A's heirs.⁵³⁷ As a result of the rule, the heirs did not acquire any interest and the words giving them an interest were treated as 'words of limitation and not of purchase.'⁵³⁸

The QLRC acknowledged there had been no decisions in Queensland considering the rule in *Shelley's Case* as at 1973 and suggested the absence of decisions was partly due to the prevalence of registered titles in Queensland.⁵³⁹ However, the QLRC held concerns about the correctness of the view that the rule in *Shelley's Case* did not apply to a system of registered titles. The QLRC identified the following three situations in which the rule may apply to registered land:

⁵³⁴ *Shelley's Case* (1581) 1 Co. Rep. 88b.

⁵³⁵ Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 59-60 [2.200].

⁵³⁶ Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 59-60 [2.200].

⁵³⁷ Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 59-60 [2.200].

⁵³⁸ 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) 19.

⁵³⁹ 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) 19.

- (1) to a grant or transfer inter vivos if technical words of limitation, even though unnecessary, were in fact used in the instrument of transfer;
- (2) to a like disposition by will of land under the Acts, since transmission has to be entered in the register in accordance with the legal effect of the testamentary disposition;
- (3) to a disposition of the equitable estate in land effected prior to 1952 by means of a schedule of trusts declared by the schedule or by separate deed and deposited with a nomination of trustees, since the latter is not an 'instrument' within the meaning of The Real Property Acts, with the consequence that, prior to 1952, amendment of the Acts introducing s 15A, technical words of limitation were necessary for the creation of equitable estates in land even if under the Act.⁵⁴⁰

The QLRC noted the alternative view that the rule in *Shelley's Case* could be abrogated by the Real Property Acts but considered that the abolition of the rule in the PLA was preferable to resolve any possible issues.

Section 28 of the PLA applies to any instrument which comes into operation on or after 1 December 1975. An 'instrument' is defined in the PLA to include a will or a deed.⁵⁴¹ The effect of the section is to treat words of limitation, such as 'remainder to his heir' or 'remainder to the heirs of his body', as words of purchase. This means that in both Situations 1 and 2 above, A will take a life interest only and the remainder to the heir or heir of his body who on the death of A intestate would be beneficially entitled to the interest. Section 28 of the PLA is modelled on the equivalent Victorian provision.⁵⁴²

29.2. Issues with the section

The QLRC proposed section 28 of the PLA for the purpose of abolishing the rule in *Shelley's Case*.⁵⁴³ The effect of the section is that from 1 December 1975, any instrument containing words of limitation will be treated as words of purchase which means that the effect of *Shelley's Case* is abrogated. However, if the section is repealed, it is not clear whether the current drafting of section 28 potentially leaves open the possibility that the rule in *Shelley's Case* continues after the repeal. In Queensland, section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) expressly provides that the repeal or amendment of an Act does not revive anything not in force or existing at the time the repeal or amendment takes effect.⁵⁴⁴ The issue is whether section 28 is a provision of abolition or simply modifies the common law. If it is the latter, there is an argument that the rule in *Shelley's Case* remained in force in Queensland and section 20(2)(a) of the PLA may not be applicable. The repeal would not, of course, affect the previous operation of the Act or anything suffered, done or begun under the Act.⁵⁴⁵ However, there is a remote possibility that it could produce an unintended

⁵⁴⁰ 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) 19-20.

⁵⁴¹ *Property Law Act 1974* (Qld) s 3, Sch 6 (definition of 'instrument').

⁵⁴² *Property Law Act 1958* (Vic) s 130.

⁵⁴³ 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) 20.

⁵⁴⁴ *Property Law Act 1974* (Qld) s 20(2)(a). The word 'Act' under section 20 includes a provision of an Act: see *Acts Interpretation Act 1954* (Qld) s 20(1).

⁵⁴⁵ *Acts Interpretation Act 1954* (Qld) s 20(2)(b).

consequence in relation to the continued application of the rule in *Shelley's Case* if any instruments created after the repeal of section 28 included words of limitation.

29.3. Other jurisdictions

29.3.1. Australia

New South Wales, Victoria, Western Australia and the Northern Territory have legislative provisions in place which effectively reverse the rule in *Shelley's Case*.⁵⁴⁶ Tasmania, South Australia and the Australian Capital Territory do not have any legislative provisions addressing the rule in *Shelley's Case*.

The VLRC in its review of the *Property Law Act 1958* (Vic) in 2010 recommended the retention (with some amendments) of section 130, which deals with the rule in *Shelley's Case*.⁵⁴⁷ The VLRC indicated that the retention of the section should be for old system land only and indicated that the rule never applied to registered land.⁵⁴⁸ The VLRC does not provide any rationale for the retention of the section.

29.3.2. New Zealand

Section 58(3) of the *Property Law Act 2007* (NZ) is the New Zealand equivalent of section 28 of the PLA and provides:

(3) Words in an instrument which, but for the abolition of the rule of law known as the rule in Shelley's case (by section 5(1)(a) of the Property Law Amendment Act 1951 and section 22 of the Property Law Act 1952), would have operated to give a person an interest in fee simple are to be treated as words of purchase and not of limitation.

Prior to the enactment of the 2007 property legislation, section 22 of the *Property Law Act 1952* (NZ) addressed the issue of the rule in *Shelley's Case*. However, the Law Commission (NZ) in its review of the 1952 Act was concerned that section 22 was not framed as a direct abolition, despite the section heading.⁵⁴⁹ In the case of section 22 the Commission noted that although the section may have abolished the rule, it went on to make provision for 'what would happen if anyone thereafter tries to rely upon the abolished rule.' In order to address this, the Law Commission suggested restating the abolition in direct language followed by a 'restatement of the consequential provisions.'⁵⁵⁰ Section 58(3) of the *Property Law Act 2007* (NZ) reflects the Law Commission's suggested approach.

⁵⁴⁶ *Conveyancing Act 1919* (NSW) s 17; *Property Law Act 1958* (Vic) s 130; *Property Law Act 1969* (WA) s 27; *Law of Property Act* (NT) s 28.

⁵⁴⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 135.

⁵⁴⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 135.

⁵⁴⁹ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 43 [134].

⁵⁵⁰ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 43 [134].

29.4. Recommendation

The Centre recommends:

- retaining section 19 with modernised language;
- amending sections 22 (estates tail), 23 (quasi-entails) and 28 (the rule in *Shelley's Case*) to retain the effect of the provisions but condensed into one section; and
- relocating section 19, along with the amended and combined section 22, 23 and 28 to 'Part 1: Preliminary' of the PLA.

As discussed above at paragraph 24.2 and paragraph 25.2, there is uncertainty whether the effect of sections 22 and 23 of the PLA is to abolish estates tail and quasi-entails in Queensland. These provisions have prevented the creation of these estates by deeming any intended estates tail or quasi-entails to be estates in fee simple. However, the sections do not specifically abolish these types of estates. In the circumstances, the Centre recommends adopting an approach similar to New Zealand which clearly abolishes estates tail and quasi entails to avoid any uncertainty regarding the position in Queensland.

The Centre further recommends that this approach is adopted in relation to section 28 (abolition of the rule in *Shelley's Case*) to ensure consistency in relation to the removal of common law rules relating to freehold land. While section 20(2)(b) of the *Acts Interpretation Act 1954* (Qld) arguably preserves the effect of these sections if they are repealed, in any event the Centre has provided example drafting to remove any doubt about the types of estates that are capable of creation in Queensland. This approach is largely supported by the QLS.

RECOMMENDATION 28. Sections 22, 23 and 28 should be amended to make it clear that the section abolishes estates tail, quasi-entails and the rule in *Shelley's Case*. Relocate the redrafted sections 22, 23 and 28 to 'Part 1: Preliminary'.

For example, using the New Zealand provisions as a guide, a new provision replacing sections 22, 23 and 28 could be drafted in the following manner:

Section [] Abolition of obsolete estates and rules

- (1) To remove all doubt the following may not be created or done:
 - (a) estates tail;
 - (b) quasi-entails.
- (2) In an instrument coming into operation on or after 1 December 1975, words which, before that date, would have created an estate tail are to be treated as creating an estate in fee simple.
- (3) The rule known as the rule in *Shelley's Case* is abolished.

30. Section 29 – Words of limitation

30.1. Overview and purpose

29 Words of limitation

- (1) A disposition of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the donee the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.
- (2) A disposition of freehold land to a corporation sole by the donor's corporate designation without the word 'successors' shall pass to the corporation the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.
- (3) This section applies to dispositions effected after the commencement of this Act.

At common law, specific words were required to be used in order to create a fee simple estate. The word required was 'heirs' after the grantee's name – that is, 'to A and his heirs'. These were known as words of limitation and if the word 'and his heirs' were not added, A only received a life estate, rather than an estate in fee simple.⁵⁵¹

In Queensland, prior to 1 December 1975 these precise words were required to transfer the fee simple in old system land.⁵⁵² An issue arose in Queensland in relation to nominations of trustees and following a decision of the Supreme Court in 1951, the *Real Property Acts* were amended to insert section 15A which was partly based on section 60 of the English *Law of Property Act 1925*.⁵⁵³ That provision applied to conveyances of unregistered land and registered or unregistered declarations of trust or dispositions of equitable interests in land. The QLRC noted that the inclusion of unregistered land made the *Real Property Acts* 'a somewhat inappropriate place in which to include the provision' and recommended that it be repealed and transferred to the proposed new property law legislation.⁵⁵⁴ The QLRC preferred the approach in section 60 of the *Property Law Act 1958* (Vic) over the English provision.

Section 29 of the PLA now enables the transfer of the whole interest of the grantor, irrespective of whether the words of limitation are used, subject to a contrary intention appearing in the disposition.⁵⁵⁵ The section only applies to dispositions effected after 1 December 1975.⁵⁵⁶ In the case of a disposition of freehold land to a corporation sole, prior to the enactment of section 29(2), the

⁵⁵¹ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 55-56 [2.165].

⁵⁵² Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.90].

⁵⁵³ 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) 20-21 for further details regarding the issue and the case which led to the amendment of the Real Property Acts.

⁵⁵⁴ 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) 21.

⁵⁵⁵ The term 'disposition' is defined in the PLA to include a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will: *Property Law Act 1974* (Qld) s 3, Sch 6.

⁵⁵⁶ *Property Law Act 1974* (Qld) s 29(3).

words 'and his successors' were required, otherwise only a life estate was passed.⁵⁵⁷ Section 29(2) of the PLA has the effect that such words are not necessary in order to pass the whole interest in the relevant land, unless a contrary intention appears in the disposition.⁵⁵⁸

Words of limitation were not necessary to pass the fee simple in the case of a corporation aggregate because:

...in contemplation of law, such a corporation never dies, and such words as 'successors or assigns' are meaningless as words of limitation in a conveyance to it.⁵⁵⁹

30.2. Issues with the section

The QLRC when considering the application of the proposed section 29 of the PLA to registered land indicated that it would apply to dispositions of registered land because of the proposed clause 28(3) (now section 28(3)) but in essence it would not have any effect because:

- the proposed clause 5(1)(a)⁵⁶⁰ (now section 5(1)(b)) makes the PLA apply to land under the *Real Property Acts* but subject to the provisions of those Acts;
- section 48 of the *Real Property Acts* does not require prescribed words of transfer.⁵⁶¹

The position remains the same under the *Land Title Act 1994* (Qld) where no prescribed words of transfer are required in the instrument of transfer.⁵⁶²

In the circumstances, there is a strong argument that section 29 of the PLA only applies to old system land. The issue of old system land is discussed at paragraph 5.2.1.

30.3. Other jurisdictions

30.3.1. Australia

South Australia is the only State in Australia which has not modified the common law position by statute. All the other States and Territories have a provision equivalent to section 29(1) of the PLA.⁵⁶³

⁵⁵⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.29.60] and GP Stuckey, *The Conveyancing Act, 1919-1969 and Regulations* (Lawbook Co, 2nd ed, 1970) 97 [282].

⁵⁵⁸ There was no similar requirement that specific words are required for a conveyance to a corporate aggregate or an incorporated company: see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA.29.60].

⁵⁵⁹ GP Stuckey, *The Conveyancing Act, 1919-1969 and Regulations* (Lawbook Co, 2nd ed, 1970) 97 [282].

⁵⁶⁰ The Queensland Law Reform Commission referred to clause 5(1)(a) which provides that the PLA applies to old system land, but it is clear from the context that the relevant clause should have been clause 5(1)(b) which proposed that the PLA apply to land under the provisions of the *Real Property Acts* but subject to the provisions of that Act.

⁵⁶¹ 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) 21.

⁵⁶² See *Land Title Act 1994* (Qld) s 61. Section 61(1)(d) only requires the instrument of transfer to include a description sufficient to identify the interest to be transferred.

⁵⁶³ *Conveyancing Act 1919* (NSW) s 47; *Property Law Act 1958* (Vic) s 60; *Property Law Act 1969* (WA) s 37; *Law of Property Act* (NT) s 29; *Conveyancing and Property Law Act* (Tas) s 61(2).

New South Wales, Victoria and the Northern Territory also have a section equivalent to section 29(2) of the PLA.

30.3.2. New Zealand

Section 43 of the, now repealed, *Property Law Act 1952* (NZ) had the same effect as section 29(1) of the PLA. The section has now been moved to schedule 6 of the *Property Law Act 2007* (NZ) which applies only to land that is not owned by the Crown and not under the *Land Transfer Act 1952* (NZ).⁵⁶⁴ It also applies to instruments relating to these categories of land. Schedule 6, clause 2 now provides:

2 Fee to pass without words of limitation

A conveyance of land without words of limitation passes the fee simple or other whole estate that the party conveying has power to dispose of.

The rationale for this change was that the section only applied to the ‘rarely found parcels of land which are in private ownership but still under the deeds system.’ The Law Commission (NZ) did not provide any commentary on the provisions in the schedule on the basis that where such a parcel of land is identified, it is normally brought under the *Land Transfer Act 1952* (NZ) prior to dealing with it.⁵⁶⁵ As a result, it is unlikely the provisions in the schedule (including clause 2) would be relied upon.⁵⁶⁶

30.4. Recommendations

The Centre is of the view that section 29 of the PLA only applies to old system land, and recommends the section be repealed. As discussed at paragraph 5.2.1 it is generally accepted that there is no old system land remaining in Queensland. The QLS agrees that the section has no application with respect to registered land and that it can be repealed. Repealing the section is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 29. Section 29 should be repealed.

⁵⁶⁴ *Property Law Act 2007* (NZ) s 351.

⁵⁶⁵ Law Commission (NZ), *A New Property Law Act Report No. 29* (1994) [803].

⁵⁶⁶ Law Commission (NZ), *A New Property Law Act Report No. 29* (1994) [803].

Part 4 – Future Interests

31. Section 30 – Creation of future interests in land

31.1. Overview and purpose

30 Creation of future interests in land

- (1) A future interest in land validly created after the commencement of this Act shall take effect as an equitable and not a legal interest.
- (2) An interest in remainder created after the commencement of this Act must not be registered in the freehold land register.
- (2A) Subsection (2) has effect despite anything in the *Land Title Act 1994*.
- (3) This section shall not apply to any future interest –
 - (a) created before the commencement of this Act whether that interest arose or arises before or after the commencement of this Act; or
 - (b) created or arising because of section 22.
- (4) In this section –

future interest means –

 - (a) a legal contingent remainder; or
 - (b) a legal executory interest.

A future interest in land at common law is an interest which grants rights in the land to be enjoyed at a future time.⁵⁶⁷ Future interests are generally categorised as reversions, remainders (vested or contingent) and executory interests.⁵⁶⁸ These categories are described in more detail below:

- a reversion generally refers to the ‘rights to future possession remaining in a grantor of a fee simple estate who has not disposed of all his interest in the land.’⁵⁶⁹ For example, A grants to B for life. In that case B has a ‘life estate vested in possession and A has a fee simple reversion vested in interest but not vested in possession until B dies’,⁵⁷⁰
- a remainder is an interest which a grantor confers on another but which does not give any rights of possession of the land until the determination of rights to possession held by another. For example, A grants to B for life and to C. In that case, ‘B has a life estate vested in possession and C a fee simple remainder that is vested in interest but not in possession.’⁵⁷¹ A remainder can either be vested in interest or contingent. It is vested when:
 - (i) the person or persons entitled to it are ascertained; and
 - (ii) it is ready to take effect in possession forthwith and is prevented from doing so only by the existence of some prior interest or interests. Otherwise a remainder is referred to as contingent,⁵⁷²

⁵⁶⁷ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 370 [10.05].

⁵⁶⁸ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 370 [10.05].

⁵⁶⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.30.30].

⁵⁷⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.30.30].

⁵⁷¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.30.30].

⁵⁷² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.30.30].

- executory interests have been described as ‘future interests which are not reversions or remainders, that is, which are not intended to wait for the natural termination of a particular estate.’⁵⁷³ There are equitable and legal executory interests.⁵⁷⁴

Future interests at common law were regulated by a large number of rules, particularly in relation to the validity and enforceability of these interests.⁵⁷⁵ These developed in the context of old system land and only applied to legal interests.⁵⁷⁶ Contingent remainders were particularly affected by these rules.⁵⁷⁷ Examples of some of the rules include, a ‘remainder or reversion after a fee simple is void’ and a ‘remainder is void if it is not supported by prior particular estate of freehold created by the same instrument.’⁵⁷⁸ Some legal executory interests were caught by the contingent remainder rules as a result of the decision in *Purefoy v Rogers*⁵⁷⁹ in the seventeenth century. The rule following that decision was that:

a legal executory interest capable of subsisting as a contingent remainder must be given effect as such. As such, legal executory interests which satisfied this description became subject to the contingent remainder rules, and so were susceptible to all the disabilities of contingent remainders.⁵⁸⁰

The QLRC considered the approach adopted in other jurisdictions including the earlier English approach under the *Real Property Act 1845* which was adopted in some other Australian States including New South Wales and South Australia.⁵⁸¹ The QLRC noted that the position in England after the introduction of the *Law of Property Act 1925* (UK) was that contingent remainders and legal executory interests were not able to be created at law and took effect as equitable interests.⁵⁸² The QLRC preferred this approach and provided the following rationale for the recommendation:

In these circumstances we see no merit in preserving in this State the power to create at law contingent remainders and legal executory interests. To do so would involve the adoption and improvement of a number of statutory provisions of not inconsiderable complexity in order to maintain a legal institution which is no longer of any real social utility and which has ceased to be employed in practice. Hence, while preserving the validity of any existing contingent remainders

⁵⁷³ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.350].

⁵⁷⁴ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.350]. For a detailed discussion on executory interests see also 172-174 [6.350]-[6.400].

⁵⁷⁵ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 370 [10.05].

⁵⁷⁶ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.420].

⁵⁷⁷ 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) 21.

⁵⁷⁸ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.290]-[6.300]. For detail of the various rules applicable see also [6.290] -[6.320].

⁵⁷⁹ (1671) 2 Wms Saund 380; 85 ER 1181 as discussed Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.400].

⁵⁸⁰ 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) 21.

⁵⁸¹ 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) 21.

⁵⁸² 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.

or executory interests already created in this state: see sub-cl (3), we recommend the adoption of the substance of s. 4(1) of the English Act of 1925, so that any such interest created in the future will take effect in equity only. This will accord with existing conveyancing practice prevailing in Queensland by which such interests are now created as trusts, and will also dispose of the difficulties and disabilities associated with legal contingent remainders, which, as we have said, have no application to such interests if created by trust.⁵⁸³

Section 30 of the PLA abrogates the effect of the contingent remainder rules and the impact of *Purefoy v Rogers* on legal executory interests. The section:

- applies to future interests that are either a legal contingent remainder or a legal executory interest.⁵⁸⁴ These interests are not defined in the PLA;
- has the effect that any future interest created after 30 November 1975 will take effect as an equitable, rather than a legal interest;
- expressly provides that an interest in remainder created after the commencement of the PLA must not be registered in the freehold land register;
- does not apply to any future interest created before the commencement of the PLA.⁵⁸⁵

Any contingent remainders created prior to 1 December 1975 are subject to the common law rules and legal executory interests also created prior to the commencement of the PLA will be subject to the rule in *Purefoy v Rogers*.⁵⁸⁶ Further, future interests that do not fall within the scope of the section 30 (reversions and vested remainders) will be governed by the common law rules also.⁵⁸⁷

31.1.1. Land Title Act 1994 (Qld) and future interests

Part of the QLRC's recommendation in relation to section 30 of the PLA also included changes to prevent the registration of future contingent remainders.⁵⁸⁸ This is set out in section 30(2) of the PLA and prohibits the registration of an interest in remainder created after 30 November 1975 in the freehold land register. Section 55 of the *Land Title Act 1994* (Qld) provides that:

The registrar may record in the freehold land register an interest in a lot for life and an interest in remainder in the way the registrar considers appropriate.

However, this section is subject to section 30(2) of the PLA⁵⁸⁹ which means that a remainder cannot be registered in the register but can be 'recorded'.

⁵⁸³ 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.

⁵⁸⁴ *Property Law Act 1974* (Qld) ss 30(1) and 30(4).

⁵⁸⁵ *Property Law Act 1974* (Qld) s 30(3).

⁵⁸⁶ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 388 [10.65].

⁵⁸⁷ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.420].

⁵⁸⁸ 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.

⁵⁸⁹ Section 30(2A) of the *Property Law Act 1974* (Qld) expressly provides that subsection 30(2) of the PLA has effect despite anything in the *Land Title Act 1994*.

31.2. Issues with the section

The QLRC's approach to reform in relation to this section and the rationale relied upon remains valid. The section is well understood and does not appear to have raised any significant issues in practice.

31.3. Other jurisdictions

31.3.1. Australia

There are two main approaches which have been implemented in Australia to address some of the issues arising from the common law contingent remainder rules. The approach in Queensland and the Northern Territory⁵⁹⁰ is to effectively abolish legal contingent remainders and legal executory interests.⁵⁹¹ The second approach is based on the earlier English legislation, *Contingent Remainders Act 1877*, which was adopted in New South Wales,⁵⁹² South Australia⁵⁹³ Victoria, Western Australia and Tasmania.⁵⁹⁴ This approach was aimed at 'mitigating the harshness of the common law contingent remainder rules' and to modify the effect of the common law contingent remainder rules.⁵⁹⁵ There is some variation within the legislation implementing this approach with New South Wales and the South Australian provisions drafted quite differently to the other jurisdictions. Commentary suggests that both these jurisdictions 'appear to have prevented both the natural and artificial destruction of contingent remainders.'⁵⁹⁶

The VLRC reviewed the contingent remainder provisions in 2010 and ultimately recommended that:

32. From the commencement of the new Property Law Act, legal life estates and legal future interests should be capable of creation only in equity as beneficial interests under a trust.⁵⁹⁷

The recommendation made by the VLRC has not been implemented in Victoria, to date.

31.3.2. New Zealand

Section 20 of the *Property Law Act 1952* (NZ) provided:

20 When contingent remainders capable of taking effect

- (1) A contingent remainder shall be capable of taking effect notwithstanding the destruction or determination by any means of the particular estate immediately preceding, and notwithstanding that it may have been created expectant on the termination of years.
- (2) A contingent remainder or a contingent interest lying between 2 estates vested in the same person shall prevent the merger of those 2 estates.

⁵⁹⁰ *Law of Property Act* (NT) s 30.

⁵⁹¹ Brendan Edgeworth, et al, *Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 204 [3.69].

⁵⁹² *Conveyancing Act 1919* (NSW) s 16.

⁵⁹³ *Law of Property Act 1936* (SA) s 25.

⁵⁹⁴ *Law of Property Act 1952* (Vic) ss 191 and 192; *Property Law Act 1969* (WA) s 26; *Conveyancing and Law of Property Act 1884* (Tas) ss 80(2) and 81.

⁵⁹⁵ Brendan Edgeworth, et al, *Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 204 [3.69].

⁵⁹⁶ Brendan Edgeworth, et al, *Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 204 [3.69].

⁵⁹⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 73: Recommendation 32.

The Law Commission (NZ) indicated that section 20(1) reversed the effect of two common law rules applicable to contingent remainders.⁵⁹⁸ The Commission recommended retaining section 20(1) but that the section be restated. Section 20(1) and (2) of the repealed 1952 Act now appear in section 63 in the *Property Law Act 2007* (NZ) which provides:

63 Contingent remainders and interests

- (1) A contingent remainder or contingent interest in land may follow a leasehold estate in the land.
- (2) A contingent remainder or contingent interest in land, expressed to take effect on the ending of a preceding estate in the land, does not become void because the preceding estate ends before the occurrence of the event or the fulfilment of the condition on which the contingent remainder or contingent interest depends.
- (3) Different estates in land vested in the same person do not merge if the estates are separated by the contingent remainder or contingent interest in the land of some other person.
- (4) In this section, **contingent remainder** or **contingent interest** means a remainder or interest that depends on -
 - (a) a future event that may or may not occur; or
 - (b) a condition that may or may not be fulfilled.

The current approach in New Zealand is to still reverse some of the common law rules associated with contingent remainders and interests.⁵⁹⁹

31.4. Recommendation

The Centre recommends section 30 of the PLA should be retained on the basis that it remains relevant in Queensland. The QLS also agrees that the section should be retained. Note, however the reference to section 22 will need to be amended if the Centre's recommendations with respect to that section are adopted and the section number changes as a result.

RECOMMENDATION 30. Section 30 should be retained. Amend reference to section 22 if required.

⁵⁹⁸ These rules are discussed in detail in the Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 44 [140].

⁵⁹⁹ See Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 44-45 for further discussion on the approach of the Law Commission.

32. Section 31 – Power to dispose of all rights and interests in land

32.1. Overview and purpose

31 Power to dispose of all rights and interests in land

- (1) All rights and interests in land may be disposed of including -
- (a) a contingent, executory or future interest in any land or a possibility coupled with an interest in any land, whether or not the object of the gift or limitation of such interest or possibility be ascertained; and
 - (b) a right of entry, into or upon land whether immediate or future, and whether vested or contingent.
- (2) All rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, after the commencement of this Act, be made exercisable by any person and the persons deriving title under that person, but, in regard to an estate in fee simple (not being a rent charge held for a legal estate) only within the period authorised by the rule relating to perpetuities.

Although at common law property was generally considered to be freely alienable, there were some rights relating to land which were not or which were subject to restrictions in relation to alienation. For example, historically contingent remainders were unable to be alienated but vested future interests could be. The rule in relation to the inalienability of contingent remainders evolved in the 18th century so that equity permitted the alienation of these.⁶⁰⁰ The effect of section 31(1) of the PLA is to render interests in land such as contingent remainders freely available at law and in equity.⁶⁰¹ The section also covers a right of entry into or upon land whether immediate or future, and whether vested or contingent.⁶⁰² The term ‘disposed’ is not defined in the PLA but ‘disposition’ is defined to include:

A conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will.

The alienation of vested and contingent future interests can occur in all situations ‘whether the interests are created by deed or by will.’⁶⁰³ In Queensland, section 8(1) of the *Succession Act 1981* (Qld) expressly provides that a person may dispose by will of any property to which the person is entitled at the time of the person’s death, irrespective of whether or not the entitlement existed at the date of the making of the will.⁶⁰⁴ Other States and Territories have similar provisions in succession legislation.⁶⁰⁵ Duncan and Vann suggest that section 31(1) of the PLA overlaps with other provisions

⁶⁰⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.31.30].

⁶⁰¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.31.60].

⁶⁰² *Property Law Act 1974* (Qld) s 31(1)(b).

⁶⁰³ Adrian Bradbrook, et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 391 [10.90].

⁶⁰⁴ *Succession Act 1981* (Qld) s 8(2).

⁶⁰⁵ See for example *Wills Act 1968* (ACT) s 7; *Wills Act 1997* (Vic) s 4 and *Wills Act 1936* (SA) s 4.

such as the *Succession Act 1981* (Qld) but ‘without producing any apparent difficulties in application.’⁶⁰⁶

The purpose of section 31(2) of the PLA is less clear. Commentary on this subsection notes that:

The section has additional effects on rights of entry by reason of subs (2). These need no longer be attached, in the case of a lease, to the reversion; rights of entry may now be originally conferred upon or subsequently alienated to persons who do not hold the reversion. Rights of entry over fee simple estate, subs (2) makes clear that the right is subject to the rule against perpetuities, except where the right of entry forms part of a rent charge held for a legal estate.⁶⁰⁷

Victoria⁶⁰⁸ and the Northern Territory⁶⁰⁹ are the only other Australian jurisdictions which each have a subsection equivalent to section 31(2) of the PLA.

32.2. Issues with the section

Section 31(1) of the PLA has current relevance and the effect of the section should be retained. The Centre questions the relevance of section 31(2) and is of the view that the effect of the section should be amended with some modifications discussed in the recommendations in paragraph 32.4 below.

32.3. Other jurisdictions

32.3.1. Australia

Apart from Western Australia, each Australian State and Territory has a provision which deals with the conveyance or disposition of future interests. The equivalent provisions in Victoria⁶¹⁰ and the Northern Territory⁶¹¹ are in essentially identical terms to section 31 of the PLA. The only difference occurs in section 19(1) of the *Property Law Act 1952* (Vic) which adds the words ‘but no such disposition shall defeat or enlarge an estate tail’ at the end of the section. These additional words are also included in the Tasmanian⁶¹² provision which is in similar form to the Victorian section. The sections in New South Wales,⁶¹³ South Australia⁶¹⁴ and the Australian Capital Territory⁶¹⁵ are in similar form to section 31(1) of the PLA and do not include an equivalent provision to section 31(2) of the PLA.

In the case of Tasmania, the Australian Capital Territory and New South Wales, the conveyance or disposition of the interest is by ‘deed’.

⁶⁰⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.31.60].

⁶⁰⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.31.60].

⁶⁰⁸ *Property Law Act 1958* (Vic) s 19(2).

⁶⁰⁹ *Law of Property Act* (NT) s 31(2).

⁶¹⁰ *Property Law Act 1958* (Vic) s 19.

⁶¹¹ *Law of Property Act* (NT) s 31.

⁶¹² *Conveyancing and Law of Property Act 1884* (Tas) s 80(1).

⁶¹³ *Conveyancing Act 1919* (NSW) s 50(1).

⁶¹⁴ *Law of Property Act 1936* (SA) s 10.

⁶¹⁵ *Civil Law (Property) Act 2006* (ACT) s 255.

32.3.2. New Zealand

Section 21 of the, now repealed, *Property Law Act 1952* (NZ) expressly enabled the conveyance, by deed, of a number of interests in property including, contingent remainders, every contingent or executory or future estate, right or interest in property.⁶¹⁶ The Law Commission (NZ) in its Preliminary Paper reviewing the 1952 Act noted that provisions such as section 21 cannot be understood ‘by themselves without looking to the principles which they alter.’⁶¹⁷ In this respect, the Commission preferred ‘direct statements of those rules in their modified form so that some of the obscurity of the present sanctions can be removed, but it is not intended to make further changes to the rules themselves.’⁶¹⁸ This approach was endorsed and adopted in the final report of the Law Commission (NZ) in 1994.⁶¹⁹

The Law Commission (NZ) also indicated that as part of the reforms, the opportunity was taken to ‘confirm that future estates and interests can be created within the limits of the rule against perpetuities, as modified by the Perpetuities Act 1964.’⁶²⁰

Section 21 of the 1952 Act has now been replaced by section 62 in the *Property Law Act 2007* (NZ) which provides:

62 Creation and disposition of estates and interests in property

- (1) Every estate, interest, or right in property that can be created or disposed of may be created or disposed of by an individual –
 - (a) during the individual’s lifetime; or
 - (b) by will.
- (2) However, subsection (1) does not make a joint tenancy severable by will.

32.4. Recommendation

The Centre recommends amending section 31 of the PLA to retain the effect of section 31(1) but not section 31(2) as it has no continuing relevance. The Centre recommends using the New Zealand approach as a basis for the redrafting. This approach is supported by the QLS. The redrafting of the provisions will also provide modernised language and improve clarity around the purpose and operation of the section. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 31. Section 31 should be amended to retain the effect of section 31(1) but not section 31(2).

⁶¹⁶ The section qualifies this ability to convey with the addition of the words ‘Provided that no person shall be empowered by this Act to dispose of any expectancy he may have as next of kin, or under the Administration Act 1969.’ *Property Law Act 1952* (NZ) s 21.

⁶¹⁷ Law Commission (NZ), *The Property Law Act: A Discussion Paper* Preliminary Paper No. 16 (1991) 43.

⁶¹⁸ Law Commission (NZ), *The Property Law Act: A Discussion Paper* Preliminary Paper No. 16 (1991) 43-44.

⁶¹⁹ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 13 [38].

⁶²⁰ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 13 [39].

For example, using the New Zealand provisions as a guide, section 31 could be amended in the following manner:

Section [31] Creation and disposition of estates and interests in property

- (1) Every estate, interest, or right in property that can be created or disposed of may be created or disposed of by an individual –
 - (a) during the individual's lifetime; or
 - (b) by will.
- (2) However, subsection (1) does not make a joint tenancy severable by will.

33. Section 32 – Restriction on executory limitations

33.1. Overview and purpose

32 Restriction on executory limitations

- (1) Where there is a person entitled to -
- (a) land, or an equitable interest in land, for an estate in fee simple or for any less estate or interest; or
 - (b) any other property, or an interest in any other property;
- with an executory limitation over on default or failure of all or any of the person's issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect if, and as soon as, there is living any issue who has attained full age and capacity of the class on default or failure of which the limitation over was to take effect.
- (2) This section applies where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

Section 32 of the PLA is modelled on section 29B of the *Conveyancing Act 1919* (NSW) with some modifications required as a result of section 30 of the PLA which has the effect that legal executory interests created after the PLA commenced take effect as equitable interests only.⁶²¹ The problem which the section is intended to address is best explained by Example 1 below:

Example 1

G grants Blackacre to A in fee simple, but if A dies without living issue, then to B in fee simple.⁶²²

The QLRC noted that since the passing of the Succession Acts 1867 to 1968, a devise to A by G is 'construed as a gift to A, subject to an executory limitation in favour of B if at the death of A he has no issue living'.⁶²³ This interpretation meant that A would never know during his or her lifetime whether the gift over in favour of B has taken effect.⁶²⁴ Commentary at the time noted that '[E]ven if A had many children and grandchildren alive, they might all perish in some calamity before his death and so leave him to die without issue'.⁶²⁵

The effect of section 32(1) of the PLA is to avoid this uncertainty so that a gift in the form in Example 1 will become absolute:

⁶²¹ 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) 23-24.

⁶²² This example has been extracted in full from Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.440].

⁶²³ 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) 23.

⁶²⁴ 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) 23 and Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.440].

⁶²⁵ Extracted from 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) 23.

- if any of A's issue reach the age of 18, irrespective of whether all of these individuals die before A or any issue;⁶²⁶ or
- A dies leaving any issue, irrespective of whether any of these individuals have reached 18.⁶²⁷

This means that the executory limitation in favour of B can never take effect and is void if one of these criteria is satisfied. The section only applies to instruments executed after 30 November 1975, 'or wills of testators dying after that date.'⁶²⁸

33.2. Issues with the section

Section 32(1) of the PLA clarifies the position in relation to executory limitations imposed on gifts over. The provision still has a current purpose. The provision is restricted to instruments executed after 30 November 1975, however it is still possible that there remain some entitlements which have yet to operate or fail. Accordingly, section 32(2) of the PLA should be retained. This can be compared to the situation in New Zealand, where the relevant date was 1906 and the Law Commission (NZ) thought it was doubtful that any entitlements remained which were yet to take effect or fail. For further discussion on this aspect of the New Zealand reform of the equivalent provision to section 32(2) of the PLA, see paragraph 33.3.2 below.

33.3. Other jurisdictions

33.3.1. Australia

Apart from South Australia, each State and Territory has an equivalent provision to section 32 of the PLA.⁶²⁹ Queensland and the Northern Territory include 'equitable interest in land' in the category of interests falling within scope of the section to account for the effect of section 30 of the PLA (and section 30 of the Northern Territory Act).

33.3.2. New Zealand

The relevant provision in New Zealand is set out in section 64 of the *Property Law Act 2007* (NZ) which provides:

⁶²⁶ 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.

⁶²⁷ Duncan and Vann indicated that 'this follows from the previous law which is added to but not replaced by the current section.': Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.32.60].

⁶²⁸ Anne Wallace, et al, *Real Property Law In Queensland* (Lawbook Co, 4th ed, 2015) [6.440].

⁶²⁹ *Conveyancing Act 1919* (NSW) s 29B; *Law of Property Act 1952* (Vic) s 132; *Property Law Act 1969* (WA) s 28; *Conveyancing and Law of Property Act 1884* (Tas) s 79; *Law of Property Act* (NT) s 32.

64 When gifts over cease to be capable of taking effect

- (1) This section applies if –
 - (a) a person (**person A**) is entitled to an estate or interest in land; and
 - (b) the estate or interest is subject to a gift over to another person (**person B**) if person A has no issue or no issue of a specified class (whether at any specified time or within any specified period).
- (2) The gift over ceases to be capable of taking effect as soon as there is issue, or a member of the specified class of issue, who attains the age of 20 years.
- (3) Subsection (2) applies even if the issue may subsequently fail.
- (4) In this section, **gift over** includes a gift over expressed to take effect on the ending of an estate or interest preceding that of the person whose estate or interest is the subject of the gift over.

The previous provision in the *Property Law Act 1952* (NZ) (section 23) was framed in a similar way to the Queensland (and other Australian jurisdictions) provision but was limited in application to land only. The Law Commission (NZ) formed the view that section 23 of the 1952 Act should be ‘re-enacted in a more approachable modern form and should ... relate to all types of property, not just, as at present, to land.’⁶³⁰ The Commission did not consider it necessary to retain section 23(2) which provided that section 23 only applied where the gift over is contained in an instrument coming into operation after 1 January 1906.⁶³¹ In the Commission’s view, any pre-1906 gifts over would have, in all reasonable probability, either operated or failed.⁶³²

33.4. Recommendation

The Centre recommends that section 32 of the PLA be redrafted to assist with clarity. This is in line with the overarching principles that inform these recommendations. The QLS agrees that the section may benefit from clearer drafting. In order to provide clarity for the section an approach similar to section 64 of the *Property Law Act 2007* (NZ) where a practical example is incorporated into the section may be one model to consider.

The Centre recommends retaining the effect of subsection (2). This subsection specifies that the section applies to instruments coming into effect after 1 December 1975. The Centre is of the view that it is possible that such instruments exist and are yet to come into effect by the passing of that testator.

The Centre notes that the age of majority in New Zealand is 20 years of age.⁶³³ The recommended amendments have been changed to reflect the age of majority in Queensland which is 18 years of age.⁶³⁴

RECOMMENDATION 32. Section 32 should be amended to provide clarity.

⁶³⁰ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 46 [145].

⁶³¹ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 46 [146].

⁶³² Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 46 [146].

⁶³³ *Age of Majority Act 1970* (NZ) s 4(1), however *c.f. Minors' Contracts Act 1969* (NZ), *Care of Children Act 2004* (NZ) and *Wills Act 2007* (NZ), under which a minor or child is a person under the age of 18 years.

⁶³⁴ See the definition of a ‘minor’ in *Law Reform Act 1995* (Qld) s 17 which states that the age of majority is 18 years.

For example, using the New Zealand provisions as a guide, section 32 could be amended in the following manner:

Section [32] When gifts over cease to be capable of taking effect

- (1) This section applies if –
 - (a) a person (**person A**) is entitled to an estate or interest in land; and
 - (b) the estate or interest is subject to a gift over to another person (**person B**) if person A has no issue or no issue of a specified class (whether at any specified time or within any specified period).
- (2) The gift over ceases to be capable of taking effect as soon as there is issue, or a member of the specified class of issue, who attains the age of 18 years.
- (3) Subsection (2) applies even if the issue may subsequently fail.
- (4) In this section, gift over includes a gift over expressed to take effect on the ending of an estate or interest preceding that of the person whose estate or interest is the subject of the gift over.
- (5) This section applies where the executory limitation is contained in an instrument coming into operation after 1 December 1975.

Part 5 – Concurrent interest – Co-ownership

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.

34. Section 33: Forms of co-ownership

34.1. 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.⁶³⁵

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.⁶³⁶ This type of tenancy was not severable which meant it could not qualify as a joint tenancy.⁶³⁷ Tenancy by entireties ceased to exist in Queensland following the enactment of the *Married Women's Property Act 1890*.⁶³⁸ Coparcenary is described as 'an unusual form of tenancy in common', with some traits of both a joint tenancy and a tenancy in common.⁶³⁹ The QLRC when considering co-ownership in 1973 noted that:

⁶³⁵ 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.

⁶³⁶ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) 235 [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.

⁶³⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [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.

⁶³⁸ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [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.

⁶³⁹ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [8.180].

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.⁶⁴⁰

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.⁶⁴¹ 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.⁶⁴²

34.2. Issues with the section

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.⁶⁴³

However, the inclusion of the provision does remove any lingering uncertainty and 'puts the matter beyond doubt.'⁶⁴⁴

34.3. Recommendation

The Centre recommends no amendments to section 33 of the PLA. The provision is well understood and removes any uncertainty as to the types of co-ownership arrangements available in Queensland.

RECOMMENDATION 33. Section 33 should be retained.

⁶⁴⁰ 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.

⁶⁴¹ 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.

⁶⁴² Charles Harpum, et al, *The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000) 476 [9.003].

⁶⁴³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.33.90].

⁶⁴⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.33.90].

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

35.1. Purpose and overview

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.

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'.⁶⁴⁵ 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.⁶⁴⁶ 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.⁶⁴⁷

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.⁶⁴⁸ The QLRC recommended the adoption of provisions similar to those that existed in New South Wales and Victoria.⁶⁴⁹

⁶⁴⁵ Charles Harpum, *The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000) 476 [9-003].

⁶⁴⁶ *Property Law Act 1974* (Qld) s 34(1A).

⁶⁴⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.34.60].

⁶⁴⁸ 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.

⁶⁴⁹ 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.

It appears from commentary on the equivalent provision in New South Wales⁶⁵⁰ that the need for the section arose when corporations increasingly began to undertake work as trustees.⁶⁵¹ Trustees hold property as joint tenants to enable the trust property to automatically pass to the other trustee when a trustee died.⁶⁵²

35.2. Issues with the section

35.2.1. 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). Schedule 1 of that 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.
- (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).⁶⁵³

⁶⁵⁰ *Conveyancing Act 1919* (NSW) s 25.

⁶⁵¹ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) 56 [30451.5].

⁶⁵² 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, 6th 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.

⁶⁵³ 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.

35.2.2. 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.⁶⁵⁴

Although other Australian jurisdictions with similar provisions also use the term dissolution, the Centre recommends updating the section to reflect the terminology used under the *Corporations Act 2001* (Cth) section 601AD(1).

35.2.3. 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

(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 the Australian Securities and Investments Commission (**ASIC**) as the case may be upon the corporation being deregistered.

⁶⁵⁴ Ford, Austin and Ramsay’s *Principles of Corporations Law* (online) LexisNexis [27.640].

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*,⁶⁵⁵ 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.⁶⁵⁶

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 section 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 a joint tenancy.⁶⁵⁷ 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.

The better view is that section 601AD(3) of the *Corporations Act 2001* (Cth), which provides that the Commonwealth or ASIC takes only the same property rights that the corporation itself held, resolves this issue. By virtue of subsection 34(2) of the PLA, the property devolves to the other joint tenant and it follows 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

⁶⁵⁵ *Foxman v Credex* [2007] NSWSC 1422, [66].

⁶⁵⁶ 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.

⁶⁵⁷ *Peldan v Anderson* (2006) 227 CLR 471, [48].

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. This issue has not been raised as a ‘live’ issue in Queensland or New South Wales to date.⁶⁵⁸

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.

35.3. Other jurisdictions

35.3.1. Australia

All the other Australian jurisdictions have provisions that have a similar effect to section 34 of the PLA.⁶⁵⁹ The VLRC recommended retaining section 28 of the *Property Law Act 1958* (Vic) during its broader review of that Act in 2010.⁶⁶⁰ 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 but is not defined.

35.3.2. 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;⁶⁶¹
- 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);⁶⁶²
- 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.⁶⁶³ 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).⁶⁶⁴ 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.

⁶⁵⁸ 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.

⁶⁵⁹ *Conveyancing Act 1919* (NSW) s 25; *Property Law Act 1969* (WA) s 29; *Civil Law (Property) Act 2006* (ACT) s 209; *Law of Property Act* (NT) s 34; *Law of Property Act 1936* (SA) s 24C; *Conveyancing and Law of Property Act 1884* (Tas) s 62; *Property Law Act 1958* (Vic) s 28.

⁶⁶⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010) 127.

⁶⁶¹ *Property Law Act 2007* (NZ) s 72(1).

⁶⁶² *Property Law Act 2007* (NZ) s 72(2).

⁶⁶³ *Property Law Act 2007* (NZ) s 72(3)(a).

⁶⁶⁴ *Property Law Act 2007* (NZ) s 72(3)(b).

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).

35.4. Recommendation

35.4.1. Reference to ‘body corporate’

The Centre recommends amending section 34 to refer to a ‘corporation’ in lieu of ‘body corporate’ and to define ‘corporation’ by reference to the definition in section 57A of the *Corporations Act 2001* (Cth). As indicated in paragraph 35.2.1 above, as the section is currently drafted the precise scope of the corporate entities to which section 34 of the PLA applies is unclear. This definition should be limited to this Division (Part 5 Division 1) because the word ‘corporation’ is used elsewhere in the Act, and does not necessarily have the same meaning. For example, the term ‘corporation aggregate’ is used with respect to deeds and has a broader meaning than the meaning defined in the *Corporations Act 2001* (Cth). This amendment will modernise the language and provide clarity to the section. Note that the recommendation to define ‘corporation’ for the purposes of this Division only is an exception to the overall recommendation to have definitions contained in a schedule dictionary to apply to the of the PLA as discussed at paragraph 215.8.

35.4.2. Equating ‘dissolution’ with the ‘death’ of a corporation – updating language

The Centre recommends section 34(2) be amended to change the word ‘dissolution’ to the term ‘deregistration’. This will modernise the language and provide clarity to the section. This is in line with the overarching principles that inform these recommendations.

35.4.3. Vesting of corporation property

It is clear from the discussion in paragraph 35.2.3 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.’⁶⁶⁵ However, the better view is that, immediately upon deregistration of the company, the title of any property that is held a joint tenant will pass to the other joint tenant. The interest the company had in the property that was held as joint tenant no longer exists and therefore it follows that there is no property to vest in the Commonwealth or ASIC. This view is consistent with the operation of section 601AD(3) of the *Corporations Act 2001* (Cth) as discussed above at paragraph 35.2.3. The Centre therefore concludes that no changes to the section are required in this regard.

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

⁶⁶⁵ D K L Raphael, ‘The *Ius Accrescendi* (Right of Survivorship) and Companies (2009) 83 *Australian Law Journal* 437, 439.

RECOMMENDATION 34. Section 34 should be amended to remove the words ‘body corporate’ and replace them with ‘corporation’. Section 34(2) should be amended to remove the word ‘dissolution’ and replace it with the word ‘deregistration’. Section 34 should be amended to include a definition of ‘corporation’ for the purposes of the division only.

For example, the word ‘corporation’ could be defined in the following manner:

In this Division ‘corporation’ has the same meaning as section 57A of the *Corporations Act 2001* (Cth).

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

36.1. 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.⁶⁶⁶ 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.⁶⁶⁷ 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’⁶⁶⁸ even where the legal interest was a joint tenancy. The exceptions included where:

- 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;⁶⁶⁹
- money was advanced on a mortgage;⁶⁷⁰
- partners in a partnership or people in a joint business venture contributed money to acquire the property as part of the business.⁶⁷¹

⁶⁶⁶ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1414].

⁶⁶⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [8.110].

⁶⁶⁸ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1415].

⁶⁶⁹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1415].

⁶⁷⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.35.60].

⁶⁷¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1415].

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 1975.⁶⁷² The term 'disposition' is defined broadly in the PLA and includes a conveyance, vesting instrument, declaration of trust, disclaimer and release.⁶⁷³ The section also covers a disposition which is wholly or partly oral.⁶⁷⁴ 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.⁶⁷⁵ 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.⁶⁷⁶

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 mortgagees⁶⁷⁷ 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.

36.1.1. 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.'⁶⁷⁸

⁶⁷² *Property Law Act 1974* (Qld) s 35(4).

⁶⁷³ *Property Law Act 1974* (Qld) sch 6.

⁶⁷⁴ *Property Law Act 1974* (Qld) s 35(5).

⁶⁷⁵ *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, 6th ed, 2010) [1418].

⁶⁷⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.35.60].

⁶⁷⁷ Mortgagees in this situation are dealt with in section 93 of the *Property Law Act 1974* (Qld).

⁶⁷⁸ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [8.140].

36.2. Issues with the section

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)⁶⁷⁹ which have the effect that, at law, land held for partnership purposes by partners is held as joint tenants.⁶⁸⁰ 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*.⁶⁸¹ 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),⁶⁸² producing an impractical outcome for the surviving partner.⁶⁸³

36.3. 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 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.⁶⁸⁴ The Northern Territory provision is in the same form as section 35 of the PLA.⁶⁸⁵ Western Australia, South Australia and Tasmania do not appear to have similar provisions.

36.4. Recommendation

No amendments to section 35 of the PLA are recommended. The section is well understood and has raised no issues.

RECOMMENDATION 35. Section 35 should be retained.

⁶⁷⁹ *Partnership Act 1892* (NSW) ss 20 and 22.

⁶⁸⁰ Peter Young, et al, *Annotated Conveyancing and Real Property Legislation (NSW)* (Butterworths, 2012) 57 [30455.35].

⁶⁸¹ *Re Livanos* [1955] St R Qd 362.

⁶⁸² 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.

⁶⁸³ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.35.180].

⁶⁸⁴ *Civil Law (Property) Act 2006* (ACT) s 210.

⁶⁸⁵ *Law of Property Act* (NT) s 35.

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

37.1. 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.⁶⁸⁶ 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.⁶⁸⁷ 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.⁶⁸⁸ Section 36 was adopted directly from the same provision in section 27 of the *Conveyancing Act 1919* (NSW).⁶⁸⁹

37.2. Issues with the section

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

37.3. Recommendation

The Centre recommends that section 36 be retained. The section is well understood and has not raised any concerns.

⁶⁸⁶ *Selby v Alston* (1797) 3 Ves. Jr. 339; 30 ER 1042.

⁶⁸⁷ *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 [PLA.36.30].

⁶⁸⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.36.60].

⁶⁸⁹ 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.

RECOMMENDATION 36. Section 36 should be retained.

Part 5 Division 2 – Statutory trusts, sale and division

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.⁶⁹⁰ 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.⁶⁹¹

This Division currently operates to allow the court to appoint a trustee for sale or partition of land upon application by a co-owner. With respect to chattels, the court can order the sale or partition directly and no trustee is appointed. The court can make orders about how the proceeds of sale, or partitioned land or chattels are to be distributed between co-owners. When making such orders the court can vary the entitlements of each co-owner, according to its findings as to their legal and equitable interests in the property.

Applications under Part 5 Division 2 are generally limited to parties who hold property together and who are not married or in a de facto relationship, or possibly partnerships where the partnership agreement does not provide for how property of the partnership is to be dealt with. This is discussed further below at paragraph 40.2.2.

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.

Each of these sections, along with the Centre’s overall recommendations for redrafting of the Division, are discussed below.

⁶⁹⁰ 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.

⁶⁹¹ 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, 6th ed, 2010) [1495].

38. Section 37 – Definitions for div 2

38.1. Overview and purpose

37 Definitions for div 2

In this division –

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

Section 37 of the PLA provides the definitions of ‘co-owner’ and ‘co-ownership’ for the purposes of Division 2. 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 definitions in section 37 apply to ‘any person with a present (as opposed to a future) interest *in an undivided share or jointly* in that property is a co-owner of any person presently interested in *another undivided share or jointly* in that property.’⁶⁹² Such a person can make an application under the Division for appointment of a trustee for sale or partition of that property. ‘Undivided’ in this context means a share as tenant in common.

In order for a party to apply to the court for an order appointing a trustee for sale or partition, (or an order to sell or partition chattels without the appointment of a trustee) it must first be established that the property sought to be sold or partitioned is ‘co-owned’, either as tenants in common, or as joint tenants. The party making such an application must then establish that they have ‘co-ownership’ of that property.⁶⁹³

The definitions apply to both real and personal property and the ownership may be legal or equitable. The definitions operate within the Division to allow a legal co-owner to take action against another legal co-owner for sale or partition of the property. Similarly, an equitable co-owner can take action against another equitable co-owner, and a person with an equitable interest only may take action against a legal owner.⁶⁹⁴ The definition may also extend to allow a co-owner who has both a legal and equitable interest in property to take action under the Division against another co-owner who has only a legal interest.⁶⁹⁵

⁶⁹² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.30].

⁶⁹³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.30].

⁶⁹⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.30]; see for example *Chamberlain v Cassegrain* [2015] NSWSC 1838.

⁶⁹⁵ See for example *Re Wiles* [1982] Qd R 45 at 47-48 where a wife and husband owned land as joint tenants and the wife claimed she was wholly entitled to the land and it was conceded that the court had jurisdiction to order the entire proceeds of the sale be awarded to the wife notwithstanding the co-ownership of the husband: Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.30].

The ownership of a co-owner must be ownership 'in possession' such that they have a present interest in the property.⁶⁹⁶ Therefore, a remainderman cannot apply for an order for appointment of a trustee for sale or partition against another co-owner.⁶⁹⁷ A life tenant would be able to apply as the interest in the property exists now, and not in the future.⁶⁹⁸

The definition also contemplates a co-owner including a person who is the 'encumbrancee' of the interest. 'Encumbrancee' is defined in schedule 6 of the PLA as including 'every person entitled to the benefit of an encumbrance, or to require payment or satisfaction of an encumbrance.'⁶⁹⁹ Further, an 'encumbrance' is defined in schedule 6 as including 'a mortgage in fee or for a lesser estate or interest, and a trust for securing money, and a lien and a charge of a portion, annuity or other capital annual sum.'⁷⁰⁰

Note, however, where a mortgagee is the holder of a mortgage (or other encumbrance) over the whole of the property that has been granted by all of the co-owners then the mortgagee is not a co-owner within section 38(1) because the mortgagee does not hold its respective interest in co-ownership with the owners of the fee simple.⁷⁰¹

38.2. Other jurisdictions

38.2.1. Australia

Division 2 of Part 5 was modelled on the trustee for sale or partition provisions in the *Conveyancing Act 1919* (NSW) which were also adopted to varying degrees in other jurisdictions around Australia. This is discussed in detail below at paragraph 40.3.1.

38.2.1.1. New South Wales

Section 66(F) of the *Conveyancing Act 1919* (NSW), upon which section 37 of the PLA was modelled is similar in effect.⁷⁰² However, in the New South Wales legislation, the term used was 'incumbrancer'. It was 'thought that the New South Wales provision was intended to refer to the person who enjoys the benefit of the encumbrance (rather than the person who creates it)'⁷⁰³ and so the term 'encumbrancee' was used in section 37 of the PLA instead. It has since been held that 'incumbrancer', in the context of appointment of a trustee for sale or partition, means the person enjoying the benefit

⁶⁹⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.30].

⁶⁹⁷ See for example *Evans v Bagshaw* (1869) LR 8 Eq 469: Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.30].

⁶⁹⁸ See for example *Gaskell v Gaskell* (1836) 6 Sim 643: Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.30].

⁶⁹⁹ *Property Law Act 1974* (Qld) schedule 6.

⁷⁰⁰ *Property Law Act 1974* (Qld) schedule 6.

⁷⁰¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.60].

⁷⁰² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.60].

⁷⁰³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.60]; see also Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 28.

of the encumbrance.⁷⁰⁴ Therefore there is no difference between the New South Wales provision and section 37 of the PLA.⁷⁰⁵

38.3. Issues with the section

38.3.1. 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 use of the word ‘encumbrancee’ is also problematic. This definition would not include a lessee or a party with the benefit of a restrictive covenant. It follows then that the rights of a lessee under a lease granted by one co-owner only are not subject to section 38(1) and therefore are not converted into an interest in the proceeds of sale, but rather the lease survives the sale under section 38. In *Re Marcellos*⁷⁰⁶ it was accepted that a lease given by only one co-owner was nevertheless binding upon subsequent owners after a sale under section 38. Commentators point out that this leaves open the prospect of frustrating the effect of section 38 ‘by a long-term lease by one co-owner to a third party and a sub-lease by the third party back to the co-owner for equivalent rental.’⁷⁰⁷

New definitions that use clear and modern language should replace the current definitions for ‘co-owner’ and ‘co-ownership’. Recommendations based on the Victorian model are set out below at paragraph 40.4. Note that the recommendation at part 215.5.3 includes repealing the words ‘encumbrance’ and ‘encumbrancee’ from the schedule 6 Dictionary, and from the balance of the PLA.

38.3.2. Additional definitions needed to aid in interpretation of the Division

The definitions in section 37 are important for defining the scope of Part 5, Division 2 and the effect of the definitions should be retained. However, the wording of the provision is outdated and could be expressed in a more contemporary and clear way. Interpretation and application of the Division can further be enhanced and aided if additional definitions are included. This is based on the Victorian approach and is discussed in detail at paragraph 40.4 below.

38.4. Recommendation

The Centre recommends that the effect of Part 5, Division 2 be retained but redrafted to modernise the language of the provision and to aid in interpretation. The amendments should include a redrafted definition of ‘co-owner’ based on the Victorian equivalent. This definition of ‘co-owner’ is simple,

⁷⁰⁴ *Australia & New Zealand Banking Group Ltd v Scott* (1993) 6 BPR 13,217.

⁷⁰⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37.60].

⁷⁰⁶ (1940) 42 SR (NSW) 154.

⁷⁰⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.38.210].

clear and concise. If this approach is adopted, there is no requirement to also define 'co-ownership' because the definition of co-ownership would follow naturally based on the definition of 'co-owner'.

It should be noted that the recommended drafting, based on the Victorian definition, describes a co-owner as a 'person who has an *interest* in land or goods....' This definition encompasses the current definition in the PLA (including encumbrancee) and is also broader. An 'interest' in land would not only include an encumbrancee (such as a mortgagee), but would also capture a lessee, for example. This will eliminate the problem identified above at paragraph 38.3.1.

The Centre further recommends that the amended provisions should also include, for the purposes of the Division, definitions of:

- property; and
- security interest.

These definitions will aid in the interpretation of the Division and clearly define the scope of the provisions.

The use of the word 'goods', as in the Victorian approach, is not recommended for the PLA. 'Chattels' is the preferred term but should not be defined as this word has a well understood common law meaning.⁷⁰⁸

Providing a definition of 'property' in terms of the Victorian legislation will aid in interpretation of the scope of the Division. The word 'property' is not defined in the PLA. The *Acts Interpretation Act 1954* (Qld) provides a definition for property that includes future interests and intangible property.⁷⁰⁹ This definition is too broad for the purposes of Division 2 as this Division only applies to present interests. Defining 'property' for the purposes of Division 2 as set out in the recommendation below, when read alongside the definition of 'co-owner', will provide certainty with respect to the scope of the section. The *Acts Interpretation Act 1954* (Qld) also includes things in action and money and this is specifically excluded from the operation of the Division by the definition of 'goods' as set out above.

The inclusion of a definition of 'security interest' is recommended if all of the recommendations for redrafting Part 5, Division 2 are adopted. The proposed drafting includes a provision that specifies that security interests held over the property are not affected by the Division.

While this is almost certainly the case in any event, including the definition puts this beyond doubt. The proposed provision to which the definition of 'security interest' relates is drafted in the following terms:

[37B] Security interests not affected

Despite anything to the contrary in any instrument creating a security interest, the severing of a joint tenancy in accordance with this Part—

- does not constitute a breach of the covenants or terms of that instrument; and
- does not affect any existing powers, rights or interests of the holder of a security interest over the property to which that severance relates.

⁷⁰⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.38.30].

⁷⁰⁹ *Acts Interpretation Act 1954* (Qld) schedule 1.

This is discussed further below at paragraph 40.4 where the recommendations with respect to Division are set out in full.

RECOMMENDATION 37. Section 37 should be amended to modernise the language and aid in interpretation of the scope of the section. The amended provisions should provide clear and concise definitions for:

- co-owner;
- property; and
- security interest.

For example, using the Victorian provision as a guide, section 37 could be drafted in the following manner:

Division 1 Preliminary

Section [37] Definitions

In this division —

co-owner means a person who has an interest in land or chattels with one or more other persons as—

- (a) joint tenants; or
- (b) tenants in common;

property means—

- (a) real and personal property, including any estate or interest in real or personal property; or
- (b) money; or
- (c) a debt; or
- (d) a thing in action; or
- (e) a right with respect to property;

security interest means an interest in or power over property by way of security for the payment of a debt or other pecuniary obligation and includes, in relation to land, a mortgage, charge or lien, whether or not registered under the *Land Title Act 1994*.

39. Section 37A and section 37B

39.1. Overview and purpose

37A Property held on *statutory trust for sale*

Property held upon the *statutory trust for sale* shall be held upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs and expenses, and of the net income until sale after payment of costs, expenses, and outgoings, and in the case of land of rates, taxes, costs of insurance, repairs properly payable out of income, and other outgoings upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners.

37B Property held on *statutory trust for partition*

Property held upon the *statutory trust for partition* shall be held upon trust—

- (a) with the consent of the encumbrancee of the entirety (if any) to partition the property and to provide (by way of mortgage or otherwise) for the payment of any equality money; and
- (b) upon such partition being made to give effect to the partition by assuring the property so partitioned in severalty (subject or not to any mortgage created for raising equality money) to the persons entitled under the partition;

but a purchaser shall not be concerned to see or inquire whether any such consent has been given.

These sections apply to land only. Section 37A is modelled on the *Conveyancing Act 1919* (NSW) section 66F(2)(a). Section 38(1) of the PLA expressly provides that the land 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. The land that is the subject of the application under section 38(1) of the PLA will, upon order of the court⁷¹⁰ vest in the trustee or trustees.

In the case of land held on a statutory trust for sale under section 37A of the PLA, the trustee will sell the land and the proceeds of sale, after expenses and costs have been paid, will be divided in accordance with the rights of the co-owners, as determined by the court.⁷¹¹ The appointment of a trustee for sale is procedurally beneficial because the trustee will be in a position to complete the conveyance to the buyer.⁷¹² This eliminates any issues that may arise if one or more of the co-owners do not cooperate with the sale process. If all parties are agreeable, however, there is no reason why the conveyance cannot be completed directly between the co-owners and the buyer.⁷¹³

The appointment of a trustee for partition under section 37B of the PLA means that, *prima facie*, the trustee should divide the land between the co-owners according to their entitlements as decided by the court. However, because of the nature of land, this can be difficult to achieve with precision. The division of the land is still possible if any co-owner, because of the way the division is achieved receives more than his fair share, makes a payment of ‘equality money’ to even up the distribution between

⁷¹⁰ Order made under section 38(1), 38(3) and 38(3A) of the *Property Law act 1974* (Qld).

⁷¹¹ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [8.500].

⁷¹² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37A.30].

⁷¹³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37A.30].

the co-owners. The trustee is required to transfer the partitioned property to the co-owners and make payment of equality money from one co-owner to the other, if necessary.⁷¹⁴

It is not the job of a trustee appointed under this Division to make determinations as to ownership or rights of the parties. If there is any doubt about ownership or rights of the parties then these are matters for the court to decide.⁷¹⁵

The trustees of a trust under section 37A or 37B of the PLA 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.⁷¹⁶

39.2. Issues with the sections

Sections 37A and 37B of the PLA are uncontroversial in their operation and effect. The main issue with the provisions is the use of outdated language that is difficult to understand.

39.3. Recommendation

The Centre recommends sections 37A and 37B be repealed on the basis that the proposed amendment to Part 5, Division 2 is adopted. This will modernise the language of the provisions and aid in interpretation. The proposed amendments to the provisions encompass the operation of sections 37A and 37B, but provide a clear and concise process for the sale or partition of co-owned property. The recommendation for drafting the amendment is set out below at paragraph 40.4.

RECOMMENDATION 38. Sections 37A and 37B should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

⁷¹⁴ Edgeworth, Brendan, et al, *Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 637 at [6.77].

⁷¹⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.37A.30]; *Re wiles* [1982] Qd R 45.

⁷¹⁶ *Property Law Act 1974* (Qld) s 39.

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

40.1. 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 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.
- (2) Where the entirety of the property is vested in trustees or personal representatives, those trustees or personal representatives shall, unless the court otherwise determines, be appointed trustees on either of such statutory trusts, but subject, in the case of personal representatives, to, their rights and powers for the purposes of administration.
- (3) Where the entirety of the property is vested at law in co-owners the court may appoint a trustee corporation either alone or with 1 or 2 individuals (whether or not being co-owners), or 2 or more individuals, not exceeding 4 (whether or not including 1 or more of the co-owners), to be trustees of the property on either of such statutory trusts.
- (3A) On such appointment under subsection (3), the property shall, subject to the *Trusts Act 1973*, section 90, vest in the trustees.
- (4) If, on an application for the appointment of trustees on the statutory trust for sale, any of the co-owners satisfies the court that partition of the property would be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the court may, with the consent of the encumbrancee of the entirety (if any), appoint trustees of the property on the statutory trust for partition, or as to part of the property on the statutory trust for sale, and as to part on the statutory trust for partition, but a purchaser shall not be concerned to see or inquire whether any such consent has been given.
- (5) When such trustees for partition have prepared a scheme of partition they shall serve notice in writing of the scheme on all the co-owners of full age, and any of such co-owners dissatisfied with the scheme may, within 1 month after service upon the co-owner of such notice, apply to the court for a variation of the same.
- (5AA) If any of the co-owners is a person for whom an administrator has been appointed under the *Guardianship and Administration Act 2000* for the property, the notice must be served on the administrator.
- (5A) If any of the co-owners is an incapacitated person within the meaning of the *Public Trustee Act 1978*, the notice must be served on the person charged by law with the management and care of the incapacitated person's property, or if there is no person charged, on the public trustee.
- (5B) Where any of the co-owners is a person not of full age or a person who cannot be found or ascertained, or as to whom it is uncertain whether the person is living or dead, the trustees may act on behalf of the person, and retain land or other property to represent the person's share.
- (6) In relation to the sale or partition of property held in co-ownership, the court may alter such statutory trusts, and the trusts so altered shall be deemed to be the statutory trust in relation to that property.
- (6A) Without limiting the power of the court so to alter the statutory trusts, the court shall, unless for good reason the court otherwise directs, so alter the statutory trusts as to provide in the case of the statutory trust for partition that—
 - (a) any encumbrance which, prior to the appointment of the trustees, affected any undivided share shall continue to extend and apply to any such share; and
 - (b) any mortgage created for raising equality money shall rank in priority after any such encumbrance.
- (7) Where property becomes subject to such statutory trust for sale—
 - (a) in the case of joint tenancy—a sale under the trust shall not of itself effect a severance of that tenancy; and
 - (b) in any case—land shall be deemed to be converted upon the appointment of trustees for sale unless the court otherwise directs.

- (8) This section applies to property held in co-ownership at the commencement of this Act and to property which becomes so held after such commencement.
- (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. As discussed above at paragraph 38, the terms ‘co-ownership’ and ‘co-owners’ are defined in the PLA in the following way:⁷¹⁷

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.

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. As set out above at paragraph 39.1, 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.

The jurisdiction under section 38 is very broad and encompasses any ‘property’ which is widely defined in the *Acts Interpretation Act 1954* (Qld).⁷¹⁸ The provision does not cover chattels. Sale or partition of chattels is addressed in section 41 of the PLA.

40.2. Issues with the section

There are a number of issues in section 38 which require amendment.

40.2.1. 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.

40.2.2. 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

⁷¹⁷ *Property Law Act 1974* (Qld) s 37.

⁷¹⁸ 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.

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*.⁷¹⁹ 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.⁷²⁰

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.⁷²¹

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.⁷²²

40.2.3. 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.⁷²³ 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.⁷²⁴ 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.⁷²⁵

⁷¹⁹ *Re Bolous* [1985] 2 Qd R 165.

⁷²⁰ *Re Bolous* [1985] 2 Qd R 165, 167.

⁷²¹ 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*.

⁷²² 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]).

⁷²³ *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314, 317.

⁷²⁴ *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314.

⁷²⁵ *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314, 321.

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.⁷²⁶ 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 *Ngatoa v Ford*.⁷²⁷ 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.⁷²⁸

In this respect, hardship or unfairness is not generally a reason for refusing an application for sale.⁷²⁹ 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.⁷³⁰

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

- conventional estoppel;⁷³¹
- equitable estoppel;⁷³²
- 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;⁷³³
- a claimed charge over the entirety of the half share (as tenant in common) of the other party based on an equity of exoneration.⁷³⁴

Relief under section 38(1) of the PLA is 'not as of right'.⁷³⁵ 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. The Centre therefore concludes that clarification of the scope of the discretion in 38(1) of the PLA is not necessary.

⁷²⁶ *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.

⁷²⁷ *Ngatoa 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.'

⁷²⁸ *Ngatoa v Ford* (1990) 19 NSWLR 72, 77.

⁷²⁹ See for example *Pascoe v Dyason* [2011] NSWSC 1217, [6]; *Harris v Harris* [2014] NSWSC 1766, [20].

⁷³⁰ *Re McNamara and the Conveyancing Act* (1961) 78 WN (NSW) 1068; *Williams v Legg* (1993) 29 NSWLR 687, 693.

⁷³¹ *Woodson (Sales) Pty Ltd v Woodson (Australia) Pty Ltd* (1996) 7 BPR 14,685, 14,701.

⁷³² *Stone v Stone* [2014] NSWSC 1655, [37].

⁷³³ *Official Trustee in Bankruptcy v Cameron* [2008] QSC 89 [5], [30].

⁷³⁴ *Official Trustee in Bankruptcy v Cameron* [2008] QSC 89 [5], [29].

⁷³⁵ *Pennie v Pennie* [2010] NSWSC 1070 [9].

40.2.4. Appointment of trustees – undivided shares vest free from encumbrance

Section 38(1) of the PLA states that where an encumbrance (for example, a mortgage) is held in respect of the entirety of the land, then, upon vesting of the land in the trustee, the land remains subject to that encumbrance. If, however, the land is held by co-owners as tenants in common and one co-owner has granted a mortgage over their share of the land, then the property vests in the trustee free of that encumbrance. The encumbrance converts into an equitable charge over the share of the proceeds of sale to which that co-owner might otherwise have been entitled to.⁷³⁶ The reason for this is explained succinctly by Duncan and Vann who state:

An encumbrancee cannot improve his or her position by claiming attachment rights to the shares of the proceeds of sale belonging to other co-owners who did not grant the encumbrance over their interest in the property.⁷³⁷

Subsection 38(1), as it is currently drafted, is not clear on exactly what happens to an encumbrance over a co-owner's share as tenant in common upon vesting. In *Crocombe v Pine Forests of Australia Pty Ltd*⁷³⁸ Young CJ commented (in respect of the New South Wales equivalent provision):

I have not been able to find any authority as to what happens to registered mortgages of undivided shares when the trustee for sale is appointed of the whole parcel. It would seem that the Registrar General would need to cancel the certificates of title and issue a new certificate of title for the whole property. The mortgagee of individual shares, however, could not protect its interest by caveat as they would have no right as against the trustee other than the right to have him administer the trust. It would seem that the rights of a mortgagee of an individual share are simply to claim the share of proceeds of sale which otherwise would pass to the mortgagor and that he or she would have a charge over that share.⁷³⁹

The provision could be amended to provide clearly what happens to an encumbrance over an undivided share in land and this would aid in the interpretation of the Division.

There is also some question as to what happens to the interests of third parties when their interest does not fall within the definition of 'encumbrancee' such as a lessee, or a person who benefits from a restrictive covenant, for example.⁷⁴⁰ The question is then: what happens to those interests? On one view, the interests are unaffected by the appointment of a trustee under the Division. As discussed above at paragraph 38.3.1, in *Re Marcellos*⁷⁴¹ it was accepted that a lease given by only one co-owner was nevertheless binding upon subsequent owners after a sale under section 38. Commentators point out that this leaves open the prospect of frustrating the effect of section 38 'by a long-term lease by one co-owner to a third party and a sub-lease by the third party back to the co-owner for equivalent

⁷³⁶ *Bunnings Group Ltd v Asden Developments Pty Ltd* [2014] 1 Qd R 493.

⁷³⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.38.201].

⁷³⁸ (2005) 291 ALR 692.

⁷³⁹ *Crocombe v Pine Forests of Australia Pty Ltd* (2005) 291 ALR 692 [76].

⁷⁴⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.38.210].

⁷⁴¹ (1940) 42 SR (NSW) 154.

rental.⁷⁴² Amending the definition of co-owner to include any party with an *interest* in the land will avoid this situation. This is the recommendation as set out above at paragraph 38.4.

The position with respect to the appointment of a trustee for partition is different in that the encumbrance over an undivided share will continue and extend to apply to the share of that co-owner granting the interest, after partition, unless the court orders otherwise.

40.2.5. Matrimonial property

Where property that is the subject of an application under section 38 of the PLA is property of a husband and wife, or de facto partners, then the better view is that the jurisdiction of the Supreme Court under section 38 of the PLA is ousted once proceedings are begun under the *Family Law Act 1975* (Cth).⁷⁴³ The Supreme Court may also stay or adjourn proceedings to allow property proceedings to be commenced under the *Family Law Act 1975* (Cth).⁷⁴⁴ The Family Court will also grant injunctions to prevent a spouse from bringing an application under section 38 of the PLA. The court may also exercise its discretion to refuse an application under section 38 on the basis that the matter should be resolved under the *Family Law Act 1975* (Cth).⁷⁴⁵

The Centre is of the view that the case law with respect to marital (or de facto) property is entirely appropriate. However, this is not set out in the provisions and it may assist if this view was express in the Division.

40.2.6. Appointment of trustees – section 38(3)

Under the current regime the court may appoint trustees in accordance with section 38(3). The Centre is of the view that it is unnecessary to set out specificities as to the appointment of trustees, and that this should be at the sole discretion of the court, and in accordance with the *Trusts Act 1973* (Qld).

40.2.7. Transitional provisions

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 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.

40.2.8. Language of the Division is outdated and difficult to understand

The language of section 30, and Part 5 Division 2 generally, is outdated, convoluted and difficult to understand. The Centre is of the view that the drafting could be clearer and more concise, which will aid in the interpretation and application of the section.

⁷⁴² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.38.210].

⁷⁴³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.38.120]; *Cattarossi v Cattarossi* (1976) 2 Fam LR 11436; although note that in some cases the court has preferred to stay proceedings rather than to find that their jurisdiction is ousted: *Stefanoski v Stefanoski* [1983] FLC 91-367; *Williams v Williams* [1979] 1 NSWLR 376.

⁷⁴⁴ *Williams v Williams* [1979] 1 NSWLR 376; *Norris v Norris* [1985] 1 NSWLR 472.

⁷⁴⁵ *Clayton v Clayton (No 2)* [2015] QDC 214.

40.3. Other jurisdictions

40.3.1. Australia

As discussed above, 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.⁷⁴⁶ The legislation in South Australia, Western Australia, the Australian Capital Territory and Tasmania are derived from the English *Partition Act 1868*.⁷⁴⁷ 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.

40.3.2. 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’.⁷⁴⁸ 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.⁷⁴⁹

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.⁷⁵⁰

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.⁷⁵¹

⁷⁴⁶ *Law of Property 2010* (NT) Pt 5, Div 2.

⁷⁴⁷ *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.

⁷⁴⁸ Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 48 [4.2].

⁷⁴⁹ Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 51-52, [4.13]-[4.14].

⁷⁵⁰ Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 52 [4.16].

⁷⁵¹ Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 53 [4.17].

The second option identified by the VLRC was based on recommendations made by the British Columbia Law Reform Commission in 1988.⁷⁵² These included providing the court with a broad discretion to take into account any relevant factor when considering an application.⁷⁵³ Under this proposal, co-owners would apply to the court for an order that land be sold or divided. Further, the 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.⁷⁵⁴ 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.⁷⁵⁵

The Victorian Parliament ultimately repealed Part IV of the *Property Law Act 1958* (Vic) in 2005.⁷⁵⁶ 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;⁷⁵⁷
- 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’;⁷⁵⁸
- 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;⁷⁵⁹
- VCAT can appoint trustees to manage and run the sale or division of property;⁷⁶⁰
- a process is set out for VCAT to make orders regarding compensation and accounting between co-owners.⁷⁶¹

40.3.3. 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 replaced 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.⁷⁶²

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

⁷⁵² Law Reform Commission of British Columbia, *Report on Co-Ownership of Land*, LRC 100 (1988).

⁷⁵³ Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 54 [4.21].

⁷⁵⁴ Law Reform Commission of British Columbia, *Report on Co-Ownership of Land*, LRC 100 (1988) 49-51.

⁷⁵⁵ Victorian Law Reform Commission, *Co-ownership in Victoria*, Discussion Paper (2001) 54 [4.20].

⁷⁵⁶ *Property (Co-Ownership) Act 2005* (Vic).

⁷⁵⁷ *Property Law Act 1958* (Vic) s 234C(4) and (5).

⁷⁵⁸ *Property Law Act 1958* (Vic) s 228.

⁷⁵⁹ *Property Law Act 1958* (Vic) s 229.

⁷⁶⁰ *Property Law Act 1958* (Vic) s 231.

⁷⁶¹ *Property Law Act 1958* (Vic) s 233.

⁷⁶² *Property Law Act 2007* (NZ) s 339(1).

are to be divided or applied.⁷⁶³ The court is required to have regard to a number of factors when making an order under section 339(1) (and any related order under section 339(4)).⁷⁶⁴ 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.

40.4. Recommendation

40.4.1. Retain the effect of Part 5 Division 2

The Centre recommends retaining the effect of the Division, but amending the provisions to provide a clear process for the sale or partition of co-owned property. Division 2 is an important mechanism in Queensland because it provides the only remedy for a co-owner if the parties are not able to agree to sell or divide real or personal property. The discretion of the court with respect to the orders it can make should be very broad so that the ability of a court to make orders that are just and fair is not hindered or restricted. This recommendation is made on the basis that there are unendingly diverse factual circumstances that may bring about such an application. Parties may co-own property for any number of reasons and the court will need a significant amount of latitude to deal fairly and reasonably with such applications.

40.4.2. Modernise the language of the division

The language of the Division as it is currently drafted is convoluted, outdated and difficult to understand. The Centre recommends redrafting the provisions to provide a clear and concise statutory framework for the sale or partition of property. As part of the modernisation of the language, the Centre recommends the word ‘partition’ be replaced with the word ‘division’.

40.4.3. Provide concise definitions for the division in section 37

The Centre’s recommendations with respect to the definitions in the Division are set out fully above at paragraph 38.4.

40.4.4. Property held on trust for sale or partition

As set out in paragraph 39.3, the Centre recommends that the effect of sections 37A and 37B be retained but redrafted to modernise the language of the provisions and to aid in interpretation. The proposed amendments to the provision encompass the operation of sections 37A and 37B, but provide a clear and concise process for the sale or partition of co-owned property. The Centre

⁷⁶³ *Property Law Act 2007 (NZ)* ss 339(4) and 343.

⁷⁶⁴ *Property Law Act 2007 (NZ)* s 342.

therefore recommends that sections 37A and 37B can be repealed on the basis that the recommended amendments be adopted.

40.4.5. Clarification of effect of vesting

The Centre recommends that section 38(1) be redrafted to provide clarity and to put beyond doubt as to the effect of a vesting order. The Centre recommends adopting wording that specifically states that, upon vesting in the trustee, the encumbrance that was in respect of one co-owner's share of the land alone, converts into an equitable charge against the proceeds of sale that the co-owner might otherwise have been entitled to. This position is in line with the current case law on the section and does not alter the current position in Queensland.

RECOMMENDATION 39. Part 5 Division 2 should be amended to modernise the language and aid in interpretation of the scope of the provision. The effect of the Division should be retained. The amended provisions should:

- retain the power of the court to make an order appointing a trustee for sale or a trustee for partition and vesting property in same;
- retain the power of the court to order the sale of chattels;
- set out what happens to an encumbrance over an undivided share of land upon vesting in the trustee;
- preserve the rights of parties who hold a security interest over the property that is the subject of an application;
- provide guidance to the court as to which matters it should take into consideration when making orders under this Division;
- provide the court with a broad discretion to make orders to effect a just and fair distribution of property between co-owners, whether by sale or by partition;
- provide the court with the power to stay or adjourn proceedings that should properly be heard in the Family Law jurisdiction;
- rely on the *Trusts Act 1973* with respect to the rules for appointing and removing trustees;
- retain the power of the court to make orders for a co-owner to account to another co-owner;
- modernise the language by replacing the word 'partition' with the word 'division' (noun) or 'divide' (verb).

For example, drawing on parts of the Victorian approach, Part 5, Division 2 could be drafted in the following manner:

Section [37A] Other forms of severance not affected

Nothing in this Part affects or prevents the severing of a joint tenancy by any other means that exist under this Act or any other Act or law.

Section [37B] Security interests not affected

Despite anything to the contrary in any instrument creating a security interest, the severing of a joint tenancy in accordance with this Part—

- (a) does not constitute a breach of the covenants or terms of that instrument; and
- (b) does not affect any existing powers, rights or interests of the holder of a security interest over the property to which that severance relates.

Section [37C] Parties to a proceeding

In addition to any other parties, all co-owners of the land to which the proceeding relates are parties to a proceeding in court under this Division.

Section [37D] Adjournment of hearings or stays of applications—spouses or domestic partners

- (1) The court may stay an application or adjourn its hearing under this Division at any time before it has made a final order under Division 2 or Division 3 if proceedings in relation to property of a co-owner who has made an application under Division 3 are commenced—
 - (a) under the *Family Law Act 1975* (Cth); or
 - (b) under Part 19 of this Act.
- (2) The court may adjourn its hearing at any time before it has made a final order under Division 2 or Division 3 to permit a co-owner of property to commence proceedings in relation to property of the co-owner—
 - (a) under the *Family Law Act 1975* (Cth); or
 - (b) under Part 19 of this Act.
- (3) Nothing in this section limits the power of the court to grant or refuse an adjournment or a stay in relation to any proceeding before it.

Division 2 Sale and division

Section [38] Application for appointment of trustee for sale or division of land

- (1) A co-owner of land may apply to court for an order or orders under this Division to be made in respect of that land.
- (2) In an application under this section the court may order the appointment of a trustee or trustees for —
 - (a) the sale of the land and the division of the proceeds among the co-owners; or
 - (b) the physical division of the land among the co-owners; or
 - (c) a combination of the matters specified in paragraphs (a) and (b).
- (3) A person who makes an application under subsection (1) must give notice of the application to the holder of a security interest over the land to which the application relates.
- (4) In an order under subsection (2) appointing a trustee or trustees for the purposes of the sale of land, the court may make any order it thinks fit to ensure that a just and fair sale of land occurs, including but not limited to orders that—
 - (a) direct the trustee or trustees as to the terms and conditions on which any sale is to be carried out; and
 - (b) direct the trustee or trustees as to the distribution of any proceeds of the sale in any manner specified by the court.
- (5) In an order appointing a trustee or trustees for the purposes of a physical division of land, the court may make any order it thinks fit to ensure that a just and fair division of land occurs, including but not limited to orders that direct the trustee or trustees as to the manner in which the division is to be carried out.
- (6) An order under this section may provide for the remuneration of the trustee or trustees appointed under the order and—
 - (a) if a trustee or trustees are appointed for the purposes referred to in subsection (4), the order may provide that the remuneration of the trustee or trustees be paid from the proceeds of sale; and
 - (b) if a trustee or trustees are appointed for the purposes referred to in subsection (5), the order may provide that the remuneration of the trustee or trustees be paid by such parties to the proceeding as the court considers just and fair in the circumstances.

Section [38A] Property vests in trustee for sale or division

- (1) Upon the appointment of a trustee or trustees for sale or division under this Division, the land that is the subject of the application vests in the trustee or trustees in accordance with section 90 of the *Trusts Act 1973*.
- (2) Where the land is subject to an encumbrance affecting the entirety, then the land vests in the trustee subject to that encumbrance.
- (3) Where an undivided share of the land is subject to an encumbrance, then the land vests in the trustee free of that encumbrance and the interest of the party entitled to the benefit of that encumbrance is converted to an equitable interest in the proceeds of sale that that co-owner might otherwise have been entitled to.

Section [38B] Sale and division of proceeds to be preferred

- (1) If the court determines that an order should be made for the sale and division of land which is the subject of an application under this Division, the court must make an order under section 38(2)(a) unless the court considers that it would be more just and fair to make an order under section 38(2)(b) or section 38(2)(c).
- (2) Without limiting any matter which the court may consider, in determining whether an order under section 38(2)(b) or section 38(2)(c) would be more just and fair, the court must take into account the following—
 - (a) the use being made of the land, including any use of the land for residential or business purposes;
 - (b) whether the land is able to be divided and the practicality of dividing the land;
 - (c) any particular links with or attachment to the land, including whether the land is unique or has a special value to one or more of the co-owners.

Section [39] Court can order sale or division of chattels

- (1) A co-owner of chattels may apply to court for an order or orders under this Division to be made in respect of those chattels.
- (2) In any proceeding under subsection (1), the court may order—
 - (a) the sale of the chattels and the division of the proceeds of sale among the co-owners; or
 - (b) the physical division of the chattels among the co-owners; or
 - (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.
- (3) Without limiting the court's powers, the court may make any other orders under this section it thinks fit to ensure that a just and fair sale or division of chattels occurs.

Section [40] Order varying entitlements to land or chattels

When making an order under this Division, the court, if it considers it just and fair, may order—

- (a) that the land or chattels be physically divided into parcels or shares that differ from the entitlements of each of the co-owners; and
- (b) that compensation be paid by specified co-owners to compensate for any differences in the value of the parcels or shares when the land or the chattels are divided in accordance with an order under paragraph (a).

Section [40B] Other orders the court can make

In any proceeding under this Division, without limiting the orders the court can make, the court may order—

- (a) that the land or chattels be sold by private sale or at auction;
- (b) that the co-owners may purchase the land or chattels at that sale or auction;

- (c) in the case of a private sale, that the sale be at fair market price as determined by an independent valuer;
- (d) in the case of an auction, that the reserve price is the reserve price set by the court;
- (e) that an independent valuation of the land or chattels take place;
- (f) that a sale is to be completed within a specified time;
- (g) that the costs of the sale be met—
 - (i) by one or more of the co-owners; or
 - (ii) from the proceeds of the sale;
- (h) that the sale and division of the proceeds of sale or the physical division of the land or chattels is subject to any terms and conditions which the court considers necessary or desirable in any particular case;
- (i) in the case of land, that any necessary documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively.

Section [41] Orders as to compensation and accounting

- (1) In any proceeding under this Division, the court may order—
 - (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
 - (b) that one or more co-owners account to the other co-owners in accordance with section 43;
 - (c) that an adjustment be made to a co-owner's interest in the land or chattels to take account of amounts payable by co-owners to each other during the period of the co-ownership.
- (2) In determining whether to make an order under subsection (1), the court must take into account the following—
 - (a) any amount that a co-owner has reasonably spent in improving the land or chattels;
 - (b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or chattels;
 - (c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or chattels for which all the co-owners are liable;
 - (d) damage caused by the unreasonable use of the land or chattels by a co-owner;
 - (e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;
 - (f) in the case of chattels, whether or not a co-owner who has used the chattels should pay an amount equivalent to rent to a co-owner who did not use the chattels.
- (3) The court must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—
 - (a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has occupied the land in relation to the land; or
 - (b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or
 - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner.

- (4) The court must not make an order requiring a co-owner who has used chattels to pay an amount equivalent to rent to a co-owner who did not use the chattels unless—
 - (a) the co-owner who has used the chattels is seeking compensation, reimbursement or an accounting for money expended by the co-owner who has used the chattels in relation to the chattels; or
 - (b) the co-owner claiming an amount equivalent to rent has been excluded from using the chattels; or
 - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to use the chattels with the other co-owner.
- (5) This section applies despite any law or rule to the contrary.

Division 3 Accounting

Section [42] Application for order for accounting

- (1) A co-owner of land or chattels may apply to the court for an order under this Division to be made for an accounting in accordance with section 43.
- (2) An application under this section may be made whether or not an application is made under Division 2.

Section [42A] Orders the court can make

- (1) In any proceeding under this Division, the court may make any order it thinks fit to ensure that a just and fair accounting of amounts received by co-owners in respect of the land or chattels occurs.
- (2) Without limiting the court's powers, it may—
 - (a) order a co-owner who has received more than the share of rent or other payments from a third party in respect of the land or chattels to which that co-owner is entitled to account for that rent or other payments to the other co-owners; and
 - (b) make any order it considers just and fair for the purposes of an accounting by a co-owner who has received more than that co-owner's just and proportionate share to the other co-owners of the land or chattels.

Section [43] Liability of co-owner to account

A co-owner is liable, in respect of the receipt by him or her of more than his or her just or proportionate share according to his or her interest in the property, to account to any other co-owner of the property.

41. Section 39 – Trustee in statutory trusts for sale or partition to consult persons interested

41.1. Overview and purpose

39 Trustee on statutory trusts for sale or partition to consult persons interested

- (1) So far as practicable trustees on the statutory trust for sale, or on the statutory trust for partition, shall—
- (a) consult the persons of full age and not subject to disability for the time being beneficially entitled to income of the property until sale or partition, and the public trustee or other person charged by law with the management and care of the property of any person for whom an administrator has been appointed under the *Guardianship and Administration Act 2000* for the property, or protected person, for the time being beneficially entitled to income of the property until sale or partition; and
 - (b) so far as consistent with the general interest of the trust, give effect to the wishes of the persons so consulted if they are interested in respect of more than half of the income of the property until sale or partition or, in case of dispute, of such of the persons so consulted as are in agreement and are interested in respect of more than half of the income of the property until sale or partition.
- (2) A purchaser shall not be concerned to see that this section has been complied with.

Section 39 of the PLA imposes a duty on the trustee to consult persons identified in 39(1)(a), that is, persons ‘beneficially entitled to the income’ of the property.⁷⁶⁵ This class includes co-owners and also extends to an encumbrancee of an undivided share because of the operation of the definition of co-owner in section 37 of the PLA.⁷⁶⁶ Commentators are of the view that the scope of the duty even extends to the beneficiaries of a trust, pointing out that ‘whereas in other respects it is sufficient to deal with the trustee of such a trust.’⁷⁶⁷

The positive duty to ‘consult’ exceeds merely telling the other party what the trustee intends to do.⁷⁶⁸ Chief Justice Young, in *Cain v Cain*⁷⁶⁹ stated that:

‘Consult’ means putting propositions, listening to propositions and listening to the reply. It means more than mere notification. Sufficient information must be given by each side to the other and there must be sufficient time for an evaluation of the proposals and listening to the response.⁷⁷⁰

Section 39(1)(b) requires the trustee give effect to the wishes of a person whose interest exceeds half the income of the property. In this case, the wishes of the majority interest will usually prevail.⁷⁷¹ However, it should be noted that if it is impractical to carry out those wishes, then the trustee is not

⁷⁶⁵ *Property Law Act 1974* (Qld) s 39(1)(a).

⁷⁶⁶ Section 37 defines ‘co-owner’ as including the encumbrancee of the interest of a joint tenant or a tenant in common.

⁷⁶⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.39.30].

⁷⁶⁸ *Rollo v Minister of Town and Country Planning* [1948] 1 All ER 13; *Cain v Cain* [2007] NSWSC 623.

⁷⁶⁹ [2007] NSWSC 623.

⁷⁷⁰ *Cain v Cain* [2007] NSWSC 623, [23].

⁷⁷¹ *Bull v Bull* [1955] 1 QB 234.

obliged to act in accordance with them.⁷⁷² Similarly, where shareholders or beneficiaries making up the majority are deeply divided then the trustee may not be able to act accordingly.⁷⁷³ Finally, the wishes must be consistent with the trust, so if, for example, the wishes of the majority were to postpone the sale, then this does not have to be given effect by the trustee.⁷⁷⁴

41.2. Recommendation

The Centre recommends repealing section 39 of the PLA on the basis that the proposed redrafting of Part 5, Division 2 is adopted. Under the proposed regime, the court has a broad discretion to make orders that it thinks are just and fair. The court would therefore take into consideration the wishes of interested parties before making orders about how the property should be dealt with. The court could also order the trustee to consult with interested parties, if the court has not had that opportunity at the time of the appointment of the trustee for sale or division.

The full recommendations with respect to the proposed redraft of Part 5, Division 2 are set out at paragraphs 38.4, 39.3 and 40.4.

RECOMMENDATION 40. Section 39 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

⁷⁷² *Abbott v Pegler* (1980) 1 BPR 9267.

⁷⁷³ *Ex Parte Eimbart Pty Ltd* [1982] Qd R 398.

⁷⁷⁴ *Abbott v Pegler* (1980) 1 BPR 9267.

42. Section 40 – Right of co-owners to bid at sale under statutory power of sale

42.1. Overview and purpose

40 Right of co-owners to bid at sale under statutory power of sale

- (1) On any sale under a statutory trust for sale the court may allow any of the co-owners of the property to purchase whether at auction or otherwise on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part of the purchase money instead of paying the same, or as to any other matters as to the court seems reasonable.
- (2) A co-owner, with a right to purchase shall not, without the leave of the court, be entitled to act as trustee in connection with the sale.

The courts commonly make orders that allow any of the co-owners of property to purchase by private treaty or auction.⁷⁷⁵ The right to bid at auction or make an offer to purchase the property for sale by private treaty does not place an obligation on the trustee to accept offers or bids by co-owners.⁷⁷⁶ The trustee should sell elsewhere if he is not satisfied with the terms of the offer, subject to the orders made by the court. The court may order that the purchasing co-owner may set-off part of the purchase price with his share already owned, rather than pay the full purchase price, only to receive his share back in cash upon settlement of the sale.⁷⁷⁷

Section 40(2) requires the leave of the court for a co-owner with a right to purchase to act as the trustee for sale or partition.

42.2. Recommendation

The Centre recommends repealing section 40 of the PLA on the basis that the proposed redraft of Part 5, Division 2 is adopted. Under the proposed regime, the court has a broad discretion to make orders that it thinks are just and fair. The proposed amendments to the Division includes the following provision with respect to co-owners bidding or offering to purchase the property:

- ...
- In any proceeding under this Division, without limiting the orders the court can make, the court may order—
- (a) that the land or goods be sold by private sale or at auction;
 - (b) that the co-owners may purchase the land or goods at that sale or auction;
- ...

The full recommendations with respect to the proposed redraft of Part 5, Division 2 are set out at paragraphs 38.4, 39.3 and 40.4.

⁷⁷⁵ See for example *Re Cordingley* (1948) 48 SR (NSW) 517; *Re Debney* (1959) 60 SR (NSW) 471; *Muller v Zielonkowsky* [2006] QSC 265; *Cain v Cain* [2007] NSWSC 623.

⁷⁷⁶ *Abbott v Pegler* (1980) 1 BPR 9267.

⁷⁷⁷ *Cain v Cain* [2007] NSWSC 623.

RECOMMENDATION 41. Section 40 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

43. Section 41 – Sale or division of chattels

43.1. Overview and purpose

41 Sale or division of chattels

- (1) Where any chattel or chattels belong to 2 or more persons jointly or in undivided shares any such person or persons may apply to the court for an order under this section.
- (2) On any application under this section the court may—
 - (a) order that the chattels in respect of which the application is made, or any 1 or more of them, be sold and the proceeds of sale distributed among the persons entitled to them under their interests in the chattel or chattels; or
 - (b) order that the chattels or some of them in respect of which the application is made be divided among the persons entitled to them; or
 - (c) order that 1 or more of such chattels be sold and the others be divided; or
 - (d) make such other orders and give any consequential directions as it thinks fit.

The common law does not allow a court to order the sale or division of co-owned chattels at the request of one of the co-owners.⁷⁷⁸ Copying from *Law of Property Act 1925* (UK), section 13 of the *Law Reform (Tortfeasors Contribution, Contributory Negligence and Division of Chattels) Act 1952* (Qld) was enacted to alleviate this problem. Section 41 of the PLA replaced this section and now operates to modify the common law so that the courts can order the sale or division of co-owned chattels.

Rather than the court ordering the appointment for a statutory trustee for sale as with land under Part 5, Division 2 of the PLA, co-owned chattels are dealt with by the court directly. The court can order the sale or partition of the chattels without a trustee. The court can, upon making an order for sale, appoint a trustee for that purpose, but this is not a statutory trust like that created by section 37A or section 37B of the PLA in respect of land.

While the section states that the court ‘may’ make an order with respect to chattels, the practical reality is that the courts will make an order unless there are exceptional circumstances. The court takes the view that if a co-owner wants to extricate himself from the co-ownership arrangement, then he is entitled to do so.⁷⁷⁹

Section 41(2) of the PLA gives the court a broad discretion to deal with the chattels, including whether to order the sale or division (or some combination of both).⁷⁸⁰

43.2. Recommendation

The Centre recommends repealing section 41 of the PLA on the basis that the proposed redraft of Part 5, Division 2 is adopted. Under the proposed regime, the court has a broad discretion to make orders

⁷⁷⁸ *Ryan v King* [1932] QWN 1; *In the marriage of MacDonald* [1948] QWN 47.

⁷⁷⁹ *Tillack v Tillack* [1941] VLR 151; *Re Catley* [1955] St R Qd 388.

⁷⁸⁰ Note that this is different from section 38(4) of the PLA with respect to sale or partition of land where sale is the preferred method and partition will only be ordered upon application by a co-owner who can convince the court that partition is more beneficial to the majority of co-owners: *Pannizutti v Trask* (1987) 10 NSWLR 531.

with respect to the sale or division of chattels. The proposed amendments to the Division include the following provision with respect the sale or division of chattels:

...

Court can order sale or division of chattels

- (1) A co-owner of chattels may apply to court for an order or orders under this Division to be made in respect of those chattels.
- (2) In any proceeding under subsection (1), the court may order—
 - (a) the sale of the chattels and the division of the proceeds of sale among the co-owners;
or
 - (b) the physical division of the chattels among the co-owners; or
 - (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.
- (3) Without limiting the court's powers, the court may make any other orders under this section it thinks fit to ensure that a just and fair sale or division of chattels occurs.

...

The full recommendations with respect to the proposed redraft of Part 5, Division 2 are set out at paragraphs 38.4, 39.3 and 40.4.

RECOMMENDATION 42. Section 41 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

44. Section 42 – Powers of the court

44.1. 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.⁷⁸¹

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.⁷⁸² 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*⁷⁸³ 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.⁷⁸⁴

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-

⁷⁸¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.42.30].

⁷⁸² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.42.30].

⁷⁸³ *Raymond v Zielonkowsky* [2006] QSC 265.

⁷⁸⁴ *Raymond v Zielonkowsky* [2006] QSC 265, [25].

owners' registered interests as joint tenants. Mullins J made this determination relying on the 'additional jurisdiction' under section 42 of the PLA.⁷⁸⁵

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.

44.2. Issues with the section

44.2.1. 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).

44.2.2. 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*⁷⁸⁶ 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 (provided that the proceeding was brought within 3 months).⁷⁸⁷ 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.⁷⁸⁸

In another Queensland Court of Appeal decision,⁷⁸⁹ 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.

⁷⁸⁵ *Raymond v Zielonkowsky* [2006] QSC 265 [36], [41].

⁷⁸⁶ *Re Wlodarczyk* [2000] 2 Qd R 216.

⁷⁸⁷ *Re Wlodarczyk* [2000] 2 Qd R 216, 220-221.

⁷⁸⁸ *Re Wlodarczyk* [2000] 2 Qd R 216, 218.

⁷⁸⁹ *Ranger & Anor v Ranger* [2009] QCA 226.

44.3. Other jurisdictions

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.⁷⁹⁰ This may include orders for the sale of land and the division of proceeds of sale among co-owners.⁷⁹¹ 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.⁷⁹²

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.⁷⁹³

44.4. Recommendation

The Centre recommends retaining the effect of Part 5, Division 2, but redrafting the provisions to provide greater clarity. The proposed redrafting, as discussed above at paragraph 40.4, will provide the court with a broad discretion to make any order necessary for the just and fair distribution of property. The proposed drafting as set out in respect of section 38 and section 41 of the PLA will address the issues identified above with section 42 and eliminate the restrictions as to what orders the court can make. Specifically, the recommended drafting of sections 38 and 39 includes a broad discretion for the court to make any orders it thinks necessary.

RECOMMENDATION 43. Section 42 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

⁷⁹⁰ *Property Law Act 1958* (Vic) s 228(1).

⁷⁹¹ *Property Law Act 1958* (Vic) s 228(2)(a).

⁷⁹² *Property Law Act 1958* (Vic) s 231(2)(b).

⁷⁹³ *Property Law Act 2007* (NZ) s 343(c).

45. Section 43 – Liability of co-owner to account

45.1. Overview and purpose

43 Liability of co-owner to account

- (1) A co-owner shall, in respect of the receipt by the co-owner of more than the co-owner's just or proportionate share according to the co-owner's interest in the property, be liable to account to any other co-owner of the property.
- (2) In this section—
co-owner means a joint tenant, whether in law or in equity, or a tenant in common, whether at law or in equity, of any property.

A feature of co-ownership of property is that all co-owners are equally entitled to possession of the whole property, whether they owned the property jointly or in common with the other owners.⁷⁹⁴ At common law, co-owners of property cannot generally⁷⁹⁵ bring an action to force another co-owner to account for rents or profits received.⁷⁹⁶ Further, if there is no lease agreement in place, and providing the co-owner in possession was not excluding the other co-owners, occupation rent is not payable.⁷⁹⁷

Section 43 of the PLA modifies the common law regarding accounting between co-owners for rent, profits or other income generated by the property. The section does not apply to:

- a co-owner in possession who profits by his own activities such as operating a business from the property;
- a co-owner who fails to rent out an unused part the property; or
- occupation rent.

A co-owner who expends capital to improve the property may rely on this section to seek an account for the increase value in the property when seeking an order for sale or partition.⁷⁹⁸ Note, however, under such an application the co-owner who made the improvements may become liable under an order for occupation rent if that co-owner was in possession of the property.⁷⁹⁹

45.2. Recommendation

The Centre recommends repealing section 43 of the PLA on the basis that the proposed redraft of Part 5, Division 2 is adopted. Under the proposed regime, the court has a broad discretion to make orders with respect to accounting to co-owners. The proposed amendments to the Division include the following provision with respect to liability of co-owners to account to other co-owners:

⁷⁹⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.43.30].

⁷⁹⁵ Exceptions include where the co-owner is a bailiff of the property for other co-owners, or was excluding other co-owners, or if he was committing waste: Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.43.30].

⁷⁹⁶ See for example *Jacobs v Seward* (1872) LR 5 HL 464; *Osachuk v Osachuk* (1971) 18 DLR (3d) 413; *Proprietors of the Centre Building Units Plan No 343 v Bourne* [1984] 1 Qd R 613.

⁷⁹⁷ *McCormick v McCormick* [1921] NZLR 275; *Dunkel v Izsak* (1984) 3 BPR 9668; *In the Marriage of Luke* (1936) 36 SR (NSW) 310.

⁷⁹⁸ *Leigh v Dickeson* (1884) 15 QBD 60.

⁷⁹⁹ *Brickwood v Young* (1905) 2 CLR 242.

...

Division 3 Accounting

[42] Application for order for accounting

- (1) A co-owner of land or chattels may apply to the court for an order under this Division to be made for an accounting in accordance with section 43.
- (2) An application under this section may be made whether or not an application is made under Division 2.

[42A] Orders the court can make

- (1) In any proceeding under this Division, the court may make any order it thinks fit to ensure that a just and fair accounting of amounts received by co-owners in respect of the land or chattels occurs.
- (2) Without limiting the court's powers, it may—
 - (a) order a co-owner who has received more than the share of rent or other payments from a third party in respect of the land or chattels to which that co-owner is entitled to account for that rent or other payments to the other co-owners; and
 - (b) make any order it considers just and fair for the purposes of an accounting by a co-owner who has received more than that co-owner's just and proportionate share to the other co-owners of the land or chattels.

[43] Liability of co-owner to account

A co-owner is liable, in respect of the receipt by him or her of more than his or her just or proportionate share according to his or her interest in the property, to account to any other co-owner of the property.

...

The full recommendations with respect to the proposed redraft of Part 5, Division 2 are set out at paragraphs 38.4, 39.3 and 40.4.

RECOMMENDATION 44. Section 43 should be repealed on the basis that the proposed amendments to Part 5, Division 2 are adopted.

Part 6 – Deeds, covenants, instruments and contracts

Part 6 of the PLA contains four divisions. Division 1 deals with deeds and covenants. Division 2 deals with general rules affecting contracts. Division 3 deals with sales of land. The final division, Division 4 deals with sales of land by instalment. The sections of each Division are discussed below in numerical order. In some cases, there are additional issues that are discussed which are not specifically related to existing provisions of the PLA but that are, nonetheless, thematically appropriate for inclusion.

46. Part 6 Division 1 – Deeds and covenants

Division 1 of Part 6 of the PLA deals with deeds. A deed may be used for a large number of purposes, including as a record of an agreement reached between two or more parties. In this sense, a deed is very similar to a contract and in fact, in the mind of many people, a deed is a synonym for contract. However, there are significant differences between a deed and a contract. A deed is a physical object, a document recording a solemn binding promise that is legally enforceable if the deed has been properly executed (i.e. it is signed, sealed and delivered). A contract, on the other hand, may not require writing if there is an agreement between the parties, offer and acceptance, an intention to be legally bound and consideration.

A deed has been described as ‘the most solemn act that a person can perform with respect to a particular piece of property or other right’.⁸⁰⁰ For a deed to be valid, it must be: written on paper;⁸⁰¹ signed;⁸⁰² sealed (or deemed to be sealed);⁸⁰³ and delivered.⁸⁰⁴

Unlike a contract, a deed is immediately binding on the party executing the deed if it is validly executed and delivered – even if the other side has not executed the deed.⁸⁰⁵ This means that a deed can be enforced by a third party⁸⁰⁶ who has not provided consideration.⁸⁰⁷ In fact, one of the main advantages of using a deed is that it can create a binding promise without the need for consideration.⁸⁰⁸

⁸⁰⁰ *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 at 369 cited in Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 30.

⁸⁰¹ See RJA Morrison and HJ Goolden (eds), *Norton A Treatise on Deeds* (2nd ed 1928), Sweet & Maxwell, 3 cited in Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 6.

⁸⁰² *Property Law Act 1974* (Qld) s 45(1).

⁸⁰³ *Property Law Act 1974* (Qld) s 45(2) provides that an instrument executed by an individual will be deemed to be sealed if the instrument is expressed to be sealed and it is signed and attested by at least 1 witness who is not a party to the instrument. See discussion at paragraph 48 below. Execution by a corporation is dealt with in section 47 discussed at paragraph 50 below.

⁸⁰⁴ *Property Law Act 1974* (Qld) s 47.

⁸⁰⁵ *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245 at [9], referring to a statement of Lord Denning MR in *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609 at 612.

⁸⁰⁶ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 22. See also Graham McBain, ‘Abolishing deeds, specialties and seals: Part 2’, June-August 2006 *Commercial Law Quarterly*, 3.

⁸⁰⁷ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 20-24 at 1.11.

⁸⁰⁸ Seddon argues that a deed should always include at least nominal consideration in case it is defective and an equitable remedy is required to enforce the deed: Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [1.10].

A second main difference is that a deed is a ‘specialty’⁸⁰⁹ at law and the usual limitation period⁸¹⁰ is doubled to 12 years.⁸¹¹ It has been argued that this longer limitation period is an anachronistic remnant from the time when old system land was transferred by deed of conveyance under a deeds system and is no longer necessary.⁸¹² The UK Law Commission in 2001 recommended that the longer limitation period for specialties should be removed⁸¹³ although this recommendation was not actually accepted by the UK Parliament.⁸¹⁴ In 2010, New Zealand changed the limitation period for deeds to 6 years because the new limitation legislation did not give extra time for specialties.⁸¹⁵

The Centre is of the view that there is no reason for the different limitation period between contracts and deeds. A 6 year limitation period is sufficient for deeds and the longer limitation period is no longer necessary. This view is supported by the QLS.

Given this, the Centre recommends that the limitation period should be the same for contracts and deeds. Implementation of this recommendation will require that section 10(3) of the *Limitation of Actions Act 1974* (Qld) be amended.

RECOMMENDATION 45. The limitation period for deeds under the *Limitation of Actions Act 1974* should be the same as the limitation period for contracts. Section 10(3) of the *Limitation of Actions Act 1974* should be amended as follows:

(3) *An action upon a specialty shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.*

46.1. Deeds and electronic commerce

Where once commerce was conducted face to face with pen and paper today electronic commerce is the norm. Contracts are often negotiated by email and may be signed electronically.⁸¹⁶ Electronic (paperless) contracting, for example, through auction sites like EBay or online grocery shopping, is ubiquitous. In such cases the contract is usually formed when the person ticks a check box or clicks ‘I agree’.

While electronic contracting is commonplace, creating deeds electronically is impossible given the current legal requirements. There is an argument to be made that the inability to create deeds electronically is already, and will continue to be, a hindrance to commercial transactions. As such, the

⁸⁰⁹ ‘Specialty’ is not defined in statute but is taken to mean an agreement under seal, as opposed to an ordinary agreement ‘under hand’. See Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 13-14 and 19.

⁸¹⁰ *Limitation of Actions Act 1974* (Qld) s 10(1).

⁸¹¹ *Limitation of Actions Act 1974* (Qld) s 10(3) which allows 12 years for a *specialty*. Note that under the *Land Title Act 1994* (Qld) s 176, a registered instrument operates as a deed. This may be to take advantage of the longer limitation period.

⁸¹² Law Commission (NZ), *Limitation Defences in Civil Cases: Update Report for the Law Commission*, Miscellaneous Paper prepared by Chris Corry, Barrister, MP 16 (2007) 29 at [78].

⁸¹³ Law Commission (UK), *Limitation of Actions*, Report No. 270, (July 2001), 100, [4.7] – [4.9].

⁸¹⁴ See: <http://www.lawcom.gov.uk/project/limitation-of-actions/> accessed December 2017.

⁸¹⁵ The *Limitation Act 2010* (NZ) does not provide an extra limitation period for deeds or specialties. The previous legislation, the now repealed *Limitation Act 1950* (NZ) s 4(3) allowed a 12 year limitation period for deeds.

⁸¹⁶ *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 at [62] – [67].

NOT GOVERNMENT POLICY

Centre is of the view that the formal requirements for executing a deed should be modernised to accommodate current electronic practices and to facilitate the creation of deeds electronically.

The following paragraphs will discuss sections 44 to 52 of the PLA as they relate to deeds and will recommend a number of changes to the current legal requirements for deeds including changes to specifically allow the creation of deeds electronically.

47. Section 44 – Description and form of deeds

47.1. Overview and purpose

44 Description and form of deeds

- (1) A deed between parties, to effect its objects, has the effect of an indenture although not indented or expressed to be indented.
- (2) Any deed, whether or not being an indenture, may be described (at the commencement of the deed or otherwise) as a deed simply, or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected.

From a historical perspective, there are two kinds of deeds – a deed poll and an indenture.⁸¹⁷ Generally, a deed poll would be unilateral and historically had edges that were straight or polled.⁸¹⁸ An indenture would be used if the deed were *inter partes*, i.e. between several parties. Historically, a copy of the deed would be made for each party from the same piece of parchment, which was then cut in a way to make it difficult to substitute a forged deed for a real deed.⁸¹⁹ The wavy line⁸²⁰ or indenture served as a fraud protection mechanism.

The practice of physically indenting deeds has not been followed for some time. In 1973, the QLRC noted that the requirement to indent a deed, though dispensed with in 1845 in the United Kingdom, remained at least technically necessary in Queensland, even if rarely practised.⁸²¹

Section 44 provides that a deed may have effect as an indenture even if it is not physically indented and regardless of how the document is described.

47.2. Issues with the section

Referring to the New South Wales equivalent⁸²² of section 44(1) of the PLA, author Nicholas Seddon argues that the word ‘deed’ has replaced the word ‘indenture.’ The practice of indenting would be almost unknown today but a modern equivalent is a deed executed in counterparts.⁸²³

⁸¹⁷ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 14.

⁸¹⁸ 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) 30.

⁸¹⁹ Graham McBain, ‘Abolishing Deeds, Specialties and Seals: Part 1’ *Commercial Law Quarterly*, (March – May 2006), 15 at 18.

⁸²⁰ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

⁸²¹ 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) 30-31.

⁸²² *Conveyancing Act 1919* (NSW) s 38(2)-(3).

⁸²³ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

It has been stated that section 44(2) of the PLA was included ‘out of an abundance of caution.’⁸²⁴ The QLRC noted that a deed should be recognised for what it purports to do rather than its physical form or technical description.⁸²⁵ Such sentiment is still relevant today.

Indenting of deeds is an archaic practice that is virtually unknown in the modern legal environment. Given this, there is room for reform.

47.3. Other jurisdictions

47.3.1. Australian jurisdictions

Most other jurisdictions in Australia have a provision that deems a deed to be an indenture even if it is not indented or expressed to be indented.⁸²⁶ The equivalent provision in Victoria,⁸²⁷ Western Australia⁸²⁸ and the Northern Territory⁸²⁹ is virtually identical to section 44(2).

47.3.2. New Zealand

Prior to 2007, the New Zealand property legislation⁸³⁰ contained a provision stating that indenting is not necessary. When the property law was reformed in 2007, the relevant provision was not retained in the *Property Law Act 2007* (NZ). The Law Commission (NZ) noted that indenting had already been abolished and argued that it is not necessary to repeat the abolition.⁸³¹

47.4. Recommendation

The need to physically indent a deed was abolished in the UK in 1845.⁸³² The QLRC submitted⁸³³ that although indenting was still technically required in Queensland until 1974 it was not widely practised. Seddon argues that removing the term ‘indenture’ from the legislation would have no effect other than to remove a source of puzzlement.⁸³⁴ Given this, the Centre recommends that section 44(1) should be repealed.

⁸²⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.44.60]).

⁸²⁵ 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) 31.

⁸²⁶ *Conveyancing Act 1919* (NSW) s 38(2); *Property Law Act 1958* (Vic) s 56(2); *Law of Property Act 1936* (SA) s 34(2); *Law of Property Act 1969* (WA) s 12; *Conveyancing and Law of Property Act 1884* (Tas) s 61(1)(d); *Law of Property Act* (NT) s 46.

⁸²⁷ *Property Law Act 1958* (Vic) s 57.

⁸²⁸ *Law of Property Act 1969* (WA) s 12.

⁸²⁹ *Law of Property Act* (NT) s 46(2).

⁸³⁰ *Property Law Act 1952* (NZ) s 4(3).

⁸³¹ Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) 266 [170].

⁸³² 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) 30-31.

⁸³³ 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) 30-31.

⁸³⁴ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

In Queensland, the amendment of an Act (e.g. repealing a section) does not revive anything not in force or existing at the time of the repeal.⁸³⁵ This means that repealing section 44(1) will not revive a requirement for deeds to be indented.

In regard to section 44(2), Duncan and Vann⁸³⁶ note that the section does not require a deed to be expressed as a deed or as any of the other types of instruments listed in the subsection, provided the instrument complies with the other requirements for a deed. It has been argued that the intention to create a deed is essentially a fourth requirement (after: writing on paper; appropriate execution; and delivery). The court will use an objective approach to determining the existence of the requisite intention to create a deed. The words used by the parties are not determinative.⁸³⁷ This means that section 44(2) is not strictly necessary because a dispute over whether a document has been executed as a deed will be determined based on all of the facts rather than on what the document is called.

The QLS supports retaining the effect of section 44(2) but removing the phrase ‘whether or not being an indenture’. Given this the Centre recommends that section 44(2) should be retained with modernised language but amended to exclude the phrase ‘whether or not being an indenture’.

RECOMMENDATION 46. Section 44 should be amended with modernised language so that section 44(1) is removed and section 44(2) does not include the phrase ‘whether or not being an indenture’.

⁸³⁵ *Acts Interpretation Act 1954* (Qld) s 20(2)(a).

⁸³⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.44.60], citing *Associated Broadcasting Services Ltd v Comptroller of Stamps* (1986) ATC 4188 at 4192.

⁸³⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.6.DIV.1.30] to [PLA.PT.DIV.1.150].

48. Section 45 – Execution of deeds by individuals

48.1. Overview and purpose

45 Formalities of deeds executed by individuals

- (1) Where an individual executes a deed, the individual shall either sign or place the individual's mark upon the same and sealing alone shall not be sufficient.
- (2) An instrument expressed—
 - (a) to be an indenture or a deed; or
 - (b) to be sealed;
 shall, if it is signed and attested by at least 1 witness not being a party to the instrument, be deemed to be sealed and, subject to section 47, to have been duly executed.
- (3) No particular form of words shall be requisite for the attestation.
- (4) A deed executed and attested under this section may in any proceedings be proved in the manner in which it might be proved if no attesting witness were alive.
- (5) Nothing in this section shall affect—
 - (a) the execution of deeds by corporations; or
 - (b) how instruments are validly executed under the *Land Title Act 1994*; or
 - (c) any deed executed before the commencement of this Act.

Section 45 of the PLA modifies the common law with respect to the execution of deeds by an individual. At common law, a deed was required to be sealed and delivered.⁸³⁸ Section 45(1) modifies this by requiring a signature or a mark on the deed. Section 45(2) will deem an instrument to be sealed if the instrument is: expressed to be a deed or expressed to be sealed; and the signature has been attested by at least one witness who is not a party to the deed.

The QLRC noted that the requirement for sealing had 'sunk to a level at which any indication of a seal on a document signed with the intention of executing it as a deed is sufficient'⁸³⁹ to satisfy the requirement of sealing. Section 45(2) addresses this issue by providing an alternative to physical sealing that has the same legal effect but without the artificial contrivance.

The effect of the common law and the PLA is that in Queensland, to be valid, a deed executed by an individual must be:

- written on paper;
- signed;
- sealed or deemed to be sealed (if expressed to be a deed or to be sealed and the signature is attested by at least one witness who is not a party to the deed); and
- delivered (as required under section 47).

⁸³⁸ 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) 31.

⁸³⁹ 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) 31.

48.2. Issues with the section

While the formalities for valid execution of a deed may be somewhat ancient, they are well known. The phrase ‘signed, sealed, delivered’ is often repeated. Failure of any of the required formalities will mean that the document in question cannot take effect as a deed (although, in some cases, it may still be effective as a contract).

Despite being well known, the required formalities for paper deeds make it impossible for a deed to be created electronically.⁸⁴⁰ There has been a broad movement towards electronic commerce and the use of electronically negotiated agreements, promises and exchanges. Deeds, however, continue to require the formalities under the common law as modified by the PLA.

The common law requires a deed to be in writing. In Queensland, ‘writing’ is defined as any mode of representing or reproducing words in a visible form.⁸⁴¹ A deed, however, is about writing *on paper*. This means that without modification to the common law through legislative provisions,⁸⁴² it is impossible to create a deed electronically.

48.2.1. Deemed sealing

The common law requires a deed to be sealed. In Queensland, a deed may be deemed sealed if it is expressed to be sealed and the signature of the party to be bound is witnessed and attested by a person who is not a party to the deed.

In 1974, the QLRC proposed that sealing would continue to be required for a deed to be valid but intended the deeming effect of section 45(2) to address the fact that personal seals are no longer used.⁸⁴³ A signature witnessed and attested by a third party is easy to achieve and less artificial than placing a meaningless seal (or some mark meant to represent a seal) on a document.

The QLRC did not intend to make attestation of a signature an additional formal requirement for a deed to be validly executed (as is the case in New South Wales.)⁸⁴⁴ Despite the QLRC’s intention, attestation of the signature on a deed has become a de-facto requirement for execution of a deed by an individual.

Expressing a document to be sealed, or deeming it sealed if the signature is witnessed is just as artificial as a meaningless seal or some mark meant to represent a seal. A number of jurisdictions across Australia, and around the world, have abolished the need for a deed to be sealed. The Centre is of the view that Queensland should follow suit. Removing the requirement for sealing or deemed sealing will also assist with the creation of deeds electronically.

⁸⁴⁰ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 34.

⁸⁴¹ *Acts Interpretation Act 1954* (Qld) schedule 1 (definition of ‘writing’).

⁸⁴² Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 98.

⁸⁴³ 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) 31-32.

⁸⁴⁴ *Conveyancing Act 1919* (NSW) s 38(1) provides that every deed shall be signed as well as sealed and attested by at least 1 witness not being a party to the deed. A deed will be deemed sealed if it is expressed to be an indenture, a deed or to be sealed and it is signed and attested: *Conveyancing Act 1919* (NSW) s 38(3).

48.2.2. Creating deeds electronically

The Centre is of the view that the PLA should be amended to facilitate the creation of electronic deeds. In the Centre's view, this may be achieved by allowing parties to an agreement to create a deed electronically by following specific requirements.

The *Electronic Transactions (Queensland) Act 2001 (Qld) (ETA)* provides that a transaction will not be invalid merely because it took place by electronic communications⁸⁴⁵ but this does not facilitate the creation of electronic deeds.

Section 8(1) of the ETA provides:

A transaction is not invalid under a State law merely because it took place wholly or partly by 1 or more electronic communications.

'State law' is defined to include written and unwritten law⁸⁴⁶ and 'transaction' is defined broadly to include 'any transaction in the nature of a contract, agreement or other arrangement'.⁸⁴⁷ Seddon argues that the focus here is on the *arrangement* not on the document. A deed is a physical object and it is awkward to say a deed 'took place' by electronic means.⁸⁴⁸ This, Seddon argues, means that it is not safe to rely on the ETA to support the validity of a deed created by electronic means.⁸⁴⁹ Of course, an electronic copy of a validly executed deed could be treated as best evidence⁸⁵⁰ of the existence of a deed, but that is a different issue.

The ETA is effective for the use of electronic signatures.⁸⁵¹ The ETA excludes particular types of transactions, requirements or permissions, including a requirement or permission for a document to be attested, authenticated, verified or witnessed by a person.⁸⁵² Attesting a digital signature may be difficult without appropriate software.⁸⁵³ Taken together, this means that deemed sealing as provided by section 45(2) of the PLA cannot take place electronically under the ETA because the signature must be attested.

Seddon argues that there is no legislation that provides for electronic deeds.⁸⁵⁴ If a legislature intends to allow for electronic deeds, then express words will be required to modify the common law. Facilitating the creation of deeds electronically will require removing the requirement for writing on paper and modifying such other aspects of the required formalities as necessary so that a deed created by electronic means can be valid.

Before considering amendments to the Queensland provisions, it is useful to consider the relevant provisions in a number of other jurisdictions. While these jurisdictions have taken some steps that

⁸⁴⁵ *Electronic Transactions (Queensland) Act 2001 (Qld) s 8(1)*.

⁸⁴⁶ *Electronic Transactions (Queensland) Act 2001 (Qld) schedule 2 (definition of 'state law')*.

⁸⁴⁷ *Electronic Transactions (Queensland) Act 2001 (Qld) schedule 2 (definition of 'transaction')*.

⁸⁴⁸ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 100.

⁸⁴⁹ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 100.

⁸⁵⁰ *Electronic Transactions (Queensland) Act 2001 (Qld) s 16(1)*.

⁸⁵¹ *Electronic Transactions (Queensland) Act 2001 (Qld) s 14*.

⁸⁵² *Electronic Transactions (Queensland) Act 2001 s 7A(1) and schedule 1 item 6*.

⁸⁵³ Adrian McCullah, Peter Little & William Caelli, 'Electronic Signatures: Understand the Past to Develop the Future', (1998) 21(2) UNSWLJ 452, 464.

⁸⁵⁴ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 97 at [2.28].

may support the creation of deeds electronically, to date no jurisdiction has put all of the requirements together.

48.3. Other jurisdictions

48.3.1. United Kingdom

In 1989, the UK amended the formalities for the valid execution of deeds by individuals. The legislation abolished any rule of law that either limited the substances on which a deed could be written⁸⁵⁵ or required a deed to be sealed.⁸⁵⁶ However, the UK legislation added a requirement that the signature of the person executing the deed must be witnessed and attested by a person who is not a party to the deed.⁸⁵⁷

48.3.2. New Zealand

The *Property Law Act 2007* (NZ) provides that to execute a deed, an individual must sign the deed and have his or her signature witnessed by a person who is not a party to the deed and who signs as a witness.⁸⁵⁸ The deed is required to be in writing but is not required to be written on paper.⁸⁵⁹ There is no requirement for a deed to be sealed or deemed to be sealed.

48.3.3. Victoria

In Victoria, the *Property Law Act 1958* (Vic) provides that a deed executed by an individual must be signed⁸⁶⁰ but does not require the deed to be sealed (if it is expressed to be sealed) or for the signature to be attested.⁸⁶¹

To the extent it has not been modified by the *Property Law Act 1958* (Vic) the common law of deeds still applies in Victoria. This means that a deed must be in writing on paper.

48.3.4. Western Australia

In Western Australia, sealing is not required⁸⁶² when an individual executes a deed. However, a deed is not validly executed unless it is signed and attested by at least one witness who is not a party to the deed.⁸⁶³

48.4. Recommendation

The Centre recommends modernising the Queensland legislation in regard to execution of deeds. A new provision should clearly set out the requirements for creation of a deed and the method of execution for individuals and corporations. In this respect, sections 45 and 46 should be combined into a single section.

⁸⁵⁵ *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 1(a).

⁸⁵⁶ *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 1(b).

⁸⁵⁷ *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 3(a).

⁸⁵⁸ *Property Law Act 2007* (NZ) ss 9(2) and 9(7).

⁸⁵⁹ *Property Law Act 2007* (NZ) s 9(1)(a).

⁸⁶⁰ *Property Law Act 1958* (Vic) s 73.

⁸⁶¹ *Property Law Act 1958* (Vic) s 73A. The instrument must be executed on or after 1 September 1989, which is the date of commencement of section 4 of the *Property Law (Deeds) Act 1977* (Vic). See Stanley Robinson, *The Property Law Act Victoria*, (1992) Lawbook Co, 153.

⁸⁶² Except in the case of a deed executed by a corporation: *Property Law Act 1969* (WA) s 9(2).

⁸⁶³ *Property Law Act 1969* (WA) s 9(1).

The Centre also recommends that the PLA facilitate the creation and execution of deeds electronically if the instrument creating the deed is:

- in writing;
- expressly acknowledged as a deed; and
- signed by the grantor in accordance with section 14 of the ETA.

In paragraph 49.4 below, the Centre has set out a recommendation that will allow for the creation and execution of a deed electronically where the deed is signed in accordance with the requirements of section 14 of the ETA.

Further, to remove any doubt about the operation of the common law requirements for creation of deeds, the legislation should specifically state that an instrument executed in accordance with the requirements of the section will take effect as a deed notwithstanding that the instrument is not written on paper (or any other substance) and that it is not sealed or expressed to be sealed. The new provision will remove the requirements for writing on paper and for sealing. A deed will be valid provided it is appropriately signed and delivered.

Of course, parties to a deed may continue to enter into deeds in writing on paper, and to have signatures witnessed but under the Centre's recommended approach, this will not be required. An example of what an amended provision may look like is provided with Recommendation 48 below.

RECOMMENDATION 47. Section 45 should be replaced with a new provision dealing with the execution of deeds, combining the requirements for valid execution of deeds by individuals and corporations into a single section. The new provision should remove the requirement for deeds to be written on paper or to be sealed or deemed to be sealed and expressly allow for deeds to be created electronically.

49. Section 46 – Execution of deeds by corporations

49.1. Overview and purpose

46 Execution of instruments by or on behalf of corporations

- (1) In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed to the deed in the presence of and attested by its clerk, secretary or other permanent officer or his or her deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices, the deed shall, subject to section 47, be deemed to have been executed under the requirements of this section, and to have taken effect accordingly.
- (2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation.
- (3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, the person may as attorney execute the conveyance by signing the person's name in such a way as to show that the person does so as attorney of the corporation in the presence of at least 1 witness, and in the case of a deed by executing the same under section 45, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.
- (4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose, either generally or in the particular instance, by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person, and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.
- (5) Subsections (1) to (4) apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.
- (6) Despite anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs of the corporation, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.
- (7) This section does not affect how instruments are validly executed under the *Land Title Act 1994*.
- (8) In this section—
purchaser shall include the registrar and any other person who because of any Act has the power, duty, or function of registering or recording instruments including instruments executed by corporations.

Section 46 of the PLA deals with the way a deed may be executed by a corporation. Under section 46(1), a purchaser can rely on a deed as duly executed by a corporation if a seal purporting to be the corporation's seal has been affixed to the deed in the presence of and attested by persons purporting to be the company clerk, secretary or other officer and a director or member of the governing body of the corporation. This provision will apply even if the corporation's constitution provides other requirements for affixing the corporate seal.⁸⁶⁴

⁸⁶⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.46.30]).

The QLRC intended this provision to function as a consumer protection clause to ‘protect a purchaser from the corporation irrespective of the particular provisions of [the corporation’s] constitution’ in regard to the execution of deeds.⁸⁶⁵ The provision has the effect of relieving ‘a purchaser of the need to scrutinise the provisions of the articles [of the corporation] for unorthodox requirements as to sealing’⁸⁶⁶ and allows the purchaser to rely on an instrument sealed in accordance with section 46.

Section 46(2) provides that a corporation may appoint an agent to execute documents not under seal. Section 46(3) provides that where a person is authorised under a power of attorney or some other power to convey an interest in property on behalf of a corporation, that person may execute the conveyance by signing as an attorney in front of an attesting witness. The sub-section further provides that in the case of a deed, the person may execute the deed under section 45.

Section 46(4) provides that where a corporation is authorised under a power of attorney or some other power to convey an interest in property on behalf of a person (including another corporation (the **first person**)) the corporation may authorise a person (the **second person**) to execute the deed or other instrument in the name of the first person. A deed that appears to be so executed will be deemed to have been executed by a duly authorised person.

Section 46(5) provides that subsections (1) to (4) apply to all instruments executed after the commencement of the PLA and to all powers or authorisations of a person, whether given before or after the commencement of the Act.

Section 46(6) preserves other methods of execution and attestation of instruments authorised by law or the governing documents of the corporation itself. Section 46(7) provides that nothing in section 46 affects the way instruments are validly executed under the *Land Title Act 1994* (Qld).⁸⁶⁷

Section 46 is largely drawn from the equivalent UK provisions contained in the 1925 UK Act⁸⁶⁸ and significantly predates the introduction of the *Corporations Act 2001* (Cth), which takes a different approach to the execution of documents by corporations. The *Corporations Act 2001* (Cth) prescribes the methods by which a corporation may execute documents (including deeds)⁸⁶⁹ and expressly sets out the assumptions a person can make in respect to such execution.⁸⁷⁰

⁸⁶⁵ 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) 32.

⁸⁶⁶ 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) 32.

⁸⁶⁷ The *Land Title Act 1994* (Qld) provides that an instrument is validly executed by a corporation if it is executed in a way permitted by law or sealed with the corporation’s seal in accordance with section 46 of the *Property Law Act 1974* (Qld): *Land Title Act 1994* (Qld) s 161(1).

⁸⁶⁸ *Law of Property Act 1925* (UK) (c 20 Geo 5) s 74.

⁸⁶⁹ *Corporations Act 2001* (Cth) s 127.

⁸⁷⁰ *Corporations Act 2001* (Cth) s 129 (5)-(6).

49.1.1. Interaction with the *Corporations Act 2001 (Cth)*

The *Corporations Act 2001 (Cth)*⁸⁷¹ allows a person to assume that a document has been duly executed by a company⁸⁷² if it appears to have been signed under section 127(1) (without a seal)⁸⁷³ or section 127(2) (with a seal) of that Act.⁸⁷⁴ Under the *Corporations Act 2001 (Cth)*, a company is not required to have a common seal⁸⁷⁵ and thus may execute a document as a deed with or without the use of a seal provided the document is expressed to be executed as a deed.⁸⁷⁶

The *Corporations Act 2001 (Cth)* also provides that section 127 does not limit the ways in which a company may execute a deed.⁸⁷⁷ Section 46(6) of the PLA also preserves any mode of execution authorised by law or the governing documents of the corporation.⁸⁷⁸ Together with section 127(4) of the *Corporations Act 2001 (Cth)*, this means that the provisions in the state and federal legislation with regard to the execution of deeds are able to operate concurrently. The Centre understands that most deeds executed by corporations in Queensland are executed under the *Corporations Act 2001 (Cth)*.

Under the *Corporations Act 2001 (Cth)*, a person is only able to assume that a document has been duly executed if it is executed in accordance with section 127(1) or (2) of the *Corporations Act 2001 (Cth)*. If a company under the Act executes a document in accordance with the Commonwealth equivalent of the ETA⁸⁷⁹ the assumptions will not apply (as the document will not have been executed in accordance with the *Corporations Act 2001 (Cth)*). Further, the *Corporations Act 2001 (Cth)* is specifically excluded from the provisions about validity of electronic transactions, writing and signature under the *Electronic Transactions Act 1999 (Cth)*.⁸⁸⁰

It has been noted that the protections under the *Corporations Act 2001 (Cth)*, which apply to a ‘person’ are wider than those under section 46(1) of the PLA, which only apply to a purchaser.⁸⁸¹

⁸⁷¹ *Corporations Act 2001 (Cth)* s 129(5)-(6).

⁸⁷² As defined in the *Corporations Act 2001 (Cth)* s 9 (definition of ‘company’).

⁸⁷³ Execution of a document without a common seal requires the signature of two directors, a director and a secretary or if there is only a sole director, that director: *Corporations Act 2001 (Cth)* s 127(1).

⁸⁷⁴ Execution of a document with a seal (if a company has a seal) requires affixing the seal as witnessed by two directors, a director and a secretary or if there is only a sole director, that director: *Corporations Act 2001 (Cth)* s 127(2).

⁸⁷⁵ *Corporations Act 2001 (Cth)* s 123.

⁸⁷⁶ *Corporations Act 2001 (Cth)* s 127(3)-(4).

⁸⁷⁷ See Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [2.10] – [2.23] for a detailed explanation of the method of execution of deeds by companies under the *Corporations Act 2001 (Cth)* and other types of corporations.

⁸⁷⁸ *Property Law Act 1974 (Qld)* s 46(6).

⁸⁷⁹ *Electronic Transactions Act 1999 (Cth)* s 8 (A transaction is not invalid because it took place by one or more electronic means) and s 10 (Signature requirement can be satisfied electronically if a method is used to identify a person and their intention).

⁸⁸⁰ *Electronic Transactions Regulations 2000 (Cth)* schedule 1, item 30.

⁸⁸¹ Section 46(1) of the *Property Law Act 1974 (Qld)* only protects a purchaser from the company who acquires their interest in good faith for valuable consideration: *Property Law Act 1974 (Qld)* s 46(1) and schedule 6 (definition of ‘purchaser’). See also Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.46.30].

49.2. Issues with the section

49.2.1. Protection for honest purchasers

Section 46(1) does not actually stipulate how a deed must be executed by a corporation. Instead, it says that a purchaser for valuable consideration may assume a deed executed or purported to be executed by a corporation is 'duly executed' if the deed has been executed in accordance with the provision. Seddon notes that the section (and its equivalent in other jurisdictions) may arguably be construed as applying only to deeds dealing with property.⁸⁸² Under this view, rather than stating how a corporation should execute deeds generally, section 46(1) has a narrow and limited purpose of protecting purchasers. This is consistent with the intentions of the QLRC.⁸⁸³

Generally, deeds are used in transactions where there is no consideration or where consideration is likely to be an issue. Duncan and Vann note that a purchaser in the sense of section 46(1) is likely to have provided valuable consideration. This means such a purchaser is unlikely to need to resort to the protection in section 46(1) because even if the document fails as a deed, it is likely to bind the corporation contractually.⁸⁸⁴

Further, the consumer protection mechanism in section 46(1) has been essentially taken over by the *Corporations Act 2001* (Cth). Most corporations in Australia are 'companies' within the meaning of the *Corporations Act 2001* (Cth) and execute documents in accordance with section 127 of that Act. Section 46 really only applies to corporations that are not registered under the *Corporations Act 2001* (Cth). Many of these corporations will have a method of executing documents set out in their constitution or in the documents or legislation creating the corporation.

49.2.2. Attestation of the seal

Duncan and Vann note that the attestation of the clerk, secretary or other officer of a corporation required by section 46(1) of the PLA is part and parcel of the sealing itself. The attestation referred to is not attestation of the execution of the deed but of the affixing of the seal. If the execution of the deed must also be attested (perhaps due to a statutory requirement) a second attesting signature will also be required.⁸⁸⁵

While this may not present a significant problem, it is one further formal requirement that may lead to a failure of a document to take effect as a deed even when there is a clear intention of the parties to create a deed.

⁸⁸² Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015), 81-82, [2.20].

⁸⁸³ 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) 32.

⁸⁸⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.46.210].

⁸⁸⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.46.90].

49.3. Other jurisdictions

Victoria,⁸⁸⁶ New South Wales⁸⁸⁷ and Western Australia⁸⁸⁸ all have provisions that are virtually identical to the Queensland legislation (all having been drawn from the equivalent UK legislation).⁸⁸⁹ As in Queensland, these provisions function as a protection for purchasers if a deed is executed in a particular way. Thus it is only by inference that the provisions set out the way that a corporation should execute a deed.⁸⁹⁰

49.3.1. South Australia and Tasmania

South Australia and Tasmania take a different approach to the execution of deeds by corporations. In South Australia, a body corporate executes a deed by affixing the common seal of the body corporate to the deed in accordance with the rules governing the use of the common seal.⁸⁹¹

Prior to 2000, the Tasmanian property legislation contained a provision very similar to section 46 of the PLA.⁸⁹² Tasmania amended the legislation in 2000, borrowing from the South Australian approach.⁸⁹³ The current provision states that a body corporate is not required to execute a deed by affixing its common seal unless it is required to do so under the enactment by which the body corporate is created or by another law relating to the execution of deeds.⁸⁹⁴

Both Tasmania and South Australia provide that a deed may be executed on behalf of a party to the deed by an attorney acting under an authority granted by deed.⁸⁹⁵

49.3.2. New Zealand

Prior to the commencement of the *Property Law Act 2007* (NZ), New Zealand had a provision that operated similarly to the Queensland provision in that a deed executed by a corporation in accordance with that Act would be deemed duly executed.⁸⁹⁶ When the law was reformed in 2007, the new provision changed the way bodies corporate execute deeds. The *Property Law Act 2007* (NZ) deals with execution of deeds by individuals and by bodies corporate in the same section. The New Zealand legislation provides that a body corporate executes a deed if the deed is signed in the name of the body corporate by at least two directors;⁸⁹⁷ a sole director (if only one),⁸⁹⁸ or a director and another

⁸⁸⁶ *Property Law Act 1958* (Vic) s 74.

⁸⁸⁷ *Conveyancing Act 1919* (NSW) s 51A.

⁸⁸⁸ *Property Law Act 1969* (WA) s 10.

⁸⁸⁹ *Law of Property Act 1925* (UK) (c 20 Geo 5) s 74.

⁸⁹⁰ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [2.19].

⁸⁹¹ *Law of Property Act 1936* (SA) s 41.

⁸⁹² *Conveyancing and Law of Property Act 1884* (Tas) s 63A.

⁸⁹³ The Tasmanian provisions of *Conveyancing and Law of Property Act 1884* (Tas) s 63 were modelled on the South Australia provisions. See South Australia, *Parliamentary Debates*, House of Assembly, 30 March 2000, (Mr Llewellyn) on the second reading of the *Strata Titles (Miscellaneous Amendments) Bill 1999*.

⁸⁹⁴ *Conveyancing and Law of Property Act 1884* (Tas) s 63.

⁸⁹⁵ *Conveyancing and Law of Property Act 1884* (Tas) s 63(1)(c)(i); *Law of Property Act 1936* (SA) s 41(1)(c)(i).

⁸⁹⁶ *Law of Property Act 1952* (NZ) s 5(1). The methods were affixing of the common seal or execution by a duly appointed attorney. See also Law Commission New Zealand, *The Property Law Act 1953 – A Discussion Paper*, Preliminary Paper No. 16 (1991) [65].

⁸⁹⁷ *Property Law Act 2007* (NZ) s 9(3)(a)(ii).

⁸⁹⁸ *Property Law Act 2007* (NZ) s 9(3)(a)(i).

person authorised under the body corporate's constitution⁸⁹⁹ if the signature is witnessed in accordance with the relevant provision.⁹⁰⁰

Similarly to Queensland, the New Zealand provision preserves any other mode of execution of a deed provided in another enactment relating to the execution of deeds by the body corporate.⁹⁰¹ Unlike Queensland, however, the New Zealand legislation also makes specific provision for deeds executed by foreign corporations or the Crown.⁹⁰²

49.4. Recommendation

As discussed above, the Centre is of the view that sections 45 and 46 should be combined into a single section that sets out when an instrument will take effect as a deed and how the instrument may be executed by individuals and corporations. The new provision should facilitate the creation of deeds electronically and remove the requirement for sealing or deemed sealing. The Centre favours an approach to execution of deeds that is drawn from the New Zealand provision⁹⁰³ and which includes a rule for signing by foreign corporations.

In addition to setting out the way individuals may execute a deed, the revised provision should set out the way corporations may execute a deed. The Centre's recommended approach, set out below, simplifies the requirements for creating and executing deeds, both by individuals and corporations. The approach allows for the creation and execution of deeds to take place electronically.

The amended section specifically removes the requirements for a deed to be in writing on paper (or any other substance) and removes the requirement for a deed to be sealed or deemed to be sealed (including by witnessing and attestation of a signature.) This means that an instrument in writing containing a statement that the instrument is to take effect as a deed will only require the signature of the grantor to be validly executed. Delivery of deeds, in the sense of an intention to be legally bound, will continue to be required and is discussed at paragraph 50 below.

Assuming that the recommendations are accepted, an issue arises in relation to the execution of deeds electronically by corporations under the *Corporations Act 2001* (Cth). The Centre understands that most corporations in Australia will execute documents in accordance with section 127 of the *Corporations Act 2001* (Cth) as the method is relatively simple and provides important safeguards for a person relying on the document as duly executed. As federal legislation, the *Corporations Act 2001* (Cth) will take precedence over the PLA. The Centre's recommended approach mimics section 127(1) and (2) of the *Corporations Act 2001* (Cth) and does not limit the way that a corporation may sign a deed. This means that state and federal legislation will continue to operate concurrently.⁹⁰⁴

However, if a corporation under the *Corporations Act 2001* (Cth) executes a deed electronically in Queensland, the protections in the *Corporations Act 2001* (Cth) will not apply. The PLA cannot give corporations under the *Corporations Act 2001* (Cth) a power to execute deeds electronically and allow a person to rely on a deed so executed as duly executed. This type of provision is required at the

⁸⁹⁹ *Property Law Act 2007* (NZ) s 9(3)(a)(iii).

⁹⁰⁰ *Property Law Act 2007* (NZ) s 9(7).

⁹⁰¹ *Property Law Act 2007* (NZ) s 9(4).

⁹⁰² *Property Law Act 2007* (NZ) ss 9(5)-(6).

⁹⁰³ *Property Law Act 2007* (NZ) s 9.

⁹⁰⁴ *Property Law Act 1974* (Qld) s 46(6).

federal level. Additionally, the provisions in the *Electronic Transactions Act 1999* (Cth) relating to electronic signature do not apply to the *Corporations Act 2001* (Cth).⁹⁰⁵ The Centre is of the view that the Commonwealth government should review the reasons for this exclusion and determine whether it should continue.

RECOMMENDATION 48. Section 46 should be replaced with a new provision dealing with the execution of deeds by individuals and corporations in a single section. The new provision should expressly remove the requirements for:

- writing on paper; and
- sealing or deemed sealing.

For example, following the New Zealand approach, sections 45 and 46 could be replaced with a combined provision drafted in the following manner:

Section [45] Signing of deeds

- (1) An instrument will take effect as a deed if it is:
 - (a) in writing and contains a conspicuous statement that the instrument takes effect as a deed;
 - (b) signed in accordance with this section; and
 - (c) delivered in accordance with section [47 on delivery].
- (2) An individual may sign an instrument as a deed if:
 - (a) the instrument is signed by the individual or their authorised agent; or
 - (b) where the deed is signed in electronic form, the instrument is signed by the individual or their authorised agent using a method in accordance with section 14 of the *Electronic Transactions (Queensland) Act 2001*.
- (3) A corporation may:
 - (a) sign an instrument as a deed with or without using a common seal if the instrument is signed:
 - (i) by 2 directors of the corporation;
 - (ii) by a director and a secretary of the corporation;
 - (iii) if the corporation has a sole director, by that director; or
 - (iv) by an authorised agent;
 - (b) if the corporation is a statutory corporation, sign an instrument as a deed in a manner authorised by the Act under which the corporation is incorporated or registered; or
 - (c) sign an instrument as a deed in electronic form if the instrument is signed as required by this subsection (3) using a method in accordance with section 14 of the *Electronic Transactions (Queensland) Act 2001*.
- (4) An instrument is signed as a deed if it has been signed in accordance with subsection (2) or (3).
- (5) This section does not limit the ways in which a corporation may sign a deed.
- (6) A corporation not incorporated by or under a law of Australia may sign a deed using any method authorised by the law of the place in which the corporation is incorporated.
- (7) For the avoidance of doubt, an instrument created in accordance with this section will take effect as a deed notwithstanding that:
 - (a) it is not written on paper or a particular substance; and
 - (b) it is not sealed or expressed to be sealed.

⁹⁰⁵ *Electronic Transactions Regulations 2000* (Cth) schedule 1, item 30.

- (8) Nothing in this section affects any deed signed before the commencement of this Act.
- (9) In this section –
- corporation** includes a statutory corporation or a corporation under the *Corporations Act 2001* (Cth).
- statutory corporation** means a corporation sole or aggregate or any corporation incorporated under the laws of the State of Queensland.

50. Section 47 – Delivery of deeds

50.1. Overview and purpose

47 Delivery of deeds

- (1) After the commencement of this Act, execution of an instrument—
- (a) in the form of a deed; or
 - (b) in the form provided in section 45 or 46;
- shall not of itself import delivery, nor shall delivery be presumed from the fact of such execution only, unless it appears that execution of the document was intended to constitute delivery of the document.
- (2) Subject to subsection (1), delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery.
- (3) In this section—
delivery means the intention to be legally bound either immediately or subject to fulfilment of a condition.

Section 47 of the PLA codifies common law principles in relation to delivery but also modifies the common law in some respects. At common law there is a presumption that the execution of an instrument as a deed imports delivery.⁹⁰⁶ This is because delivery refers to an intention to be bound and a person executing a deed is demonstrating an intention to create a deed. However, the PLA expressly modifies this aspect of the common law by providing that delivery cannot be presumed or imported by the execution of an instrument in the form of a deed unless such execution is intended to constitute delivery.

Delivery continues to be a requirement for valid execution of a deed. At common law, delivery refers to an intention to be bound. It is a state of mind, not the physical handing over of the document.⁹⁰⁷ This position is retained by section 47 with the definition of ‘delivery’ included in section 47(3).

Delivery of a deed may be inferred from the circumstances. *400 George St*⁹⁰⁸ revolved around a dispute over whether an instrument expressed to be a deed was in fact a deed. The issue in that case involved a lease and an agreement for a lease which had been executed by one side. If the instrument in question was in fact validly executed and delivered as a deed, the party that had executed it would be unable to withdraw from the lease. In the initial case, the trial judge found that the instrument was not a deed. On appeal, Muir JA stated that in determining whether an instrument is a deed or a contract, the task at hand is to decide what is meant by the words in the instrument when viewed in the context in which the instrument was entered into.⁹⁰⁹ Muir went on to hold that the words ‘executed as a deed,’ ‘signed sealed and delivered’ and ‘by executing this deed’ demonstrated that the parties intended to create a deed. However, Muir found the deed did not take effect because it was never delivered.⁹¹⁰ The evidence in the case pointed to a clear intention that both parties were to become bound at the same time. The side that executed the deed did not intend to be bound until

⁹⁰⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.47.30].

⁹⁰⁷ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [3.2].

⁹⁰⁸ *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245.

⁹⁰⁹ *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245, [36].

⁹¹⁰ *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245, [57].

the other side was also bound. As the other side did not execute the deed, the requisite intention to be legally bound was not present.

50.2. Issues with the section

Seddon notes that the intention to create a deed is different from the intention to be immediately bound, which is the definition of delivery.⁹¹¹ This is one reason that the PLA has removed the common law presumption that execution imports delivery.

The law as to delivery of a deed is generally well understood. The QLS, in its submission to the relevant Issues Paper⁹¹² did not identify any issues with the existing provision.

50.3. Other jurisdictions

50.3.1. NSW, ACT and Victoria – delivery under the common law

The property legislation in New South Wales and the Australian Capital Territory is silent on the issue of delivery of deeds.⁹¹³ However, this does not mean that delivery is not required but rather that delivery is determined under the common law. It has been noted that in New South Wales, delivery continues to be essential to the validity of a deed.⁹¹⁴

The Victorian legislation does not specify that delivery is required. As in New South Wales, this means that delivery continues to be governed by the common law. The Victorian legislation only addresses delivery to abolish the common law rule that said an agent cannot deliver a deed on behalf of a principal unless authorised to do so by an instrument sealed by the principal.⁹¹⁵

50.3.2. Western Australia – formal delivery not required

The Western Australian legislation provides that ‘formal delivery’ is not necessary for a deed to be validly executed.⁹¹⁶ However, Seddon notes⁹¹⁷ that this has not been interpreted as an abolition of delivery but rather a relaxation of the need for delivery to be formal in the sense of physical delivery. An intention to be bound is still required for a deed to be valid in Western Australia.

50.3.3. Tasmania and South Australia – delivery not required

In Tasmania and South Australia, delivery is not qualified by the word ‘formal’. The legislation says that ‘Delivery and indenting are not necessary in any case.’⁹¹⁸ While this may do away with the common law concept of delivery, the intention of the parties still remains an important factor.

⁹¹¹ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [3.2].

⁹¹² Commercial and Property Law Research Centre, *Property Law Review Issues Paper 6: Property Law Act 1974(Qld) – PLA Parts 1-4, Part 6 (Deeds) and Part 20 (Notices)*, http://www.justice.qld.gov.au/__data/assets/pdf_file/0003/498612/issues-paper-6-property-law-review.pdf.

⁹¹³ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 119, [3.3].

⁹¹⁴ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales*, (Lexis Nexis Butterworths, 2012-2013) at [30700.15]. See also GP Stuckey, *The Conveyancing Act 1919-1969*, (Lawbook Co, 1970) at 89.

⁹¹⁵ *Property Law Act 1958* (Vic) s 73B.

⁹¹⁶ *Property Law Act 1969* (WA) s 9(3).

⁹¹⁷ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015), 120 [3.3], citing *Monarch Petroleum NL v Citco Australia Petroleum Ltd* [1986] WAR 310 at 353-355.

⁹¹⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 63(3); *Law of Property Act 1936* (SA) s 41(3).

The legislation provides that despite a technical defect in the execution, a deed will be taken to be valid if there is evidence external to the deed that the party intended to be bound to it.⁹¹⁹ The legislation further provides that despite any other law, an instrument will be a deed if it is executed in accordance with the section and:

- the instrument is expressed to be a deed; or
- the instrument is expressed to be sealed and delivered (or for an individual, sealed); or
- from the circumstances of the execution or the nature of the instrument, the parties intend it to be a deed.⁹²⁰

50.3.4. New Zealand

The New Zealand approach is similar to Queensland. That is, the deed is not binding unless delivered by the person to be bound (or by another with express or implied authority of the person) in circumstances where the person intends to be bound immediately, or if subject to conditions, when the conditions are fulfilled.⁹²¹

The New Zealand approach is notable for the clarity of drafting of the legislative provision. In this respect, the New Zealand approach provides a useful example of a plain language approach to drafting a complex idea.

50.4. Recommendation

The QLRC introduced section 47 of the PLA specifically to reform what were viewed as the unsatisfactory aspects of the law of delivery of deeds.⁹²² At common law, execution of a document in the form of a deed is taken as prima facie evidence of an intention to be bound and in this regard, such execution imports delivery. The QLRC criticized this approach, favouring instead an approach where the question of whether a deed had been delivered depended on evidence of an intention to be bound rather than on evidence of an intention not to be bound on execution.⁹²³

The QLS did not identify any issues in practice with the delivery of deeds under the PLA. The Centre is of the view that the requirement for delivery, as an intention to be bound, should remain. Further, the Centre is of the view that delivery should also be required in the context of electronic deeds. In the Centre's view, delivery of a deed will be the same whether the deed is in paper or electronic.

The Centre recommends that delivery of a deed remain as a formal requirement for a deed to be valid. Section 47 should be retained with modernised language.

RECOMMENDATION 49. Section 47 should be retained with modernised language.

⁹¹⁹ *Conveyancing and Law of Property Act 1884* (Tas) s 63(4); *Law of Property Act 1936* (SA) s 41(4).

⁹²⁰ *Conveyancing and Law of Property Act 1884* (Tas) s 63(5); *Law of Property Act 1936* (SA) s 41(5).

⁹²¹ *Property Law Act 2007* (NZ) s 9(9).

⁹²² 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) 33.

⁹²³ 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) 34.

For example section 47 could be modernised in the following manner:

Section [47] Delivery of deeds

- (1) The execution of an instrument in the form of a deed does not, of itself, import delivery unless a contrary intention is expressed in clear words.
- (2) Subject to subsection (1), delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery.
- (3) In this section—
delivery means the intention to be legally bound either immediately or subject to fulfilment of 1 or more conditions.

51. Section 48 – Construction of expressions

51.1. Overview and purpose

48 Construction of expressions used in deeds and other instruments

- (1) In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires—
- (a) **month** means calendar month; and
 - (b) **person** includes an individual and a corporation; and
 - (c) words indicating a gender include each other gender; and
 - (d) words in the singular include the plural and words in the plural include the singular.
- (2) A covenant, power or other provision implied in a deed or other instrument because of this or any other Act shall be construed in accordance with subsection (1).

Section 48 has a wide application as it applies to all deeds, contracts, wills, orders and other instruments. While there may be an overlap with the *Acts Interpretation Act 1954* (Qld), Duncan and Vann submit that the latter will prevail as the more specific provision.⁹²⁴ However, it should also be noted that the *Acts Interpretation Act 1954* (Qld) applies to Acts,⁹²⁵ not to instruments generally.

51.2. Issues with the section

Section 48 expressly provides for situations where the context of the deed, contract or other instrument may require that expressions in section 48(1)(a) to 48(1)(d) does not apply. This means parties are free to effectively contract out of the section. As such, there do not seem to be any issues with the operation of the section.

51.3. Other jurisdictions

Victoria,⁹²⁶ New South Wales⁹²⁷ and Tasmania⁹²⁸ have equivalent provisions in their property legislation.

51.4. Recommendation

There have been no issues identified with section 48. As such, the Centre is of the view that the section should be retained with modernised language.

RECOMMENDATION 50. Section 48 should retained with modernised language.

⁹²⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.48.30].

⁹²⁵ *Acts Interpretation Act 1954* (Qld) s 2.

⁹²⁶ *Property Law Act 1958* (Vic) ss 61, 83.

⁹²⁷ *Conveyancing Act 1919* (NSW) ss 76, 181.

⁹²⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 64.

52. Section 49 – Implied covenants may be negated

52.1. Introduction and overview

49 Implied covenants may be negated

- (1) Subject to this Act, a covenant, power or other provision implied under this or any other Act shall have the same force and effect, and may be enforced in the same manner, as if it had been set out at length in the instrument in which it is implied.
- (2) Any such covenant or power may, unless otherwise provided in this or such other Act, be negated, varied, or extended by—
 - (a) an express declaration in the instrument in which it is implied; or
 - (b) another instrument.
- (3) Any such covenant or power so varied or extended shall, so far as may be, operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were implied under the Act.

A covenant is a formal agreement or a promise in a deed or other document under seal.⁹²⁹ Seddon says that ‘covenant’ generally refers to a term in a deed but it is not always used that way.⁹³⁰ In any deed, there will be express covenants, which are the terms of the deed but there are also covenants that may be implied in the deed by statute.

Section 49 provides that a covenant, power or other provision implied into an instrument by the PLA or any Act will have effect as if it has been set out in the instrument itself. Unless otherwise provided, the parties to an instrument where a covenant or power has been implied may exclude, vary or extend the implied covenant or power in the instrument itself. Alternatively, the parties may exclude, vary or extend an implied covenant or power in another instrument.⁹³¹ Where the covenant or power has been varied or extended by either method, the implied covenant or power will operate as if the variations or extensions were implied by the Act.

The Queensland provision was drawn from the New South Wales equivalent.⁹³² However it is much wider as the New South Wales provision is limited to deeds whereas the Queensland provision applies to instruments which includes a deed, a will and an Act⁹³³ and under the *Acts Interpretation Act 1954* (Qld) means any document.⁹³⁴

⁹²⁹ Encyclopaedic Australian Legal Dictionary (LexisNexis) (definition of ‘covenant’).

⁹³⁰ Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

⁹³¹ See discussion at 52.2 below as to whether express words are required if the negation, variation, or extension is contained in another instrument.

⁹³² *Conveyancing Act 1919* (NSW) s 74. See also Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 35.

⁹³³ *Property Law Act 1974* (Qld) schedule 6 (definition of ‘instrument’).

⁹³⁴ *Acts Interpretation Act 1954* (Qld) schedule 1 (definition of ‘instrument’). See also the definition of ‘document’ which can be almost any material on which writing, sounds, images or messages can be produced.

52.2. Issues with the section

Duncan and Vann⁹³⁵ note that there may be some issue with the interpretation of section 49(2). If the implied covenant or power is negated, varied or extended, an ‘*express declaration in the instrument in which it is implied*’⁹³⁶ is necessary. However, from a plain language reading of the section, if an implied covenant or power is negated, varied or extended by another instrument, such an express declaration is not required. This would mean an implied covenant or power could be excluded or modified without an express declaration if there is a direct inconsistency with a term in another instrument.

Commentary on the equivalent provision in New South Wales has indicated that the maxim ‘*Expressum facit cessare tacitum*’ (what is expressed renders what is implied silent) would apply. Under this view, an implied covenant that is inconsistent with an express covenant will be excluded.⁹³⁷

52.3. Other jurisdictions

New South Wales is the only other jurisdiction in Australia that has an equivalent provision. In New Zealand, the *Property Law Act 1952 (NZ)*⁹³⁸ contained a very similar provision to section 49. With the introduction of the *Property Law Act 2007 (NZ)*⁹³⁹ the language was modernised but the substance of the provision was retained.

52.4. Recommendation

As there does not seem to be a great deal of controversy with the provision, the options for reform are basically limited to modernising the language. The underlying principles: that implied covenants take effect unless excluded or modified (provided such modification or exclusion is allowed); and that an express covenant will override an implied covenant (again, provided such modification or exclusion is allowed) are sound and essential legal principles.

Given this, the Centre is of the view that the section should be retained with modernised language.

RECOMMENDATION 51. Section 49 should be retained with modernised language.

⁹³⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.49.90]).

⁹³⁶ *Property Law Act 1974 (Qld)* s 49(2)(a).

⁹³⁷ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales*, (Lexis Nexis Butterworths, 2012-2013) at [32137.1].

⁹³⁸ *Property Law Act 1952 (NZ)* s 68 (now repealed).

⁹³⁹ *Property Law Act 2007 (NZ)* s 283. The Law Commission (NZ) supported modernising the language while retaining the substance of the provision: Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16, (1991) 77, [259].

53. Section 50 – Covenants entered into by a person with himself and others

53.1. Overview and purpose

50 Covenants and agreements entered into by a person with himself or herself and another or others

- (1) Any covenant, whether express or implied, or agreement entered into by a person with the person and 1 or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.
- (2) This section applies to covenants or agreements entered into before or after commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to the person and 1 or more other persons, but without prejudice to any order of the court made before such commencement.

At common law, a person cannot contract with himself, even if the agreement is entered into between the person on the one hand and the same person together with another person or other people on the other.⁹⁴⁰ This means, for example, that a partnership cannot enter into an effective agreement with another partnership if there is a partner common to both groups.⁹⁴¹

Section 50 of the PLA abolishes the common law rule and is taken from an equivalent provision in place in the UK,⁹⁴² New South Wales⁹⁴³ and Victoria.⁹⁴⁴ The QLRC felt that the provision was necessary in light of section 14 of the PLA, which allows a person to convey or lease property by a person to a person jointly with another or others.⁹⁴⁵

The effect of section 50 is that it will treat an agreement between A with A and B as an agreement between A and B, but without converting it into such an agreement (as this would affect the rights of contribution as between A & B).⁹⁴⁶

53.2. Issues with the section

The section has been described as ‘remedial and facultative rather than prohibitive of any particular transaction.’⁹⁴⁷ Given this, it is considered that the section in its current form does not raise any significant issues.

⁹⁴⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.50.30].

⁹⁴¹ 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) 35.

⁹⁴² *Law of Property Act 1925* (UK) (c 20 Geo 5) s 82.

⁹⁴³ *Conveyancing Act 1919* (NSW) s 72.

⁹⁴⁴ *Law of Property Act 1958* (Vic) s 82.

⁹⁴⁵ 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) 35.

⁹⁴⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.50.90].

⁹⁴⁷ *Re Broons* [1989] 2 Qd R 315 at 317.

53.3. Recommendation

The Centre is of the view that the section be retained with modernised language.

RECOMMENDATION 52. Section 50 should retained with modernised language.

54. Sections 51 and 52 – Receipt in instrument

54.1. Overview and purpose

51 Receipt in instrument sufficient

- (1) A receipt for consideration money or securities in the body of a deed or other instrument shall be a sufficient discharge for the same to the person paying or delivering the same without any further receipt for the same being endorsed on the deed or instrument.
- (2) This section applies only to deeds or instruments executed after the commencement of this Act.

52 Receipt in instrument or endorsed evidence

- (1) A receipt for consideration money or other consideration in the body of a deed or instrument or endorsed on the deed or instrument shall in favour of a subsequent purchaser not having notice that the money or other consideration acknowledged to be received was not in fact paid or given wholly or in part be sufficient evidence of the payment or giving of the whole amount of the money or other consideration.
- (2) This section applies to deeds or instruments executed or endorsements made before or after the commencement of this Act.

Sections 51 and 52 are closely related and are dealt with together. The sections address situations where a deed or other instrument contains a receipt for purchase money or consideration. The first situation arises where the deed or other instrument contains a clause in the body of the deed acknowledging receipt of consideration money or security. The second situation is where a receipt for consideration money or other consideration is contained in the body of the deed or is indorsed on the deed itself.

54.1.1. Section 51

Historically, a receipt in the body of a deed was conclusive proof at law so that the person giving the receipt was estopped from denying that the money or securities had not been received.⁹⁴⁸ However, in equity, if evidence could be adduced to show that the money or security had in fact not been paid, the person who had not received the money could be given a remedy.⁹⁴⁹

Section 51 effectively makes the equitable rule prevail. The section provides that the receipt clause is a sufficient discharge for the person paying or delivering the consideration money. ‘Sufficient’ is not the same as conclusive⁹⁵⁰ which means that a seller may still seek to recover an amount that is in fact due despite the existence of a receipt in the deed or other instrument.

⁹⁴⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.30].

⁹⁴⁹ Stanley Robinson, *The Property Law Act Victoria*, (Lawbook Co, 1992) 141.

⁹⁵⁰ Stanley Robinson, *The Property Law Act Victoria*, (Lawbook Co, 1992) 141, [2] citing *Re Duce and Boots Cash Chemists Southern Ltd's Contract* [1937] 1 Ch 642 at 649, 650.

54.1.2. Section 52

A practice also developed to indorse a receipt on the deed itself (even where the deed contained a receipt clause in the body of the deed).⁹⁵¹ Like the receipt clause in the body of a deed, such an indorsed receipt under seal would give rise to an estoppel but equity would still be able to intervene if the purchase money had not, in fact, been paid.⁹⁵²

Prior to the enactment of section 52, even if there was a receipt clause in the deed itself the absence of an indorsed receipt would put a subsequent purchaser on notice as to whether the purchase money or consideration had in fact been paid.⁹⁵³ Section 52 functions so that lack of an endorsed receipt no longer is constructive notice that the payment has not in fact occurred, provided there is a receipt clause in the body of the deed.⁹⁵⁴

54.2. Issues with the sections

Duncan and Vann⁹⁵⁵ submit that section 51 produces ‘no significant legal consequences’ as between the parties to the deed or instrument, but confirms the equitable position which was in effect in Queensland from the time of the *Judicature Act 1876* (Qld).

Section 52 has disposed of the practice of indorsing receipts on a deed or instrument where that deed or instrument contains a receipt clause in the body.⁹⁵⁶

Duncan and Vann submit that a subsequent purchaser who obtains registered title for land under the *Land Title Act 1994* (Qld) would not need to rely on section 52 as such a purchaser would have indefeasible title.⁹⁵⁷ Duncan and Vann also question whether it was ever the case in Queensland that the lack of an indorsed receipt was sufficient to put a subsequent purchaser on notice.⁹⁵⁸

54.3. Other jurisdictions

Equivalent provisions are in place in Victoria,⁹⁵⁹ New South Wales,⁹⁶⁰ and Tasmania.⁹⁶¹ In these jurisdictions, however, the provision is limited to deeds, whereas in Queensland the provisions apply to deeds and instruments, or in the case of section 51, deeds and ‘other’ instruments.

⁹⁵¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.30].

⁹⁵² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.30].

⁹⁵³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.30], citing *Greenslade v Dare* (1855) 20 Beav 284; 52 ER 612 at 292 (Beav), 615 (ER).

⁹⁵⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.30].

⁹⁵⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.60].

⁹⁵⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.60].

⁹⁵⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.120]; *Land Title Act 1994* (Qld) ss 184-185.

⁹⁵⁸ Although it is noted that this was the position in England: Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.30].

⁹⁵⁹ *Property Law Act 1958* (Vic) ss 67-68.

⁹⁶⁰ *Conveyancing Act 1919* (NSW) ss 39-40

⁹⁶¹ *Conveyancing and Law of Property Act 1884* (Tas) s 67-68.

54.4. Recommendation

The Centre is of the view that section 51 does little more than preserve an equitable position that has been the law in Queensland from at least 1876. Despite this, it is still common practice in Queensland for deeds and other instruments to include a receipt clause in the body of the deed or instrument itself. Given this, there can be no harm in retaining the effect of section 51.

Section 52, on the other hand, is unlikely to be relevant for registered land under the *Land Title Act 1994* (Qld). Given that old system land is all but eliminated in Queensland (as discussed at paragraph 5.2.1), the continued purpose served by section 52 is doubtful.

The QLS has agreed that there are likely no reasons to keep sections 51 and 52 but noted that this does not mean there is a reason to remove the sections. Despite this, the Centre is of the view that section 51 should be retained with modernised language and that section 52 should be repealed.

RECOMMENDATION 53. Section 51 should be retained with modernised language.

RECOMMENDATION 54. Section 52 should be repealed.

55. Section 53 – Benefit and burden of covenants relating to land

55.1. Overview and Purpose

53 Benefit and burden of covenants relating to land

- (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and the covenantee's successors in title and the persons deriving title under the covenantee or the covenantee's successors in title, and shall have effect as if such successors and other persons were expressed.
- (2) A covenant relating to any land of a covenantor or capable of being bound by the covenantor, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of the covenantor, the covenantor's successors in title and the persons deriving title under the covenantor or the covenantor's successors in title, and, shall have effect as if such successors and other persons were expressed.
- (2A) Subsection (2) extends to a covenant to do some act relating to the land, even though the subject matter may not be in existence when the covenant is made.
- (3) For the purposes of this section in connection with covenants restrictive of the user of land—
successors in title shall be deemed to include the owners and occupiers for the time being of such land.
- (4) This section applies only to covenants made after the commencement of this Act, but shall take effect subject, in the case of registered land, to the *Land Title Act 1994*.

Details of the rationale for inclusion of section 53 in the PLA are found in the explanation provided by the QLRC in its 1973 Report:

This clause is concerned with the passing upon assignment of an estate of the benefit and of the burden of covenants which 'touch and concern land'. These provisions merely affirm the common law as stated in Spencer's Case (1583) 5 Co. Rep. 16a (see Helmore, *op.cit.*, at p 124), but dispense with the necessity for express reference in the instrument to the covenantor's successors in title. They are thus essentially 'word-saving' provisions..... although these clauses also nullify the common law rule that the assignee must have had the same estate as the covenantee.....

The clause is adopted from ss 78 and 79 of the English Law of Property Act 1925 which appear as ss 70 and 70A of the New South Wales Conveyancing Act. The latter are expressly applied to land under the Real Property Act in that State; but in view of the desirability of maintaining the principle of indefeasibility of title of a registered proprietor against unregistered interests and equities, it seems necessary to provide expressly that this clause of the Bill should be subject to the provisions of The Real Property Acts 1861 to 1963.⁹⁶²

The section has not been reviewed since it came into effect on 1 December 1975.⁹⁶³

⁹⁶² 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) 35-36.

⁹⁶³ A minor amendment was made to the section in 1994 to substitute references to the *Real Property Acts* with the *Land Title Act 1994* (Qld): see *Land Title Act 1994* (Qld) No. 11 s 194 Sch 2 which commenced on 24 April 1994.

The term ‘covenant’ is not defined in the PLA but is accepted at common law to mean an agreement in a deed or a promise in a contract or agreement relating to land.⁹⁶⁴ A freehold covenant refers to those covenants that affect the use and enjoyment of land.⁹⁶⁵ These covenants may restrict the owner’s use of the land, or impose positive obligations that must be discharged and are typically entered into between sellers and buyers prior to the sale of land, or may be entered between landowners and neighbours.⁹⁶⁶

Section 53 of the PLA does not alter the substantive common law rules relevant to covenants affecting freehold land which are summarised in paragraph 56.1.1 below. Section 53 is generally accepted as a ‘word saving’ provision. At common law it was necessary to show that the covenantor and covenantee when entering into a covenant intended it to run with the land.⁹⁶⁷ This was usually demonstrated by appropriate words in the relevant covenant instrument indicating the intention that the covenant extended to successors in title (of the covenantee and covenantor).⁹⁶⁸

The effect of section 53 is to make it unnecessary to demonstrate this intention in the instrument as the section automatically implies this intention. There are some differences between sections 53(1) and 53(2) which are highlighted further below.

55.1.1. Covenant ‘relates to any land’

An initial threshold issue relevant to the operation of section 53 is that the relevant covenant ‘relates to any land’. This requires the covenant to ‘touch and concern’ the land of either the covenantee or covenantor.⁹⁶⁹ Whether or not a covenant touches and concerns the land depends on whether it affects the ‘nature, quality, mode of use or value of the land of the covenantee.’⁹⁷⁰ A covenant that is only for the personal benefit of the covenantee does not touch and concern the land.

55.1.2. Section 53(1)

In the case of land of the covenantee, section 53(1) has the effect that a covenant relating to the land of a covenantee is ‘deemed’ to also be made with the covenantee’s successors in title.⁹⁷¹ The section is directed at the benefit of the covenant as it is concerned with the covenantee’s land.⁹⁷² There has been limited case law in Queensland that has directly considered section 53(1) of the PLA. The Queensland Court of Appeal considered the section in *Simmons v Lee*⁹⁷³ and confirmed the position

⁹⁶⁴ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20] 765; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 259.

⁹⁶⁵ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20].

⁹⁶⁶ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20].

⁹⁶⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.80].

⁹⁶⁸ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.80].

⁹⁶⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.53.90].

⁹⁷⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.53.90].

⁹⁷¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.53.120] referring to *Simmons v Lee* [1998] 2 Qd R 671 per McPherson J.

⁹⁷² Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 311 [13.19]; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 535; Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1380 [32-014].

⁹⁷³ (1998) 2 Qd R 671.

that on any view, it operates at the ‘very least’ as a ‘word saving’ provision, supplying the words ‘successor in title’ in the relevant instrument.⁹⁷⁴

The term ‘successors in title’ (which is used in both section 53(1) and (2)), in the case of covenants restrictive of the user of land, extends to owners and occupiers of the relevant land.⁹⁷⁵ Prior to the introduction of section 53(1), there was some suggestion that only an assignee having the same legal estate as the original covenantee could enforce the benefit of the covenant.⁹⁷⁶ For example, at common law a tenant would be unable to take the benefit of a covenant made by the owner of the fee simple estate. The rationale for this position was that a person who ‘derived title under but did not take the same estate as the covenantee (such as his lessees) were not his assigns and could not therefore enforce the covenant.’⁹⁷⁷

There is some commentary which questions the correctness of this rule⁹⁷⁸ and it has been described as an ‘old technical rule which no longer has any practical value.’⁹⁷⁹ The effect of section 53(3)⁹⁸⁰ is to clarify the position so that it is clear that an assignee does not require the same legal estate as the covenantee in order to enforce the restrictive covenant. Any owner or occupier can enforce the benefit of a restrictive covenant.⁹⁸¹

55.1.3. Section 53(2)

In the case of land of the covenantor, section 53(2) operates in a similar way as section 53(1) in that it is unnecessary to expressly refer to successors in title in an instrument as the section ‘deems’ that it extends to the covenantor’s successors in title.⁹⁸² The section is directed at the burden of the covenant as it is concerned with the covenantor’s land. The section does not alter the common law

⁹⁷⁴ *Simmons v Lee* (1998) 2 Qd R 671, 677. The court also indicated in that case that the ‘word saving’ impact of section 53(1) was not excluded simply because the relevant instrument referred personally to the original covenantee (or lessor in this case) and not to any assignees. The court considered that ‘it was precisely because of the absence of any reference to assignees that section 53(1) was relevant’ and that something more than the use of the use of a name is needed to displace section 53(1) (at 677).

⁹⁷⁵ *Property Law Act 1974* (Qld) s 53(3).

⁹⁷⁶ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 535 [1736]; Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1380 [32-014]. Harpum et al indicate that doubts were expressed regarding the correctness of this interpretation. For further discussion on this issue and case references see [32-014] – [32-015]. See also Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 311 [13.19] which cites a comment from another commentator that ‘there is insufficient authority to make it entirely clear that this was a common law requirement.’

⁹⁷⁷ Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1380 [32-014].

⁹⁷⁸ Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1380 [32-014]; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 312 [13.21].

⁹⁷⁹ Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 312 [13.21].

⁹⁸⁰ The other Australian jurisdictions that have an equivalent to section 53 also define ‘successors in title’ broadly in this way.

⁹⁸¹ Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 312 [13.21] and Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 535. See also *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board Ltd* [1949] 2 KB 500 and *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 ALL ER 371, 380.

⁹⁸² Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20], [17.90], [17.130].

position that a successor in title is not subject to the burden of a positive covenant.⁹⁸³ Section 53(2) of the PLA was considered in the Queensland Supreme Court case of *Rural View Developments Pty Limited v Fastfort Pty Limited*.⁹⁸⁴ McMurdo J in that case followed the reasoning in *Rhone v Stephens*⁹⁸⁵ in relation to the equivalent provision in the United Kingdom and indicated that:

...this section facilitates the drafting of documents by making it unnecessary to refer to successors in title, but it does not make such persons subject to the burden of a positive covenant.

Another feature of section 53(2) is that it is subject to a contrary intention expressed in the covenant. A 'contrary intention' can be found in the 'wording and the context' of the relevant instrument, without the instrument expressly excluding successors in title from its operation.⁹⁸⁶ Section 53(1) does not include a similar reference, although it is likely to be an implicit qualification to the section.⁹⁸⁷

The comments made above in relation to the operation of section 53(3) in the context of section 53(1) apply equally to section 53(2). In summary, section 53(3) expands the category of successors in title able to enforce a restrictive covenant to successors who do not necessarily have the same legal estate as the original covenantor.

55.1.4. Section 53(4)

Section 53(4) provides that section 53 only applies to covenants made after 1 December 1975 which is the date that the PLA commenced. The section applies to land registered under the *Land Title Act 1994* (Qld) but is subject to that Act.⁹⁸⁸ This means that a transferee of the fee simple is not bound upon registration by any unregistered covenants to which the transferee has not agreed to be bound.

55.2. Issues with the section

Section 53 of the PLA does not alter the common law position in relation to the general unenforceability of the burden of a positive freehold covenant. As indicated above, the primary function of section 53 is to remove the need to indicate expressly in the covenant instrument that it extends to successors in title. In Queensland, it is the effect of the common law position regarding positive covenants which has raised most of the issues associated with covenants, rather than the operation of section 53 of the PLA. This is most clearly illustrated in Queensland in the context of easements that incorporate a covenant. Section 53 has arisen as an ancillary issue only in these cases and has been confirmed in the relevant decisions as only having a word saving effect. The issue regarding the enforceability of positive covenants is discussed in detail in paragraph 56.

⁹⁸³ See *Rhone v Stephens* [1994] 2 AC 310, 318 and *Rural View Developments Pty Limited v Fastfort Pty Limited* (2011) 1 Qd R 35, 40, referring to *Rhone v Stephens* [1994] 2 AC 310.

⁹⁸⁴ (2009) 1 Qd R 35.

⁹⁸⁵ *Rhone v Stephens* [1994] 2 AC 310 at 322

⁹⁸⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.53.270].

⁹⁸⁷ For example, *Simmons v Lee* (1998) 2 Qd R 671, 677 and *Cape Flattery Silica Mines Pty Ltd v Hope Vale Aboriginal Shire Council & Anor* [2012] QSC 381.

⁹⁸⁸ The section does not impact on the indefeasibility of title: Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.270].

55.3. Other jurisdictions

55.3.1. Australia

The majority of the other Australian jurisdictions have equivalent provisions to section 53 of the PLA. New South Wales, Victoria, Western Australia and Tasmania have similar provisions and these have generally been interpreted in the same way as section 53 of the PLA – that is, the sections function as ‘deeming’ or word saving provisions only.⁹⁸⁹ The Australian Capital Territory provision has been drafted differently but has a similar effect.⁹⁹⁰ South Australia does not have a provision and the Northern Territory has a significantly different legislative regime dealing with covenants, although the relevant Act does enable the benefit of a covenant to be enforced by a person who has the estate in the land benefited by the covenant.⁹⁹¹

55.3.2. United Kingdom

The position in the United Kingdom is similar to Queensland. The relevant provisions are set out in sections 78 (dealing with the benefit) and 79 (dealing with the burden) of the *Law of Property Act 1925* (UK). The sections have also been interpreted as having primarily a word saving function.⁹⁹²

55.3.3. New Zealand

The provisions in the New Zealand *Property Law Act 2007* (NZ) have clarified the issues surrounding the interpretation of sections 63 and 64 of the now repealed *Property Law Act 1952* (NZ) (similar to section 53 of the *Property Law Act 1974* (Qld)). Section 64 related to the burden of a covenant and provided that a covenant is deemed to be made by the covenantor ‘and his or her successors in title and persons claiming through the covenantors or successors in title.’⁹⁹³ Section 63 addressed the benefit of a covenant and was generally interpreted as having wider application than section 64, which was viewed as a word saving provision only. The provisions under the *Property Law Act 2007* (NZ), (sections 301 (benefit), 302 (burden) and 303 (legal effect of covenants running with land)), have addressed the uncertainty regarding the operation of the previous provisions by making it clear that

⁹⁸⁹ *Conveyancing Act 1919* (NSW) ss 70 & 70A; *Property Law Act 1958* (Vic) ss 78 & 79; *Property Law Act 1969* (WA) ss 47 & 48; *Conveyancing and Law of Property Act 1884* (Tas) ss 71 & 71A. Note also section 91 of the *Conveyancing and Law of Property Act 1884* (Tas) which applies section 71 to land under the Torrens system (see the *Land Titles Act 1980* (Tas)).

⁹⁹⁰ *Land Titles Act 1925* (ACT) s 109. The terminology used in the ACT legislation is different from the other jurisdictions. Although it does cover the benefit of a covenant to be enforced, it does not extend to the burden of the covenant. In this respect, the position in the Australian Capital Territory and South Australia in relation to the burden of covenants is that provision needs to be made in the terms of the instrument: see Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 381 [14.26].

⁹⁹¹ Sections 170-172 of the *Law of Property Act* (NT) is drafted in different terms. However, section 170 enables the benefit of a covenant to be enforced by a person who has the estate in the dominant land that has the benefit of the covenant. Section 171 provides, amongst other things, that a covenant binds each person who has an interest in the land subject to the burden of the covenant.

⁹⁹² *Rhone v Stephens* [1994] 2 AC 310 and Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1382 [32-016]. However, see also Leslie Turano, ‘Intention, Interpretation and the Mystery of section 79 of the *Law of Property Act 1925*’ (2000) *Conveyancer and Property Lawyer* 377 where the purpose of section 79 (and section 78) is discussed and the current interpretation of the provisions as solely word saving is questioned.

⁹⁹³ For further commentary on the New Zealand position see Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 903-906.

the covenant will run with the land and is enforceable against successors in title, subject to some qualification.⁹⁹⁴

55.3.4. Reviews and reform in other Australian jurisdictions relevant to section 53 of the PLA

A number of reviews have considered issues associated with covenants.⁹⁹⁵ However, these have not considered in detail the equivalent provisions to section 53 of the PLA. The VLRC, following its review of the *Property Law Act 1958* (Vic), recommended that the equivalent provisions (sections 78 and 79 of the Victorian Act) be retained for both registered and old system land. The Final Report did not discuss the sections in any detail but rather added the sections to its list of recommendations and noted that both sections were word saving provisions which allowed the running of the benefit (or burden in the case of section 79) of covenants that ‘touch and concern the land without express mention of the covenantor’s successors in title.’⁹⁹⁶ There is no detailed explanation provided for the recommendation to retain both sections of the *Property Law Act 1958* (Vic).

55.4. Recommendation

The Centre recommends retaining section 53(1) and (2), repealing section 53(3) and amending section 53(4) to modernise the language. The section should read: *‘This section applies only to covenants made after 1 December 1975, but shall take effect subject to the Land Title Act 1994.’*

This means that section 53 operates solely as a word saving provision only and avoids the need to include express provision in the covenant instrument that it is intended to run with the land.

Section 53(1) and (2) will remain in their current form and continue operating as a ‘deeming’ or word saving provisions only. Preserving these provisions overcomes any uncertainties associated with the common law position regarding an assignee requiring the same legal estate in order to enforce a restrictive covenant. Further, it avoids the need to include express provision in the covenant instrument that it is intended to run with the land.

If section 53 of the PLA is a word saving provision only, the section is arguably superfluous and has no real function. In those circumstances, the repeal of the section is logical as it will remove a provision that has no utility. However, a practical effect of any repeal is that covenantees and covenantors will need to ensure that the covenant instrument incorporates clear provision that the covenant is intended to run with the land and cover successors in title.

Further, repealing the provision will also potentially raise issues associated with whether the assignee must then be required to have the same legal estate as the covenantee where a restrictive covenant

⁹⁹⁴ See *Property Law Act 2007* (NZ) s 303(1)(a) in relation to the enforceability against the successors to burdened land only where the covenant is intended to benefit the owner for the time being of the covenantee’s land etc. See Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 905.

⁹⁹⁵ See for example, Victorian Law Reform Commission *Easements and Covenants* Final Report No. 22 (2010); United Kingdom Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* Report No. 327 (2011); Land Titles Office (NSW), *Review of the Law of Positive Covenants Affecting Freehold Land* Discussion Paper (1994).

⁹⁹⁶ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No. 20 (2010) 133.

is concerned, which appears to have been the requirement prior to the introduction of the provision. The QLS declined to comment in relation to section 53 of the PLA.

RECOMMENDATION 55. Section 53(1) and (2) should be retained. Section 53(3) should be repealed. Section 53(4) should be amended to read: *'This section applies only to covenants made after 1 December 1975, but shall take effect subject to the Land Title Act 1994.'*

56. Reform of rules relating to enforcement of burden of positive covenants in Queensland

56.1. Overview and purpose

The burden of positive covenants at present cannot be enforced against a transferee of freehold land in Queensland. This particularly affects parties to easements that contain covenants. The focus of this discussion is on the enforceability of the burden of positive covenants, particularly in the context of easements. Subject to some limited situations, restrictive covenants in Queensland cannot be registered and this review is not concerned with the enforceability of restrictive covenants, except in relation to the different legal treatment of freehold negative and freehold positive covenants. There is some confusion in practice in Queensland, particularly in relation to covenants contained within easements and the enforceability of these against successors in title.

56.1.1. What is a covenant?

A 'covenant' at common law means an agreement in a deed or a promise in a contract or agreement relating to land.⁹⁹⁷ A freehold covenant refers to those covenants that affect the use and enjoyment of land.⁹⁹⁸ These covenants may restrict the owner's use of the land, or impose positive obligations that must be discharged and are typically entered into between sellers and buyers prior to the sale of land, or may be entered between a landowner and neighbour.⁹⁹⁹ An overview of the general law in relation to covenants is set out below.

- There is a difference between the benefit of a covenant and the burden of a covenant:¹⁰⁰⁰
 - the benefit of a covenant provides the covenantee (the person entitled to enforce the benefit of the promise) with the right to enforce the benefit of the promise provided.
- The person who bears the 'burden' of the covenant is obliged to perform the promise and is known as the covenantor.¹⁰⁰¹
 - Covenants can be positive or negative and the distinction is one of substance, rather than form.¹⁰⁰²
- The difference between a positive and negative covenant is that:
 - a positive covenant requires an act of the covenantor or expenditure of money. For example, requiring the covenantor to maintain a building in a state of repair;¹⁰⁰³
 - a negative or restrictive covenant restrains the covenantor's use of the subject land. It can usually be complied with if the covenantor does 'absolutely nothing'.¹⁰⁰⁴ For

⁹⁹⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20]; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 259.

⁹⁹⁸ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20]; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 259.

⁹⁹⁹ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20].

¹⁰⁰⁰ *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.

¹⁰⁰¹ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20].

¹⁰⁰² Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.87].

¹⁰⁰³ Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.87].

¹⁰⁰⁴ Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.87].

example, the covenant may restrict the height of a building or the number of dwellings on the land.¹⁰⁰⁵

- The difference has been described judicially in the following way:
 - ...restrictive covenants subtract specified use rights from the landowner's original endowment, while positive obligations add a burden to landownership which was never part of the landowner's endowment.¹⁰⁰⁶
- Covenants are enforceable between the original parties to the agreement. The position is different in relation to successors in title.
- The burden of a negative or restrictive covenant can be passed to successors in title under equitable principles.¹⁰⁰⁷
- Generally, the burden of a positive covenant does not run with land at law and is not enforceable against successors in title.¹⁰⁰⁸ It is only enforceable against the original covenantor.¹⁰⁰⁹ This is known as the rule in *Austerberry v Corporation of Oldham* (the *Austerberry* rule).¹⁰¹⁰ The legal basis for the rule was explained in *Rhone v Stephens*¹⁰¹¹ where Lord Templeman indicated that enforcing a positive covenant against a successor to the covenantor would breach the rule that contracts are enforceable only against the persons who entered into them. The position in relation to the enforcement of restrictive covenants was different and did not breach the rule. This is because equity does not enforce the covenant but instead, prevents the 'purchaser from exercising a right that he or she did not acquire.'¹⁰¹²
- The benefit of a positive or restrictive covenant can run with the land so that the covenantee's successors in title are entitled to enforce the covenant against the covenantor (but not the covenantor's successors) if certain requirements are met. For example, the covenant must

¹⁰⁰⁵ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.20]; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3rd ed, 2011) 377 [14.21].

¹⁰⁰⁶ Explained in this way by Lord Templeman in *Rhone v Stephens* extracted in Pamela O'Connor, 'Careful What You Wish For: Positive Freehold Covenants' (2011) 3 *Conveyancer and Property Lawyer* 191, 205.

¹⁰⁰⁷ *Tulk v Moxhay* (1848) 2 Ph 774. Restrictive covenants have been described as having a 'quasi proprietary status', being 'contractual obligations that function, in some circumstances, as property rights': Teresa Sutton 'On the Brink of Land Obligations Again' (2013) *The Conveyancer and Property Lawyer* 17, 18.

¹⁰⁰⁸ There are a number of exceptions to this general rule. Statutory exceptions include positive and negative covenants contained in by-laws for a community titles scheme under the *Body Corporate and Community Management Act 1997* (Qld), positive and negative covenants in a building management statement registered under s 54A of the *Land Title Act 1994* (Qld); Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.140].

¹⁰⁰⁹ See *Rhone v Stephens* [1994] 2 AC 310, 318; Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.90] and [17.130].

¹⁰¹⁰ *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750; Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.88].

¹⁰¹¹ *Rhone v Stephens* [1994] 2 AC 310, 318.

¹⁰¹² *Rhone v Stephens* [1994] 2 AC 310, 318; Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.90]. See also the comments in *Rural View Developments Pty Limited v Fastfort Pty Limited* (2009) 1 Qd R 35, 39 which confirmed the general rule that the 'burden of a positive covenant does not run with the land unless the covenant itself amounts to the grant of some easement, rent-charge or some estate or interest in the land. In particular, a mere covenant to repair, or to do something of that kind, does not...run with the land in such a way as to bind those who may acquire it.'

touch and concern the land and there must be an intention that the benefit should run with the land.¹⁰¹³

56.1.2. Statutory covenants

In Queensland, a statutory covenant is a covenant created by an Act which may be entered into by a land owner with a statutory body, usually for a public purpose such as conserving a physical or natural feature of the land.¹⁰¹⁴ The covenants can be positive or negative and once registered are binding on the covenantor and any successor of the land.¹⁰¹⁵ For statutory covenants under Part 6, Division 4A of the *Land Title Act 1994* (Qld), only the State, another entity representing the State, or a local government can be the covenantee.¹⁰¹⁶

56.1.3. Enforcing the burden of a positive covenant in Queensland

The burden of a positive covenant does not run with the land at common law in Queensland and the practical effect of this is that only the original covenantor is bound by a positive covenant.¹⁰¹⁷ The reason for this is discussed in detail in paragraph 56.1.1 above. There is some limited scope for the enforceability of the burden of a positive covenant in Queensland which is discussed in more detail in paragraph 56.2.1 below.

Queensland differs from other Australian jurisdictions in relation to the enforceability of restrictive covenants. There is no general provision in the *Land Title Act 1994* (Qld) providing for the registration of a restrictive covenant, although there are some limited circumstances enabling these covenants to be registered. The categories of restrictive covenants which can be registered under the *Land Title Act 1994* (Qld) include:¹⁰¹⁸

- building management statements - both positive and negative covenants contained in a registered building management statement;¹⁰¹⁹
- statutory covenants which cover the use of the lot or building on the lot, preservation of a native animal or plant or natural feature of the lot that is of cultural or scientific significance. Also included are covenants that ensure the lot burdened by the covenant cannot be transferred except with other specified land.¹⁰²⁰

¹⁰¹³ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 528 [1720].

¹⁰¹⁴ See for example, *Land Title Act 1994* (Qld) s 97A(3)(a) and (b) where a covenant must be aimed at preserving a native animal or plant or a natural or physical feature of the lot that is of cultural or scientific significance.

¹⁰¹⁵ *Land Title Act 1994* (Qld) s 97A(4).

¹⁰¹⁶ *Land Title Act 1994* (Qld) s 97A(2). This Final Report does not consider statutory covenants under the *Land Title Act 1994* (Qld).

¹⁰¹⁷ This applies to positive covenants in registered instruments such as easements. The position is different in the case of statutory covenants registered on the title to the land.

¹⁰¹⁸ For further commentary on the practical aspects of registering restrictive covenants under the *Land Title Act 1994* (Qld) see Christensen, Dixon and Wallace, *Land Titles Law and Practice*, Thomson Reuters (looseleaf) [4.5320], [6.17750] and Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.340] – [17.430].

¹⁰¹⁹ *Land Title Act 1994* (Qld) s 54A. Section 54A provides that a Building Management Statement contains provisions benefiting and binding the lots to which it applies. However, unlike section 97A(4)(b) of the *Land Title Act* (Qld) it does not expressly say it is binding on successors.

¹⁰²⁰ *Land Title Act 1994* (Qld) s 97A.

56.1.4. When does the transfer of the burden of a positive covenant become relevant in Queensland?

In Queensland, issues associated with the enforceability of the burden of a positive covenant have arisen primarily in the context of easements and leases. These are discussed below.

56.1.4.1. Easements

The difficulties caused by the common law position are most clearly illustrated in Queensland in the case of easements. Easements can be granted requiring one or both of the dominant or servient owners to repair or maintain the site of the easement.¹⁰²¹ Although these obligations will bind the original parties to the contract, the successors in title will not be similarly bound. There have been a number of cases in Queensland which have considered the enforceability of covenants attached to easements. A summary of the type of easements and covenants from these cases is set out below:

- an easement for access and drainage which contained a covenant that the grantor and grantee were each responsible for half the cost of any construction, repairs, maintenance or upgrading required to the roadway, drains, pipes or culverts or other improvements on the easement;¹⁰²²
- a right of way/access easement that contained a covenant that the grantor and grantee must keep the servient tenement free of noxious and other weeds and all rubbish;¹⁰²³
- an easement over the area occupied by a party wall (including any extension to the wall) which imposed an obligation on a party who used any extension to the wall to pay half of the value of such portion of the extension as he or she proposed to use.¹⁰²⁴

These types of obligations relating to easements can be complex and their continued enforceability can be fundamental to ensuring and preserving land access into the future.¹⁰²⁵ A common situation arises where there is an easement granted over particular land and a covenant containing maintenance obligations is subsequently entered between the owners of the dominant and servient tenements.¹⁰²⁶ The utility and value inherent in an easement may be diminished where the subsidiary obligations are unenforceable and not observed by subsequent covenantors.¹⁰²⁷ For example, an unmaintained easement may render the easement land unfit to serve the original purpose for which it was created.¹⁰²⁸

The difficulty associated with the enforceability of a covenant in an easement has been recognised in the Queensland decision of *Rufa Pty Ltd v Cross* where Kneipp J indicated that:

¹⁰²¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 528 [1719].

¹⁰²² *Rural View Developments Pty Limited v Fastfort Pty Limited* (2009) 1 Qd R 35, 39.

¹⁰²³ *Fanigun Pty Ltd v Woolworths Limited* [2006] 2 Qd R 366 [2].

¹⁰²⁴ *Rufa Pty Ltd v Cross* (1981) Qd R 365.

¹⁰²⁵ See, for example, *Rural View Developments Pty Ltd v Fastfort Pty Ltd* [2011] 1 Qd R 35; *Kocagil v Chen* [2012] NSWSC 1354.

¹⁰²⁶ For example, *Clifford v Dove* [2003] NSWSC 938.

¹⁰²⁷ See, for example, *Mount Cathay Pty Ltd v Lend Lease Funds Management Ltd* [2012] QCA 274, where an easement was obstructed and the obstructing party claimed that this was due to a failure on the part of the other party to perform their obligation to maintain it; Land Titles Office (NSW), *Review of the Law of Positive Covenants Affecting Freehold Land* Discussion Paper (1994) 42.

¹⁰²⁸ See, for example, *Mount Cathay Pty Ltd v Lend Lease Funds Management Ltd* [2012] QCA 274.

The law relating to the enforcement of covenants in easements between successors in title to the original parties is difficult and uncertain.¹⁰²⁹

The approach adopted in Queensland when considering covenants in easements has varied and depended on the particular factual situation. A number of approaches have been adopted by the courts in some of the cases to overcome the enforceability problem. For example, in *Rufa Pty Ltd v Cross* two of the judges relied on an interpretation of the covenant from the trial judge that it was part of the 'essential fabric of an easement binding upon any successors in title' who chose to make use of the (easement), while Kneipp J upheld the covenant on the basis that 'a man who takes the benefit of a deed is bound by a condition contained in it.'¹⁰³⁰ The different judicial approaches which have been applied are discussed in more detail under the judicial exceptions section below.

56.1.4.2. Leases

At common law, where there is a lease in place in relation to freehold land and that land is purchased or transferred subject to the lease, it is known as an assignment of the reversion.¹⁰³¹ Covenants contained in a lease were not enforceable between the new owner of the land and the lessee. Sections 117 and 118 of the PLA now regulate this situation in Queensland. In effect, the sections enable the passing of the benefit and burden of covenants in a lease which are required to be performed by either the lessor or lessee in the circumstances provided for in the sections.

56.2. Problems identified with enforcement of the burden of positive covenants in Queensland

The purpose of any reform in this area would be to facilitate the burden of a covenant to run with the land in some capacity without the need to rely on some other mechanism to enable this to occur such as through novation. As discussed in paragraph 56.1.4.1 above, issues of enforceability tend to arise in the context of covenants attached to easements where the utility and value inherent in an easement may be diminished if obligations such as repair and maintenance are unenforceable and not observed by successors in title of the covenantor. Some mechanisms have been developed to enforce the burden of a positive covenant, however, these are not ideal solutions and have limited applicability.

56.2.1. Mechanisms utilised to enforce a positive covenant

There are a number of mechanisms which have been used to enforce the burden of positive covenants. These can be categorised as:

- contractual or drafting exceptions;
- judicial exceptions; and
- statutory exceptions.

The discussion below illustrates the potentially complex legal matrix that has developed in relation to positive covenants, including the fine distinctions developed in the courts and the potentially complicated contractual arrangements entered into in order to enable the burden of positive

¹⁰²⁹ (1981) Qd R 365, 369.

¹⁰³⁰ *Rufa Pty Ltd v Cross* (1981) Qd R 365 at 366, 367 and 371. See also Land Titles Office (NSW), *Review of the Law of Positive Covenants Affecting Freehold Land* Discussion Paper (1994) 44.

¹⁰³¹ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.890].

covenants to run with the land. The examples listed below do not comprise a full list of the mechanisms that have been used to circumvent the common law position.

56.2.1.1. Contractual or drafting exceptions

Contractual mechanisms have been used in an attempt to facilitate the passing on of the burden of some positive obligations (for example, to allow maintenance and access to the property).¹⁰³² For example:

- personal covenants can be used to bind successive covenantors. Under this approach the initial covenantor agrees to ensure that the subsequent purchaser of the burdened land will enter into an identical covenant with the covenantee.¹⁰³³ Clearly, the use of personal covenants to bind successors in title is only effective if each successive title holder agrees to enter into such an arrangement;
- the creation of a chain of indemnity covenants which requires each successive seller (covenantor) of land the subject of a covenant to impose a covenant on the purchaser requiring the purchaser to indemnify the covenantor against any breach of covenant committed by the purchaser or the purchaser's successor in title.¹⁰³⁴ Each successor in title will be liable to the preceding covenantor for the obligations imposed by the covenant. Enforcement under this model is practically difficult as it requires a series of actions following the chain of owners of the property.¹⁰³⁵

These contractual approaches are generally regarded as a less secure method of enforcing positive covenants than if the obligations were to run with the land.¹⁰³⁶ This is mainly due to the technical requirements that arise in the creation of a series of individually enforceable contracts.

56.2.1.2. Judicial exceptions

The courts have also developed exceptions to the general principle that a positive covenant does not run with the land. This has enabled some positive covenants to be enforced against successors in title in limited circumstances. However, these exceptions have been applied inconsistently in Australian courts, and their position in Queensland is uncertain.¹⁰³⁷ A brief overview of the relevant exceptions is set out below:

¹⁰³² Teresa Sutton 'On the Brink of Land Obligations Again' (2013) *The Conveyancer and Property Lawyer* 17, 19.

¹⁰³³ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.130].; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 523 [1709]. The covenant will be directly enforceable against a successor in title as there will be a privity of contract relationship. This direct covenant should include a requirement that the successor in title will only sell, transfer or assign the property on the condition that the purchaser enters into an equivalent covenant. This method of enforcing positive covenants is a 'drafting solution' as it can assist with the enforcement of a positive covenant.

¹⁰³⁴ Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3rd ed, 2011) 368.

¹⁰³⁵ Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3rd ed, 2011) 368.

¹⁰³⁶ 'A chain is only as good as its weakest link': United Kingdom Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre*, Report No. 327 (2011) 101; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3rd ed, 2011) 368-369.

¹⁰³⁷ See for example, *Konstas v Southern Cross Pumps and Irrigation Pty Ltd* (1996) 217 ALR 310.

- **Pure benefit and burden principle**

The pure benefit and burden principle is a reasonably broad rule which has been used to enforce the burden of a positive covenant against a successor in title of a covenantor.¹⁰³⁸ The premise of the rule is that a party who accepts the benefit of a proprietary interest that runs with the land must also accept the obligations or burden imposed under the instrument that created the interest.¹⁰³⁹ In the case of easements, the principle has been articulated as follows:

...where the grant of an easement imposed on the grantee the obligation to repair the site of the easement, the grantee's successors in title were liable for the cost of repairs because, having claimed the benefit under the grant of easement, they could not avoid the burden.¹⁰⁴⁰

The principle has been considered in a number of Australian cases,¹⁰⁴¹ although its status is uncertain and has been criticised.¹⁰⁴² It is generally accepted that the 'pure' benefit and burden principle is not applicable in Queensland.¹⁰⁴³

- **Conditional benefits principle**

The conditional benefits principle is framed in more restrictive terms than the pure benefits and burden principle. It arises where an instrument creating the relevant interest is construed as conferring benefits conditional upon the performance of certain obligations.¹⁰⁴⁴ This principle has been explained as follows:

A covenant may grant to a person some right relating to land such as to use a road or a party wall, and the grant of the right may be conditional upon the person discharging certain specified obligations relevant to the exercise of the right. Where this is the case, in appropriate circumstances, a successor in title who chooses to exercise the right will be held liable to discharge the obligations which are conditional to the exercise of the right.¹⁰⁴⁵

¹⁰³⁸ *Halsall v Brizell* (1957) Ch 169, per UpJohn, J. In *Hasall v Brizell* the defendant's predecessor in title had been granted the right to use the estate roads and sewers and covenanted to pay money for the maintenance of the facilities; *Rufa Pty Ltd v Cross* [1981] Qd R 365, per Kneipp, J; *Frater v Finlay* (1968) 91 WN (NSW) 730. It has arisen particularly in the context of easements. See for example, Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.200] and Peter Butt, 'Making Positive Covenants Run' (2013) 87 *Australian Law Journal* 812, 812.

¹⁰³⁹ *Tito v Waddell (No 2)* [1977] Ch 106, 289 – 290; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 524-525 [1712].

¹⁰⁴⁰ Peter Butt, 'Making Positive Covenants Run' (2013) 87 *Australian Law Journal* 812, 812 referring to *Halsall v Brizell* [1957] Ch 169.

¹⁰⁴¹ *Gallagher v Rainbow* (1994) 179 CLR 624; *Konstas v Southern Cross Pumps and Irrigation Pty Ltd* (1996) 217 ALR 310.

¹⁰⁴² See, for example *Clifford v Dove* [2003] NSWSC 938; *Government Insurance Office (NSW) v K A Reed Services Pty Ltd* [1988] VR 829; Peter Butt, 'Making Positive Covenants Run' (2013) 87 *Australian Law Journal* 812, 812, 812 for a discussion of the 'sophistry' in the court decisions considering the pure benefit and burden approach.

¹⁰⁴³ See for example *Rufa Pty Ltd v Cross* [1981] Qd R 365 where Kneipp J applied the rule. However, the majority of the court preferred the conditional benefits approach. See also, Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.2000] and Peter Butt, 'Making Positive Covenants Run' (2013) 87 *Australian Law Journal* 812, 812.

¹⁰⁴⁴ Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3rd ed, 2011) 371 [14.10].

¹⁰⁴⁵ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.150]. See *Fanigun Pty Ltd v Woolworths Ltd* [2006] 2 Qd R 366 [98] and *Rufa Pty Ltd v Cross* [1981] Qd R 365, 366.

The principle has been treated more favourably in Queensland than the broader pure benefit and burden principle.¹⁰⁴⁶ The precise scope of the conditional benefits principle is not completely clear or settled.¹⁰⁴⁷

56.2.1.3. Statutory exceptions

The common law rule against the running of the burden of positive covenants can be abrogated by statute, either generally or in particular situations. In Queensland there is no general statutory provision which abrogates the common law position. However, there are a number of specific statutory exceptions that allow positive covenants to bind successors in title including:

- by-laws for a community titles scheme - both positive and negative covenants that form part of the by-laws for a community titles scheme are enforceable against subsequent owners of a lot;¹⁰⁴⁸
- building management statements – it is questionable whether positive and negative covenants contained in a registered building management statement are enforceable against successors in title;¹⁰⁴⁹
- statutory covenants - both positive and negative statutory covenants will be enforceable against successors in title to a lot, as long as they are registered.¹⁰⁵⁰ These covenants must relate to the lot or a building on, or proposed to be built on, the lot and be aimed at, amongst other things, directly preserving a native animal or natural feature of the lot that is of cultural or scientific significance;
- transport easement for support under the *Transport Planning and Coordination Act 1994* (Qld) – each term, whether negative or positive, is binding on successors in title.¹⁰⁵¹

56.3. Other jurisdictions

Apart from the Northern Territory and New South Wales, the approach in the other jurisdictions is consistent with Queensland. New South Wales and the Northern Territory are the only jurisdictions that have enacted statutory provisions to specifically address the common law rule relating to the enforceability of the burden of a positive covenant. The New South Wales legislation is limited to covenants contained within easements and does not create a new statutory regime to regulate positive covenants more generally. The position in New South Wales can be compared to the Northern Territory legislation which does create a statutory regime with broad application. Victoria

¹⁰⁴⁶ For example, *Rufa Pty Ltd v Cross* [1981] Qd R 365, *Fanigun Pty Ltd v Woolworths Ltd* [2006] 2 Qd R 366 and in more recent cases such as *Rural View Developments Pty Ltd v Fastfort Pty Ltd* [2011] 1 Qd R 35 where the court discussed the principle but distinguished the decision in *Rufa Pty Ltd* on the basis of the arrangement the subject of the proceedings. The covenant in the easement in that case provided: ‘The Grantor and Grantee shall each be responsible for one half of the cost of any construction, repairs, maintenance or upgrading required to the road way, drains, pipes or culverts or other improvements on the Easement’ (at 39).

¹⁰⁴⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [17.180]. See also the limits to this approach discussed at [17.810].

¹⁰⁴⁸ *Body Corporate and Community Management Act 1997* (Qld) s 59(3). The CMS is binding upon registered proprietors including successors in title and the by-laws form part of the CMS.

¹⁰⁴⁹ *Land Title Act 1994* (Qld) s 54A.

¹⁰⁵⁰ *Land Title Act 1994* (Qld) s 97A.

¹⁰⁵¹ *Transport Planning and Coordination Act 1994* (Qld) s 28AH. Pt 4, Div 2 of the Act regulates transport easements for support. See Explanatory Statement, Transport and Other Legislation Amendment Bill 2014, 61-66.

has undertaken a relatively recent review of easements and covenants generally, including considering the issue of enforceability of the burden of a positive covenant. The position in these jurisdictions is discussed below.

56.3.1. New South Wales

Section 88BA was incorporated into the *Conveyancing Act 1919* (NSW) in 1996 in an attempt to overcome the problems associated with the enforceability against successors in title of positive covenants.¹⁰⁵² The section enables covenants that require repair or maintenance of the site of an easement 'to continue to apply after ownership of the land having the benefit or burden of the covenant changes.'¹⁰⁵³ The section is prospective so that only positive covenants entered into after the provision took effect on 1 August 1996 will be subject to the section. The section operates in the following way:

- it is restricted to positive covenants that require:
 - the maintenance of land;
 - the repair of land; or
 - the maintenance and repair of land;
- in the case of Torrens land, the instrument imposing the covenant must be registered in the Torrens register;¹⁰⁵⁴
- in the case of old system title land, the relevant instrument must be registered in the deeds register;¹⁰⁵⁵
- the burden of the registered covenant will then run with the land and bind successors to title;¹⁰⁵⁶
- the relevant instrument, including the covenant, must clearly indicate the land which is to be maintained or repaired, the land benefited by the covenant and the land which is subject to the burden of the covenant;¹⁰⁵⁷
- the instrument must be executed by each person to be bound by the covenant;¹⁰⁵⁸ and
- the covenant can be released or varied.¹⁰⁵⁹

¹⁰⁵² The *Property Legislation Amendment (Easements) Act 1995* introduced this provision and made consequential amendments to sections 87A and 88F of the *Conveyancing Act 1919* (NSW). In *Rural View Developments Pty Ltd v Fastfort Pty Ltd*, it was noted that these amendments to the *Conveyancing Act 1919* (NSW) addressed the demand for reform in enabling these types of positive covenants to run with the land. An example of the use of s 88BA is found in the case *Kocagil v Chen* [2012] NSWSC 1354, where the court held that a covenant for the maintenance of the drainage line associated with the easement was an integral part of the arrangements made for the creation of the easement to drain water. It appears that a degree of connection between the easement and the subject matter of the covenant is required. This is similar to the statement in *Rhone v Stephens* [1994] 2 AC 310 that the obligation must be relevant to the exercise of the right, although this case was not considered in the judgment.

¹⁰⁵³ Land and Property Information, 'Property Legislation Amendment (Easements) Act 1995 – Partial Commencement' 54 *Information Bulletin* 1. See also Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 528 [1719].

¹⁰⁵⁴ *Conveyancing Act 1919* (NSW) s 88BA(2).

¹⁰⁵⁵ *Conveyancing Act 1919* (NSW) s 88BA(2)(c).

¹⁰⁵⁶ *Conveyancing Act 1919* (NSW) s 88BA(1).

¹⁰⁵⁷ *Conveyancing Act 1919* (NSW) s 88BA(3).

¹⁰⁵⁸ *Conveyancing Act 1919* (NSW) s 88BA(4).

¹⁰⁵⁹ *Conveyancing Act 1919* (NSW) s 88BA(5).

The changes made in New South Wales are limited to covenants to contribute to the maintenance and/or repair of land. A covenant requiring a person to contribute to the cost of maintenance and repair does not fall within the scope of section 88BA. The common law position remains the same in relation to other types of positive covenants.

56.3.2. Northern Territory

The Northern Territory has adopted the broadest legislative provisions relating to covenants under the *Law of Property Act* (NT).¹⁰⁶⁰ The regime provides for the registration of restrictive and positive covenants on the title of the benefited and burdened land.¹⁰⁶¹ The relevant provisions of the *Law of Property Act 2000* (NT) operate as follows:

- the term ‘covenant’ is defined to mean both a negative or positive obligation in respect of use, ownership or maintenance of particular land that is created for the benefit of other land;¹⁰⁶²
- a covenant in gross is a covenant which is created without dominant land in favour of the Territory, a local government body, a statutory corporation or a prescribed person;¹⁰⁶³
- a covenant or covenant in gross is created under the Act by registration of:
 - a deed of grant or an instrument of covenant or covenant in gross under the relevant provisions of the *Land Title Act* (NT);
 - a plan of subdivision and an instrument of covenant or covenant in gross;
 - an instrument lodged with the Registrar-General under section 19(2) of the *Crown Lands Act* (NT);¹⁰⁶⁴
- the benefit of a covenant can be enforced by a person who has an estate in the dominant land that has the benefit of the covenant and any person claiming under or through him or her;¹⁰⁶⁵
- a covenant or covenant in gross binds each person who has an interest in the land subject to the burden of the covenant or covenant in gross.¹⁰⁶⁶ However, it will not bind the person unless the person’s interest in the land:
 - is the burdened estate or the estate of a mortgagee; or
 - confers on the person a right to possess the land for more than 21 years;¹⁰⁶⁷
- a covenant or covenant in gross that is not a restrictive or access covenant is enforceable against every person who is at the time of its contravention bound by it;¹⁰⁶⁸
- the position in the case of a restrictive or access covenant or covenant in gross is different and is set out in section 173(2) of the Act;
- the Act includes provisions regarding the extinguishment of covenants,¹⁰⁶⁹ and

¹⁰⁶⁰ *Law of Property Act* (NT) Pt 9 Div 4 ss 166-175. The Act applies to registered covenants and interacts closely with the *Land Title Act* (NT) (see ss 106, 107, 114). The Victorian Law Reform Commission has indicated that the provisions effectively abolish the *Austerberry* rule: see Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No. 20 (2010) 84 [6.93].

¹⁰⁶¹ Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3rd ed, 2011) 449 [17.4].

¹⁰⁶² *Law of Property Act* (NT) s 167.

¹⁰⁶³ *Law of Property Act* (NT) s 168.

¹⁰⁶⁴ *Law of Property Act* (NT) s 169.

¹⁰⁶⁵ *Law of Property Act* (NT) ss 170, 171 and 173.

¹⁰⁶⁶ *Law of Property Act* (NT) s 171(1).

¹⁰⁶⁷ *Law of Property Act* (NT) s 171(2).

¹⁰⁶⁸ *Law of Property Act* (NT) s 173(1).

¹⁰⁶⁹ *Law of Property Act* (NT) s 174.

- in the case of land that is subject to the burden of an easement or covenant, the Act establishes a process for a person with an interest in the land to apply to court for an order to modify or extinguish a covenant.¹⁰⁷⁰

The legislation has only been considered in a limited number of cases in the Northern Territory and it is not possible to assess whether or not the statutory scheme raises any issues.¹⁰⁷¹

56.3.3. Victoria

In 2010, the VLRC completed a review of easements and covenants.¹⁰⁷² The VLRC recommended that the burden of a positive covenant should not run with the covenantor's land except under specific legislation.¹⁰⁷³ As a general rule, the VLRC indicated that positive covenants should operate only in contract and not bind the covenantor's successors in title.¹⁰⁷⁴ This recommendation was made following consideration of submissions in relation to this issue. The reasons for this recommendation included:¹⁰⁷⁵

- the *Austerberry* rule ensures positive freehold covenants remain under the control of Parliament;
- positive covenants could impose unduly onerous obligations on successors in title;
- positive covenants that run with the land could displace community titles schemes and the requirements placed upon such, as they could be used as a method of avoiding the procedural requirements of a body corporate;
- there are a number of alternatives to positive covenants.

56.3.4. United Kingdom¹⁰⁷⁶

The position in the United Kingdom is currently the same as Queensland in that the burden of positive covenants remain unenforceable under the common law rule from *Austerberry*.¹⁰⁷⁷ However, the United Kingdom Law Reform Commission recently reviewed easements, covenants and profits a

¹⁰⁷⁰ *Law of Property Act* (NT) ss 176 – 181.

¹⁰⁷¹ See for example *Registrar General's Stated Case* [2011] NTSC 69; *Phelps v Development Consent Authority* [2012] NTCA 2.

¹⁰⁷² Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No. 20 (2010). The Commission was tasked with reviewing and reporting on the desirability of changes to Victoria's property laws in relation to the *Property Law Act 1958* (Vic) and easements and covenants.

¹⁰⁷³ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No. 20 (2010) 88 (Recommendation 35).

¹⁰⁷⁴ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No. 20 (2010) 87 (Recommendation 35).

¹⁰⁷⁵ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No. 20 (2010) 87-88 (Recommendation 35).

¹⁰⁷⁶ In addition to the countries discussed in Part 56.3, legislation has enabled positive covenants to run with the land in Northern Ireland (*The Property (Northern Ireland) Order 1997*, Article 34) and Ireland (*Land and Conveyancing Law Reform Act 2009*, s 49). Scotland has had positive covenants running with the land since 1840 and this is now provided for in the *Title Conditions (Scotland) Act 2003*. The Ontario Law Reform Commission recommended that the burden of a positive covenant should run with land in 1989.

¹⁰⁷⁷ *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.

prendre, producing a Report in 2011 with a number of recommendations.¹⁰⁷⁸ In the context of covenants (both restrictive and positive), the Law Commission recommended that:

- a new statutory land obligation (positive or negative) be created to replace covenants. The obligation/s would be a new legal interest in land, effectively ending the rule in *Austerberry*;¹⁰⁷⁹
- adjustments be made to the land registration procedures for those interests;
- the jurisdiction of the Lands Chamber of the Upper Tribunal be extended to provide some protection against land becoming overburdened by positive obligations;¹⁰⁸⁰ and
- existing freehold covenants should continue to work as they do now but a new approach would be used for future promises.¹⁰⁸¹

The particulars of implementing this scheme were considered in detail, with a draft Bill included in the report. The key three parts of the Bill address:

- the creation of the new land obligation (Part 1);
- reform provisions relating to easement and profits (Part 2);
- reform of the Lands Chamber of the Upper Tribunal (Part 3).¹⁰⁸²

The recommendations made by the Law Commission were generally consistent with the position adopted in previous reviews of covenants in the United Kingdom.¹⁰⁸³ However, no further steps have been taken in relation to the adoption of the recommendations to date and it is not clear whether the recommendations will be implemented. The Ministry of Justice indicated in January 2013 that the Government's response to the Law Commission's report had been delayed by other 'priorities' but that it had met with stakeholders to discuss the recommendations and was preparing a response to the Law Commission.¹⁰⁸⁴ If the recommendations are adopted, a different and new regime will be introduced into the United Kingdom that will make the current issues associated with enforcing the burden of a positive covenant obsolete.

56.3.5. New Zealand

Positive covenants run with the land under the *Property Law Act 2007* (NZ). Both the benefit and the burden of a positive covenant may run with the land and bind successors in title.¹⁰⁸⁵ Where a covenant:

¹⁰⁷⁸ United Kingdom Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* Report No. 327 (2011).

¹⁰⁷⁹ (1885) LR 29 Ch D 750.

¹⁰⁸⁰ Teresa Sutton, 'On the Brink of Land Obligations Again' (2013) *The Conveyancer and Property Lawyer* 17, 17.

¹⁰⁸¹ United Kingdom Law Reform Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* Report No. 327 (2011).

¹⁰⁸² Part 4 of the Bill deals with general issues.

¹⁰⁸³ The United Kingdom Law Commission has previously considered covenants in other working papers and reports. Recommendations were made in these to reform the existing covenant regime. See for example Law Commission, *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971); Law Commission, *Transfer of Land: The Law of Positive and Restrictive Covenants* Report (1984).

¹⁰⁸⁴ Ministry of Justice, *Report on the Implementation of Law Commission Proposals* (2013) 12.

¹⁰⁸⁵ *Property Law Act 2007* (NZ) ss 301 and 302.

- burdens the covenantor’s land; and
- is intended to benefit the owner of the covenantee’s land; and
- there is no privity of estate relationship between the parties,

the covenant will be binding in equity.¹⁰⁸⁶ The regime in New Zealand effectively permits the burden of positive covenants to run with the land in the same way that restrictive covenants run – that is, in equity.¹⁰⁸⁷ The covenants are notified on the land title register but are not registered. The Act also sets out details regarding the rank of covenants in relation to other unregistered interests, which affects the order of their priority.¹⁰⁸⁸ The covenant is to be treated as an equitable interest.¹⁰⁸⁹ The court may make determinations with respect to covenants,¹⁰⁹⁰ and may also modify or extinguish a covenant in certain specified circumstances.¹⁰⁹¹ The reform in New Zealand has been described as ‘incremental’ as it preserves the rules of equity, rather than putting in place new statutory legal rights in relation to covenants.¹⁰⁹²

Provision has also been made in New Zealand so that the burden of the obligations under a fixed term easement can be enforced against the holder (for the time being) of that estate by the person entitled for the time being to the easement.¹⁰⁹³ The Explanatory Note to the Property Law Bill notes that the section is only of limited application as it relates only to an easement granted for a fixed term, rather than absolutely and that the effect of the clause is to attach the benefit from an easement of that kind to the land out of which the easement has been granted.¹⁰⁹⁴

56.4. Interaction with section 62 of the *Land Title Act 1994* (Qld)

Section 62(1) of the *Land Title Act 1994* (Qld) sets out the effect of registration of a transfer of title. The section reads:

62 Effect of registration of transfer

- (1) On registration of an instrument of transfer for a lot or an interest in a lot, all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.
- (2) Without limiting subsection (1), the registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.
- (3) Without limiting subsection (1), the registered transferee of a registered lease is bound by and liable under the lease to the same extent as the original lessee.
- (4) In this section –

¹⁰⁸⁶ *Property Law Act 2007* (NZ) s 303.

¹⁰⁸⁷ The provisions in the New Zealand legislation have clarified the issues surrounding the interpretation of sections 63 and 64 of the *Property Law Act 1952*(NZ) (equivalent to section 53 of the *Property Law Act 1974* (Qld)) by making it clear that successors in title can enforce the covenant: see paragraph 55.3.3 above for more details about this issue.

¹⁰⁸⁸ *Property Law Act 2007* (NZ) ss 305(2), 307.

¹⁰⁸⁹ *Property Law Act 2007* (NZ) s 305(1).

¹⁰⁹⁰ *Property Law Act 2007* (NZ) s 313.

¹⁰⁹¹ *Property Law Act 2007* (NZ) s 317.

¹⁰⁹² Victorian Law Reform Commission, *Easements and Covenants* Final Report No. 22 (2010) 114.

¹⁰⁹³ *Property Law Act 2007* (NZ) s 294(3).

¹⁰⁹⁴ Explanatory Note, Property Law Bill (NZ) 52.

rights, in relation to a mortgage or lease, includes the right to sue on terms of the mortgage or lease to recover a debt or enforce a liability under the mortgage or lease.

The section applies to the transfer of all interests in land once the transfer of that land is registered.¹⁰⁹⁵

It could be concluded that the operation of this section has the effect of making covenants in registered easements enforceable against a successor in title but the case law does not support this view. As far as the enforceability of covenants contained in easements upon successors in title, section 62(1) is unsatisfactory and the case law that considers the section has given a very narrow reading of its application.

In *Measures v McFadyen*¹⁰⁹⁶ the operation of the section was discussed in respect of obligations under a registered mortgage. In that case it was held that a right to sue for damages for a completed breach is a personal right and therefore not enforceable against successors in title. This case suggests that only rights, powers and privileges associated with a covenant that ‘touches and concerns the land’ or which arises out of the interest in the land will be transferred.¹⁰⁹⁷ This is further supported by the decision in *Jodaway v Langton*¹⁰⁹⁸ where the court again considered the operation of section 62, this time in the context of a debt arising under an interest free loan contained in a registered lease. In that case Mullins J concluded:

There appears to be no authority to support a construction of s 62(1) of the *LTA* that the expression ‘the rights, powers, privileges and liabilities of the transferor in relation to the lot’ covers rights, powers, privileges and liabilities which do not run with the land.¹⁰⁹⁹

The soliloquy of this is that the right to enforce collateral obligations, such as obligations to pay money under a registered easement, will not be transferred to, or enforceable by or upon successors in title.¹¹⁰⁰

The Centre is therefore of the view that the operation of the proposed draft provisions operate to create rights addition to rights in the *Land Title Act 1994* (Qld).

56.5. Recommendation

As indicated above at paragraph 56.1.3, this Final Report is not concerned with the enforceability of restrictive covenants in Queensland. Similarly, statutory covenants under the *Land Titles Act 1994* (Qld) are not under consideration for the purposes of the recommendation.

The Centre recommends amending the PLA to allow the burden of a certain covenants contained in a registered easements to be enforceable by and against successors in title. Such provisions could be modelled on, or adapted from, the New South Wales approach in section 88BA of the *Conveyancing*

¹⁰⁹⁵ Sharon Christensen, WM Dixon and A Wallace, *Land Titles Law and Practice*, Thomson Reuters (looseleaf) [6.180].

¹⁰⁹⁶ (1910) 11 CLR 723.

¹⁰⁹⁷ Sharon Christensen, WM Dixon and A Wallace, *Land Titles Law and Practice*, Thomson Reuters (looseleaf) [6.180]. See *Measures v McFayden* (1910) 11 CLR 723.

¹⁰⁹⁸ [2003] QSC 79.

¹⁰⁹⁹ *Jodaway v Langton* [2004] Qd R 272 [19].

¹¹⁰⁰ Sharon Christensen, WM Dixon and A Wallace, *Land Titles Law and Practice*, Thomson Reuters (looseleaf) [6.890]; see for example *Queensland Premier Mines Pty Ltd v French* [2007] HCA 53.

Act 1919 (NSW). The ultimate aim of the draft proposed provisions is to facilitate the enforcement of the relevant covenant contained in a registered instrument by enabling the burden of a certain covenants to be enforced by and against successors in title.

This option will not be a significant departure from the existing regime in Queensland, and will resolve the issues currently faced by parties and the courts so that the alternative mechanisms that have developed to overcome the problem will no longer be necessary. This will eliminate the inconsistency and uncertainty that have also developed alongside these mechanisms.

The approach in New South Wales, as discussed above, applies only to covenants that require repair or maintenance of the site of an easement and only this type of burden will continue to apply after ownership of the land having the benefit or burden of the covenant changes. It is the view of the Centre that this does not go far enough. This is supported in submissions received from the QLS in which it was agreed that this approach is ‘overly restrictive’. The types of covenants that are enforceable in the proposed draft provisions are intentionally limited. This will avoid any abuse of the system by parties who include personal covenants, or other promises that would otherwise not be enforceable upon successors in title, into easements so as to unfairly impose those same obligations on other parties in the future.

If no changes are made to the current law, then the status quo would be preserved so that the burden of a positive covenant does not run with the land. This would generally be consistent with the approach in the majority of the other Australian jurisdictions, apart from New South Wales and the Northern Territory. This would mean that parties seeking enforcement of a burden of a positive covenant contained in a registered easement would have to rely on the alternative mechanisms discussed in paragraph 56.2.1 above, which are inadequate, for the reasons set out in that discussion. In submissions received from the QLS, it was agreed that positive covenants contained within registered easements should bind successors in title.

The adoption of a new statutory regime which would allow for the registration and/or notification of all covenants on the title, such as that of the New Zealand or Northern Territory Acts, is in the Centre’s view, a significant departure from the current position in Queensland. While the Centre acknowledges that this approach was supported in submissions from the QLS, it remains the Centre’s view that this scale of reform is unnecessary for Queensland, in the circumstances.

As discussed above at paragraph 2 the Centre also recommends redrafting section 4 and inserting a similar provision to sit with the proposed new provisions. This will allow the provisions to flow and be read together without having to jump from one Part of the Act to another. This is in line with the overarching principles that inform these recommendations. The proposed drafting is provided below in the recommendation. Note that the language has been modernised slightly by way of removal of the reference to ‘registered land’. This is because there is virtually no (if any) old system land in Queensland, as discussed at paragraph 5.2.1.

The Centre further recommends including a definition of ‘covenant’ for the purposes of the section. The proposed drafting for this definition is set out below in the recommendation. The object of including the definition of ‘covenant’ in the PLA is to provide further clarity and certainty, in line with the overarching principles that inform these recommendations.

56.6. Retrospectivity

The Centre is of the view that the new provisions should operate retrospectively. The *Legislative Standards Act 1992* (Qld) sets out the fundamental legislative principles to be applied to legislation in Queensland. One of those fundamental principles to consider when drafting legislation is whether that legislation adversely affects the rights and liberties, or retrospectively imposes obligations.¹¹⁰¹ The common law rule is that ‘a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to past events.’¹¹⁰²

The draft proposed provisions are clearly expressed to have retrospective effect. It is the view of the Centre that this is necessary and important to give proper effect to the laws governing covenants in easements. It is acknowledged that this is a significant step, however the Centre feels this is justified on several grounds.

There are strong policy reasons supporting the case for retrospectivity. There is a volume of case law that indicates that the matter is a live issue that needs to be clarified. The recommended changes will assist with the removal of doubt in a system where parties may or may not benefit from one of the judicial exceptions that have developed which, as stated above, have been applied inconsistently in the past. All parties will benefit from the commercial certainty that the changes provide, along with the time and costs saved by avoiding agitating these matters in court.

While the existing rights and obligations of people will be affected if the amendments are given retrospective effect, it is noted that it is merely the enforceability of the rights and obligations that will be given effect. Anecdotally, the Centre believes that there is a general perception of most lay people that they are bound by those covenants in any event.

There is further anecdotal evidence that many practitioners have a fundamental misunderstanding of this area of property law and are advising their clients that they are in fact bound by certain covenants, or conversely, are able to enforce certain covenants, in circumstances where they are not. The changes proposed by the Centre will bring the law into line with what is likely to be happening in practice.

Further, unless the amendments are given retrospective effect, there is a significant volume of registered instruments to which the ‘old rules’ will apply, and only newly registered instruments will benefit from the changes. The unfairness of this, in the view of the Centre, outweighs any perceived unfairness in making enforceable already existing covenants upon successors in title.

Importantly, the terms of the covenants in registered instruments are readily available on the freehold land register. All parties would know about these obligations, or come to learn about the obligations contained in registered easements by a simple search of the Register when they obtain an interest in the land.

¹¹⁰¹ *Legislative Standards Act 1992* (Qld) s 4(3)(g).

¹¹⁰² *Maxwell v Murphy* (1957) 96 CLR 261, per Dixon CJ.

56.7. Building Management Statements

The Centre raises an issue for consideration in respect of building management statements (**BMS**) under the *Land Title Act 1994* (Qld). Arguably, any interests or rights in the nature of an easement in a registered BMS are captured by these proposed provisions. There is some uncertainty that covenants contained in these instruments are not enforceable.¹¹⁰³ The Centre is of the view that these types of covenants should be enforceable, however ideally this should be articulated in the *Land Title Act 1994* (Qld). However, expressly stating that the provisions also include covenants contained in a BMS is an option to consider.

RECOMMENDATION 56. The new PLA should include provisions which allow the enforcement of certain covenants in registered easements. This should include a definition of ‘covenant’ that applies to the section only. Section 4 should be repealed.

For example, the new PLA could include a section drafted in the following manner:

Section [] Enforceability of covenants contained in registered easements

- (1) In this section –
covenant means an obligation (whether positive or negative) in respect of the use, ownership or maintenance of particular land (servient land) that is created for the benefit of other land (dominant land).
- (2) Covenants contained in registered easements are binding upon and enforceable by and against successors in title to the grantor and the grantee.
- (3) Subsection (2) does not apply to covenants that are expressed to be personal to the original grantor or grantee.
- (4) The types of covenants to which subsection (2) applies include, but are not limited to:
 - (a) obligations for the payment of rates and taxes related to the area of the easement;
 - (b) obligations to maintain or repair, or contribute to the maintenance or repair of the easement;
 - (c) obligations to contribute to the building, maintenance or repair of infrastructure used in connection with the easement.
- (5) This section applies to all registered easements regardless of when the instrument was registered.
- (6) The rights created by section [number] are in addition to those rights under the *Land Title Act 1994*.

Section [to replace repealed section 4] Act not to be taken to confer right to register restrictive Covenant

Nothing in this Act shall be construed as conferring on any person a right to registration of a restrictive covenant.

¹¹⁰³ Cathy Sherry, ‘Building Management Statements and Strata Management Statements: Unholy Mixing of Contract and Property’ (2013) 87 *Australian Law Journal* 393.

Part 6 Division 2 – General rules affecting contracts

Division 2 of Part 6 deals with a number of general principles affecting contracts. The Division is comprised of only a handful of sections.

57. Section 54 – Effect of joint contracts and liabilities

57.1. Overview and purpose

54 Effect of joint contracts and liabilities

- (1) Subject to this and to any other Act—
- (a) a promise made by 2 or more persons shall, unless a contrary intention appears, be construed as a promise made jointly and severally by each of those persons; and
 - (b) a liability which is joint shall not be discharged, nor shall a cause of action with respect to the liability be extinguished, because of any fact, event, or matter except to the extent that the same would because of the fact, event or matter be discharged or extinguished if the liability were joint and several and not joint.
- (2) In this section—
promise includes a promise under seal, a covenant, whether express or implied under this Act, and a bond or other obligation under seal.
- (3) This section applies only to a promise, liability or cause of action coming into existence after the commencement of this Act.

Where two or more people promise to do something then it will depend upon how the contract is construed¹¹⁰⁴ as to whether they will be jointly liable, jointly and severally liable, or if they are severally liable to perform that promise. Historically, the position both at law and in equity is a presumption in favour of there being a joint liability, in the absence of anything contrary in the agreement.¹¹⁰⁵

The varying features of the different obligations are set out below:

- **joint liability:**
 - a joint promise is a single promise that is made jointly by the promisors – there is a single promise but all promisors are liable;
- **several liability:**
 - *several and cumulative liability* is where A and B promise to pay C \$10 and C will be entitled to \$10 from A and \$10 from B – a total of \$20. In effect, this is two separate contracts, one for A to pay C \$10 and another for B to pay C \$10;
 - *several but non-cumulative liability* is where A and B agree to pay C \$10 – C is entitled to \$10 only, from either A or B. This form of promise in a contract is extremely rare,¹¹⁰⁶

¹¹⁰⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.30].

¹¹⁰⁵ *Levy v Sale* (1877) 37 LT 709; *Peabody v Baron* (1884) 5 LR (NSW) 72; *White v Tyndall* (1888) 13 App Cas 263.

¹¹⁰⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.30] citing Williams, *Joint Obligations* pp 41-43.

- **joint and several liability:**
 - this is a combination of the above 2 scenarios – the promisee may sue all of the promisors jointly if they fail to perform the promise (suing on the joint liability), or he can sue one or more individual promisees (suing on the several liability). In this scenario, performance of the promise by one, some or all of the promisees will discharge the joint and several obligations owed by all of them.

Once the obligation has been characterised upon proper construction of the contract, it is then possible to assess the appropriate legal consequences that will flow.¹¹⁰⁷ If it was presumed, or the contract was construed, as a joint promise then there were many technical rules that applied. Many of these rules resulted in unjust consequences.¹¹⁰⁸ For example, Duncan and Vann¹¹⁰⁹ cite the examples:

... a judgment against one co-promisor discharged the other co-promisors even if the judgment debtor was insolvent because there was only one cause of action and only one judgment could be obtained¹¹¹⁰.... [further] on the death of a joint debtor, his or her obligation did not pass to his or her personal representatives but by right of survivorship to the co-debtors.¹¹¹¹

Section 54 of the PLA reverses the presumption that co-promisors are jointly liable, and instead makes them jointly *and* severally liable, in the absence of anything expressly to the contrary in the contract. The QLRC noted that, while the section is not absolutely necessary, it avoids any awkward consequences where a contract might otherwise have been construed as creating a joint liability, rather than a joint and several liability.¹¹¹²

The use of the word ‘includes’ on subsection (2) means that the operation of the section is not limited to deeds under seal and the section applies to all contracts, even oral ones.¹¹¹³

57.2. Issues with the section

57.2.1. Application and scope of the section

It is clear from the above discussion that the section applies to the rules about obligations and liabilities of multiple parties. There is, however, some question as to whether the section applies equally to the benefits and rights that flow to the promisee. Some commentators are of the view that the QLRC was under the impression that section 54(1) was applicable to both the burden and the

¹¹⁰⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.30] citing *Chitty on Contracts, General Principles*, 24th ed., pp 79-80.

¹¹⁰⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.30].

¹¹⁰⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.60].

¹¹¹⁰ *Kendall v Hamilton* (1879) 4 App Cas 504; *Bank of Australasia v Miller* (1885) 6 ALT 234; *G Pusta Architectural Products Pty Ltd v Matthews* [1973] Tas SR (NC 1).

¹¹¹¹ *White v Tyndall* (1888) 13 App Cas 263.

¹¹¹² 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), 37.

¹¹¹³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.180].

benefit of the promise.¹¹¹⁴ The QLRC report¹¹¹⁵ suggests that section 54 of the PLA performs the same function as the UK equivalent.¹¹¹⁶ However, the UK equivalent specifically includes the term 'or for their benefit' and therefore applies to the joint promisees. The better view is that section 54 of the PLA does not extend to the benefit and rights flowing from the promise as the section, on its terms, deals only with burdens and liabilities.

Section 54 of the PLA does apply to promises in registered instruments and has the consequence of making obligations in easements enforceable jointly and severally between parties.

57.2.2. Interaction with the *Partnership Act 1891*

Section 54 operates subject to other provisions of the PLA and other Acts.¹¹¹⁷ Section 12 of the *Partnership Act 1891* (Qld) is expressed to make every partner jointly liable 'with the other partners for all debts and obligations...'¹¹¹⁸ There is a view that this is not sufficient to exclude the operation of section 54, and thus any obligation of a partner will, notwithstanding the operation of section 12 of the *Partnership Act 1891* (Qld), be joint *and* several, and not merely joint, as the section expresses. This view is formed on the basis that '[to] fully exclude [section] 54 ... the other statute must deal (expressly or impliedly) with the construction of a promise as joint *and* the consequences of such a construction.'¹¹¹⁹

57.3. Other jurisdictions

57.3.1. United Kingdom

Section 81 of the *Law of Property Act 1925* (UK) is limited to instruments under seal so is narrower in application than section 54 of the PLA in that regard. However, as discussed above at paragraph 57.2.1, the UK Act applies to both the burden and the benefit of the promise so that beneficiaries of the promise are entitled jointly and severally to that benefit.

57.3.2. Australia

Apart from Queensland and Victoria, no other Australian jurisdictions have provisions altering the common law concerning joint and several liability of parties. In Victoria, the equivalent provision has the same scope as the UK Act above. The *Property Law Act 1958* (VIC) section 81 provides:

¹¹¹⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.150] citing 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), 36 which refers generally to 'promises'.

¹¹¹⁵ 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), 36.

¹¹¹⁶ *Law of Property Act 1925* (UK) s 81.

¹¹¹⁷ *Property Law Act 1974* (Qld) s 54(1).

¹¹¹⁸ *Partnership Act 1891* (Qld) s 12(1),

¹¹¹⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.54.180].

81 Effect of covenant with two or more jointly

- (1) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall, by virtue of this Part, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond or obligation devolves, and where made after the commencement of this Act shall be construed as being also made with each of them.
- (2) This section shall extend to a covenant implied by virtue of this Part.
- (3) This section shall apply only if and as far as a contrary intention is not expressed in the covenant, contract, bond or obligation, and shall have effect subject to the covenant, contract, bond or obligation, and to the provisions therein contained.
- (4) Except as otherwise expressly provided, this section shall apply to a covenant, contract, bond or obligation made or implied after the thirty-first day of January One thousand nine hundred and five.

57.4. Recommendation

The Centre recommends retaining section 54, but with modernised language to assist in its interpretation. This is in line with the overarching principles that inform these recommendations. The Centre is of the view that it is desirable to modify the harsh operation of the complex common law rules with respect to joint liability by providing a statutory presumption that such liabilities are joint and several, in the absence of any express terms to the contrary.

RECOMMENDATION 57. Section 54 should be retained with modernised language.

58. Section 55 – Contracts for the benefit of third parties

58.1. Overview and purpose

55 Contracts for the benefit of third parties

- (1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Prior to acceptance the promisor and promisee may, without the consent of the beneficiary, vary or discharge the terms of the promise and any duty arising from it.
- (3) Upon acceptance—
 - (a) the beneficiary shall be entitled in the beneficiary's own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor, and relief by way of specific performance, injunction or otherwise shall not be refused solely on the ground that, as against the promisor, the beneficiary may be a volunteer; and
 - (b) the beneficiary shall be bound by the promise and subject to a duty enforceable against the beneficiary in the beneficiary's own name to do or refrain from doing such act or acts (if any) as may by the terms of the promise be required of the beneficiary; and
 - (c) the promisor shall be entitled to such remedies and relief as may be just and convenient for the enforcement of the duty of the beneficiary; and
 - (d) the terms of the promise and the duty of the promisor or the beneficiary may be varied or discharged with the consent of the promisor and the beneficiary.
- (4) Subject to subsection (1), any matter which would in proceedings not brought in reliance on this section render a promise void, voidable or unenforceable, whether wholly or in part, or which in proceedings (not brought in reliance on this section) to enforce a promissory duty arising from a promise is available by way of defence shall, in like manner and to the like extent, render void, voidable or unenforceable or be available by way of defence in proceedings for the enforcement of a duty to which this section gives effect.
- (5) In so far as a duty to which this section gives effect may be capable of creating and creates an interest in land, such interest shall, subject to section 12, be capable of being created and of subsisting in land under any Act but subject to that Act.
- (6) In this section—

acceptance means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on the promisor's behalf, in the manner (if any), and within the time, specified in the promise or, if no time is specified, within a reasonable time of the promise coming to the notice of the beneficiary.

beneficiary means a person other than the promisor or promisee, and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified or in existence at the time when the promise was given.

promise means a promise—

 - (a) which is or appears to be intended to be legally binding; and
 - (b) which creates or appears to be intended to create a duty enforceable by a beneficiary;

and includes a promise whether made by deed, or in writing, or, subject to this Act, orally, or partly in writing and partly orally.

promisee means a person to whom a promise is made or given.

promisor means a person by whom a promise is made or given.
- (7) Nothing in this section affects any right or remedy which exists or is available apart from this section.
- (8) This section applies only to promises made after the commencement of this Act.

Section 55 of the PLA was based on section 56 of the *Law of Property Act 1925* (UK) and alters the common law doctrine of privity with respect to contracts for the benefit of third parties. The common law does not permit a third party to enforce a covenant in a contract, even if that contract is solely for

the benefit of that third party.¹¹²⁰ Where the requirement of section 55 of the PLA are met, the doctrine of privity is effectively abolished.¹¹²¹ The QLRC said about the doctrine of privity of contract that it was 'invariably a source of serious injustice'¹¹²² and commented:

There is little doubt that in general the rule is highly inconvenient and that it defeats the reasonable and justifiable expectations of the parties, enabling persons to escape from obligations which they have, often for value, deliberately undertaken.¹¹²³

In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*¹¹²⁴ Gaudron J was of the view that to preclude a third party from enforcing the promise would allow for the promisor to be unjustly enriched where they have accepted consideration in return for making the promise.¹¹²⁵

The QLRC proposed the drafting for section 55 of the PLA be formulated using the 1937 Law Revision Committee¹¹²⁶ recommendations, notwithstanding those same recommendations were not adopted in England, and other jurisdictions such as America and South Africa.

58.1.1. Section 55 compared with section 13 of the PLA

Section 55 of the PLA is similar in operation to section 13, which is discussed in detail at paragraph 14. Both sections modify the law with respect to privity of contract. However, the main difference between section 13 and section 55 is that section 55 requires acceptance of the benefit by the third party by words or conduct, communicated to the promisor.

Further, section 13 of the PLA relates to a third party to a contract taking an interest in land, or the benefit of any condition, right of entry, covenant or agreement in respect of land. Section 55 of the PLA is broader and relates to benefits to third parties to contracts generally.

Finally, section 13 makes no reference to the requirement of consideration, where section 55(1) requires consideration to move from the promisee to the promisor.

58.1.2. Operation of the provision

The way section 55 operates is as follows:

- a promisor;
 - for valuable consideration moving from the promisee;
 - promises to do, or refrain from doing an act or acts;
 - for the benefit of a beneficiary not privy to the agreement between the promisor and promisee;

¹¹²⁰ *Wilson v Darling Island Stevedoring & Lighterage Co Ltd* (1956) 95 CLR 43.

¹¹²¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.55.90].

¹¹²² 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) 38.

¹¹²³ 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) 38.

¹¹²⁴ (1988) 165 CLR 107.

¹¹²⁵ *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 176 per Gaudron J.

¹¹²⁶ Law Revision Committee, *Sixth Interim Report* (1937) Cmd 5449.

- prior to acceptance of the benefit by the beneficiary, the promisor and promisee may vary or rescind the promise;¹¹²⁷ and
- upon acceptance of the benefit by the beneficiary;
- becomes subject to an enforceable duty to perform that promise; and
- has all the usual defences available to the promisor.¹¹²⁸

Some examples of where section 55 has been relied on include:¹¹²⁹

- a promise contained in a contract of sale of a real estate agency to continue the employment of the manager – the manager was able to rely on section 55 of the PLA to overcome the problem of lack of privity and enforce the promise;¹¹³⁰ and
- payment of a mortgage debt by a promisee owed by a third party in return for the release of the third party from a registered mortgage by the promisor.¹¹³¹

The definition of **beneficiary** means that the third party may be expressly identified and in existence, notwithstanding that that person may not have been identified or in existence at the time the promise was made. In this regard, section 55 of the PLA mirrors section 13.

A **promise** as defined by section 55(6) of the PLA, must appear to be legally binding so this would likely exclude arrangements as between family and friends, for example.¹¹³² The promise must create or intend to create an enforceable duty. The QLRC¹¹³³ intended that the inclusion of this wording in the definition of ‘promise’ would preclude a situation where ‘the parties to the promise could not have intended to confer enforceable rights on third parties but the effect of the promise is incidentally to benefit a third party.’¹¹³⁴ Therefore, a promise that merely confers a benefit on a third party is insufficient to come within the ambit of the section.¹¹³⁵ An incidental beneficiary is not assisted by section 55 of the PLA. Further, ‘a contractual term that merely regulates the relationship between promisor and promisee will not be enforceable by a third party if it does not amount to a promise to benefit the third party and can create an enforceable duty.’¹¹³⁶

¹¹²⁷ *Property Law Act 1974* (Qld) s 55(2).

¹¹²⁸ *Property Law Act 1974* (Qld) s 55(4).

¹¹²⁹ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 376 [12.70].

¹¹³⁰ *Batchelor v Ocean Downs Pty Ltd* (unreported, QSC 16 September 1985 per Ambrose J).

¹¹³¹ *Orphin v AGC (Advances) Ltd* (unreported, QSC 8 October 1987 per de Jersey J).

¹¹³² Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 376 [12.90].

¹¹³³ 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) 39.

¹¹³⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.55.90]).

¹¹³⁵ *National Australia Bank Ltd v Hart* [2002] QSC 51.

¹¹³⁶ Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4th ed, 2013) 376 [12.70] citing *Davis v Archer Park Newsagency Rockhampton* (unreported, QSC 17 July 1884 per Demack J).

A beneficiary of a promise is required to accept that promise before there will be any obligation on the promisor to perform that promise. **Acceptance** is defined in subsection (6) and can be broken down to the following elements:

- assent by words or conduct;
- communicated by the beneficiary or his agent;
- to the promisor or his agent;
- within the specified time, or if no time is specified, then within a reasonable time of coming to the notice of the beneficiary.

Section 55(3)(b) of the PLA operates so that, once the benefit of the promise has been accepted by the third party beneficiary, then any corresponding obligations on the third party beneficiary become binding and it is a defence for the promisor if those corresponding obligations have not been met. Commentators submit that it is only those obligations that are in relation to the conditions that attach to the promise that are imposed upon the third party beneficiary.¹¹³⁷ The corresponding obligation does not extend to obligations that are not referable to that promise.¹¹³⁸

The effect of subsection (7) is to preserve the common law so that, should a third party beneficiary be unable to rely on the section (say, for example because he was unable to show 'acceptance') then the common law rules of privity continue to apply, along with the exceptions. The third party in that case is not prevented from relying on one of the exceptions to the common law in order to enforce the promise.

58.2. Issues with the section

58.2.1. Section 55 and interest in land

Section 55 can operate in respect of contracts relating to land and section 13 does not exclusively cover the field in this regard. The QLRC pointed out that the section could operate to grant an interest in land.¹¹³⁹ For example:

...the promise is to grant the beneficiary an option to purchase land which is accepted by the beneficiary, this will create an interest in land.¹¹⁴⁰

In *Re Davies*¹¹⁴¹ the Full Court of the Court of Appeal considered whether the appellant, who was the lessee of part of a building, was entitled to rely on section 55 of the PLA to enforce a covenant between the original lessor and the purchaser of the reversion. The original lessor and the purchaser of the reversion had covenanted that the appellant would be allowed to exercise an option in its lease. The

¹¹³⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.55.120].

¹¹³⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.55.120].

¹¹³⁹ 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) 41.

¹¹⁴⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.55.180]; see also Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 41.

¹¹⁴¹ [1989] 1 Qd R 48.

lease was unregistered and so, while the lease term itself was protected by section 11 of the *Real Property Act 1877- 1981* (Qld),¹¹⁴² the options to renew contained in the unregistered instrument were extinguished by the operation of section 44 of the *Real Property Act 1861-1963* (Qld), the predecessor to section 184 of the *Land Title Act 1994* (Qld).¹¹⁴³ The court accepted that the appellant was able to rely on section 55 of the PLA to enforce the covenant, notwithstanding that it was not a party to the instrument creating that covenant. However, the appellant was not able to show that it had accepted the benefit of the promise within a reasonable time.

58.2.2. Interaction with *Land Title Act 1994*

Section 55(5) of the PLA states that the section operates subject to section 12 of the PLA (interest in land created by parol) and any interest in land that is capable of being created under the provisions of an Act, subject to that Act. Therefore, commentators conclude that ‘the indefeasibility provisions of the *Land Title Act 1994* (Qld) conferring indefeasibility on a registered title will not be overridden by this section.’¹¹⁴⁴ Further, section 55 of the PLA ‘cannot be used to expand the scope of persons entitled to enforce the benefit of a covenant under section 97A of the *Land Title Act 1994* (Qld) where the beneficiary is not a person within the definition of covenantee under section 97A(2).’¹¹⁴⁵

58.2.3. Identified and in existence at the time of the promise

As discussed at paragraph 14.2.1, section 55 of the PLA, along with the equivalent provision in the Northern Territory,¹¹⁴⁶ is cast in wider terms than other jurisdictions by operation of the definition of **beneficiary**. In Queensland, the third party beneficiary does not have to be identified or in existence at the time the contract was made. In other jurisdictions, the equivalent provisions do not extend to individuals who are not in existence and identifiable at the time the covenant is entered into.

As discussed at paragraph 58.3.1.3, the courts in New South Wales have read down the operation of the provision because of this limitation. By removing the requirement that the third party be in existence and identifiable when the covenant is made, section 55 of the PLA is cast in much broader terms than the other States’ counterparts.¹¹⁴⁷ Section 56 of the *Law of Property Act* (NT) is in a similar form to section 55 of the PLA and also extends to individuals who are not in existence and identifiable at the time the covenant is entered into.¹¹⁴⁸ This could, arguably, apply to successors in title and assigns.

The QLRC reasoned that the definition of **beneficiary** should be cast in these wider terms to overcome situations such as unborn children and, more so, the unincorporated corporation which it described as ‘very much more common’ and ‘often a source of great practical difficulty because of the rule which precludes an agency relationship on behalf of the non-existent principal.’¹¹⁴⁹ The QLRC intended for

¹¹⁴² *Medical Benefits Fund of Australia Ltd v Fisher* [1984] 1 Qd R 606.

¹¹⁴³ *Re Davies* [1989] 1 Qd R 48, 51. See also *Friedman v Barrett* [1962] Qd R 498.

¹¹⁴⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.55.180].

¹¹⁴⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.55.180].

¹¹⁴⁶ *Law of Property Act 2000* (NT) s 56, note that in NT the promise must be in writing see s 56(6).

¹¹⁴⁷ *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9th ed, 2013) 861 [9.12]

¹¹⁴⁸ *Law of Property Act* (NT) s 12.

¹¹⁴⁹ 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) 41.

the definition of **beneficiary** to create a situation that would achieve the same result as in South Africa where a company can accept the benefit of a promise made before it was incorporated, after incorporation.¹¹⁵⁰ Section 131 of the *Corporations Act 2001* (Cth) now provides for this situation and states, in part:

If a person enters into, or purports to enter into, a contract on behalf of, or for the benefit of, a company before it is registered, the company becomes bound by the contract and entitled to its benefit if the company, or a company that is reasonably identifiable with it, is registered and ratifies the contract...¹¹⁵¹

Section 55 would therefore no longer apply to companies not yet registered, and parties would rely on the Commonwealth Act instead. The section would, however, continue to apply to individuals not born, or not yet belonging to a particular class, at the time the promise is made.

In New Zealand the beneficiary is described as a '*person, designated by name, description, or reference to a class*'¹¹⁵² and this is similar to the approach in Queensland. The use of the term 'reference to a class' removes any doubt that the section could apply to successors in title and assigns, and unborn people.

58.2.4. Requirement for acceptance

As discussed above at paragraph 58.1.1, section 55(1) of the PLA includes the phrase 'upon acceptance by the beneficiary'.

In making the recommendations for the drafting of section 55 of the PLA, the QLRC followed the English recommendation that made 'acceptance' of the benefit a precondition to the imposition of duty to perform the promise on the promisor. The QLRC noted that:

The desirability of making enforceability subject to the beneficiary's acceptance of the promise may be open to question... we feel it is prudent to advance with some degree of caution in proposing this reform.¹¹⁵³

No other rationale was provided for the inclusion of the requirement for acceptance.

58.3. Other jurisdictions

58.3.1. Australia

Victoria, South Australia, New South Wales, Tasmania and Western Australia have very similar provisions which adopt the drafting approach in section 56 of the *Law of Property Act 1925* (UK).¹¹⁵⁴

¹¹⁵⁰ 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) 41.

¹¹⁵¹ *Corporations Act 2001* (Cth) s 131(1).

¹¹⁵² *Contracts (Privity) Act 1982* (NZ) s 4.

¹¹⁵³ 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) 40.

¹¹⁵⁴ *Property Law Act 1958* (Vic) s 56(1); *Law of Property Act 1936* (SA) s 34(1); *Conveyancing Act 1919* (NSW) s 36C; *Conveyancing and Law of Property Act 1884* (Tas) s 61(1)(c); *Property Law Act 1969* (WA) s 11(1).

There are some significant differences between the Queensland (and Northern Territory) provision and the Victorian, South Australian, New South Wales, Tasmanian and Western Australian provisions.

Firstly, in Queensland under section 55 of the PLA, the beneficiary does not have to be identified or in existence at the time of the execution of the assurance or other instrument.

Secondly, the other jurisdictions, except Northern Territory, conflate the law in respect of land and property into one section. As discussed, Queensland has section 13 of the PLA in respect to a third party taking an interest in land, and section 55 which applies generally to parties taking a benefit of a promise in a contract or deed.

58.3.1.1. Western Australia

As discussed above, in Western Australia for example, section 11 of the *Property Law Act 1969* (WA) conflates the modification of the doctrine of privity with respect to both land and personal property. Section 11 is also confined to persons who are in existence and identifiable when the covenant is made. The section is set out in the following terms:

11. Persons taking who are not parties

- (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant or agreement over or respecting land or other property, although he is not named as a party to the conveyance or other instrument that relates to the land or property.
- (2) Except in the case of a conveyance or other instrument to which subsection (1) applies, where a contract expressly in its terms purports to confer a benefit directly on a person who is not named as a party to the contract, the contract is, subject to subsection (3), enforceable by that person in his own name but—
 - (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
 - (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
- (3) Unless the contract referred to in subsection (2) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the person referred to in that subsection has adopted it either expressly or by conduct.

The Western Australian legislation provides in section 11(2)(c) that any obligations imposed on the beneficiary according to the terms of the contract are enforceable against the beneficiary, should that beneficiary seek to enforce the promise. This is similar in operation to section 55(3)(b) of the PLA.

58.3.1.2. Victoria

In Victoria, the VLRC recommended that section 56(1) of the *Property Law Act 1958* (Vic) be amended to confirm 'its meaning as interpreted by the courts' as follows:

- clarifying that an interest in personal property does not fall within the scope of the section; and

- providing that a covenant ‘under an instrument made *inter partes* may be enforced by a person who, although not named, is a person to whom the conveyance or other instrument purports to grant something, provided that the person was in existence and identifiable at the time the covenant was made.’¹¹⁵⁵

58.3.1.3. New South Wales

In New South Wales, the *Conveyancing Act 1919* (NSW) section 36C provides:

36C Persons taking who are not parties

- (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant, or agreement over or respecting land or other property, although the person may not be named as a party to the assurance or other instrument.
- (2) Such person may sue, and shall be entitled to all rights and remedies in respect thereof as if he or she had been named as a party to the assurance or other instrument.

This provision has been read down by the courts over time. Section 36C has been held not to abrogate the doctrine of privity.¹¹⁵⁶ In respect of covenants relating to land, the provision has been given some operation by the courts. However, it has been held that there is a requirement that the covenant must purport to be made ‘with’ the third party, notwithstanding the third party is not a party to the instrument. Merely stating that the covenant is for the benefit of the third party is not sufficient.¹¹⁵⁷

58.3.1.4. New Zealand

Section 7 of the *Property Law Act 1952* (NZ) provided that:

Any person may take an immediate benefit under a deed, although not named as a party thereto.

This provision was repealed by the *Contracts (Privity) Act 1982* (NZ) with the effect that it did not apply to any deeds made on or after 1 April 1983.¹¹⁵⁸

The *Contracts (Privity) Act 1982* (NZ) section 4 provides:

Where a promise contained in a deed or contract confers, or purports to confer, a benefit on a person, designated by name, description, or reference to a class, who is not a party to the deed or contract (whether or not the person is in existence at the time when the deed or contract is made), the promisor shall be under an obligation, enforceable at the suit of that person, to perform that promise: provided that this section shall not apply to a promise which, on the proper construction of the deed or contract, is not intended to create, in respect of the benefit, an obligation enforceable at the suit of that person.

In relation to deeds made after this date the position has been described in the following way:

Section 4 *Contracts (Privity) Act 1982*, which applies to deeds made on or after 1 April 1983, provides that, where a promise contained in a deed or contract confers or purports to confer a benefit on a person designated in the deed or contract by name, description, or reference to a class

¹¹⁵⁵ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 43 Recommendation 10.

¹¹⁵⁶ *Beswick v Beswick* [1968] AC 58.

¹¹⁵⁷ *Jones v Bartlett* (2000) 205 CLR 166; *John Nitschke Nominees Pty Ltd v Hahndorf Golf Club Inc* (2004) 88 SASR 334; *Application of Caroline Chisholm Village Pty Ltd* (1980) 1 BPR 9507.

¹¹⁵⁸ *Contracts (Privity) Act 1982* (NZ) s 13.

(but who is not a party to a deed or contract), that promise is enforceable at the suit of that person against the promisor. Deeds made before 1 April 1983 are subject to s 7 Property Law Act 1952, which provides that any person may take an immediate benefit under a deed although not named as a party thereto. In effect, the position in respect of deeds is the same under both provisions.¹¹⁵⁹

58.4. Recommendation

The Centre recommends that section 55 of the PLA be amended, using the Western Australian legislation as a starting point, to modernise the language to provide greater clarity around the application and operation of the section. This is in line with the overarching principles that inform these recommendations. Further, the Centre recommends:

- removing the requirement for acceptance of the benefit on the basis that there was no satisfactory justification for its inclusion, and that no other Australian jurisdictions (except Northern Territory) have such a requirement;
- retaining the broader drafting that allows a third party not identified or in existence at the time of the promise to enforce the promise, which will avoid the position in New South Wales where the equivalent provision has been read down by the courts (as discussed at paragraph 58.3.1.3);
- adopting the terminology used in New Zealand when describing the beneficiary (*person, designated by name, description, or reference to a class*) so as to allow persons of a class, for example, successors and assigns, or as yet unborn people, to enforce a promise;
- amending section 55(5) to provide clarity and remove the reference to an interest in land created under any other Act because it is clear in section 5 of the PLA that the PLA operates subject to the *Land Title Act 1994* (Qld); and
- retaining the requirement that any corresponding obligations on the beneficiary be imposed, should the promise be enforced.¹¹⁶⁰

The Centre recommends using the Western Australian provision as a starting point, with some changes.

RECOMMENDATION 58. Section 55 should be amended to provide clear language to aid in application and interpretation of the section. The Centre recommends the following:

- remove the requirement for ‘acceptance’ but retain the requirement that any corresponding obligations on the beneficiary be imposed, should the promise be enforced;
- retain the broad effect of the definition of beneficiary that includes a beneficiary not identified or in existence at the time the promise was made and expand this to include classes of persons to remove any doubt that the section applies to successors in title and assigns.
- amend section 55(5) to provide clarity and remove the reference to an interest in land created under any other Act because it is clear in section 5 that the PLA operates subject to the *Land Title Act 1994*.

¹¹⁵⁹ Tom Bennion et al, *New Zealand Land Law* (Bookers Ltd, 2nd ed, 2009) [10.18.02] 893-894.

¹¹⁶⁰ See section 55(3)(b) of the PLA and the proposed redrafting which is based on *Property Law Act 1969* (WA) s 11(2)(c).

For example, using the Western Australian provision as a guide, section 55 could be drafted in the following manner:

Section [55] Persons taking who are not parties

- (1) A promisor who, for a consideration moving from the promisee, promises to do or refrain from doing an act or acts for the benefit of a beneficiary shall be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Unless the contract referred to in subsection (1) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the beneficiary has adopted it either expressly or by conduct.
- (3) Where a contract referred to in subsection (1) expressly in its terms purports to confer a benefit directly on a beneficiary who is not named as a party to the contract, the contract is enforceable by the beneficiary in his own name but —
 - (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
 - (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
- (4) This section applies to promises for the creation of an interest in land, subject to section [new sections replacing 6, 10,11, 12 and 59].
- (5) This section applies to promises made after the commencement of this Act.
- (6) In this section-
beneficiary includes a person designated by name, description or class and who may or may not have been identified and in existence at the time the promise was made.

Alternative wording

Section [55] Persons taking who are not parties

- (1) A promisor who promises to do or refrain from doing an act or acts:
 - (a) for the benefit of a beneficiary;
 - (b) after the commencement of this Act; and
 - (c) for consideration moving from the promisee,shall be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Unless the contract referred to in subsection (1) otherwise provides, the contract may be cancelled or modified by the mutual consent of the persons named as parties thereto at any time before the beneficiary has adopted it either expressly or by conduct.
- (3) A contract referred to in subsection (1) is enforceable by the beneficiary in the beneficiary's own name if the contract expressly in its terms purports to confer a benefit directly on a beneficiary who:
 - (a) is not named as a party to the contract;
 - (b) is designated by name, description or class; and
 - (c) may or may not have been identified and in existence at the time the promise was made.
- (4) In an action brought by a beneficiary described in subsection (3):
 - (a) all defences that would have been available to the defendant in an action or proceeding in a court of competent jurisdiction to enforce the contract had the plaintiff in the action or proceeding been named as a party to the contract, shall be so available;
 - (b) each person named as a party to the contract shall be joined as a party to the action or proceeding; and
 - (c) such defendant in the action or proceeding shall be entitled to enforce as against such plaintiff, all the obligations that in the terms of the contract are imposed on the plaintiff for the benefit of the defendant.
- (5) This section applies to promises for the creation of an interest in land, subject to section [new sections replacing 6, 10,11, 12 and 59].

59. Section 56 – Guarantees to be in writing

59.1. Overview and purpose

56 Guarantees to be in writing

- (1) No action may be brought upon any promise to guarantee any liability of another unless the promise upon which such action is brought or some memorandum or note of the promise, is in writing, and signed by the party to be charged, or by some other person by the party lawfully authorised.
- (2) A promise, or memorandum or note of a promise, in writing shall not be treated as insufficient for the purpose of this section merely because the consideration for such promise does not appear in writing or by necessary inference from a written document.

Section 56 preserves the Statute of Frauds provision dealing with ‘special promise to answer for the debt, default or miscarriage of another person’.¹¹⁶¹ At the time the Statute of Frauds was introduced, there was no requirement that a contract be in writing (or any other particular form).¹¹⁶² Further, at that time, there were restrictions on the admissibility of oral evidence from the parties or people interested in the result of the action.¹¹⁶³ One of the key rationales for the introduction of the Statute of Frauds was to prevent fraud and perjury by ensuring it was not possible to prove the contents of an agreement by oral evidence only. The Statute introduced writing requirements in relation to a number of categories of contracts including guarantees.

The QLRC considered whether the guarantee part of section 4 of the Statute of Frauds should be retained in its 1970 Report.¹¹⁶⁴ The QLRC took into account the position adopted in Western Australia and the United Kingdom where the guarantee provision was retained and the recommendation from the New South Wales Law Reform Commission to repeal it. The QLRC acknowledged that the words ‘special promise to answer for the debt, default or miscarriage of another’ contained in the original Statute of Frauds section had created some interpretation issues but noted that it was generally accepted that the words covered guarantees ‘of another’s liabilities of any kind’ and that the Property Law Bill would reflect this.¹¹⁶⁵ Although the QLRC held concerns about the possible jurisdictional differences arising from the recommendation for repeal in New South Wales,¹¹⁶⁶ it ultimately identified broader policy issues which supported retaining the requirement for writing. These policy issues included the benefit of retaining some degree of ‘formality and deliberation’ in relation to a

¹¹⁶¹ *Statute of Frauds 1677* s 4.

¹¹⁶² N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012), 834 [16.1].

¹¹⁶³ United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land*, Working Paper No. 92 (1985) 5. Clearly these restrictions on the admissibility of evidence no longer apply.

¹¹⁶⁴ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 8.

¹¹⁶⁵ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 8.

¹¹⁶⁶ The QLRC indicated that it could ‘perceive the advantages of the course recommended in New South Wales’ but did not provide any further detail about what these advantages were: Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 8.

transaction that could impose serious obligations and which should not be undertaken or enforced lightly.¹¹⁶⁷

The provision must be expressly pleaded if the defendant intends to rely upon it as a defence.¹¹⁶⁸ When the provision is successfully relied upon as a defence, the effect is that the guarantee is valid but unenforceable.¹¹⁶⁹

59.2. Issues with the section

There is an extensive history of criticism that has been levelled against the writing requirements in section 4 of the Statute of Frauds generally.¹¹⁷⁰ However, there is limited material specifically addressing section 56 of the PLA. As indicated above, one of the primary reasons for its retention in Queensland was to provide a sense of formality to the transaction, reinforcing the serious nature of the obligation guarantors were entering into. The QLRC recognised the issues with interpretation that had arisen in relation to the words ‘special promise to answer for the debt, default or miscarriage of another’ which appeared in section 4 of the Statute of Frauds. The QLRC attempted to address this by using the phrase ‘guarantee of another’s liabilities of any kind’ which is reflected in section 56.¹¹⁷¹ An overview of the general criticism of the writing requirement for guarantees is set out below.

59.2.1. Object of the Statute of Frauds is no longer relevant

One of the primary objects of the Statute of Frauds was to prevent fraud by preventing actions attempting to enforce oral agreements only. The requirement that guarantees be in writing assisted in limiting the circumstances in which a contract might be established by ‘false or loose talk’ where there was never an intention to create one.¹¹⁷² The criticism now is that the primary purpose underpinning the Statute is no longer a ‘live’ issue and that the requirement for writing may prevent a legitimate claim relying on a valid oral guarantee.¹¹⁷³

¹¹⁶⁷ Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970) 8.

¹¹⁶⁸ N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 838 [16.7]; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.56.60]. Where it is not pleaded in proceedings and the claim is in relation to an oral guarantee, the absence of writing and the unenforceability of the guarantee is not something which would be raised by the relevant court: Seddon, *Cheshire & Fifoot Law of Contract* 834 [16.1], 838 [16.7] and Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.56.30].

¹¹⁶⁹ N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 834 [16.1].

¹¹⁷⁰ See for example N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 834; New South Wales Law Reform Commission, *Application of Imperial Acts* Report No. 4 (1967); Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970); Graham McBain ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420; John Phillips ‘Guarantees: Protecting the Bankers’ (2012) 3 *Journal of Business Law* 248, 248-270.

¹¹⁷¹ The Northern Territory is the only other jurisdiction that uses this phrase instead of the original description in section 4 of the *Statute of Frauds 1677*.

¹¹⁷² John Phillips ‘Guarantees: Protecting the Bankers’ (2012) *Journal of Business Law* 248, 250.

¹¹⁷³ John Phillips ‘Guarantees: Protecting the Bankers’ (2012) *Journal of Business Law* 248, 250-251.

59.2.2. Protecting ‘unsophisticated or inexperienced’ guarantor

The requirement for writing in relation to a guarantee was also viewed as a mechanism that might remind guarantors of the seriousness of the obligation they were undertaking. A number of Law Reform Commissions and Committees in different jurisdictions have raised the issue of the requirement for writing as a mechanism to protect a potentially ‘vulnerable’ class of guarantors.¹¹⁷⁴ However, it is generally accepted that the majority of guarantees, particularly in the commercial arena, are in writing, irrespective of any requirements imposed under the Statute of Frauds provisions.¹¹⁷⁵ Balanced with the policy imperative of providing a level of protection for less experienced individuals accepting the obligations as guarantors is the need to recognise that a guarantee is a critical component of a large number of financial transactions.¹¹⁷⁶ In this respect, guarantors should fully understand their obligations but at the same time the creditor should also be in a position to enforce the guarantee if required.¹¹⁷⁷ Simply requiring something to be in writing in order for it to be enforceable does not always provide certainty that the guarantor actually understands what it is that he or she is agreeing to. Further, three Australian jurisdictions appear to have navigated an environment where there is no requirement that guarantees be in writing without any significant issues arising.¹¹⁷⁸

The introduction of the requirement under section 55(1) of the *National Credit Code*¹¹⁷⁹ that a guarantee of a consumer credit contract must be in writing signed by the guarantor may partly address concerns associated with the ‘vulnerable’ class of guarantors. A guarantee for the purposes of the *National Credit Code* includes an indemnity (other than one arising under a contract of insurance).¹¹⁸⁰ This means that both guarantees and indemnities must satisfy the writing requirement imposed under the *National Credit Code*.

¹¹⁷⁴ United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land*, Working Paper No. 92 (1985); Queensland Law Reform Commission, *A Review of the Statute of Frauds 1677; the Statute of Frauds Amendment Act 1828; the Statute of Frauds and Limitations of 1867 (Qld) and the Sale of Goods Act 1896 (Qld)*, Report No. 6 (1970); New South Wales Law Reform Commission, *Application of Imperial Acts* Report No. 4 (1967).

¹¹⁷⁵ See N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 834; Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420.

¹¹⁷⁶ John Phillips, ‘Guarantees: Protecting the Bankers’ (2012) *Journal of Business Law* 248, 249.

¹¹⁷⁷ John Phillips, ‘Guarantees: Protecting the Bankers’ (2012) *Journal of Business Law* 248, 249 referring to the comments made by Lord Bingham in *Royal Bank of Scotland Plc v Etridge*. See *Tipperary Developments Pty Ltd v Western Australia* (1990) 258 ALR 124 where an oral guarantee provided by the State of Western Australia was not enforceable as it was not in writing and it was pleaded as a defence to the claim. The WA Court of Appeal considered a variety of issues on the appeal including a claim that the State was stopped from denying a representation that it would not rely on the Statute of Fraud and equitable estoppels claim which would result in the enforcement of the promise (at [128] – [129] and [62]-[69] in relation to the Statute of Fraud discussion).

¹¹⁷⁸ See New South Wales, Australian Capital Territory and South Australia. See N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 840 [16.9] who suggest that the reason for this is that ‘in the vast majority of cases no-one in their right mind would be content with an oral guarantee and so there is simply no need for a paternalistic legislature to step in.’

¹¹⁷⁹ The *National Credit Code* is Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth). It replaced the Uniform Consumer Credit Code in all States and Territories. The *National Consumer Credit Protection Act 2009* (Cth) is binding on all States and Territories including Queensland through a referral of power by each State and Territory to the Commonwealth (see section 51(xxxvii), Commonwealth Constitution: Andrea Beatty and Andrew Smith, *Annotated National Credit Code* (Butterworths, 4th ed, 2011), vii.

¹¹⁸⁰ See *National Credit Code* s 204.

Section 55 of the *National Credit Code* will apply to a guarantee if:

- it guarantees obligations under a credit contract; and
- the guarantor is a natural person or a strata corporation.¹¹⁸¹

A 'credit contract' is a contract under which credit is or may be provided where:

- the debtor is a natural person¹¹⁸² or a strata corporation; and
- the credit is provided or intended to be provided wholly or predominantly:
 - for personal, domestic or household purposes; or
 - to purchase, renovate or improve residential property for investment purposes; and
- a charge is or may be made for providing the credit; and
- the credit provider provides the credit in the course of a business of providing credit.¹¹⁸³

A guarantee which falls within the scope of the *National Credit Code* is not enforceable unless it complies with section 55.¹¹⁸⁴ Accordingly, in jurisdictions that do not have formal requirements of writing to enforce guarantees there is still a requirement for writing for a guarantee of obligations arising under a credit contract.

In general, where the credit is provided for business purposes, the *National Credit Code* will not apply.¹¹⁸⁵ Some practical examples of situations where a guarantee may be subject to section 55 of the *National Credit Code* include where it is provided in relation to:

- personal and car loans;
- credit cards; and
- home and investment property loans.

The guarantee must also provide a warning with the form and content of the warning prescribed in the regulations.¹¹⁸⁶ A guarantee of the kind subject to section 55 of the *National Credit Code* is expressly excluded from the operation of the *Electronic Transactions Act 1999* (Cth).¹¹⁸⁷ The effect of this is that a guarantee to which the *National Credit Code* applies under section 8 cannot be made, given or provided by electronic communication.¹¹⁸⁸

There are other consumer protections provided to vulnerable guarantors through voluntary industry specific Codes. For example, both the Code of Banking Practice¹¹⁸⁹ and Customer Owned Banking

¹¹⁸¹ *National Credit Code* s 8.

¹¹⁸² A natural person is defined to include an individual or a body corporate: *National Credit Code* s 211.

¹¹⁸³ *National Credit Code* ss 4 and 5. There are a number of categories of credit expressly excluded under section 6 of the *National Credit Code* including short term credit, employee loans, pawnbroker credit etc.

¹¹⁸⁴ *National Credit Code* s 55(4).

¹¹⁸⁵ Denise McGill and Nicola Howell, 'Improving the Ability of Guarantors to Make a Real Choice: Lenders' Practices in Taking Third Party Guarantees' (2013) *Journal of Banking and Finance Law Practice* 182, 184.

¹¹⁸⁶ See *National Credit Code*, s 55(3) and *National Consumer Credit Protection Regulations 2010* (Cth) reg 81.

¹¹⁸⁷ See section 7A(2) of the *Electronic Transactions Act 1999* (Cth) and reg 4 and sch 1 of the *Electronic Transactions Regulation 1999* (Cth).

¹¹⁸⁸ *Electronic Transactions Regulations 1999* (Cth), reg 4 and sch 1 and Andrea Beatty and Andrew Smith *Annotated National Credit Code* (Butterworths, 4th ed, 2011) 466 [187.10].

¹¹⁸⁹ This Code applies to banks.

Code of Practice¹¹⁹⁰ have provisions which cover guarantors and set out the process adopted by the relevant institution in relation to accepting and managing a guarantee and indemnity given by an individual to secure financial accommodation provided to another individual or small business.¹¹⁹¹

59.2.3. 'Arbitrary' distinction between a guarantee and an indemnity¹¹⁹²

Another criticism of the provision is that it makes an 'arbitrary' distinction between a guarantee and an indemnity.¹¹⁹³ The requirement for writing in the case of a guarantee but not other types of contracts assumes that a guarantee is distinguishable from other categories of contract and of a 'type' that requires writing more so than other types of contracts.¹¹⁹⁴ Generally, an indemnity will impose more onerous obligations than a guarantee but there is no requirement that these kinds of contracts be in writing.¹¹⁹⁵ Further, distinguishing between a guarantee and an indemnity is not always a simple process and may depend on 'fine points of drafting'.¹¹⁹⁶ Some commentators have indicated that to provide special treatment to guarantees above other classes of contracts is not justified and that if courts are able to determine the 'veracity of oral evidence' in the case of equivalent contracts to guarantees and more onerous ones (such as an indemnity) then they are equally capable of doing the same in the case of a guarantee.¹¹⁹⁷

59.2.4. Interpretation issues

There is a considerable body of case law which has considered the guarantee provision in section 4 of the Statute of Frauds. When section 56 of the PLA was introduced, the Law Reform Commission modernised the Statute of Frauds provision by replacing the words 'special promise to answer for the debt, default or miscarriage of another person' with the term '*guarantee any liability of another.*' Some commentators have suggested that the current wording of section 56(1) of the PLA has overcome some, but not all, of the interpretation problems associated with the original wording.¹¹⁹⁸ Some criticisms or problems with section 4 of the Statute of Frauds (which apply equally to section 56 of the PLA) include:

¹¹⁹⁰ This Code applies to Australian customer-owned banking institutions which include mutual building societies, credit unions and mutual banks.

¹¹⁹¹ See *Customer Owned Banking Code of Practice* (2014), cl 12 and *Code of Banking Practice* 2013, cl 31.

¹¹⁹² For a detailed discussion of this issue see Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) 56-59.

¹¹⁹³ Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420.

¹¹⁹⁴ Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420.

¹¹⁹⁵ Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420.

¹¹⁹⁶ Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420; Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) 56.

¹¹⁹⁷ John Phillips, 'Guarantees: Protecting the Bankers' (2012) *Journal of Business Law* 248, 251 - 252.

¹¹⁹⁸ This term has been the subject of significant judicial consideration. Seddon summarises the 3 questions a court needs to consider when looking at these words:

- was the contract an indemnity or guarantee;
- is the guarantee the main object of the transaction, rather than being incidental to the contract;
- is the guarantor under full personal liability to the creditor?

See N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 846 [16.18].

- that the judicial interpretation of it has required ‘sophistry’ in order to exclude and limit its application.¹¹⁹⁹ For example, the guarantee must be the ‘main object of the transaction’ rather than incidental to it in order for the provision to apply.¹²⁰⁰ If it is only incidental, the section will not apply and an oral guarantee may be enforceable;¹²⁰¹
- the difficulty associated with distinguishing guarantees and indemnities;
- the distinction between a promise which comprises an original promise¹²⁰² and one which is collateral¹²⁰³ – that is, supporting the primary liability of a third party.¹²⁰⁴ The formality requirements will not apply to an ‘original promise’;¹²⁰⁵
- the liability guaranteed must be to the creditor – that is, the guarantee is to the creditor against the default of some third party;¹²⁰⁶
- the uncertainty regarding the availability of part performance in the case of guarantees.¹²⁰⁷

59.3. Other jurisdictions

59.3.1. Australia

The Australian jurisdictions vary in relation to the retention of the formality requirements for guarantees. Western Australia, Northern Territory, Victoria and Tasmania have retained the requirement for writing with some differences in the language adopted. The Northern Territory has adopted the same approach as Queensland and modernised the original Statute of Frauds language so that the words ‘special promise to answer for the debt, default, or miscarriage of another’ have been replaced with the phrase ‘promise to guarantee any liability of another’.¹²⁰⁸ Western Australia

¹¹⁹⁹ Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420.

¹²⁰⁰ N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 844 [16.16].

¹²⁰¹ Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420, 433.

¹²⁰² Whether or not a promise is an ‘original promise’ rather than a guarantee depends on the circumstances of the case. Generally a promise is not collateral if the promisor undertakes to the debtor to pay the debtor’s debt and the promisor is liable irrespective of whether the debtor is liable and irrespective of whether or not the debtor defaults: see James O’Donovan and John Phillips, *The Modern Contract of Guarantee* (Lawbook Co, 3rd ed, 1996) 70-71.

¹²⁰³ Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420.

¹²⁰⁴ N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 843 [16.15].

¹²⁰⁵ Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420, 435.

¹²⁰⁶ N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 841 [16.11].

¹²⁰⁷ John Phillips, ‘Guarantees: Protecting the Bankers’ (2012) *Journal of Business Law* 248, 253 where the author notes ‘There is a final argument supporting the view that written evidence of a guarantee should no longer be required. A legitimate claim upon an oral guarantee is not likely to be preserved by general doctrines which might operate as failsafe mechanisms. First, the equitable doctrine of part performance is unlikely to apply to a guarantee. On one view the doctrine excludes guarantees from its ambit because it only applies to contracts relating to the disposition of an interest in land. But in any event, even if this is incorrect, as a matter of proof, part performance is unlikely to be successfully pleaded in respect of a guarantee. The doctrine of part performance requires conduct by the creditor which makes it inequitable for the guarantor to rely on the statute...’.

¹²⁰⁸ *Law of Property Act* (NT) s 58.

has retained section 4 of the Statute of Frauds in relation to guarantees and Tasmania and Victoria have re-enacted the provision.¹²⁰⁹ The effect of the provision is the same in each jurisdiction.

New South Wales, South Australia and the Australian Capital Territory no longer have any formality requirements in relation to guarantees. The New South Wales Law Reform Commission recommended the abolition of all remaining classes of contract in section 4 of the Statute of Frauds, including the requirement for writing in relation to contracts of guarantee.¹²¹⁰ The Report does not clearly articulate the reasons for the removal of the writing requirement for guarantees. However, the Commission discussed in general terms the problems with the Statute of Frauds including:

- that meritorious claims may fail simply because it was not in the prescribed form (in writing), not because the 'agreement claimed was not entered into';¹²¹¹
- the writing requirement and the Statute had led to 'innumerable abuses'.¹²¹²

The Commission noted the review process undertaken in the United Kingdom and Western Australia where recommendations were made to retain section 4 in a modified form but which retained the requirement for writing in relation to guarantees.¹²¹³

The Law Reform Commission in the Australian Capital Territory considered the issue of the Statute of Frauds in its 1973 report and recommended the repeal of the entire Statute.¹²¹⁴ The Commission relied upon the reasoning in the New South Wales Law Reform Commission Report, described above, to justify the repeal of section 4 of the Statute.¹²¹⁵

In 1975 the Law Reform Committee of South Australia looked at the provision and recommended its repeal.¹²¹⁶ The Committee identified a number of issues in relation to the writing requirement for guarantees including:

¹²⁰⁹ See *Law Reform (Statute of Frauds) Act 1962* (WA) s 2; *Mercantile Law Act 1935* (Tas) s 6; *Instruments Act 1958* (Vic) s 126(1).

¹²¹⁰ New South Wales Law Reform Commission *Application of Imperial Acts* Report (1967) 99.

¹²¹¹ New South Wales Law Reform Commission *Application of Imperial Acts* Report (1967) 98.

¹²¹² New South Wales Law Reform Commission *Application of Imperial Acts* Report (1967) 98.

¹²¹³ New South Wales Law Reform Commission *Application of Imperial Acts* Report (1967) 99. The modified version of section 4 included the repeal of special promises of executors, agreements upon consideration of marriage and agreements not to be performed within the space of a year of the making.

¹²¹⁴ ACT Law Reform Commission, *Report on the Imperial Acts in Force in the Australian Capital Territory and Supplementary Report* Report (1973) and *Imperial Acts (Substituted Provisions) Act 1986* (ACT). The Commission made a number of recommendations that certain provisions be enacted to replace some sections of the Statute of Frauds. See for example sections 1, 2 and 3 of the Statute relating to the creation of leases and interests in land. The Commission recommended that these provisions be repealed but that provisions in terms of ss 23C and 23D of the *Conveyancing Act 1919* (NSW) be enacted (at 35).

¹²¹⁵ ACT Law Reform Commission, *Report on the Imperial Acts in Force in the Australian Capital Territory and Supplementary Report* Report (1973) 35.

¹²¹⁶ South Australian Law Reform Committee, *34th Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

- the distinction that had been made between a guarantee and an indemnity with the Statute of Frauds not applying to the latter. The Committee indicated that the distinction was a ‘disgrace to the law and merely a trap for the unwary’;¹²¹⁷
- recognition that the majority of commercial guarantees were in writing which means that it is usually individuals that may have the Statute pleaded against them. The Committee held the view that ‘ordinary people’ were penalised by the requirement for writing;¹²¹⁸
- the extensive list of exceptions that had been developed to avoid the effect of the Statute;¹²¹⁹
- the Committee considered that where a dispute about the terms of a guarantee or whether a guarantee had actually been given was raised, it ought to be dealt with in the same manner as other ‘disputed questions of fact’.¹²²⁰

The effect of the removal of the writing requirement for guarantees is that a guarantor can be sued on an oral guarantee.¹²²¹ However, in practice, the majority of guarantees (at least in the commercial context) are in writing.¹²²² There do not appear to be any significant issues arising from the repeal of the guarantee provision in New South Wales, the Australian Capital Territory and South Australia.¹²²³

59.3.2. United Kingdom

The United Kingdom has retained the writing requirement for guarantees and the issue was considered on two separate occasions in 1937 and again in 1953. The Law Reform Committee in 1937 recommended the repeal of the majority of section 4 of the Statute of Frauds, including the writing requirement for guarantees. Some of the reasons for the recommendation to repeal the writing requirement for guarantees include:¹²²⁴

- section 4 was the product of obsolete conditions;
- the provision ‘promotes more frauds than it prevents’;
- the classes of contracts to which section 4 applies appear to have been arbitrarily selected with no explanation why the requirement for writing applies to some categories of contract but not others;

¹²¹⁷ South Australian Law Reform Committee, *34th Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6. The Committee considered that it was only in the ‘rarest’ instances that a commercial guarantee was not in writing.

¹²¹⁸ South Australian Law Reform Committee, *34th Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

¹²¹⁹ South Australian Law Reform Committee, *34th Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

¹²²⁰ South Australian Law Reform Committee, *34th Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

¹²²¹ New South Wales Law Reform Commission, *Representations as to Credit* Report No. 57 (1988) (Community Law Reform Program (14th report)) [3.1].

¹²²² N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 840 [16.9]. Note however there have been instances where this has not occurred. Seddon has noted that ‘no-one in their right mind would be content with an oral guarantee and so there is simply no need for a paternalistic legislature to step in’ [16.9].

¹²²³ N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10th ed, 2012) 840 [16.9].

¹²²⁴ The reasons for the recommendation to repeal set out here have been extracted from Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420, 424 – 429.

- the provision is out of step with the manner in which business is normally done. The common practice is for guarantees to be in writing to enable a 'paper trail' in the commercial environment;
- guarantees which do not comply with the writing requirement are unenforceable, rather than being void. This has the potential to create 'anomalous' consequences.

However, despite the list of criticisms, a minority of the 1937 Committee members wanted to retain this part of section 4.¹²²⁵ The final report was not acted upon and the Law Reform Committee in 1953 recommended the repeal of a large part of section 4 but the Committee unanimously recommended that the guarantee provision be retained.¹²²⁶ The rationale for the retention of the guarantee provision included:

- concern that 'inexperienced people' were providing guarantees in circumstances where they did not fully understand the obligation they were undertaking;¹²²⁷
- requiring a guarantee to be in writing would give the 'proposed surety an opportunity for thought';¹²²⁸
- guarantees were a special class of contract which was generally one sided in the sense that the guarantor was getting nothing out of the arrangement and the formality of writing would ensure it was 'settled and recorded.'¹²²⁹

59.4. Recommendation

The Centre recommends section 56 of the PLA be amended so that indemnities fall within the scope of the section. The Centre further recommends inserting provisions that allow for a contract of guarantee and indemnity to be formed electronically if the contract complies with the requirements of section 11 and 14 of the *Electronic Transactions (Queensland) Act 2001* (Qld) (subject to exceptions in the National Consumer Credit Code as discussed above at paragraph 59.2.2).

Amending section 56 in this way has a number of benefits. Firstly, it promotes consistency with other consumer protection codes currently in operation. As previously mentioned, the definition of 'guarantee' in section 204 of the *National Credit Code* includes an indemnity (other than one arising under a contract of insurance). Secondly, the amendment would counteract the 'arbitrary' distinction between a guarantee and an indemnity presently made in section 56 of the PLA and provide appropriate recognition of the significance of providing an indemnity.¹²³⁰ Thirdly, it would eliminate issues associated with distinguishing between a guarantee and an indemnity. The QLS supports this amendment in its submissions.

This recommendation also considers the fact that an indemnity is a primary obligation and it seems perverse that indemnities are not required to be in writing where a guarantee, which is a secondary

¹²²⁵ Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) 50 [3-002].

¹²²⁶ Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) 50 [3-002].

¹²²⁷ Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) 50 [3-002].

¹²²⁸ Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) 51 [3-002].

¹²²⁹ Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6th ed, 2011) 51 [3-002].

¹²³⁰ Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420, 420.

obligation, is required to be in writing. The inclusion of indemnities in the section will resolve this anomaly.

The Centre does not recommend that the provision be repealed because, despite the criticism set out above, there are still a number of factors which may support the retention of section 56. Firstly, it is a provision which has a large volume of reasonably settled case law to guide the interpretation of the different components of the section. It is not a regularly litigated section in its current form and has been relied upon infrequently in Queensland as a defence to the enforcement of a guarantee.

Secondly, a majority of Australian jurisdictions also require that guarantees be in writing in order to be enforceable. There are advantages to maintaining consistency between the jurisdictions including certainty and clarity when a guarantor resides in a different state or territory from where the recipient of the guarantee is based.

Thirdly, although the majority of guarantees will inevitably be in writing, there will still be a number that are not, particularly in the case of non-commercial transactions. Although section 55 of the *National Credit Code* requires guarantees to be in writing and signed, the scope of the coverage provided is limited to those guarantees provided under a 'credit contract'. Not all guarantees will fall within the scope of section 55. It is inevitable that there will be guarantees provided by individuals who may not be in a position to properly appreciate the seriousness of the undertaking they are providing. In this respect, there is value in a provision which may give a potential guarantor reason to pause and properly consider what he or she is agreeing to undertake.

With respect to guarantees and indemnities formed electronically, the Centre is of the view that the same standard of formalities required in section 11 and section 59 of the PLA for contracts for the sale or other disposition of land should apply. See paragraph 13 for the discussion and recommendations with respect to electronic contracts for the sale and other disposition of land.

If the electronic contract complies with section 11 (for writing) and section 14 (for signature) of the *Electronic Transactions (Queensland) Act 2001* (Qld), then for the purposes of contracts of guarantee and indemnity under the PLA, the formality requirements are satisfied. This is subject to section 6 of the PLA (both in its current form and in the proposed redrafting of that section) which means that the *National Credit Code* legislation will continue to operate with respect to consumer credit contract guarantees and indemnitees, and these contracts cannot be formed electronically. These recommendations promote consistency within the PLA, in line with the overarching principles that guide the Centre's recommendations.

RECOMMENDATION 59. Section 56 should be amended to include indemnities. Provisions should be inserted that allow for a contract of guarantee and indemnity to be formed electronically if the contract complies with the requirements of sections 11 and 14 of the *Electronic Transactions (Queensland) Act 2001*, subject to exceptions in the *National Credit Code*.

60. Section 57 – Effect of provisions as to conclusiveness of certificates etc.

60.1. Overview and purpose

57 Effect of provisions as to conclusiveness of certificates etc.

- (1) Subject to any other Act, a provision in a contract or instrument to the effect that a certificate, statement or opinion of any person shall be or be received as conclusive evidence of any fact in the certificate, statement or opinion contained shall be construed to mean only that such certificate, statement or opinion shall be or be received as prima facie evidence of that fact.
- (2) This section shall not apply to—
 - (a) a certificate, statement or opinion of a person who, in making the certificate or statement or in forming the opinion, is bound to act judicially or quasi-judicially or as arbitrator or quasi-arbitrator; or
 - (b) a provision agreed to after a dispute has arisen as to the relevant fact.
- (3) This section applies to a contract made or instrument executed after but not before the commencement of this Act, and shall have effect despite any stipulation to the contrary.
- (4) In this section—

fact includes any matter, thing, event, circumstance or state of affairs.

Parties to a contract can, as between themselves, agree that a written certificate issued by either of them, or a third party, is conclusive evidence in respect of that matter.¹²³¹ Unless the instrument specifies the matter to be certified must be certified in writing, there is no need for the certificate itself to be written, so even an oral statement or opinion, in the right circumstances, could suffice.¹²³² A provision that states that a certificate is ‘deemed’ to be conclusive evidence of a matter ‘may evidence an artificial extension of what the certificate evidences on its face’¹²³³ however this is not sufficient to support a challenge of that certificate.¹²³⁴ The QLRC regarded this position as a ‘highly undesirable state of affairs’¹²³⁵ and section 57 of the PLA was included to modify the general law in this regard.

The general law does not extend to certificates which are fraudulent, or otherwise illegal,¹²³⁶ even if the instrument contains a provision that purports expressly to operate in the case of fraud.¹²³⁷ There are other exceptions to the general principle¹²³⁸ and further, where the conclusiveness of a certificate limits a party’s legal rights, the provision will be construed strictly.¹²³⁹ The court has also found in

¹²³¹ See for example *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643.

¹²³² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57.30].

¹²³³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57.30].

¹²³⁴ *Lanlex No 29 Pty Ltd v Leach* (1996) 8 BPR 15,429 at 15,434 per Sheller JA.

¹²³⁵ 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) 48.

¹²³⁶ *Dobbs v National Bank of Australasia Ltd* (1935) 53 CLR 643.

¹²³⁷ *Redmond v Wynne* (1892) 13 LR (NSW) 39.

¹²³⁸ For example where the provision operates to create an invalid restraint of trade.

¹²³⁹ *Kirsch v HP Brady Pty Ltd* (1937) 58 CLR 36.

certain cases that the operation of a conclusiveness provision is conditional or qualified on a close reading of the instrument.¹²⁴⁰

Section 57 is broadly drafted to cover a 'provision in a contract or instrument' which could include instruments such as deeds, articles of association, rules of clubs, and wills.¹²⁴¹ Section 57(1) of the PLA alters the law with respect to conclusiveness of certificates so that a certificate that otherwise would have been conclusive proof, is now construed so that it is prima facie evidence only. A party may challenge the conclusiveness of the certificate, however the onus of proof that the certificate is incorrect is on the challenging party, and not the party who seeks to rely on the certificate.¹²⁴²

An example of how the provision operates can be found in the case *Julong Pty Ltd v Fenn*.¹²⁴³ In that case, some provisions of the mortgage document were cast in terms that mirrored the effect of section 57 of the PLA. The terms of the mortgage provided that a certificate issued that stated the amount of the debt was prima facie evidence of the amount owing by the mortgagor. The onus was on the mortgagor to prove that the debt described in the certificate was incorrect. It was the position of the mortgagor that amount had been repaid. It was established that part of the debt had been repaid and that was not in dispute. It was the remaining balance of the debt that was the subject of the litigation. On appeal the court held that because the debtors were unable to adduce evidence that the balance of the debt had been repaid, then the onus of proof was not discharged. The certificate stood, on the balance of probabilities, as proof of the debt.¹²⁴⁴

Section 57(2) of the PLA sets up a number of exceptions to the general position created by section 57(1). Where a person is bound to act as an arbitrator or quasi-arbitrator, for example an architect or engineer, then the common law position remains. This was the intention of the QLRC, reasoning:

... it is extremely common for such a provision to be included in building and engineering contracts, where the 'final' certificate of the supervising architect or engineer is usually made conclusive evidence of due performance of the contract work and of the amount owing under the contract... To allow conclusive effect to such a provision is much less objectionable because the architect or engineer in such a case is under a duty to act as an arbitrator or quasi-arbitrator in forming his opinion, and this required that he should act fairly towards both parties...¹²⁴⁵

Therefore, section 57(2) excludes from the operation of the provision certificates issued by architects and engineers, and these certificates are therefore subject to the general law and are conclusive if the instrument provides for same.

¹²⁴⁰ *Arthur H Stephens (Q) Pty Ltd v Dalby Town* [1969] Qd R 306; *John Gran & Sons Ltd v Trocadero Building & Investment Co Ltd* (1938) 60 CLR 1.

¹²⁴¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57.30].

¹²⁴² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57.60].

¹²⁴³ [2003] Q ConvR 54-586.

¹²⁴⁴ *Julong Pty Ltd v Fenn* [2003] Q ConvR 54-586; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57.60].

¹²⁴⁵ 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) 49.

60.2. Issues with the section

Section 57 of the PLA remains relevant and is well understood in practice. No problems have been identified with the section.

60.3. Other jurisdictions

While there are no direct corresponding provisions in other property law legislation in Australia, numerous other Acts in Australia regulate the law with respect to the conclusiveness of certificates and other statements or opinions in various situations.¹²⁴⁶

60.4. Recommendation

Section 57 should be retained on the basis that the rationale and policy behind the provision remains relevant today. The provision is well understood and has not caused problems. The language of the provisions could be modernised.

RECOMMENDATION 60. Section 57 should be retained with modernised language.

¹²⁴⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters (looseleaf) [PLA.57.60].

61. Section 57A – Effect of Act or Statutory instrument

61.1. Overview and Purpose

57A Effect of Act or statutory instrument

- (1) A statutory instrument, other than prescribed subordinate legislation, does not and can not—
- (a) render void or unenforceable any contract or dealing concerning property that is made, entered into or effected contrary to the statutory instrument; or
 - (b) for a contract for the sale of land—give a party to the contract a right to terminate the contract for a failure by another party to the contract to comply with the statutory instrument.
- (2) Where an Act or statutory instrument requires that a certificate, consent or approval relating to any contract or dealing with property (by sale, lease, mortgage or otherwise) be obtained or tendered before or at the time the contract is entered into or the time of the dealing, then, in the absence of greater particularity as to that time in the Act or instrument, it shall be sufficient compliance with that requirement if the certificate, consent or approval is obtained or tendered as required at or immediately before—
- (a) in the case of a sale—settlement; and
 - (b) in the case of a lease—the lessee’s entry into possession under the lease; and
 - (c) in the case of a mortgage—the mortgagor’s accepting liability under the mortgage; and
 - (d) in the case of any other dealing—its finalisation.
- (3) In this section—
- prescribed subordinate legislation** means subordinate legislation that is prescribed by regulation.
- Note* – See section 357 in relation to the application of this section.

The original section 57A was introduced into the PLA in 1985.¹²⁴⁷ An amendment to the section was proposed and introduced into the Queensland Parliament in 2014. However, that proposed amendment lapsed.¹²⁴⁸ The same amendment was put before Parliament again in June 2017 and was passed. The amendment replaced the original drafting of section 57A(1) with a new subsection which:

- provides that a statutory instrument, other than prescribed subordinate legislation, cannot render void or unenforceable a contract or dealing concerning property that is made, entered into or effected contrary to the statutory instrument;¹²⁴⁹ and
- makes it clear that a statutory instrument cannot provide a party with the ability to terminate a contract for sale of land because of another party’s failure to comply with a statutory instrument.¹²⁵⁰

The Centre makes no further recommendations with respect to section 57A(1) of the PLA.

61.2. Issues with the section

61.2.1. Section 57A(2)

The first issue associated with section 57A(2) of the PLA relates to what has been described as the ‘numerous drafting infelicities’¹²⁵¹ associated with the provision. In general the issues with the

¹²⁴⁷ *Property Law Act Amendment Act 1985* (Qld) (No. 3) s 4. Assented to 18 March 1985.

¹²⁴⁸ See *Justice and Other Legislation Amendment Bill 2014* (Qld) cl 102 (lapsed).

¹²⁴⁹ Explanatory Notes, Court and Civil Legislation Amendment Bill (Qld) 2017, 35.

¹²⁵⁰ Explanatory Notes, Court and Civil Legislation Amendment Bill (Qld) 2017, 35.

¹²⁵¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.57A.60]).

subsection relate to the need for greater clarity around what is meant by terms such as ‘absence of greater particularity’ and words such as ‘finalisation’ (see subsection 57A(2)(d)), in addition to the need to ensure the language used in section 57A is consistent with the rest of the PLA.

The second issue associated with section 57A(2) relates to the lack of clarity regarding the actual role of the section and the policy underlying its inclusion in the PLA. The Second Reading Speech¹²⁵² relies on the same rationale for the inclusion of sections 57A(1) and section 57A(2), although the provisions operate in different ways. The utility of section 57A(2) is difficult to assess and, unless every Queensland Act and statutory instrument is reviewed, there is no guarantee that the provision is not required.

Section 57A was originally enacted to overcome a number of cases where contracts for the sale of land were held to be impliedly void for illegality due to a failure to comply with certain subordinate legislation.¹²⁵³ An example of the type of provision intended to be captured by section 57A is found in *Chitts v Allaine*.¹²⁵⁴ This case concerned the interpretation of the by-laws of the Council of the City of Redcliffe which provided:

Sale or lease of boarding-house, flat or tenement building.

14(i) No person whether principal or agent shall ... sell to any person ... the goodwill of any such premises without having tendered to the intending ... purchaser a certificate from the health surveyor of the Council to the effect that such premises are, at the time of ... sale, in a fit condition to be registered or re-registered.

The court concluded that the intention of the by-law was to make it illegal for a contract of sale to be entered into unless a certificate was first given to the buyer. Any contract for sale entered before that time was found to be void.

Section 57A(1) only applies to prohibitions contained in statutory instruments and not prohibitions contained in a section of an Act.¹²⁵⁵ The purpose of the section is to avoid a finding of implied illegality rendering the contract void or unenforceable unless the statutory instrument expressly provided for this result. The Second Reading Speech relevant to the provision noted that:

The provisions of this Bill still provide ample protection to purchasers but ensure that subordinate legislation does not interfere with traditional conveyancing practices unless it is clearly intended to do so. This provision further ensures that contracts entered into freely by parties can proceed and removes any uncertainty as to the validity of the contract.¹²⁵⁶

61.2.2. Section 57A(2) – timing

Section 57A(2) refers to the provisions of both an Act and a statutory instrument which require a ‘certificate, consent or approval’ relating to any contract or dealing with property to be obtained or

¹²⁵² Second Reading Speech, *Property Law Act Amendment Bill* (Qld), 25 October 1984, 1852-1853.

¹²⁵³ Second Reading Speech, *Property Law Act Amendment Bill* (Qld), 25 October 1984, 1852-1853.

¹²⁵⁴ [1982] 1 Qd R 319.

¹²⁵⁵ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 271. The instrument needs to be one that satisfies the requirements of s 7 of the *Statutory Instruments Act 1992* (Qld) – the instrument is made under an Act, another statutory instrument, or a power conferred by an Act or statutory instrument and also under a power conferred otherwise by law (s 7(2)).

¹²⁵⁶ Second Reading Speech, *Property Law Act Amendment Bill* (Qld), 25 October 1984, 1853.

tendered before or at the time of the contract.¹²⁵⁷ It specifies what constitutes sufficient compliance from a timing perspective (in the absence of greater particularity in the relevant Act or instrument) in the different categories of dealings described in the section. The section was also intended to assist with overcoming the problem described in paragraph 61.2.1 above. However, difficulties in interpreting the section have arisen as a result of ‘drafting infelicities’.¹²⁵⁸

The Queensland Full Court considered the provision in *Garms v Birnzweig*.¹²⁵⁹ The court did not reach any final views as to the meaning of section 57A(2) as the case involved an appeal by the appellant against an order for specific performance made on a summary judgment application under the Supreme Court rules. The respondent and appellant entered into a contract for the sale of a property owned by the respondent. A provision under an Act which is now repealed¹²⁶⁰ provided that any person not registered as a house builder who performed building construction to a certain value in relation to a dwelling house must not sell the property or offer it for sale at any time during a certain period unless the person first obtained the approval of the Builder’s Registration Board to the sale and provided written notice of certain matters to potential buyers. The relevant approval had not been obtained in this case prior to the parties entering into the contract for sale and was provided sometime later. The buyer claimed that the delivery of the certificate was too late and it should have been provided prior to entry into the contract. The seller applied for, and was given, summary judgment for specific performance of the contract. The appellant buyer sought leave to defend in relation to the matter. The Full Court’s role was to decide whether a case for leave to defend had been shown rather than to express a final view on the matter. The court held that section 57A(2) did not assist the seller and as a result the contract was void and illegal.

Comments made by the Full Court in relation to section 57A(2) of the PLA during this process highlight some of the uncertainties with the section. These and other more general drafting issues regarding the provision are summarised below:

- uncertainty regarding the meaning of the phrase ‘absence of greater particularity as to that time in the Act or instrument’. For example, does the legislation need to expressly specify a time period or is there a need to compare the particularity specified in the Act or instrument with the particularity specified in section 57A(2) of the PLA. Further, does subsection 57A(2) have any relevance or application where the other Act or statutory instrument particularises the time when the certificate is to be obtained – for example before contract,¹²⁶¹
- the term ‘settlement’ is used in section 57A(2)(a) but the term ‘completion’ is used in the rest of the PLA. It has been suggested that consistency of language should have been maintained throughout the PLA.¹²⁶²

¹²⁵⁷ The Second Reading Speech only refers to section 57A(2) as applying to subordinate legislation. It does not refer to the provisions of an ‘Act’. It is not clear why the reference to an ‘Act’ was introduced into the section. See Second Reading Speech, *Property Law Amendment Bill* (Qld), 25 October 1984, 1852.

¹²⁵⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57A.60].

¹²⁵⁹ [1990] 2 Qd R 336.

¹²⁶⁰ *Builders’ Registration and Home-owners’ Protection Act 1979-1987* (Qld) s 53(3).

¹²⁶¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57A.60].

¹²⁶² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57A.60].

- the term ‘finalisation’ is used in relation to ‘other dealings’ in subsection 57A(2)(d) which may lead to disagreements regarding the actual time when a dealing is deemed to be finalised;
- section 57A(2)(c) refers to the time at which the mortgagor accepts liability under the mortgage. Issues potentially arise in relation to determining at what point a mortgagor accepts that liability.¹²⁶³

Section 57A(2) was considered and applied in 2010 in the Supreme Court case of *St George Bank Ltd v Perpetual Nominees Ltd*.¹²⁶⁴ One of the issues in that case was whether a provision in the *Land Act 1994* (Qld) provided a greater degree of particularity regarding timing than section 57A(2) of the PLA. Justice Wilson agreed with counsel for the applicant that time in section 57A(2) refers to ‘the time the contract is entered into or the time of the dealing’ and that there was no greater particularity about that time provided for in the other Act.¹²⁶⁵ Justice Wilson was satisfied that section 57A(2) was applicable and that it was sufficient to have the relevant approval required under the *Land Act 1994* (Qld) at the time of settlement as specified in subsection 57A(2)(a) of the PLA. Section 57A(2) was not considered in any detail in this case.

61.3. Recommendation

Reform of section 57A(2) is recommended. This section should be redrafted to address the drafting problems previously identified above at paragraph 61.2.2 and to provide greater clarity. The Centre recommends simplifying the wording regarding timing in relation to the certificates, consents or approvals by indicating that where a statute provides for these to be obtained before the contract is entered into that, unless specified to the contrary, the contract will not be void or unenforceable provided the certificate, consent or approval is obtained before settlement. This would mean that there would be no need for the subparagraphs (a) to (d) in the current section.

RECOMMENDATION 61. Section 57A(2) should be amended. The amendments should state that where a statute provides for certificates, consents or approvals to be obtained before the contract is entered into, unless specified to the contrary, the contract will not be void or unenforceable provided the certificate, consent or approval is obtained before settlement. If this approach is adopted, subparagraphs (a) to (d) in the current section are not required and should be repealed.

¹²⁶³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.57A.60].

¹²⁶⁴ [2011] Qd R 389, 393-394.

¹²⁶⁵ [2011] Qd R 389, 394. The relevant provision of the *Land Act 1994* (Qld) was section 346(1) which provides: ‘(1) The mortgagee must first offer the lease for sale by public auction or with the Minister’s written approval may sell the lease by private contract.’

62. Section 58 – Insurance money from burnt building

62.1. Overview and purpose

Section 58 of the PLA originated from the *Fires Prevention (Metropolis) Act 1774* (14 Geo III, c 78) (**Fires Prevention Act**), one of the Imperial Acts.¹²⁶⁶

58 Insurance money from burnt building

Where a building is destroyed or damaged by fire a person who has granted a policy of insurance for insuring it against fire may, and shall, on the request of a person interested in or entitled to the building, cause the money for which the building is insured to be laid out and expended, so far as it will go, towards rebuilding, reinstating, or repairing the building, unless –

- (a) the person claiming the insurance money within 30 days next after the person's claim is adjusted, gives sufficient security to the person who has granted that policy that the insurance money will be so laid out and expended; or
- (b) the insurance money is in that time settled and disposed of to and amongst the contending parties to the satisfaction and approbation of the person who has granted the policy of insurance.

The effect of section 58 is that, notwithstanding any other statute or contractual rights in a buyer, the buyer as a 'person interested' has a right to call upon the seller's insurers to apply insurance money in reinstatement of the premises destroyed by fire.¹²⁶⁷ The precise categories of interested persons are not clarified in the section. However, it is accepted that the section extends beyond simply individuals interested in the insurance policy to those who are interested in the building that was destroyed or damaged by fire. Generally accepted categories include:

- a buyer who has entered into a contract for sale;
- a lessee;¹²⁶⁸
- a mortgagee; or
- a contiguous neighbour whose property was damaged by a fire in an insured property (for example, the neighbour's building may only be separated by a party wall).

The primary interpretation issue with section 58 relates to the words 'money for which the building is insured'. A fire insurance policy is a contract of indemnity only. It is accepted that section 58 does not increase the amount which the insurer is liable to pay under the policy, irrespective of how or to whom the amount insured is paid out. The amount paid will not exceed the 'maximum amount which the insurer would, apart from section 58, be liable to pay the insured under the policy.'¹²⁶⁹ This means

¹²⁶⁶ Before the enactment of the *Property Law Act 1974* (Qld) there was some doubt as to whether the statute applied in Queensland. For further discussion on the history of the provision, see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.58.30]-[PLA.58.240].

¹²⁶⁷ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 322.

¹²⁶⁸ A lessor can also be a person interested.

¹²⁶⁹ Position restated in *Kern Corporation Limited v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 178.

that section 58 of the PLA cannot be used to expose the insurer to a pecuniary liability more extensive than its contractual liability under the policy of insurance.¹²⁷⁰

The limitations in relation to the reliance on the section by these categories of interested persons are discussed further below in paragraph 62.2.2. The section only applies to buildings damaged by fire and does not make the 'person interested' an insured.¹²⁷¹

The provision in its original form in the Imperial enactment was designed to deter owners of property in eighteenth century England from burning down their properties to collect insurance money and to protect those other persons living contiguously who suffered loss or damage as a result. If one of those other persons affected adversely by the fire made a claim upon the insurers, the money could not be paid to the insured party but had to be spent on rebuilding. This prevented the insured party from merely claiming the proceeds and never reinstating. A policy of fire insurance is a contract of indemnity and the liability of the insurer is ordinarily limited to the actual loss or damage suffered by the insured.¹²⁷²

62.2. Issues with the section

62.2.1. Rationale underpinning the original imperial enactment outdated

The original Imperial enactment was drafted in the context of quite specific social conditions¹²⁷³ which, arguably, required protection to be provided to interested parties apart from the owner of the property. These historic social circumstances no longer exist and the incidence of insurance cover held by individuals most likely affected by damage or destruction to property caused by fire is far greater. Parties with a financial or other interest in the property as mortgagees or lessees, for example, are normally insured as a condition of those agreements. There is limited case law in Queensland in relation to section 58 of the PLA. This suggests that it is an underutilised section and persons interested in or entitled to the building rely on other non-statutory mechanisms to address loss arising from fire damage or destruction to buildings.

62.2.2. Section limited to fire damage or destruction

Section 58 (and its Imperial Act predecessor) only applies to damage to a building (or its destruction) caused by fire and no other cause. The application of the section is, as a result, very limited. This is particularly evident when compared against modern insurance policies in relation to property which generally cover multiple risks and multiple types of property under the one policy.

¹²⁷⁰ WD Duncan and W M Dixon *The Law of Real Property Mortgages* (Federation Press, 2nd ed, 2013) 208.

¹²⁷¹ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 323.

¹²⁷² WD Duncan and W M Dixon *The Law of Real Property Mortgages* (Federation Press, 2nd ed, 2013) 208.

¹²⁷³ These conditions included the prevention of arson affecting neighbouring properties.

62.2.3. Section is not an alternative to buyer obtaining own insurance

The effectiveness of section 58 relies entirely upon the existence, legality or adequacy of the seller's insurance. The buyer has no control over this and it is not a satisfactory alternative to the buyer contracting their own insurance.¹²⁷⁴

62.2.4. Section 58 is effectively obsolete where contract of sale is completed

The application of section 58 is limited in the context of a contract for sale of land.¹²⁷⁵ The provision is only available prior to the contract settling. Once the contract is complete 'the effect of an earlier demand is rendered nugatory as the vendor has no loss to compensate and the insurer's liability is reduced to nil.'¹²⁷⁶ In other words, if there is no obligation under the policy to pay, there can be no statutory obligation under the section to reinstate. Once completion occurs, the seller cannot claim to have suffered loss or seek to have the building reinstated.¹²⁷⁷ This is because the seller has been paid in full under a contract of sale and does not suffer any loss recoverable under their insurance. There is then no insurance money available to be used in reinstatement.¹²⁷⁸ Any demand made upon the insurer prior to this would then lapse.

The position is the same where a property the subject of an unconditional and enforceable contract of sale is damaged by fire, a demand by a buyer who is ready, able and willing to complete the sale is fatal to a claim under section 58.¹²⁷⁹ This is because where the buyer establishes an enforceable interest in the property, the buyer also establishes that the seller will not suffer any loss by the fire. Brennan J in his judgment in *Kern Corporation Ltd v Walter Reid Trading Pty Ltd* noted that a buyer in that situation:

...must protect his interest under another policy or under the provisions of s. 63 of the Property Law Act if he has obtained the cover available pursuant to its terms.¹²⁸⁰

62.2.5. Lessee and mortgagee alternative mechanisms to section 58

62.2.5.1. Lessee

In most lease agreements, at least in the case of commercial leases, there is usually a term of the lease that requires the lessor to reinstate premises in the event of loss. There is also often a provision which provides for the abatement (or suspension) of rent in certain cases such as total damage to the premises.¹²⁸¹ Further, there is often a provision which enables the lessor and lessee to give notice to

¹²⁷⁴ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 324.

¹²⁷⁵ *Kern Corporation Limited v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164. The subject property in this case was destroyed by fire between the date of contract and completion and the buyer made a relevant request under section 58. The insurers rejected the demand. Before the date for completion, the buyer unsuccessfully sought a declaration that the insurers were liable. Completion then occurred.

¹²⁷⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.58.180]).

¹²⁷⁷ *Kern Corporation Limited v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 178–179 (Mason J).

¹²⁷⁸ Sharon Christensen and WD Duncan 'Unlocking risk allocation and equitable conversion: Reform of the passing of risk in the sale of land' (2012) 2 *Property Law Review* 3, 17

¹²⁷⁹ *Kern Corporation Limited v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191 (Brennan J).

¹²⁸⁰ (1987) 163 CLR 164 at 191.

¹²⁸¹ WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Thomson Reuters, 2014) 347.

determine the lease if the premises are unsuitable for occupation as a result of damage or destruction.¹²⁸²

In commercial leases, it is usually the lessor that maintains the insurance of the property, irrespective of any covenant in the lease agreement.¹²⁸³ Where insurance in relation to the leased premises is in joint names of the lessee and lessor, or by a policy taken to be made for joint benefit, it is possible that a lessee has sufficient interest to require full reinstatement.¹²⁸⁴ Similarly, if the lessee makes a contribution towards the insurance policy (even an indirect contribution), he or she is likely to have sufficient interest and the lessee may request reinstatement without the limitations of the section.¹²⁸⁵

62.2.5.2. Mortgagee

As with leases, mortgage arrangements will usually address issues of insurance. A standard mortgage instrument will generally require that the mortgagor insure, and maintain insurance, in relation to the secured property.¹²⁸⁶ Mortgage instruments will often include a term that provides for the use of insurance money towards building or reinstating the premises destroyed or damaged at the option of the mortgagee or towards the payment of the money secured under the mortgage.¹²⁸⁷

62.2.6. Leases – potential to contract out of section 58 of the PLA

There is some authority which suggests that the operation of section 58 can be contracted out of, or modified. In *Bit Badger Pty Ltd v Cunich*¹²⁸⁸ a clause in a commercial lease provided for abatement of rent and suspension of the covenant to repair. The clause also included a covenant that the lessee would not request that the insurer of the building, where it was damaged or destroyed by fire, apply the money to be laid out or expended so far as the money goes towards rebuilding, reinstatement or repair of the building. Justice White noted in her judgment that part of the lease clause ‘would appear to be a contracting out of the provisions of s. 58 of the *Property Law Act 1974*.¹²⁸⁹

62.2.7. Insurance Contracts Act 1984 (Cth) potentially covers the field

62.2.7.1. History

The *Insurance Contracts Act 1984* (Cth) (ICA) when introduced repealed the Fires Prevention Act in its application to a contract of insurance or proposed contract of insurance so far as that Act applies to various States.¹²⁹⁰ In a practical sense, this only affected South Australia and Western Australia as they were the only jurisdictions where the Imperial legislation remained in force.¹²⁹¹ The introduction of the ICA occurred following the completion of the reference to the Australian Law Reform Commission (ALRC) by the Attorney-General which amongst other things, reviewed and considered

¹²⁸² WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Thomson Reuters, 2014) 347.

¹²⁸³ WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Thomson Reuters, 2014) 339-340. The usual obligation of the lessor under a commercial lease is to insure items such as the plate glass windows and doors etc, to maintain a public liability policy and to insure fixtures.

¹²⁸⁴ WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Thomson Reuters, 2014) 347, 348-349.

¹²⁸⁵ *Mumford Hotels Ltd v Wheeler* [1964] Ch 117.

¹²⁸⁶ WD Duncan and W M Dixon *The Law of Real Property Mortgages* (Federation Press, 2nd ed, 2013) 199.

¹²⁸⁷ WD Duncan and W M Dixon *The Law of Real Property Mortgages* (Federation Press, 2nd ed, 2013) 206.

¹²⁸⁸ [1997] 1 Qd R 136, 141.

¹²⁸⁹ *Bit Badger Pty Ltd v Cunich* [1997] 1 Qd R 136, 141.

¹²⁹⁰ *Insurance Contracts Act 1984* (Cth) s 3; WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Lawbook Co, 7th ed, 2014) [110.2600].

¹²⁹¹ New South Wales, Victoria and the Australian Capital Territory were not affected by the repeal of the Imperial Act as it was not in force in these jurisdictions. Queensland, Tasmania and the Northern Territory were also not affected as derivative legislation is in force.

the adequacy and appropriateness of insurance landscape in Australia.¹²⁹² The ALRC Final Report No. 20 when considering the Fires Prevention Act, noted that there were no objections from the insurance industry to the suggestion in the ALRC Discussion Paper No. 7 that the Imperial Act be repealed or overridden by Commonwealth legislation.¹²⁹³ However, the Report acknowledged two submissions which identified additional potential functions apart from its function of reducing the risk of arson as follows:

- enabling a mortgagee to protect his or her security by requiring the insurer to expend the insurance moneys on reinstatement;
- protecting a lessee where the leased premises are damaged or destroyed in fire and there is no lease term requiring the lessee to insure the premises or a rent abatement provision.¹²⁹⁴

In the case of the mortgagee and mortgagor situation, the ALRC noted that as property insurance normally covers both the mortgagor and mortgagee for their respective interests, situations where the mortgagee's security is potentially diminished by the mortgagor receiving the insurance payment occur only rarely.¹²⁹⁵ Further, the ALRC noted that the issues identified above are legal issues relevant to mortgagor and mortgagee and lessor and lessee, rather than issues with insurance.¹²⁹⁶

62.2.8. Is the ICA an alternative to section 58 of the PLA?

It is possible that the policy objective underlying the Imperial Act and its equivalent in section 58 of the PLA may be achieved through sections 48 and 50 of the ICA. As indicated above, a policy of fire insurance is a contract of indemnity. This generally requires an insured making a claim to demonstrate a strict proprietary interest in the insured interest or an agency or trust relationship to the person who suffered the loss.¹²⁹⁷ Section 48 of the ICA has the effect of allowing recovery by a third party, even where there is no privity of contract between that third party and the insurer, provided that third party qualifies as a 'third party beneficiary' as defined in section 11 of the ICA as:¹²⁹⁸

.. a person who is not a *party* to the contract but is specified or referred to in the contract, whether by name or otherwise, as a person to whom the benefit of the insurance cover provided by the contract extends.¹²⁹⁹

The objective of section 48 was to overcome the effects of the indemnity principle.¹³⁰⁰ Some key differences between the operation of this section and section 58 of the PLA are set out below:

¹²⁹² The reference to the Australian Law Reform Commission was made on 9 September 1976 and the Final Report No. 20, which was accompanied by a draft Bill, was published in 1982.

¹²⁹³ Australian Law Reform Commission, *Insurance Contracts*, Final Report No. 20 (1982) 78 [129]. The suggestion was made in the Australian Law Reform Commission, *Insurance Contracts*, Discussion Paper No. 7 (1978) 36 [62].

¹²⁹⁴ Australian Law Reform Commission, *Insurance Contracts*, Final Report No. 20 (1982) 78 [129].

¹²⁹⁵ Australian Law Reform Commission, *Insurance Contracts*, Final Report No. 20 (1982) 78 [129].

¹²⁹⁶ Australian Law Reform Commission, *Insurance Contracts*, Final Report No. 20 (1982) 78 [129].

¹²⁹⁷ Peter Mann and L Candace, *Mann's Annotated Insurance Contracts Act* (Thomson Reuters, 5th ed, 2012) 298-299 [48.10].

¹²⁹⁸ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [110.3600]

¹²⁹⁹ *Insurance Contracts Act 1984* (Cth) s 11.

¹³⁰⁰ Peter Mann and L Candace, *Mann's Annotated Insurance Contracts Act* (Thomson Reuters, 5th ed, 2012) 298-299 [48.10].

NOT GOVERNMENT POLICY

- the provision has a narrower scope of application and reliance is limited to ‘third party beneficiary’ compared to the broader category of ‘person interested in or entitled to the building’ under section 58 of the PLA. This requires the insurance policy to refer to a specified beneficiary or class of beneficiary for section 48 to apply. This will vary with every insurance policy.
- it has a broader application than section 58 of the PLA as the third party beneficiary can recover loss in accordance with the insurance policy. However, the third party beneficiary is not ‘deemed’ to be a party to the contract of insurance under section 48;
- the loss covered under section 48 is potentially broader than the fire damage or destruction under section 58 of the PLA and is not limited to rebuilding, reinstating or repairing the building. The scope, of course, is dependent on the terms of the insurance policy;
- the insurer has the same defences to an action as the insurer would have in an action by the insured.¹³⁰¹

Section 50 of the ICA is more limited in application and restricted to sales where the risk has passed to the buyer. The provision was enacted to address the problem of a purchaser remaining bound to pay the full purchase price where the property the subject of an enforceable contract of sale was damaged or destroyed prior to settlement.¹³⁰² Prior to the introduction of the section, a purchaser was unable to benefit from the seller’s insurance for loss occurring prior to completion or entry into occupation.¹³⁰³ Some key features of this section compared to section 58 of the PLA are set out below:

- it is only available where:
 - the purchaser agrees to purchase or take an assignment of a property which then gives (or will give) the purchaser a right to occupy or use the building;
 - the seller or assignor has general insurance over the building;
 - the risk regarding loss or damage to the building has passed to the purchaser.

The application of the provision is therefore narrower than section 58 of the PLA;

- it covers broader loss than fire damage or destruction under section 58 of the PLA, although this will depend on the scope of the insurance policy taken out by the seller;
- the purchaser is deemed to be insured under the contract of insurance from the day the risk passes and ending at the earliest time specified in the section (e.g. upon entering possession, termination of sale, completion etc.). This gives the ‘insured’ broader rights than under section 58 of the PLA which only provides the interested party with a right to demand reinstatement, rather than deeming the party to be an insured under the policy.

¹³⁰¹ An illustration of the operation of section 48(3) is found in *Commonwealth Bank of Australia v Baltica General Insurance Co Ltd* (1992) 28 NSWLR 579 where the mortgagee who had been noted on the policy as a party with an interest in the property unsuccessfully claimed under section 48 of the ICA. The insured party had been refused insurance on the basis of fraudulent misrepresentation or, alternatively, material non-disclosure. The insurance company in this case was entitled to rely on the same defence in relation to a claim by the mortgagee.

¹³⁰² Peter Mann and L Candace, *Mann’s Annotated Insurance Contracts Act* (Thomson Reuters, 5th ed, 2012) 322 [48.10].

¹³⁰³ Peter Mann and L Candace, *Mann’s Annotated Insurance Contracts Act* (Thomson Reuters, 5th ed, 2012) 323 [48.10].

62.3. Other jurisdictions

There is some variation regarding the retention of the equivalent provision in other Australian jurisdictions. In summary, the provision has been repealed in New South Wales,¹³⁰⁴ Victoria,¹³⁰⁵ Western Australia and South Australia.¹³⁰⁶ Derivatives of the Imperial Act are retained in the Northern Territory¹³⁰⁷ and Tasmania¹³⁰⁸ and these provisions are similar to section 58 of the PLA. The ALRC in its *Insurance Contracts Discussion Paper No 7* indicated that in New South Wales, 'insurance law has lacked regulation of this type since 1879. Its absence has certainly led to no discernible mischief.'¹³⁰⁹

62.4. Recommendation

The Centre recommends repealing section 58. The case law in Queensland where section 58 of the PLA has been relied on is limited which suggests that more effective alternative mechanisms are available where a situation falling within the scope of section 58 arises. The terms of mortgage instruments, leases (particularly commercial) and contracts for sale of land usually provide an avenue to deal with building destruction and damage after destruction by any insured risk. Further, while sections 48 and 50 of the ICA do not replicate section 58 of the PLA, they potentially provide an avenue for recourse in circumstances where a mortgagee, lessee or purchaser do not have their own policy of insurance. For these reasons, it is recommended that section 58 be repealed.

RECOMMENDATION 62. Section 58 should be repealed.

¹³⁰⁴ *Hazelwood v Webber* (1934) 62 CLR 268.

¹³⁰⁵ The provision was repealed by the *Sale of Land Amendment Act 1982* (Vic).

¹³⁰⁶ *Insurance Contracts Act 1984* (Cth) 3(1) repealed the operation of the Imperial Act in Western Australia and South Australia.

¹³⁰⁷ *Law of Property Act* (NT) s 61.

¹³⁰⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 90E.

¹³⁰⁹ Australian Law Reform Commission *Insurance Contracts Discussion Paper No. 7* (1978). New South Wales has not had an equivalent provision since it was repealed in the *City of Sydney Improvement Act 1879* (NSW). The Australian Capital Territory inherited New South Wales laws.

Part 6 Division 3 – Sales of land

Division 3 contains a number of provisions dealing with sales of land. A number of the provisions were only recently added to the PLA to address the national move towards electronic conveyancing.

63. Section 58A – Definitions for div 3

63.1. Overview and purpose

58A Definitions for div 3

In this division—

conveyancing transaction see the National Law, section 3.

e-conveyance means a conveyancing transaction to be completed using e-conveyancing.

e-conveyancing means a system of land conveyancing that uses an ELN to lodge documents electronically for the purposes of the land titles legislation.

electronic workspace, for an e-conveyance, means a shared electronic workspace within an ELN that allows the participating subscribers to the e-conveyance—

(a) to lodge a document electronically under the National Law; and

(b) if relevant, to authorise or complete financial settlement of the e-conveyance.

ELN means an Electronic Lodgment Network under the National Law.

financial settlement, of an e-conveyance, means the exchange of value, in an ELN, between financial institutions in accordance with the instructions of participating subscribers to the e-conveyance.

land titles legislation see the *Electronic Conveyancing National Law (Queensland) Act 2013*, section 6.

National Law means the Electronic Conveyancing National Law (Queensland).

participating subscriber, to an e-conveyance, means a subscriber who is involved in the e-conveyance as a party to the e-conveyance or as a representative of a party.

subscriber see the National Law, section 3.

Section 58A of the PLA was added in 2014 to broaden the Act to accommodate electronic conveyancing in Queensland.

63.2. Issues with the section

The Centre has not identified any issues with section 58A of the PLA.

63.3. Recommendation

No changes to section 58A of the PLA are recommended at this time.

RECOMMENDATION 63. Section 58A should be retained.

64. Section 58B – Meaning of settlement of a sale of land in an e-conveyance

64.1. Overview and purpose

58B Meaning of settlement of a sale of land in an e-conveyance

(1) In an Act, a reference to the *settlement* (however described) of a sale of land or a contract for the sale of land has the meaning given by this section if the sale is to be completed using e-conveyancing, unless the Act expressly provides otherwise.

Example of another way to describe a settlement of the sale of land—
completion of the sale of the land

(2) Settlement, of the sale of land, occurs when the electronic workspace for the e-conveyance records that—

- (a) financial settlement occurs; or
- (b) if there is no financial settlement, the documents necessary to transfer title have been accepted for electronic lodgment by the registrar.

(3) In this section—

sale, of land, includes an exchange for value.

Section 58B of the PLA was added in 2014 to broaden the Act to accommodate electronic conveyancing in Queensland.

64.2. Issues with the section

There are no issues that have been identified with section 58B of the PLA.

64.3. Recommendation

No changes to section 58B are recommended at this time.

RECOMMENDATION 64. Section 58B should be retained.

65. Section 59 - Contracts for the sale of land etc. to be in writing

Section 59 of the PLA is considered together with sections 6, 10, 11 and 12. As discussed above at paragraph 12 the Centre recommends that sections 6, 10 to 12 and 59 be replaced with a new provision that addresses the issues that have been identified.¹³¹⁰

¹³¹⁰ This was presented as an option in Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) Sales of Land and Other Related Provisions*, 28, [3.4.3].

66. Section 60 – Sales of land by auction

66.1. Overview and purpose

60 Sales of land by auction

- (1) In the case of a sale of land by auction—
- (a) where the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the vendor—the vendor shall not be entitled to bid or to employ any person to bid at the sale, nor shall the auctioneer be entitled to take any bid from the vendor or any such person; and
 - (aa) any sale contravening paragraph (a) may be treated as fraudulent by the purchaser; and
 - (b) a sale may be notified in the conditions of sale to be subject to a reserved or upset price, and a right to bid may also be in the auction expressly reserved by or on behalf of the vendor; and
 - (c) where a right to bid is expressly reserved, but not otherwise—the vendor or any one person on the vendor's behalf may bid at the auction.
- (2) This section applies to sales effected after the commencement of this Act.

The purpose of section 60 is to ensure buyers at an auction are aware the seller may bid in the auction. If the seller wishes to bid at an auction the right must be reserved to the seller in the conditions of sale. This must be a separate reservation to any statement of a reserve price. If the right to bid is reserved the seller or anyone on their behalf may bid. More than one bid may be submitted.

If the right to bid is not reserved the seller is unable to bid and an auctioneer must not accept a bid from the seller. If the right to bid is not expressly reserved the auctioneer must not accept a bid from the seller and any sale in that case may be treated as fraudulent and avoided by the buyer.¹³¹¹

Section 60 has not been amended since its enactment and is based upon provisions of the *Sale of Land by Auction Act 1867* (UK).

66.2. Issues with the section

66.2.1. Section to be read with *Property Occupations Regulation 2014*

The operation of section 60 is supplemented by section 24 of the *Property Occupations Regulation 2014* (Qld), which also regulates the right of a seller to bid at an auction. Section 24 provides:

Bids by seller

- (1) This section applies in relation to a seller of property offered for sale by auction.
- (2) If the seller or seller's agent bids for the property when it is offered for sale, the auctioneer must disclose to the other bidders that the bid is made by the seller or seller's agent.
- (3) If the seller sets a reserve price for the property, the auctioneer must not accept a bid from the seller or seller's agent that is higher than the reserve price.

Section 24 imposes an obligation on the auctioneer to disclose a seller bid at the time it is made and must not accept a seller bid if the reserve price for the property has been reached. Section 24 does not require that the right to bid should be reserved within the conditions of sale, but makes no reference to section 60 of the PLA.

¹³¹¹ *Parfitt v Jepson* (1877) 46 LQJ 529.

66.2.2. Notification of a seller's right to bid in the PLA

A majority of other Australian jurisdictions also require the seller's right to bid at an auction to be reserved or notified to the buyer in the conditions of sale prior to the auction. The clear benefit of this type of provision is that a buyer is aware of the seller's intention to bid prior to the auction commencing. The buyer can therefore exercise a choice whether to participate in the auction at an early stage.

The consumer protection benefit of the notification is clear. This requirement is appropriately located in the *Property Occupations Act 2014* (Qld) or regulations.

66.3. Other jurisdictions

Similar provisions to section 60 of the PLA and section 24 of the *Property Occupations Regulation 2014* (Qld) exist in other jurisdictions.

An equivalent provision to section 60 of the PLA exists in New South Wales¹³¹² and the Northern Territory.¹³¹³ In both jurisdictions this provision is supplemented by statutory provisions governing dummy bidding at auctions and other conduct of auctioneers or real estate agents. In particular, in New South Wales the conditions of sale for residential property only allow the seller to make one bid.

In Western Australia, South Australia, Victoria, Tasmania and the Australian Capital Territory a seller is prohibited from bidding at an auction either by themselves or through an agent unless a number of conditions are fulfilled. In each case the conditions include notification of the right to bid in the conditions of sale or auction. These conditions are contained within equivalent legislation to the *Property Occupations Act 2014* (Qld) in each jurisdiction, except Victoria where it is located in the *Sale of Land Act 1962* (Vic). The right of a seller to bid once conditions have been fulfilled ranges from an unlimited number of times to only once.

A number of other conditions are common such as:

- a requirement to announce the seller's right to bid at the commencement of the auction;
- a requirement to identify the bid as the seller bid each time;
- a prohibition on the seller bidding once the reserve is achieved; and
- a requirement to disclose if the property was passed in on a seller's bid to buyers after the auction where representations about the final bid are made.

An overview of other common conditions is set out below.

¹³¹² *Conveyancing Act 1919* (NSW) s 65.

¹³¹³ *Law of Property Act* (NT) s 63.

Table 1: Common auction conditions

Jurisdiction	Dummy bidding prohibited	Notified in conditions of sale	Right to bid announced	Seller bid identified each time	Seller cannot bid once reserve achieved	Passed in on seller bid must be disclosed
QLD ¹³¹⁴		✓		✓ (unlimited bids)	✓	
NSW ¹³¹⁵	✓	✓ ¹³¹⁶	✓	✓ (only bid once)		
VIC ¹³¹⁷	✓	✓	✓	✓ (no limit)		✓
WA ¹³¹⁸	✓	✓ (number of bids specified)				
SA ¹³¹⁹		✓	✓	✓ (max 3 bids)	✓	✓
NT ¹³²⁰	✓	✓				
ACT ¹³²¹	✓	✓	✓	✓		✓
TAS ¹³²²	✓	✓	✓	✓		✓

¹³¹⁴ *Property Law Act 1974* (Qld) s 60 and *Property Occupations Regulation 2014* (Qld) s 24.

¹³¹⁵ *Conveyancing Act 1919* (NSW) s 65 and *Property Stock and Business Agents Act 2002* (NSW) s 66 and s 66A.

¹³¹⁶ If notified in conditions then *Property Stock and Business Agents Act 2002* (NSW) s 66 limits it to one bid by the auctioneer.

¹³¹⁷ *Sale of Land Act 1962* (Vic) ss 28, 41, 43.

¹³¹⁸ *Auction Sales Act 1973* (WA) s 29.

¹³¹⁹ *Land and Business (Sale and Conveyancing) Act 1994* (SA) ss 240, 24P.

¹³²⁰ *Law of Property Act* (NT) s 63 and *Auctioneers Act* (NT) s 15.

¹³²¹ *Civil Law (Sale of Residential Property) Act 2003* (ACT) ss 29, 30 & 33.

¹³²² *Property Agents and Land Transactions Act 2005* (Tas) s 40-42 & 47.

66.4. Recommendation

The consumer protection benefit of the notification is clear so the Centre recommends repealing section 60 from the PLA and inserting it in more appropriate legislation. This requirement is appropriately located in the *Property Occupations Act 2014* (Qld) or regulations.

No significant issues have been raised with the need or desirability of retaining an obligation on the auctioneer to disclose to buyers that the seller may bid at an auction. The only recommendation is to repeal the provision from the PLA and relocate it to the *Property Occupations Act 2014* (Qld).

RECOMMENDATION 65. Section 60 should be repealed on the basis that the same or similar provision is inserted in the *Property Occupations Act 2014*.

67. Section 61 – Conditions of sale of land

67.1. Overview and purpose

61 Conditions of sale of land

- (1) Under a contract for the sale of registered land the purchaser shall be entitled at the cost of the vendor –
- (a) to receive from the vendor sufficient particulars of title to enable the purchaser to prepare the appropriate instrument to give effect to the contract; and
 - (b) to receive from the vendor an abstract of any instrument, forming part of the vendor's title, in respect of which a caveat is entered upon the register; and
 - (c) to have the relevant certificate of title or other document of title lodged by the vendor in the land registry to enable the instrument to be registered; and
 - (d) to have any objection to the registration of the instrument removed by the vendor.
- (1A) However, as to any such objection which the purchaser ought to have raised on the particulars or abstract, or upon the investigation of the title, or which arises from the purchaser's own act, default, or omission, the purchaser shall not be entitled to have the same removed except at the purchaser's own cost.
- (2) Under any contract for the sale of any land there shall be implied a term that –
- (a) payment or tender of any money payable under the contract may be made by a financial institution cheque drawn on itself or a bank; and
 - (b) an obligation on the part of the vendor to execute and deliver a conveyance of the subject land, or instruments of title to the land, free of encumbrances shall be satisfied if the vendor will, upon completion of the contract, be able to and does in fact discharge any existing encumbrance out of the purchase money payable under the contract by the purchaser; and
 - (c) unless otherwise agreed by the parties, their solicitors or conveyancers, settlement of the contract must take place at the office of the land registry at which the document relating to the conveyance may be lodged or, if there are 2 or more such offices, the office that is nearest to the land.
- (3) Where in any contract for the sale of any land the date for payment of the purchase money or any part of the purchase moneys is to be ascertained by reference to a period of time expiring on a day which is a Saturday, a Sunday, or a public holiday, then, unless the contract designates such day as a Saturday, a Sunday, or by the name of the public holiday, completion shall take place –
- (a) on such other day as may be agreed by the parties, their solicitors or conveyancers; or
 - in default of such agreement –
 - (b) on the day, other than a Saturday, Sunday, or public holiday, next following the day on which the period of time so expired.
- (3A) However, if under subsection (2)(c) settlement of the contract must take place at an office of the land registry, but the office is not open for business on the day (the **relevant day**) provided for completion under subsection (3), the completion must take place –
- (a) on a day, on which the office is open for business, agreed by the parties, their solicitors or conveyancers; or
 - (b) if there is no agreement under paragraph (a) – on the next day the office is open for business after the relevant day.
- (4) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract, and to the provisions contained in the contract.

Section 61 of the PLA sets out a number of statutory obligations on a seller of land and confers certain rights upon the buyer of the relevant land which are implied in the contract for sale. The relevant terms set out in section 61 are subject to the express terms in the contract and will only be applicable

in so far as the express contractual terms and section 61 are not inconsistent.¹³²³ An explanation of the operation of each of the subsections, where relevant, is discussed in below.

67.2. Issues with the section

The discussion below considers some of the issues in relation to the components of section 61 of the PLA that have been highlighted in Queensland case law and commentary on the provision.

67.2.1. Section 61(1)(a) – ‘sufficient particulars of title to enable the purchaser to prepare the appropriate instrument’

This subsection requires the seller to provide sufficient particulars of title to enable a buyer to prepare the transfer document. The provision was adopted from section 57(1) of the *Conveyancing Act 1919* (NSW) and is limited in scope to registered land only.¹³²⁴ The QLRC justified its inclusion on the following basis:

In Queensland contracts for the sale of land are usually prepared by real estate agents and the particulars of title which appear therein are not always accurate. Consequently we think that the statutory implication by sub-cl.(1)(a) of a right to obtain particulars of title necessary for the preparation of the instrument of transfer represents a useful addition to the powers of the purchaser.¹³²⁵

Real estate agents now have access to instant electronic title searches and there are contractual remedies for mistakes in the property description. Further, a buyer’s lawyer as part of standard legal practice would undertake a title search before preparing transfer documents and would not simply rely upon the description contained in the contract for sale. For these reasons, the section has limited utility within the current conveyancing environment.

67.2.2. Section 61(1)(b) – ‘abstract of any instrument, forming part of the vendor’s title’ represented by a caveat

The underlying object of this subsection is to oblige the seller to produce the relevant instrument backing a caveat which may or may not have an effect on the title depending on the assessment as to priority. The word ‘instrument’ is defined in schedule 6 of the PLA to include a ‘deed, will and Act.’¹³²⁶ The provision is briefly mentioned by the QLRC as being directed to ‘matters which commonly form the subject of requisitions on title and inquiries in conveyancing transactions in Queensland.’¹³²⁷ The language in the section is not entirely appropriate, particularly the use of the qualifying words ‘forming part of the vendor’s title’. This is because a claim under an instrument supported by a caveat would

¹³²³ *Property Law Act 1974* (Qld) s 61(4).

¹³²⁴ 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) 50.

¹³²⁵ 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) 50.

¹³²⁶ In turn ‘deed’ is defined in schedule 6 of the *Property Law Act 1974* (Qld) to include ‘an instrument having under this or any other Act the effect of a deed.’

¹³²⁷ 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) 50.

not at that stage form part of the seller's title. This part of the section should be amended to better reflect practice.

67.2.3. Section 61(1)(c) – to have relevant certificate of title lodged by the vendor to enable the transfer to be registered

Subsection 61(1)(c) is directed towards the sale of part of a lot which is sold subject to subdivision and where a new title would issue for the balance area. The QLRC indicated that the subsection would 'prove useful in cases where, for example, the interest sold is less extensive than the full freehold estate in the land.'¹³²⁸ The section also refers to 'or other document of title' which may cover an instrument that is required to be produced for registration prior to the transfer in order to allow the actual registration to occur.

The obligation under section 61(1)(c) is explicit in the Real Estate institute of Queensland (REIQ) standard contract for sale as the seller would have to produce a title for the buyer to be registered where only part of the land is to be sold.¹³²⁹ Even if the standard form REIQ contract for sale is not used, it is standard practice for a 'further assurance' provision to be included as an express term in land sale contracts. The *Land Sales Act 1984* (Qld) also requires that the seller of a proposed lot settle the contract for sale of the lot not later than 18 months after the buyer enters into the contract for sale. The contract cannot be settled unless the relevant certificate of title is issued.¹³³⁰ The section therefore has no utility.

67.2.4. Section 61(1)(d) – 'to have any objection to the registration of the instrument removed by the vendor'

This subsection provides the seller with the ability to object to the conveyance. This objection must then be met by the seller. The scope of the section is quite narrow as significant objections to the registration of any instrument (which would have to be the transfer to the buyer) are likely to arise only in limited circumstances including where:

- there is a caveat over the title;
- the seller is not the registered owner of the property.

If the seller does not remedy the objection, he or she will be in breach of the contract and the usual contractual remedies will be available to the buyer. A seller under a contract for sale of land promises to transfer a title to the buyer in any event. Despite this, the provision is still relevant as it provides an added layer of protection for the buyer and makes it clear that any removal of an objection to registration of the instrument is at the cost of the seller.

¹³²⁸ 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) 50.

¹³²⁹ Clause 10.7 of the REIQ Standard Contract for Houses and Residential Land (11th ed) provides: 'Further Acts: If requested by the other party, each party must, at its own expense, do everything reasonably necessary to give effect to this contract.' See also clause 5.3(1)(a) where the seller must provide to the buyer at settlement 'any instrument of title for the Land required to register the transfer to the Buyer.'

¹³³⁰ This obligation is found in section 14 of the *Land Sales Act 1984* (Qld). Amendments to the *Land Sales Act 1984* (Qld) commenced on 1 December 2014 and were made under the *Land Sales and Other Legislation Amendment Act 2014* (Qld), Pt 7.

67.2.5. Section 61(1A) – ‘objection which the purchaser ought to have raised on the particulars....the purchaser shall not be entitled to have the same removed except at the purchaser’s own cost’

Subsection 61(1A) was more relevant when requisitions on title were delivered and the buyer had a specific time to raise an objection. However, it is not limited to this broader application. The provision applies to any objections found on the title. Failure on the part of the buyer to raise an objection meant that the buyer was deemed to have accepted the title as shown. A buyer now has until completion to raise objections. If the buyer does not raise objections and settles then he or she is subject to the relevant defect and would have to pay for the removal of that defect.

Section 61(1A) was introduced at the time of ‘old system land’ and there was a wide use of requisitions on title under that old system. Requisitions on title were removed in Queensland in 1994 in the standard REIQ contract for the sale of land.

Under section 69 of the PLA, any objection to title can be raised up until the time of settlement. If a purchaser fails to raise an objection to title and settles a contract without knowing of a defect, the act of settlement is an acceptance of the title contracted for and no further objections can be raised after settlement.

If an objection to title was raised before settlement and there was some uncertainty as to whether or not it is substantial or material, then under the REIQ standard contract for the sale of land, the purchaser would give written notice to the seller of the intention to claim compensation on the possibility they may be forced to settle the contract without the defect being removed on the grounds that it is not material.

67.2.6. Section 61(2)(a) – payment or tender by bank cheque or financial institution cheque

This subsection was inserted to circumvent the technical objection which may have been raised by a buyer that true tender under the contract should be in cash not a bank cheque. Payment or tender by cash was seen to be impractical. The REIQ standard form contract now contains a provision allowing payment by bank cheque.¹³³¹ There is still benefit in retaining the provision for purposes of clarity.

The subsection will not apply to electronic conveyances as all payment or tender will occur electronically. This should be expressly provided for in the subsection in order to avoid any doubt about the scope of the subsection.

67.2.7. Section 61(2)(b) – ‘free of encumbrances’

This subsection was included in the PLA for the purpose of conferring ‘validity on the present convenient practice’ of the seller giving a title free of encumbrance by discharging any encumbrance in existence out of the purchase money on settlement.¹³³² Prior to the introduction of this provision

¹³³¹ See REIQ Contract for Houses and Residential Land (11th ed) clause 2.5. The terms ‘bank’ and ‘financial institution’ are defined in clause 1.1 of the Contract.

¹³³² 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) 50.

the validity of the practice was not clear as the obligation of the seller was to exchange a title free from encumbrance in exchange for the purchase money and the buyer, contractually, was able to insist on a clear title before paying the purchase money.¹³³³ For example, a registered mortgage on the title at settlement constituted an encumbrance, despite the buyer being handed the release of mortgage at settlement. However, handing over a release of mortgage at settlement is now accepted conveyancing practice.

67.2.8. Section 61(2)(c) – place of settlement

The QLRC noted that this subsection was ‘designed to avoid disputes which sometimes arise as to the proper place for settlement, but leaves it open to the parties or their solicitors to select a place which is suited to their convenience.’¹³³⁴ The REIQ standard form contract for sale contains a provision which applies where the parties do not agree on where settlement is to occur. In that situation, settlement should take place at the office of a solicitor or the financial institution nominated by the seller or if the seller does not nominate, at the land registry office in or near the place for settlement.¹³³⁵ Invariably, the parties usually agree on a place of settlement and the section is only relevant where the parties do not.

In an electronic conveyancing environment, the concept of ‘place of settlement’ is irrelevant. The subsection may need a slight change to expressly exclude electronic conveyancing.

The operation of this subsection is qualified by subsection 61(3A) which is discussed below.

67.2.9. Section 61(3) – time of settlement

Subsection 61(3) is directed at the situation where the date for settlement falls on a Saturday, Sunday or public holiday. Although this scenario is unlikely in practice, the subsection enables the settlement date to:

- be negotiated further; or
- where agreement is not reached, occur on the next day following which is not a Saturday, Sunday or public holiday.

The REIQ standard contract for sale includes a clause that covers the postponement of anything that is required to be done on a day that is not a ‘Business Day’ to the next Business Day.¹³³⁶ The clause is broader than subsection 61(3) as it covers settlement and also dates for finance and inspection. This subsection, along with subsection 61(3A) could be better expressed to improve the clarity of the provisions and to allow for contingencies such as natural disasters and the like that prevent parties from attending settlement.

¹³³³ 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).

¹³³⁴ 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) 50.

¹³³⁵ REIQ Contract for Houses and Residential Land (11th ed) clause 5.2.

¹³³⁶ REIQ Contract for Houses and Residential Land (11th ed) clause 10.5

67.2.10. Section 61(3A) – alternative place/time of settlement

Subsection 61(3A) was added to the PLA in 2005.¹³³⁷ The section provides for an alternative place of settlement where the land registry office is nominated in the contract but the office is not open for business on the specified settlement date. This situation may arise, for example, where there is a 'show day' holiday in the locality of the land registry. In those circumstances, the subsection enables settlement to occur:

- on a day on which the land registry office is open for business agreed by the parties; or
- where there is no agreement, on the next day the office is open for business.

As indicated above, the subsection could be expressed in a clearer way. The section could also be amended to take into account natural disasters and other contingencies that prevent parties from attending settlement.

67.2.11. Section 61(4) – application of section

This subsection provides that the provisions of section 61 can be overridden by express terms in the contract. There is no reason to alter this position in relation to section 61.

67.3. Recommendation

It is clear from the discussion above that there are some changes required in relation to section 61 of the PLA. Submissions were received from the QLS. Other than the repeal of section 60(1)(c), no other changes were supported. The amendments recommended by the Centre are set out below.

67.3.1. Section 61(1)(a)

The Centre recommends repealing section 61(1)(a). As set out above, real estate agents and solicitors now have access to instant electronic title searches and there are contractual remedies for mistakes in the property description. Further, a buyer's solicitor as part of standard legal practice would undertake a title search before preparing transfer documents and would not simply rely upon the description contained in the contract for sale. For these reasons, the section has limited utility within the current conveyancing environment.

If there was a material misdescription of the property, the position at common law is not altered – the rule in *Flight v Booth*¹³³⁸ allows a party to terminate a contract which contains a misdescription so substantial that the party has ended up with something that is materially different to what that party contracted for. If the subject matter of the contract was so different to what was originally contracted for, it can reasonably be supposed that but for the misdescription, the party would never have entered into the contract. Further, where the subject matter of the contract is not properly stated, section 59 of the PLA (and the redrafted version proposed by the Centre at paragraph 12.4) will mean that the contract is not enforceable.

¹³³⁷ The section was inserted by the *Natural Resources and Other Legislation Amendment Act 2005* (Qld) s 126.

¹³³⁸ (1834) 131 ER 1160.

Further, the Centre has recommended the implementation of a seller disclosure regime.¹³³⁹ This regime will require the seller to provide to the buyer a current title search and a copy of the registered plan of the lot that is the subject of the contract. The buyer would then be able to verify the details of the lot by a search of the Register.

Given the accessibility of title information, and the fact that there appears to be no case law where this section has been considered, the section is of no real practical effect.

67.3.2. Section 61(1)(b)

The Centre recommends retaining section 61(1)(b) but modifying the language slightly. As stated above, the language in the section is not entirely appropriate, particularly the use of the qualifying words ‘forming part of the vendor’s title’. The section applies to caveats that are supported by a charge. A claim under an instrument supported by a caveat would not at that stage form ‘part of’ the seller’s title. This part of the section should be amended to better reflect practice and to modernise the language. The Centre recommends amending the section by removing the words ‘forming part of the vendor’s title’ and replacing them with words to the effect of ‘which are within the seller’s possession.’

67.3.3. Section 61(1)(c)

The Centre recommends repealing section 61(1)(c). This recommendation has the support of QLS. As set out above, the section has no utility where the obligation under section 61(1)(c) is explicit in the REIQ standard contract for sale as the seller would have to produce a title for the buyer to be registered where only part of the land is to be sold.¹³⁴⁰

Further, as discussed above, in circumstances where the standard form REIQ contract for sale is not used, it is standard practice for a ‘further assurance’ provision to be included as an express term in land sale contracts. The *Land Sales Act 1984* (Qld) also requires that the seller of a proposed lot settle the contract for sale of the lot not later than 18 months after the buyer enters into the contract for sale. The contract cannot be settled unless the relevant certificate of title is issued.¹³⁴¹

Finally, the Centre is aware that it is the intention of the Registrar of Titles to abolish paper titles altogether in the near future. In that event, the section has no utility at all.

67.3.4. Section 61(1)(d)

The Centre recommends retaining section 61(1)(d). The provision is still relevant as it provides an added layer of protection for the buyer and makes it clear that any removal of an objection to registration of the instrument is at the cost of the seller. Further, the provision does not merge on

¹³³⁹ Commercial and Property Law Research Centre, *Final Report: Seller Disclosure in Queensland*, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/536748/final-report-seller-disclosure-in-queensland.pdf.

¹³⁴⁰ Clause 10.7 of the REIQ Standard Contract for Houses and Residential Land (11th ed) provides: ‘Further Acts: If requested by the other party, each party must, at its own expense, do everything reasonably necessary to give effect to this contract.’ See also clause 5.3(1)(a) where the seller must provide to the buyer at settlement ‘any instrument of title for the Land required to register the transfer to the Buyer.’

¹³⁴¹ This obligation is found in section 14 of the *Land Sales Act 1984* (Qld). Amendments to the *Land Sales Act 1984* (Qld) commenced on 1 December 2014 and were made under the *Land Sales and Other Legislation Amendment Act 2014* (Qld), Pt 7.

settlement, and would operate post-settlement and prior to registration to oblige the seller to bear the costs of the removal of any objection.

67.3.5. Section 61(1A)

Section 61(1A) of the PLA is unnecessary and adds no additional protection to the buyer in respect of registered land than that provided in the contract, as set out above at paragraph 67.2.5.

The common law position with respect to material or substantial defects remains the same.

67.3.6. Section 61(2)(a)

The Centre recommends retaining section 61(2)(a) on the basis that the parties can contract out of the operation of the provision. Further, the REIQ standard contract contracts out of the provision. The Centre further recommends amending the section slightly to confirm that electronic conveyancing is not subject to the operation of the provision.

67.3.7. Section 61(2)(b)

The Centre recommends retaining section 61(2)(b) to confirm the validity of the current practice of the seller giving a title free of encumbrance by discharging any encumbrance in existence out of the purchase money on settlement.

67.3.8. Section 61(2)(c)

The Centre recommends retaining the effect of section 61(2)(c) as it acts to resolve disputes where the parties cannot agree. The Centre further recommends amending the section slightly to confirm that electronic conveyancing is not subject to the operation of the provision.

67.3.9. Section 61(3) and section 61(3A)

The Centre is of the view that the effect of these two provisions can be amended to provide clarity about the time of settlement where the contract provides for settlement on a non-business day, and where parties are physically unable to attend settlement due to a natural disaster or similar.

Making the proposed amendments will clarify the position of parties where there is a local public holiday, such as a 'show day', and for events such as the 2011 floods in Brisbane and other areas which left parties physically unable to attend settlement.

With respect to provisions about non-business days for settlement, the Centre recommends amending section 61(3) to the extent that it clarifies that the public holiday in question must be a public holiday in the place for settlement. This will account for a situation where, for example, the seller is in Caboolture and the buyer is in Brisbane and the place for settlement is Brisbane. The seller will not be able to rely on a Caboolture 'show day' to have the date for settlement moved to the next business day. Settlement will take place in Brisbane because in the place for settlement it is not a public holiday. If, however, the place for settlement is Caboolture, then by operation of the Act, the day for settlement is the next business day in Caboolture. The parties can 'contract out' of the operation of this provision by agreement.

The proposed drafting below relies on the definition of 'business day' as set out in the *Acts Interpretation Act 1954* (Qld) schedule 1:

business day means a day that is not –

- (a) a Saturday or Sunday; or
- (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

The proposed drafting also uses simpler language and incorporates the effect of both the current section 61(3) and 61(3A). This is in line with the overarching principles that inform these recommendations.

With respect to a party's inability to attend the place for settlement, the proposed drafting incorporates contingencies for circumstances where parties are prevented from attending settlement because of natural disasters or other similar events. Amendments that clarify the parties' positions and provide clear and simple language are in line with the overarching principles that inform these recommendations. The proposed section relies on a definition of 'business day' different to the definition as set out in the *Acts Interpretation Act 1954* (Qld) schedule 1. The definition used for the proposed section is the same as the one proposed for new provisions relating to inoperative computer systems and electronic conveyancing (discussed at paragraph 80). The rationale for this is that, by operation of the sections, the settlement date could inadvertently fall on the days between Christmas and New Year. It is standard conveyancing practice in Queensland to exclude the business days between Christmas and New Year and this should be reflected in the PLA in the context of these sections.

The proposed draft provisions below are modelled on section 70A of the PLA which provides for a procedure where there is a failure of the Titles Office computer system. The Centre is of the view that the recommended amendments are necessary because currently there is no provision in the PLA for the suspension on time being of the essence. Presently, parties who do not wish to complete a contract may take advantage of a natural disaster to terminate a contract if the other party is unable to attend settlement.

Similarly, parties who intend to complete a contract but are physically unable to attend settlement will be in breach of the contract and risk the usual consequences of same.

The Centre recommends that these provisions that relate specifically to time and the suspension of same, are best located with section 62 of the PLA which confirms that time is not of the essence unless otherwise stipulated in the contract.

67.3.10. Section 61(4)

The Centre recommends no change to section 61(4). This allows parties to 'contract out' of the operation of the section and the Centre is of the view that this should remain the position.

RECOMMENDATION 66. The Centre makes the following recommendations with respect to section 61:

- repeal section 61(1)(a);
- retain 61(1)(b) but modify the language slightly by removing the words ‘forming part of the vendor’s title’ and replacing them with words to the effect of ‘which is within the seller’s possession’;
- repeal section 61(1)(c);
- retain section 61(1)(d);
- repeal section 61(1A);
- amend section 61(2)(a) to make it clear that the subsection does not apply to electronic conveyancing;
- retain section 61(2)(b);
- amend section 61(2)(c) to make it clear that the subsection does not apply to electronic conveyancing;
- amend sections 61(3) and 61(3A) in terms of the proposed draft provided below;
- retain section 61(4);
- bring provisions about time (i.e. section 61(3), 61(3A) and 70A) together under section 62; and
- add a section that deals with the situation where a party is unable to attend a place for settlement because of a natural disaster-type event in terms of the proposed draft provided below.

For example, section 61(3) and 61(3A) could be redrafted in the following manner:

- (3) Where in any contract for the sale of any land the date for settlement is a day which not a business day in the place for settlement in the contract or as determined by section 61(2)(c), unless the contract designates such day as a Saturday, a Sunday, or by the name of the public holiday, settlement shall take place:
- (a) on a day agreed by the parties or their solicitors; or where no such agreement is made, then
 - (b) on the next business day in the place for settlement.

For example, a section that deals with the situation where a party is unable to attend a place for settlement because of a natural disaster-type event could be drafted in the following terms:

Section [61A] Adverse event preventing attendance at place of settlement

- (1) In this section –
- (a) a seller or a buyer includes their solicitors and agents;
 - (b) **adverse event** means an event that causes a serious disruption to a community and includes, but is not limited to:
 - (i) cyclone;
 - (ii) seismic event;
 - (iii) flood;
 - (iv) storm;
 - (v) storm tide;
 - (vi) tsunami;
 - (vii) tornado;
 - (viii) fire;
 - (ix) landslide;
 - (x) civil commotion;

- (xi) act of terrorism;
 - (xii) riot or public disturbance;
 - (xiii) war or war-like activity whether or not war is declared;
 - (xiv) explosion;
 - (xv) sudden impact of objects such as aircraft or spacecraft.
- (c) **disruption period** means the time during which the seller or the buyer is prevented from physically attending settlement as a result of an adverse event.
- (d) **business day** means a day other than:
- (i) a Saturday or Sunday;
 - (ii) a public holiday; or
 - (iii) a day in the period 27 to 31 December.
- (2) This section applies to a contract of sale if:
- (a) time is of the essence; and
 - (b) the buyer or the seller, without fault on their part, are unable as a result of an adverse event, to attend settlement on the day and time determined in accordance with the contract or under this Act.
- (3) Time ceases to be of the essence of the contract.
- (4) For the disruption period a failure by the buyer or the seller to attend settlement in the place for settlement in the contract or as determined by section 61(2)(c), at the time for settlement as determined in the contract or otherwise agreed by the parties, will not be a breach of the contract.
- (5) The party that is unable to attend the time and place for settlement as a result of the adverse event must:
- (a) as soon as is practical notify the other party to the contract by any means about the adverse event and how it prevents them from attending settlement at the time and place for settlement;
 - (b) take reasonable steps to mitigate the effect of the adverse event with respect to attending the time and place for settlement;
 - (c) as soon as is practical give a written notice to the other party advising that the disruption period is over and include in that notice a specific time and date for settlement being not less than 5 business days and not more than 10 business days from the date of service of that notice.
- (6) Upon service of the notice described in [61A](5)(c) time is again of the essence.

68. Section 62 – Stipulations not of the essence of the contract

68.1. Overview and purpose

62 Stipulations not of the essence of the contract

Stipulations in contracts, as to time or otherwise, which under rules of equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law under rules of equity.

The section is a re-enactment of the equivalent provision in the *Judicature Act 1876* (Qld) regarding the ‘prevalence of the equitable rules regarding the essentiality of stipulations, principally as to time, in contracts.’¹³⁴² At common law the time fixed for the performance of a contract was of the essence and therefore an essential part of the contract. If performance did not occur at that time, the party at fault was in breach of the contract and could not enforce the contract.¹³⁴³ However, in equity, a stipulation as to time was not dealt with as strictly and was not regarded as essential.¹³⁴⁴ Equity would grant a party a reasonable time to perform and would grant specific performance, provided that treating the time stipulation as not essential would not result in an injustice to one of the parties so as to ‘render it inequitable to treat the stipulation as a non-essential term.’¹³⁴⁵ Where specific performance was ordered in favour of the party in breach of the contract, the court would also require that party to pay compensation.¹³⁴⁶

The effect of section 62 is to make the rule in equity applicable to proceedings at law as well.¹³⁴⁷ The extension of the equitable doctrine in this way does not mean that the rules of the Equity Court as to time are to be applied generally. The doctrine will only apply in the cases, ‘for the purposes, and under the circumstances, in which equity would have applied them before the Act.’¹³⁴⁸

The section applies to both registered and old system land.

¹³⁴² 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) 51.

¹³⁴³ G.P Stuckey, *The Conveyancing Act, 1919-1969* (Lawbook Company Limited, 2nd ed, 1970) [118]; Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [30335.1].

¹³⁴⁴ G.P Stuckey, *The Conveyancing Act, 1919-1969* (Lawbook Company Limited, 2nd ed, 1970) [118].

¹³⁴⁵ G P Stuckey, *The Conveyancing Act, 1919-1969* (Lawbook Company Limited, 2nd ed, 1970) [118].

¹³⁴⁶ G P Stuckey, *The Conveyancing Act, 1919-1969* (Lawbook Company Limited, 2nd ed, 1970) [118]. For a further discussion of the operation of the New South Wales equivalent provision in section 13 of the *Conveyancing Act 1919* (NSW) see Editor, ‘Contracts for the Sale of Land – Stipulations as to Time’ (1965) 39 *Australian Law Journal* 63 – 64.

¹³⁴⁷ G P Stuckey, *The Conveyancing Act, 1919-1969* (Lawbook Company Limited, 2nd ed, 1970) [118] and Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [30335.1].

¹³⁴⁸ G.P Stuckey, *The Conveyancing Act, 1919-1969* (Lawbook Company Limited, 2nd ed, 1970) [118]. Mason J in the High Court decision of *Louinder v Leis* (1982) 41 ALR 187, 198-199 discusses the operation of the New South Wales provision. Mason J indicated that ‘Equity departed from the common law in insisting that a breach of a stipulation as to time only entitled the innocent party to rescind where time was of the essence in the contract. It was otherwise at common law.’

68.2. Issues with the section

Section 62 of the PLA makes the equitable rule regarding stipulations in contracts, specifically in relation to time, applicable to proceedings at law. The operation of the section, historically, has not raised any significant issues in Queensland.

While there is no issue with the operation of the section, the Centre is of the view that the provisions regarding time can all be brought together. Specifically, section 61(3) and section 61(3A) would be more appropriately placed with section 62. Section 70A, which also relates to time, should also be brought together with section 62. All of these provisions create a statutory right for a party to a contract to delay settlement under certain circumstances without the right to termination or compensation becoming available to the other party.

68.3. Other jurisdictions

The other Australian jurisdictions, apart from Tasmania, have a provision equivalent to section 62 of the PLA.¹³⁴⁹

68.4. Recommendation

The Centre recommends that section 62 of the PLA be retained. The provision raises no significant problems. Practitioners are familiar with the provision and the standard REIQ contract alters the position under the PLA to make time of the essence in any event.

Bringing the provisions that relate to time together will make the PLA clearer and simpler to understand and is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 67. Section 62 should be retained. The provisions that relate to time should be brought together within the new PLA, i.e. sections 61(3), 61(3A) and 70A.

¹³⁴⁹ *Conveyancing Act 1919* (NSW) s 13; *Property Law Act 1952* (Vic) s 41; *Law of Property Act 1936* (SA) s 16; *Property Law Act* (NT) s 65; *Property Law Act 1969* (WA) s 21; *Civil Law (Property) Act 2006* (ACT) s 501.

69. Section 63 – Application of insurance money on completion of a sale or exchange

69.1. Overview and purpose

63 Application of insurance money on completion of a sale or exchange

- (1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of, and, on completion of the sale or exchange or so soon afterwards as the same shall be received by the vendor, paid –
 - (a) to any person entitled to the money because of an encumbrance over or in respect of the land; and
 - (b) as to any balance remaining, to the purchaser.
- (2) For the purpose of this section, cover provided by such a policy maintained by the vendor extends until the date of completion, and money does not cease to become payable to the vendor merely because the risk has passed to the purchaser.
- (3) This section shall apply only to contracts made after the commencement of this Act, and shall have effect subject to –
 - (a) any stipulation to the contrary contained in the contract; or
 - (b) the payment by the purchaser of the proportionate part of the premium from the date of the contract.
- (4) This section shall apply to a sale or exchange by an order of court, as if –
 - (a) for references to the ‘vendor’ there were substituted references to the ‘person bound by the order’; and
 - (b) for the reference to the completion of the contract there were substituted a reference to the payment of the purchase or equality money (if any) into court; and
 - (c) for reference to the date of the contract there were substituted a reference to the time when the contract became binding.

Under general law principles, the effect of a contract for the sale of land is that the risk of physical damage or destruction to the property passes to the buyer, unless the parties expressly agree otherwise.¹³⁵⁰ As a consequence, where the premises are destroyed or damaged between the date of the contract and settlement of the transaction the buyer bears the burden of the resulting loss. It is irrelevant whether the seller has current insurance over the property as the buyer is not entitled to the benefit of the seller’s insurance policy.¹³⁵¹

Section 63 of the PLA is intended to modify the common law position in relation to the disposition of proceeds of any insurance which the seller receives prior to completion of the contract for sale.¹³⁵² The section operates in the following way:

- where after contract insurance money becomes payable under any policy maintained by the seller in respect of any damage to (or destruction of) property included in the contract, that money will upon completion be held by the seller on behalf of (or paid on completion to) any

¹³⁵⁰ New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984).

¹³⁵¹ See *Rayner v Preston* (1881) 18 ChD 1.

¹³⁵² Sharon Christensen and WD Duncan ‘Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land’ (2012) 2 *Property Law Review* 3, 17.

person entitled to the money because of an encumbrance, and any balance remaining to the buyer;¹³⁵³

- the cover provided by the policy of insurance which is maintained by the seller extends until the completion date and the money does not cease to become payable to the seller merely because the risk has passed to the buyer;¹³⁵⁴
- the section has effect subject to:
 - any stipulation to the contrary in the contract; or
 - the payment by the buyer of the proportionate part of the premium from the date of the contract.¹³⁵⁵

The QLRC when considering insurance in conveyancing transactions looked at the approach in the United Kingdom in the form of section 47 of the *Law of Property Act 1925* (UK) as a possible precedent provision. The QLRC recommended the adoption of section 47 with some differences including that the section specifically provide that the insurer is still liable even though risk of the property has passed to the buyer¹³⁵⁶ and the section does not require the consent of the seller's insurer.¹³⁵⁷

Clearly, where the buyer has his or her own insurance over the property, the potential financial loss arising as a consequence of damage or destruction to the property is not an issue. Although in Queensland it is standard practice for a buyer to hold insurance over the property the subject of the sale contract from the time the contract is entered into, it is not a legal requirement and the situation could arise where a buyer is uninsured and suffers significant financial loss as a result of damage to, or destruction of, the relevant property.

69.2. Issues with the section

The discussion below considers some of the issues in relation to section 63 of the PLA that have been highlighted in Queensland case law and commentary on the provision.

69.2.1. Section 63 only applies if the seller has insurance

An obvious initial limitation of section 63 of the PLA is that it has no application if the seller does not have insurance. Whether or not a seller has adequate insurance in relation to a property is a matter outside the control of the buyer. A seller is not obliged to maintain insurance before or after the signing of a contract for sale. Further, the 'damage or destruction' of the property referred to in

¹³⁵³ *Property Law Act 1974* (Qld) s 63(1).

¹³⁵⁴ *Property Law Act 1974* (Qld) s 63(2).

¹³⁵⁵ *Property Law Act 1974* (Qld) s 63(3).

¹³⁵⁶ 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); New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984), [3.8]. The New South Wales Law Reform Commission noted that when making this change, the QLRC was 'concerned that the insurer may escape liability under the policy by showing that the risk had passed to the purchaser':[3.9]. However, the New South Wales Law Reform Commission did not think the provision was necessary as the mere passing of risk to the purchaser is not a justification for the seller's insurer refusing to pay a claim under the seller's policy: [3.9].

¹³⁵⁷ 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); New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.8]. The UK provision in section 47 of the *Law of Property Act 1925* required the consent of the insurer.

section 63(1) will be confined to damage or destruction by causes which are insured against under the seller's insurance policy.¹³⁵⁸

69.2.2. Buyers in Queensland generally take out their own insurance

In Queensland the common law position applies and risk passes to the buyer when a contract of sale is executed, unless the contract provides otherwise. As a result, the general practice in Queensland is for buyers to obtain their own insurance in relation to their interest in the relevant property. The utility of section 63 of the PLA arises in the situation where the buyer is uninsured. There have been limited cases in Queensland relying on section 63 of the PLA which, arguably, suggests that the issue sought to be addressed by the provision does not arise in practice very often.¹³⁵⁹

69.2.3. Section will not apply if there is a stipulation in the contract to the contrary or the payment by the buyer of the proportionate part of the insurance premium etc.

The application of section 63 of the PLA is subject to:

- a stipulation in the contract to the contrary; or
- the payment by the buyer of the proportionate part of the premium from the date of contract.

Clearly where the contract for sale stipulates that the section does not apply, then section 63 is obsolete. The purpose underpinning the additional qualification regarding the buyer's contribution to the insurance is unclear, as is the actual effect of the provision. For example:

- is the buyer required to pay the premium to the seller or the insurance company?;
- is it sufficient for a buyer to make a notional payment by adjustment of the purchase price on settlement or should it be paid at the time of contract?¹³⁶⁰

69.2.4. Section 50 of the *Insurance Contracts Act 1984 (Cth)* - an alternative to section 63 of the PLA?

Section 50 of the ICA applies where the risk of loss of a building passes to the buyer under a contract of sale. Where loss occurs in relation to the building the buyer is deemed to be the insured party and able to claim upon the seller's insurance. Commentators have noted that:

The object of the section is to keep the seller's insurance alive pending the transfer of possession from the seller to the buyer, which would normally occur at completion. The section presumes that the right to the proceeds of the insurance remain alive notwithstanding that the seller has been paid the purchase price and suffered no loss.¹³⁶¹

Although the effect of section 50 of the ICA deems the buyer to be the insured party, some limitations to the application of the provision include:

¹³⁵⁸ H Weld, John Peter Thomas and Allan James Chay (eds), *Queensland Conveyancing Law Commentary*, CCH Australia Ltd [6.865].

¹³⁵⁹ See *State Government Insurance Office (Queensland)* [1984] 2 Qd R 441 and *Kern Corporation v Walter Reid Trading Pty Ltd (No 1)* (1986) 4 ANZ Ins Cas 60-690.

¹³⁶⁰ H Weld, John Peter Thomas and Allan James Chay (eds), *Queensland Conveyancing Law Commentary*, CCH Australia Ltd [6.865].

¹³⁶¹ Sharon Christensen and WD Duncan 'Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land' (2012) 2 *Property Law Review* 3, 17.

- it is only effective if the seller has valid insurance and is not under insured;
- the buyer is subject to the same defences as the insurer has against the seller such as, material non-disclosure or misstatement when the insurance was effected;
- the loss of the seller's right to indemnity upon receipt of purchase money by the seller is not directly addressed;
- the benefit of the section ceases at whichever time specified in section 50(1)(d) to (g) is the earliest (e.g. when the sale or assignment is completed).¹³⁶²

The section will provide assistance to some purchasers but may not cover the field completely because of the limitations set out above.

69.2.5. Applies only to events within a limited time period

The right in section 63 of the PLA only applies to damage or destruction which occurs within a limited time period – that is, the damage to, or destruction of, the property must occur between contract and completion.¹³⁶³ Further, the rights under the section which benefit the purchaser relate only to money paid to the buyer under the insurance policy before completion.¹³⁶⁴ This is an event which is very unlikely to occur in practice.

69.2.6. Section not available where seller receives purchase money and therefore suffers no loss upon completion

Section 63 is also potentially limited in its application where the seller has not suffered any loss. This situation will arise where the seller is paid the purchase price or has an enforceable contract for sale. In that situation, any contract of insurance held by the seller will lapse.¹³⁶⁵ This in turn means that the section is obsolete. In the High Court decision of *Ziel Nominees Pty Ltd v VACC Insurance Co Ltd*,¹³⁶⁶ the court held that a buyer is still obligated to pay the full purchase price, irrespective of whether the seller has made or is entitled to make an insurance claim in relation to damage to the property. A contract of insurance is a contract of indemnity which means that a seller who receives the full purchase price has not suffered any loss from the damage to the property.¹³⁶⁷

Commentary suggests that the wording in section 63(2) of the PLA is not 'strong' enough to overcome this problem.¹³⁶⁸ Both the Queensland and New South Wales Law Reform Commissions have

¹³⁶² H Weld, John Peter Thomas and Allan James Chay (eds), *Queensland Conveyancing Law Commentary*, CCH Australia Ltd [6.845].

¹³⁶³ Sharon Christensen and WD Duncan 'Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land' (2012) 2 *Property Law Review* 3, 17 referring to *Ex parte State Government Insurance Office (Queensland)*(ex parte) [1984] 2 Qd R 441, 444.

¹³⁶⁴ Sharon Christensen and WD Duncan 'Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land' (2012) 2 *Property Law Review* 3, 17. See also *Ex parte State Government Insurance Office (Queensland)* [1984] 2 Qd R 441, 445.

¹³⁶⁵ Sharon Christensen and WD Duncan 'Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land' (2012) 2 *Property Law Review* 3, 17.

¹³⁶⁶ (1975) 7 ALR 667.

¹³⁶⁷ New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.4].

¹³⁶⁸ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 325 [5.4.4] referring to *Ziel Nominees Pty Ltd v VACC Insurance Co Ltd* (1991) 180 CLR 173.

identified this problem as a possible limitation to the utility of section 63.¹³⁶⁹ In this respect, the QLRC suggested changes to section 63 by proposing that the risk in respect of damage to land not pass to the buyer until completion or until the purchaser enters into or is entitled to possession of the land. This approach was not implemented and only minor amendments to the PLA were made following the review of the Act.¹³⁷⁰

69.3. Other jurisdictions

Both Victoria and the Northern Territory have a similar provision to section 63 of the PLA. Section 66 of the *Law of Property Act* (NT) is in similar terms to section 63 of the PLA. The provision in Victoria, section 35 of the *Sale of Land Act 1962* (Vic), has a similar effect to the Queensland provision in terms of providing the buyer with the benefit of the seller's insurance policy.¹³⁷¹ However, section 35 of the Victorian Act contains some significant differences. The points of difference include:

- the insurer can avoid liability to the seller by establishing that a prudent insurer would not have insured the buyer against the risk covered by the policy;¹³⁷²
- the insurer can avoid liability to a buyer at any time prior to the 'happening of the risk' by giving a termination notice to the seller.¹³⁷³ The practical operation of this subsection is unclear as the insurer would need to know that the insured property was under a contract of sale. This is unlikely to occur in practice;¹³⁷⁴
- the buyer's rights still subsist notwithstanding the seller suffers no loss or will suffer no loss because of the payment of the balance of purchase money.¹³⁷⁵ There are different views among commentators regarding whether or not this provision overcomes the issue arising from *Ziel Nominees v VACC Insurance Ltd.*¹³⁷⁶ The New South Wales Law Reform Commission considered that the provision, in addition to the concluding words of section 35(1), potentially overcame the problem raised by the decision of *Ziel Nominees v VACC Insurance Ltd.*¹³⁷⁷ This interpretation would mean that the seller's insurer could not claim that the payment to the seller of the purchase price then discharged the insurer from any liability under the insurance policy.¹³⁷⁸ An alternative view regarding the effect of section 35(2) of the *Sale of Land Act*

¹³⁶⁹ See Queensland Law Reform Commission, *Problems Relating to Passing of Risk between Vendor and Purchaser* Preliminary Discussion Paper No. 13 (1984) 3-4; Queensland Law Reform Commission, *A Bill to amend the Property Law Act 1974-1985* Working Paper No. 30 (1986) 25-26; Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1986* Report No. 37 (1987) 24-27; New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.4]-[3.6] and [3.8]-[3.10].

¹³⁷⁰ A minor amendment was made to section 63(4) pursuant to the *Statute Law (Miscellaneous Provisions) Act 1989* (Qld) Sch 1.

¹³⁷¹ *Sale of Land Act 1962* (Vic) s 35(1).

¹³⁷² *Sale of Land Act 1962* (Vic) s 35(3).

¹³⁷³ *Sale of Land Act 1962* (Vic) s 35(4).

¹³⁷⁴ Sharon Christensen and WD Duncan 'Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land' (2012) 2 *Property Law Review* 3, 17.

¹³⁷⁵ *Sale of Land Act 1962* (Vic) s 35(2).

¹³⁷⁶ (1991) 180 CLR 173.

¹³⁷⁷ New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.19].

¹³⁷⁸ New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.19].

1962 (Vic) is that it is still 'conjectural' whether it has the effect of circumventing the indemnity principle in insurance law.¹³⁷⁹

69.4. Recommendation

The Centre recommends repealing section 63. It is clear from the discussion above that the current utility of section 63 of the PLA is questionable, particularly in light of the limits on the application of the section. The provision is only applicable to a limited time period between the making of the contract for sale and completion and will only apply where the buyer does not hold insurance. The utility of the section is then further dependent on the seller holding appropriate insurance over the property. Although the Victorian provision has attempted to address the issue of the insurance indemnity principle, it is unclear if the intended result is achieved. Therefore, the recommendation in relation to section 63 of the PLA, based on the discussion above, is that it should be repealed.

RECOMMENDATION 68. Section 63 should be repealed.

¹³⁷⁹ Sharon Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 216.

70. Section 64 – Right to rescind on destruction of or damage to dwelling house

70.1. Overview and purpose

64 Right to rescind on destruction of or damage to dwelling house

- (1) In any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs.
- (2) Upon rescission of a contract under this section, any money paid by the purchaser shall be refunded to the purchaser and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled to the insurance policy because of an encumbrance over or in respect of the land.
- (3) In this section –
 - sale of a dwelling house** means the sale of improved land the improvements on which consist wholly or substantially of a dwelling house or the sale of a lot on a building units plan within the meaning of the *Building Units and Group Titles Act 1980* or the sale of a lot included in a community titles scheme under the *Body Corporate and Community Management Act 1997* if the lot –
 - (a) wholly or substantially, consists of a dwelling; and
 - (b) is, under the *Land Title Act 1994* –
 - (i) a lot on a building format plan of subdivision; or
 - (ii) a lot on a volumetric format plan of subdivision, and wholly contained within a building.
- (4) This section applies only to contracts made after the commencement of this Act and shall have effect despite any stipulation to the contrary.

This section provides the buyer of a dwelling under a contract of sale, with the option to rescind the contract prior to settlement where the house is damaged or destroyed, by any means 'so as to be unfit for occupation as a dwelling house', provided that the buyer gives written notice of rescission before the completion of the sale or earlier taking of possession.¹³⁸⁰ The section has effect regardless of any contractual stipulation to the contrary.¹³⁸¹

The origins of section 64 of the PLA are not clear, with no mention of the section in either the Working Paper or Discussion Paper of the QLRC¹³⁸² which preceded the enactment of the PLA. There is no obvious counterpart in other common law jurisdictions, although Victoria does have a broadly comparable provision in section 34 of the *Sale of Land Act 1962* (Vic). The details of this provision and section 36 of the Victorian Act are discussed further below.

McMurdo J in *Dunworth v Mirvac Queensland Pty Ltd*¹³⁸³ indicated that:

The evident policy underlying this provision is the protection of purchasers of dwelling houses from the burden of having to complete a contract where the house becomes uninhabitable by

¹³⁸⁰ Sharon Christensen and WD Duncan 'Unlocking risk allocation and equitable conversion: Reform of the passing of risk in the sale of land' (2012) 2 *Property Law Review* 3, 17.

¹³⁸¹ *Property Law Act 1974* (Qld) s 64(4).

¹³⁸² Queensland Law Reform Commission, *Amendments to the Property Law Act 1974-1985* Working Paper No. 30 (1986) 24, 26-27.

¹³⁸³ [2012] 1 Qd R 207.

destruction or damage after the contract is made. Absent a term to the contrary, the common law position would be that the property would be at the purchaser's risk pending completion.¹³⁸⁴

An examination of the section in light of catastrophic flooding events in Queensland revealed a number of deficiencies in the drafting of the section that impact on its effectiveness as a protection mechanism for buyers without insurance.

An overview of the key components of section 64 of the PLA is set out below.

70.1.1. Applies only to 'dwelling house'

Section 64 only applies to a contract for the 'sale of a dwelling house'. The phrase 'sale of a dwelling house' is defined in section 64(3) and encompasses:

- the sale of improved land the improvements on which consist wholly or substantially of a dwelling house; or
- the sale of a lot in a building units plan within the meaning of the *Building Units and Group Titles Act 1980* (Qld); or
- the sale of a lot in community title scheme under the *Body Corporate and Community Management Act 1997* (Qld) if the lot consists of a dwelling and is either:
 - a lot on a building format plan; or
 - volumetric format plan, and wholly contained within a building.¹³⁸⁵

The term 'dwelling house' is not defined in the PLA but it has been held to include a building which is used for the purpose of 'human habitation'.¹³⁸⁶ Section 64 does not prescribe that the 'dwelling house' must be private which means that it can be divided into more than one residence as flats.¹³⁸⁷ However, if the house is no longer used as a residence then it no longer qualifies as a dwelling house.¹³⁸⁸

70.1.2. 'Dwelling house' must be 'damaged or destroyed'

The dwelling house which is the subject of the contract for sale must be 'damaged or destroyed', making it unfit for human habitation. This latter aspect of the section is discussed in further detail below. In terms of the 'damage or destruction', the cause is not restricted under section 64 and could extend to damage arising from the acts of third parties or from natural disasters such as floods or cyclones. Generally, it is contemplated that the damage to the dwelling house is physical damage which requires repair (or restoration) rather than a 'temporary impediment' to occupying the dwelling house.¹³⁸⁹ For example, the physical evidence of fire damage is obvious in most cases. This can be compared with rising damp damage or damage from flood where the actual manifestation of the damage is less obvious (watermarked walls that require repainting or carpet that require treatment

¹³⁸⁴ *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 Qd R 207, 223.

¹³⁸⁵ *Property Law Act 1974* (Qld) s 64(3).

¹³⁸⁶ See for example, *Griffiths v Appleby* [1949] ALR 268 and *Re Council of Municipality of Woollahra* (1947) 47 SR (NSW) 166 and *Ex parte SGIO (Queensland)* [1984] 2 Qd R 441 at 445 (Andrews SPJ) – covers residential flats.

¹³⁸⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.64.30].

¹³⁸⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.64.30] referring to *Re Nordenfelt* [1895] 1 QB 151.

¹³⁸⁹ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 326-327.

or replacement).¹³⁹⁰ In the case of strata title dwellings, the damage must be to the actual lot, not the common areas or common property. The Centre does not consider that the expression ‘destroyed or damaged’ needs to be defined in the section.

70.1.3. Dwelling house must be ‘unfit for human habitation’ as a result of damage or destruction

The other key requirement in relation to section 64 of the PLA is that the damage or destruction must result in the ‘dwelling house’ being ‘unfit for human habitation’. Whether or not the premises fall within the category of being unfit for human habitation is a question of fact and degree.¹³⁹¹ Some comments about this criterion extracted from cases and commentary include:

- the damage or destruction needs to be significant enough that no person would be reasonably expected to live in the dwelling house;¹³⁹²
- a dwelling house can still be unfit for occupation if only part of the dwelling is destroyed. For example, if only the kitchen or bathroom is destroyed or damaged, the dwelling will still be unfit for occupation as it cannot be used as a dwelling house without a kitchen or bathroom;
- temporary or transient damage may not necessarily result in the dwelling house being unfit for occupation. For example, loss of power or lights is unlikely to fall within the scope of the section;¹³⁹³
- a local government notice such as an enforcement notice issued, for example, because the local government believes the building is unfit for use or occupation could be used as evidence to support unfitness for occupation under section 64 of the PLA;¹³⁹⁴
- a dwelling is likely to be ‘unfit for occupation’ if occupation is only possible by means of ‘makeshift arrangements ... pending repairs and reconstruction necessary to restore the premises to make them wholly fit for occupation’ as a dwelling house.¹³⁹⁵ However, some time to allow for restoration or cleaning up should be allowed immediately after an event such as a flood.¹³⁹⁶

A buyer can rely on section 64 to rescind a contract for sale regardless of whether the seller indicates that he or she is able to rectify the damage prior to settlement.¹³⁹⁷ The position in Queensland can be contrasted with Victoria where the seller has the right to elect to restore the property prior to completion. The position in Victoria is discussed in more detail below.

¹³⁹⁰ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 326-327.

¹³⁹¹ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 327 referring to a number of cases including *Georgeson v Palmos* (1962) 106 CLR 578, *Dallas Costa v Beydown* (1990) 5 BPR 11,379; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.64.60].

¹³⁹² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.64.90] referring to *Cruse v Mount* [1933] Ch 278, 282.

¹³⁹³ See *Georgeson v Palmos* (1962) 106 CLR 578, 587 (per Menzies J).

¹³⁹⁴ See *Building Act 1975* (Qld) s 248-249 and S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 327.

¹³⁹⁵ See *Georgeson v Palmos* (1962) 106 CLR 578, 587 per Windeyer J.

¹³⁹⁶ See *Georgeson v Palmos* (1962) 106 CLR 578, 587 per Windeyer J.

¹³⁹⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.64.90].

70.1.4. Notice in writing rescinding the contract must be given

There is also a requirement under the section that notice in writing rescinding the contract must be given ‘not later than the date of completion or possession whichever the earlier occurs’. The date of completion is generally taken to mean the actual date of settlement.¹³⁹⁸ Once rescission occurs under section 64 of the PLA:

- money paid by the buyer is refunded to the buyer;
- any documents of title or transfer are returned to the seller;
- the seller remains entitled (alone) to the benefit of any insurance policy, subject to rights of any person entitled to the policy because of an encumbrance over or in respect of the land.¹³⁹⁹

70.2. Issues with the section

The discussion below considers some of the issues in relation to section 64 of the PLA that have been highlighted in Queensland case law and commentary on the provision.

70.2.1. Application of section limited to ‘dwelling houses’

A buyer’s right of rescission under section 64(1) of the PLA only applies in relation to a ‘dwelling house’. The underlying rationale for limiting the section to only dwelling houses is not clear, although consumer protection is probably one reason. Commentators have suggested that there are no policy reasons which could justify the extension of the provision to commercial buildings, partly because the buyer in the commercial context would be favoured.¹⁴⁰⁰ Others suggest that buyers of commercial property have in the past suffered loss, referring to cases such as *Kern Corp Ltd v Walter Reid Trading Pty Ltd*¹⁴⁰¹ and should be able to rely on a provision such as section 64.

It is not clear whether this provides a sufficient basis to extend the application of section 64 to commercial property. However, there is no proposal that the situation in relation to risk allocation in Queensland be altered as part of this review. Accordingly, risk is passed to buyers at the time a valid and binding contract for sale is entered into. This may provide justification for extending section 64 of the PLA to cover commercial property. If the provision was extended, the parties to the sale transaction (in the case of commercial property only) could be entitled to contract out of the section if there is an express term to the contrary included in the contract for sale.¹⁴⁰² A further issue is ensuring that the test regarding fitness for occupation is appropriate in the commercial context.

70.2.2. Clarifying the meaning of the term ‘date of completion’

The term ‘date of completion’ is not defined in the PLA. Prior to 2011, there was uncertainty regarding whether the term only covered the date specified in the contract or covered extensions of time including where the contract date is extended by court order for specific performance. The issue was

¹³⁹⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.64.60].

¹³⁹⁹ *Property Law Act 1974* (Qld) s 64(2).

¹⁴⁰⁰ See for example G Walker, ‘Insurance and the Sale of Land’ (1981) 9 *Australian Business Law Review* 148, 165.

¹⁴⁰¹ Sharon Christensen and WD Duncan, ‘Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land’ (2012) 2 *Property Law Review* 3, 20 referring to *Kern Corp Ltd v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164.

¹⁴⁰² Sharon Christensen and WD Duncan, ‘Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land’ (2012) 2 *Property Law Review* 3, 20.

discussed and clarified in the Queensland Court of Appeal decision of *Dunworth v Mirvac Qld Pty Ltd*.¹⁴⁰³ In that case, the buyer entered into a contract for the purchase of an off-the-plan apartment. Prior to the contracted settlement date, the buyer purported to terminate the contract and commenced proceedings against the seller for misleading and deceptive conduct associated with the height of the apartment and other matters. The buyer's claim was dismissed and an order for specific performance was made requiring completion on 8 February 2011. On 13 January 2011 the apartment was substantially damaged in the Brisbane floods and rendered unfit for occupation. The seller offered to restore the premises, although it was expected to take approximately four months to do so. The buyer relied on section 64 of the PLA and rescinded the contract. The issue before the court was whether the buyer, in default, could rely on section 64 of the PLA to rescind the contract while subject to an order for specific performance.

In terms of the construction of the term 'date of completion', the Court of Appeal indicated that the section should 'naturally be read as contemplating the actual date of completion or possession.'¹⁴⁰⁴ In this particular case, the date of completion for the purpose of section 64 of the PLA was the relevant date specified in the order for specific performance. The court indicated that where completion of the contract or possession of the dwelling house has not taken place and there is destruction or damage to the dwelling house resulting in it being unfit for occupation, the buyer has a right of rescission under section 64 of the PLA.¹⁴⁰⁵

70.2.3. Uncertainty regarding the time for assessment of fitness for occupation

A further issue relating to the term 'date of completion' arises in the context of assessing when the property is damaged and becomes unfit for occupation. The Court of Appeal decision¹⁴⁰⁶ which clearly stated that the right to rescind extends up to the date of actual completion and not the date for completion in the contract which may be extended or deferred, does not clarify the issue of timing in relation to when the dwelling house must be unfit for occupation.¹⁴⁰⁷ This raises a number of issues regarding interpretation of timing including:

- does assessment of damage occur at the time (or immediately after) the damage or destruction occurs? Authority for this approach is found in the High Court decision of *Georgeson v Palmos*.¹⁴⁰⁸ This approach would mean that the buyer would have a right to terminate if the property is 'unfit for occupation' immediately after the damage occurs, irrespective of the state of the property at the time of rescission (if it is later) or settlement;
- if the seller could remedy the damage, does that mean that the dwelling house is not rendered unfit?;
- does the property need to remain unfit for occupation until the time of rescission, although this is not provided for in section 64(1) of the PLA?;

¹⁴⁰³ [2011] QCA 207.

¹⁴⁰⁴ *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 Qd R 207, 221 (per Chief Justice).

¹⁴⁰⁵ *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 Qd R 207, 221 (per Chief Justice).

¹⁴⁰⁶ See *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 Qd R 207, 221.

¹⁴⁰⁷ Sharon Christensen and WD Duncan, 'Unlocking Risk Allocation and Equitable Conversion: Reform of the Passing of Risk in the Sale of Land' (2012) 2 *Property Law Review* 3, 19.

¹⁴⁰⁸ (1962) 106 CLR 578 and see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.64.90].

- does the property need to be unfit for occupation at the time of settlement?¹⁴⁰⁹ Commentary in relation to this interpretation indicates that it is only valid if it is accepted that the ‘exercise of rights under section 64 is subject to the principle that a seller is only required to deliver a property in habitable condition with vacant possession at the time of settlement.’¹⁴¹⁰ This interpretation is unlikely as it effectively extends the section to accommodate reinstatement by the seller prior to settlement which is not provided for in section 64 currently.¹⁴¹¹

70.2.4. Seller is unable to take any steps under section 64 to avoid rescission

Section 64 of the PLA does not contain a specific provision allowing the seller to avoid rescission by electing to reinstate by the date of actual completion and actually completing the reinstatement. Whether or not the dwelling house can be restored does not currently preclude rescission where the requirements of section 64 have been met.¹⁴¹² The position in Victoria is different and the buyer’s right to rescind is unavailable where the seller is able to restore the damage to the dwelling house and does so before the buyer becomes ‘entitled to possession or to receipt of rents and profits.’¹⁴¹³

70.3. Other jurisdictions

Section 34 of the *Sale of Land Act 1962* (Vic) applies to dwelling houses only and gives the buyer a right to rescind where the dwelling house is so damaged or destroyed between contract and completion (or earlier possession) so as to be unfit for occupation as a dwelling house. Under section 36 of the Victorian legislation, the seller has the right to elect to restore the property to its pre-damaged condition before completion or earlier possession occurs. Where the seller restores the damage within the relevant time period, the buyer is not entitled to rely on section 34 – that is, the buyer’s right to rescission lapses.

70.4. Recommendation

The Centre recommends amending section 64 to clarify some of the issues raised above and to provide a mechanism for the seller to repair the dwelling in certain circumstances, and the buyer to rescind the contract before the dwelling is restored to a standard ‘fit for occupation’.

There is no proposal to alter the current position in relation to risk remaining with the buyer until completion or earlier possession. As a result, a force majeure provision such as section 64 of the PLA does have some value, irrespective of whether or not the buyer has contracted insurance. The application of the section does not depend on whether or not the seller has insurance or whether that insurance is adequate. This can be compared to other sections such as section 58 of the PLA. It is clear from the discussion above that there are issues in relation to section 64 that can be resolved with some amendment to the section.

¹⁴⁰⁹ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 328.

¹⁴¹⁰ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 328.

¹⁴¹¹ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 328.

¹⁴¹² *Dunworth v Mirvac Queensland Pty Ltd* [2011] QCA 207, 221 (per Chief Justice).

¹⁴¹³ *Sale of Land Act 1962* (Vic) s 36.

The Centre does not recommend extending the application of the section to contracts for the sale of 'commercial property' notwithstanding the same rules exist in relation to the passing of risk at common law. The inclusion of commercial property within the scope of the section would require consideration of the appropriateness of the test of fitness for occupation in the commercial context and, in the view of the Centre, this is difficult to achieve. Further, parties to a contract for sale of commercial property are ordinarily sophisticated parties with the means and knowledge to protect their interests. This view is supported in submissions made by the QLS.

The Centre recommends that the expression 'date of completion' should be clarified in light of the Queensland Court of Appeal decision of *Dunworth v Mirvac Queensland Pty Ltd*¹⁴¹⁴ so that it expressly states that it means 'the date of actual completion'. This approach would take into account any extensions of time and deferral of actual completion which may occur for a variety of reasons.

The amendments should also clarify the time at which the assessment of fitness for occupation is undertaken. Provisions that allow the seller an opportunity to reinstate the property and therefore avoid rescission, but also ensure the buyer has the right to rescind in certain circumstances, seems to strike a fair balance.

The Centre recommends amending the section to allow for the seller to repair the property to make it 'fit for occupation' however, the buyer has the right to rescind the contract at any time before the dwelling is once again 'fit for occupation.' This means that a seller can attempt to repair the dwelling, however if the buyer is not satisfied with the standard of those repairs, then the contract can be rescinded. This will motivate the seller to make repairs that are of a standard that is acceptable to the buyer. The inclusion of a provision of this type would address an issue of potential unfairness which arises where a damaged property has been reinstated to the same condition at the date of actual completion as it was at the time of contract, yet the buyer still wants to rescind the contract.

The Centre does not recommend a provision like section 36 of the *Sale of Land Act 1962 (Vic)* which effectively enables the seller to elect to reinstate by the date of actual completion and where reinstatement occurs by that time, avoids rescission. The concern here is that, if the seller elects to reinstate before settlement, in circumstances where most contracts for the sale of land are only 30 days, then a substandard repair may be undertaken in order to complete the works before settlement to avoid rescission by the buyer. The buyer would not have the opportunity to rescind the contract and this point was raised in submissions by the QLS where it was agreed that there is risk of substandard repairs being carried out, and that the buyer should be allowed to rescind.

As stated above, the Centre is of the view that the right to rescind the contract should subsist only to the point that the dwelling has been reinstated to 'fit for occupation' standard. The QLS on the other hand is of the view that the right to rescind should subsist up until the date of completion, regardless of the repairs carried out. The Centre considered this position and formed the view that this would swing the pendulum too far in the favour of the buyer. The seller may go to a good deal of expense and effort to restore the dwelling and it does not seem fair that, notwithstanding that at the date for completion the dwelling is fit for occupation, the buyer can still rescind in any event. The Centre has therefore made these recommendations on the basis that they are fair to both parties.

¹⁴¹⁴ [2012] 1 Qd R 207.

RECOMMENDATION 69. Section 64 should be amended to allow the buyer the right to rescind the contract while the dwelling remains unfit for occupation, up until the date for settlement and if the buyer has not rescinded the contract before settlement or before the dwelling is once again fit for occupation, then the seller is bound by the contract and must proceed to settlement. The amendment should be made to clarify the meaning of 'date of completion' as the date of actual completion, taking into account any extensions by agreement or by operation of the Act.

71. Section 65 – Rights of purchasers as to execution of conveyance

71.1. Overview and purpose

65 Rights of purchaser as to execution

- (1) On a sale, the purchaser shall not be entitled to require that the conveyance to the purchaser be executed in the purchaser's presence, or in that of the purchaser's solicitor or conveyancer, as such, but shall be entitled to have, at the purchaser's own cost, the execution of the conveyance attested by some person appointed by the purchaser, who may, if the purchaser thinks fit, be the purchaser's solicitor or conveyancer.
- (2) This section applies only to sales made after the commencement of this Act.

The section has its origins in the nineteenth century case of *Viney v Chaplin*¹⁴¹⁵ which essentially provided that a purchaser was entitled to require the 'most complete proof of a conveyance' and may be entitled to insist upon 'execution of the conveyance in his presence or that of his solicitor'¹⁴¹⁶ or insist upon the seller's presence in appropriate circumstances. Section 65 'abolishes' any right of the purchaser to insist upon the presence of the seller. It allows any other person to attest the execution of the conveyance.¹⁴¹⁷

71.2. Issues with the section

The QLRC discussed this section in its report in 1973 prior to the introduction of the PLA and even at that early stage of the legislative process commented on the utility of the section. The QLRC noted that:

In Queensland the right of the purchaser to insist upon execution of a transfer in his presence is probably impliedly dispensed with by contract which commonly includes a clause requiring production on settlement of a duly executed and registrable memorandum of transfer. Nevertheless, it seems prudent that the above provisions should be adopted in this State.¹⁴¹⁸

One of the key issues in relation to section 65 of the PLA is that the section is directed at the execution of deeds of conveyance of old system land rather than to the conveyancing of registered land. As discussed at paragraph 5.2.1, for all intents and purposes, there is no remaining old system land in Queensland. In the case of registered land under the *Land Title Act 1994* (Qld), the execution and witnessing of transfers are governed by sections 161 and 162 of that Act. The same procedure is set out for Crown leasehold where the execution and witnessing of instruments is governed by section

¹⁴¹⁵ (1858) 2 De G & J 468.

¹⁴¹⁶ 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) 51.

¹⁴¹⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.65.30].

¹⁴¹⁸ 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) 51.

310 of the *Land Act 1994* (Qld) and section 46 of the *Land Regulation 2009* (Qld). In these circumstances, the utility of section 65 of the PLA is arguably limited.

A second issue is the progressive implementation of electronic conveyancing into Queensland. When introduced in its entirety, this form of conveyancing means that dealings for land conveyancing can be digitally prepared, signed and settled and lodged directly into the electronic land register.¹⁴¹⁹ The use of the digital environment for conveyancing makes the presence of a person to attest to the execution of the conveyancing obsolete. Further, as any execution will be by digital signature, there will be no 'signing' to witness in the traditional 'paper' sense. In this context, section 65 of the PLA has no utility.

71.3. Recommendation

It is clear from the discussion above that section 65 of the PLA serves no (or limited) purpose as it only has application to old system land. It is recommended that the provision be repealed.

RECOMMENDATION 70. Section 65 should be repealed.

¹⁴¹⁹ The first release of e-conveyancing commenced in December 2013 and allowed a limited range of transactions including releases of mortgages. The second stage of e-conveyancing allows an extended range of transactions including transfers and became available in Queensland in 2015.

72. Section 66 – Receipt in instrument or endorsed authority for payment

72.1. Overview and purpose

66 Receipt in instrument or endorsed authority for payment

- (1) If a financial institution manager, a solicitor or a conveyancer produces an instrument, having in the body of the instrument or endorsed on the instrument a receipt for consideration money or other consideration, the instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration, or produces a duly executed instrument in respect of registered land, the instrument shall be a sufficient authority to the person liable to pay or give the same for the person's paying or giving the same to the financial institution manager, solicitor, or conveyancer without the financial institution manager, solicitor or conveyancer producing any separate or other direction or authority in that behalf from the person who executed or signed the receipt or instrument.
- (2) In this section –
- conveyancer** includes the agent of the conveyancer.
- financial institution manager** means the person performing the function of general manager or manager of a financial institution, and includes an agent of the financial institution manager.
- instrument** includes a discharge of mortgage.
- solicitor** includes the agent of the solicitor.

This section has its origins in the nineteenth century case of *Viney v Chaplin*¹⁴²⁰ which established, amongst other things, that a buyer had a strict right to require the purchase money to be paid by the buyer to the seller personally or in his presence.¹⁴²¹ The possession of an 'executed conveyance with a signed receipt for the purchase money indorsed therein, was not itself an authority to the solicitor' of the seller to receive the purchase money.¹⁴²² This meant that if the buyer paid the seller's solicitor the purchase money and the solicitor did not 'account for it', then the buyer may be required to pay the money again.¹⁴²³ Section 66 has the effect of displacing this principle and enables a financial institution manager, conveyancer or solicitor who produces an instrument which incorporates in some form a receipt for payment of the consideration, signed by the person who has the authority to give a receipt for the payment, to give a receipt without any separate direction or authority.¹⁴²⁴ The relevant instrument must be produced and be relevant to the particular transaction.¹⁴²⁵

¹⁴²⁰ (1858) 2 De G&J 468.

¹⁴²¹ 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) 51-52.

¹⁴²² 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) 51-52.

¹⁴²³ 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) 51-52.

¹⁴²⁴ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 374. This provides sufficient authority for the person liable to pay to pay the financial institution manager, conveyancer or solicitor.

¹⁴²⁵ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 374. An example of an instrument is a transfer.

The QLRC when looking at the effect of *Viney v Chaplin* noted that the principle was abrogated in England and Victoria¹⁴²⁶ by legislation. Further, the QLRC acknowledged that it was not uncommon for the purchase money to be paid directly to the seller's solicitor or trust account relying only on producing the relevant executed memorandum of transfer, Form W, which was used in Queensland at the time of the QLRC report.¹⁴²⁷ Form W included an acknowledgement by the seller that he or she had received the purchase money. The QLRC was concerned that this approach may not overcome the decision in *Viney v Chaplin* and recommended that the legal position in Queensland be brought into 'conformity' with the 'existing practice' at the time by the adoption of a provision similar to the ones in England or Victoria.¹⁴²⁸ In this respect, the QLRC considered that the approach in section 69(1) of the *Property Law Act 1958* (Vic) was more appropriate for Queensland as it provided for instruments executed under the Torrens system (including mortgage discharge) and receipt by bankers as well as solicitors.¹⁴²⁹ The provision was adjusted slightly by substituting the term 'deed', which was in the Victorian section, with the word 'instrument' in the Queensland section.

72.2. Issues with the section

There appears to have been no litigation where section 66 has been relied upon in Queensland.¹⁴³⁰ The majority of other Australian jurisdictions have implemented a more general provision dealing with the effect of the receipt of money in the body of a deed. This is discussed below. The provision has been drafted in a relatively complicated way which makes its meaning and effect difficult to understand.

The progressive implementation of electronic conveyancing into Queensland may also make section 66 of the PLA in its current form almost unworkable. When introduced in its entirety, this form of conveyancing means that dealings for land conveyancing can be digitally prepared, signed and settled and lodged directly into the electronic land register.¹⁴³¹ The payment of purchase money (or other consideration) will occur electronically.

¹⁴²⁶ The relevant provision in England at that time (1973) was located in the *Conveyancing Act 1881*, section 56(1) which provided that the production by a solicitor of an executed deed with a receipt for the payment endorsed [thereon] should be a sufficient authority for payment to the solicitor.

¹⁴²⁷ 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) 51, 52.

¹⁴²⁸ 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) 51, 52.

¹⁴²⁹ The reference to 'banker' in section 66 of the *Property Law Act 1974* (Qld) was repealed and replaced with 'financial institution manager'. See *Miscellaneous Acts (Non-bank Financial Institutions) Amendment Act 1997* (Qld). The term 'financial institution' covers a 'bank, building society or credit union': *Acts Interpretation Act 1954* (Qld). The amendment was in line with the policy of the government to remove legislative discrimination against and between building societies, credit unions and banks in the deregulated financial market.

¹⁴³⁰ Searches undertaken have not identified any cases specifically dealing with section 66 of the *Property Law Act 1974* (Qld).

¹⁴³¹ The first release of e-conveyancing commenced in December 2013 and allowed a limited range of transactions including releases of mortgages. The second stage of e-conveyancing allows an extended range of transactions including transfers and became available in Queensland in 2015.

72.3. Other Australian jurisdictions

There is some variation regarding the retention of a similar provision in other Australian jurisdictions. In summary, Victoria and Tasmania have a similar provision but both jurisdictions use the word ‘deed’ rather than ‘instrument’.¹⁴³² The Northern Territory, New South Wales, Australian Capital Territory and Western Australia all have a general provision which provides, subject to some variation, that a receipt for consideration of money in the body of a deed or other instrument is sufficient evidence of the payment.¹⁴³³

72.4. Recommendation

The extent to which section 66 of the PLA serves any current purpose is not clear however, out of an abundance of caution the Centre recommends the effect of the section should be retained amended to provide greater clarity. The Centre has provided suggested drafting for the amendments set out below. This will provided greater clarity and modernise the language in line with the overarching principles that inform these recommendations.

RECOMMENDATION 71. Section 66 should be amended to provide greater clarity about the operation of the section.

For example, the section could be drafted in the following manner:

- (1) Written directions given by a seller’s solicitor to the buyer or their solicitor, or financial institution manager in relation to the payment of any money under the contract is sufficient discharge of the purchaser in respect of the payment of money.
- (2) In this section –
financial institution manager means the person performing the function of general manager or manager of a financial institution, and includes an agent of the financial institution manager.
solicitor includes the agent of the solicitor.

¹⁴³² *Property Law Act 1958* (Vic) s 69 and *Conveyancing and Law of Property Act 1884* (Tas) s 69.

¹⁴³³ *Law of Property Act* (NT) s 53; *Conveyancing Act 1919* (NSW) s 40; *Civil Law (Property) Act 2006* (ACT) s 220; *Property Law Act 1969* (WA) s 14.

73. Section 67 – Restrictions on vendor’s right to rescind on purchaser’s objection

73.1. Overview and purpose

67 Restriction on vendor’s right to rescind on purchaser’s objection

- (1) In any contract the vendor shall not be entitled to exercise any right to rescind the contract, whether given by the contract expressly or otherwise, on the ground of any requisition or objection made by the purchaser unless and until the vendor has given the purchaser 7 days notice of the vendor’s intention to rescind so as to enable the purchaser to withdraw or waive the requisition or objection.
- (2) This section applies only to contracts made after the commencement of this Act, and shall have effect despite any stipulation to the contrary.

The section was incorporated into the original PLA at a time when the standard forms of contract in use in Queensland for the sale of land contained a clause permitting the seller to rescind the contract upon receipt of a requisition or objection to title which the seller was ‘unable or unwilling to comply with.’¹⁴³⁴ As a condition precedent to the exercise of the right of rescission under the standard contract, the seller was required to give notice of seven days to the buyer of his or her intention. This gave the buyer the chance to withdraw the requisition or objection in order to save the contract.¹⁴³⁵

The right was not a statutory right and the QLRC indicated that there was some advantage to adopting the same approach as New South Wales where the right was both contractual and statutory.¹⁴³⁶ The statutory provision in New South Wales was aimed at preventing the exclusion of the right of the buyer to waive his or her requisition. The QLRC considered that there was ‘some advantage in placing the position on a statutory basis and in adopting the provisions of the New South Wales section.’¹⁴³⁷ Further, that it seemed safe to conclude that ‘no change in common practice will result from the enactment of the proposed clause in Queensland.’¹⁴³⁸

73.2. Issues with the section

The main issue with section 67 is its ongoing relevance. Firstly, the utility of the section was closely linked to the standard form of contract in Queensland which permitted the delivery of requisitions on title by the buyer to the seller. However, this right of a buyer to deliver written requisitions on title to

¹⁴³⁴ 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) 52.

¹⁴³⁵ 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) 52.

¹⁴³⁶ 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) 52.

¹⁴³⁷ 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) 52.

¹⁴³⁸ 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) 52.

a seller was removed from the standard form contract in Queensland in 1994. One of the reasons for the removal of the contractual term was that the practice had become pointless. Sellers would often deliver formulaic responses to questions from buyers which were of no benefit to a buyer.

Secondly, the delivery of requisitions was of particular importance in the conveyancing of old system land where a buyer was not in a position to ascertain very much information about the land being purchased from government registries. Old system land is discussed at paragraph 5.2.1. Clearly in the case of registered land, there is now greater access to information about the relevant land, some of which is freely available online.

In these circumstances, the utility and relevance of section 67 of the PLA is limited.

73.3. Recommendation

As the practice of delivery of requisitions on title in Queensland has long ceased and is no longer a contractual provision, section 67 of the PLA is obsolete. The Centre recommends that the provision be repealed.

RECOMMENDATION 72. Section 67 should be repealed.

74. Section 67A – When statutory rights of termination end for land sales if e-conveyancing is used

74.1. Overview and purpose

67A When statutory rights of termination end for land sales if e-conveyancing is used

- (1) This section applies if—
 - (a) an Act provides for a right of termination (however described) in relation to the sale of land or a contract for the sale of land; and
 - (b) the right is expressed to end on settlement; and
 - (c) the sale is settled using e-conveyancing.
- (2) The right of termination ends on settlement.
- (3) However, the right of termination may not be exercised during any period the electronic workspace for the e-conveyance is locked for the purpose of settlement.
- (4) In this section—

locked, in relation to an electronic workspace for an e-conveyance, means the ELN for the workspace does not allow a participating subscriber to the e-conveyance to change a document or instruction in the workspace.

Section 67A of the PLA was added in 2014 to broaden the Act to accommodate electronic conveyancing in Queensland.

74.2. Issues with the section

No issues have been identified with section 67A of the PLA.

74.3. Recommendation

The Centre does not recommend any changes to section 67A of the PLA.

RECOMMENDATION 73. Section 67A should be retained.

75. Section 68 – Damages for breach of contract to sell land

75.1. Overview and purpose

68 Damages for breach of contract to sell land

- (1) A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser in such sum as at the time the contract was made was reasonably foreseeable as the loss liable to result, and which does in fact result, from the failure of the vendor to perform the contract and, unless the contract otherwise provides, the vendor shall not be relieved, wholly or in part, of liability for damages measured under this section merely because of the vendor's inability to make title to the land the subject of the contract of sale, whether or not such inability was occasioned by the vendor's own default.
- (2) This section shall not affect any right, power or remedy which, apart from this section, may be available to a purchaser in respect of the failure of a vendor to show or make good title or otherwise to perform a contract for the sale of land.
- (3) This section shall not apply to contracts for the sale of unregistered land and shall apply only to contracts entered into after the commencement of this Act.

The purpose of this section was to abolish the rule in *Bain v Fothergill*¹⁴³⁹ which provided a special exception to the general rule regarding the liability of a seller who breaches a contract of sale for land. The general rule is that a seller who fails to perform a contract to sell and convey land is in the same position as any other contracting party and is therefore liable in damages to the other party for breach of contract.¹⁴⁴⁰ The damages could include the buyer's loss of bargain.¹⁴⁴¹ The exception to this rule which was articulated in the House of Lords in *Bain v Fothergill*¹⁴⁴² applied particularly to old system land and had the effect that the buyer was unable to claim bargain damages where the seller's only reason for non-performance was an inability to make good title due to no fault of the seller. The basis for the exception appears to originate from the 'peculiar difficulties of making a title to land in England.'¹⁴⁴³ The difficulty arose because of the very real possibility in relation to old system land that the seller was ignorant of the legal state or position of his or her title.¹⁴⁴⁴

The QLRC recommended the enactment of section 68 and considered that the rule in *Bain v Fothergill* was inappropriate for a system of registered conveyancing where there is certainty and clarity in

¹⁴³⁹ (1874) LR 7 HL 158.

¹⁴⁴⁰ 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) 53.

¹⁴⁴¹ This is described by the 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) 53 as being the 'difference between the contract price of the land and its value at the time it ought to have been conveyed to him.'

¹⁴⁴² (1874) LR 7 HL 158.

¹⁴⁴³ 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) 53.

¹⁴⁴⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.68.60]. The rule in *Bain v Fothergill* has been described as one 'laid down for defects in title which lay concealed in title deeds which were often in the phrase attributed to Lord Westbury, difficult to read, disgusting to touch and impossible to understand' - Megarry J in *Wroth v Tyler* [1974] Ch 30 extracted in Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.68.60].

relation to the seller's title.¹⁴⁴⁵ This recommendation was made despite early Queensland case law to the contrary.¹⁴⁴⁶ The QLRC indicated that:

....a vendor should not, unless the contract otherwise provides, escape liability for damages for failure to transfer land agreed to be sold simply because of an inability to fulfil a contract which, although perhaps not occasioned by default on his part, is even less due to any fault on the part of the purchaser. As between the two parties to the contract, it is difficult to see why the purchaser should carry the risk of the vendor's inability to make good title.¹⁴⁴⁷

Section 68 of the PLA abrogates the rule in *Bain v Fothergill* in relation to land, other than old system land.¹⁴⁴⁸ The section has the effect that failure to make title is deemed to be a breach of contract, whether or not occasioned by the default of the seller. The ordinary measure of damages which is applicable to other breaches of contract applies in the case of a breach of a contract for the sale of land.¹⁴⁴⁹

75.2. Issues with the section

75.2.1. Historical circumstances no longer support the need for a provision to address *Bain v Fothergill*

It is clear from the discussion above that the policy objective of section 68 of the PLA was to address a legal rule arising out of very specific historical circumstances which included the existence of old system land in England in the nineteenth century, the associated mechanisms for documenting title and the consequential difficulties that a seller encountered in establishing title under the old land system. Those circumstances did not apply to the Queensland property environment where, on the whole, registered land was the norm. The introduction of section 68 simply restated what had been the accepted rule for breaches of contract for sales of registered land and avoided the effect of the decision in *Bain v Fothergill* which altered (and limited) the general position in a specific situation.

The Torrens system of land registration means that the 'inability to make title' beyond the control of either party is now essentially obsolete in the case of registered land. Land titles in Queensland not held under the Torrens system are limited in number. The New South Wales Law Reform Commission noted in its 1990 Report that conveyances in Queensland of 'unregistered titles, and therefore the likelihood of the Rule being applied, are almost insignificant.'¹⁴⁵⁰

¹⁴⁴⁵ 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) 53.

¹⁴⁴⁶ See *Merry v Australian Mutual Provident Society* (1872) 2 QSCR 40 and *Boardman v Mc Grath* [1925] QWN 8.

¹⁴⁴⁷ 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) 53.

¹⁴⁴⁸ See *Property Law Act 1974* (Qld) s 68(3) which expressly excludes old system land from the scope of the section.

¹⁴⁴⁹ 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) 53.

¹⁴⁵⁰ New South Wales Law Reform Commission, *Community Law Reform Program: Damages for Vendor's Inability to Convey Good Title: the Rule in Bain v Fothergill* Report 64 (1990) [3.27].

75.2.2. Transparency of legal position if repealed

If section 68 of the PLA is repealed, the general position is that the rule in *Bain v Fothergill* is not revived in relation to registered land.¹⁴⁵¹ The position in relation to old system land simply remains the same as it was – that is, it was never subject to section 68 and *Bain v Fothergill* continues to apply. However, repeal of the provision potentially means that the legal position in relation to the abolition of the rule in *Bain v Fothergill* is ‘hidden’. Individuals seeking to determine the position in relation to the rule would need to track back through legislation to identify the repealed provision and understand the effect of section 20 of the *Acts Interpretation Act 1954* (Qld). This adds cost, red tape and reduces transparency of the legal position which raises broader issues of access to justice.

In the case of old system land, the rule in *Bain v Fothergill* remains applicable irrespective of whether section 68 is repealed. However, as there is unlikely to be any old system land remaining, the risk of the rule being invoked is limited. In any event, a large number of exceptions to the rule have developed over the years, potentially limiting its application further.¹⁴⁵² Current conveyancing practices also mean that sellers are required to investigate their title prior to selling and any title defects should be identified prior to the contract being entered into.

75.3. Other Australian jurisdictions

The position in other Australian jurisdictions is varied. New South Wales has abolished the rule in *Bain v Fothergill* in relation to all land.¹⁴⁵³ The recommendation to abolish the rule was made in a 1990 New South Wales Law Reform Commission Report which specifically reviewed the rule in *Bain v Fothergill*.¹⁴⁵⁴ The Northern Territory has also abolished the rule but not in relation to contracts for the sale of unregistered land.¹⁴⁵⁵ In 1989, the Victorian Law Reform Commission recommended the abolition of *Bain v Fothergill*, however the recommendation has not been implemented.¹⁴⁵⁶ Western Australia has no statutory provision abolishing the rule.¹⁴⁵⁷ The rule also appears to have been retained in South Australia and Tasmania.

75.4. Recommendation

The Centre recommends that section 68 be retained but that its form is simplified to assist with its interpretation. This is in line with the overarching principles that inform these recommendations. The Centre recommends adopting the drafting approach in New South Wales, with some minor variation,

¹⁴⁵¹ See subsection 20(2)(a) of the *Acts Interpretation Act 1954* (Qld).

¹⁴⁵² Although a return to the rule in *Bain v Fothergill* is not suggested in this Report, a case such as *Bailey v Woondella Pty Ltd* [2012] VSC 396 (appeal pending) illustrates the potential difficulties of the application of the rule in *Bain v Fothergill*.

¹⁴⁵³ *Conveyancing Act 1919* (NSW) s 54B.

¹⁴⁵⁴ New South Wales Law Reform Commission, *Community Law Reform Program: Damages for Vendor’s Inability to Convey Good Title: the Rule in Bain v Fothergill* Report 64 (1990) [3.27].

¹⁴⁵⁵ *Law of Property Act* (NT) s 70(2).

¹⁴⁵⁶ Victorian Law Reform Commission, *Sale of Land*, Report No. 20 (June 1989) 19 (Recommendation 14).

¹⁴⁵⁷ However, Justice Ipp in the Supreme Court case *Government Employees Superannuation Board v Martin* (1997) 19 WAR 224 indicated that the rule in *Bain v Fothergill* should not be followed. However, he noted that ‘In case I am wrong in this regard I shall deal with the matter as if the rule remains applicable’ but concluded in his decision that if the rule in *Bain v Fothergill* is still part of the law, it was not applicable to the facts of the case before him.

which is set out in section 54B of the *Conveyancing Act 1919* (NSW). The proposed draft provision is set out below.

RECOMMENDATION 74. Section 68 should be amended.

For example, using the New South Wales legislation as a guide, section 68 could be drafted in the following terms:

Section [68] Damages for breach of contract for sale

- (1) The rule of law known as the rule in *Bain v Fothergill* is abolished in relation to contracts for the sale or other disposal of registered land or any interest in registered land made after the commencement of this section.
- (2) The court may award damages for loss of bargain against a seller who cannot perform such a contract because of a defect in the seller's title.
- (3) This section shall not affect any right, power or remedy which, apart from this section, may be available to a buyer in respect of the failure of a seller to show or make good title or otherwise perform a contract for the sale of land.

76. Section 68A – Forfeiture of deposit on purchaser’s default

76.1. Overview and purpose

68A Forfeiture of deposit on purchaser’s default

- (1) This section applies in relation to a contract for the sale of a proposed lot.
- (2) The contract may provide for a sum not exceeding 20% of the purchase price of the proposed lot paid under the contract as a deposit (whether paid in 1 or more amounts) to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser.
- (3) However, the sum may only be forfeited or retained by the vendor if the breach results in the termination of the contract.
- (4) It is declared, for this section, that a sum not exceeding 20% of the purchase price of the proposed lot that is paid under the contract as a deposit (whether paid in 1 or more amounts) is not, either at law or in equity, a penalty if the sum is forfeited and retained by the vendor because the contract is terminated following the purchaser’s breach of the contract.
- (5) In this section—

proposed lot means—

 - (a) a proposed lot within the meaning of the Land Sales Act 1984; or
 - (b) a proposed lot within the meaning of the Body Corporate and Community Management Act 1997; or
 - (c) land that will be shown as a lot on a building units plan or group titles plan registered under the *Building Units and Group Titles Act 1980* ; or

Note—

There is limited scope for the registration of new building units plans and group titles plans under the *Building Units and Group Titles Act 1980* —see section 5A of that Act.

 - (d) a proposed lot within the meaning of the *South Bank Corporation Act 1989*, section 97B.

Section 68A deals with the sale of proposed lots which are also known as off-the-plan sales. A proposed lot is a lot that will come into existence on the registration of a plan,¹⁴⁵⁸ establishment of a community titles scheme¹⁴⁵⁹ or under the other legislation listed in the section. The section allows for a deposit of up to 20% of the purchase price for an off-the-plan sale to be forfeited if a breach by the buyer results in the termination of the sales contract. The section provides that forfeiture of the deposit in such circumstances is not a penalty.

As discussed below at paragraph 82.2.3. the maximum deposit for sales of off-the-plan lots was increased so that developers would be better able to finance development projects.¹⁴⁶⁰

76.2. Issues with the section

The section was added to the PLA in December 2014. No issues were raised with the section.

76.3. Recommendation

The Centre is of the view that section 68A should be retained with modernised language.

RECOMMENDATION 75. Section 68A should be retained with modernised language.

¹⁴⁵⁸ *Land Sales Act 1984* (Qld) schedule 1 (definition of ‘proposed lot’).

¹⁴⁵⁹ *Body Corporate and Community Management Act 1997* (Qld) schedule 6 (definition of ‘proposed lot’).

¹⁴⁶⁰ See paragraph 82.2.3.

77. Section 69 – Rights of purchaser where vendor’s title defective

77.1. Overview and purpose

69 Rights of purchaser where vendor’s title defective

- (1) Where specific performance of a contract would not be enforced against the purchaser by the court because of a defect in or doubt as to the vendor’s title, but such defect or doubt does not entitle the purchaser to rescind the contract, the purchaser shall nevertheless be entitled to recover the purchaser’s deposit and any instalments under the contract and to be relieved from all liability under the contract, unless the contract discloses such defect or doubt and contains a stipulation precluding the purchaser from objecting to the defect or doubt.
- (2) If the defect or doubt not disclosed by the contract is one which is known or ought to have been known to the vendor at the date of the contract the purchaser shall in addition be entitled to recover the purchaser’s expenses of investigating the title.
- (3) This section applies –
 - (a) to a contract for the sale or exchange of land or any interest in land made after the commencement of this Act; and
 - (b) despite any provision to the contrary contained in the contract.

This section is derived from section 55 of the *Conveyancing Act 1919* (NSW). It was included in the PLA to address the following situation:

When a vendor defaults in the performance of a contract for the sale of land, the purchaser is entitled to rescind and recover his deposit and any instalments paid under the contract. However, the right to rescind may be excluded where, for example, the contract provides that the vendor’s title shall not be objected to. In such case a court of equity will not grant specific performance which would have the effect of forcing a defective title on an unwilling purchaser, but the contract remains binding at law and the purchaser is unable to recover his deposit...¹⁴⁶¹

This result was described as ‘unreasonable’ when the QLRC was considering the inclusion of section 69 into the PLA in 1973.¹⁴⁶²

¹⁴⁶¹ 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) 53. Derrington J in *Delbridge v Low* [1990] 2 Qd R 317, 328 explains that the section was intended to ‘remedy the antecedent difficulty where there was a defect or doubt in title which was not so serious as to justify a repudiation but which was such that the court would not order specific performance. In that case the purchaser could not recover the deposit. This hiatus has been closed by this provision, but only if it is a defect or doubt in title which is established. This is an express limitation to the power so that it cannot be invoked where this preliminary requirement is absent.’

¹⁴⁶² 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) 53.

The QLRC noted that section 55(1) of the *Conveyancing Act 1919* (NSW) avoided the result as it:

- provided a buyer with a right to recover the deposit and any paid instalments; and
- enabled a buyer to be relieved from contractual liability where specific performance would not be enforced against the buyer as a result of a defect in the seller's title, even where the buyer was not entitled to rescind.¹⁴⁶³

The QLRC recommended the inclusion of section 55(1) and (2) of the *Conveyancing Act 1919* (NSW) into the PLA, with modification to section 55(1) to enable the deposit to be recovered where the court would refuse specific performance because the seller's title is defective or doubtful. In other jurisdictions it had been held that the words used in the New South Wales provision, 'defect in the vendor's title' would not cover 'doubtful' title.¹⁴⁶⁴

Section 69 of the PLA operates in the following way:

- it applies where a seller is in breach of a contract because of a doubt or defect in the seller's title means that the land cannot be conveyed as contracted;
- specific performance would not be available to a seller (i.e. the contract would not be enforced against the buyer) because of a defect in or doubt to the seller's title;
- the buyer is entitled to recover his or her deposit and any instalments under the contract;
- the recovery of the deposit is not available where the contract:
 - discloses the defect or doubt; and
 - contains a stipulation preventing the buyer from objecting to that defect or doubt;
- subsection 69(2) also enables the buyer to recover expenses relating to the title if the defect or doubt is known or ought to have been known to the seller at the date of the contract but was not disclosed in the contract. The section also appears to preclude any further action for damages for breach by the seller as it provides that the purchaser shall be 'relieved of all liability under the contract'.¹⁴⁶⁵ Commentators note that the section reverses the ordinary principles of contract law.¹⁴⁶⁶
- subsection 69(3) simply extends the operation of the provision to all contracts for the sale or exchange of land or any interest in land despite any contrary provision.

The section will only apply to those cases where the reason for refusal of specific performance is the 'defect or doubt' in the seller's title. It does not apply to situations where specific performance is refused for other reasons such as hardship, mistake or misdescription.¹⁴⁶⁷ Section 69 does not provide

¹⁴⁶³ Section 55(1) of the *Conveyancing Act 1919* (NSW) was described in this way by the 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) 53.

¹⁴⁶⁴ 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) 54 referring to the decision in *Bennett v Stuart* (1927) 27 S.R(NSW) 317, 327-8.

¹⁴⁶⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.69.120].

¹⁴⁶⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.69.120].

¹⁴⁶⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.69.60].

a general discretion to return deposits to buyers in all cases.¹⁴⁶⁸ The section is unavailable where the contract for sale discloses the relevant title defect or doubt and includes a provision which precludes the purchaser from objecting to the defect or doubt. Exclusionary provisions limiting or precluding objections to title must be specific to be enforceable by a seller.¹⁴⁶⁹ Where the contract discloses the defect, the buyer would take subject to it if that is what has been agreed.

77.2. Issues with the section

The discussion below considers some of the issues in relation to section 69 of the PLA that have been highlighted in Queensland case law and commentary on the provision.

77.2.1. Application of rule difficult – what is ‘doubtful’ title?

As indicated above, section 69 of the PLA also applies to both a ‘defect in the title’ and a ‘doubt in the title’. The latter is intended to be something different from a defect. Both expressions originate from old system land where the root of title may have depended upon a chain of deeds and may only be as good as the validity of the deeds. A defect in title, properly so called, was one which went to an actual defect in the title such as an undisclosed easement directly affecting the title.

Under old system land, often the basis of title depended on the judicial construction of a number of different instruments (such as deeds of conveyance and wills) which were often poorly drafted and unclear, making it difficult or impossible to make any certain decisions regarding whether the seller could show title or not. Under all standard conditions of sale in Queensland now, the seller states that they have the capacity to sell. Further, once the buyer becomes the registered owner, in the absence of fraud, the buyer’s title is ‘good’ regardless of the revelation of the doubt.¹⁴⁷⁰ Doubts in title in relation to registered land would rarely arise and if they did, it is likely they would be dealt with in other ways. It may not be readily obvious what a ‘doubtful’ registered title might constitute until third party rights arising out other instruments outside the contract of sale are determined.¹⁴⁷¹ This makes a ‘doubt’ in title in section 69(1) difficult to establish in order to rely on the section.¹⁴⁷²

77.2.2. Application of section limited – expansion required?

A further limitation of this section arises because it only applies where specific performance would not be ordered against a buyer ‘because of a defect or doubt in the seller’s title’. This is very limited

¹⁴⁶⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.69.60]. See for example *Delbridge v Low* [1990] 2 Qd R 317, 329 where the criterion prescribed for the exercise of the remedy in section 69 of the *Property Law Act 1974* (Qld) had not been established – in that case the buyer sought return of the deposit because a pergola on the property included a roof which was contrary to building by-laws. An order for demolition (if made) would have resulted in no undercover parking at the premises. The court held that the mere existence of circumstances which created the possibility or risk that the property at a future date may be subject to a statutory charge or burden did not constitute a defect in title. Accordingly, in that case, section 69 was not applicable.

¹⁴⁶⁹ *Faruqi v English Real Estate Ltd* [1979] 1 WLR 963.

¹⁴⁷⁰ In the example of a will and beneficiaries, any disappointed beneficiaries would have to consider alternative remedies.

¹⁴⁷¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.69.210].

¹⁴⁷² There was an unsuccessful attempt to invoke section 69 to prevent a registered mortgagee exercising power of sale from doing so when there was some evidence that the mortgagor (unbeknownst to the mortgagee) could have been subject to having their title upset through fraud. This was held not to be a doubt in the mortgagee’s title and thus the sale by the mortgagee was not upset: see *Shapowloff v Lombard Australia Ltd* [1980] Qd R 517.

as specific performance may not be ordered for a wide variety of reasons including proven misrepresentation, laches, hardship, and mistake or seller estoppel by conduct giving the buyer the impression that the strict letter of the contract would not be insisted upon. Judicial commentary on the section notes that the requirement that there be a 'defect or doubt in title' 'is an express limitation to the power so that it cannot be invoked where this preliminary requirement is absent.'¹⁴⁷³

In New South Wales, section 55(1) of the *Conveyancing Act 1919* (NSW) is supplemented by section 55(2A) which provides:

In every case where the court refuses to grant specific performance of a contract, or in any proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without interest thereon.

This subsection was not originally part of section 55 but was added in 1930 and broadened the scope of section 55. Prior to the introduction of section 55(2A), section 55 did not apply to situations where there was no defect in the seller's title or to those cases where specific performance would have been refused by a court in equity because the title was doubtful.¹⁴⁷⁴ The introduction of section 55(2A) extended the court's jurisdiction by providing it with the discretion to order the return of the deposit beyond situations where specific performance was refused to 'any other suit or proceeding'.¹⁴⁷⁵ For example, it extends to cases such as where there is no defect in the seller's title, where the title is doubtful, where the contract is binding at law on the purchaser.¹⁴⁷⁶ However, there must be special or exceptional circumstances where it would be unjust or inequitable for the seller to keep the deposit before an order can be made pursuant to section 55(2A).¹⁴⁷⁷

A limitation to the application of section 55(2A) arises where the purchaser is entitled to relief against the forfeiture of the deposit. In that situation, the section is not available.¹⁴⁷⁸ Commentary on the provision in relation to this point notes that an order under section 55(2A) would be less advantageous to the buyer than one made under the general law 'as terms as to costs etc. may be imposed upon him or her.'¹⁴⁷⁹

Victoria has a provision which addresses the issue of return of deposits in section 49(2) of the *Property Law Act 1958* (Vic). The section provides:

¹⁴⁷³ See Derrington J in *Delbridge v Low* [1990] 2 Qd R 317, 328.

¹⁴⁷⁴ See *Benyon v Wongala Holdings Pty Ltd* (1999) 9 BPR 16,781, 16,785 per Powell JA referring to *Bennett v Stuart* (1927) 27 SR (NSW) 317.

¹⁴⁷⁵ *Benyon v Wongala Holdings Pty Ltd* (1999) 9 BPR 16,781, 16,785 per Powell JA; Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) 97 [31040.5].

¹⁴⁷⁶ *Benyon v Wongala Holdings Pty Ltd* (1999) 9 BPR 16,781 at 16,785 per Powell JA; Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) 97 [31040.5].

¹⁴⁷⁷ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) 97 [31040.5] referring to a variety of New South Wales decision including *Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 NSWLR 268 and *Port Development Underwriting (Victoria) Pty Ltd* [1977] VR 454.

¹⁴⁷⁸ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [31040.20].

¹⁴⁷⁹ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [31040.20].

49(2) – Where the Court refuses to grant specific performance of a contract or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit.

The section was recently reviewed as part of the VLRC’s general review of the *Property Law Act 1958* (Vic) during 2010.¹⁴⁸⁰ The section is described by the VLRC as being equivalent to section 55(2A) of the *Conveyancing Act 1919* (NSW). The VLRC noted that the majority of the commentary and case law in New South Wales and Victoria in relation to the provision relates to the debate regarding both the circumstances and the threshold which needs to be satisfied before a court will exercise the discretion provided for in the section.¹⁴⁸¹ This remained the focal point of the VLRC’s consideration of the section.

At the time of considering the inclusion of section 69 in the PLA, the QLRC noted that section 55(2A) of the *Conveyancing Act 1919* (NSW) added a discretionary power which is broader than section 55(1) and not limited to cases in which specific performance is refused.¹⁴⁸² The QLRC did not favour the inclusion of such a general discretionary power to order the return of a deposit to a defaulting buyer and referred to its reasons for excluding the proposed clause 57 of the PLA (‘Recovery of Sums Paid under Discharged Contracts’) in the Report. Unfortunately, the QLRC’s discussion in relation to the proposed clause 57 does not provide the actual reasons for its exclusion and notes only that:

...in deference to the cogent criticisms of and comments made on the draft clause 57 by Mr C.W. Pincus of Counsel, the Commission has decided that it would be preferable to omit the provision altogether.¹⁴⁸³

This in turn means it is not possible to determine the basis for the QLRC’s decision to exclude from section 69 a subsection similar to section 55(2A) of the *Conveyancing Act 1919* (NSW).

77.3. Other jurisdictions

Section 69 of the PLA is based on the New South Wales provision, section 55(1) of the *Conveyancing Act 1919* (NSW). Although Victoria has a provision which addresses the issue of the return of deposits, it is equivalent to section 55(2A) of the *Conveyancing Act 1919* (NSW) and does not include a section similar to section 69(1) of the PLA or section 55(1) of the New South Wales legislation.

¹⁴⁸⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010) 62-64 and Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 43-45. The main issue in relation to section 49(2) considered by the Commission relates to the threshold test for the exercise of the discretion – that is, the liberal approach was that the court needed to be satisfied by the buyer that there were exceptional circumstances which justified the exercise of the wide discretion whereas as the other view based on New South Wales case law was that the test was whether it was ‘unjust and inequitable’ for a seller to retain the deposit in any particular case. The VLRC proposed that the threshold test for the exercise of the court’s discretion be put on statutory footing and recommended the ‘just and equitable’ approach: see Recommendation 12, Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 45.

¹⁴⁸¹ Victorian Law Reform Commission *Review of the Property Law Act 1958* Consultation Paper (2010) 62.

¹⁴⁸² 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) 54.

¹⁴⁸³ 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) 48.

77.3.1. The operation of the discretion in New South Wales

The discretion in section 55(2A) is broad but not unlimited.¹⁴⁸⁴ In *Lucas and Tait (Investments) Pty Limited v Victoria Securities Ltd*¹⁴⁸⁵ the court emphasised that ‘A vendor who forfeits a deposit in strict enforcement of his legal right is not to be deprived of it under section 55(2A) unless it is unjust or inequitable to permit him to retain it.’¹⁴⁸⁶ The section confers a ‘liberal approach’ and there has been no expression of where the boundaries of discretion lie.¹⁴⁸⁷

Santow J, in *Godard Pty Limited v Satnaq Pty Limited*¹⁴⁸⁸ noted that the wide discretion even extends to circumstances ‘where the contract of sale provides for the retention of the deposit where the purchaser is in breach of an essential term of the contract, or any notice issued under it.’¹⁴⁸⁹ The onus is on the purchaser to show that it is unjust for the vendor to retain the deposit.¹⁴⁹⁰

In New South Wales, the proper approach courts take when considering a claim under section 55(2A) was set out by Santow JA in *Havyn Pty Ltd v Webster*.¹⁴⁹¹ His Honour stated:

- (a) Section 55(2A) confers upon the court statutory jurisdiction to return forfeited deposits which was not previously available either at common law or in equity. Therefore, it would be wrong to seek to confine the jurisdiction conferred by the words of the statute by analogy with the jurisdiction of common law and equity to relieve against penalties or forfeiture.
- (b) Notwithstanding this, it is important for a court in considering the scope of the discretion conferred by s 55(2A) to bear in mind that a deposit is an earnest of performance. That fact forms part of the context in which the discretion falls to be exercised, and means that a Court will not lightly be moved to order the return of a Deposit paid as an earnest of performance, and forfeited in accordance with the express terms of the contract when performance does not occur.
- (c) That context is significant when considering the justice and equity of the case, and whether the court ‘sees fit’ to order the deposit to be returned. It does not involve putting a gloss on the words of the statute requiring the applicant to show ‘special circumstances’ (or satisfy any like test) before a deposit will be returned.
- (d) In particular, this principle mandates against characterising a forfeited deposit as a windfall to the vendor, merely because it is forfeited.
- (e) In considering an application under s 55(2A), it will often be material for the court to consider a number of factors, including (though not exhaustively) the nature of the deposit, the terms of the contract providing for its forfeiture and the circumstances in which the deposit was forfeited.

¹⁴⁸⁴ *5 Ridge Pty Ltd v Tryname Pty Ltd* [2017] NSWSC 317, [58].

¹⁴⁸⁵ (1973) 2 NSWLR 268, 272.

¹⁴⁸⁶ *Lucas and Tait (Investments) Pty Limited v Victoria Securities Ltd* per Street CJ at [272].

¹⁴⁸⁷ *Lucas and Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 NSWLR 268 per Street CJ at [272] and [273].

¹⁴⁸⁸ [1999] NSWSC 1283.

¹⁴⁸⁹ *Godard Pty Limited v Satnaq Pty Limited* [1999] NSWSC 1283, [335].

¹⁴⁹⁰ *Clarke v Dilberovic* (1982) NSW ConvR 55-083, [56, 491].

¹⁴⁹¹ (2005) 12 BPR 22,837.

Further, Santow JA stated:

The purchaser must therefore do more than merely show that the deposit has been forfeited, and that it will thus result in a 'windfall' to the vendor as will usually be the case. The Court should not take an approach to ordering the return of deposits under s 55(2A) which weakens the proper function of a deposit in providing a sanction so that the purchasers treat the making and completing of contracts with due seriousness.¹⁴⁹²

77.3.2. Review of case law in New South Wales

To demonstrate how section 55(2A) of the *Conveyancing Act 1919* (NSW) operates, the following is a summary of the recent cases where the section was relied upon.

In *Nassif v Caminer*¹⁴⁹³ the Court of Appeal considered a case where there was a contract for the sale of a commercial property which was subject to a lease. The purchase price was \$5.6 million and the deposit of \$280,000 was paid.

At the time of the contract for sale, the lessee's rent was in arrears in breach of the lease agreement. The seller disclosed the breach of the lease to the buyer, but did not particularise the amount which was \$253,850. The buyer became aware of the amount of the arrears in rent after administrators were appointed to the lessee and the administrators disclaimed the lease. While the buyer accepted that the rent in arrears was a debt owing to the seller, they claimed that the loss of the lease resulted in a substantial diminution of the value of the property and claimed \$840,000 to be set against the purchase price pursuant to the contract.¹⁴⁹⁴ The buyer also claimed misrepresentation on the part of the seller for the failure to disclose the amount of rental arrears.

The seller rejected this claim and served the buyer with a notice to complete. The buyer took this refusal to be a repudiation of the contract and purported to terminate the contract. The seller in turn took this purported termination as a repudiation and also purported to terminate the contract. The property was later sold to a third party for \$600,000 more than the original contract price.¹⁴⁹⁵

The court held that the purported termination by the buyer was not valid. The subsequent termination of the contract by the seller for anticipatory breach was therefore justified and valid.¹⁴⁹⁶ Sackville AJA and Batsen JA agreed (Macfarlan JA dissenting) that the deposit should be forfeited to the seller. Their Honours were of the view that the buyer had other options available to them with respect to their claim for deceptive and misleading conduct, by completing the contract and then making a claim under the *Fair Trading Act 1987* (NSW) to recover damages. Sackville AJA also questioned whether the purported misrepresentations influenced the actions of the buyer¹⁴⁹⁷ and therefore concluded '... I do not think that the representations said to have been made on behalf of the vendors prior to the purchaser's entry into the contract provide a sound basis for an order requiring the vendors to return the deposit.'¹⁴⁹⁸

¹⁴⁹² *Havyn Pty Ltd v Webster* (2005) 12 BPR 22,837, [155].

¹⁴⁹³ (2009) 74 NSWLR 276.

¹⁴⁹⁴ *Nassif v Caminer* (2009) 74 NSWLR 276, 19.

¹⁴⁹⁵ *Nassif v Caminer* (2009) 74 NSWLR 276, 21.

¹⁴⁹⁶ *Nassif v Caminer* (2009) 74 NSWLR 276, 92.

¹⁴⁹⁷ *Nassif v Caminer* (2009) 74 NSWLR 276, 95.

¹⁴⁹⁸ *Nassif v Caminer* (2009) 74 NSWLR 276, 94.

With respect to the effect of the increase in the purchase price when the property was subsequently sold to a third party, the court held that this is indeed one factor that needs to be taken into account when a court is considering exercising the discretion under section 55(2A).¹⁴⁹⁹ In this case their Honours factored in the cost of reselling and the delay in receiving the balance of the purchase price. It was concluded that the ‘windfall’ ‘... whether considered alone or in combination with other circumstances, does not warrant an order under s 55(2A) of the *Conveyancing Act* for a return of the deposit.’¹⁵⁰⁰

In *Melic Pty Ltd v Lainson*¹⁵⁰¹ a buyer purported to terminate a contract for the sale of land after the appointment of trustees for sale, notwithstanding there was a clause in the contract that was essentially an acceleration clause that required the date for completion to be brought forward, should a trustee be appointed. The price for the property was \$1.5 million and the deposit of \$150,000 was expressed in the contract to be ‘non-refundable.’¹⁵⁰²

Justice Hamilton found that the purported termination was not valid and refused to make an order for the return of the buyer’s deposit. On the matter of the application for the return of the deposit under section 55(2A), His Honour was of the view that the section was available to be exercised notwithstanding the contract describing the deposit as ‘non-refundable’ because the effect of a finding otherwise would act as an ouster of the jurisdiction of the court.¹⁵⁰³ In any event, His Honour did consider the agreement that the deposit was non-refundable, along with the wrongful termination of the contract, as sufficient reason to deny the application for the return of the deposit.¹⁵⁰⁴

The contract for the sale of acreage was the subject matter of the recent proceedings in *Ebadeh-Ahvazi v Namrood*.¹⁵⁰⁵ In that case the purchase price was \$1.46 million and the deposit of \$146,000 was paid by the buyer. Both the seller and the buyer purported to validly terminate the contract. The buyer purported to terminate the contract because the seller had not complied with certain requirements issued in a notice relating to environmental breaches arising before the contract for sale. However, the court held that the contract was properly terminated by the seller when the purported termination by the buyer was taken to be a repudiation.

The buyer sought to have the deposit returned to him under section 55(2A) on the basis *inter alia* that:

- (a) the seller had misled the buyer into thinking the sale was a mortgagee sale;
- (b) the seller misled the buyer about the existence of the notices regarding various breaches of environmental legislation; and
- (c) the property sold for an additional \$40,000 in short time.¹⁵⁰⁶

The court found that, while the description of the sale as a ‘mortgagee sale’ was deceptive, this did not influence the buyer to enter into the contract. Further, the court found that the buyer could not

¹⁴⁹⁹ See also *Borda v Burgess* (2003) 11 BPR 21,203; *Nelson v Bellamy* 10 BPR 19,011; *Coppa v Barnett* [2012] NSWSC 490.

¹⁵⁰⁰ *Nassif v Caminer* (2009) 74 NSWLR 276, 99.

¹⁵⁰¹ (2005) 12 BPR 23,373.

¹⁵⁰² *Melic Pty Ltd v Lainson* (2005) 12 BPR 23,373, [3].

¹⁵⁰³ *Melic Pty Ltd v Lainson* (2005) 12 BPR 23,373, [24].

¹⁵⁰⁴ *Melic Pty Ltd v Lainson* (2005) 12 BPR 23,373, [25].

¹⁵⁰⁵ [2017] NSWSC 399.

¹⁵⁰⁶ *Ebadeh-Ahvazi v Namrood* [2017] NSWSC 399, 116.

reasonably have been expected in the circumstances to be told about the notices. Again, the court found that even if the buyer had known about the notices, he would have entered into the contract in any event. Finally, even though a higher sale price was achieved, the seller incurred some extra costs to re-sell the property, and His Honour considered that \$40,000, received some five months after the buyer agreed to purchase the property, did not amount to a big profit.¹⁵⁰⁷

Having regard to all of this, along with the ‘well-established nature of a deposit as an earnest of performance’, the court declined to order the deposit returned.¹⁵⁰⁸

In *Evolution Lifestyles Pty Ltd v Clarke (No 3)*¹⁵⁰⁹ the court ordered the return of a \$34,000 deposit paid by the buyer under a ‘rent to own’ contract in circumstances where:

- the court set aside the contract on the basis that its terms were ‘overtly unfair in operation’;¹⁵¹⁰
- entry into the contract involved undue pressure and threats of violence from the co-buyer who was the husband of the buyer who was the defendant in these proceedings;¹⁵¹¹
- the representations of the seller were misleading;¹⁵¹² and
- the buyer had a flawed understanding of the contract and received flawed legal advice.¹⁵¹³

The court declined to exercise its discretion to order the return of the deposit of \$465,888.80 in *Sydney Developments Pty Ltd v Perry Properties Pty Ltd*.¹⁵¹⁴ In this case the purchase price was \$4,658,888 and special condition 25 of the contract required the buyer to pay two deposits of 10% each – the first on the date of the contract and the second 122 days later. Time was expressed to be of the essence in the contract and the contract provided that failure to comply with special condition 25 will give rise to a right for the seller to terminate the contract and the deposit paid would be forfeited.¹⁵¹⁵

When the buyer failed to pay the second 10%, it admitted that it had funding problems and asked for an extension of time. There were further negotiations and extensions of time and finally the seller terminated the contract for breach of special condition 25. The buyer contended that special condition 25 was a penalty and was therefore unenforceable, and the contract was therefore not validly terminated.¹⁵¹⁶ The buyer then purported to terminate the contract on the basis that the seller’s purported termination was a repudiation.

The court held that special condition 25 was not in the nature of a penalty and that the seller validly terminated the contract when the buyer failed to pay the second deposit. The court then declined to make an order for the return of the first deposit, notwithstanding that the buyer had spent some considerable money making applications for development approvals in respect of the land. The court

¹⁵⁰⁷ *Ebadeh-Ahvazi v Namrood* [2017] NSWSC 399, 117.

¹⁵⁰⁸ *Ebadeh-Ahvazi v Namrood* [2017] NSWSC 399, 123.

¹⁵⁰⁹ [2016] ASC 155-212.

¹⁵¹⁰ *Evolution Lifestyles Pty Ltd v Clarke (No 3)* [2016] ASC 155-212, [157].

¹⁵¹¹ *Evolution Lifestyles Pty Ltd v Clarke (No 3)* [2016] ASC 155-212, [163].

¹⁵¹² *Evolution Lifestyles Pty Ltd v Clarke (No 3)* [2016] ASC 155-212, [170].

¹⁵¹³ *Evolution Lifestyles Pty Ltd v Clarke (No 3)* [2016] ASC 155-212, [170].

¹⁵¹⁴ *Sydney Developments Pty Ltd v Perry Properties Pty Ltd* (2016) 18 BPR 35,905.

¹⁵¹⁵ *Sydney Developments Pty Ltd v Perry Properties Pty Ltd* (2016) 18 BPR 35,905, [3].

¹⁵¹⁶ *Sydney Developments Pty Ltd v Perry Properties Pty Ltd* (2016) 18 BPR 35,905, [4].

again took into account the 'nature of the payment as an earnest of performance and the important role such payments play in transactions of this kind'.¹⁵¹⁷

In *5 Ridge Pty Ltd v Tryname Pty Ltd*¹⁵¹⁸ the court ordered the return of a buyer's deposit in circumstances where the seller made misrepresentations to the buyer about the exercise of an option by a tenant. Penbroke J noted that misrepresentation by a seller is relevant to the exercise of the discretion to return a deposit to a buyer under section 55(2A).

Similarly in *Statewide Developments Pty Ltd v Higgins*¹⁵¹⁹ and *Havyn Pty Ltd v Webster*¹⁵²⁰ the court ordered the return of a buyer's deposit where the seller had made misrepresentations to induce the buyer to enter into the contract, and then purported to terminate the contract and retain the deposit.

In *Chambers v Borness*¹⁵²¹ a series of 'trials and tribulations' that befell the buyer, while attracting the sympathy of the court, did not contribute to the factors which the court considered when deciding not to return the deposit to the buyer. The court did, however, set-off some payments made by the buyer for a licence and occupation fee, and payment of rates, taxes and other outgoings under that licence against the deposit and other claims for damages, to arrive at an amount to be forfeited to the seller.

This review of the recent case law in New South Wales regarding section 55(2A) of the *Conveyancing Act 1919* (NSW) clearly shows that the courts are unwilling to exercise their discretion unless it can be clearly shown that it is unjust and inequitable to allow the vendor to keep the deposit. The core principle that a deposit provides a sanction so that a buyer will treat the making and completing of contracts with due seriousness is maintained and deposits are only ordered to be returned in exceptional circumstances. A summary of what this might mean for Queensland includes:

- a deposit represents an earnest of performance and forfeiting a deposit to a seller where the buyer fails to perform certain obligations under a contract is not unjust or inequitable in and of itself;
- the buyer must be able to show that forfeiting the deposit to the seller is unjust or inequitable, before the court will order its return;
- the re-sale of the property at a higher price does not create a 'windfall' that justifies the return of a deposit;
- unfortunate circumstances that befall a buyer are not a factor that the court will consider when contemplating an order except where specific performance is not ordered on the basis of a successful equitable defence such as laches, hardship, misrepresentation, accident, fraud, mistake or surprise etc.;
- misrepresentations by the seller that induce the buyer into the contract may make it unjust or inequitable for a seller to forfeit the deposit;
- unfair contract terms may justify the return of a deposit; and

¹⁵¹⁷ *Sydney Developments Pty Ltd v Perry Properties Pty Ltd* (2016) 18 BPR 35,905, [56].

¹⁵¹⁸ [2017] NSWSC 371.

¹⁵¹⁹ [2011] NSWCA 35.

¹⁵²⁰ (2005) 12 BPR 22,837.

¹⁵²¹ [2014] NSW ConvR 56-334.

- the court can exercise its discretion and make an order for the return of the deposit, regardless of the terms of the contract.

77.4. Recommendation

The Centre believes that there may be some limited application of the operation of this section and for that reason, the effect of the section should be retained. However, the Centre recommends that section 69 be amended in the following ways:

- the concept of ‘doubt’ in title is obsolete and unlikely to arise in the registered land context. The Centre is therefore of the view that the words ‘or doubt’ should be removed from section 69(1) and (2); and
- expanding the section to give the courts a general discretion to return deposits in certain circumstances.

The reference to ‘doubt’ relates to old system land. Removal of the terms is in line with our recommended approach to ‘old system land’ and the overarching principles that inform our recommendations.

Currently, the application of section 69 is limited to situations where specific performance would not be granted to a seller because of a defect or doubt in the title held. The Centre recommends expanding the operation of section 69 in terms of section 55(2A) of the *Conveyancing Act 1919* (NSW).

The Centre has also concluded that the expansion of the section to include a general discretion for the court to make orders with respect to the return of the deposit or otherwise is appropriate where the contract is not enforced against the buyer for any reason. The benefit of the inclusion of this general discretion is to allow a court to consider the circumstances of the case before it and, after balancing the various factors, decide whether the return of the deposit is appropriate in the circumstances.

This will also bring Queensland into line with the position in New South Wales and Victoria where the relevant court has the discretion to order the recovery of a deposit in much broader circumstances.

If the provision is amended in terms of the New South Wales legislation the decisions from New South Wales, while not binding, will be persuasive on Queensland courts.

RECOMMENDATION 76. Section 69 should be amended in the following manner:

- remove the words ‘or doubt’ from section 69(1) and (2); and
- expand the section to give the courts a general discretion to return deposits in certain circumstances.

For example, using the New South Wales legislation as a guide, section 69 could be expanded by the inclusion of a subsection drafted in the following manner:

Section [69] [subsection number]

Where the court refuses to grant specific performance of a contract against a buyer or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit.

78. Section 70 – Applications to court by vendor and purchaser

78.1. Overview and purpose

70 Applications to court by vendor and purchaser

A vendor or purchaser of land, or their respective representatives, may apply in a summary way to the court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with a contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as to the court may appear just, and may order how and when and by whom all or any of the costs of and incident to the application are to be borne and paid.

The provision originated from section 9 of the *Vendor and Purchaser Act 1874* in England, and is known as the ‘Vendor and Purchaser Summons’. The QLRC in its commentary of the section noted that:

Its object is to provide a summary way of obtaining the determination of the Court on an isolated point arising on a contract without the necessity of instituting a suit for specific performance. The exception in respect of questions affecting the validity or existence of the contract refers to the validity or existence of the contract in its inception, and the Court may under the section make an order which gives effect to its determination, e.g., by ordering the return of a deposit.¹⁵²²

The QLRC noted that it may be the case that the jurisdiction conferred by the provision does not add greatly to that already exercisable under the Supreme Court Rules in existence in 1973 when the Report was prepared. The section is intended to enable the matter to be dealt with by way of a Chamber application where there are no (or minor) disputes as to the facts and where it can be determined upon affidavit evidence without resort to oral evidence.¹⁵²³ In the Supreme Court decision of *Re MacDonald*,¹⁵²⁴ Dowsett J noted that parties should not simply ‘avail’ themselves of section 70 in order to avoid the delay of the civil list ‘in cases where the appropriate procedure is other than that contemplated by s 70.’¹⁵²⁵ Section 70 is not an appropriate process where there are significant disputed facts.¹⁵²⁶

The discretion of the court to make an order under section 70 of the PLA is wide. For example, the court may order the return of a deposit if it declares that there is a material or substantial defect in the seller’s title. A ‘claim for compensation’ might still be made under the section as compensation is available for a misdescription under the existing standard conditions of sale in Queensland. It has been held in Queensland that compensation is available even after settlement.¹⁵²⁷ From a procedural perspective, a question determined under a section 70 summons is deemed to be *res judicata* (as

¹⁵²² 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) 54.

¹⁵²³ Where oral evidence is required, the matter would be adjourned to the civil list for trial as an action.

¹⁵²⁴ [1989] 2 Qd R 29.

¹⁵²⁵ [1989] 2 Qd R 29, 34.

¹⁵²⁶ See *Re MacDonald* [1989] 2 Qd R 29, 34.

¹⁵²⁷ See *Re Forward Development Associates and Martin’s Contract* [1982] Qd R 569 and *Re Custom Credit Corporation Ltd* [1985] 1 Qd R 35.

between the parties to the contract) and cannot again be litigated if it is later necessary to bring enforcement action (for example, for specific performance).

The phrase in section 70 of the PLA 'any other question arising out of or connected to the contract' covers a variety of matters including:

- the construction of the contract;
- the construction of any statute which might affect the construction or performance of the contract;
- a declaration regarding whether the seller's title shown conforms to what was contracted.¹⁵²⁸

Matters which are not justiciable under this section are 'matters concerning the existence or validity of the contract'. This covers things such as whether the contract:

- is illegal or void through some vitiating cause (for example fraud);
- satisfies the requirements of the Statute of Frauds;
- is still on foot or has been properly rescinded.¹⁵²⁹

A court will also generally not consider the following questions on a section 70 summons:

- whether there has been a breach of contract by a party;
- any assessment of damages (as opposed to compensation);¹⁵³⁰
- whether the parties have abandoned the contract;¹⁵³¹
- whether to enforce a term of the contract (for example, a restrictive covenant by injunction);¹⁵³²
- subject to comments in paragraph 78.2.2 below, specific performance of the contract.¹⁵³³

¹⁵²⁸ See for example *Re Glanning* [1987] 2 Qd R 523.

¹⁵²⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.70.150].

¹⁵³⁰ *Re Mujaj* [1998] 2 Qd R 152.

¹⁵³¹ *Re Macdonald* [1989] 2 Qd R 29.

¹⁵³² *Re Forward Development Associates and Martin's Contract* [1982] Qd R 569.

¹⁵³³ However, see *Evans v Robcorp Pty Ltd* [2014] QSC 26 where the use of section 70 of the *Property Law Act 1974* (Qld) for an application for summary judgment by the vendor of land seeking specific performance was not questioned in the decision. Although the application for summary judgment was refused, this was on the basis of hardship and the absence of financial capacity of the purchaser to settle. Lyons J did note at the start of the decision that 'The precise test to be applied in determining whether or not summary judgment should be granted under s 70 was not the subject of submissions in the present case. The rules relating to summary judgment under the Supreme Court Rules have changed since the section was first introduced. Whether that has any consequences for the present application is unclear, but, in my view, does not matter for the determination of the present application' (at [2]). For further commentary on this case see Bill Duncan 'The Defence of Hardship to Specific Performance Actions' (2014) 29(3) *Australian Property Law Bulletin* 55 and Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.70.150].

78.2. Issues with the section

78.2.1. *Uniform Civil Procedure Rules 1999 (Qld)* - potentially covers the field?

Other than an appeal, there are two types of originating process under the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR), namely a claim and an application.¹⁵³⁴ In the case of a claim, either the plaintiff or defendant may bring an interlocutory application for summary judgment after a defendant files a notice of intention to defend.¹⁵³⁵ An application is governed by a different rule in the UCPR and the originating document is referred to as an originating application.¹⁵³⁶ An originating application can only be made if, relevantly, the only or main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely.¹⁵³⁷ An application and any supporting affidavit material must be served on each respondent at least 3 business days before the day set for the hearing.¹⁵³⁸

An originating application potentially offers a similarly expeditious means of bringing a matter before court as does a seller and buyer application under section 70 of the PLA. Applications relying on the equivalent of an originating application have been made in Queensland previously in the alternative to a section 70 application under the PLA.¹⁵³⁹ In terms of cases involving disputed questions of fact, as indicated in paragraph 78.1 above, these are generally not intended to be dealt with under section 70. Ultimately, it is a matter for the court to decide if disputed questions should be determined by relying on section 70 of the PLA, but the view seems to be that they should not be.¹⁵⁴⁰ This limitation regarding the use of section 70 for disputes of fact appears to be similar to that placed on the bringing of an originating application under UCPR rule 11(a) which is available where the main issue in the proceeding is an issue of law and a substantial dispute of fact is unlikely.

Section 70 of the PLA provides that the court may make such order ‘as to the court may appear just.’ In bringing an originating application under UCPR rule 11(a), an applicant needs to establish that the court has power to grant the relief sought. For example, a party to a land contract could seek relevant declaratory relief that the other party has not lawfully terminated the contract. A power to grant declaratory relief is provided by section 10 of the *Civil Proceedings Act 2011* (Qld). With respect to consequential orders, UCPR rule 658(1) provides that the court may make any order that the nature of the case requires, including a judgment. It is possible that in a case in which the court has jurisdiction, this broadly drafted rule would appear to permit the making of any order that could otherwise be made under the primary power conferred by section 70 of the PLA such as returning a

¹⁵³⁴ See UCPR rule 8(2). A claim is governed by UCPR rule 22 and a statement of claim must be attached to the claim. An application is governed by UCPR rule 26 and the originating document is referred to as an Originating Application (see Form 5).

¹⁵³⁵ UCPR rule 292 (in the case of the plaintiff) and UCPR rule 293 (in the case of the defendant).

¹⁵³⁶ UCPR rule 26.

¹⁵³⁷ UCPR rule 11(a).

¹⁵³⁸ UCPR rule 27(1) and UCPR rule 28(1).

¹⁵³⁹ See for example *Re Ringrose Pty Ltd* [1994] 1 Qd R 382, 383 and where an application was brought under section 70 of the PLA and in the alternative under O.64 of the *Rules of the Supreme Court*. Order 64 r1BB enabled an application by originating summons in cases where a person was claiming a legal or equitable right in a case where the determination of the right depends on the question of law and it was unlikely that there would be any substantial dispute of fact. This is similar to the Originating Application process under UCPR rule 11(a).

¹⁵⁴⁰ See *Re Ringrose Pty Ltd* [1994] 1 Qd R 382 and *Re MacDonald* [1989] 2 Qd R 29, 34.

deposit. Alternatively, orders could potentially be framed by way of mandatory injunctive relief requiring one party to effect certain acts.¹⁵⁴¹

78.2.2. Uncertainty regarding scope of the section based on recent decisions

Recent decisions of the Queensland Supreme Court relating to summary applications made under section 70 of the PLA raise issues regarding the use of the section and its scope. In *Evans v Robcorp*¹⁵⁴² the applicant made a summary application under section 70 for specific performance. There was no discussion in the case of the appropriateness of section 70 as a vehicle for seeking specific performance although Lyons J indicated:

The precise test to be applied in determining whether or not summary judgment should be granted under section 70 was not the subject of submissions in the present case. The rules relating to applications for summary judgment under the Supreme Court Rules have changed since the section was first introduced. Whether that has any consequence for the present application is unclear but, in my view, does not matter for the determination of the present application.¹⁵⁴³

The respondent raised financial hardship (no financial capacity to settle) during the proceedings and the application for summary judgment failed. The matter was remitted for trial.¹⁵⁴⁴ The decision also referred to an earlier case of *Lindaning Pty Ltd v Goodlock*¹⁵⁴⁵ as providing support for the ‘summary’ nature of the application under section 70. This earlier case was also a summary application for specific performance (which was decreed) but there is no reference in that case to section 70 of the PLA. The decision in *Lindaning* refers to the fact that specific performance was sought by originating application.¹⁵⁴⁶

Commentary in relation to *Evans v Robcorp*¹⁵⁴⁷ suggests (since it was not explained in the decision) that Lyons J assumed the remedy of specific performance was available ‘presumably upon the basis...that the section was appropriately utilised by a buyer and seller and that the court may make such order upon the application as to the court may appear just.’¹⁵⁴⁸ This may include specific performance if ‘applied in conjunction with the *Uniform Civil Procedure Rules 1999*.’¹⁵⁴⁹

The position in relation to specific performance and section 70 of the PLA remains uncertain.

¹⁵⁴¹ As to the application of UCPR rule 658 in a different context, see *Alder v Khoo & Ors* [2010] QCA 360, [27]-[28]. See also ss 13 and 14 of the *Civil Proceedings Act 2011* (Qld).

¹⁵⁴² [2014] QSC 26.

¹⁵⁴³ *Evans v Robcorp* [2014] QSC 26, [2].

¹⁵⁴⁴ *Evans v Robcorp* [2014] QSC 26, [16] – [17].

¹⁵⁴⁵ [2011] QSC 266.

¹⁵⁴⁶ [2011] QSC 266, [1]. Proceedings under section 70 of the PLA are commenced by originating application using Form 5 of the UCPR.

¹⁵⁴⁷ [2014] QSC 26.

¹⁵⁴⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.70.150].

¹⁵⁴⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.70.150].

78.3. Other Australian jurisdictions

Victoria, Northern Territory and Tasmania have an equivalent provision to section 70 of the PLA.¹⁵⁵⁰ The form of the relevant sections in each jurisdiction is similar to the Queensland provision. The Victorian provision was reviewed by the VLRC in 2010 and it was noted that the relevant sub-section (section 49(1)) was 'uncontentious'.¹⁵⁵¹ The Commission was more concerned with section 49(2) of the *Property Law Act 1958* (Vic) which dealt with the return of deposits. The Final Report recommended that section 49(1), (2) and (3) should be revised and consolidated into a single provision, although the recommendation to date has not been adopted.¹⁵⁵²

78.4. Recommendation

The Centre recommends repealing section 70. The Centre is of the view that existing civil procedure rules in Queensland, particularly originating applications made under UCPR rule 11(a), provide a similarly expeditious process for dealing with issues that would ordinarily fall within the scope of section 70. The discussion in paragraph 78.2.1 supports a position that the object underpinning the introduction of section 70 of the PLA can be met relying on an originating application under the UCPR.

RECOMMENDATION 77. Section 70 should be repealed.

¹⁵⁵⁰ See *Property Law Act 1958* (Vic) s 49; *Law of Property Act* (NT) s 72; *Conveyancing and Law of Property Act 1884* (Tas) s 39. In Victoria, the section is part of what in Queensland is section 69 of the *Property Law Act 1974* (Qld).

¹⁵⁵¹ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010).

¹⁵⁵² Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) (Recommendation 11).

79. Section 70A – Computers inoperative on day for completion

79.1. Overview and purpose

70A Computers inoperative on day for completion

- (1) This section applies if –
 - (a) a contract for the sale of land does not provide otherwise; and
 - (b) time is of the essence of the contract; and
 - (c) the purchaser under the contract, without default on the purchaser’s part, can not, on the date for completion of the contract, verify the vendor’s title because computers in the relevant office of the land registry under the *Land Title Act 1994* are inoperative for any reason.
- (2) Time ceases to be of the essence of the contract.
- (3) The vendor is taken –
 - (a) not to have proved title to the land; and
 - (b) not to be in breach of the contract only because of the failure to prove title at that time.
- (4) The vendor or purchaser may give a written notice to the other party to the contract to complete the sale.
- (5) The notice must state –
 - (a) that the computers are again fully operational; and
 - (b) a period of days, of not more than 7 business days, from the day the notice is given for completion of the sale.
- (6) The notice may be given no earlier than the day after the first continuous day of operation of the computers after computer operation is fully restored.
- (7) From a party’s receipt of the notice, time is again of the essence of the contract.

Section 70A was introduced into the PLA in 2000¹⁵⁵³ to address an issue which was raised in a decision of the Queensland Court of Appeal in *Imperial Bros Pty Ltd v Ronim Pty Ltd*¹⁵⁵⁴ arising from a contract for the sale of land. The contract was silent in relation to whether the seller had to prove title at completion and, if so, how that was to be achieved.¹⁵⁵⁵ Time was of the essence under the contract and the settlement day and time was set. As a result of other factors not relevant to the decision, the settlement deadline was not met and the day after settlement, the seller rescinded the contract. On the day of the scheduled settlement, the buyer’s solicitors were unable to conduct a necessary search to check the seller’s title to the property as the computers in the Titles Registry were inoperative. The buyer claimed in the proceedings that the seller was unable to show good title at the exact time of completion and that the electronic register in the Titles Registry was the only way to achieve this. This in turn raised a broader question as to how a seller with an electronic title only is able to show and make good title on the date for completion.¹⁵⁵⁶

¹⁵⁵³ The section was introduced in the *Justice and Other Legislation (Miscellaneous Provisions) Act 2000* (Qld).

¹⁵⁵⁴ [1999] Qd R 172.

¹⁵⁵⁵ W D Duncan and SA Christensen, ‘Overcoming the Problems of Showing and Making Cyber Title’ (2000) 8 *Australian Property Law Journal* 1, 2. The authors [at 3] note that ‘although the standard Queensland contract is silent as to any obligation on the vendor to establish that it can make good title, it is conceded that there is a fundamental obligation on a vendor to show good title according to the contract and this principle is really beyond argument.’

¹⁵⁵⁶ W D Duncan and SA Christensen, ‘Overcoming the Problems of Showing and Making Cyber Title’ (2000) 8 *Australian Property Law Journal* 1, 2.

The Court of Appeal found that the seller could not make good title at the time of completion. The court implied a term into the contract that the obligation to complete was suspended where, through no fault of the parties, on the day for completion the necessary title checks could not be carried out because the Titles Registry computer system was inoperative.¹⁵⁵⁷ This provided the buyer with a reason not to complete.¹⁵⁵⁸ The contract remained on foot but time ceased to be of the essence and the suspension of the obligation to complete only lasted until the buyer was able to verify the title once the Titles Registry system was operational again. It is an accepted conveyancing practice in Queensland that the buyer will undertake a search of the Titles Registry on the day of completion to ensure that the seller's title remains unaffected by interests apart from those that the buyer has agreed to.¹⁵⁵⁹

Section 70A of the PLA effectively restates the Court of Appeal's implied term in *Imperial Bros Pty Ltd v Ronim Pty Ltd*¹⁵⁶⁰ and provides clarity in relation to settlement issues that may arise as a result of the Titles Registry computer system being inoperative. The section operates in the following way:

- where, without default on the buyer's part, the buyer is unable to verify the seller's title because the computers in the Titles Registry are inoperative for any reason:¹⁵⁶¹
 - the seller is taken not to have proved title; and
 - the seller is not in breach of the contract only by virtue of failure to prove title at completion;¹⁵⁶²
- time ceases to be of the essence of the contract;¹⁵⁶³
- either the seller or buyer can give written notice for completion of the sale after the computers become fully operational again and the notice must specify a time period (no more than 7 business days) for the completion of the sale;¹⁵⁶⁴
- time is again of the essence from receipt of the notice by the relevant party.¹⁵⁶⁵

79.2. Issues with the section

The section was introduced to address and clarify the specific issue identified in *Imperial Bros Pty Ltd v Ronim Pty Ltd*.¹⁵⁶⁶ The provision does not appear to have been the subject of any consideration by the courts since it was enacted in 2000. The section is described as providing statutory recognition

¹⁵⁵⁷ *Imperial Bros Pty Ltd v Ronim Pty Ltd* [1999] Qd R 172, 180. The court indicated that '...although the respondent would ordinarily have been obliged to settle strictly in accordance with the time stipulated within the contract the circumstances that title could not be shown then because the computer was down, suspended its obligation to settle, consistently with the implied term to which we have referred. The contract therefore remained on foot.' [181].

¹⁵⁵⁸ W D Duncan and SA Christensen, 'Overcoming the Problems of Showing and Making Cyber Title' (2000) 8 *Australian Property Law Journal* 1, 2.

¹⁵⁵⁹ W D Duncan and SA Christensen, 'Overcoming the Problems of Showing and Making Cyber Title' (2000) 8 *Australian Property Law Journal* 1, 3. The authors note that 'In Queensland, a vendor is not contractually entitled to deliver requisitions on title. In the context of this modification to conveyancing practice together with a lack of documentary evidence of title, there is a good reason why it is appropriate to examine the obligation of a vendor generally "to show and make good title" at completion'.

¹⁵⁶⁰ [1999] Qd R 172.

¹⁵⁶¹ Additional preconditions under the *Property Law Act 1974* (Qld) s 70A(1)(a) and (b) are that the contract for the sale of land does not provide otherwise and time is of the essence of the contract.

¹⁵⁶² *Property Law Act 1974* (Qld) s 70A(1) and (3).

¹⁵⁶³ *Property Law Act 1974* (Qld) s 70A(2).

¹⁵⁶⁴ *Property Law Act 1974* (Qld) s 70A(4) and (5).

¹⁵⁶⁵ *Property Law Act 1974* (Qld) s 70A(7).

¹⁵⁶⁶ [1999] Qd R 172.

that a seller 'with an electronic title can only prove their title, if the buyer is able to search the indefeasible title in the Land Title Register' and a way to provide protection to the buyer where there is no avenue for the seller to provide title at completion.¹⁵⁶⁷ The section continues to have this role.

79.3. Recommendation

In the circumstances the retention of section 70A in its current form is recommended. However, the introduction of electronic conveyancing within Queensland potentially raises broader issues associated with computer inoperability and other technical issues associated with the systems involved in the conveyancing process which do not fall within the scope of section 70A. These issues are discussed in paragraph 80 below.

RECOMMENDATION 78. Section 70A should be retained.

¹⁵⁶⁷ S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 300.

80. Inoperative computer systems and electronic conveyancing

80.1. Overview Electronic Conveyancing

The *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld) commenced on 23 April 2013 and provides for the Electronic Conveyancing National Law (**ECNL**) to be a law of Queensland. The ECNL establishes the legal framework for electronic exchange of funds and lodgement of instruments in the Titles Registry.¹⁵⁶⁸ It also provides for the establishment of an electronic lodgement network (**ELN**), operators of the network (**ELNO**), subscribers, rules and the powers of the Registrar to implement and monitor the system.

The first ELN is operated by Property Exchange Australia Ltd (**PEXA**). PEXA is a web-based property exchange which will allow parties to a conveyancing transaction to:

- prepare land title instruments;
- settle the transaction; and
- lodge instruments for registration electronically.

Under the ELN, the traditional face to face settlement is replaced by an electronic exchange process for funds and instruments. The steps involved in an electronic settlement do not mirror the paper process exactly. It is not possible to apply the traditional concept of 'settlement' of a land transaction to an electronic environment. The concept of settlement is important within a contractual and statutory context. In both cases, the act of 'settlement' marks a point in time when certain rights of the buyer, usually to terminate or cancel the transaction can no longer be exercised. The PLA was recently amended to, amongst other matters, clarify what 'settlement' means in the electronic conveyancing environment.¹⁵⁶⁹ 'Settlement' in that context occurs when the electronic workspace for the electronic conveyance records that:

- financial settlement¹⁵⁷⁰ occurs; or
- if there is no financial settlement, the documents necessary to transfer title have been accepted for electronic lodgement by the registrar.¹⁵⁷¹

The term 'financial settlement' is defined to mean 'the exchange of value, in an ELN, between financial institutions in accordance with the instructions of participating subscribers to the e-conveyance.'¹⁵⁷²

Once the time for settlement nominated by the parties is reached the electronic workspace will lock. After a workspace locks the system will undertake a number of verifications and checks prior to proceeding to exchange funds and lodge documents. If the PEXA system and all third party systems (Titles Registry, Office of State Revenue and financial institutions) are operating the workspace will proceed to settlement without further intervention by the parties. However, there are a number of circumstances in which settlement on that day may not be possible. This may be due to a failure by

¹⁵⁶⁸ The ECNL is supported by the *Land Title Act 1994* (Qld) and the Model Operating Rules and Model Participation Rules approved by the Australian Registrar's National Electronic Conveyancing Council.

¹⁵⁶⁹ Explanatory Notes, Land Sales and Other Legislation Amendment Bill 2014 (Qld) 9.

¹⁵⁷⁰ *Property Law Act 1974* (Qld) s 58A.

¹⁵⁷¹ *Property Law Act 1974* (Qld) s 58B(2).

¹⁵⁷² *Property Law Act 1974* (Qld) s58BA.

one of the parties to the contract or it could be a system failure or technical problem. In the case of a technical failure, such as unavailability of the Titles Registry or a financial institution system, PEXA will, by 4pm on the day for settlement, notify the parties that the settlement cannot proceed and that a new time and date for settlement needs to be set. At this time the workspace unlocks. A more detailed discussion of the technical problems that may arise once the electronic workspace is locked is set out further below.

The 'locked' electronic workspace raises slightly different issues in relation to termination rights than under a paper based conveyancing process. Once the workspace is locked, the parties are unable to unlock or stop settlement proceeding. This means although termination rights may exist and could be exercised during the locked phase, the ELN will proceed with the transaction. In order to address this issue in the context of statutory termination rights, the PLA has been amended to insert a new section 67A. The section prohibits the exercise of a statutory right of termination during any period the electronic workspace for the electronic conveyance is locked for the purpose of settlement.¹⁵⁷³ The word 'locked' is defined in section 67A(4) to mean:

locked, in relation to an electronic workspace for an e-conveyance means the ELN for the workspace does not allow a participating subscriber to the e-conveyance to change a document or instruction in the workspace.

The REIQ Standard Form contracts were amended to incorporate a similar clause in relation to available contractual termination rights. Clause 11.3(6) provides that a contractual right to terminate may not be exercised during the time the workspace is locked for settlement.¹⁵⁷⁴

80.2. Time is of the essence, technical errors and settlement delays in electronic conveyancing environment

Time is of the essence in Queensland standard form contracts for sale of land and there is no proposal within this review process to reconsider (or alter) this position for electronic conveyancing purposes. There are a number of steps that take place within the electronic workspace once it is locked leading up to settlement. These steps all involve electronic communication between PEXA, financial institutions, the Titles Registry, third party beneficiaries receiving disbursements from the settlement proceeds such as utility companies and the Office of State Revenue. A broad summary of the process which occurs once the electronic workspace is locked is set out below:

- funds held in source accounts need to be moved to 'clearing accounts'.¹⁵⁷⁵ This step requires PEXA to send a payment instruction to the relevant financial institution where the source account is held;
- assuming the funds from the source accounts have been transferred to the relevant financial institutions, PEXA then sends a request to the Reserve Bank Australia (**RBA**)¹⁵⁷⁶ to place a reservation on the Exchange Settlement Account (**ESA**) of the financial institutions which means the funds cannot be used for another purpose by the financial institutions;

¹⁵⁷³ *Property Law Act 1974* (Qld) s 67A(3).

¹⁵⁷⁴ REIQ Contract for Houses and Residential Land (11th ed).

¹⁵⁷⁵ Source accounts include a solicitor's trust account and the accounts of a financial institution.

¹⁵⁷⁶ This request is made through the Reserve Bank Information and Transfer System (**RITS**) which is operated by the RBA.

NOT GOVERNMENT POLICY

- after confirmation of reservation from the RBA, PEXA lodges documents with the Titles Registry;
- assuming lodgement occurs, the Titles Registry sends a confirmation to PEXA that the documents have been accepted for lodgement;
- PEXA will then send a request to the RBA to exchange funds between the financial institutions' ESA and the RBA will confirm the fund exchange;
- PEXA will request that the recipient financial institution pay the relevant disbursements to the third party accounts (stamp duty, lodgement fees, utilities); and
- subscribers are notified of settlement completion.

There are many parts of this process where human error or technical problems may prevent settlement from occurring. Human errors that may delay settlement might include:

- insufficient trust account funds;
- a financial institution is unable to make the transfer due to an account not being found or the account being closed or the account being invalid;
- the Titles Registry lodgement fails because of a document error; and
- incorrect disbursement account details – incorrect disbursement account information is entered and money is not received by the intended recipient.

In the case of technical problems, delayed settlement may occur as a result of the inoperability of one (or more) of the computer systems linked into the electronic conveyancing process. The systems involved in the process will include PEXA, the RBA, relevant financial institutions, Titles Registry and third party beneficiaries receiving disbursements. Problems with settlement may arise as a result of any one of these systems being inoperative for reasons such as: maintenance; problems within a system that make it unavailable; a technical problem which prevents the systems 'talking' to each other at different points; and electricity supplies being compromised for various reasons including natural disasters. The unavailability of these systems may prevent:

- required financial transfers occurring (including disbursements);
- the lodgement or receipt of documents to the Titles Registry; and
- requests from PEXA or confirmations from other participants being generated or received.

If settlement is unable to take place within the electronic workspace as a result of computer inoperability, the system unlocks at 4pm on the relevant day and steps need to be taken by the parties to reschedule settlement. This includes all the steps undertaken prior to the electronic workspace locking such as verifying funds availability, signing the settlement schedule, undertaking a title check and verifying stamp duty. The REIQ Standard Contracts were amended in May 2015 to make provision for where electronic settlement fails due to a computer system operated by the Titles Registry, Office of State Revenue, PEXA or a financial institution in the transaction being unavailable for settlement by 4pm. Clause 11.4 provides that settlement is deemed to be the next business day and time remains of the essence. The parties are required to co-operate under clause 11.2 to ensure the workspace is ready for settlement on the following business day.

The issue is whether a statutory provision similar to the contractual provision should be introduced to ensure a consistent approach for all conveyances. The standard form contracts are not always used in practice. This means that, in the absence of some other mechanism, there is no clear process to address the situation where settlement is unable to proceed at the nominated time as a result of computer technical problems which occur while the electronic workspace is locked.

80.3. Issues raised

The REIQ standard contracts provide a simple, clear process to address the issue of settlement delay arising from computer inoperability. However, the use of the standard form contracts in Queensland is not ubiquitous. There will be situations where other agreements are used and these may not include a provision similar to clause 11.

A statutory approach was adopted to address the ‘computer inoperability’ issue arising in the context of paper based conveyancing with the introduction of section 70A of the PLA which has the effect of suspending time of the essence within the parameters of the provision. This was partly justified on the basis of providing ‘broader coverage’ and to avoid the possibility of the parties attempting to overcome the problem in their own way, potentially leading to more litigation.¹⁵⁷⁷ These reasons apply equally to technical problems during the locked phased of the electronic conveyancing process. Further, a statutory solution provides a level of transparency and certainty to the parties involved in the process.

Although the model presented by section 70A of the PLA does provide some assistance in relation to this issue, it is not completely transferable to the electronic conveyancing environment for a number of reasons including:

- the section is drafted in the context of a paper conveyancing system;
- the section is only directed towards the inoperability of one computer system – that is, the Titles Registry. The electronic conveyancing environment is dependent on the interaction and operability of a number of computer systems; and
- under section 70A, in order to ‘reset’ time of the essence, written notice is required that includes, amongst other things, a statement that the computers are again fully operational. Within the electronic conveyancing environment it may not always be clear when a particular computer system is operational again as the system is reliant on the interaction between multiple systems outside of PEXA.

80.4. Recommendation

The Centre recommends adopting a similar approach to the one set out in the REIQ standard form contract. Provisions should be enacted to mirror the process set out in the REIQ contracts. The process under clause 11 is simple and does not require any notices to be issued by the parties or the suspension of time of the essence for any period. A provision similar to the contractual approach would also ensure that there is consistency between the contractual and statutory provisions.

An overview of the matters which should be included in an adapted statutory provision is below:

¹⁵⁷⁷ Sharon Christensen and Amanda Stickley, ‘Electronic Title in the New Millennium’ 4(2) 2000 *Flinders Journal of Law Reform* 209.

NOT GOVERNMENT POLICY

- the section will apply in the same situations set out in clause 11 of the REIQ contract. These situations cover electronic settlement failure due to a computer system operated by the Titles Registry, Office of State Revenue, PEXA or a financial institution in the transaction being unavailable for settlement by 4pm;
- in those circumstances, time remains of the essence of the contract;
- settlement is automatically rescheduled to occur within a specified period (for example, the next business day or 3 business days after the failure), subject to the inoperative system functioning again;
- either party can nominate to resettle within a certain time period;¹⁵⁷⁸ and
- the resetting of the time is 'notification' of settlement and time is again of the essence of the contract.

The Centre is of the view that this is the preferable approach, rather than to adopt a similar process to section 70A. This will avoid issues such as the way notice should be given for the purposes of triggering time of the essence again, and how the parties are able to determine when the relevant computer system is operating again. This approach is arguably more complicated and is inconsistent with the contractual approach which does not suspend time of the essence.

Under the Centre's proposed provisions, the definitions provided in section 58A apply and additional definitions for the purposes of this section are provided. The time at which settlement is effected is governed by section 58B of the PLA which provides in part:

- (2) Settlement, of the sale of land, occurs when the electronic workspace for the e-conveyance records that—
 - (a) financial settlement occurs; or
 - (b) if there is no financial settlement, the documents necessary to transfer title have been accepted for electronic lodgment by the registrar.

In the proposed drafting, 'business day' is defined to exclude the days between Christmas and New Year, which reflects the REIQ contract and contemporary conveyancing practice. The rationale for this is that, by operation of the section, the settlement date could inadvertently fall on the days between Christmas and New Year. It is standard conveyancing practice in Queensland to exclude the business days between Christmas and New Year and this should be reflected in the PLA in the context of these sections.

This means that parties to a contract for sale of land that has failed to settle because the Titles Registry computer system is inoperative at the time of settlement can agree to effect financial settlement only, with the registration of the buyer pending the reinstatement of the Titles Registry computer system. The buyer can take possession of the property in this case because financial settlement has occurred, notwithstanding they are not yet registered on the title. This is, in effect, the same as a normal conveyance as there is usually a lag time between exchange of cheques and Titles Registry forms, and the actual registration of the buyer as the proprietor of the property.

RECOMMENDATION 79. Insert provisions in the new PLA that will address the issue of inoperative computer systems on the day of settlement.

¹⁵⁷⁸ If the other non-nominating party does not re-sign as required for the purposes of e-conveyancing, the usual contractual rights would apply.

For example, adopting the approach in the REIQ standard for contract for sale of land, the provision could be drafted in the following way:

Section [] Computer systems inoperable or unavailable at settlement

- (1) In this section –
 - business day** means a day other than:
 - (a) a Saturday or Sunday;
 - (b) a public holiday; or
 - (c) a day in the period 27 to 31 December.
 - electronic lodgement** means lodgement of a document in the Titles Registry in accordance with the Electronic Conveyancing National Law.
 - electronic settlement** means financial settlement and electronic lodgement in the land registry facilitated by an ELN.
 - settlement date** is the date for settlement as agreed by the parties, or by operation of this section.
- (2) This section applies:
 - (a) to contract for the sale of land where time is of the essence; and
 - (b) where an electronic settlement cannot occur by 4pm on the settlement date because of an inoperative computer system operated by:
 - (i) Titles Registry;
 - (ii) Office of State Revenue;
 - (iii) Reserve Bank;
 - (iv) a financial institution; or
 - (v) an ELN.
- (3) If subsection (2) applies then:
 - (a) no party is in default;
 - (b) the settlement date is deemed to be the next business day; and
 - (c) time remains of the essence;
- (4) If the subsection (3) applies, then parties must do everything required in the electronic lodgement network to enable settlement to occur on the settlement date.

Part 6 Division 4 – Instalment sales of land

Part 6 Division 4 (the **Division**) of the PLA deals with sales of land by instalment under a type of contract known as a terms contract or **instalment contract**. A traditional instalment contract is where the purchase money is paid in a series of instalments over a period of time whilst a signed transfer and the certificate of title in the name of the seller is held in escrow by a third party. The transfer and certificate of title are handed to the buyer upon payment of all the instalments.

The Division was enacted to replace the *Contracts of Sale of Land Act 1933* (Qld) (**1933 Act**).¹⁵⁷⁹ Prior to the 1933 Act, any default in the payment of an instalment by the buyer potentially gave the seller the right to rescind the contract, retake possession of the land and even attempt to retain all payments made under the contract.¹⁵⁸⁰ Additionally, the buyer could find, upon paying the purchase price in full, that the seller had sold or mortgaged the land to another person between the date of contract and the date of settlement.¹⁵⁸¹

The 1933 Act addressed these issues by requiring the seller not to mortgage or sell the land without the consent of the buyer. The 1933 Act also provided that in the event of default in the payment of an instalment, the seller was unable to rescind the contract without first giving the buyer statutory notice and a 30 day period to remedy the default.

The QLRC commented upon the 1933 Act when re-enacting the essence of the legislation in the PLA:

[A] ‘terms contract’ or ‘instalment contract’ has obvious analogies with an agreement for the hire-purchase of chattels. It is, or at any rate, prior to 1962 was, the form more commonly in use in Victoria, whereas the practice of transferring title subject to a mortgage in favour of the vendor is more common in New South Wales. In Queensland both methods are in use, although it is probably true to say that ‘terms contracts’ are uncommon in the case of relatively expensive or high priced land.¹⁵⁸²

The provisions of the 1933 Act were subject to significant criticism,¹⁵⁸³ including by the QLRC.¹⁵⁸⁴ Despite this, the difficulties and dangers faced by buyers under instalment contracts were considered to be real and substantial which resulted in key aspects of the 1933 Act being incorporated in the PLA. The 1933 Act forms the conceptual basis of the Division.

¹⁵⁷⁹ For a critique of the *Contracts of Sale of Land Act 1933* (Qld), see BH McPherson, ‘Contracts of Sale of Land Act, 1933, Part III’ (1962) 4 *University of Queensland Law Journal* 167.

¹⁵⁸⁰ 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) 55.

¹⁵⁸¹ 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) 54. See also Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.6.DIV.4.30].

¹⁵⁸² 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), 54.

¹⁵⁸³ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.6.DIV.4.30] and *Petrie v Dwyer* (1954) 912 CLR 99, 106.

¹⁵⁸⁴ 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) 57.

In 2016 the Centre questioned¹⁵⁸⁵ whether there was a need to retain the Division. The QLS responded that, while instalment contracts are rare, they do exist. The Centre is of the view that the Division should be retained but with significant modifications, as set out below which will address anomalies and reduce litigation arising out of the wide construction that has been given to the definition of instalment contract by the courts. The Division is comprised of seven sections, which work together. In order to understand the Centre's recommendations for the Division, it is necessary first to consider each of the sections briefly.

81. Section 71 – Definitions

81.1. Overview and purpose

71 Definitions for div 4

In this division—

deposit means a sum—

- (a) not exceeding the prescribed percentage of the purchase price payable under an instalment contract; and
- (b) paid or payable in 1 or more amounts; and
- (c) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser.

instalment contract means an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments.

mortgage includes any encumbrance or charge other than a charge attaching by the operation of any statutory enactment.

prescribed percentage means—

- (a) for a contract for the sale of a proposed lot—20%; or
- (b) otherwise—10%.

proposed lot means—

- (a) a proposed lot within the meaning of the Land Sales Act 1984; or
- (b) a proposed lot within the meaning of the Body Corporate and Community Management Act 1997; or
- (c) land that will be shown as a lot on a building units plan or group titles plan registered under the Building Units and Group Titles Act 1980; or

Note—

There is limited scope for the registration of new building units plans and group titles plans under the Building Units and Group Titles Act 1980—see section 5A of that Act.

- (d) a proposed lot within the meaning of the South Bank Corporation Act 1989, section 97B.

purchaser includes any person from time to time deriving an interest under an instalment contract from the original purchaser under the contract.

sale includes an agreement for sale and an enforceable option for sale.

vendor includes any person to whom the rights of a vendor under an instalment contract have been assigned.

¹⁵⁸⁵ Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) Sales of Land and Other Related Provisions*, 161, [2.4.2].

The instalment contract provisions contain important protections for buyers of land under a genuine instalment contract, which is where a deposit of up to the **prescribed percentage** (currently 10 % of the purchase price for existing lots and 20% for proposed lots) is paid and the balance of the purchase price is paid in instalments over an agreed period of time until the entire purchase price has been paid, after which settlement occurs. It is usual for a transfer to be executed by the seller at the time of contract and held in escrow with the title by a third party until the final payment is made. A buyer's interest in the property may be protected during this time through the registration of a non-lapsing caveat on the title of the property¹⁵⁸⁶ or by lodging a consent caveat with the agreement of the seller.

However, genuine instalment contracts are virtually unknown in Queensland and they are generally limited to informal family contracts. This is because in the modern economy it is much easier for buyers to obtain finance from a bank or other lender or for the buyer to give a mortgage back for the balance of the purchase money than has been the case in previous decades.

Most of the cases that have considered the impact of the instalment contract provisions have dealt with contracts which were not intended to be instalment contracts by the parties but that were deemed to be instalment contracts by the operation of the definition of 'instalment contract'. The definitions in the section may catch a range of conventional contractual arrangements, sometimes with unwitting consequences for a seller. The situations where instalment contracts have been held to exist, despite the intention of the parties, include the following situations:¹⁵⁸⁷

- the deposit exceeds the prescribed percentage of the purchase price;¹⁵⁸⁸
- a payment of a sum is made by the buyer to the seller (or the seller's agent) under the contract;¹⁵⁸⁹ and
- where the buyer is bound to make any payments at all (purchase instalment or not) to the seller under the contract (e.g. payments to maintain the land,¹⁵⁹⁰ interest payments or payment for an extension of time to complete the contract).¹⁵⁹¹

In some of these cases, the buyer was unable to settle on the agreed date and the seller attempted to rescind the contract and seek damages. The buyer was then able to avoid liability for failing to complete the contract by arguing, effectively on a technicality, that the contract was, in fact, an instalment contract and the seller could not rescind without giving appropriate notice. Sellers who purported to rescind the contract have found themselves to be in substantial breach of the contract,¹⁵⁹² most without even realising that they had entered into an instalment contract in the first place.

¹⁵⁸⁶ *Property Law Act 1974* (Qld) s 74.

¹⁵⁸⁷ For a discussion of the creation of instalment contracts due to the operation of the definition of 'deposit' see S Christensen, WM Dixon, WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) [4.4.1.1] to [4.4.1.6], 233-239.

¹⁵⁸⁸ *Emlen Pty Ltd v Cabbala Pty Ltd* [1989] Qd R 620. This also includes situations where a discount on the purchase price results in the deposit being greater than 10%: *Moor v BHW Projects Pty Ltd* [2004] QSC 60; cf *Re Divoca's Caveat* [2008] QCA 127.

¹⁵⁸⁹ *Wacal Developments Pty Ltd v Realty Investments Pty Ltd* (1978) 140 CLR 503.

¹⁵⁹⁰ *Bradiotti v Queensland City Properties Ltd* (1991) 172 CLR 293.

¹⁵⁹¹ *Starco Developments Pty Ltd v Ladd* [1999] 2 Qd R 542.

¹⁵⁹² And the statutory obligation to give 30 days notice before rescinding: *Property Law Act 1974* (Qld) s 72.

81.2. Issues with the section

81.2.1. Deemed instalment contracts

As discussed, the definitions operate in a way that may make a contract an ‘instalment contract’ in situations where the protections of the statutory regime were neither necessary nor intended by the parties. These types of contracts have given rise to almost all the litigation under the Division.

A contract may be deemed an instalment contract if the purported deposit does not satisfy the definition of deposit in section 71 of the PLA. If the amount of the deposit exceeds the prescribed percentage (10%, or 20% in the case of proposed lots) of the purchase price, an instalment contract will be created.¹⁵⁹³ This is because the amount paid as a deposit will not be a ‘deposit’ within the meaning of section 71 and will be a payment that the buyer is bound to make without becoming entitled to receive a transfer (conveyance) in exchange for the payment. This creates an instalment contract in accordance with the definition notwithstanding the contract requires only the payment of a deposit and the balance of purchase price in a single sum.

An agreed discount on the purchase price given after payment of a 10% deposit but taking effect prior to settlement may result in the formation of an instalment contract if, as a result of the discount, the deposit exceeds the prescribed percentage.¹⁵⁹⁴ Where the purported discount in the purchase price is applied at settlement as a rebate to the seller (e.g. for early settlement) without actually reducing the purchase price before settlement an instalment contract is not likely to be created.¹⁵⁹⁵

It has been suggested that if a deposit is paid immediately to the seller and it is truly non-refundable to the buyer in any situation, that this is likely to create an instalment contract as the deposit will not be a deposit within the meaning of section 71¹⁵⁹⁶ as the payment does not conform with the definition of ‘deposit’. The typical option agreement provides for the payment of a non-refundable option fee and a deposit of 10% of the purchase price. This could have the effect that all such option agreements are in fact instalment contracts,¹⁵⁹⁷ particularly given that a ‘sale’ within the meaning of section 71 includes an ‘enforceable option for a sale.’¹⁵⁹⁸

It has been suggested that any payment between contract date and completion from the buyer to the seller pursuant to the contract over and above the prescribed percentage of the purchase price may make the contract an instalment contract.¹⁵⁹⁹ This has included: payments to the seller to maintain the land in a condition for farming;¹⁶⁰⁰ payments of interest on the outstanding balance of the

¹⁵⁹³ *Emlen Pty Ltd v Cabbala Pty Ltd* [1989] 1 Qd R 620.

¹⁵⁹⁴ *Moor v BHW Project Pty Ltd* [2004] QSC 60.

¹⁵⁹⁵ *Re Divoca’s Caveat* [1991] 2 Qd R 121.

¹⁵⁹⁶ See *Phillips v Scotdale Pty Ltd* [2008] QCA 127. See also Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters (looseleaf) [PLA.71.30] and S Christensen, WM Dixon, WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 235 [4.4.1.1].

¹⁵⁹⁷ S Christensen, WM Dixon, WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 236 [4.4.1.2].

¹⁵⁹⁸ *Property Law Act 1974* (Qld) s 71 (definition of ‘sale’).

¹⁵⁹⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.71.60].

¹⁶⁰⁰ *Bradiotti v Queensland City Properties Ltd* (1991) 172 CLR 293.

purchase price,¹⁶⁰¹ and payments for an extension of time to complete the sale¹⁶⁰² unless the payment has been held to have been made under a collateral contract rather than a variation to the original contract.¹⁶⁰³ Many of these outcomes were unintended by the framers of the Division which has been held to apply in circumstances where the contracts are otherwise, in effect, the usual deposit paid and one payment of the balance of purchase money within a specified time.

81.3. Recommendation

The principal issue to be remedied in the Division is the inadvertent creation of instalment contracts where no instalment contract was intended. The Centre is of the view that the mere requirement of payments by the buyer between contract date and settlement which do not strictly meet the criterion of the balance of purchase price should not be sufficient, on its own, to create an instalment contract. Rather, the protection of the Division should be limited to those instalment contracts in the conventional sense of the term where a deposit is paid and the balance of purchase money is paid over a lengthy period by a number of instalments. This is where the land remains in the seller's name and buyers require long-term protection of their rights.

The Centre recommends significant amendments to the definitions in section 71 in order to exclude the inadvertent creation of instalment contracts. This includes amendment to the definition of 'deposit' to remove reference to the prescribed percentage (while retaining the 10% threshold) and to ensure that particular payments are not deemed to be instalment payments when they are not intended to be credited towards the balance of purchase price. Further, the definition of 'mortgage' is no longer needed given the recommendation at paragraph 215 regarding the schedule 6 definitions.

The Centre recommends that an instalment contract should not be created merely by a requirement for any payments by the buyer between contract date and settlement. These payments may occur where a buyer goes into possession prior to settlement but not in that circumstance exclusively. This will include payments: for rent and outgoings; to maintain the land; of interest on the balance of the purchase price; for an extension of time; for rates and taxes; or any other similar payment.

An example of what the amended definitions section may look like is provided with the Recommendation below. Under the recommended approach, a reduction to the purchase price that results in the deposit exceeding 10% of the purchase price will be likely to create an instalment contract unless the reduction is applied on settlement as a rebate to the buyer and not as a reduction in the price.

RECOMMENDATION 80. Section 71 should be amended with modernised language to provide that an instalment contract is not created merely by payments from the buyer to, or at the direction of, the seller between contract date and settlement. This will include payments: for rent and outgoings; to maintain the land; of interest on the balance of the purchase price; for an extension of time; for rates and taxes; or any other similar payment.

¹⁶⁰¹ *Wacal Developments Pty Ltd v Realty Investments Pty Ltd* (1978) 140 CLR 503.

¹⁶⁰² *Starco Developments Pty Ltd v Ladd* [1999] 2 Qd R 542.

¹⁶⁰³ *Kaneko v Crawford* [1999] 2 Qd R 514.

For example, section 71 could be drafted in the following manner:

Section [] Definitions for division

In this division—

buyer includes any person from time to time deriving an interest under an instalment contract from the original seller under the contract.

contract for the sale of land does not include a contract for the sale of a proposed lot.

deposit means a sum not exceeding 10% of the purchase price—

- (a) paid or payable in 1 or more amounts to secure the buyer's performance of the contract; and
- (b) refundable to the buyer on breach of contract by the seller or for non-fulfilment of a contingent condition of the contract.

instalment does not include –

- (a) an option fee;
- (b) payments by the buyer between contract date and settlement for:
 - (i) rent and outgoings;
 - (ii) maintenance of the land;
 - (iii) interest on the balance of the purchase price;
 - (iv) an extension of time to complete the contract;
 - (v) rates and taxes relating to the land; or
 - (vi) any similar payment.

instalment contract means a contract for the sale of land in terms of which the buyer is bound to make a payment or payments by instalment of the purchase price (other than a deposit) without becoming entitled to receive a transfer of the title in registrable form in exchange for the payment or payments.

payment includes a payment made to any person in discharge of a debt of the seller or in reimbursement of the seller.

proposed lot means—

- (a) a proposed lot within the meaning of the *Land Sales Act 1984*; or
- (b) a proposed lot within the meaning of the *Body Corporate and Community Management Act 1997*; or
- (c) land that will be shown as a lot on a building units plan or group titles plan registered under the *Building Units and Group Titles Act 1980*; or

Note—

There is limited scope for the registration of new building units plans and group titles plans under the *Building Units and Group Titles Act 1980*—see section 5A of that Act.

- (d) a proposed lot within the meaning of the *South Bank Corporation Act 1989*, section 97B.

sale includes an agreement for sale.

seller includes any person to whom the rights of a seller under an instalment contract have been assigned with the consent of the buyer under section 73.

82. Section 71A – Application

82.1. Overview and purpose

71A Application of div 4

- (1) This division shall not bind the Crown.
- (2) Where a contract for the sale of land may, at the election of the purchaser, be performed in a manner which would constitute it an instalment contract, it shall, unless and until the purchaser elects to perform it in some other manner, be presumed to be an instalment contract within the meaning of this section.
- (3) This division applies—
 - (a) to an instalment contract entered into after the commencement of this Act; and
 - (b) despite anything to the contrary contained in any contract.
- (4) Sections 74 to 76 do not apply with respect to a contract for the sale of land by the public trustee.

Section 71A deals with the application of the Division. It provides that the Division does not bind the Crown. It also provides that if the buyer has a choice to perform the contract in a way that creates an instalment contract or in some other way, the contract will be presumed to be an instalment contract unless the buyer elects to perform it in another manner. Section 71A(3) provides that parties may not contract out of the provisions. Section 71A(4) provides that particular provisions of the Division do not apply to sale of land by the public trustee.

82.2. Issues with the section

82.2.1. Binding on the Crown

Section 71A provides that the Division does not bind the Crown. The Crown, in this sense, generally refers to the executive branch of government.¹⁶⁰⁴ However, it may not always be clear whether a government body, such as a government owned business, is the Crown for the purposes of being exempt from the instalment contract provisions. It has been suggested that there is no clear guiding principle to determine whether a statutory body or a government business is in fact the Crown.¹⁶⁰⁵

If the question were to arise in practice, it may require recourse to the legislation that created the statutory body and consideration of the intention of the legislature.¹⁶⁰⁶ There seems no reason to exclude the Crown, which is bound generally by the PLA,¹⁶⁰⁷ from the operation of the Division. As numerous government agencies are involved in the sale of land, there is no good reason why a buyer should be denied the protections afforded to any other instalment buyer. This also eliminates the uncertainty in any instance of whether the seller is an individual or body within the shield of the Crown.

¹⁶⁰⁴ See Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 5th ed, 2013) 154 [4.4].

¹⁶⁰⁵ Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 5th ed, 2013) 162 [4.6].

¹⁶⁰⁶ Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 5th ed, 2013) 169 [4.8].

¹⁶⁰⁷ *Property Law Act 1974* (Qld) s 2.

82.2.2. Elect to perform

Section 71A(2) provides that if the buyer has a choice to perform the sales contract as an instalment contract or in some other manner, it will be presumed to be an instalment contract unless and until the buyer elects to perform the sales contract in some other manner.

The policy reason for this provision is obviously to protect buyers who may have (or end up with) an instalment contract. Given the extra burden an instalment contract creates for the seller, and the fact that an instalment contract may never be created, it seems more appropriate to reverse the presumption so that the contract is presumed not to be an instalment contract until the time when the buyer elects to perform it as an instalment contract. Leaving the section as it stands merely creates the particular problem which these reforms are generally endeavouring to address by making an ordinary contract subject to the strictures of the Division when it may never be performed as an instalment contract.

82.2.3. Off-the-plan sales

In December 2014, the definitions in section 71 were amended to allow a contract for the sale of a proposed lot (also known as an ‘off-the-plan’ sale) to provide for a deposit of up to 20% of the purchase price.¹⁶⁰⁸ The Parliamentary Debates indicate that this change is intended to assist developers when financing major projects.¹⁶⁰⁹ For sales of existing lots, the prescribed percentage has remained at 10%.

It has been suggested that sales of proposed lots could be specifically excluded from the Division. Arguably, the instalment contract provisions were not intended to apply to sales of proposed lots. Proposed lots have not been registered and no title has been issued. This means that there is nothing to caveat,¹⁶¹⁰ a transfer cannot be required after one-third of the purchase price has been paid¹⁶¹¹ (as there is no title to transfer) and there is no certificate of title that can be held in escrow by a prescribed authority.¹⁶¹² However, the High Court has held that despite this, the Division applies to sales of proposed lots.¹⁶¹³

The increase in the prescribed percentage for deposits on sales contracts for proposed lots¹⁶¹⁴ makes it less likely that off-the-plan sales contracts will be deemed to be instalment contracts. Despite this, because of the manner in which developments are financed, it is not practically feasible that property developers would enter into instalment contracts intentionally nor that they would wish to do so inadvertently. Further, there is sufficient protection to buyers of proposed lots in the *Land Sales Act 1984* (Qld) and *Body Corporate and Community Management Act 1997* (Qld).

¹⁶⁰⁸ *Land Sales and Other Legislation Amendment Act 2014* (Qld) s 62, amending *Property Law Act 1974* (Qld) s 71.

¹⁶⁰⁹ Queensland, Legislative Assembly, *Parliamentary Debates*, ‘Land Sales and Other Legislation Amendment Bill: Introduction’, (Bleijie JP, 3 June 2014), 1941.

¹⁶¹⁰ *Property Law Act 1974* (Qld) s 74.

¹⁶¹¹ *Property Law Act 1974* (Qld) s 75.

¹⁶¹² *Property Law Act 1974* (Qld) s 76.

¹⁶¹³ *Chan v Dainford Limited* (1985) 155 CLR 533, 538-539.

¹⁶¹⁴ *Property Law Act 1974* (Qld) s 71 (definition of ‘prescribed percentage’ and ‘proposed lot’).

This amendment can be catered for by a definition in section 71 of ‘contract for the sale of land’ which excludes contracts for the sale of ‘proposed lots,’ as the latter expression is already defined in that section.

82.3. Recommendation

The Centre recommends amending section 71A to:

- make the Division binding on the Crown;
- reverse the presumption in 71A(2) so that a contract is presumed not to be an instalment contract unless the buyer elects to perform it as an instalment contract; and
- expressly exclude proposed lots from the operation of the Division.

The QLS supports these positions. To achieve these changes, the Centre is of the view that section 71A(1) should be repealed and section 71A(2) should be amended.

The effect of repealing section 71A(1) will be to make the Division binding on the Crown. To the extent that the Crown may wish to exclude the operation of the Division, the Centre’s recommended approach in relation to section 5 of the PLA¹⁶¹⁵ will enable the Crown to specify an intention to exclude the operation of the Division in another Act, where relevant.

Section 71A(2) should be amended to provide that a contract will not become an instalment contract until the buyer elects to perform the contract as an instalment contract.

RECOMMENDATION 81. Section 71A should be amended with modernised language so that section 71A(1) is repealed and section 71A(2) is amended as follows:

Where a contract for the sale of land may at the election of the buyer be performed in a manner which would constitute an instalment contract, it will not be presumed to be an instalment contract until the buyer elects in writing to perform it in that manner.

Section 71A(3) and (4) should be retained.

¹⁶¹⁵ Discussed at paragraph 3 above.

83. Section 72 – Restriction on vendor’s right to rescind

83.1. Overview and purpose

72 Restriction on vendor’s right to rescind

- (1) An instalment contract shall not be determinable or determined because of default on the part of the purchaser in payment of any instalment or sum of money (other than a deposit or any part of a deposit) due and payable under the contract until the expiration of a period of 30 days after service upon the purchaser of a notice in the approved form.
- (2) A purchaser upon whom a notice in the approved form has been served may within the period mentioned in subsection (1) pay or tender to the vendor or the vendor’s agent such sum as would have been due and payable under the contract at the date of such payment or tender but for such default (including any sum in respect of which the default was made).
- (3) Upon payment or tender under subsection (2) any right or power of the vendor to determine the contract because of the default specified in the notice shall cease and the purchaser shall be deemed not to be in default under the contract.
- (4) A notice shall be deemed to be to the like effect of that in the approved form if it is reasonably sufficient fully and fairly to apprise the purchaser of the purchaser’s default and of the effect of the purchaser’s failure to remedy the default within the time specified in this section.

Section 72 restricts a seller’s right to terminate the contract for the buyer’s failure to pay any instalment or sum of money due and payable under the contract without giving 30 days notice in the approved form.¹⁶¹⁶ It also provides that if the buyer pays the amount in the 30 day period, the buyer is no longer in default and the seller’s right to terminate for that breach will cease.¹⁶¹⁷ The section gives the buyer the opportunity to remedy the default and provides that, if remedied, the buyer is not in default under the contract and the seller no longer has the ability to determine the contract in respect of that breach.

83.2. Issues with the section

Section 72 is one of the key consumer protection mechanisms in the Division. Ironically, it is also the provision that creates a problem for deemed instalment contracts. Under an ordinary contract, if the buyer is unable to settle at the appointed date and time of settlement, the seller may terminate the contract and forfeit the deposit. A buyer will have very little recourse. However, under an instalment contract, if the seller has terminated without giving 30 days notice in the approved form, the seller’s termination is wrongful and the seller’s conduct constitutes a repudiation of the sales contract.

The Centre queries the purpose of section 72(4). That section provides that the notice requirement is satisfied if the approved form (Form 2) is not used but the notice is sufficient to ‘fully and fairly’ apprise the buyer of the default and the effect of a failure to remedy the default in the specified period. In the Centre’s view, the provision is redundant due to the operation of the *Acts Interpretation Act 1954* (Qld)¹⁶¹⁸ which provides that substantial compliance is sufficient when an approved form is required by an Act.

¹⁶¹⁶ *Property Law Act 1974* (Qld) s 72(1). If the notice is not in the approved form, it may still be effective if it is reasonably sufficient fully and fairly to inform the buyer of the default and the effect of the buyer’s failure to rectify the default in the specified time: s 72(4).

¹⁶¹⁷ *Property Law Act 1974* (Qld) s 72(3).

¹⁶¹⁸ *Acts Interpretation Act 1954* (Qld) s 48A.

83.3. Recommendation

The Centre is of the view that the effect of section 72(1) to 72(3) should be retained with modernised language. Section 72(4) is unnecessary and should be repealed.

RECOMMENDATION 82. Section 72(1), 72(2) and 72(3) should be retained with modernised language and section 72(4) should be repealed.

84. Section 73 – Land not to be mortgaged by vendor

84.1. Overview and purpose

73 Land not to be mortgaged by vendor

- (1) A vendor under an instalment contract shall not without the consent of the purchaser sell or mortgage the land the subject of the contract.
- (2) Where land is mortgaged in contravention of this section—
 - (a) the instalment contract shall be voidable by the purchaser at any time before completion of the contract; and
 - (b) the vendor shall be guilty of an offence against this Act.
Maximum penalty—9 penalty units.
- (3) Nothing in this section affects—
 - (a) the rights of any bona fide purchaser from the vendor for value and without notice of the instalment contract; or
 - (b) the *Land Title Act 1994*.

Section 73 provides that the seller may not, without the consent of the buyer, sell or mortgage the land.¹⁶¹⁹ If the seller mortgages the land without the buyer's consent, the contract is voidable by the buyer at any time prior to completion and the seller is guilty of an offence against the PLA.¹⁶²⁰ The section does not give a remedy or make it an offence if the seller sells the land to a third party without the consent of the buyer. Of course, if the buyer under the instalment contract has lodged a non-lapsing caveat in accordance with section 74 of the PLA, it will not be possible to transfer or mortgage the land to the third party by any registered instrument without the consent of the buyer in any case.

84.2. Issues with the section

Under an instalment contract the seller cannot sell or mortgage the land without the consent of the buyer. There are two issues that arise. The first is where the seller under the instalment contract seeks to sell the land to a third party under conditions where the third party buyer replaces the seller by means of a novation of the original contract so that the buyer under the instalment contract receives title from the third party purchaser. It is the Centre's view that the novation of the existing contract could not be undertaken without the buyer's written consent by signature as land contracts remain subject to the Statute of Frauds provisions in the PLA (sections 11 and 59).

The second, and probably the more common, issue relates to situations where the seller under the instalment contract may want to mortgage the land the subject of the instalment contract. This is most likely to arise in the case of long-term contracts for the purchase of proposed lots or 'off-the-plan' sales. If these types of contracts are excluded as suggested, the most common existing situation where the subject land may be mortgaged after contract will be very much reduced.

Under the existing rules, the buyer would be able to withhold consent to such a sale or mortgage. In regards to a sale, if the sale to the third party is on such terms that the only effect on the instalment contract is that the existing seller is replaced by the new owner of the property, and all other terms of the instalment contract remain, then there is little reason for the buyer to withhold consent. Whether

¹⁶¹⁹ *Property Law Act 1974* (Qld) s 73(1).

¹⁶²⁰ *Property Law Act 1974* (Qld) s 73(2).

the seller of the land is able to novate the contract to a third party without the consent of the buyer is, as mentioned, very doubtful regardless of the provisions of the contract of sale.

The QLS submission supports allowing the seller to sell the land to a third party subject to that third party adopting the instalment contract. That is, the third party would be novated into the position of the original seller and all the existing terms of the instalment contract remain. At completion, the buyer would receive title to the land from the third party purchaser.

If the buyer has lodged a non-lapsing caveat¹⁶²¹ the seller under the instalment contract will not be able to transfer the title to the third party as the caveat will forbid the registration of any instrument affecting the land until the instalment contract is complete or the caveat is removed.

In the case of a mortgage of the land the subject of the instalment contract, it is understood that some instalment contracts may include a term stating that the buyer consents to any mortgage of the land. If valid, such a consent clause could allow the seller to mortgage the land relying on the prior consent given in the contract. While this may occur in practice, it is very doubtful if it was the intention of the legislation to give the seller *carte blanche* to mortgage the subject land without any further consent of the buyer for the duration of the contract. This would completely defeat the purpose of affording the buyer a right to give or withhold consent in any one particular instance.

The QLS submission supports allowing the seller to rely on a consent to any mortgage given in advance, provided the amount secured by the mortgage does not exceed the balance of the purchase price under the instalment contract. Whilst this permits some transactional flexibility there are very few buyers who would have any idea of the extent of the seller's indebtedness at the date of the contract nor is there any obligation upon a seller to reveal it. In the Centre's view, a consent to a mortgage given in advance is not fully informed, as the terms of the mortgage, the amount secured or further advance made, etc. are not known at the time the consent is given.

84.3. Recommendation

The section does not currently provide a penalty or sanction if the seller sells the land to a third party without the consent of the buyer. Whether the seller is able to novate the instalment contract to a third party purchaser without the consent of the buyer is conjectural. Given this, there is little justification to remove the existing statutory provision. This means that the seller under an instalment contract will continue to require the consent of the buyer to sell the land to a third party. If the buyer has not lodged a caveat, a third party may be able to obtain indefeasible title to the land.

The Centre recommends that the instalment contract should be voidable if the seller sells the land in contravention of the section. This will apply the same remedy to a sale without consent as is currently applied to a mortgage without consent. It will also provide an extra layer of protection for buyers under instalment contracts in the event they do not lodge a caveat.

With regard to the mortgaging of the land, the Centre recommends that section 73 should specify that a seller may not rely on a buyer's consent to mortgage the land if that consent is given in advance of the terms of the mortgage being known. As the Centre has already recommended that contracts for

¹⁶²¹ *Property Law Act 1974 (Qld) s 74.*

the sale of proposed lots be excluded from the Division, clarifying the position in this way is unlikely to have a significant impact.

RECOMMENDATION 83. The effect of section 73 should be retained and amended with modernised language to:

- allow the seller to void the contract at any time before settlement if the land the subject of the instalment contract is mortgaged or sold in contravention of the section; and
- provide that a seller may not rely on a buyer's consent to the mortgage or sale of the land the subject of the instalment contract if the consent is given in advance to the terms of the mortgage or sale being known.

For example, section 73 could be amended in the following manner:

Section [73] Land not to be mortgaged or sold by the seller

- (1) A seller under an instalment contract may not, without the consent of the buyer, mortgage or sell the land the subject of the contract.
- (2) The consent of a buyer is of no effect if the consent is given in advance of the terms of the sale or the mortgage being provided to the buyer.
- (3) If the land is sold or mortgaged in contravention of this section the instalment contract is voidable by the buyer at any time before completion of the contract.
- (4) Where an instalment contract has been voided under subsection (3), the buyer will be entitled to recover the deposit and the instalment payments as a debt.
- (5) Nothing in this section affects any other right or remedy the buyer may have at law or under the instalment contract.

85. Section 74 – Purchaser’s right to lodge a caveat

85.1. Overview and purpose

74 Right of purchaser to lodge caveat

- (1) A purchaser under an instalment contract for the sale of land registered under the *Land Title Act 1994* may, by a caveat under that Act that is expressed to be lodged under this section, forbid the registration of any instrument affecting the land the subject of the contract until completion of the instalment contract.
- (1A) A caveat lodged under this section is taken, for the purposes of the *Land Title Act 1994*, to have been lodged other than under part 7, division 2 of that Act.
- (2) A caveat lodged under this section may on the application of any person interested be removed upon proof to the satisfaction of the registrar or of the court—
 - (a) that the purchaser has consented to removal of the caveat; or
 - (b) that the instalment contract has been rescinded or determined or discharged by performance or otherwise; or
 - (c) of any other ground which justifies removal of a caveat.
- (3) Nothing in this section affects the powers of the registrar in relation to caveats under the *Land Title Act 1994*.

Section 74 gives the buyer the right to lodge a non-lapsing caveat¹⁶²² under the *Land Title Act 1994* (Qld). The caveat will prevent the registration of any instrument affecting the land until the instalment contract is complete.

85.2. Recommendation

Section 74 is a very strong protection and there is no reason to change the protection given to buyers under an instalment contract. The retention of this section is further supported by Recommendation 86 below, which calls for removing the requirement to place a title deed and signed transfer in escrow with a prescribed authority.

RECOMMENDATION 84. Section 74 should be retained with modernised language.

¹⁶²² *Property Law Act 1974* (Qld) s 74(1).

86. Section 75 – Right to require a conveyance

86.1. Overview and purpose

75 Right to require conveyance

- (1) A purchaser who is not in default under an instalment contract may at any time after an amount equal to one-third of the purchase price has been paid serve upon the vendor a notice in writing requiring the vendor to convey the land to the purchaser conditionally upon the purchaser at the same time executing a mortgage in favour of the vendor or such other person as the vendor may specify to secure payment of all money which would afterwards but for the execution of such mortgage have become payable by the purchaser under the instalment contract.
- (2) A vendor who is not in default under an instalment contract may at any time after an amount equal to one-third of the purchase price has been paid serve upon a purchaser a notice in writing requiring the purchaser to accept conveyance of the land from the vendor conditionally upon the purchaser at the same time executing a mortgage, or (if it is reasonable to so require) mortgages, in favour of the vendor or such other person or persons as the vendor may specify to secure payment of all money which would afterwards but for the execution of such mortgage or mortgages have become payable by the purchaser under the instalment contract.
- (3) A vendor who requires a purchaser to accept a conveyance under subsection (2) shall be obliged to advance to the purchaser—
 - (a) an amount equal to the transfer duty imposed under the *Duties Act 2001* on the conveyance; and
 - (b) an amount equal to legal costs payable by the purchaser of preparation, execution and registration of conveyance of the land to the purchaser; but such obligation shall be conditional upon the purchaser agreeing to the amount so advanced being added to the principal sum secured by the mortgage or by such 1 of the mortgages as is specified by the vendor.
- (4) A mortgage executed under this section shall—
 - (a) contain all such terms and all such powers and covenants on the part of the mortgagor as may be agreed by the vendor and the purchaser and shall accord with and provide for observance of all obligations of the purchaser under the instalment contract; and
 - (b) in the case of subsection (1), but subject to subsection (7)—be prepared and registered at the expense of the purchaser; and
 - (c) in the case of subsection (2), but subject to subsection (7)—be prepared and registered at the expense of the vendor.
- (5) Transfer duty under the *Duties Act 2001* and the legal costs of preparation, execution and registration of conveyance of the land to the purchaser shall be payable by the party or parties in the same way as if such land were being conveyed to the purchaser in consequence of payment in full of the purchase price or other performance by the purchaser of the contract.
- (6) In the event of the vendor and the purchaser failing to agree upon the terms, covenants and powers, or any of them, to be contained in the mortgage or whether it is reasonable on the part of the vendor to require the purchaser to execute more than 1 mortgage, the mortgage and any such term, covenant or power to be contained in the mortgage shall be settled, or the number of mortgages and the land to be made subject to such mortgages determined, by an independent practising solicitor or conveyancer appointed by the president of the Law Society on the application to the solicitor or conveyancer of the vendor and the purchaser or either of them, and the mortgage so settled and the number so determined shall be deemed to have been agreed upon by both the vendor and the purchaser.
- (7) The reasonable costs of settling a mortgage under subsection (6) shall be borne by the vendor and the purchaser in such proportions (if any) as in the circumstances the president of the Law Society thinks fit, and such costs shall be recoverable by the solicitor or conveyancer in those proportions (if any) from the vendor and the purchaser in any court of competent jurisdiction.
- (8) A person liable for costs because of subsection (7) shall be entitled to require those costs to be taxed under the *Costs Act 1867*.
- (9) Where a notice in writing under this section has been served upon a vendor by a purchaser or upon a purchaser by a vendor, and such vendor or, as the case may be, purchaser without lawful excuse fails

to convey or to accept a conveyance of the land or to execute any instrument requisite for giving effect to this section, such vendor or purchaser—

- (a) shall be deemed to have broken a condition of the contract, and the purchaser or, as the case may be, vendor shall be entitled to all civil remedies accordingly; and
- (b) the party so failing shall be guilty of an offence under this Act.

Maximum penalty—9 penalty units.

- (10) In any contract entered into after the commencement of this Act, a reference to the *Contracts of Sale of Land Act 1933*, section 9 shall be construed as a reference to this section.

Section 75 provides that after an amount equal to one-third of the purchase price has been paid, the buyer, if not in default under the instalment contract, may require the seller to convey, or transfer¹⁶²³ the land to the buyer, subject to a mortgage by the buyer in favour of the seller (or another party as the seller specifies).¹⁶²⁴ The intention of this section is to facilitate the conversion of instalment contracts to sales supported by a mortgage to secure the unpaid balance of the purchase price.¹⁶²⁵

A seller who is not in default under the instalment contract has an equivalent right to require the buyer to accept transfer of the land subject to a mortgage by the buyer in favour of the seller (or another party as the seller specifies).¹⁶²⁶ Any such mortgage will contain the terms, powers and covenants on the part of the mortgagor as agreed between the buyer and seller and must accord with the buyer's obligations under the instalment contract.¹⁶²⁷ The party that calls for the transfer must bear the costs of preparing and registering the mortgage.¹⁶²⁸

If the seller calls for the buyer to accept transfer, the seller must advance to the buyer an amount equal to the transfer duty and the legal costs payable by the buyer for the preparation, execution and registration of the transfer, provided the buyer agrees to have the amount advanced added to the principal sum secured by the mortgage.¹⁶²⁹ Such amounts are shared between the parties as if the land were being conveyed by payment in full of the purchase price.¹⁶³⁰

If the terms of a mortgage cannot be agreed between the parties, either the buyer or the seller may request the president of the Law Society to appoint an independent solicitor or conveyancer to settle the terms of the mortgage.¹⁶³¹

86.2. Issues with the section

One issue with the section relates to the seller's position if the buyer does not agree to have the amount of the transfer duty and the costs of preparing, executing and registering the transfer added

¹⁶²³ As noted in the discussion at paragraph 215.5.2 the term conveyance simply means transfer.

¹⁶²⁴ *Property Law Act 1974* (Qld) s 75(1).

¹⁶²⁵ 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) 58.

¹⁶²⁶ *Property Law Act 1974* (Qld) s 75(2).

¹⁶²⁷ *Property Law Act 1974* (Qld) s 75(4)(a).

¹⁶²⁸ *Property Law Act 1974* (Qld) s 75(4)(b).

¹⁶²⁹ *Property Law Act 1974* (Qld) s 75(3). Although, the seller's position is unclear if the buyer refuses to agree to the amount so advanced being added to the principal sum: S Christensen, WM Dixon, WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 4th ed, 2016) 240 [4.4.2.3].

¹⁶³⁰ *Property Law Act 1974* (Qld) s 75(5).

¹⁶³¹ *Property Law Act 1974* (Qld) s 75(6). The reasonable costs of such settlement will be borne by the buyer and seller in such proportions as the solicitor or conveyancer thinks fit: *Property Law Act 1974* (Qld) s 75(7).

to the principal amount secured under the mortgage. The seller will not be required to advance the sums to the buyer in such circumstances but it is unclear the extent to which the buyer would be able to exercise its right to require the seller to accept the transfer. It is likely that the seller's right will remain as the exercise is only contingent on advancing the sums if the buyer agrees to have those added to the principal.

A second issue relates to the time before a party can call for the other to transfer, or accept transfer of the land. It is arguable that the requirement to wait until one-third of the purchase price has been paid before either party can require the other to give, or accept as the case may be, transfer of the land should be removed.

The QLS supports amending section 75 to allow the buyer to call for the transfer of the land at any time. The Centre would agree with this suggestion but recommends that it be upon at least 3 months notice in writing by the buyer to the seller. This time period is to permit finance to be arranged by a buyer if that is necessary.

Additionally, the QLS questioned the utility of retaining the section noting that it may create practical difficulties if the seller already has a mortgage over the land the subject of the instalment contract. The Centre sees no practical difficulties with this situation as the purchase price would normally have to be applied in any case in discharge of any encumbrances. Further, the seller's ability to require the buyer to accept transfer may accelerate the buyer's liability for land tax and rates on the property.

A third issue relates to vendor finance. The section provides for the transfer to be subject to a mortgage 'in favour of the vendor or such other person as the vendor may specify.' While vendor finance is not required by the section, it should be matter for the parties to decide whether to use vendor finance. Additionally, it should be a matter for the buyer to decide on what terms and with whom to take out a mortgage.

86.3. Recommendation

The Centre is of the view that the buyer's right to require the seller to transfer the land subject to a mortgage should remain and should be exercisable at any time upon 3 month's written notice, regardless of how much of the purchase price has been paid. This will essentially result in bringing forward the settlement date under the instalment contract. The buyer will be required to organise their own financing to pay out the amounts owing. The terms of the transfer will be as agreed between the parties. In the event the parties cannot agree, the transfer will be subject to the buyer performing all of its obligations under the instalment contract up to and including the new date of settlement.

However, in the Centre's view, the seller's right to require the buyer to accept transfer of the land should be removed. This is justifiable because the detriment to a buyer as a result of the seller forcing the buyer to accept a transfer is likely to be greater than the detriment to the seller when the buyer forces the transfer. Further, the seller is in the position to seek a sale supported by a mortgage or an instalment contract at the time the land is sold. Additionally, removing the seller's right to require a transfer will remove the obligation on the seller to advance funds to the buyer.

Finally, the Centre recommends removing the references to mortgages in favour of the seller leaving that matter to be negotiated between the parties, if necessary, as other finance is readily available. It is a matter for the parties to decide on their own financing arrangements. Under the Centre's

recommended approach, the buyer seeking to require transfer of the land would be responsible to obtain their own financing to complete the transfer.

RECOMMENDATION 85. Section 75 should be amended to remove:

- the one-third threshold before a buyer can call for the seller to transfer the land; and
- the seller's ability to require the buyer to accept a transfer of the land.

For example, section 75 could be drafted in the following manner:

Section [75] Right to require transfer

- (1) A buyer who is not in default under an instalment contract may require the seller to transfer the land to the buyer by giving the seller at least 3 months notice in writing of that intention.
- (2) The notice must —
 - (a) state that the buyer is requiring the seller to transfer the land to the buyer subject to terms to be agreed between the parties, and
 - (b) nominate the date for settlement of the transfer as no earlier than 3 months from the date of receipt of the notice by the seller.
- (3) Where the parties cannot agree on the terms in subsection (2)(a), the transfer will be subject to the performance of the obligations of the buyer under the instalment contract up to and including the date of settlement.
- (4) Where notice has been given in accordance with subsection (1) and (2) above, failure to transfer the land or execute any instrument required to give effect to the transfer will be deemed a breach of contract.

87. Section 76 – Deposit of title deed

87.1. Overview and purpose

76 Deposit of title deed and conveyance

- (1) A purchaser who is not in default under an instalment contract may at any time after the contract has been entered into direct the vendor at the cost of the purchaser to deposit with a prescribed authority—
 - (a) the title deed or deeds relating to the land the subject of the contract; and
 - (b) a duly executed conveyance or instrument of transfer of the land in favour of the purchaser, which shall be deemed to be delivered by the vendor in escrow pending discharge of the contract by performance or otherwise.
- (2) A vendor who fails to comply with a direction given under subsection (1) shall be deemed to have broken a condition of the contract, and the purchaser shall be entitled to all civil remedies accordingly.
- (3) The title deed or deeds and the conveyance or instrument of transfer referred to in subsection (1) shall be held in trust by the prescribed authority who shall not, except for the purpose of safekeeping, deliver the same to any person (other than another prescribed authority, to be held by the person under this section) until—
 - (a) the time for performance of the contract arrives; or
 - (b) the contract is discharged by performance or otherwise; or
 - (c) the court otherwise orders on the application of the prescribed authority or of the vendor or the purchaser or some interested person.
- (4) In this section—

prescribed authority means any of the following—

 - (a) any person, firm or corporation who at the commencement of this Act is a prescribed authority for the purposes of the *Contracts of Sale of Land Act 1933*, section 5(i);
 - (b) any financial institution carrying on business in the State;
 - (c) a trustee corporation;
 - (d) a solicitor or conveyancer or firm of solicitors or conveyancers, other than a solicitor, conveyancer or firm whom the Council of the Queensland Law Society Incorporated has resolved should not be a prescribed authority; but does not include a person to whom paragraph (a) applies where the Minister’s approval of that person to be a prescribed authority has been withdrawn, which the Minister is authorised to do.
- (5) Nothing in this section applies to an instalment contract where at the time such contract is made the land is subject to an existing mortgage.

Section 76 allows a buyer, who is not in default under the instalment contract, to require the seller to deposit the certificate of title to the land and a duly executed conveyance or instrument of transfer with a prescribed authority to be held in trust.¹⁶³² A prescribed authority includes a financial institution, a trustee corporation, a solicitor or conveyancer or another authorised person.¹⁶³³

¹⁶³² *Property Law Act 1974* (Qld) s 76(3).

¹⁶³³ *Property Law Act 1974* (Qld) s 76(4).

87.2. Issues with the section

An issue that arises with the operation of this section relates to the fact that paper certificates of title are generally being phased out by the Titles Registry. In fact, the majority of titles in Queensland are now held electronically and no paper certificate of title has been issued for the property. Under the *Land Title Act 1994 (Qld)*¹⁶³⁴ certificates of title are only issued in limited circumstances. Further, the registration of any dealing with the land requires that the paper certificate of title be surrendered for cancellation.¹⁶³⁵ This means that there may not be a paper certificate of title.

There is an argument that a strict reading of section 76 could require the seller to obtain a certificate of title where one does not currently exist.¹⁶³⁶ However, the section is not intended to place a burden on the seller by requiring the seller to obtain a paper title when no paper title has been issued.

The QLS has argued the entire section could be repealed, stating that the ability of the buyer to lodge a non-lapsing caveat is adequate protection. The QLS further noted that if the certificate of title exists but is held by a mortgagee, the seller may not be able to comply with the section.

87.3. Recommendation

The Centre recommends that section 76 should be repealed. In the Centre's view, the reduced reliance on paper certificates of title means that a non-lapsing caveat¹⁶³⁷ offers greater protection to buyers than the ability to have the certificate of title and signed transfer held in escrow.

The ability to lodge a non-lapsing caveat is the most efficient way for the buyer to protect their interest in the land. As discussed above at paragraph 85.1 the caveat will prevent any dealing with the land until the instalment contract is complete. For this reason, the Centre recommends that section 76 should be repealed.

RECOMMENDATION 86. Section 76 should be repealed.

¹⁶³⁴ *Land Title Act 1994 (Qld)* s 42.

¹⁶³⁵ *Land Title Act 1994 (Qld)* s 154(1). Note that there are a number of exceptions: *Land Title Act 1994 (Qld)* s 154(2).

¹⁶³⁶ Unless the land is subject to an existing mortgage at the time the instalment contract is entered into: *Property Law Act 1974 (Qld)* s 76(5).

¹⁶³⁷ *Property Law Act 1974 (Qld)* s 74.

Part 7 – Mortgages

Part 7 of the PLA deals with mortgages of land and other property. The Part contains 26 sections covering a broad range of topics. Some of the sections apply to all mortgages and some apply subject to the terms in the instrument of mortgage itself.

In Victoria it has been noted that much of the law of mortgages is outside of the property legislation.¹⁶³⁸ This is equally true in Queensland. 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 modernisation and streamlining of the provisions.

The provisions in Part 7 are generally well known, understood in practice and supported by significant case law. For a number of these provisions, other than modernising the language, there is no demonstrated need for reform. There are other sections however that require amendment. As discussed further below, these range from minor amendments to address changes in terminology, references to paragraphs or to remove ambiguity in phrasing all the way to more significant amendments to reduce or limit adverse consequences that result under the existing legislation.

The Centre prepared *Issues Paper 4 – Mortgages, Co-ownership, Encroachment and Mistake*¹⁶³⁹ (**Issues Paper 4**) seeking public submissions in relation to a number of issues identified with the provisions of Part 7.

While most of the questions about Part 7 in Issues Paper 4 related to specific sections, one issue that was raised dealt with a provision in New South Wales. The *Conveyancing Act 1919* (NSW)¹⁶⁴⁰ 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.¹⁶⁴¹

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*¹⁶⁴² (**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).¹⁶⁴³ 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.

¹⁶³⁸ 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) 135.

¹⁶³⁹ Commercial and Property Law Research Centre, *Property Law Review Issues Paper 4: Property Law Act 1974 (Qld) – Mortgages, Co-ownership, Encroachment and Mistake*, available at http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/487231/issues-paper-4-property-law-review.pdf.

¹⁶⁴⁰ *Conveyancing Act 1919* (NSW) s 93.

¹⁶⁴¹ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (LexisNexis, 2012), 175 [32318.5].

¹⁶⁴² 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) 44.

¹⁶⁴³ Queensland, *Parliamentary Debates*, 23 October 1974, 1564-1566.

NOT GOVERNMENT POLICY

Under federal law, the *National Credit Code*¹⁶⁴⁴ 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 purposes¹⁶⁴⁵ 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.

Given the provisions of the *National Credit Code* the Centre is of the view that there is no reason to introduce a New South Wales-style right of early redemption of a mortgage.

¹⁶⁴⁴ *National Credit Code* s 82. The *National Credit Code* is Schedule 1 to the *National Consumer Credit Protection Act 2009* (Cth).

¹⁶⁴⁵ *National Credit Code* s 5.

88. Section 77 – Definitions for pt 7

88.1. 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.¹⁶⁴⁶ The phrase no longer appears in any of the relevant legislation.

The term ‘principal money’ is defined in an inclusive way to capture annuities and rent charges.

88.2. Issues with the section

As mentioned above, much of the law of mortgages is located in places other than the PLA. For this reason, the definitions in Part 7 are not extensive.

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.

88.3. Recommendation

The Centre recommends that the definitions in section 77 should be retained with modernised language and amended to remove the reference to ‘*memorandum of mortgage*’. The QLS has agreed that the definition of ‘*instrument of mortgage*’ is broad enough to include any memorandum of mortgage that may still exist.

RECOMMENDATION 87. Section 77 should be retained with modernised language including removal of the term ‘*memorandum of mortgage*’.

¹⁶⁴⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.77.60].

89. Section 77A – Application of pt 7

89.1. 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.¹⁶⁴⁷

Part 7 also applies, subject to any other Act, to other mortgages of land or any other property.¹⁶⁴⁸

In Report No 16, the QLRC 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’.¹⁶⁴⁹

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 mortgage of chattels.¹⁶⁵⁰ Other provisions, the QLRC noted, ‘may conveniently be so applied.’¹⁶⁵¹ Some of the sections in Part 7 are expressly limited to land or mortgages of land.¹⁶⁵²

¹⁶⁴⁷ *Property Law Act 1974* (Qld) s 77A(1)(b).

¹⁶⁴⁸ *Property Law Act 1974* (Qld) s 77A(1)(c).

¹⁶⁴⁹ 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) 58.

¹⁶⁵⁰ 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) 59-60.

¹⁶⁵¹ 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) 60.

¹⁶⁵² For example, *Property Law Act 1974* (Qld) ss 78(1)(b), s 79, 80(2), 81, 82(5), 86.

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).

89.2. Issues with the section

89.2.1. The PPSA and the PLA

As the name implies, the PPSA applies to personal property such as motor vehicles, household goods, business inventory, intellectual property and company shares.¹⁶⁵³ 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).¹⁶⁵⁴ Other interests, even if they may be an interest in personal property are excluded from the PPSA.¹⁶⁵⁵

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.¹⁶⁵⁶

However, there is conflicting authority¹⁶⁵⁷ 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*¹⁶⁵⁸ it was held that the phrase ‘an instrument of mortgage of land’¹⁶⁵⁹ did not include a mortgage of land and other property. However in *St George Bank Ltd v Perpetual Nominees Limited*¹⁶⁶⁰ it was held that the phrase could include a mortgage over land and other property.

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.

It was suggested in the submissions that:

The enforcement provisions of the PPSA should apply to personal property to the exclusion of the PLA. It would be worthwhile removing any uncertainty as to whether enforcement of a security interest over personal property in Qld requires compliance with both the PPSA (to the extent required by the PPSA and the security interest) and the PLA.

However, the QLS submitted that they are not aware of any significant problems in practice caused by the inconsistencies between the PPSA and Part 7 of the PLA. The QLS further submitted that Part 7 should continue to apply to mortgages of land and other property.

¹⁶⁵³ *Personal Property Securities Act 2009* (Cth) s 3.

¹⁶⁵⁴ *Personal Property Securities Act 2009* (Cth) s 10 (definition of ‘personal property’).

¹⁶⁵⁵ *Personal Property Securities Act 2009* (Cth) s 8.

¹⁶⁵⁶ *Personal Property Securities Act 2009* (Cth) s 117.

¹⁶⁵⁷ This issue is discussed further at 95.2.3 below.

¹⁶⁵⁸ [1990] 2 Qd R 129.

¹⁶⁵⁹ *Property Law Act 1974* (Qld) s 83(4)(a).

¹⁶⁶⁰ [2010] QSC 57.

89.2.2. Application to old system land

A second issue is that the section refers to old system land and mortgages of old system land. However, as discussed at paragraph 5.2.1 it is unnecessary to include old system land as for all intents and purposes, there is none remaining in Queensland. Further, to the extent any old system land is identified, it must be brought under the *Land Title Act 1994* (Qld) before it can be dealt with.¹⁶⁶¹

89.3. Recommendation

The Centre is of the view that the interaction between the PPSA and the PLA is sufficiently understood and does not create significant problems in practice. Given this, there is little justification to disturb the existing state of affairs.

In relation to old system land, the Centre is of the view that it is unnecessary for Part 7 to apply to old system land. There is unlikely to be any such land left in Queensland and to the extent any is identified, it must be brought under the *Land Title Act 1994* (Qld) before it can be dealt with. Given this, the Centre recommends that section 77A be retained with modernised language and amended to remove the reference to old system land.

RECOMMENDATION 88. Section 77A should be retained with modernised language and amended to remove reference to old system land.

¹⁶⁶¹ The process for achieving this in a simplified form is discussed at paragraph 200.

90. Section 78 – Implied obligations in mortgages

90.1. Overview and purpose

78 Implied obligations in mortgages

- (1) In every instrument of mortgage there shall be implied on the part of the mortgagor the following obligations—
 - (a) that the mortgagor will pay the principal money and interest secured according to the rate and at the times and mentioned in the mortgage without any deduction whatever;
 - (b) that the mortgagor will keep all buildings and other improvements erected and made upon the land in as good and substantial repair as the same were in at the date of the mortgage, and that the mortgagor will permit the mortgagee at all convenient times, until such mortgage is redeemed, with or without agents, to enter into and upon such land to view and inspect the state of repair of such buildings and improvements.
- (2) An obligation implied because of this section shall, if the mortgage is by deed, take effect as a covenant on the part of the mortgagor.
- (3) This section applies only if and as far as a contrary intention is not expressed in the instrument of mortgage, and shall have effect subject to the terms of the instrument, and to the provisions contained in the instrument.
- (4) Subject to subsection (3), an obligation implied by this section shall have effect as if it were in terms contained in the instrument of mortgage.

Section 78 implies obligations into every instrument of mortgage, subject to the express terms in the instrument of mortgage itself, an obligation on the mortgagor to: repay principal and interest; keep all buildings on the land in good repair; and allow the mortgagee to inspect the state of repair.

The provision is drawn from the *Real Property Act 1861* (Qld) but applies to ‘every instrument of mortgage’ not just to mortgages of real property. In 1973, the QLRC noted that the express terms of the mortgage will almost invariably modify the implied obligations. However, the QLRC also stated that ‘these provisions have for so long formed part of the law that it would be unwise to abolish them altogether’.¹⁶⁶²

90.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised by the submissions to Issues Paper 4.

90.3. Recommendation

Although section 78 will rarely be invoked, as its operation will nearly always be superseded by the express terms of the instrument of mortgage itself, there is no demonstrated need for the section to be amended or repealed. Give this, the Centre recommends that section 78 should be retained with modernised language.

RECOMMENDATION 89. Section 78 should be retained with modernised language.

¹⁶⁶² 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) 60.

91. Section 79 – Variation of mortgage

91.1. 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.¹⁶⁶³

Generally, the initial mortgage will provide for particular types of variation, such as fluctuation in interest rates or to allow further advances.¹⁶⁶⁴ 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.¹⁶⁶⁵ The equivalent provision in New South Wales¹⁶⁶⁶ was the basis for this provision in Queensland.¹⁶⁶⁷

91.2. Issues with the section

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. On a literal reading, this means that one variation of mortgage may be used to increase the interest rate and to decrease the amount secured by the mortgage. However, a separate memorandum of mortgage would be required to shorten the term of the mortgage or to vary any other condition in the instrument of mortgage.

¹⁶⁶³ *Property Law Act 1974* (Qld) s 79(1)(a) to (d).

¹⁶⁶⁴ Discussed at paragraph 94 below.

¹⁶⁶⁵ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, Federation Press, 2013), 213-214.

¹⁶⁶⁶ *Conveyancing Act 1919* (NSW) s 91(1).

¹⁶⁶⁷ 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) 60.

The Centre suggests that section 79(1)(e) should refer to ‘paragraphs (a) to (d)’ rather than just to ‘paragraphs (a) to (b)’. This would allow the use of a single variation to shorten the term and change the interest rate.

No issues were raised in the submissions in relation to section 79.

91.3. Other jurisdictions

In most cases, the instrument of mortgage itself will provide for the variation. A number of jurisdictions¹⁶⁶⁸ 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.¹⁶⁶⁹

91.4. Recommendation

There seems to be little reason why a memorandum of variation should not be able to vary both the interest payable and extend or shorten the term. It seems more likely that the reference in section 79(1)(e) should include section 79(1)(a) to 79(1)(d). This view was supported by the submissions. Given this, the Centre recommends that section 79 be retained but that the reference in section 79(1)(e) should be amended to refer to ‘paragraphs (a) to (d)’.

RECOMMENDATION 90. Section 79 should be retained with modernised language and updated so that it is clear a single variation of mortgage may vary any of the following:

- the interest rate payable;
- the secured amount;
- the term of the mortgage; and
- any other condition, covenant or provision in the instrument of mortgage.

¹⁶⁶⁸ *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.

¹⁶⁶⁹ *Real Property Act 1886* (SA) s 153; *Transfer of Land Act 1893* (WA) s 105A.

92. Section 80 – Inspection and production of instruments

92.1. 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—
- any authorised dealing with the land; or
 - 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—
- 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
 - at the cost of the person making that request; and
 - 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—
- order that person to deliver up the document or documents of title; or
 - 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)—
- 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
 - 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—
- constitute a breach of any term, covenant, condition or proviso for re-entry contained in the mortgage; or
 - occasion any forfeiture or penalty; or
 - 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 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, usually by producing the certificate of title (the **production right**).

The section explicitly states that registration of a second or subsequent mortgage is not a breach of the first mortgage, regardless of the terms of the mortgage. This gives the mortgagor a right to register second and subsequent mortgages against the land (even without the consent of the mortgagee). The production right 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 production right has generally been used to allow the mortgagor to compel the mortgagee to produce the title deed.¹⁶⁷⁰ However, the section applies to other documents in the mortgagee's possession. This may include collateral securities and guarantees.¹⁶⁷¹

The section provides a remedy in the event that a mortgagee does not produce the relevant documents after a request. Additionally, section 80 provides that after the dealing or mortgage for which the relevant document has been produced is registered, the document will be redelivered to the mortgagee or person entitled to take delivery, unless the document is a certificate of title or other document that must be cancelled under the *Land Title Act 1994* (Qld). It should be noted that that Act provides that an instrument may only be registered for a lot if any certificate of title for the lot is returned for cancellation.¹⁶⁷²

92.2. Issues with the section

Issues Paper 4 raised concerns about unclear wording, out-of-date terminology and electronic documents in the digital age. While these concerns are relevant, the major issue with the section relates to the declining relevance of paper certificates of title.

The production right, so far as it relates to certificates of title, is virtually redundant given the decreased use of paper certificates of title. It has long been practice that a certificate of title is not issued unless the mortgagee expressly consents¹⁶⁷³ and that any certificates which have been issued must be surrendered upon registration of a dealing. Where no certificate of title has been issued, there will be nothing to produce.

¹⁶⁷⁰ 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* (2nd ed, 2013, Federation Press), 108.

¹⁶⁷¹ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 108-109.

¹⁶⁷² *Land Title Act 1994* (Qld) s 154.

¹⁶⁷³ *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) [PLA.80.60], [PLA.80.150].

92.2.1. As long as the right subsists

One area of reform that was discussed in Issues Paper 4 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 inspection and production rights will not be available if the mortgagor’s right to redeem has been postponed.¹⁶⁷⁴ However, it is likely that this is an unsupportable position as the right to redeem ultimately subsists.¹⁶⁷⁵ In Issues Paper 4, the Centre suggested that the wording could be changed to reflect the fact that the right remains so long as the mortgage is current.

Such clarification is supported by the submissions. The QLS submitted that the section should be clarified to provide that the mortgagor’s rights under the section remain at all times up to the release of the mortgage as a charge upon the land.

92.2.2. Meaning of ‘authorised’

A second area where clarification may be required relates to the use of the word ‘authorised.’ Section 80(2)(a) requires the mortgagee to produce the documents of title to allow the mortgagor to register any authorised dealing with the land. There has been some discussion whether ‘authorised’ means authorised by the mortgage or authorised by the Torrens system.¹⁶⁷⁶

The instrument of mortgage may expressly prohibit the mortgagor from entering into subsequent mortgages without the consent of the first mortgagee. However, on the basis of the decision in *Holley v Metropolitan Permanent Building Society*,¹⁶⁷⁷ 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.’¹⁶⁷⁸ Combined, the effect of section 80(2) and (4) means that a mortgagor can require the mortgagee to produce documents to register either: a second or subsequent mortgage; or a dealing that is permitted by the instrument of mortgage itself.¹⁶⁷⁹ Other dealings with the land must be ‘authorised’ by the mortgagee or permitted by the instrument of mortgage. In practice, this means any other dealing to which the mortgagee consents as most mortgages contain a prohibition on dealings by the mortgagor without the mortgagee’s consent.¹⁶⁸⁰

In Issues Paper 4, the Centre suggested removing the word ‘authorised’ to avoid any confusion about its meaning. However, the submissions to Issues Paper 4 did not support this change.

92.2.3. Distinction between court and chambers

The third area for reform is relatively minor. The UCPR¹⁶⁸¹ removed the distinction between ‘court’ and ‘chambers’ so the references in section 80(2A) and 80(2B) are out-of-date. The references to

¹⁶⁷⁴ 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) [PLA.80.90].

¹⁶⁷⁵ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.80.90].

¹⁶⁷⁶ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 111.

¹⁶⁷⁷ [1983] 2 Qd R 786.

¹⁶⁷⁸ *Holley v Metropolitan Permanent Building Society* [1983] 2 Qd R 786 at 791.

¹⁶⁷⁹ Or at least not prohibited by the instrument of mortgage. See WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 113-114.

¹⁶⁸⁰ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.80.210].

¹⁶⁸¹ *Uniform Civil Procedure Rules 1999* (Qld).

‘chambers’ are out-of-date and the section could simply refer to ‘court’¹⁶⁸² and achieve the same effect.

92.2.4. Application to electronic documents

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 inspection and production rights in section 80 of the PLA 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).’¹⁶⁸³ This means it is very likely that the section will apply to electronic documents.

If no certificate of title has been issued, it is arguable that the section places a positive obligation on a mortgagor to obtain a certificate of title on request of the mortgagee. Clearly, however, this is not the intention of the legislation. It has long been practice that certificates of title are only issued in limited circumstances and are required to be surrendered¹⁶⁸⁴ before any dealing with the land can be registered. Any certificate of title deposited with the Titles Registry will be cancelled.¹⁶⁸⁵

The reduced reliance on paper certificates of title means that the production and inspection rights are less relevant than they once were. Without paper certificates of titles to produce or inspect, there is a very limited list of documents that may be in the possession of the mortgagee that the mortgagor would 1) not already be able to access; or 2) require to be produced for registration of a dealing with the land.

The inspection and production rights may remain relevant in some limited circumstances. However without paper certificates of title, any reliance on the rights in the section will be much reduced.

92.3. Other jurisdictions

92.3.1. New South Wales

In New South Wales, the *Conveyancing Act 1919* (NSW)¹⁶⁸⁶ gives the mortgagor both the inspection right and the production right. The relevant provision in New South Wales requires production of documents to facilitate the registration of any authorised dealing. New South Wales 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.¹⁶⁸⁷

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.

¹⁶⁸² Defined in this context to mean the Supreme Court: *Property Law Act 1974* (Qld) schedule 6 (definition of ‘court’).

¹⁶⁸³ *Acts Interpretation Act 1954* (Qld) sch 1 (definition of ‘document’).

¹⁶⁸⁴ *Land Title Act 1994* (Qld) s 154.

¹⁶⁸⁵ *Land Title Act 1994* (Qld) ss 42, 45.

¹⁶⁸⁶ *Conveyancing Act 1919* (NSW) s 96.

¹⁶⁸⁷ *Hypac Electronic Pty Ltd (In Liq) v Registrar-General* [2003] NSWSC 1213 [33].

This means that in New South Wales, 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.¹⁶⁸⁸

92.3.2. Victoria and Western Australia

The word 'authorised' is not found in the Victorian¹⁶⁸⁹ or Western Australian¹⁶⁹⁰ provisions.¹⁶⁹¹ In these 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.¹⁶⁹² 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.¹⁶⁹³ 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.¹⁶⁹⁴

92.4. Recommendation

The Centre is of the view that the inspection and production rights in the section are of limited utility given the reduced reliance on certificates of title. Without paper certificates of title, the rights are virtually meaningless as there will be few, if any, documents to produce. Further, a mortgagor is unlikely to require access to any other documents in the mortgagee's possession.

In the Centre's view, the purpose of section 80 is to give the mortgagor a right to register subsequent mortgages and other 'authorised' dealings -- being those dealings that are not prohibited by the instrument of mortgage. Given this, it is the Centre's view that section 80 should be amended to focus this core purpose.

The inspection and production rights should apply to any documents of title that are in the mortgagee's possession or that are required to be produced to enable the registration of a registrable instrument subsequent to the mortgage. While this is likely to be a very limited range of documents, there should be little harm in retaining these rights.

¹⁶⁸⁸ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 112.

¹⁶⁸⁹ *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.

¹⁶⁹⁰ *Transfer of Land Act 1893* (WA) s 127.

¹⁶⁹¹ See *Hypac 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.

¹⁶⁹² *Transfer of Land Act 1958* (Vic) s 86; *Transfer of Land Act 1893* (WA) s 127.

¹⁶⁹³ *Vasiliou v Marchesi* (2006) 157 FCR 252 [4] – [5].

¹⁶⁹⁴ *Transfer of Land Act 1893* (WA) s 127A which was introduced in 2014.

RECOMMENDATION 91. Section 80 should be amended with modernised language to:

- focus on giving mortgagors a right to register second and subsequent mortgages without in any way breaching the terms of the mortgage, and despite anything to the contrary in the instrument of mortgage itself; and
- apply the inspection and production rights to electronic documents in the mortgagee's possession that may be required to enable the registration of a registrable instrument dealing with the land.

93. Section 81 – Actions for possession by mortgagors

93.1. Overview and purpose

81 Actions for possession by mortgagors

- (1) A mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land, as to which the mortgagee has not given notice of the mortgagee's intention to take possession or to enter into the receipt of the rents and profits of the land, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative to the land, in the mortgagor's own name only, unless the cause of action arises upon a lease or other contract made by the mortgagor jointly with any other person.
- (2) This section does not prejudice the power of a mortgagor independently of this section to take proceedings in the mortgagor's own name only, either in right of any legal estate vested in the mortgagor or otherwise.
- (3) This section applies whether the mortgage was made before or after the commencement of this Act.

Section 81 permits the mortgagor to bring certain proceedings in the mortgagor's own name if the mortgagor is entitled to possession or to the receipt of the rents and profits of the mortgaged property. The section is intended to remedy a problem under a legal mortgage of old system land where the mortgagor could not bring an action for possession of the land against third parties without joining the mortgagee in the action.¹⁶⁹⁵

The QLRC recognised that the section, drawn from the *Judicature Act 1876* (Qld) 'is therefore of importance mainly, if not only, in the case of mortgages of old system land.'¹⁶⁹⁶

93.2. Issues with the section

As discussed at paragraph 5.2.1 it is considered that there is no old system land remaining in Queensland and to the extent any is identified, it must be brought under the *Land Title Act 1994* (Qld) before it can be dealt with. The Centre is of the view that provisions relating solely to old system land should be repealed where possible.

93.3. Recommendation

In generally keeping with the Centre's approach to provisions dealing with old system land, section 81 should be repealed.

RECOMMENDATION 92. Section 81 should be repealed.

¹⁶⁹⁵ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.81.30].

¹⁶⁹⁶ 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) 63.

94. Section 82 – Tacking and further advances

94.1. 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 further advances and priority. The section is drawn from equivalent provisions in the United Kingdom¹⁶⁹⁷ and prevents a practice known as tacking. Under the general law, tacking occurred in two basic ways:¹⁶⁹⁸ 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 first mortgage) is added, or tacked on, to the first mortgage, effectively squeezing out the second mortgagee's priority.¹⁶⁹⁹

The most important application of the doctrine of *tabula in naufragio* ('the plank in the shipwreck') arose in the context of legal mortgages of old system land. If a legal mortgage of old system 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

¹⁶⁹⁷ *Law of Property Act 1925* (15 Geo 5, c 20) s 94.

¹⁶⁹⁸ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed), Federation Press, 176-177.

¹⁶⁹⁹ 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) 63.

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.¹⁷⁰⁰ 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 that rank in priority to subsequent mortgages 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.¹⁷⁰¹

The section abolishes the right to tack¹⁷⁰² 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*¹⁷⁰³ 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 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*,¹⁷⁰⁴ 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.

¹⁷⁰⁰ 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* (3rd ed, 2013, Lexis Nexis Butterworths), 25.2, 25.4.

¹⁷⁰¹ *Property Law Act 1974* (Qld) s 82(1)(a)-(c).

¹⁷⁰² 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.

¹⁷⁰³ (1861) 9 HLC 514, cited in Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.82.240].

¹⁷⁰⁴ [1899] 1 Ch 132, cited in WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 184.

Section 82(1)(c) is intended to reverse the result in *West v Williams*¹⁷⁰⁵ but doubt has been raised whether the provision in its present form achieves this result.¹⁷⁰⁶

94.2. Issues with the section

94.2.1. 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*.¹⁷⁰⁷ 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*.¹⁷⁰⁸ 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*.¹⁷⁰⁹

To put this issue beyond doubt it may be appropriate to add certain words of qualification to the existing provision.

94.2.2. 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.¹⁷¹⁰ However, it has been argued that section 82 refers to actual notice.¹⁷¹¹

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.¹⁷¹² 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).¹⁷¹³

¹⁷⁰⁵ [1899] 1 Ch 132.

¹⁷⁰⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.82.690].

¹⁷⁰⁷ [1899] 1 Ch 132.

¹⁷⁰⁸ [1899] 1 Ch 132.

¹⁷⁰⁹ [1899] 1 Ch 132.

¹⁷¹⁰ *Property Law Act 1974* (Qld) sch 6 (definition of ‘notice’).

¹⁷¹¹ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 183 citing *Beachquest Pty Ltd v Interstate Mortgage and Investments Pty LTD* [2003] 2 Qd R 586, 593 per White J.

¹⁷¹² Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) 694 [18 204].

¹⁷¹³ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 179-180.

94.3. Other jurisdictions

Victoria,¹⁷¹⁴ Tasmania¹⁷¹⁵ and New Zealand¹⁷¹⁶ have followed the UK¹⁷¹⁷ example and abolished the right to tack, except in circumstances prescribed by the relevant legislation.

In New South Wales, 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*¹⁷¹⁸ 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.

94.4. Recommendation

The Centre is of the view that section 82(1)(c) should be amended to provide that where a prior mortgagee's mortgage requires that mortgagee to make further advances, such further advances will rank in priority ahead of a subsequent mortgage. However, this outcome should only occur if the obligation to make the further advances was contained in the prior mortgagee's mortgage, or an instrument secured by the prior mortgagee's mortgage, immediately prior to the creation of the subsequent mortgage.

This means that the issue of notice of the subsequent mortgage will be less relevant if the obligation to make the further advances pre-dates the subsequent mortgage. It is up to the subsequent mortgagee to consider whether a prior mortgage imposes the obligation on the prior mortgagee to make further advances and to determine whether there is a risk that such further advances may affect the subsequent mortgagee's security. The QLS strongly supports this amendment.

If there is no obligation to make further advances and the first mortgagee has actual notice (as discussed below) of the second or subsequent mortgages, then further advances made by the first mortgagee will not be tacked to the prior mortgage.

The recommended 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 prior 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.

¹⁷¹⁴ *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.

¹⁷¹⁵ *Conveyancing and Law of Property Act 1884* (Tas) s 38.

¹⁷¹⁶ *Property Law Act 2007* (NZ) ss 89-94.

¹⁷¹⁷ *Law of Property Act 1925* (15 Geo 5, c 20) s 94.

¹⁷¹⁸ [1975] 2 NSWLR 293.

However, it should be noted that the Centre's recommended position is different than the position under the PPSA for personal property. Under that Act, further advances on a security interest provided for by a security agreement will have the same priority as prior advances.¹⁷¹⁹

Further, to address the issue of actual versus constructive notice, the Centre is of the view that notice, in the context of whether a prior mortgagee has notice of subsequent mortgages at the time the further advances are made should be limited to actual notice only. The re-drafted section 82 should contain a definition of notice which provides that in the section, notice means actual notice and does not include constructive notice.¹⁷²⁰

In terms of modernised language, the Centre also notes that the words 'encumbrance' and 'encumbrancee' in section 82(4A) should be replaced with 'mortgage' and 'mortgagee', as discussed at paragraph 215.5.3.6.

RECOMMENDATION 93. Section 82 should be retained with modernised language and amended to provide that in the section, notice means actual notice and does not include constructive notice. Section 82(1)(c) should be amended to provide that further advances from a prior mortgagee will rank in priority to a subsequent mortgage if, immediately prior to the creation of the subsequent mortgage, the prior mortgage (or an instrument secured by the prior mortgage) requires the prior mortgagee to make such further advances.

¹⁷¹⁹ *Personal Property Securities Act 2009* (Cth) s 58.

¹⁷²⁰ Note that this will be an exception of the general principle discussed at paragraph 215.1 that the definition in the dictionary should apply throughout the entire Act.

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

95.1. 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.¹⁷²¹ These powers include:

- a very broad power of sale (including powers incident to the power of sale);¹⁷²²
- 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.¹⁷²³

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.

95.2. Issues with the section

95.2.1. 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.¹⁷²⁴ Duncan and Vann argue that to be more accurate, the clause should read ‘or’, not ‘and.’¹⁷²⁵

95.2.2. 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...’.¹⁷²⁶ 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.¹⁷²⁷

¹⁷²¹ See discussion at 95.2.3 for discussion of whether this includes a mortgage of land and other property.

¹⁷²² *Property Law Act 1974* (Qld) s 83(2).

¹⁷²³ *Property Law Act 1974* (Qld) s 83(1)(a)-(e).

¹⁷²⁴ R Lowenstern, ‘Sales by Mortgagees – the power to buy in at auction’, (1928) 2 *Australian Law Journal* 7.

¹⁷²⁵ See Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.83.330].

¹⁷²⁶ *Property Law Act 1974* (Qld) s 83(2)(b).

¹⁷²⁷ *Mineral Resources Act 1989* (Qld) s 8.

95.2.3. 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 above¹⁷²⁸ 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)¹⁷²⁹ 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
- 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*¹⁷³⁰ 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*¹⁷³¹ Wilson J relied on section 5(2) and held that a mortgage over land and other property was caught by section 83.

95.2.4. Power to sever and sell fixtures

The PLA does not expressly grant a mortgagee a power to sever and sell fixtures as part of the power of sale although this may be included in the instrument of mortgage. The submissions to Issues Paper 4 supported amending the PLA to provide mortgagees this statutory power. Such a power is generally included in instruments of mortgage.

95.3. Other jurisdictions

Legislation in the other Australian jurisdictions¹⁷³² is largely similar to that in Queensland. All have provisions that are based on the equivalent provision in the UK.¹⁷³³ 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.¹⁷³⁴ New South

¹⁷²⁸ At paragraph 89.2.1 above.

¹⁷²⁹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.83.360], [PLA.83.630]. 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.

¹⁷³⁰ [1990] 2 Qd R 129.

¹⁷³¹ [2010] QSC 57.

¹⁷³² *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.

¹⁷³³ *Law of Property Act 1925* (15 Geo 5, c 20) s 101.

¹⁷³⁴ For example, *Conveyancing Act 1919* (NSW) s 109(1)(d) and (f); *Law of Property Act* (NT) s 86(d) and (g).

Wales¹⁷³⁵ and the Northern Territory¹⁷³⁶ give the mortgagee a statutory power to sever and sell fixtures. Mortgagees are also given other powers incidental to the power of sale.¹⁷³⁷

Notably, all of the jurisdictions (except the Northern Territory)¹⁷³⁸ 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...'

95.4. Recommendation

The Centre is of the view that section 83 should be retained with modernised language and amended to address the issues raised above. The first two issues, clarifying that the powers to vary any contract of sale or to buy in at auction are separate; and that minerals and mines apart from the surface may be vested in the Crown are minor amendments to clarify the current position.

The amendment to give mortgagees a statutory power to sever and sell fixtures is more significant as it represents an expansion of the mortgagee's power of sale. However, the instrument of mortgage itself may give this power to mortgagee's which means there is unlikely to be a significant impact as a result of such an amendment. Further, the exercise of a power of sale, whether under statute or under the instrument of mortgage is subject to the safeguards in section 84.

RECOMMENDATION 94. Section 83 should be retained with modernised language and amended to:

- clarify that the mortgagee's powers under the section include a power to vary any contract of sale or to buy in at auction;
- clarify that the power to sell any mines or mineral apart from the surface is subject to the fact that the mines or minerals may be vested in the Crown; and
- provide mortgagees with a statutory power to sever and sell fixtures apart from the land.

¹⁷³⁵ *Conveyancing Act 1919* (NSW) s 109(1)(e).

¹⁷³⁶ *Law of Property Act* (NT) s 86(1)(d).

¹⁷³⁷ *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.

¹⁷³⁸ The provision in the NT has a comma in place of the 'and': *Law of Property Act* (NT) s 86(a).

96. Section 84 – Regulation of exercise of power of sale

96.1. Overview and purpose

84 Regulation of exercise of power of sale

- (1) A mortgagee shall not exercise the power of sale conferred by this Act or otherwise unless and until—
 - (a) default has been made in payment of the principal money or interest or any part of it secured by the instrument of mortgage, and notice requiring payment of the amount the failure to pay which constituted the default under such instrument of mortgage has been served on the mortgagor and such default has continued for a space of 30 days from service of the notice; or
 - (b) default has been made in the observance or fulfilment of some provision contained in the instrument of mortgage or implied by this or any other Act and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed and performed, and notice requiring the default to be remedied has been served on the mortgagor, and such default has continued for the space of 30 days from service of the notice.
- (2) A notice under this section may be in the approved form.
- (3) This section applies, despite any stipulation to the contrary and despite section 49, to mortgages made whether before or after the commencement of this Act, but only to the exercise of a power of sale arising upon or in consequence of a default occurring after the commencement of this Act.
- (4) A reference in any instrument of mortgage to the power of sale conferred on a mortgagee by any 1 or more of the Acts repealed by the *Land Title Act 1994* shall be construed as a reference to the power of sale conferred by this Act.
- (5) Nothing in this section applies to the exercise by a mortgagee of the power of sale conferred on a mortgagee under the Land Act.

The exercise of the power of sale is a commonly used remedy where the mortgagor is in default of its obligations under the mortgage.¹⁷³⁹ Most modern mortgage documents contain a power of sale.¹⁷⁴⁰ The PLA contains a statutory power of sale that is implied to every mortgage, subject to the terms of the mortgage instrument. Section 84 of the PLA regulates the exercise of the power of sale whether exercised under the PLA or the mortgage instrument.

The exercise of the power of sale is a ‘drastic remedy’ and therefore the conditions set out in section 84 of the PLA must be strictly observed.¹⁷⁴¹ Notice to the mortgagor under section 84 (**section 84 notice**) is ‘an essential prerequisite to a valid exercise of the power of sale.’¹⁷⁴² The purpose of the section ‘appears to be to protect persons likely to be prejudiced by the sale of the mortgaged property...’¹⁷⁴³ The effect of the notice requirement is that the mortgagor is given a chance to remedy the breach because of the dire consequences of a sale by a mortgagee.¹⁷⁴⁴

Three basic conditions must first be met before the mortgagee can exercise the power of sale:

¹⁷³⁹ B Edgeworth, CJ Rossiter and MA Stone, *Sackville & Neave Property Law Cases and Materials* (LexisNexis Butterworths, 9th ed, 2013) 1091 [11.53].

¹⁷⁴⁰ W Duncan, and W Dixon, *The Law of Real Property Mortgages* (Federation Press, 2nd ed., 2013) 260.

¹⁷⁴¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.84.30]; *Hunter v Hunter* [1936] AC 222, 247, 253.

¹⁷⁴² *Carr v Finance Corporation of Australia Ltd (No 2)* (1982) 150 CLR 139.

¹⁷⁴³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.84.240].

¹⁷⁴⁴ *Bevham Investments v Belgot Pty Ltd* (1982) 149 CLR 494; see also Edgeworth, B, CJ Rossiter and MA Stone, *Sackville & Neave Property Law Cases and Materials* (LexisNexis Butterworths, 9th ed, 2013) 1091 [11.53].

- firstly, the mortgagor must be in default of the obligations contained or implied in the mortgage;
- secondly, the mortgagee must serve a section 84 notice on the mortgagor setting out the specifics of the default, and requiring the remedy of that default; and
- finally, the default must continue for 30 days after the notice is served.¹⁷⁴⁵

Once all of these conditions are satisfied, the mortgagee can proceed to sell the property. Other provisions of the PLA regulate how the power of sale is exercised and how the sale proceeds are to be applied.¹⁷⁴⁶

96.2. Issues with the section

The operation and application of section 84 of the PLA is generally well known, understood in practice and supported by significant case law. However, the Centre has received submissions from the Department of Natural Resources and Mines (**DNRM**) identifying a growing problem with the exercise of a mortgagee's power of sale after the mortgagor becomes insolvent and the Trustee in Bankruptcy or liquidator disclaims the property the subject of the mortgage. Disclaimers by a Trustee in Bankruptcy or liquidator usually occur where the debt secured by the mortgage exceeds the market value of the property. A downturn in the property market, primarily in some regional, areas is contributing to a surge in disclaimers.

An increasing number of mortgagees are seeking court orders vesting disclaimed property in the mortgagee so that the mortgagee can sell or otherwise deal with the property. Most mortgagees seek vesting orders due to the uncertainty in the case law about the status of the mortgage and the rights of the mortgagee following a disclaimer. On one view, the land vests absolutely in the State, which means the fee simple disappears along with any registered interest. The alternative view is that the title vests in the State, probably as trustee, subject to registered interests including mortgages.

In each case, the State, on the presumption the disclaimed land vests in the State, is joined as a party. The State does not object to the vesting order by the mortgagee but is required to respond at taxpayers' expense. In nearly all reported decisions, the court orders the property to vest in the mortgagee with orders for the sale of the property, consistent with the usual mortgagee duties when exercising power of sale.

The sequence of events that usually lead to this problem are described in detail below.

96.2.1. Property vests in the trustee or comes under the control of a liquidator

According to section 58(1)(a) of the *Bankruptcy Act 1966* (Cth) (**Bankruptcy Act**) all property of a bankrupt vests immediately in the Trustee in Bankruptcy. The section provides:

the property of the bankrupt, not being after-acquired property, vests forthwith in the Official Trustee or, if, at the time when the debtor becomes a bankrupt, a registered trustee becomes the trustee of the estate by virtue of section 156A, in that registered trustee.

¹⁷⁴⁵ *Property Law Act 1974* (Qld) s 84(1)(a) and (b).

¹⁷⁴⁶ See *Property Law Act 1974* (Qld) s 85 (Duty of mortgagee or receiver as to sale price) and s 88 (Application of proceeds of sale).

Rights of secured creditors to realise or otherwise deal with the security (in this case the property of the bankrupt) are expressly preserved by the Bankruptcy Act section 58(5). No action can be taken against the bankrupt personally without the leave of the court.¹⁷⁴⁷

In the case of a company mortgagor, the appointment of a liquidator to a corporation under the *Corporations Act 2001* (Cth) (**Corporations Act**) does not automatically vest the property of the corporation in the liquidator.¹⁷⁴⁸ However, the directors no longer have power to manage the company's affairs, which powers are vested in the liquidator, including the power to sell or otherwise dispose of assets of the company.¹⁷⁴⁹ The liquidator is entitled to apply to court for an order vesting property of the company in the liquidator,¹⁷⁵⁰ but will not usually take this step until the liquidator has made a decision whether to disclaim the property as onerous. Under section 471C of the Corporations Act the holders of a security interest can take action to realise their security, but cannot bring an action against the debtor personally.

Whilst the property remains vested in the Trustee or under the control of a liquidator, a secured creditor is entitled to realise its security by selling the property.

The sale process under section 84 may be initiated by serving a section 84 notice on the mortgagor and Trustee or liquidator. If the section 84 notice is served prior to bankruptcy or liquidation the mortgagee will be able to continue with the process, without interference from the Trustee or liquidator.

96.2.2. Disclaimer of onerous property

The Trustee in Bankruptcy is entitled, after property vests upon a bankruptcy, to disclaim the property¹⁷⁵¹ if it is burdened by covenants that are 'onerous', or the property is 'unsaleable'.¹⁷⁵² A liquidator also has a power to disclaim property on behalf of the company on similar terms.¹⁷⁵³ 'Onerous' covenants may include a mortgage containing covenants to pay principal and interest, to repair or to pay taxes.¹⁷⁵⁴ Usually, a Trustee in Bankruptcy or liquidator will disclaim a property where there is little or no equity and the costs, charges and expenses of realising the property will be more than its value.

96.2.2.1. Effect of the disclaimer on secured creditors

According to section 133(2) of the Bankruptcy Act the effect of a disclaimer is:

...to determine forthwith the rights, interests and liabilities of the bankrupt and his or her property in or in respect of the property disclaimed, and discharges the trustee from all personal liability in respect of the property disclaimed as from the date when the property vested in him or her, but

¹⁷⁴⁷ *Bankruptcy Act 1966* (Cth) s 58(3).

¹⁷⁴⁸ *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 220 CLR 592; *Re Middle Harbour Investments Ltd (in liq)* [1977] 2 NSWLR 652, [660]-[661].

¹⁷⁴⁹ *Corporations Act 2001* (Cth) s 477(2)(c).

¹⁷⁵⁰ *Corporations Act 2001* (Cth) s 475(2).

¹⁷⁵¹ *Bankruptcy Act 1966* (Cth) s 133(1).

¹⁷⁵² *Bankruptcy Act 1966* (Cth) s 133(1AA).

¹⁷⁵³ *Corporations Act 2001* (Cth) s 568.

¹⁷⁵⁴ *Re: Exton* (1932) 5 ABC 83; *Re Tulloch Ltd (No 2)* (1978) 3 ACLR 808.

NOT GOVERNMENT POLICY

does not, except so far as is necessary for the purpose of releasing the bankrupt and his or her property and the trustee from liability, affect the rights or liabilities of any other person.¹⁷⁵⁵

Similarly, the Corporations Act¹⁷⁵⁶ preserves the rights of creditors that have accrued up to the date of the disclaimer:

(1) A disclaimer is taken to have terminated... the company's rights, interests, liabilities and property in or in respect of the disclaimer property, but does not affect any other person's rights or liabilities except so far as necessary in order to release the company and its property from liability.¹⁷⁵⁷

Two consequences of a disclaimer should be noted.

First as stated by Derrington J in *ING Bank (Australia) Limited v State of Queensland*¹⁷⁵⁸ that the effect of a disclaimer under section 133 of the Bankruptcy Act is to disclaim the legal and equitable rights and interests of the bankrupt, notwithstanding the legal estate was not vested in the Trustee.¹⁷⁵⁹ A similar conclusion is reached in relation to the equivalent provisions of the Corporations Act.¹⁷⁶⁰

Secondly, most commentators and courts agree that clearly the provisions of the Bankruptcy Act and Corporations Act have 'no effect on the rights, interests and liabilities of other persons except in so far as it is necessary prospectively to release the bankrupt from her or his rights, interests and liabilities.'¹⁷⁶¹ In *Middle Harbour Investments Ltd*, Bowen CJ said:

Subject to what I have to say in a moment on the question whether the land will revert to the Crown, it appears to me that the mortgagee will retain its rights in respect of principal, interest and charges which have become due at the date of disclaimer. So far as it proves practicable, it can enforce its claim against the land; so far as this proves insufficient to meet the amount due it may prove as an unsecured creditor in the winding up.¹⁷⁶²

Therefore, the disclaimer 'has no effect on liabilities which have accrued due prior thereto'¹⁷⁶³ including a mortgagee's right to exercise power of sale to recover the outstanding monies plus interest accrued to the date of the disclaimer.¹⁷⁶⁴

It should logically follow that if a mortgagee has served a section 84 notice and the period of 30 days has elapsed prior to a disclaimer, the mortgagee should be able to proceed to sell the property. In *Tulloch (No 2)*¹⁷⁶⁵ Needham J said that where the default already existed, 'the right to sell [by exercise

¹⁷⁵⁵ See also: *National Australia Bank v Leroy* [2003] FCA 862, [3]; *Re: Tulloch (No 2)* (1978) 3 ACLR 808; *RAMS Mortgage Corporation Ltd v Skipworth and Another (No 2)* (2007) 239 ALR 799; *Perpetual Trustees Victoria Ltd v Queensland* [2016] FCA 1202.

¹⁷⁵⁶ *Corporations Act 2001* (Cth) s 568D.

¹⁷⁵⁷ *Corporations Act 2001* (Cth) s 568D. See also *Willmott Growers Group Inc v Willmott Forests Limited (in liq.)* [2013] 251 CLR 592; *Re Middle Harbour Investments Ltd (in liq)* [1977] 2 NSWLR 652, 660-661.

¹⁷⁵⁸ [2017] FCA 411, [20] (agreeing with Edelman J in *Westpac Banking Corporation v State of Queensland* [2016] FCA 269).

¹⁷⁵⁹ See also *Commonwealth Bank of Australia v State of Queensland: in the Matter of Ginn* [2016] FCA 1337.

¹⁷⁶⁰ *Middle Harbour Investments Ltd* [1977] 2 NSWLR 652.

¹⁷⁶¹ Paul McQuade and Michael Gronow, *Australian Bankruptcy Law & Practice* Thomson Reuters Australia, [133.2.05] current as at 30 November 2016; Paul McQuade and Patrick Hay, *Bankruptcy in Australia: a guidebook*, Thomson Reuters Australia [51.940] current as at June 2017.

¹⁷⁶² *Middle Harbour Investments Ltd* [1977] 2 NSWLR 652, 660.

¹⁷⁶³ *Dekala Pty Ltd (in liq) v Perth Land & Leisure Ltd* (1987) 17 NSWLR 664, [666] cited in Paul McQuade and Michael Gronow, *Australian Bankruptcy Law & Practice* Thomson Reuters Australia, [133.2.05] current as at 30 November 2016.

¹⁷⁶⁴ For example *Tulloch (No 2)* (1978) 3 ACLR 808.

¹⁷⁶⁵ (1978) 3 ACLR 808.

of power of sale] vested in the mortgagee is one of the rights not affected by the disclaimer...¹⁷⁶⁶ This view of the legal position would mean that a mortgagee who has complied with the statutory conditions to exercising power of sale prior to disclaimer should be able to proceed to sell the property without a vesting order.

If this is an accurate statement of the law, why are mortgagees, such as the mortgagee in *ING Bank (Australia) Limited v State of Queensland*¹⁷⁶⁷ where the section 84 notice was served and the 30 days had expired, seek vesting orders? Several uncertainties appear to impact on a mortgagee's decision to seek a vesting order:

1. the legal status of the mortgage after disclaimer depends on the capacity in which the State holds the land after disclaimer; and
2. if the rights of the mortgagee under the mortgage remain enforceable whether the mortgagee will be able to comply with Titles Registry requirements for a mortgagee sale after disclaimer.

96.2.2.2. Does the land vest in the State after disclaimer?

The ability of the mortgagee to deal with their interest in the land depends upon the effect of the disclaimer on the fee simple interest. Both the Bankruptcy Act and Corporations Act clearly divest the bankrupt of all 'rights, interests and liabilities' in or in relation to the property. No provision is made in either Act for a transfer or vesting of ownership providing only for the disclaimer to be recorded on the title in the Titles Registry.

The question that arises is, if the bankrupt or company no longer owns the property after disclaimer, who does? The case law is yet to reach a firm conclusion, but most judges favour the view that the land vests in the State by operation of an 'escheat'. The controversy in the case law centres on whether the common law doctrine of escheat applies (vesting the land absolutely in the State) or whether the disclaimer provisions alter the doctrine creating a form of statutory escheat. Derrington J considered that:

Under the process of the statutory escheat brought about by the operation of s 133(1) of the Act, on the making of the disclaimer the Crown took back the full title to the Property. However, the statutory regime expressly provides that the title received by the Crown is subject to the existing charges on the land ...How this result is achieved in relation to Torrens system land has been, and remains, the subject of some controversy. The potential inconsistency arises, in cases such as the present, because the existing mortgage had created a charge upon the fee simple interest of the mortgagor and it is difficult to ascertain how such a charge might continue to exist after the fee simple interest is disclaimed and the totality of the interests in the land has reverted to the Crown by escheat ¹⁷⁶⁸

96.2.2.3. What is the doctrine of escheat?

The doctrine of escheat is an incident of a tenure system where the fee simple interest in land emanates from a grant by the State.¹⁷⁶⁹ The purpose of the doctrine is to ensure that no land is ownerless by providing for land with no heir to revert to the State (the superior interest holder).

¹⁷⁶⁶ *Tulloch (No 2)* (1978) 3 ACLR 808, 813. This position was impliedly approved in *National Australia Bank Limited v State of New South Wales* (2009) 260 ALR 115, [11].

¹⁷⁶⁷ [2017] FCA 411.

¹⁷⁶⁸ *ING Bank (Australia) Limited v State of Queensland, in the matter of Watson* [2017] FCA 411, [22].

¹⁷⁶⁹ *Wik Peoples v Queensland* (1996) 187 CLR 1, 90-91.

Historically it appears that the doctrine did not operate to vest 'ownerless' land automatically in the State. Some act of the State, such as taking possession, was required.¹⁷⁷⁰ In Queensland, the doctrine is subject to the operation of section 20(3) of the PLA and it is suggested that 'the only remnants of the doctrine of escheat appear to be where a landowner's Trustee in Bankruptcy exercises the statutory power to disclaim land that is subject to onerous covenants or is difficult to sell and where a liquidator exercises a similar power to disclaim land of a company.'¹⁷⁷¹

96.2.2.4. Does the land escheat to the State subject to the mortgage?

If the land escheats to the State, ownership of the land reverts to the State. Under the common law the land vests immediately in the State. In the context of the *Land Title Act 1994* (Qld) and *Land Act 1994* (Qld) the question is whether the State holds the land in fee simple or as unallocated State Land. For the interest of the mortgagee to remain the fee simple interest must be held by the State together with the other interests in the land.

Some authorities express the view that upon disclaimer the property escheats to the State vesting immediately.¹⁷⁷² For example, in *Re Tulloch (No 2)*,¹⁷⁷³ Needham J held:

It was submitted by counsel representing the Attorney General and the Commissioner for Land Tax that if, upon disclaimer the land excheated [sic], the mortgages would be destroyed. There was no serious contention between the various parties that, in the absence of a vesting order...the land vested or escheated to the Crown (emphasis added)... it seems to me that no other conclusion is possible.

Similarly in *Re Mercer & Moore*¹⁷⁷⁴ Jessel MR arrived at the conclusion that where a freehold estate comes to an end, it goes back to the Crown, but conceded that '...I am not sure here that the estate is in the Crown, but if it is not in the Crown I do not know where it is.'¹⁷⁷⁵

Despite the acknowledged uncertainties about the vesting of title, nearly all recent case law recognises that the intention of both the Bankruptcy Act and Corporations Act is to preserve the rights of secured creditors and on that basis the land does not vest automatically in the State. In *Re Tulloch (No 2)*,¹⁷⁷⁶ Needham J continued:

In the absence of any vesting order, then, the land would escheat to the Crown and, at least partly because of the provisions of 296(2),¹⁷⁷⁷ the rights of the mortgagees and charges would, 'except so far as is necessary for the purpose of releasing the company and the property of the company liability', remain.

¹⁷⁷⁰ Sir William Blackstone, *Commentaries on the Laws of England* 1809 (15th ed, 1809) vol. 2, 244-5; *Attorney-General of Ontario v Mercer* (1883) 8 App Cas 767 at 772 per Earl of Selbourne LC; *National Australia Bank Ltd v New South Wales* (2009) 260 ALR 115, [14].

¹⁷⁷¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [446].

¹⁷⁷² See for example *National Australia Bank v Leroy* [2003] FCA 862; *Sandhurst Trustee Ltd v 72 Seventh Street Nominees Pty Ltd (in liq)* (1998) 45 NSWLR 556; *RAMS Mortgage Corporation Ltd v Skipworth (No 2)* (2007) 210 FLR 11.

¹⁷⁷³ (1978) 3 ACLR 808, 812-813.

¹⁷⁷⁴ (1880) 14 CH D 287. See also *Re Weiland (Deceased)* (1945) 13 A.B.C. 220, 225.

¹⁷⁷⁵ *Re Mercer & Moore* (1880) 14 CH D 287, 296; followed in *National Australia Bank v Leroy* [2003] FCA 862; *Sandhurst Trustees Ltd v 72 Seventh Street Nominees Pty Ltd (in liq)* (1998) 45 NSWLR 556; *RAMS Mortgage Corporation Ltd v Skipworth (No 2)* (2007) 210 FLR 11.

¹⁷⁷⁶ (1978) 3 ACLR 808, 812-813.

¹⁷⁷⁷ S 296(2) of the *Companies Act 1961* (NSW) (repealed) is similar to s 133(2) of the *Bankruptcy Act 1966* (Cth).

In *ING Bank (Australia) Ltd v Queensland*,¹⁷⁷⁸ Derrington J referred to the effect of section 133(1) of the Bankruptcy Act (the disclaimer provision) as a 'process of statutory escheat.'

Rares J, in *National Australia Bank Limited v State of New South Wales* also notes:

Escheat has the consequence that the radical title merges in the Crown which is then free to regrant the land as it pleases. Yet, s 133(9) expressly denies that the Crown has such a title, because the Court, not the Crown, proceeding judicially can determine that the property vest otherwise than in the Crown.¹⁷⁷⁹

His Honour concluded (in obiter):

Since s 133(9) proceeds on the basis that the Court retains jurisdiction to vest property that has been disclaimed under s 133(1) in a person either actually entitled to it, or in whom it would be just and equitable to vest it, the concept that somehow, in the meantime, the property escheated to the Crown does not fit easily into the statutory scheme... *In providing for a Trustee in Bankruptcy (or a corporation by the act of its liquidator) to disclaim property and for the Court to have jurisdiction to vest that property in another person, the Parliament necessarily intended that no escheat would occur automatically on a disclaimer.*¹⁷⁸⁰ (emphasis added)

Gardiner AJ in *Muir v Mid Murray Fire Protection Pty Ltd (in liq)*¹⁷⁸¹ expressed the view that the 'party which, after disclaimer, for practical purposes holds the only real interest in the property is [the mortgagee]...' and later ponders the joining of the State to the application, saying: 'while I consider it might be technically necessary, I cannot imagine what interest the Crown would wish to put up if it were joined and heard on this application.'¹⁷⁸² His Honour took a very practical approach and concluded:

...even if it were assumed that upon escheat of the property to the Crown, it would still be subject to the mortgage to ANZ by reason of its security over the property. Adopting this approach, I see no reason to require that the Crown be joined as a party. It will only delay the matter and add to the legal costs for no apparent good purpose.¹⁷⁸³

If the majority view¹⁷⁸⁴ is accepted the effect of a disclaimer is:

1. the proprietary rights and interest of the bankrupt in the land cease upon disclaimer;
2. the fee simple interest remains subject to registered interests;
3. accrued rights of secured creditors against the land remain enforceable to the extent of the debt (principal and interest) outstanding on the date of disclaimer;

¹⁷⁷⁸ *ING Bank (Australia) Ltd v Queensland* [2017] FCA 411. See also *National Australia Bank Ltd v New South Wales* (2009) 260 ALR 115.

¹⁷⁷⁹ *National Australia Bank Ltd v New South Wales* (2009) 260 ALR 115, [26].

¹⁷⁸⁰ *National Australia Bank Ltd v New South Wales* (2009) 260 ALR 115, 26.

¹⁷⁸¹ (2014) 32 ACLC 14-060, [14]-[15].

¹⁷⁸² *Muir v Mid Murray Fire Protection Pty Ltd (in liq)* (2014) 32 ACLC 14-060, [15].

¹⁷⁸³ (2014) 32 ACLC 14-060, [16].

¹⁷⁸⁴ *Re Middle Harbour Investments Ltd (in liq)* [1977] 2 NSWLR 652, 660-661; *Sandhurst Trustees Ltd v 72 Seventh Street Nominees Pty Ltd (in liq)* (1998) 45 NSWLR 556; *Commonwealth Bank of Australia v State of Queensland: in the Matter of Ginn* [2016] FCA 1337; *National Australia Bank Limited v State of New South Wales* [2014] FCA 298.

4. the fee simple does not revert absolutely to the State but is held by the State subject to registered interests, including mortgages;
5. an interested party may apply to the Federal Court for a vesting order.

96.2.3. Can a mortgagee exercise power of sale without a vesting order?

On the basis that the fee simple interest remains, albeit held by the State, and the interest of a registered mortgagee remains registered on the title, can the mortgagee exercise their rights in the registered mortgage or under the PLA as against the land?

Several statements in the case law suggest that despite the preservation of a secured creditor's accrued rights, a vesting order is required.

In *National Australia Bank Ltd v New South Wales*, Rares J describes the circumstances as a 'special position created with the (temporary) repository of the title, namely the Crown, pending the final decision of the court as to the person in whom the title will vest.'¹⁷⁸⁵ (underlining added)

In *National Australia Bank Limited v State of New South Wales*,¹⁷⁸⁶ Perram J stated:

[9] The immediate consequence of the disclaimer of the onerous property by the Bank was that the Paruna Place property escheated to the Crown in right of New South Wales... It has been said of the operation of s 133 that the Crown holds the property in fee simple and that only the interest of the proprietor goes out of existence on the escheat. The immediate consequence of the escheatment is therefore that the Bank does not presently have the rights it would have had against Mr Elters but for his bankruptcy and presently has no right to enforce its security against the State of New South Wales. (underlying added)

Similar statements appear in *Australia and New Zealand Banking Group Limited v State of Queensland*¹⁷⁸⁷ and *Rams Mortgage Corporation Ltd v Skipworth (No 2)*.¹⁷⁸⁸

These statements suggest that after disclaimer further dealings with the land are within the jurisdiction of the court rather than the mortgagee or the State. In the Centre's view this conclusion does not logically follow for a number of reasons, which are set out below.

1. Prior to disclaimer a mortgagee may have initiated the power of sale process under section 84 by serving a notice and 30 days may have elapsed. At this time the mortgagee has an accrued right to sell the land in accordance with the PLA. If no disclaimer occurs the mortgagee can proceed to realise their security by selling the land. Even if a section 84 notice has not been given prior to bankruptcy, the rights of secured creditors are preserved and steps can be taken to realise the security. Whilst a mortgagee may liaise with the Trustee in Bankruptcy the consent of the Trustee or liquidator to the sale is not required.
2. How does the position change after disclaimer? The Bankruptcy Act and Corporations Act expressly preserve the rights of secured creditors in relation to the land post disclaimer. Case law also recognises that a disclaimer does not extinguish a secured

¹⁷⁸⁵ *National Australia Bank Ltd v New South Wales* (2009) 260 ALR 115, [28].

¹⁷⁸⁶ [2014] FCA 298.

¹⁷⁸⁷ [2016] FCA 1221, [6].

¹⁷⁸⁸ [2007] WASC 75, [28]–[29].

creditor's accrued rights, but there is little analysis of the position in recent decisions. In *Re Tulloch (No 2)*¹⁷⁸⁹ Needham J said that where the default already existed, 'the right to sell [by exercise of power of sale] vested in the mortgagee is one of the rights not affected by the disclaimer...'.¹⁷⁹⁰ If it is accepted that the fee simple interest in the land is not extinguished upon a disclaimer, but is held by the State, and the creditor's interest as mortgagee also remains valid, are there policy or practical reasons why a mortgagee should require a vesting order to exercise a power of sale?

3. The first reason may be that a vesting order allows other parties to claim ownership rights in the land and potentially avoid a sale by the mortgagee. The circumstances in which another party, unknown to the mortgagee prior to disclaimer, is likely to claim a right to ownership of the property, is rare. In the period leading up to disclaimer a mortgagee is entitled, in the event of a default, to take action to realise their security without regard to the interests of other parties, except for those entitled to notice under section 84 of the PLA. The purpose of the 30 days following a section 84 notice is to allow any party entitled to redeem the mortgage to do so. If this has not occurred by then, it is unlikely to occur after disclaimer. Of the cases surveyed only one involved a claim by a third party to ownership rights in the land. In all other cases, the respondent was the State and no objection to the vesting was raised.
4. The second argument may be that as a disclaimer extinguishes the contractual rights of the mortgagee against the mortgagor it also extinguishes the security interest created by the registered mortgage. This ignores the fact that in most contemporary mortgages, the land itself is charged with repayment of a sum of money set out in the registered instrument. Validity of a registered mortgage does not depend on the existence of a personal obligation to repay a debt.¹⁷⁹¹
5. The third potential argument is that as the land has escheated to the State, no dealing can occur without the consent of the State. Arguments against this position are that the State does not bear any liability under the mortgage or have a right to redeem the mortgage so why should consent be required. Further, how is the position of the State after disclaimer different to the position of the Trustee or liquidator prior to disclaimer, neither of which are able to prevent or interfere with a secured creditors rights.

On balance, the preferred position is that a mortgagee who has served a section 84 notice prior to disclaimer should be entitled after disclaimer to continue the process and sell the property. Arguably the only time a mortgagee may require a vesting order is if no section 84 notice was served prior to disclaimer. In this case the mortgagee will not have any accrued rights and the contractual rights upon which a default may be based are extinguished.

¹⁷⁸⁹ (1978) 3 ACLR 808.

¹⁷⁹⁰ *Tulloch (No 2)* (1978) 3 ACLR 808, 813.

¹⁷⁹¹ *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81.

Despite this conclusion, our recommendation proposes a new process for all mortgagees, irrespective of the stage reached in the section 84 process prior to disclaimer, to exercise a power of sale after disclaimer without the need to obtain a vesting order.

96.3. Other jurisdictions

The position in other Australian jurisdictions is essentially the same as in Queensland. Each jurisdiction has mortgagee sale provisions in similar terms. No express provision is made for the position of the mortgagee after disclaimer.¹⁷⁹²

96.4. Recommendation

The Centre recommends making express provision in the PLA for a mortgagee to exercise power of sale after disclaimer by the Trustee or a liquidator.

Clearly, the uncertainty in the case law needs to be addressed to provide ‘a simpler and more efficient approach.’¹⁷⁹³ The issues to be addressed in drafting amendments to section 84 are set out below.

1. The capacity in which the State holds the land after disclaimer should be clarified. It is recommended that the State hold the land as a statutory trustee and be given the power to consent to the sale of the land by a registered mortgagee. The State is only entitled to waive the vesting of the land by escheat if given express power to do so.¹⁷⁹⁴
2. The PLA should set out the conditions for consent of the State to a sale by the mortgagee:
 - a the Trustee or liquidator must formally disclaim the property. A disclaimer by the Trustee or liquidator should act as the trigger for the right of the mortgagee to exercise power of sale rather than the requirement for a default;
 - b notice of the disclaimer (in the form approved by the Registrar) and an intention to exercise power of sale should be lodged in the Titles Registry;
 - c after notification of disclaimer a mortgagee must give notice to all joint owners of the land of an intention to exercise power of sale of the disclaimed property;
 - d an appropriate period should elapse after notification and prior to sale to allow an interested party to bring an application for a vesting order. The recommended amendments cannot remove the right of an interested party to bring an application under the Bankruptcy Act or Corporations Act, but the circumstances in which this is likely to occur are rare. The Centre suggests a period of 30 days.
3. The mortgagee should be subject to the same duties and obligations as a mortgagee exercising power of sale in the usual course.

¹⁷⁹² *Conveyancing Act 1919* (NSW) s 111; *Real Property Act 1900* (NSW) s 57; *Land Titles Act 1980* (Tas) s 77; *Transfer of Land Act 1958* (Vic) s 77; *Transfer of Land Act 1958* (WA) ss 106, 107 and 108; *Real Property Act 1886* (SA) ss 132, 133.

¹⁷⁹³ *National Australia Bank Ltd v New South Wales* (2009) 260 ALR 115, [1].

¹⁷⁹⁴ *Re Suncorp Insurance and Finance* [1991] 2 Qd R 704, 708.

4. The requirements for registration should be modified so that a declaration of continuing default is not required.
5. Proceeds of the sale should be distributed in accordance with section 88 of the PLA with one minor modification.
6. The provision should apply to all registered mortgagees selling after disclaimer irrespective of whether a section 84 notice was served prior to disclaimer.

The intention of the recommendation is to streamline the process for mortgagees and ensure that mortgagees do not need to seek vesting orders.

Certain aspects of the recommended amendments are considered in more detail below.

96.4.1. Where there is more than one registered owner and one party is bankrupt or in liquidation

A co-owner of a property may grant a mortgage over his or her share of the property, whether the land is held as joint tenants, or as tenants in common.¹⁷⁹⁵ If a co-owner grants a mortgage over the property, this does not bind the other owners to the terms of the mortgage and even if the mortgage purports to be over the entire property, it is construed as attaching only to the share of the property of the co-owner granting the mortgage.¹⁷⁹⁶ If all co-owners are in agreement, however, the mortgage can be granted over all of their interests in the property to secure the obligation of one of them.¹⁷⁹⁷ This is the usual case.

Where a property is held by more than one person as joint tenants, upon vesting of the bankrupt's, or the liquidating company's, share of property in the Trustee in Bankruptcy, any joint tenancy held with the bankrupt is severed and the secured interest is over the share held by the bankrupt as tenant in common.¹⁷⁹⁸ The recommendation takes into account the position of joint tenants and it is noted that where the other tenant/s are not a party to the mortgage, they will hold their interests as tenants in common and will not be subject to the mortgage. Of course, in this situation the mortgagee is going to have difficulty in selling only a part interest in a property to a third party. In practice, the mortgagee will often negotiate with the other owners to try to resolve the situation.

In the case of joint mortgagors, their position will likely be addressed in the mortgage instrument. Most commercial mortgages will make all of the parties to the mortgage jointly and severally liable and therefore the other parties will become responsible for the fulfilment of the obligations of the bankrupt. Again, in a situation like this the mortgagee will usually negotiate with the other mortgagors to come to a resolution. However, it should be noted that the mortgagee will have the power to sell, as it currently does, if it chooses to realise the asset without negotiating with the joint owners.

¹⁷⁹⁵ *Lyons v Lyons* [1967] VR 169; *Katsaitis v Commonwealth Bank of Australia* (1987) 5 BPR 12,049; *Westpac Banking Corporation v Sansom* (1995) NSW ConvR 55-733; *Andrews v Wilcox* [2008] NSWSC 280.

¹⁷⁹⁶ *First National Securities Ltd v Hegerty* [1985] QB 850; *Westpac Banking Corporation v Sansom* (1995) NSW ConvR 55-733.

¹⁷⁹⁷ *Hall v Westpac Banking Corp* (1987) 4 BPR 9587, 9581.

¹⁷⁹⁸ *Re Francis; Ex Parte Official Trustee* (1988) 19 FCR 149; *Corke v Corke* (1994) 48 FCR 359, 368.

96.4.2. Notice to Registrar and other registered owners

Under the recommendation, notice of the disclaimer may be given to the Registrar by either the Trustee, liquidator or the mortgagee in the form required by the Registrar.

The recommendation takes into account the requirements for a Trustee in Bankruptcy or liquidator to give notice to the Registrar of the disclaimer,¹⁷⁹⁹ and that the disclaimer is noted on the title. Upon disclaimer, the Trustee in Bankruptcy or liquidator must notify the Registrar by lodging a Form 14 – General Request (deposited as an Administrative Noting Miscellaneous). The Trustee in Bankruptcy or liquidator must also attach a notice of the disclaimer when lodging the Form 14 – General Request, along with an extract from the National Personal Insolvency Index which validates the trustee’s right to disclaim the property.¹⁸⁰⁰ Any interested party would thereafter be able to search the freehold land register and see that the interest of the bankrupt has been disclaimed. Despite this statutory requirement a Trustee or liquidator may not give notice within the time specified. To allow the property to be dealt with in a timely manner, there is no reason to restrict the giving of this notice to the Trustee or liquidator. Notice, with appropriate evidence, may also be given by the mortgagee. At the same time, the form of notice should act as notice to the Registrar of the mortgagee’s intention to deal with the land.

Once the disclaimer is noted on the title to the property the mortgagee is entitled to give notice of their intention to deal with the land to joint owners, who are not bankrupt or in liquidation. The purpose of this notice is to notify other parties who may have an interest in redeeming the mortgage, to pay the debt or seek a vesting order. The need for a notice to the bankrupt is specifically excluded on the basis that the bankrupt has no interest in the property upon the disclaimer being made, and therefore no ability to remedy the breach. The mortgagee would then exercise the power of sale in the usual way.

96.4.3. Sections 85 and 88 apply to a mortgagee sale after disclaimer

The obligations relating to a mortgagee exercising power of sale set out in section 85 and section 88 of the PLA should apply to this process. Whether this needs to be stated expressly in the Act depends on the drafting approach to the suggested amendments.

RECOMMENDATION 95. Section 84 should be retained with modernised language and amended to deal with the issue of disclaimer of property by a Trustee in Bankruptcy or a liquidator under the *Bankruptcy Act 1966* (Cth) and or the *Corporations Act 2001* (Cth).

¹⁷⁹⁹ *Bankruptcy Act 1966* (Cth) s 133(3); *Corporations Act 2001* (Cth) s 568A(1)(d); see also Department of Natural Resources and Mines, *Land Title Practice Manual (Queensland)*. https://www.dnrm.qld.gov.au/data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf_at [14-2260].

¹⁸⁰⁰ See Department of Natural Resources and Mines, *Land Title Practice Manual (Queensland)* https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf_at [14-2260].

For example, section 84 could be amended to contain additional provisions drafted in the following manner:

Section [84] Regulation of exercise of power of sale

...

- (6) Subsections (7)-(8) apply if property is subject to a registered mortgage and the Trustee in Bankruptcy or liquidator disclaims the property under the *Bankruptcy Act 1966* (Cth) or *Corporations Act 2001* (Cth).
- (7) The State holds the property as trustee subject to the rights of the mortgagee under the mortgage.
- (8) Subsections (1)-(3) do not apply to the registered mortgagee who may exercise the power of sale conferred by this Act if:
 - (a) disclaimer of the property by the Trustee in Bankruptcy or liquidator has been notified to the Registrar of Titles;
 - (b) the mortgagee has given notice, in the approved form, to the Registrar of Titles and all other registered owners of the property, notifying the mortgagee's intention to exercise power of sale after 30 days; and
 - (c) a period of 30 days has passed and no interested party has applied for an order of the court under the *Bankruptcy Act 1966* (Cth) or *Corporations Act 2001* (Cth) to vest the property in that party.

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

97.1. 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 sale¹⁸⁰¹ 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,¹⁸⁰² 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

¹⁸⁰¹ 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).

¹⁸⁰² 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.

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.¹⁸⁰³ 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.'

97.2. Issues with the section

A dictionary definition of a 'delegate' is 'one delegated to act for or represent another.'¹⁸⁰⁴ 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.¹⁸⁰⁵ 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.¹⁸⁰⁶ For this reason, almost invariably, both the mortgage instrument and the appointment document will specify that the receiver is appointed as the agent of the mortgagor.¹⁸⁰⁷

Under the PLA, mortgagees have a statutory right to appoint a receiver.¹⁸⁰⁸ 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.¹⁸⁰⁹

The appointment of a receiver does not affect the duty of the mortgagee with respect to sale price.¹⁸¹⁰ As demonstrated, a receiver, either by way of private or statutory appointment, is the agent of the mortgagor, rather than the mortgagee.

¹⁸⁰³ Explanatory Notes, Property Law (Mortgagor Protection) Amendment Bill 2008 (Qld), 1.

¹⁸⁰⁴ *Macquarie Australian Dictionary*.

¹⁸⁰⁵ See WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 9.4-9.5, referring to *Trimelston (Lord) v Hamill* (1810) 1 Ball & B 377 385.

¹⁸⁰⁶ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 11.7.4.

¹⁸⁰⁷ 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* (2nd ed, 2013, Federation Press), 11.13.1.

¹⁸⁰⁸ *Property Law Act 1974* (Qld) s 83(1)(c).

¹⁸⁰⁹ *Property Law Act 1974* (Qld) s 92(2).

¹⁸¹⁰ *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).

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.

Further, every obligation that is imposed on a mortgagee exercising a power of sale should also clearly be applicable to receivers exercising a power of sale, whether appointed as an agent of the mortgagee or not.

97.3. 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.¹⁸¹¹ However, the level of statutory prescription of the exercise of the power of sale by mortgagees and receivers is without precedent elsewhere in Australia.¹⁸¹²

The Northern Territory provision¹⁸¹³ is very similar to the Queensland position and refers to the mortgagee being under a duty to take reasonable care to ensure the property is sold at market value. Tasmania and Victoria both have provisions that require mortgagees to sell 'in good faith and having regard to the interest of the mortgagor', grantor / encumbrancer and other persons, sell subject to such terms and conditions as the mortgagee thinks fit.¹⁸¹⁴ In Tasmania, this has not been interpreted as a requirement that the mortgagee has a duty to obtain the best price reasonably possible.¹⁸¹⁵ However it is suggested that Victoria takes a wider view.¹⁸¹⁶

In New South Wales, the legislation requires mortgagees and chargees to take reasonable care to ensure that land is not sold for less than its market value, or the best price that may be reasonably obtained.¹⁸¹⁷ The legislation also provides that the obligation applies to an agent appointed by a mortgagee or chargee in the same way as it applies to the mortgagee or chargee exercising a power of sale.¹⁸¹⁸

97.4. Recommendation

The Centre is of the view that section 85 of the PLA should clearly provide that the duty of a mortgagee exercising a power of sale to take reasonable care to ensure that the property is sold at the market value also applies to a receiver exercising a power of sale. This amendment is supported by the QLS.

¹⁸¹¹ See WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 10.6.

¹⁸¹² WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 10.6.1 at 277.

¹⁸¹³ *Law of Property Act 2000* (NT) s 90(1).

¹⁸¹⁴ *Land Titles Act 1980* (Tas) s 78(1)(a); *Transfer of Land Act 1958* (Vic) s 77.

¹⁸¹⁵ *Upton v Tasmanian Perpetual Trustees Ltd* (2007) 242 ALR 422. See also WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 10.6.3 at 277.

¹⁸¹⁶ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 10.6.4 at 277-278.

¹⁸¹⁷ *Conveyancing Act 1919* (NSW) s 111A(1).

¹⁸¹⁸ *Conveyancing Act 1919* (NSW) s 111A(2).

Further, the obligations that apply to a mortgagee exercising a power of sale should also apply to a receiver exercising a power of sale, whether the receiver is an agent of the mortgagee or not.

RECOMMENDATION 96. Section 85 should be retained with modernised language and clarified to provide that:

- the mortgagee's duty to take reasonable care to ensure that the property is sold at the market value also applies to a receiver exercising a power of sale; and
- where the power of sale is exercised by a receiver, the receiver must comply with the obligation to give the mortgagor notice of the sale in the approved form.

98. Section 86 – Effect of conveyance on sale

98.1. 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 old system 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.

Section 86(3) provides that a conveyance on sale by a mortgagee is deemed to have been made in the exercise of the power of sale unless a contrary intention appears. Section 86(4) excludes transfers resulting from an exercise of the power of sale under other legislation.

98.2. Issues with the section

98.2.1. Old system land – sections 86(1)

As section 86(1) relates only to old system land, the Centre is of the view that it should be repealed, subject to the approach to old system land at paragraph 5.2.1. As discussed, for all practical purposes, there is no old system land remaining in Queensland. To the extent any is found to exist, that land must be brought under the *Land Title Act 1994* (Qld) before it can be dealt with.

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

*Shapowloff v Lombard Australia Limited*¹⁸¹⁹ 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.¹⁸²⁰ 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.’¹⁸²¹ This power is also provided for in the *Land Title Act 1994* (Qld).¹⁸²² Mortgages of land under the *Land Title Act 1994* (Qld) are included under part 7 of the PLA.¹⁸²³

It has been suggested that the section does nothing more than confirm what is already provided for in existing sections of the PLA¹⁸²⁴ and under the *Land Title Act 1994* (Qld).¹⁸²⁵

98.2.3. Presumption of sale under exercise of the statutory power of sale

Duncan and Vann¹⁸²⁶ submit that section 86(3) operates to deem any sale by a mortgagee to be a sale or conveyance made in exercise of the power of sale conferred by the PLA. The effect of this is that once the sale is characterised as an exercise of a power of sale by a mortgagee, section 86(3) applies so that section 86(1) and 86(2) will apply to the sale. The presumption can be rebutted with evidence of a contrary intention.

98.3. Other jurisdictions

The other jurisdictions in Australia all have provisions virtually identical to those contained in section 86(1) and 86(2).¹⁸²⁷ However, the issues to be resolved in the PLA make discussion of the equivalent provisions unnecessary.

98.4. Recommendation

In line with the general approach to provisions that deal with old system land (discussed at paragraph 5.2.1) the Centre is of the view that section 86(1) should be repealed. Further, as section 86(2) does nothing more than confirm what is already provided for in the *Land Title Act 1994* (Qld), the section serves little purpose. The QLS agreed with this assessment but was of the view that there is no harm

¹⁸¹⁹ [1980] Qd R 517.

¹⁸²⁰ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.86.90].

¹⁸²¹ 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) 69.

¹⁸²² Section 79.

¹⁸²³ *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).

¹⁸²⁴ Such as *Property Law Act 1974* (Qld) s 77A(1)(b)(i).

¹⁸²⁵ *Land Title Act 1994* (Qld) ss 78(1), 79.

¹⁸²⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.86.300].

¹⁸²⁷ *Conveyancing Act 1919* (NSW) s 112; *Law of Property Act 2000* (NT) s 91; *Conveyancing and Law of Property Act 1884* (Tas) s 23; *Property Law Act 1958* (Vic) s 104; *Property Law Act 1969* (WA) s 60; *Law of Property Act 1936* (SA) s 49.

in retaining the section. However, the Centre is of the view that this is insufficient to justify retaining the section.

Further, there is no need to retain section 86(3). This is because section 86(1) is to be repealed and section 86(2) is provided for in other legislation which means there is little reason to deem a sale by a mortgagee as a sale in exercise of the statutory power of sale.

If subsections 86(1) to 86(3) are repealed, there is no reasons to keep section 86(4), as its only purpose is to ensure that the section does not apply. If the section is repealed, it will not apply. Given this, the Centre recommends that section 86 should be repealed in its entirety.

RECOMMENDATION 97. Section 86 should be repealed.

99. Section 87– Protection of purchasers

99.1. 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.

99.2. Issues with the section

99.2.1. 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.'¹⁸²⁸ The provision applies only to an exercise of the power of sale conferred by the PLA.¹⁸²⁹ It does not operate in relation to a transfer 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.¹⁸³⁰

¹⁸²⁸ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.87.180].

¹⁸²⁹ *Property Law Act 1974* (Qld) s 83(1).

¹⁸³⁰ *Property Law Act 1974* (Qld) s 87(1)(a) to (d).

99.2.2. Benefit is no greater than existing protections

In relation to land under the *Land Title Act 1994* (Qld), it is submitted by Duncan and Vann¹⁸³¹ 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.

99.3. Other jurisdictions

Across Australian jurisdictions¹⁸³² 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.

The New Zealand legislation contains a provision that is very similar to section 87 in that it protects a buyer who purchases from a mortgagee.¹⁸³³ The New Zealand provision is drafted in plainer language than the Queensland provision.

99.4. Recommendation

The Centre is of the view that where a mortgagee exercises a power of sale, a third party buyer should not have to look behind the sale to determine whether the mortgagee's power is being properly exercised. A buyer who, without notice of any irregularity in the mortgagee's exercise of the power of sale, purchases from a mortgagee exercising a power of sale should be protected regardless of whether the power being exercised was granted under the statute or under the instrument of mortgage.

Further, the Centre is of the view that the third party buyer's protection should commence at a clear point in time. As discussed at paragraph 99.2.2 above, if the time of conveyance is the registration of the transfer, the protection given is no greater than the protection given by indefeasibility. For this reason, the Centre is of the view that the protection should commence from the time the buyer purchases the property.

The submissions to Issues Paper 4 supported these amendments.

¹⁸³¹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.87.240].

¹⁸³² *Conveyancing Act 1919* (NSW) s 112(3); *Property Law Act 1958* (Vic) s 104(2); *Law of Property Act 1936* (SA) s 49(2).

¹⁸³³ *Property Law Act 2007* (NZ) s 184.

RECOMMENDATION 98. Section 87 should be retained with modernised language but amended so that the protection given to buyers applies:

- to any exercise of a power of sale by a mortgagee or receiver; and
- to a person who purchases from a mortgagee or receiver.

For example, using the New Zealand provision as a guide, section 87 could be drafted in the following manner:

Section [87] Protection of purchasers

- (1) A person who purchases mortgaged property from a mortgagee or a receiver exercising a power of sale:
 - (a) is not answerable for the loss, misapplication, or non-application of the purchase money paid for the property; and
 - (b) need not inquire whether—
 - (i) a case has arisen to authorise the sale; or
 - (ii) due notice was given; or
 - (iii) the leave of the court, when so required, was obtained; or
 - (iv) the power of sale was otherwise improperly or irregularly exercised.
- (2) Any person who suffers loss or damage by an unauthorised, or improper, or irregular exercise of a power of sale will have a remedy in damages against the person exercising the power.

100. Section 88 – Application of proceeds of sale

100.1. Overview and purpose

88 Application of proceeds of sale

- (1) Subject to this section, the money arising from sale, and which is in fact received by the mortgagee, shall be held by the mortgagee in trust to be applied by the mortgagee—
- (a) firstly, in payment of all costs, charges and expenses properly incurred by the mortgagee as incident to the sale, or any attempted sale, or otherwise; and
 - (b) secondly, in discharge of the mortgage money, interest and costs, and other money (if any) due under the mortgage; and
 - (c) thirdly, in payment of any subsequent mortgages or encumbrances;
- and the residue (if any) of the money so received shall be paid to the person entitled to receive or entitled to give receipts for the proceeds of sale of the mortgaged property.
- (2) The money that is in fact received by a mortgagee arising from sale in the exercise of the power conferred under the Mineral Resources Act must, subject to subsection (1)(a) and (b), be dealt with as provided under that Act.
- (3) The proceeds of sale arising from a sale by a mortgagee in the exercise of the power conferred by the Land Act shall be disposed of as provided in that Act.

Section 88 provides for the order of distribution of the money arising from a mortgagee sale. Money is applied: to costs, charges and expenses properly incurred; then to discharge of the mortgage money; and finally, to any subsequent mortgages or encumbrances. The mortgagee holds any such money received in trust¹⁸³⁴ to be applied in the manner prescribed. The provision applies to any exercise of a power of sale, whether under the instrument of mortgage or under the statute.

100.2. Issues with the section

Section 88 is generally well known and readily understood in practice. There were no submissions to Issues Paper 4 in respect of this section.

However, an issue may arise where onerous property has been disclaimed and sold by a mortgagee exercising a power of sale. In such circumstances, section 88 should set out a process dealing with a surplus after sale, if any. As discussed above at paragraph 96.2.2.1, the bankrupt, and the Trustee in Bankruptcy or liquidator have no further interest in the property upon disclaimer. For this reason, it is appropriate for section 88 to make provision for the application of a surplus (if any) in such circumstances.

100.3. Recommendation

The Centre is of the view that section 88 should be retained with modernised language but amended to provide a process for the application of a surplus following the sale of disclaimed property in the unlikely event that a surplus materialises.

In the case of a mortgagee exercising power of sale after a disclaimer (in reliance on the Recommendation 95 above) the Centre recommends that any surplus money after the sale proceeds are applied in accordance with section 88(1) is to be paid into court. The surplus sale proceeds (if any)

¹⁸³⁴ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 10.7.1 at 2797-280.

should not automatically be returned to a bankrupt who has disclaimed their interest in the property. Paying the surplus sale proceeds (if any) into court will allow any party who claims an interest in that money, for example, creditors of the bankrupt, to make an application to recover some or all of the money.

Further, as discussed at paragraph 215.5.3.8 the Centre is of the view that the word 'encumbrance' is captured in the definition of mortgage and does not need to be included in a re-drafted section 88.

RECOMMENDATION 99. Section 88 should be retained with modernised language and amended to deal with the issue of a surplus (should one arise) as a result of a sale of disclaimed property.

For example, section 88 could be amended to contain an additional provision drafted in the following manner:

Section [88] Application of proceeds of sale

...

- (1A) A mortgagee exercising power of sale under section [84(8)] must apply the money realised from sale according to subsection (1)(a), (b) and (c) and pay the residue (if any) into court and any person with a claim to some or all of that money may make an application to the court to recover that money.

101. Section 89 – Provisions as to exercise of power of sale

101.1. 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).¹⁸³⁵

Strictly speaking, section 89(1) is not necessary as the power of sale in the PLA¹⁸³⁶ 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.¹⁸³⁷ It has been argued¹⁸³⁸ 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.

101.2. Issues with the section

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.¹⁸³⁹ The section generally assumes that no separation has occurred. It may be preferable for the section to be amended to refer to the mortgage, rather than specify the mortgage money.

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

¹⁸³⁵ *Property Law Act 1974* (Qld) s 89.

¹⁸³⁶ *Property Law Act 1974* (Qld) s 83(1)(a).

¹⁸³⁷ *Property Law Act 1974* (Qld) schedule 6 (definition of ‘mortgagee’).

¹⁸³⁸ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.89.90].

¹⁸³⁹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.89.90].

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.¹⁸⁴⁰

101.3. Other jurisdictions

Across Australian jurisdictions¹⁸⁴¹ and in the UK,¹⁸⁴² 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.¹⁸⁴³

101.4. Recommendation

The submissions to Issue Paper 4 noted that section 89(1) could be amended to simply refer to the mortgage, not the mortgage money. Such amendment, it was submitted, would encompass both the mortgage debt and the mortgage security. Further, the submissions agreed that section 89(3) is unlikely to be of any utility but argued that there is no harm in leaving the provision in place.

Given this, the Centre is of the view that section 89 should be retained with modernised language and to refer to the person entitled to receive and give a release of the mortgage.

RECOMMENDATION 100. Section 89 should be retained with modernised language and amended to refer to the person for the time being entitled to receive and give a release of the mortgage.

For example, section 89(1) could be amended in the following manner:

Section [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 mortgage money or give a release of the mortgage.

¹⁸⁴⁰ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.89.330]. See also, Peter Butt, 'The Mortgagee's duty on sale' (1979) 53 *Australian Law Journal* 172 183.

¹⁸⁴¹ *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).

¹⁸⁴² *Law of Property Act 1925* (UK) s 106.

¹⁸⁴³ In New South Wales, 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).

102. Section 90 – Mortgagee’s receipts discharges etc

102.1. Overview and purpose

90 Mortgagee’s receipts discharges etc.

- (1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in the mortgagee’s mortgage, or arising under the mortgage, and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage or to see to the application of the money or securities so paid or transferred.
- (2) Money received by a mortgagee under the mortgagee’s mortgage or from the proceeds of securities comprised in the mortgagee’s mortgage shall be applied in like manner as in this Act directed respecting money received by the mortgagee arising from a sale under the power of sale conferred by this Act, but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

Section 90(1) provides that a mortgagee exercising the statutory power of sale can provide a receipt for any money or securities comprised in or arising under the mortgage. The mortgagee’s receipt for the proceeds of sale will operate to discharge the buyer’s obligation to pay the purchase price.

Section 90(2) deals with the manner of application of:

- money received by a mortgagee from a person other than the mortgagor and other than a buyer under the statutory power of sale; and
- proceeds of securities received by a mortgagee from a person other than the mortgagor and that have been realised by the mortgagee.

Such money is to be applied in accordance with section 88 except that the costs, charges and expenses, properly incurred in recovering or receiving the money or securities, including the costs of converting securities to money, can be added to the costs, charges and expenses under section 88.

102.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised by the submissions to Issues Paper 4.

102.3. Recommendation

The Centre is of the view that section 90 of the PLA should be retained with modernised language.

RECOMMENDATION 101. Section 90 should be retained with modernised language.

103. Section 91 – Amount and application of insurance money

103.1. 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 mortgagee¹⁸⁴⁴ and the application of money 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:

¹⁸⁴⁴ *Property Law Act 1974* (Qld) s 83(1)(b).

- spent to make good the loss or damage in respect of which the money is received;¹⁸⁴⁵ 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).¹⁸⁴⁶

Despite this, section 91(5) provides that 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.¹⁸⁴⁷ Section 91(5) overrides the right of the mortgagee to require that insurance money is used to discharge the mortgage¹⁸⁴⁸ but only if the insurance is for reinstatement or replacement.

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, section 91(7) is apparently in conflict with 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 apparent contradiction between the paragraphs may need to be remedied in order to provide greater certainty for mortgagors and mortgagees.

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.¹⁸⁴⁹

103.2. Issues with the section

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 the apparent contradiction between the terms of the subsections.

103.2.1. Making good vs reinstating

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

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.¹⁸⁵⁰ Section 91(5) refers to insurance for the reinstatement or replacement value of the mortgaged property.

¹⁸⁴⁵ *Property Law Act 1974* (Qld) s 91(3).

¹⁸⁴⁶ *Property Law Act 1974* (Qld) s 91(4).

¹⁸⁴⁷ *Property Law Act 1974* (Qld) s 91(5).

¹⁸⁴⁸ *Property Law Act 1974* (Qld) s 91(4).

¹⁸⁴⁹ As set out in *Property Law Act 1974* (Qld) s 91(6).

¹⁸⁵⁰ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 210.

While it may be possible that subsections 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. 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).

103.2.2. 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.

If there is no stipulation in the instrument of mortgage itself, the mortgagee will be able require that insurance money be applied toward the discharge of the mortgage and not towards the reinstatement of the mortgaged property unless the mortgagee has required, or consented to, the mortgagor effecting insurance.

103.3. 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.¹⁸⁵¹ Under the relevant provisions¹⁸⁵² (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;¹⁸⁵³
- cannot effect insurance in specified circumstances (such as no insurance is required under the mortgage or the mortgagor is required to maintain insurance); and

¹⁸⁵¹ *Law of Property Act 1925* (UK) s 108.

¹⁸⁵² *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.

¹⁸⁵³ 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).

- 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.¹⁸⁵⁴

As initially proposed by the QLRC, section 91 was virtually identical¹⁸⁵⁵ to the provisions described above. However, subsections 91(5) to 91(7) were subsequently added to the provision. It has been noted¹⁸⁵⁶ 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.¹⁸⁵⁷

103.4. Recommendation

The Centre is of the view that section 91 should use consistent language when referring to the application of insurance money. There should not be different requirements for application of insurance money depending on whether the insurance was for loss or damage by fire or whether the insurance was for reinstatement or replacement of the mortgaged property.

Further, it should be clear that section 91 applies despite any stipulation to the contrary in the instrument of mortgage. Given this, it is the Centre's view that the situation with respect to section 91(4) should be reversed. In other words, it should provide that a mortgagee may only require that insurance money be applied toward the discharge of the mortgage money if: 1) the instrument of mortgage expressly gives the mortgagee this right; and 2) the mortgagee has not required the mortgagor to effect, or consented to the mortgagor effecting, the insurance. This means a mortgagee may not require the insurance money to be used to discharge the mortgage unless the instrument of mortgage gives this power and the mortgagee has been paying the insurance. Such an amendment will remove the apparent contradiction between section 91(4) and section 91(7).

RECOMMENDATION 102. Section 91 should be retained with modernised language but amended so that:

- the language used in relation to the purpose of the insurance is consistent; and
- the mortgagee may only require insurance money to be paid toward the discharge of the mortgage if this is expressly authorised by the instrument of mortgage and the mortgagee has not required the mortgagor to effect, or consented to the mortgagor effecting, such insurance.

¹⁸⁵⁴ 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).

¹⁸⁵⁵ 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) 40 of the draft bill.

¹⁸⁵⁶ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press), 211.

¹⁸⁵⁷ *Property Law Act 1974 (Qld)* s 91(5).

For example, section 91(5) could be amended with additional wording in the following manner:

Section [91] Amount and application of insurance money

...

- (5) 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.

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

104.1. 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 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.¹⁸⁵⁸

The statutory power to appoint a receiver is not triggered until the mortgagee is entitled to exercise the power of sale conferred by the Act¹⁸⁵⁹ (i.e. after default, service of notice and 30 days continuance of default).¹⁸⁶⁰ 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.

104.2. Issues with the section

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.

104.2.1. 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.¹⁸⁶¹

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,¹⁸⁶² the mortgagee will never be able to exercise the power to appoint a receiver because the statutory power of sale will never become exercisable.¹⁸⁶³

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).¹⁸⁶⁴

One issue with this suggestion is that a mortgagee could be entitled, under the terms of the mortgage, to enter into and take possession of the land on any default. This could result, at least in theory, in a situation where the mortgagee would be entitled to enter into and take possession of the property

¹⁸⁵⁸ 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) 72.

¹⁸⁵⁹ *Property Law Act 1974* (Qld) s 83(1)(a).

¹⁸⁶⁰ *Property Law Act 1974* (Qld) s 84.

¹⁸⁶¹ *Property Law Act 1974* (Qld) s 83(3).

¹⁸⁶² As allowed by *Property Law Act 1974* (Qld) s 83(3).

¹⁸⁶³ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.92.30].

¹⁸⁶⁴ *Property Law Act 1974* (Qld) s 92(1A).

well before the mortgagee is entitled to exercise a power of sale. The PLA requires a default that continues for at least 30 days after notice¹⁸⁶⁵ has been given to the mortgagor.

104.2.2. 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.¹⁸⁶⁶ The *Corporations Act 2001* (Cth) restricts who may act as a receiver in the case of a corporation.¹⁸⁶⁷

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.¹⁸⁶⁸ 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.'¹⁸⁶⁹ If the parties to a mortgage require a more active figure, additional powers may be conferred by the instrument of mortgage.¹⁸⁷⁰

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.

104.3. Other jurisdictions

Victoria,¹⁸⁷¹ Western Australia,¹⁸⁷² South Australia¹⁸⁷³ and Tasmania¹⁸⁷⁴ all have the same requirement as Queensland. These jurisdictions have all been based on the UK position.¹⁸⁷⁵

104.3.1. New South Wales

Under the statutory power to appoint a receiver in New South Wales, a receiver may be appointed when there has been a default¹⁸⁷⁶ 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

¹⁸⁶⁵ *Property Law Act 1974* (Qld) s 84.

¹⁸⁶⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.92.60].

¹⁸⁶⁷ *Corporations Act 2001* (Cth) s 418.

¹⁸⁶⁸ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.92.240].

¹⁸⁶⁹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.92.240].

¹⁸⁷⁰ *Property Law Act 1974* (Qld) s 83(3).

¹⁸⁷¹ *Property Law Act 1958* (Vic) s 109(1).

¹⁸⁷² *Property Law Act 1969* (WA) s 65.

¹⁸⁷³ *Law of Property Act 1936* (SA) s 53.

¹⁸⁷⁴ *Conveyancing and Law of Property Act 1884* (Tas) s 26.

¹⁸⁷⁵ *Law of Property Act 1925* (UK) s 109.

¹⁸⁷⁶ *Conveyancing Act 1919* (NSW) s 115A(1) (definition of 'default').

appointment of the receiver has been made in writing and is registered.¹⁸⁷⁷ A receiver cannot exercise a power of sale over mortgaged land unless the mortgagee is entitled to exercise the power of sale.¹⁸⁷⁸

104.4. Recommendation

The Centre is of the view that there should be a consistent trigger for the statutory power to appoint a receiver. This will require amending section 92(1) so that the statutory right to appoint a receiver arises when the mortgagee is entitled to enter into and take possession of the mortgaged property. This will bring about consistency between the trigger for mortgages registered under the *Land Act 1994* (Qld) and the *Mineral Resources Act 1989* (Qld) as reflected in section 91(1A).

As noted above, this may result in a situation where a receiver can be appointed prior to the mortgagee being entitled to exercise the power of sale. However, as in New South Wales, the receiver would not be able to exercise a power of sale until the mortgagee is entitled to exercise the power. This makes it unlikely that a receiver would be appointed before the power of sale had accrued.

Further, this recommendation is unlikely to have a significant impact for two reasons. The first is that the statutory power to appoint a receiver will only arise for individuals, as receivers for corporations will be appointed under the *Corporations Act 2001* (Cth). The second is that the power will only apply if there is no power to appoint a receiver in the mortgage. The instrument of mortgage itself will almost invariably give the mortgagee a power to appoint a receiver and modify the trigger event for such an appointment. This means the mortgagee will not rely on the statutory power so the trigger in section 91(1) will not apply. It is very unlikely that a mortgagee would resort to the statutory power when appointing a receiver.

Further, as discussed above, the *Corporations Act 2001* (Cth) restricts who may operate as a receiver of property of a corporation. The Centre is of the view that section 92(1) should expressly state that the mortgagee may appoint such suitably qualified person as the mortgagee sees fit. It is likely that the words 'suitably qualified' are already implied into the power but there can be little harm in making the requirement express.

RECOMMENDATION 103. Section 92 should be retained with modernised language but amended to provide that:

- the statutory power to appoint a receiver may be exercised at any time after the mortgagee has become entitled to enter upon and take possession of the land subject to the mortgage; and
- the person appointed as a receiver must be suitably qualified.

¹⁸⁷⁷ *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* (2nd ed, 2014, Lexis Nexis Butterworths) [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) 42 of draft bill), however this was not included when the *Property Law Act 1974* (Qld) was passed.

¹⁸⁷⁸ *Conveyancing Act 1919* (NSW) s 115A(3).

105. Section 93 – Effect of advance on joint account

105.1. Overview and purpose

93 Effect of advance on joint account

- (1) Where—
- (a) in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than 1 out of money, or as money, belonging to them on a joint account; or
 - (b) a mortgage, or such an obligation, or such a transfer is made to more persons than 1, jointly; the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall, as between them, and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to those persons on a joint account, and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, despite any notice to the payer of a severance of the joint account.
- (2) This section applies if and so far as a contrary intention is not expressed in the mortgage, obligation, or transfer, and has effect subject to the terms of the mortgage, obligation, or transfer, and to the provisions contained in the mortgage, obligation or transfer.
- (3) Where the Act (if any) under which the mortgage is registered provides for registration of a record of death or transmission by or upon death, this section shall have effect only upon such registration as is provided by that Act.
- (4) This section applies only to mortgages made or obligations created after the commencement of this Act.

Section 93 is a statutory enactment of an implied joint account clause permitting the survivor of a number of mortgagees to give a discharge for the mortgage money. The QLRC noted that joint account clauses do not affect the rights of mortgagees among themselves¹⁸⁷⁹ but enable surviving mortgagees to give a complete discharge for the mortgage moneys.

The section will not apply if there is a contrary intention expressed in the instrument of mortgage, and the section will take effect subject to the terms of the mortgage. Duncan and Vann note that 'joint account' clauses are 'a common feature of all mortgages to more than one mortgagee'.¹⁸⁸⁰ This means that the section is rarely used.

105.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised by the submissions to Issues Paper 4.

105.3. Recommendation

As noted, the section will only very rarely apply as it is usually superseded by the terms of the instrument of mortgage itself. Despite this, the Centre is of the view that the section serves a useful

¹⁸⁷⁹ 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) 72-73.

¹⁸⁸⁰ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.93.30].

purpose and should remain part of the legislation. Given this, it is recommended that section 93 should be retained with modernised language.

RECOMMENDATION 104. Section 93 should be retained with modernised language.

106. Section 94 – Obligation to transfer instead of discharging mortgage

106.1. Overview and purpose

94 Obligation to transfer instead of discharging mortgage

- (1) Where a mortgagor is entitled to redeem the mortgage shall because of this Act, have power to require the mortgagee, instead of discharging, and on the terms on which the mortgagee would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs, and the mortgagee shall because of this Act be bound to transfer accordingly.
- (2) The right of the mortgagor conferred by this section shall belong to and be capable of being enforced by each encumbrancee, or by the mortgagor, despite any intermediate encumbrance, but a requisition of an encumbrancee shall prevail over a requisition of the mortgagor, and as between encumbrancees a requisition of a prior encumbrancee shall prevail over a requisition of a subsequent encumbrancee.
- (3) This section shall not apply—
 - (a) in the case of a mortgagee being or having been in possession; or
 - (b) in the case of a mortgage which contains a valid and enforceable covenant or condition in favour of the mortgagee in restraint of the trade or business of the mortgagor or any other collateral benefit or advantage in favour of the mortgagee.
- (4) 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 94 permits a mortgagor who is entitled to redeem a mortgage to require the mortgagee to transfer, rather than discharge, the mortgage to a third person as directed by the mortgagor. The section was designed to remedy an issue at general law in the case of old system land where the mortgagee, on payment of the mortgage, was only required to convey the mortgaged property to the person redeeming the mortgage.¹⁸⁸¹ This could be problematic if there were subsequent mortgages.¹⁸⁸²

The right is subject to a number of restrictions. Firstly, if there is an encumbrance (generally, a second or subsequent mortgage), the encumbrancee may make a request that will prevail over the request of the mortgagor. Secondly, the section does not apply in the case of a mortgagee being or having been in possession, or where the mortgage contains a condition, such as a restraint of trade clause, that provides a collateral benefit or advantage to the mortgagee.

106.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised by the submissions to Issues Paper 4.

106.3. Recommendation

The Centre is of the view that section 94 should be retained with modernised language.

¹⁸⁸¹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.94.30].

¹⁸⁸² See Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.94.30] for further explanation.

NOT GOVERNMENT POLICY

However, as discussed at paragraph 215.5.3.9, the word 'encumbrance' generally refers to a mortgage, and in this section it is used to refer to a second or subsequent mortgage. In the Centre's view, a re-drafted provision should replace the references to encumbrance and encumbrancee with a reference to subsequent mortgage and subsequent mortgagee as the definition of mortgage includes an encumbrance.

RECOMMENDATION 105. Section 94 should be retained with modernised language.

107. Section 95 – Relief against provision for acceleration of payment

107.1. 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.

107.2. Issues with the section

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.'¹⁸⁸³ 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.¹⁸⁸⁴ 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.¹⁸⁸⁵

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.¹⁸⁸⁶ 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'.

In Issues Paper 4, the Centre suggested that rather than relying on contextual arguments, it may be preferable to amend the section to clarify that relief is only given against the effect of the acceleration clause.

The QLS did not support this and submitted that such an amendment could result in a situation where a court could grant relief against acceleration (e.g. if the default had been remedied or there had been a payment into court of an unpaid amount) but the mortgagee could still exercise its other powers, including the power of sale.

107.3. Other jurisdictions

The Northern Territory¹⁸⁸⁷ 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.¹⁸⁸⁸

107.4. Recommendation

The Centre is of the view that section 95(2) should be amended to say that the mortgagor is 'relieved of the obligation to pay the accelerated sum'. The goal of this recommendation is to clarify that the

¹⁸⁸³ *Property Law Act 1974* (Qld) s 95(2).

¹⁸⁸⁴ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.95.120].

¹⁸⁸⁵ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.95.120].

¹⁸⁸⁶ 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) [PLA.95.120].

¹⁸⁸⁷ *Law of Property Act* (NT) s 105.

¹⁸⁸⁸ WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press) [4.6.1].

NOT GOVERNMENT POLICY

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.

RECOMMENDATION 106. Section 95 should be retained with modernised language and clarified so that the mortgagor is relieved of the obligation to pay the accelerated sum.

108. Section 96 – Mortgagee accepting interest on overdue mortgage not to call up without notice

108.1. Overview and purpose

96 Mortgagee accepting interest on overdue mortgage not to call up without notice

- (1) Where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, and the mortgagee has accepted interest on the sum for any period (not being less than 3 months) after default has been so made, then so long as the mortgagor performs and observes all covenants expressed or implied in the mortgage, other than the covenant for payment of the principal sum, the mortgagee shall not be entitled to take proceedings to compel payment of the sum, or for foreclosure, or to enter into possession, or to exercise any power of sale, without giving to the mortgagor 3 months' notice of the mortgagee's intention so to do.
- (2) No purchaser from the mortgagee exercising the mortgagee's power of sale shall be concerned to inquire whether the mortgagee has accepted interest after such default.
- (3) This section applies to mortgages whether made before or after the commencement of this Act, but only where the default has occurred after such commencement, and shall have effect despite any stipulation to the contrary.

The historical rationale for the enactment of section 96 arose from the nature of a mortgage of old system land, a form of mortgage that is rarely seen today.¹⁸⁸⁹ The section is intended to prevent mortgagors who have continued to pay interest on overdue mortgages from being called up on less than three months' notice.¹⁸⁹⁰

108.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised by the submissions to Issues Paper 4.

108.3. Other jurisdictions

The section is based on an equivalent provision in New South Wales.¹⁸⁹¹ This provision was drawn from a New Zealand provision in the 1952 Act, which was retained with modernised language in the 2007 Act.¹⁸⁹²

108.4. Recommendation

The Centre is of the view that section 96 should be retained with modernised language. The equivalent New Zealand provision provides a useful example.

RECOMMENDATION 107. Section 96 should be retained with modernised language.

¹⁸⁸⁹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.96.30].

¹⁸⁹⁰ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (LexisNexis, 2012), 173-4 [32312.5].

¹⁸⁹¹ *Conveyancing Act 1919* (NSW) s 92.

¹⁸⁹² *Property Law Act 2007* (NZ) s 118.

For example, using the New Zealand provision as a guide, section 96 could be drafted in the following manner:

Section [96] Mortgagee accepting interest after expiry of term not to call up without notice

- (1) This section applies if—
 - (a) the term of a mortgage over property, or any period for which the term has been renewed or extended, has expired; and
 - (b) the principal amount secured by the mortgage has not been repaid; and
 - (c) the mortgagee has, after the date of expiry, accepted interest on the principal amount (except by entering into possession of the property or appointing a receiver) for a period not shorter than 3 months after that date; and
 - (d) the mortgagor has observed all covenants under the mortgage instrument except the covenant to repay the principal amount on the due date.
- (2) The mortgagee must not call up as payable the principal amount unless—
 - (a) the mortgagee has served on the current mortgagor a notice of the intention to do so at the expiry of the period specified in the notice; and
 - (b) that period has expired.
- (3) The period specified in the notice under subsection (2) must not be shorter than 60 working days after the date of service of the notice.
- (4) A notice under subsection (2) may be given in accordance with the notice provision of this Act [i.e. s 347].

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

109.1. 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 ensure that the mortgagee either elects to exercise a power of sale or to foreclose.¹⁸⁹³

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*,¹⁸⁹⁴ 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 97.¹⁸⁹⁵

¹⁸⁹³ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (LexisNexis, 2012), 185 [32367].

¹⁸⁹⁴ (1973) 132 CLR 499.

¹⁸⁹⁵ 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).

109.2. Issues with the section

Duncan and Vann¹⁸⁹⁶ 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.¹⁸⁹⁷

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.¹⁸⁹⁸

109.3. Other jurisdictions

In Australia, only New South Wales¹⁸⁹⁹ and the Northern Territory¹⁹⁰⁰ have a provision that is equivalent to section 97 of the PLA.

109.4. Recommendation

The section is intended to discourage mortgagees from suing the mortgagor on the personal covenant in the instrument of mortgage by making recourse to the power of sale or foreclosure a more viable option (especially if the mortgagor's only asset is the mortgaged property).

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 the same lender and a borrower, the Centre recommends amending the section so that the interest of the mortgagor in any mortgaged property where the mortgage is held by the mortgagee shall not be taken in execution.

RECOMMENDATION 108. Section 97 should be retained with modernised language but amended to clarify that the interest of the mortgagor in any mortgaged property (where the mortgagor may have granted more than one mortgage to a mortgagee) may not be taken in execution of the judgment.

¹⁸⁹⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.97.60].

¹⁸⁹⁷ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.97.60].

¹⁸⁹⁸ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.97.60].

¹⁸⁹⁹ *Conveyancing Act 1919* (NSW) s 102.

¹⁹⁰⁰ *Law of Property Act* (NT) s 107.

110. Section 98 – Abolition of consolidation of mortgages

110.1. Overview and purpose

98 Abolition of consolidation of mortgages

- (1) A mortgagor seeking to redeem any 1 mortgage is entitled to do so without paying any money due under any separate mortgage made by the mortgagor, or by any person through whom the mortgagor claims, solely on property other than that comprised in the mortgage which the mortgagor seeks to redeem.
- (2) This section has effect despite any stipulation to the contrary.
- (3) This section applies only where the mortgages are or 1 of them is made after the commencement of this Act.

Section 98 effects a statutory abolition of the doctrine of consolidation of mortgages. The doctrine had potential application where the same mortgagor granted separate mortgages over separate property to secure different debts to the same mortgagee.¹⁹⁰¹ Where the mortgagor defaulted under the mortgages, and the doctrine applied, the mortgagee was entitled to consolidate the mortgages against the mortgagor (i.e. to require as a condition of redemption of one mortgage that all mortgages be redeemed).¹⁹⁰²

The purpose of the doctrine was to protect a mortgagee where one mortgage was considered a safe security and another was considered to be hazardous and the mortgagee would be at risk if the mortgagor was permitted to redeem the safe security only.¹⁹⁰³ Unfortunately, the doctrine could lead to unjustified hardship for mortgagors. Section 98 seeks to obviate hardship of this type.

110.2. Issues with the section

It should be noted that section 98 is only applicable where the separate mortgages secure different debts. Where the separate mortgages clearly provide that the mortgages secure the same debt, the mortgagee can require the mortgagor to pay off that debt before releasing any of the mortgages (unless the mortgages make provision to the contrary). In this instance, the mortgagee is relying on the express terms of the mortgage instruments rather than the doctrine of consolidation.

There is also the possibility that a mortgagee may consolidate a mortgage and another security interest which is not a mortgage, e.g. a vendor's lien.¹⁹⁰⁴

However, these issues were not identified as significant by the Centre or in the submissions to Issues Paper 4.

¹⁹⁰¹ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.98.30].

¹⁹⁰² WD Duncan and WM Dixon, *The Law of Real Property Mortgages* (2nd ed, 2013, Federation Press) [4.15].

¹⁹⁰³ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.98.60].

¹⁹⁰⁴ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.98.120].

110.3. Recommendation

As there were no issues raised during the public submission period, the Centre is of the view that section 98 should be retained with modernised language.

RECOMMENDATION 109. Section 98 should be retained with modernised language.

111. Section 99 – Sale of mortgaged property in action for redemption or foreclosure

111.1. Overview and purpose

99 Sale of mortgaged property in action for redemption or foreclosure

- (1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by the person either for redemption alone, or for sale alone, or for sale or redemption in the alternative.
- (2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, even though—
 - (a) any other person dissents; or
 - (b) the mortgagee or any person so interested does not appear in the action;
 and without allowing any time for redemption or for payment of any mortgaged money, may direct a sale of the mortgaged property, on such terms, subject to subsection (3), as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.
- (3) In an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.
- (4) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of encumbrances.
- (5) This section applies to actions brought whether before or after the commencement of this Act.
- (6) In this section—

mortgaged property includes the estate or interest which a mortgagee would have had power to convey if the statutory power of sale were applicable.
- (7) For the purposes of this section the court may, in favour of a purchaser, make an order vesting the mortgaged property, or appoint a person to convey the property, subject or not to any encumbrance, as the court may think fit or, in the case of an equitable mortgage, may create and vest a legal estate in the mortgagee to enable the mortgagee to carry out the sale as if the mortgage had been made by deed or instrument by way of legal mortgage.

Section 99 confers the court with very wide powers to order a sale of mortgaged property in proceedings for other relief (such as foreclosure, redemption or recovery of the mortgage money) as well as permitting an order for sale in proceedings for sale only.

An order for sale under section 99(1) and (2) may be made in respect of all kinds of mortgages, both legal and equitable, with the power of sale also extending to equitable liens and charges.¹⁹⁰⁵ The court is only permitted to make an order for sale, the section does not permit the granting of leases or licences in relation to the mortgaged property.

111.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised by the submissions to Issues Paper 4.

¹⁹⁰⁵ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.99.90].

111.3. Recommendation

As there were no issues raised during the public submission period, the Centre is of the view that section 99 should be retained with modernised language.

Further, as discussed at paragraph 215.5.3.10 the Centre is of the view that the words ‘encumbrance’ and ‘encumbrancee’ are captured in the definition of, and should be replaced with, the words ‘mortgage’ and ‘mortgagee’ as necessary in a redrafted section 99.

RECOMMENDATION 110. Section 99 should be retained with modernised language.

112. Section 100 – Realisation of equitable charges by the court

112.1. Overview and purpose

100 Realisation of equitable charges by the court

- (1) Where an order for sale is made by the court in reference to an equitable mortgage of land the court may, in favour of a purchaser, make an order vesting the land or may appoint a person to convey the land or create and vest in the mortgagee a legal estate in the land to enable the mortgagee to carry out the sale, as the case may require, in like manner as if the mortgage had been created by instrument or deed by way of legal mortgage, but without prejudice to any encumbrance having priority to the equitable mortgage unless the encumbrancee consents to the sale.
- (2) This section applies to equitable mortgages whether made or arising before or after the commencement of this Act.

Section 100 facilitates transfer of land when the court has made an order for sale in reference to an equitable mortgage of land. In its terms, section 100 is largely similar to section 99(7) although it is suggested that one possible area of difference between the two sections is where a court makes an order for sale under its inherent jurisdiction (as opposed to its jurisdiction under section 99) in respect of an equitable charge or lien. As the definition of mortgage in schedule 6 of the PLA includes charges, an equitable charge or lien would likely fall within the term ‘equitable mortgage’ in section 100.

112.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised by the submissions to Issues Paper 4.

112.3. Recommendation

Although the operation of the section is narrow and does not appear to have featured in Queensland case law, the Centre is of the view that the rationale for the introduction of the section remains valid. Other than modernised language, there is no demonstrated need for amendment or repeal of the section.

Further, as discussed at paragraph 215.5.3.11 the Centre is of the view that the words ‘encumbrance’ and ‘encumbrancee’ are captured in the definition of, and should be replaced with, the words ‘mortgage’ and ‘mortgagee’ as necessary in a redrafted section 100.

RECOMMENDATION 111. Section 100 should be retained with modernised language.

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

113.1. 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.

113.2. Issues with the section

There are several 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 third relates to the use of the term 'warden' in section 101(4)(d). The final concern is the reference to old system land.

113.2.1. 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.¹⁹⁰⁶

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.¹⁹⁰⁷

113.2.2. 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 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.¹⁹⁰⁸

113.2.3. 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.

In addition to the out-of-date reference to mining warden, the section also refers to old system land. As discussed at paragraph 5.2.1 there is no old system land remaining in Queensland which means that this reference should be removed.

¹⁹⁰⁶ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.101.60] referring to *In the Application of Priomalli* [1977] 1 NSWLR 39, 41 (which considered the NSW equivalent of section 101).

¹⁹⁰⁷ Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [PLA.101.60]. Waddell J in *In the Application of Priomalli* [1977] 1 NSWLR 39, 41 notes it is surprising that the provision does not cover such a situation.

¹⁹⁰⁸ 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) [PLA.101.210] at footnote 29.

113.3. Other jurisdictions

The provision in Queensland was based on a similar provision in New South Wales.¹⁹⁰⁹ In 2010, the New South Wales 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.'¹⁹¹⁰

113.4. Recommendation

The Centre is of the view that effect of section 101 should be retained. However, the section should be amended to include the situation where a mortgagee has died but no representative has (yet) been appointed. Such amendment could be modelled on the New South Wales amendment to the equivalent provision in that legislation.

Further, the section should clarify any ambiguity over whether a debt is kept alive if it is incorrectly certified that no amount remains payable under the mortgage. Finally, the re-drafted provision should remove the out-of-date terms references to the mining warden and to old system land.

RECOMMENDATION 112. Section 101 should be retained with modernised language and 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;
- remove the out-of-date reference to the mining warden; and
- remove reference to old system land.

¹⁹⁰⁹ *Conveyancing Act 1919* (NSW) s 98.

¹⁹¹⁰ *Conveyancing Act 1919* (NSW) s 98(1) as amended by *Statute Law (Miscellaneous Provisions) Act (No 2) 2010* (NSW) schedule 1.7.

Part 8 – Leases and Tenancies

114. Section 102 – Abolition of *interesse termini* as to reversionary leases and leases for lives

114.1. Overview and purpose

102 Abolition of *interesse termini* as to reversionary leases and leases for lives

- (1) The doctrine of *interesse termini* is abolished.
- (2) As from the commencement of this Act all terms of years absolute shall, whether the interest is created before or after such commencement, be capable of taking effect at law or in equity, according to the estate interest or powers of the grantor, from the date fixed for commencement of the term, without actual entry.
- (3) A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than 21 years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void, but this subsection does not apply to any term taking effect in equity under a settlement, or created out of an equitable interest under a settlement, or under an equitable power for mortgage, indemnity or other like purposes.
- (4) Nothing in subsections (1) and (2) prejudicially affects the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions, or, as respects terms or interests created before the commencement of this Act, operates to vary any statutory or other obligations imposed in respect of such terms or interests.
- (5) Nothing in this Act affects the rule of law that a legal term, whether or not being a mortgage term, may be created to take effect in reversion expectant on a longer term, which rule is confirmed.
- (6) In this section—
term of years includes a term for less than a year, or for a year or years and a fraction of a year or from year to year.

Prior to the introduction of relevant legislation, there was no restriction between the length of time that might elapse between the granting of a right to a lease and the commencement of the lease. These leases are known as reversionary leases. The effect of this position was that a lease granted in 1917, for example, which did not commence until 1946 was still valid.¹⁹¹¹ The rule against perpetuities was not breached as the right to a lease was an immediate vested interest – that is, a right of entry or *interesse termini* only. This interest fell short of an estate in the relevant land. The actual vesting of possession of the subject land which in turn created an estate in the land did not occur until the commencement of the lease.¹⁹¹² The doctrine of *interesse termini* was abolished by section 149 of the *Law of Property Act 1925* (UK), so that leases taking effect in the future immediately create a legal estate (albeit one which does not arise until a future date).¹⁹¹³ However, section 149(3) of the United Kingdom legislation imposes a limitation in relation to the grant of future leases commencing more than 21 years after being entered into. A similar provision was introduced into New South Wales in

¹⁹¹¹ *Mann, Crossmin and Paulin Ltd v Registrar of Land Registry* [1918] 1 Ch 202.

¹⁹¹² Emma Slessenger, 'In perpetuity' (2010) 14(5) *Landlord and Tenant Review* 165, 166.

¹⁹¹³ Adrian J Bradbrook, Clyde E Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths 3rd ed, 2009) 36 [1.10]. Section 149 of the 1925 Act was originally enacted as section 146 of the *Law of Property Act 1922* (UK). The 1922 legislation did not commence until 1926 when it came into operation 'contemporaneously with the Law of Property Act, 1925.' See *Re Strand & Savoy Properties & Savoy Properties, Ltd* [1960] Ch.D 327, 328.

1930 in the form of section 120A(3) of the *Conveyancing Act 1919* (NSW). The Queensland provision was modelled on both the United Kingdom and New South Wales provision.¹⁹¹⁴

This discussion will focus on subsection 102(3). The balance of the provision is not problematic and only requires modernisation of language. The full recommendation is set out below at paragraph 114.4.

114.1.1. Section 102(3) overview and purpose

Under section 102(3) of the PLA, a lease which is specified to take effect from a date which is more than 21 years after the date of the instrument purporting to create it is void, as is 'a contract to create such a term'.¹⁹¹⁵ If the commencement of the lease is within 21 years of the date of the lease then section 102(3) of the PLA will not apply irrespective of the remoteness of the relevant contract.¹⁹¹⁶ The operation of the equivalent provision in the United Kingdom has been described in the following way:

The first limb of this enactment nullifies the creation of a reversionary lease limited to take effect more than 21 years from the date of the lease, eg a lease executed in 1980 for a term of ten years to run from 2005. The second limb nullifies a contract to create such a term, ie a term that will commence more than 21 years from the date of the lease by which it will eventually be created. For example, a contract made in 1980 to grant a lease for ten years in 1982, the term to run from 2005 is void.

Thus, the Act relates the period of 21 years to the date of the lease, not to the date of the contract.¹⁹¹⁷

The section expressly provides that it does not apply to terms taking effect in equity under a settlement, created out of an equitable interest under a settlement or under an equitable power for mortgage, indemnity or other like purposes.

Section 102(3) of the PLA and its interstate equivalents will not apply to an option to renew an existing lease, even if the exercise of the option means the renewed lease will not commence until after 21 years from the date of the existing lease '(or of any contract that created the existing lease)'.¹⁹¹⁸ The scope of the equivalent provision in section 120A(3) of the *Conveyancing Act 1919* (NSW) in relation to options to renew has been explained in the following way:

The reference in the section to a 'contract to create such a term' is a reference to the contract to create the parent term, not the contract to give a further term if the option is exercised. Hence, as long as the parent term commences within 21 years of the contract that creates it, an option to renew that term is valid, even though the option is not exercisable within that 21 years. Thus the provision does not invalidate an option contained in a 35 year lease (granted now) to renew the

¹⁹¹⁴ 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) 79.

¹⁹¹⁵ H Weld, John Peter Thomas and Allan James Chay, (eds) *Queensland Conveyancing Law Commentary* CCH Australia Ltd (online) [25-330].

¹⁹¹⁶ See H Weld, John Peter Thomas and Allan James Chay, (eds) *Queensland Conveyancing Law Commentary* CCH Australia Ltd (online) [25-330], referring to the English case *In re Strand and Savoy Properties Ltd* (1960) Ch 582.

¹⁹¹⁷ E H Burn, *Modern Law of Real Property* (Butterworths, 13th ed, 1982) 369.

¹⁹¹⁸ See *Re Strand and Savoy Properties Pty Ltd* [1960] Ch 582 and *Weg Motors Ltd v Hales* [1962] Ch 49, 68 and 78.

lease for further term at the end of the 35 years; nor does it invalidate the further term if actually granted. Nor, by parity of reasoning, does it invalidate an option to renew contained in a 10 year parent lease, where the parent lease is to be granted 20 years from now, even though the option would not be exercisable until 30 years from now.¹⁹¹⁹

The position is the same under section 102(3) of the PLA. The provision does not appear to have been judicially considered in Queensland.

114.2. Issues with the section

114.2.1. Policy underpinning section 102(3) unclear

The policy which underpins this section and its equivalent in the United Kingdom and other Australian jurisdictions is unclear. There is some suggestion that the provision in the United Kingdom was introduced 'in order to prevent unnecessary complication of title.'¹⁹²⁰ However, there is very little commentary on this issue. Buckley J in *Re Strand & Savoy Properties, Ltd*, when considering section 149(3) of the *Law of Property Act 1925* (UK), stated:

I must confess that when I look at the language of s 149 and the language of Sch. 15 to the Act of 1922, cl. 7, I find it difficult myself to discover what the policy of the legislature was about this. In particular, I find it difficult to understand the policy of cl. 7(2) of Sch. 15. The real property legislation of 1925 was an elaborate code which radically altered the law of the land with regard to the tenure of real property and matters relating to that subject, and there are many aspects on which one can discern what the policy of the legislature was from the terms of the Act, but in this particular regard I confess that I find myself unable to distil any particular policy out of the relevant provisions.¹⁹²¹

Related to this issue is the lack of clarity regarding the reason for the nomination of 21 years as the relevant time period beyond which the term or contract is void under section 102(3) of the PLA.

114.2.2. Practical issues

There is some anecdotal evidence which suggests that in practice section 102(3) has been viewed as covering options to renew leases, even though this is not consistent with the actual legal position. This cautious approach has the potential effect of limiting the extent to which parties enter into long term commercial transactions that may include options to renew leases which commence more than 21 years after the agreement.

114.2.3. Possible artificial distinction between an option to renew contained in a lease and a right contained in 'an instrument purporting to create' a leasehold?

Section 102(3) of the PLA does not cover options to renew contained in a lease agreement. It is difficult to see the difference between an option to renew contained in a lease and a right contained

¹⁹¹⁹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1540].

¹⁹²⁰ Emma Slessenger, 'In Perpetuity' (2010) 14(5) *Landlord & Tenant Review* 165, 166 referring to Wolstenholme and Cherry Conveyancing Statutes.

¹⁹²¹ *Re Strand & Savoy Properties, Ltd* [1960] Ch.D 327, 329. Buckley J in that decision held that an option to renew a lease of 35 years for an additional 35 years was valid at [331].

in ‘an instrument purporting to create’ a leasehold estate. In the view of the Centre, the distinction is arguably artificial.

114.2.4. Instruments that create a short lease to commence at a future date

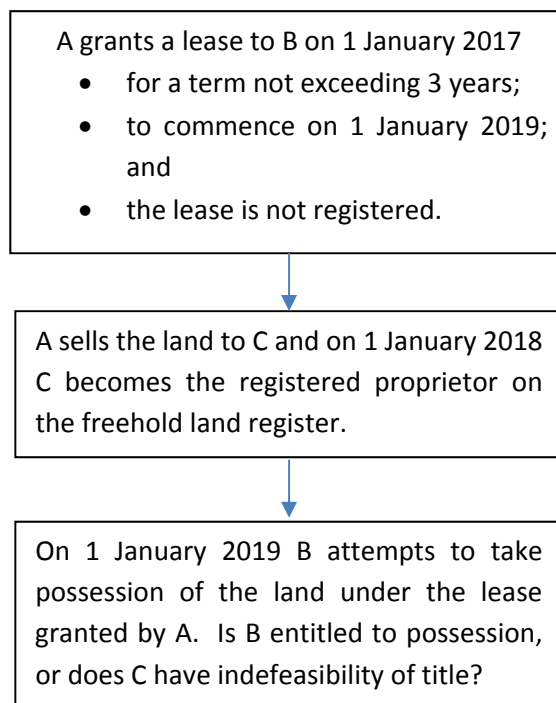
In submissions to the Centre, the QLS has identified a potential issue generally with the practice of granting leases to begin at a future date. The question is whether a short lease actually granted to a lessee (whether registered or unregistered at the date of grant) for a tenancy commencing at some future date, as opposed to an agreement for lease that commences at a future date, is enforceable as against future owners.

An agreement for lease to be granted at a future date presents no difficulty, for if the term of the lease had not commenced (in the case of an unregistered lease for a period not exceeding 3 years), or was registered by the date a new owner was registered, the new owner would take the land subject to that lease.

A short lease is defined in schedule 2 of the *Land Title Act 1994* (Qld) in the following way:

- short lease** means a lease –
- (a) for a term of 3 years or less; or
 - (b) for year to year or a shorter period.

The question arises in the following circumstances:



Section 185(1)(b) of the *Land Title Act 1994* (Qld) states that an interest of a lessee under a short lease is an exception to indefeasibility of title. A purchaser of land takes that land subject to a short lease

that has already commenced. The question is, as in the above scenario, does C take the land subject to the short lease where the term had not commenced when C became the registered owner?

The better view is that C does not take the land subject to the short lease, and upon registration of C's interest, C enjoys indefeasibility of title. A short lease has a **term** of three years or less. Schedule 2 of the *Land Title Act 1994* (Qld) defines a '**term** of a lease' as 'the period beginning when the lessee is first entitled to possession of a lot or part of a lot...' It follows then that it is the **term** of the lease that is protected by section 185(1)(b) – the short lease exception to indefeasibility. B is not yet entitled to possession at the time C is registered as owner and therefore B loses their interest.

B would have contractual remedies as against A. If the lease had been registered before the new owner was registered, the interest of the registered lessee in prospect would take priority of any interest registered subsequently.

The above situation is the position as the legislation currently stands. Any unregistered short lease granted that commences any time in the future, whether it is more or less than 21 years into the future, is subject to the same outcome. The recommendation below at 114.4 to repeal section 102(3) is not impacted.

114.3. Other jurisdictions

As indicated above, section 102(3) replicates section 120A(3) of the *Conveyancing Act 1919* (NSW). Victoria, Western Australia and the Northern Territory all have similar provisions to section 102(3) of the PLA.¹⁹²² The South Australian legislation has a provision that abolishes the doctrine of *interesse termini* but does not include an equivalent to section 102(3) of the PLA.¹⁹²³

114.4. Recommendation

The Centre recommends section 102(3) of the PLA be repealed. There is uncertainty regarding the purpose of the section. It does not appear that the provision has been the subject of judicial consideration in Queensland. The equivalent provision in the United Kingdom has been considered judicially and in one of those cases the judge could not identify any particular policy underpinning the section.

Repealing the subsection is recommended on the basis that there does not appear to be any clear rationale for the rule. Further, the repeal of the provision will allow for greater flexibility of term in the case of commercial transactions. Submissions received from the QLS support the repeal of section 102(3).

The Centre recommends the balance of section 102 be retained with modernised language.

RECOMMENDATION 113. Section 102(3) should be repealed. The balance of the provision should be retained with modernised language.

¹⁹²² *Property Law Act 1958* (Vic) s 149(3); *Property Law Act 1969* (WA) s 74(3); *Law of Property Act* (NT) s 115(3).

¹⁹²³ See *Law of Property Act 1936* (SA) s 24B.

115. Section 103 – [Repealed]

Section 103 – Abolition of distress for rent and rates –was repealed by *Statute Law (Miscellaneous Provisions) Act (No. 2) 1992* (Qld).

Covenants implied into leases by provisions of the PLA and short form covenants

The PLA implies into all leases a number of covenants or other obligations on the parties to a lease:

- section 104 – prohibits a lessee from committing voluntary waste, that is positive acts that result in damage to the land or structures;
- section 105 – implies into every lease an obligation upon the lessee to pay rent and keep the premises in good repair;
- section 106(1)(a) – implies into every lease for a term of 3 years or less an obligation for the lessor to keep the premises in a condition fit for human habitation, if that is the principal purpose for the lease;
- section 106(1)(b) – implies into every lease for a term of 3 years or less an obligation for the lessee to care for the premises and repair damage cause by the lessee;
- section 107 – gives the lessor the power to enter the premises to view and repair, and to re-take possession if the lessee is in breach of its obligations.

Section 109 of the PLA also provides for standardised covenants to be implied in leases by reference. This is done by way of a table of lease covenants in short form in column 1 of schedule 3, and the full version of the covenant in column 2 of schedule 3. The short form leases were designed to aid practitioners in the era before word processing was readily available. Section 109 provides for a detailed covenant to be notionally imported into a lease simply by using the short form of the covenant in the column 1 of the schedule. This meant that the lengthy version of the full covenant did not have to be manually replicated into every lease, but rather reference was to be had to column 2 of schedule 3 for the complete and full wording of the covenant. Section 110 of the PLA also relates to the use of short form leases.

The Centre has made recommendations at paragraph 122.4 to implement a change to the current approach to implied and short form covenants in leases. In line with the approach taken in New Zealand, the Centre recommends that the PLA be amended to contain a set of standard lease covenants that are to be implied into every lease, subject to any other Act, and subject a contrary intention in the lease. Each of the sections mentioned above are impacted by this new approach, and a recommendation in respect of all of the sections is set out at paragraph 122 below, following an analysis of the existing provisions in turn.

116. Section 104 – Voluntary waste

116.1. Overview and purpose

104 Voluntary waste

- (1) A lessee shall not commit voluntary waste.
- (2) Nothing in subsection (1) applies to any lease without impeachment of waste, or affects any licence or other right to commit waste.
- (3) A lessee who infringes subsection (1) is liable in damages to the reversioner but this section imposes no criminal liability.
- (4) This section does not affect the operation of any event which may determine a tenancy at will.

Section 104 of the PLA makes a lessee liable for voluntary waste. The concept of voluntary waste is discussed in detail at paragraph 26.1.1 and applies equally to lessees as it does to life tenants.¹⁹²⁴

Where the tenancy is at will, the lessee is not liable for voluntary waste, however the act of committing voluntary waste terminates the tenancy and the tenant becomes a trespasser.¹⁹²⁵ The tenant is then liable for damages caused by the wilful act that constitutes voluntary waste.¹⁹²⁶

Subsection 104(2) of the PLA makes it possible to contract out of the provision in the lease instrument.

116.2. Issues with the section

Section 104 of the PLA is still relevant and should be retained, however the language is archaic and difficult to understand.

116.3. Other jurisdictions

116.3.1. Australia

New South Wales,¹⁹²⁷ Victoria¹⁹²⁸ and Northern Territory¹⁹²⁹ have provisions similar to section 104 of the PLA.

116.3.2. United Kingdom

The *Statute of Marlborough 1267* [Waste] XXIII deals with waste and is the oldest legislation in force in the United Kingdom.

¹⁹²⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.104.30].

¹⁹²⁵ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.104.30].

¹⁹²⁶ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.104.60].

¹⁹²⁷ *Imperial Acts Application Act 1969* (NSW) s 32.

¹⁹²⁸ *Property Law Act 1958* (Vic) s 132A.

¹⁹²⁹ *Law of Property Act* (NT) s 24.

116.3.3. New Zealand

In New Zealand, the *Property Law Act 2007* (NZ) implies into every lease the following covenant:¹⁹³⁰

The lessee will not commit, or permit any of the lessee's agents, contractors, or invitees to commit, the tort of voluntary waste in relation to the leased premises.

116.4. Recommendation

The Centre is of the view that section 104 may continue to have some limited application and recommends the effect of the section be retained. The Centre recommends a new approach to implied covenants and short-form lease covenants that are contained in sections 104, 105, 106, and 107 as set out at paragraph 122. This approach will maintain all of the implied covenants (with modernised language) and some of the short-form covenants that remain relevant to modern leasing practices. The recommendation is that the amended covenants be relocated to an amended schedule 3 as covenants implied into every lease, unless the contrary intention appears.

The Centre is of the view that the language should be modernised to provide greater clarity and aid in interpretation. This is in line with the overarching principles that inform these recommendations. The equivalent New Zealand provision provides a starting point, however the words 'the tort of' should not be used as this is not consistent with the language used in the PLA. The existing subsection (2) will be absorbed in the overarching provision that specifies that all implied lease covenants operate subject to a contrary intention in the instrument. Subsections (3) and (4) are superfluous and can be omitted. The full recommendation with respect to implied covenants is set out at paragraph 122.4.

RECOMMENDATION 114. The effect of section 104 should be retained but relocated to schedule 3 as an implied covenant in all leases subject to a contrary intention

¹⁹³⁰ *Property Law Act 2007* (NZ) s 218 and Part 2 of schedule 3.

117. Sections 105 and 106 – Obligations of lessees and lessors

117.1. Overview and purpose

105 Obligations of lessees

- (1) Subject to this Act and to the provisions of the lease, in every lease of land made after the commencement of this Act there shall, unless otherwise agreed, be implied the following obligations by the lessee with the lessor –
- (a) **To pay rent** – that the lessee will pay the rent reserved at the time mentioned in the lease, but, if the demised premises or any part of the premises shall at any time during the continuance of the lease be destroyed or damaged by fire without fault on the part of the lessee, flood, lightning, storm, or tempest so, in any such event as to render the same unfit for the occupation and use of the lessee, then and so often as the same shall happen, the rent reserved, or a proportionate part of the rent, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part of the rent shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee;
 - (b) **To keep in repair** – that the lessee will, at all times during the continuance of the lease, keep and, at the termination of the lease, yield up the demised premises in good and tenantable repair, having regard to their condition at the commencement of the lease, damage from fire, flood, lightning, storm and tempest, and reasonable wear and tear excepted, but this obligation is not implied in the case of a lease for a term of 3 years or for any less period of premises for the purpose or principally for the purpose of human habitation.
- (2) In the case of a lease by deed any obligation implied by this section shall take effect as a covenant.

106 Obligations in short leases

- (1) In a lease of premises for a term of 3 years or for any less period there is an obligation -
- (a) on the part of the lessor, in the case of a lease of premises for the purpose or principally for the purpose of human habitation, to provide and maintain the premises or such part as is let for such purpose in a condition reasonably fit for human habitation; and
 - (b) on the part of the lessee –
 - (i) to care for the premises in the manner of a reasonable tenant; and
 - (ii) to repair damage caused by the lessee or by persons coming on the premises with the lessee's permission.
- (2) This section applies –
- (a) to leases made after the commencement of this Act; and
 - (b) despite any other provision of this Act or any agreement to the contrary.

Section 105 of the PLA has its origins in sections 70 and 31 of *The Real Property Acts 1861-1963*.¹⁹³¹ Section 105 was incorporated to clarify the position following a Queensland Supreme Court decision which held that the implied covenants to pay rent, taxes and to keep the premises in good repair under *The Real Property Acts* applied to an unregistered parol lease of land for periods of less than three years.¹⁹³² The QLRC held the view that although there were criticisms of the relevant case, it

¹⁹³¹ 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) 80.

¹⁹³² See *Leahy v Canavan* [1970] Qd R 224 discussed 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) 80.

was ‘clearly convenient there should be an appropriate implication of obligations in all leases.’¹⁹³³ The QLRC’s preferred approach followed the Supreme Court decision with the result that the proposed section 105 implied an obligation on the part of the lessee to pay the rent required under the lease and keep the premises in ‘good and tenantable repair’, in relation to all leases ‘whether of land under *The Real Property Acts* or otherwise and whether registered or by parol’.¹⁹³⁴ The QLRC based section 105 of the PLA upon section 84 of the *Conveyancing Act 1919* (NSW).

The effect of section 105 is to imply a term in a lease which requires the lessee to pay rent and to keep the premises in repair. The obligation to keep the premises in repair is not implied in the case of a lease ‘for a term of three years or for any less period of premises for the purpose or principally for the purpose of human habitation.’¹⁹³⁵ The application of the section is subject to a contrary term in the lease agreement.

The rationale for the introduction of section 106(1)(a) of the PLA was to overcome a common law rule which was not suited to the way in which residential leasing was carried out in practice in Queensland. In England, at common law, there was no implied undertaking on the part of the lessor in a lease of a dwelling house that it was fit for human habitation or that the lessor would undertake any repairs.¹⁹³⁶ That rule was established during a period when lengthy leases of residential property were common.¹⁹³⁷ The common law position in England was altered by legislation which implied a condition of fitness ‘for human habitation’ and implied a ‘covenant by the landlord to repair the structure and exterior of a dwelling house let for less than seven years.’¹⁹³⁸

The QLRC noted in its discussion in relation to the proposed section 106 of the PLA that those historical circumstances have never existed in Queensland and the common law rule was not suited to local conditions.¹⁹³⁹ As the common law rule prevailed in Queensland, section 106(1)(a) was proposed as a mechanism to address the issue. In this respect the QLRC indicated that:

The common law rule is therefore unsuited to Queensland conditions, and we propose the adoption of the principles of the Ontario and English legislation, confining, however, the obligation so imposed to tenancies for periods of three years or less. This is all the more necessary as the

¹⁹³³ 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) 81.

¹⁹³⁴ 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) 81.

¹⁹³⁵ *Property Law Act 1974* (Qld) s 105(1)(b).

¹⁹³⁶ 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) 81.

¹⁹³⁷ 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) 81.

¹⁹³⁸ 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) 81.

¹⁹³⁹ 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) 81.

NOT GOVERNMENT POLICY

preceding clause [cl 105] would otherwise now ordinarily impose on the tenant an implied obligation to repair.¹⁹⁴⁰

The rationale for the inclusion of section 106(1)(b), which imposes obligations on the lessee, was explained by the QLRC to:

simply express the common law as stated by Denning L.J in *Warren v Kean* [1954] 1 QB 15, namely, that he must abstain from acts of waste and do ‘the little jobs about the place which a reasonable tenant would do.’

A comparison of the key components of sections 105 and 106 is set out in Table 2 below.

Table 2: Comparison of sections 105 and 106 of the PLA

Section 105(1)(b)	Section 106(1)(a) and (b)
Lessee obligations subject to the PLA and the provisions of the lease.	The obligations apply despite any other provision of the PLA or any agreement to the contrary: s 106(2).
Applies to leases longer than 3 years not for the purpose or principally for the purpose of human habitation.	Applies to leases for a term of 3 years (or less). Part of the obligation only applies to leases for the purpose or principally for the purpose of human habitation.
	Lessor to provide and maintain the premises in a condition reasonably fit for human habitation: s 106(1)(a).
	Lessor obligation only applicable in the case of premises for the purpose or principally for the purpose of human habitation: s 106(1)(a).
Lessee during the lease keep, and yield up the premises in good and tenantable repair.	Lessee to care for the premises in the manner of a reasonable tenant and to repair damage caused by lessee or by persons coming on the premises with the lessee’s permission: s 106(1)(b).
Obligation not implied in the case of a lease for a term of 3 years (or less) of premises for the purpose or principally for the purpose of human habitation.	

In summary:

- section 105(1)(b) will not apply to a lease of 3 years or less which is for the purpose or principally for the purpose of human habitation. This means that the repair obligation is not imposed on the lessee. For example, a lease for a private dwelling house for 2 years is not covered. However, a lease for 2 years which is not for the purpose of human habitation will be covered;

¹⁹⁴⁰ 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) 81.

- section 105(1)(b) will apply to a lease longer than 3 years. This means that the repair obligation will be imposed on the lessee. For example, a lease for a business premises or residence will be covered by section 105(1)(b);
- section 106(1)(a) will apply to a lease of 3 years or less which is for purpose or principally for the purpose of human habitation. The obligation is imposed on the lessor to provide and maintain premises in a condition fit for human habitation. Business leases will not fall within the scope of the section; and
- section 106(1)(b) will apply to any lease (human habitation or business) of 3 years or less. The section imposes an obligation on the lessee to care for the premises and to repair the same.

117.1.1. Relationship between sections 105(1)(b) and 106(1)(a)

If the relevant lease is for a period 3 years or less and is for the purpose or principally for the purpose of human habitation, then the lessee repair obligation in section 105(1)(b) will not apply. However, the lease is likely to be caught by section 106(1)(a) which imposes an obligation on the lessor in relation to providing and maintaining the premises in a condition reasonably fit for human habitation.

117.2. Issues with the sections.

117.2.1. ‘Purpose of human habitation’

The terms ‘human habitation’ and ‘purpose of human habitation’ are not defined in the PLA. Section 105(1)(b) of the PLA as originally passed did not include any reference to the purpose of the short lease being for human habitation. The term was subsequently incorporated into subsections 105(1)(b) and 106(1)(a) by the *Property Law Act Amendment Act 1975* (Qld), prior to the commencement of the PLA.¹⁹⁴¹ The amendments were made to clarify the situation in relation to leases for business premises. The reason for the changes to sections 105 and 106 of the PLA was explained in the following way when the Bill was introduced into the Queensland Parliament:

Under these sections as they presently stand, there is an obligation, except where the lease provides to the contrary, on the part of the lessee to keep leased premises for a term in excess of three years in a good state of repair. In the case of a lease of three years or less, there is an obligation on the part of the lessor to keep the premises in a good state of repair notwithstanding any agreement to the contrary. However, business premises are commonly held under short leases, and invariably there is an obligation included in the lease for the lessee to keep the premises in repair. The effect of the proposed amendment to sections 105 and 106 will be to allow this practice to continue except where the provisions of the lease itself provide to the contrary.¹⁹⁴²

It seems likely from the comments made by the QLRC set out above and the First Reading Speech that it was intended to cover a lease for human habitation – that is, premises other than business premises.

117.2.2. Application of the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld)

Statutory protection to residential tenants was first provided in Queensland in 1975 under the *Residential Tenancies Act 1975* (Qld). This Act was then replaced by the *Residential Tenancies Act 1994* (Qld). The *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (**RT&RA Act**)

¹⁹⁴¹ *Property Law Act Amendment Act 1975* (Qld) ss 9 and 10.

¹⁹⁴² Queensland, *Hansard*, 24 October 1975, 1499 (Hon W.E Knox Minister for Justice and Attorney-General) (in relation to the *Property Law Act Amendment Bill*).

commenced in 2009 and repealed the 1994 legislation. The main objects of the Act are to state the rights and obligations of tenants, lessors and agents for residential tenancies and residents, providers and agents for rooming accommodation.¹⁹⁴³ The RT&RA Act applies to premises which are occupied under a residential tenancy agreement. The key definitions under the Act include:

- a ‘residential tenancy agreement’ is an agreement under which a person gives to someone else a right to occupy ‘residential premises’ as a residence. The agreement can be wholly in writing, wholly oral or wholly implied or a combination of these;¹⁹⁴⁴
- ‘residential premises’ are premises used, or intended to be used, as a place of residence or mainly as a place of residence;¹⁹⁴⁵ and
- ‘premises’ include:
 - a part of premises and land occupied with premises;
 - a caravan or its site or both the caravan and site; and
 - a manufactured home in, or intended to be situated in, a moveable dwelling park or its site, or both the manufactured home and site; and
 - a houseboat.¹⁹⁴⁶

In the context of repair obligations, the RT&RA Act includes a number of obligations which are imposed on both the lessor and lessee depending on the type of premises which is the subject of the residential tenancy agreement. These provisions include:

- section 185 – lessor obligations generally which include ensuring the premises and inclusions are clean and are in good repair (section 185(2)). The provision does not apply to an agreement if the premises are moveable dwelling premises consisting only of the site for the dwelling and the tenancy is a long tenancy;
- section 186 – lessor obligations for facilities in moveable dwelling parks;
- section 187 – lessor obligations for moveable dwelling site;
- section 188 – lessee obligations generally which include keeping the premises and inclusions clean and not maliciously or allowing someone else to maliciously damage the premises or inclusions;
- section 189 – lessee obligations for facilities in moveable dwelling parks; and
- section 190 – lessee obligations for moveable dwelling site.

117.2.3. Interaction between the PLA and the RT&RA Act

Section 27(1) of the RT&RA Act expressly provides that the PLA does not apply to residential tenancy agreements. There has been no clear articulation regarding whether a lease for the purpose or principally for the purpose of human habitation is essentially the same as a residential tenancy agreement for a residence, although as indicated in paragraph 117.2.1 above, there is support for the position that it covers residential premises.

¹⁹⁴³ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 5.

¹⁹⁴⁴ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 12.

¹⁹⁴⁵ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 10.

¹⁹⁴⁶ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 9.

The operation of the section 105(1)(b) in the context of the RT&RA Act has been described in the following ways:

Although the *Property Law Act 1974*, s 105(1)(b) in its terms applies to leases of residential premises for a period longer than three years, the section is overridden by the *Residential Tenancies and Rooming Accommodation Act 2008*, s 27 which provides that the provisions of the *Property Law Act 1974* do not apply to residential tenancies. The obligations concerning repair of residential tenancies are found in ss 185-191, 247, 253 of the *Residential Tenancies and Rooming Accommodation Act 2008*.¹⁹⁴⁷

It should be mentioned that the *Residential Tenancies and Rooming Accommodation Act 2008* applies exclusively to the tenancies of 'residential premises' which are defined to mean, in that former Act, 'premises used or intended to be used as a place of residence'. Unless there is some distinction between 'residence' and 'human habitation' which has significance in law, there appears very little reason to add this proviso in s 105(1)(b) and for the enactment of s 106(1)(a).¹⁹⁴⁸

A similar statement is made in relation to section 106(1)(b) of the PLA as follows:

Although s 106 purports to apply to all short-term leases it will not apply to leases of residential premises because they are excluded from the ambit of the *Property Law Act 1974* by s 27 of the *Residential Tenancies and Rooming Accommodation Act 2008*.¹⁹⁴⁹

The interaction between the PLA and the *Residential Tenancies Act 1975* (Qld) (now repealed) was discussed by Gummow J in *Northern Sandblasting Pty Ltd v Harris*.¹⁹⁵⁰ The relevant *Residential Tenancies Act 1975* (Qld) provision, section 7(a) is similar (but not the same) as section 185 of the RT&RA Act. Gummow J indicated:

It has been suggested that, in respect of tenancy agreements to which the Residential Tenancies Act applied, the legislative scheme, which involved the commencement of both statutes on 1 December 1975, was that the Residential Tenancies Act applied to the exclusion of provisions such as s 106 of the Property Law Act. In the Court of Appeal, Pincus JA said in his dissenting judgment, and I agree:

It seems improbable that the legislature would have desired that both of these provisions, worded similarly but not identically, apply to tenancies of dwelling-houses: the intention appears to have to set out, in the [Residential Tenancies Act], a comprehensive statement of the implied obligations of the landlord and of the tenant in tenancies of dwelling-houses, rather than to oblige landlords and tenants to attempt to piece those obligations together by scrutiny of s 7 of the [Residential Tenancies Act] and ss 105 and 106 of the [Property Law Act].

Further, as indicated above, at least as regards s 7(a), the Residential Tenancies Act conferred upon tenants more comprehensive rights than ss 105 and 106 of the Property Law Act. Support for the construction preferred by Pincus JA is provided by s 5 of the Residential Tenancies Act. ...

In my view, in the circumstances of the present case, the obligation of the appellant with respect to the fitness of the leased premises for human habitation was to be found in s 7(a)(ii) of the Residential Tenancies Act. However, even if in the present case s 5 of the Residential Act permitted

¹⁹⁴⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.600].

¹⁹⁴⁸ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.105.210]).

¹⁹⁴⁹ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.680].

¹⁹⁵⁰ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 384-385.

a concurrent operation of s 106(1)(a) of the Property Law Act, the result as indicated earlier in these reasons, would not be to avail the respondent.¹⁹⁵¹

Section 27(1) of the RT&RA Act is more explicit than the equivalent provision in section 5 of the *Residential Tenancies Act 1975* (Qld) in terms of the exclusion of the application of the PLA to residential tenancy agreements under the RT&RA Act. However, the PLA will still apply to tenancies that are not residential tenancy agreements.¹⁹⁵²

117.2.4. What is not covered under the RT&RA Act?

There are a number of agreements which are excluded from the RT&RA Act including:

- a lease granted by the State under a law other than under the *State Housing Act 1945* (Qld) or the *Housing Act 2003* (Qld);¹⁹⁵³
- a long-term lease entered into or granted by the South Bank Corporation in relation to premises within the South Bank Corporation area;¹⁹⁵⁴
- a tenancy agreement where a regulation declares that the Act does not apply to the agreement;¹⁹⁵⁵
- a right to occupy a residential property given pursuant to a contract of sale where the term is for 28 days or less or a right to occupy under a mortgage between the parties;¹⁹⁵⁶
- a right to occupy a property for the purposes of holiday letting.¹⁹⁵⁷ A tenancy for a period of more than six weeks is deemed not to be a holiday tenancy;
- a tenancy agreement where the tenant is a boarder or lodger;¹⁹⁵⁸
- a tenancy agreement for premises which are part of an educational institution, hospital, nursing home or retirement village;¹⁹⁵⁹
- an agreement that is a rental purchase plan agreement with the State;¹⁹⁶⁰
- a tenancy agreement for temporary refuge accommodation where the accommodation is not approved supported accommodation;¹⁹⁶¹
- tenancy agreements pursuant to the *Manufactured Homes (Residential Parks) Act 2003* (Qld).¹⁹⁶² These agreements are governed under the Manufactured Homes legislation and include provisions about the home owner's responsibilities¹⁹⁶³ and the park owner's responsibilities¹⁹⁶⁴ and obligations;¹⁹⁶⁵

¹⁹⁵¹ *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 384-385.

¹⁹⁵² *Residential Tenancies and Rooming Accommodation Bill 2008* (Qld) s 27(2).

¹⁹⁵³ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 26.

¹⁹⁵⁴ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 26(4).

¹⁹⁵⁵ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 20.

¹⁹⁵⁶ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 30.

¹⁹⁵⁷ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 31.

¹⁹⁵⁸ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 32.

¹⁹⁵⁹ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 33 and 34.

¹⁹⁶⁰ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 35.

¹⁹⁶¹ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 36.

¹⁹⁶² *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 37.

¹⁹⁶³ *Manufactured Homes (Residential Parks) Act 2003* (Qld) s 16.

¹⁹⁶⁴ *Manufactured Homes (Residential Parks) Act 2003* (Qld) s 17.

¹⁹⁶⁵ *Manufactured Homes (Residential Parks) Act 2003* (Qld) Part 14, Divisions 1 & 2.

- a tenancy entered into by the Commonwealth, State, local government or corporation as tenant for the purpose of subletting premises to an employee of the tenant;¹⁹⁶⁶
- head leases for affordable housing agreements;¹⁹⁶⁷
- head leases for supported accommodation including drug rehabilitation;¹⁹⁶⁸ and
- 99 year leases on Hamilton or Hayman Island and the Pacific Mirage development on the Gold Coast.¹⁹⁶⁹

The implied obligations imposed under sections 105 and 106 may potentially be applicable to these categories of lease agreements to the extent that these categories fall within the scope of the PLA provisions and are not dealt with under separate legislation or, in the case of section 105, excluded by the terms of the lease.

117.3. Other jurisdictions

Section 84 of the *Conveyancing Act 1919* (NSW) was used as the model for section 105 of the PLA and although it is in similar form to Queensland it does not exclude from its operation leases of 3 years or less that are for the purpose or principally for the purpose of human habitation. Other jurisdictions do not appear to have an equivalent provision in place.

In the case of section 106 of the PLA, similar provisions in other jurisdictions have not been identified in property legislation.

117.4. Recommendation

The Centre is of the view that sections 105 and 106 may continue to have some limited application and recommends the effect of the sections be retained. The Centre recommends a new approach to implied covenants and short-form lease covenants that are contained in sections 104, 105, 106, and 107 as set out at paragraph 122. This approach will maintain all of the implied covenants (with modernised language) and some of the short-form covenants that remain relevant to modern leasing practices. The recommendation is that the amended covenants be relocated to an amended schedule 3 as covenants implied into every lease, unless the contrary intention appears. The proposed amendment to section 106 as set out below relies on the inclusion of a definition of 'short lease' in schedule 6 dictionary. This is discussed at paragraph 12.4 and Recommendation 12.

The Centre further recommends modernising the language to clarify the interaction between section 105 and section 106 and to make the application of the sections clearer. This is in line with the overarching principles that inform these recommendations. As discussed above, the main issue with sections 105 and 106 appear to relate to the interaction between these sections, specifically subsections 105(1)(b) and 106(1)(a) which refer to a lease for the purpose of human habitation, and the provisions of the RT&RA Act which imply similar obligations in the case of residential tenancy agreements. However, section 27(1) of the RT&RA Act makes it clear that the PLA will not apply to a residential tenancy agreement under the RT&RA Act. That Act also excludes from its application certain categories of lease agreements. Therefore, the provisions of the PLA will apply to some of

¹⁹⁶⁶ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 38.

¹⁹⁶⁷ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 39.

¹⁹⁶⁸ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 41 & 42.

¹⁹⁶⁹ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss 521-523.

those excluded categories, and the Centre concludes that the section still have some function, albeit limited.

Submissions were received from the Residential Tenancies Authority (**RTA**) and QLS. The RTA agrees with the above position that the PLA does not apply to residential tenancy agreements that are covered by the RT&RA Act, however there are other types of arrangements to which the PLA applies, which are listed above at 117.2.4. The RTA states in its submission that the recommendation to retain the sections will have no impact on the interaction between the PLA and the RT&RA Act.

The QLS states in its submission that, as a matter of practice, the obligations in section 105 and 106 appear in almost every lease and Committee Members are not aware of any reliance on the provisions. The submission from the QLS stated that the 'sections could be repealed if provision was made for similar obligations to apply to 2 categories in particular'. The QLS particularises those categories as:

- holiday letting; and
- tenancies under a contract of sale.

The Centre agrees that parties to agreements in the above categories should continue to enjoy the protection of the sections, however the Centre is also of the view that the operation of the provisions should not be limited to those two categories identified by the QLS in its submission. Holiday letting and tenancies under a contract of sale are likely to be the more common situations that arise in practice where section 105 and 106 apply. However, the Centre asserts that all of the types of agreements listed above at 117.2.4 should continue to be covered by the sections unless the contrary intention appears in the lease. The Centre therefore concludes that the amendment suggested by the QLS would limit the operation of the sections to those two categories, and the Centre has respectfully declined to recommend this for the reasons stated above. The full recommendation with respect to implied covenants is set out at paragraph 122.4.

RECOMMENDATION 115. The effect of sections 105 and 106 should be retained but relocated to schedule 3 as an implied covenant in all leases subject to a contrary intention.

118. Section 107 – Powers in lessor

118.1. Overview and purpose

107 Powers in lessor

Unless otherwise agreed, in every lease of land made after the commencement of this Act there shall be implied the following powers in the lessor—

- (a) **To enter and view**—that the lessor may, by the lessor, or the lessor’s agents, during the term at a reasonable time of the day upon giving to the lessee 2 days previous notice in writing of the lessor’s intention to enter, enter upon the demised premises and view the state of repair of the premises, and may serve upon the lessee or leave at the lessee’s last or usual place of abode in the State, or upon the demised premises, a notice in writing of any defect, requiring the lessee, within a reasonable time, to repair same in accordance with any covenant or obligation expressed or implied in the lease;
- (b) **To enter and repair**—that in default of the lessee repairing any defect according to notice, the lessor may from time to time enter the premises and execute the required repairs;
- (c) **To enter and carry out requirements of public authority, and repair under the lease**—that the lessor may, by the lessor, or the lessor’s agents, at all reasonable times during the term, with workpersons and others and all necessary materials and appliances, enter upon the demised premises or any part of the premises, for the purpose of complying with the terms of any present or future legislation affecting the premises, and of any notices served upon the lessor or lessee by the licensing, local, municipal, or other competent authority, involving the destruction of noxious weeds or animals, or the carrying out of repairs, alterations, or works of a structural character, which the lessee may not be bound, or if bound may neglect, to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease;
- (ca) However, such destruction, repairs, alterations, and works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee;
- (d) **To re-enter and take possession**—that, in case the rent or any part of the rent is in arrear for the space of 1 month (although no formal demand therefor has been made), or in case default is made in the fulfilment of any covenant, obligation, condition, or stipulation, whether expressed or implied in the lease, and on the part of the lessee to be performed or observed, and such default is continued for the space of 2 months, or in case the repairs required by such notice are not completed within the time specified in the lease, the lessor may re-enter upon the demised premises (or any part of the premises in the name of the whole) and determine the estate of the lessee in the premises, but without releasing the lessee from liability in respect of the breach or non-observance of any such covenant, obligation, condition, or stipulation.

Section 107 of the PLA implies into every lease certain powers of the lessor, unless the parties agree otherwise. The powers are set out in turn below.

118.1.1. Power to enter and view section 107(a)

Unless otherwise agreed by the parties, this section gives the lessor the right to enter the premises provided the lessor has provided 2 days notice in writing and entry must be at a reasonable time of day. The lessor can serve a defect notice in writing requiring the lessee to repair the defect, if required by the lease. Where the lease does not contain a covenant to repair, the lessor may enter the premises to personally make the repairs.¹⁹⁷⁰

¹⁹⁷⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.107.30].

118.1.2. Power to enter and repair section 107(b)

Where the lease contains a covenant requiring the lessor to keep the premises in repair, the lessee is required, despite this subsection, to serve a notice upon the lessor as to what requires repair.¹⁹⁷¹ In *McCarrick v Liverpool Corp*¹⁹⁷² the lessor had a statutory right to enter and view the premises. The wife had fallen due to a patent defect in two steps leading to the back yard. The lessor would have become aware of the defect, should they have exercised the right to enter the premises and inspect. Notwithstanding this, the lessor was not liable to repair the defect unless and until the lessee served a notice to repair.

Where the defect is latent, the lessor must make the repairs when he becomes aware of the defect, whether by notice from the lessee, or by other means.¹⁹⁷³ However, it should be noted that, while the lessor has the right to enter and view, there is no positive obligation to do so.¹⁹⁷⁴

118.1.3. Power to enter and carry out requirements of public authority, and repair under the lease section 107(c) and (ca)

The lessor or the lessor's agent has the right to enter the premises to carry out requirements of a local authority. The works must be carried out in a manner that does not cause undue interference with the lessee's use and occupation of the premises. Undue interference may amount to a breach of an express or implied covenant of quiet enjoyment.¹⁹⁷⁵

118.1.4. Power to re-enter and take possession section 107(d)

In the absence of any express covenants in the lease, section 107(d) sets out the circumstances in which the lessor can re-enter the premises and terminate the lease. The section is enlivened when:

- rent is in arrears for 1 month, whether or not a formal demand for payment of rental arrears has been made; or
- the lessee has defaulted on any other express or implied covenant for 2 months.

The lessor can elect to re-enter the premises and determine the lease but if the lessor does not, there may be an argument that the breach has been waived.¹⁹⁷⁶ If the lessor exercises the right of re-entry under this section, the lease is immediately determined by operation of law.¹⁹⁷⁷ The lessor may not necessarily have to physically re-enter the premises, or to serve a writ for recovery of possession. It will be sufficient in Queensland if the lessor makes an unequivocal demand upon the lessee for immediate possession.¹⁹⁷⁸

¹⁹⁷¹ *Morgan v Liverpool Corp* [1927] 2 KB 131.

¹⁹⁷² [1947] AC 219.

¹⁹⁷³ *O'Brien v Robinson* [1973] AC 912.

¹⁹⁷⁴ *Griffin v Pillet* [1926] 1 KB 17.

¹⁹⁷⁵ *Moore v Western Australia* (1907) 5 CLR 326.

¹⁹⁷⁶ *Roberts v Davey* (1833) 4 B & Ad 644; 110 ER 606.

¹⁹⁷⁷ *Re Stewart; Ex parte Overell's Pty Ltd* [1941] St R Qd 175.

¹⁹⁷⁸ *Ex parte Whelan* [1986] 1 Qd R 500.

118.2. Other jurisdictions

118.2.1. Australia

All jurisdictions have similar provisions. In New South Wales¹⁹⁷⁹ and the Australian Capital Territory¹⁹⁸⁰ the lessor is restricted to entering the premises twice a year to inspect. In the Northern Territory, as in Queensland, the lessor must give 2 days notice but may enter the premises as many times as desired.¹⁹⁸¹ In Western Australia¹⁹⁸² and Victoria¹⁹⁸³ the lessor is restricted to entry once a year however no notice is required. In Tasmania¹⁹⁸⁴ and South Australia¹⁹⁸⁵ the lessor may enter at all reasonable times and no notice is required.

118.2.2. New Zealand

In New Zealand, the *Property Law Act 2007* (NZ) implies into every lease covenants.¹⁹⁸⁶

11 Power to inspect premises

- (1) The lessor may at all reasonable times, either personally or by the lessor's agent, enter the leased premises for the purpose of—
 - (a) inspecting their state of repair; or
 - (b) carrying out repairs; or
 - (c) complying with the requirements of—
 - (i) any enactment or bylaw; or
 - (ii) any notice issued by a competent authority.
- (2) The lessor will not unreasonably interfere with the lessee's occupation and use of the leased premises in the exercise of the power conferred by subclause (1).

12 Power to cancel lease for non-payment of rent or other breach

- (1) The lessor may cancel the lease in accordance with section 244 if—
 - (a) any rent is unpaid for 15 working days after the due date for payment (whether or not a demand for payment has been made to the lessee by written notice signed by the lessor or the lessor's agent); or
 - (b) the lessee has failed, for a period of 15 working days, to observe or perform any other covenant, condition, or stipulation on the part of the lessee expressed or implied in the lease.
- (2) The lessee is not released from liability for the payment of any unpaid rent or for the breach or non-observance of any other covenant, condition, or stipulation referred to in subclause (1) if the lessor cancels the lease in accordance with section 244 and, accordingly,—
 - (a) the lessor peaceably re-enters the leased premises or any representative part of those premises; or
 - (b) the court makes an order for possession of the land in favour of the lessor.

In addition, sections 244 to 264 of the New Zealand Act set out a comprehensive code for the cancellation of leases.

¹⁹⁷⁹ *Conveyancing Act 1919* (NSW) s 85.

¹⁹⁸⁰ *Civil Law (Property Act) 2006* (ACT) s 120(1)(a).

¹⁹⁸¹ *Law of Property Act* (NT) s 119(1)(a).

¹⁹⁸² *Property Law Act 1969* (WA) s 93(1).

¹⁹⁸³ *Property Law Act 1928* (Vic) s 67(1)(c).

¹⁹⁸⁴ *Land Titles Act 1980* (Tas) s 67.

¹⁹⁸⁵ *Law of Property Act 1936* (SA) s 125(b).

¹⁹⁸⁶ *Property Law Act 2007* (NZ) s 218 and Part 2 of schedule 3.

118.3. Recommendation

The Centre is of the view that section 107 may continue to have some limited application and recommends the effect of the section be retained. The Centre recommends a new approach to implied covenants and short-form lease covenants that are contained in sections 104, 105, 106, and 107 as set out at paragraph 122. This approach will maintain all of the implied covenants (with modernised language) and some of the short-form covenants that remain relevant to modern leasing practices. The recommendation is that the amended covenants be relocated to an amended schedule 3 as covenants implied into every lease, unless the contrary intention appears.

The Centre is of the view that the language should be modernised to provide greater clarity and aid in interpretation. This is in line with the overarching principles that inform these recommendations. The equivalent New Zealand provision provides a starting point. The effect of the covenant will remain subject to a contrary intention in the lease document. The full recommendation with respect to implied covenants is set out at paragraph 122.4.

RECOMMENDATION 116. The effect of section 107 should be retained but relocated to schedule 3 as an implied covenant in all leases subject to a contrary intention.

119. Section 108 – Repealed

Section 108 – Recovery of possession where half-year’s rent is due – was repealed by the *District Courts Act and Other Acts Amendment Act 1989* (Qld).

120. Section 109 – Short forms of covenants and obligations of lessees

120.1. Overview and purpose

109 Short forms of covenants and obligations of lessees

- (1) Whenever in any lease which expressly refers to schedule 3 there is used the form of words contained in column 1 and distinguished by a number in it, such form of words shall imply an obligation by the lessee or the lessor with the lessor or the lessee in the terms contained in column 2, and distinguished by the corresponding number.
- (2) There may be introduced into or annexed to any form in column 1 any addition to, exception from, or qualification of the same, or any words in such column may be struck out or omitted, and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission, shall be taken to be added to the corresponding form in column 2.
- (3) In the case of a lease by deed any obligation implied by this section shall take effect as a covenant.
- (4) This section applies only to leases made after the commencement of this Act.

Schedule 3 Short forms of covenants in leases

Direction as to the forms in this schedule

- 1 Parties who use any of the forms in column 1 may substitute for the words 'lessee' or 'lessor', any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in column 2.
- 2 Such parties may substitute 1 gender for another, or the plural number for the singular, in the forms in column 1, and corresponding changes shall be taken to be made in the corresponding forms in column 2.
- 3 Such parties may fill up the blank spaces left in the forms in column 1 so employed by them with any words or figures and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.
- 4 Such parties may introduce into or annex to any form in column 1 any addition to, exception from, or qualification of the same, or may strike out or omit any words of or from such column, and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission shall be taken to be added to the corresponding form in column 2.
- 5 The covenants in column 2 shall be taken to be made with or by and apply to the lessor or lessee, as the case may be.

Leases

Column 1

1 That the lessee covenants with the lessor to pay rent.

2 Provided that in the event of damage by fire, lightning, flood, or tempest, rent shall abate until the premises are restored.

Column 2

1 And the lessee covenants with and promises to the lessor that the lessee, will, during the term, pay to the lessor, the rent reserved, in manner mentioned previously, without any deduction of any kind, other than any deduction which the lessee is by an Act entitled to make.

2 Provided that in case the demised premises, or any part of the demised premises, shall at any time during the continuance of the lease be destroyed or damaged by fire without fault on the part of the lessee, flood, lightning, storm, or tempest, so, in any such event as to render the same unfit for the occupation and use of the lessee, then, and so often as the same shall happen, the rent reserved, or a proportionate part of the rent, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part of the

3 And to pay taxes, except for local improvements.

4 And to maintain and leave the premises in good repair (having regard to their condition at the commencement of the lease), reasonable wear and tear, and damage by fire, lightning, flood and tempest excepted.

5 And that the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, and that in default the lessor may repair.

6 And that the lessor may enter and carry out requirements of public authorities, and repair under the lease.

rent shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee.

3 And also that the lessee will pay all taxes, rates and assessments of any kind, whether municipal, local government, parliamentary, or otherwise which are at any time during the term charged upon the demised premises, or upon the lessor, on account of the demised premises, except taxes for local improvements or works assessed upon the property benefited by them.

4 And also that the lessee will during the term, when, where, and so often as the need shall be, but having regard to the condition of the leased premises at the commencement of the lease and excepting reasonable wear and tear, and damage by fire, lightning, flood and tempest occurring within the term—

(a) well and sufficiently maintain, amend, and keep; and

(b) at the expiration or sooner determination of the term peaceably surrender and yield up to the lessor;

in good and substantial repair the leased premises, including all appurtenances, buildings, erections and fixtures belonging to the leased premises, or at any time within the term lawfully made or erected by the lessor upon or within the leased premises.

5 That the lessor, may, by himself or herself or the lessor's agents, during the term at a reasonable time of the day upon giving to the lessee 2 days previous notice, enter upon the demised premises and view the state of repair of the demised premises, and may serve upon the lessee or leave at the lessee's last or usual place of abode in the State, or upon the demised premises, a notice in writing of any defect, requiring the lessee, within a reasonable time, to repair same in accordance with any covenant expressed or implied in the lease, and that in default of the lessee so doing it shall be lawful for the lessor from time to time to enter and execute the required repairs.

6 That the lessor may, by himself or herself or the lessor's agents, at all reasonable times during the term, with workers and others, and all necessary materials and appliances, enter upon the demised premises, or any part of the demised premises, for the purpose of complying with the terms of any present or future legislation affecting the premises, and of any notices served upon the lessor or lessee by licensing, local, municipal, or other competent authority, involving the destruction of noxious weeds or animals, or the carrying out of any repairs, alterations, or works of a structural character, which the lessee may not be bound, or if bound may neglect, to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease. However, such destruction, repairs, alterations, and

NOT GOVERNMENT POLICY

7 And to insure from fire in the joint names of the lessor and the lessee.	works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee.
8 And to paint outside every (___) year.	7 And also that the lessee will immediately insure the demised premises to the full insurable value of the demised premises in some insurance office approved by the lessor in the joint names of the lessor and the lessee, and keep the same so insured during the continuance of the lease, and will upon the request of the lessor show to the lessor the receipt for the last premium paid for such insurance, and as often as the demised premises shall be destroyed or damaged by fire all and every the sum or sums of money which shall be recovered or received for or in respect of such insurance, shall be laid out and expended in building or repairing the demised premises or such parts of the demised premises as shall be destroyed or damaged by fire.
9 And to paint and paper inside every (___) year.	8 And also that the lessee will, in every (___) year during the continuance of the lease, paint all the outside woodwork and ironwork belonging to the demised premises now or usually painted with 2 coats of proper paint, in a well executed manner.
10 And to fence.	9 And also that the lessee will, in every (___) year, paint the inside wood, iron and other works now or usually painted, with 2 coats of proper paint, in a well executed manner, and also will repaper with paper of a quality as at present such parts of the premises as are now papered, and also wash, stop, whiten, or colour such parts of the demised premises as are now plastered.
11 And to keep up fences.	10 And also that the lessee will, during the continuance of the lease, erect and put up on the boundaries of the demised land or upon such boundaries upon which no substantial fence now exists a good and substantial fence.
12 And to cultivate.	11 And also will, from time to time, during the continuance of the lease, keep up the fences and walls of or belonging to the demised premises, and make anew any parts of the demised premises that may require to be new-made in a good and careful manner and at proper seasons of the year.
13 That the lessee will not cut timber.	12 And also that the lessee will at all times during the continuance of the lease cultivate, use, and manage all such parts of the land as are or shall be broken up or converted into tillage in a proper and careful manner, and will not impoverish or waste the same.
	13 That also that the lessee will not cut down, fell, injure, or destroy any growing or living timber or timber-like trees standing and being upon the demised land, without the consent in writing of the lessor.

NOT GOVERNMENT POLICY

<p>14 That the lessee will not without consent use premises otherwise than as a private dwelling house.</p>	<p>14 And also that the lessee or any subtenant will not convert, use, or occupy the demised premises or any part of the demised premises into or as a shop, warehouse, or other place for carrying on any trade or business of any kind, or suffer the premises to be used for any such purpose or otherwise than as a private dwelling house, without the consent in writing of the lessor.</p>
<p>15 And will not assign or sublet without leave; no fine to be taken.</p>	<p>15 And also that the lessee or any subtenant will not, during the continuance of the lease, assign, transfer, demise, sublet, or part with the possession or by any act or deed, procure the demised premises, or any part of the demised premises, to be assigned, transferred, demised, sublet to or put into the possession of any person or persons, without the consent in writing of the lessor, but such consent shall not be refused in the case of a proposed respectable and responsible assign, tenant or occupier.</p>
<p>16 That the lessee will not carry on any offensive trade.</p>	<p>Provided further, that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent, but this proviso shall not preclude the right of the lessor to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such license or consent.</p>
<p>17 That the lessee will carry on the business of a licensee within the meaning of the <i>Liquor Act 1992</i> and conduct the same in an orderly manner.</p>	<p>16 That the lessee or any subtenant will not at any time during the continuance of the lease use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the demised premises or any part of the demised premises, any noxious, noisome, or offensive art, trade, business, occupation, or calling, and no act, matter, or thing of any kind shall, at any time during the continuance of the lease, be done in or upon the premises or any part of the demised premises which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the occupiers or owners of any neighbouring premises.</p>
<p>18 And will apply for renewal of licence.</p>	<p>17 And also that the lessee, or the subtenant for the time being, will at all times during the continuance of the lease, use, exercise, and carry on, in and upon the demised premises, the trade or business of a licensee within the meaning of the <i>Liquor Act 1992</i> , and keep open and use the buildings upon the demised land as and for a hotel, and manage and conduct such trade or business in a quiet and orderly manner, and will not do, commit, or permit, or suffer to be done or committed any act, matter, or thing of any kind by which or by means of which any licence shall or may be forfeited or become void or liable to be taken away, suppressed, or suspended in any manner at all, and will comply in all respects with the requirements of the <i>Liquor Act 1992</i> .</p>
<p>18 And will apply for renewal of licence.</p>	<p>18 And also that the lessee, or the subtenant for the time being, will from time to time, during the continuance of the lease at the proper times for that purpose, apply for and endeavour to obtain at the</p>

NOT GOVERNMENT POLICY

<p>19 And will facilitate the transfer of licence.</p>	<p>person's own expense all such licences as are or may be necessary for carrying on the trade or business of a licensee within the meaning of the <i>Liquor Act 1992</i> in and upon the demised premises, and keeping the buildings open as and for a hotel.</p>
<p>20 The (lessor) covenants with the (lessee) for quiet enjoyment.</p>	<p>19 And also that the lessee, or the subtenant for the time being, will at the expiration or other sooner determination of the lease sign and give such notice or notices, and allow such notice or notices of a renewal or transfer of any licence as may be required by law to be affixed to the demised premises, to be affixed and remain so affixed during such time or times as shall be necessary or expedient in that behalf, and generally to do and perform all such further acts, matters, and things as shall be necessary to enable the lessor, or any person authorised by the lessor, to obtain the renewal of any licence or any new licence or the transfer of any licence then existing and in force.</p>
<p>21 And that the lessee may remove the lessee's fixtures.</p>	<p>20 And the lessor covenants with the lessee that the lessee paying the rent reserved, and performing the covenants on the lessee's part contained, shall and may peaceably possess and enjoy the demised premises for the term granted, without any interruption or disturbance from the lessor or any other person or persons lawfully claiming by, from or under the lessor.</p>
<p>21 And that the lessee may remove the lessee's fixtures.</p>	<p>21 And also that the lessee may at or prior to the expiration of the lease take, remove, and carry away from the demised premises all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes, or other articles upon the demised premises in the nature of trade or tenants' fixtures bought upon the demised premises by the lessee, but the lessee shall in such removal do no damage to the demised premises, or shall immediately make good any damage which the lessee may occasion to them.</p>

Where a lease contains covenants by express reference to schedule 3 and the words used are the same as those in column 1 of schedule 3, then the full covenant set out in the corresponding column 2 are imported by reference into the lease. Commentators warn that great caution needs to be taken when using the short form covenants.¹⁹⁸⁷ There is danger in altering the conditions expressed in column 2 as they may conflict with the covenant expressed in the schedule, and result in undesirable obligations.¹⁹⁸⁸ Drafters should also carefully consider the full covenant in column 2 before using the short form to ensure it reflects the intentions of the parties.¹⁹⁸⁹

¹⁹⁸⁷ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.109.30].

¹⁹⁸⁸ *Mitchell v Brown* (1909) 9 SR (NSW) 539; Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.109.30].

¹⁹⁸⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.109.30].

120.2. Issues with the section

Schedule 3 of the PLA contains covenants that are unlikely to be used in modern commercial leasing practice. Further, section 109 of the PLA is not widely used as commercial leases generally contain specific and detailed covenants about the terms of the lease agreement. The section is therefore of limited utility. The Centre is of the view that the provision was used as ‘word saving’ before word processing, when each lease had to be manually typed out. With the advent of word processing technology, lease forms are now generated easily and economically, thus greatly reducing the need for provisions of this type.

120.3. Other jurisdictions

New South Wales¹⁹⁹⁰ and the Northern Territory¹⁹⁹¹ have similar provisions. In New Zealand the approach is slightly different whereby certain covenants are implied into all leases, unless the contrary intention appears.¹⁹⁹² Schedule 3 of the New Zealand Act is set out as follows:

Property Law Act 2007 (NZ)

Schedule 3 Covenants, conditions, and powers implied in leases of land

...

Part 2 Covenants, conditions, and powers implied in all leases of land

4 Payment of rent

- (1) The **lessee** will pay the rent payable under the lease when it falls due.
- (2) However, if the leased premises or any part of them are destroyed or damaged by any of the causes specified in subclause (3) to the extent that they become unfit for occupation and use by the lessee, the rent and any contribution payable by the lessee to the outgoings on those premises will abate, in fair and just proportion to the destruction or damage, until those premises—
 - (a) have been repaired and reinstated; and
 - (b) are again fit for occupation and use by the lessee.
- (3) The causes referred to in subclause (2) are—
 - (a) fire, flood, or explosion (whether or not the fire, flood, or explosion is caused, or contributed to, by the lessee’s negligence); or
 - (b) lightning, storm, earthquake, or volcanic activity; or
 - (c) any other cause the risk for which the lessor has insured the premises.
- (4) Despite subclause (2), the lessee is not entitled to the abatement referred to in that subclause if, and **to** the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of—
 - (a) the lessee; or
 - (b) the lessee’s agent, contractor, or invitee; or
 - (c) any other person under the lessee’s direction or control.
- (5) Any dispute arising under this clause will be referred to arbitration under the Arbitration Act 1996.

5 Alteration of buildings

- (1) The lessee will not, without the consent of the lessor, alter any building that comprises, or is part of, the leased premises.
- (2) The **lessor** will not unreasonably withhold consent under subclause (1).

¹⁹⁹⁰ *Conveyancing Act 1919* (NSW) s 86.

¹⁹⁹¹ *Law of Property Act* (NT) s 120.

¹⁹⁹² *Property Law Act 2007* (NZ) ss 217-220 and schedule 3.

6 Noxious or offensive acts or things

- (1) The lessee will not do, or permit to be done, on the leased premises any of the things specified in subclause (2) to—
 - (a) the lessor; or
 - (b) the other lessees of the lessor; or
 - (c) the owners or occupiers of neighbouring properties.
- (2) The things referred to in subclause (1) are—
 - (a) any noxious or offensive act or thing; or
 - (b) any act or thing that is, or is likely to be, a nuisance or that causes, or is likely to cause, any nuisance, damage, or disturbance.

7 Commission of waste

The lessee will not commit, or permit any of the lessee's agents, contractors, or invitees to commit, the tort of voluntary waste in relation to the leased premises.

8 Lessor not to depart from grant

The lessor will not derogate from the lease.

9 Lessee entitled to quiet enjoyment

The lessee and all persons claiming under the lessee will be able quietly to enjoy the leased premises without disturbance by any person specified in section 218(2).

10 Premises unable to be used for particular purpose

- (1) The lessee may terminate the lease, on reasonable notice to the lessor, if—
 - (a) it is an express or implied term of the lease that the leased premises may be used for 1 or more specified purposes; and
 - (b) at any time during the currency of the lease, those premises cannot, or can no longer be, lawfully used for 1 or more of those specified purposes.
- (2) Despite subclause (1), the lessee may not terminate the lease if the reason the leased premises cannot, or can no longer be, lawfully used for 1 or more of the specified purposes is because of an act or omission of—
 - (a) the lessee; or
 - (b) the lessee's agent, contractor, or invitee; or
 - (c) any other person under the lessee's direction or control.

11 Power to inspect premises

- (1) The lessor may at all reasonable times, either personally or by the lessor's agent, enter the leased premises for the purpose of—
 - (a) inspecting their state of repair; or
 - (b) carrying out repairs; or
 - (c) complying with the requirements of—
 - (i) any enactment or bylaw; or
 - (ii) any notice issued by a competent authority.
- (2) The lessor will not unreasonably interfere with the lessee's occupation and use of the leased premises in the exercise of the power conferred by subclause (1).

12 Power to cancel lease for non-payment of rent or other breach

- (1) The lessor may cancel the lease in accordance with section 244 if—
 - (a) any rent is unpaid for 15 working days after the due date for payment (whether or not a demand for payment has been made to the lessee by written notice signed by the lessor or the lessor's agent); or
 - (b) the lessee has failed, for a period of 15 working days, to observe or perform any other covenant, condition, or stipulation on the part of the lessee expressed or implied in the lease.
- (2) The lessee is not released from liability for the payment of any unpaid rent or for the breach or non-observance of any other covenant, condition, or stipulation referred to in subclause (1) if the lessor cancels the lease in accordance with section 244 and, accordingly,—
 - (a) the lessor peaceably re-enters the leased premises or any representative part of those premises; or
 - (b) the court makes an order for possession of the land in favour of the lessor.

Part 3 Covenant implied in all leases of land (except short-term leases)

13 Lessee to keep and yield up premises in existing condition

- (1) The lessee will,—
 - (a) at all times during the currency of the lease, keep the leased premises in the same condition that they were in when the term of the lease began; and
 - (b) at the termination of the lease, yield the leased premises in that condition.
- (2) However, the lessee is not bound to repair any damage to the leased premises caused by—
 - (a) reasonable wear and tear; or
 - (b) any of the following:
 - (i) fire, flood, or explosion (whether or not the fire, flood, or explosion is caused or contributed to by the lessee’s negligence);
 - (ii) lightning, storm, earthquake, or volcanic activity;
 - (iii) any other cause the risk for which the lessor has insured the premises.
- (3) Despite subclause (2)(b), the lessee is not excused from liability to repair any damage caused by any of the events referred to in that paragraph if, and to the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of—
 - (a) the lessee; or
 - (b) the lessee’s agent, contractor, or invitee; or
 - (c) any other person under the lessee’s direction or control.

Part 4 Covenant implied in short-term leases

14 Lessee to use premises reasonably

The lessee will, at all times during the currency of the lease, use the leased premises in the way that a reasonable tenant would.

120.4. Recommendation

The Centre recommends a new approach to short-form lease covenants and implied covenants that are contained in sections 104, 105, 106, and 107 as set out at paragraph 122. This approach will maintain some of the short-form covenants that are relevant to modern leasing practices, and along with the existing implied covenants, relocate them to an amended schedule 3 as covenants implied into every lease, unless the contrary intention appears. The full recommendation with respect to implied covenants is set out at paragraph 122.4.

RECOMMENDATION 117. Section 109 should be repealed. The effect of some of the relevant short-form covenants should be retained but relocated to schedule 3 as implied covenants in all leases subject to a contrary intention.

121. Section 110 – Cases in which statutory obligations or powers not implied

121.1. Overview and purpose

110 Cases in which statutory obligations or powers not implied

Where on the face of any lease it appears that any of the short forms of words contained in schedule 3, column 1 has been struck out, the covenant, obligation or proviso represented by such short form of words shall not be implied in the lease by sections 105 and 109.

Section 110 of the PLA is designed to prevent confusion created by the striking out of any short forms of covenant¹⁹⁹³ (discussed above at paragraph 120). If it appears on the face of the lease that any short form of words from column 1 of schedule 3 have been deleted, then none of the corresponding provisions in column 2 relating to that short form apply.¹⁹⁹⁴

121.2. Issues with the section

Section 110 of the PLA only has utility in respect of sections 105 (Obligations in leases) and section 109 (Short forms of covenants and obligations of lessees). If section 109 is not retained then the section will only operate in respect of section 105 of the PLA. Section 105 clearly states that the section applies subject to the provisions of the lease. Arguably, the section will have no function.

121.3. Recommendation

The recommendations for section 110 of the PLA depend on what decision is made in respect of sections 105 and 109 of the PLA. If section 105 and the short form lease provisions are retained then there may be some utility in retaining the section, with modernised language. If the recommendation as set out in paragraph 122.4 is adopted then section 110 will have no purpose and can be repealed.

RECOMMENDATION 118. Section 110 should be repealed on the basis that the recommendations in respect of section 105 and 109 are adopted.

¹⁹⁹³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.110.30].

¹⁹⁹⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.110.30].

122. New approach to implied and short-form lease covenants

122.1. Overview and purpose

As set out above, the PLA implies into all leases a number of covenants or other obligations on the parties to a lease. The relevant sections are:

- section 104 – discussed above at paragraph 116;
- sections 105 and 106 – discussed above at paragraph 117; and
- section 107 – discussed above at paragraph 118.

Section 109 provides for a detailed covenant to be notionally imported into a lease simply by using the short form of the covenant in schedule 3. This meant that the lengthy version of the full covenant did not have to be manually replicated into every lease, but rather reference was to be had to the schedule for the complete and full wording of the covenant. Section 110 of the PLA also relates to the use of short form leases.

The Centre recommends a change to the current approach to implied and short form covenants in leases. In line with the approach taken in New Zealand, the Centre recommends that the PLA be amended to contain a set of standard lease covenants that are to be implied into every lease, subject to any other Act, and subject a contrary intention in the lease. Where there is no express agreement between the parties which would contradict the implied covenants then the covenants will operate.

Each of the sections mentioned above are impacted by this new approach.

122.2. Issues with the current approach

122.2.1. The implied covenants are unsatisfactory

The covenants implied into every lease (subject to contrary intention) contained in sections 104, 105 and 107, and the covenants contained in section 106 (which cannot be contracted out of) are lengthy, difficult to understand and use archaic language. While it may arguably be justifiable to have these covenants as a default position in the case of oral leases, or where the lease is silent on certain issues, the current drafting is problematic.

122.2.2. Not in line with modern leasing practice

In modern commercial leasing practice, it is standard for leases to contain covenants that cover all of the matters addressed in sections 104, 105 and 107. The Centre is of the view that the use of the short-form covenants would be almost, if not entirely, non-existent because of the ease with which lengthy lease documents can now be generated from detailed precedents.

122.2.3. Many short form covenants are outdated

Schedule 3 contains many covenants that would be of no use in modern commercial leasing practice. Covenants with respect to liquor licencing, painting, harvesting of trees and erecting fences for example, are not reflective of covenants that may be found in typical commercial leases today. Indeed, if the parties were to contract with respect to such matters, they are likely to engage highly skilled practitioners to negotiate and draft such covenants, and would not simply rely on the short-form covenants.

122.2.4. Caution is required when using short form leases

As stated above at paragraph 120.1, commentators warn that great caution needs to be taken when using the short form covenants.¹⁹⁹⁵ There is danger in altering the conditions expressed in column 2 as they may conflict with the covenant expressed in the schedule, and result in undesirable obligations.¹⁹⁹⁶ Drafters should also carefully consider the full covenant in column 2 before using the short form to ensure it reflects the intentions of the parties.¹⁹⁹⁷

122.3. Other jurisdictions

122.3.1. New Zealand

The recommendations with respect to implied covenants in leases reflect the approach in New Zealand.¹⁹⁹⁸

122.3.2. Australia

Other jurisdictions in Australia imply various covenants into leases¹⁹⁹⁹ and these differ from State to State. The Northern Territory and New South Wales employ short-form lease covenants similar to section 109 of the PLA.²⁰⁰⁰

122.4. Recommendation

The Centre recommends repealing the current provisions that contain implied lease covenants. The Centre further recommends repealing the short-form lease provision and amending schedule 3. A new approach, based on the New Zealand model should be adopted.

There should be a new overarching section that implies covenants into all leases, except where the parties agree otherwise. If, for example, the lease instrument contains a covenant about the same subject as one of the implied covenants, this would indicate the parties have agreed to exclude the operation of the implied covenant in favour of their own arrangement.

The implied covenants also operate subject to the PLA and any other Act.

Schedule 3 should be amended to contain a number of relevant, standardised lease covenants that parties can rely on in circumstances where there is no agreement otherwise. Note that the recommendation for Item 6 - **Alteration of buildings** includes a subparagraph (2): ‘The lessor will not unreasonably withhold consent under subclause (1).’ Subclause (2) is only required if the

¹⁹⁹⁵ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.109.30].

¹⁹⁹⁶ *Mitchell v Brown* (1909) 9 SR (NSW) 539; Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.109.30].

¹⁹⁹⁷ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.109.30].

¹⁹⁹⁸ *Property Law Act 2007* (Qld) ss 218 – 200 and schedule 3.

¹⁹⁹⁹ See for example: *Imperial Acts Application Act 1969* (NSW) s 32, *Property Law Act 1958* (Vic) s 132A and *Law of Property Act* (NT) s 24 which all have a provision similar to section 104 of the PLA; *Conveyancing Act 1919* (NSW) s 84 which is similar to section 105 of the PLA; *Conveyancing Act 1919* (NSW) s 85, *Civil Law (Property Act) 2006* (ACT) s 120(1)(a), *Law of Property Act* (NT) s 119(1)(a), *Property Law Act 1969* (WA) s 93(1), *Property Law Act 1928* (Vic) s 67(1)(c), *Land Titles Act 1980* (Tas) s 67 and *Law of Property Act 1936* (SA) s 125(b) which all contain provisions similar to section 107 of the PLA.

²⁰⁰⁰ *Conveyancing Act 1919* (NSW) s 86 and *Law of Property Act* (NT) s 120.

recommendations for section 121 are adopted. If the recommendations for section 121 are not adopted then delete subclause (2). The discussion and recommendations for section 121 of the PLA are set out at paragraph 132.

The recommended approach is simpler, and brings all the implied covenants into one schedule, which will aid in application. The modernised language and updated covenants will bring the PLA in line with modern leasing practices.

RECOMMENDATION 119. The Centre makes the following recommendations with respect to implied covenants and short-form covenants:

Sections to be repealed

- repeal section 104;
- repeal section 105;
- repeal section 106;
- repeal section 107; and
- repeal section 109.

Section to be added:

Section [] Covenants, conditions and powers implied into all leases

- (1) Subject to subsection (2), the covenants, conditions and powers set out in Part 1 of schedule 3 are implied into every lease:
 - (a) subject to this Act and any other Act; and
 - (b) unless otherwise agreed by the parties.
- (2) The covenants in Item 3 of Part 1 of schedule 3 are not implied into short leases.
- (3) The covenants in Part 2 of schedule 3 are implied into all short leases subject to this Act and any other Act.

Amend Schedule 3 in the following terms:

Schedule 3 Part 1

1. Payment of rent

The lessee will pay the rent payable under the lease when it falls due.

2. Payment of taxes, rates, etc.

The lessee will pay all taxes, rates and assessments of any kind which are charged or chargeable upon the land or upon the lessor, in respect of the leased premises for the term of the lease in the proportion that the area of the leased premises bears to the land subject to the assessment.

3. Maintain and leave the premises in good repair **option 1 wording*

- (1) Subject to subclause (2), during the term of the lease the lessee will maintain, repair and keep the premises in good condition.
- (2) In fulfilment of the obligation in subclause (1), regard is to be had to the condition of the leased premises at the commencement of the lease and excepting reasonable wear and tear, and any damage caused by fire, flood or storm occurring during the lease term.
- (3) At the end of the lease, whether by expiration of the lease term or otherwise, the lessee will surrender and yield up the premises to the lessor in good and substantial repair including all:

- (a) appurtenances;
- (b) buildings;
- (c) erections; and
- (d) fixtures.

3. Maintain and leave the premises in good repair **option 2 alternative wording**

- (1) The lessee will:
 - (a) at all times during the currency of the lease, keep the leased premises in the same condition that they were in when the term of the lease began; and
 - (b) at the termination of the lease, yield the leased premises in that condition.
- (2) However, the lessee is not bound to repair any damage to the leased premises caused by:
 - (a) reasonable wear and tear; or
 - (b) any of the following:
 - (i) fire, flood, or explosion (whether or not the fire, flood, or explosion is caused or contributed to by the lessee's negligence);
 - (ii) lightning, storm or earthquake; or
 - (iii) any other cause the risk for which the lessor has insured the premises.
- (3) Despite subclause (2)(b), the lessee is not excused from liability to repair any damage caused by any of the events referred to in that paragraph if, and to the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of:
 - (a) the lessee;
 - (b) the lessee's agent, contractor, or invitee; or
 - (c) any other person under the lessee's direction or control.

4. Abatement of rent if premises is destroyed or damaged

- (1) If the leased premises or any part of them are destroyed or damaged by any of the causes specified in subclause (2) to the extent that they become unfit for occupation and use by the lessee, the rent and any contribution payable by the lessee to the outgoings on those premises will abate, in fair and just proportion to the destruction or damage, until those premises:
 - (a) have been repaired and reinstated; and
 - (b) are again fit for occupation and use by the lessee.
- (2) The causes referred to in subclause (1) are:
 - (a) fire, flood, or explosion (whether or not the fire, flood or other inundation of water, or explosion is caused, or contributed to, by the lessee's negligence);
 - (b) lightning, storm or earthquake; or
 - (c) any other cause the risk for which the lessor has insured the premises.
- (3) Despite subclause (1), the lessee is not entitled to the abatement referred to in that subclause if, and to the extent that, any insurance moneys that would otherwise have been payable to the lessor for the destruction of or damage to the leased premises cannot be recovered because of an act or omission of:
 - (a) the lessee;
 - (b) the lessee's agent, contractor, or invitee; or
 - (c) any other person under the lessee's direction or control.

5. Assignment of the lease

- (1) The lessee may not assign the lease without first obtaining the lessor's written consent, which will not be unreasonably withheld.

6. Alteration of buildings

- (1) The lessee will not, without the consent of the lessor, alter any building that comprises, or is part of, the leased premises.
- (2) The lessor will not unreasonably withhold consent under subclause (1).*
**Note that subclause (2) is only required if the recommendations for section 121 are adopted. If the recommendations for section 121 are not adopted then delete subclause (2).*

7. Noxious or offensive acts or things

- (1) The lessee will not do, or permit to be done, on the leased premises any of the things specified in subclause (2) to:
 - (a) the lessor; or
 - (b) the other lessees of the lessor; or
 - (c) the owners or occupiers of neighbouring properties.
- (2) The things referred to in subclause (1) are:
 - (a) any noxious or offensive act or thing; or
 - (b) any act or thing that is, or is likely to be, a nuisance or that causes, or is likely to cause, any nuisance, damage, or disturbance.

8. Commission of waste

The lessee will not commit, or permit any of the lessee's agents, contractors, or invitees to commit, voluntary waste in relation to the leased premises.

9. Lessee entitled to quiet enjoyment

- (1) The lessee and all persons claiming under the lessee will be able quietly to enjoy the leased premises without disturbance by:
 - (a) the lessor;
 - (b) the lessor's agent, contractor or invitee; or
 - (c) any other person under the lessee's direction or control.
- (2) The lessor will not derogate from the lease.

10. Change of use

- (1) The lessee must not use the premises for any other purpose other than the permitted purpose unless the lessor consents to the change of use.
- (2) The lessor will not unreasonably withhold consent to a request from the lessee for a change in use of the premises.

11. Power to inspect premises

- (1) The lessor may at all reasonable times, either personally or by the lessor's agent, enter the leased premises for the purpose of:
 - (a) inspecting their state of repair; or
 - (b) carrying out repairs; or
 - (c) complying with the requirements of:
 - (i) any enactment or bylaw; or
 - (ii) any notice issued by a competent authority.
- (2) The lessor will not unreasonably interfere with the lessee's occupation and use of the leased premises in the exercise of the power conferred by subclause (1).

12. Power to terminate lease for non-payment of rent or other breach

- (1) The lessor may terminate the lease if:
 - (a) any rent is unpaid for 1 calendar month after the due date for payment (whether or not a demand for payment has been made to the lessee by written notice signed by the lessor or the lessor's agent); or
 - (b) the lessee has failed, for a period of 2 calendar months, to observe or perform any other covenant, condition, or stipulation on the part of the lessee expressed or implied in the lease.

- (2) The lessee is not released from liability for the payment of any unpaid rent or for the breach or non-observance of any other covenant, condition, or stipulation referred to in subclause (1) if the lessor terminates the lease.
- (3) If the lessor terminates the lease under subclause (1) or (2), then the lessor may re-enter and take possession of the leased premises or any representative part of those premises subject to [sections replacing section 124 at Recommendation 134].

13. Lessee may remove lessee's fixtures

- (1) Prior to or at the end of the lease, whether by expiration of the lease term or otherwise, the lessee must remove and take away from the premises all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes and other items owned by the lessee.
- (2) The lessee will repair any damage caused to the premises by the removal of the items mentioned in subclause (1).
- (3) If the lessee does not comply with subclause (1) or (2) within one month of the expiry of the lease term then the items mentioned in subclause (1) are deemed to be abandoned items and the lessor is entitled to remove, sell or otherwise dispose of the abandoned items.
- (4) The lessor may recover from the lessee any loss or damages incurred in exercising its rights under subclause (3).

Schedule 3 Part 2

Covenant implied in short leases

14. Lessee to use premises reasonably

- (1) Subclauses (2) and (3) apply to a lease:
 - (a) for a term of 3 years or any less term; and
 - (b) of a premises principally for the purpose of human habitation.
- (2) The lessor will maintain the leased premises in a condition reasonably fit for human habitation.
- (3) The lessee will:
 - (a) care for the premises in a manner of a reasonable tenant; and
 - (b) repair damage to the premises caused by the lessee or their agents, licensees or invitees.

123. Section 111 – Lessee to give notice of ejectment to the lessor

123.1. Overview and purpose

111 Lessee to give notice of ejectment to the lessor

Every lessee to whom there is delivered any writ or plaint for recovery or for delivery of land leased to or held by the lessee, or to whose knowledge any such writ or plaint comes, shall immediately give notice to the lessor or the lessor's agent, and, if the lessee fails to do so, the lessee shall be liable to the person of whom the lessee holds the land for any damages sustained by that person because of the failure, to be recovered by action in any court of competent jurisdiction.

Section 111 of the PLA requires 'any lessee upon whom process for recovery of land is served, or to whose knowledge such process comes, to immediately give notice to the lessor, in order that he or she may make preparation to defend the proceedings'.²⁰⁰¹

This provision and rule 143 of the UCPR provide for any lessor to appear and defend such action in respect of property which is leased.²⁰⁰² If the lessee fails to notify the lessor in accordance with section 111 of the PLA, the lessee may be liable in damages that being the loss sustained by reason of such failure.²⁰⁰³

The relevant rule from the UCPR is set out below:

143 Possession of land

- (1) A person who is not named in a claim as a defendant in a proceeding for the possession of land may file a notice of intention to defend if the person files an affidavit showing the person is in possession of the land either directly or by a tenant.
- (2) Subject to rule 69, a person who files a notice of intention to defend under subrule (1) becomes a defendant by virtue of the notice and must—
 - (a) when filing the notice, file an application to the court for directions; and
 - (b) serve a copy of the notice, the affidavit mentioned in subrule (1) and the application mentioned in paragraph (a) on every other party to the proceeding.
- (3) A notice of intention to defend under this rule may be confined to a specified part of the land.

123.2. Issues with the section

Section 111 of the PLA has not been the subject of any litigation, however the provision remains relevant and could be relied upon in the modern commercial leasing context, although the Centre concedes that the frequency with which such circumstances may arise is probably very low. The language of the section is outdated and difficult to understand.

²⁰⁰¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.111.30].

²⁰⁰² Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.111.30].

²⁰⁰³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.111.30].

123.3. Other jurisdictions

123.3.1. Australia

Victoria has a provision cast in almost identical terms.²⁰⁰⁴ The Victorian Law Reform Commission did not address leases as it was outside of the scope of that review.²⁰⁰⁵ No other Australian jurisdictions have an equivalent provision.

123.3.2. New Zealand and United Kingdom

The Queensland and Victorian provision was imported from the *Law of Property Act 1925* (UK).²⁰⁰⁶ New Zealand does not have an equivalent provision.

123.4. Recommendation

The Centre recommends retaining section 111 of the PLA with modernised language. While the application of the section is limited, there is some scope for a third party, for example a mortgagee, to seek to eject a tenant to obtain possession of the land. Section 111 simply imposes liability on the lessee for failure to inform the lessor of the action to recover the land.

RECOMMENDATION 120. Section 111 should be retained with modernised language.

²⁰⁰⁴ *Property Law Act 1958* (Vic).

²⁰⁰⁵ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 21.

²⁰⁰⁶ *Law of Property Act 1925* (UK) s 145.

124. Section 112 – Provisions as to covenants to repair

124.1. Overview and purpose

112 Provisions as to covenants to repair

- (1) Damages for a breach of a covenant, obligation or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant, obligation or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant, obligation, or agreement, and in particular no damage shall be recovered for a breach of any such covenant, obligation, or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been or be pulled down, or such structural alterations made to the premises as would render valueless the repairs covered by the covenant, obligation, or agreement.
- (2) A right of re-entry or forfeiture for a breach of any such covenant, obligation, or agreement shall not be enforceable, by action or otherwise, unless the lessor proves that the fact that such a notice as is required by section 124 had been served on the lessee was known either—
 - (a) to the lessee; or
 - (b) to an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee; or
 - (c) to the person who last paid the rent due under the lease either on the person's own behalf or as agent for the lessee or under-lessee;
 and that a time reasonably sufficient to enable the repairs to be executed had elapsed since the time when the fact of the service of the notice came to the knowledge of any such person.
- (3) Where a notice as referred to in subsection (2) has been sent by post in a registered letter addressed to a person at the person's last known place of abode in or out of the State, and that letter is not returned through the post office undelivered, then, for the purposes of subsection (2), that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.
- (4) This section applies whether the lease was created before or after the commencement of this Act.

At common law, where a lessor brings an action for damages for breach of the covenant to repair, damages are assessed as the diminution in value of the reversionary estate because of the breach, including consideration of the length of time the lease has to run and the saleable value of the reversion.²⁰⁰⁷ If the lease term ends and the covenant to leave the premises in repair is not observed, then the measure of damages is the reasonable and proper amount to put the premises in a state of repair.²⁰⁰⁸

Section 112 of the PLA modifies the common law in the following way:

²⁰⁰⁷ *Mills v East London Union* (1872) LR 8 CP 79; Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.112.30].

²⁰⁰⁸ *Joyner v Weeks* [1891] 2 QB 31; Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.112.30].

- during the lease term – damages for breach of a covenant are restricted to the amount of the diminution of the reversion as a result of the breach; and
- at the end of the lease – where there is a covenant to yield up the premises in good repair, recovery is limited to the amount, if any, of the diminution of the value of the reversion.

In *Jacquin v Holland*²⁰⁰⁹ the lessor of premises brought an action seeking to recover damages for breach of the covenant to deliver up in good repair. The repairs required to put the premises in good repair were estimated at £100. The defendant argued that the equivalent UK provision limited his liability to the diminution of the value of the premises, which was £50. The court held that the damages were £50, that is, the diminution of the value.²⁰¹⁰ Note, however, the cost of repairs can be taken, *prima facie*, as evidence of the amount of the diminution of the value of the reversion.²⁰¹¹

In *Smiley Townshend*²⁰¹² Lord Justice Denning (as he was then) said the appropriate question was: ‘how much was the market value of the landlord’s interest diminished at the end of the lease by reason of the disrepair?’²⁰¹³ The court should not consider scarcity or demand for the property, or if the property has been relet immediately.²⁰¹⁴

No damages can be recovered if the premises is due to be demolished, either by a decision of the lessor, or by a local authority.²⁰¹⁵

124.2. Issues with the section

Section 112(1) continues to have application by regulating the amount that is recoverable by a lessee in circumstances where there has been a breach of the covenant to repair. However, section 112(2) is essentially replicated by section 124 of the PLA, which is discussed at paragraph 137. Further, subsection 112(3) sets out when a notice is deemed to be served by post. Section 347 of the PLA has a similar, although less detailed, framework. Note, however, the recommendations in respect of section 347, discussed at paragraph 204.

124.3. Other jurisdictions

124.3.1. Australia

Section 133A of the *Conveyancing Act 1919* (NSW) is cast in almost identical terms. The Northern Territory also has similar provisions, however the drafting is modernised and clearer. Section 123 of the *Law of Property Act* (NT) reads:

²⁰⁰⁹ [1960] 1 WLR 258; [1960] 1 All ER 402.

²⁰¹⁰ *Jacquin v Holland* [1960] 1 WLR 258; [1960] 1 All ER 402.

²⁰¹¹ *Jones v Herxheimer* [1950] 2 KB 106.

²⁰¹² [1950] 2 KB 311.

²⁰¹³ *Smiley Townshend* [1950] 2 KB 311, 319-320.

²⁰¹⁴ *Jacquin v Holland* [1960] 1 WLR 258; [1960] 1 All ER 402.

²⁰¹⁵ *Property Law Act 1974* (Qld) s 112(1); *Keates v Graham* [1960] 1 WLR 30; [1959] 3 All ER 919.

Law of Property Act (NT)

123 Provisions as to covenants to repair

- (1) Subject to subsection (2), damages for breach of a covenant, obligation or agreement, whether express or implied or general or specific, to:
 - (a) keep or put premises in good repair during the currency of a lease; or
 - (b) leave or put premises in good repair at the termination of a lease,are not to exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of the covenant, obligation or agreement.
- (2) Damages are not recoverable for a breach of a covenant, obligation or agreement to leave or put premises in good repair at the termination of a lease if it is shown that at or shortly after the termination of the lease:
 - (a) the premises, in whatever state of repair they might be, would be or have been pulled down; or
 - (b) structural alterations would be or have been made to the premises that would render valueless the repairs covered by the covenant, obligation or agreement.
- (3) A right of re-entry or forfeiture for a breach of a covenant, obligation or agreement referred to in subsection (1) or (2) is not enforceable unless the lessor proves that:
 - (a) a notice has been served on the lessee in accordance with section 137 and the service of the notice was known at the time of or shortly after the service of the notice by:
 - (i) the lessee;
 - (ii) an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee; or
 - (iii) the person who last paid the rent due under the lease either on the person's own behalf or as agent for the lessee or under-lessee; and
 - (b) a period of time reasonably sufficient to enable the execution of the repairs has lapsed from the time when the fact of the service of the notice became known to the lessee, under-lessee or person and the exercise of the right of re-entry or forfeiture.
- (4) If a notice referred to in subsection (3)(a) is sent by post in a registered letter addressed to a person at the person's last known place of residence in or out of the Territory and the letter is not returned through the post office undelivered, the person is, for the purposes of that provision, unless the contrary is proven, to be taken to have had knowledge of the fact that the notice had been served from the time when the letter would have been delivered in the ordinary course of post.
- (5) This section applies to leases whether created before or after the commencement of this Act.

124.3.2. New Zealand

There is no equivalent provision in New Zealand.

124.4. Recommendation

The Centre recommends amending section 112 as set out in detail below.

124.4.1. Amend section 112(1) to modernise the language

The Centre is of the view that it is appropriate to continue to moderate the quantum of damages that can be recovered as a result of a breach of a covenant to repair. For example, in a scenario where the lessee breaches a covenant to repair, but the lessor intends to demolish or remove the unrepaired building in any event at the end of the lease term, then is proper that the amount of damages the lessor can recover should be limited. However, the Centre considers that it may be just and equitable to modify the existing provision so that the amount recoverable by the lessor for a breach of a covenant to repair is the lesser of either the diminution of the value of the premises as a result of the

breach, or the cost to repair the premises. This takes into account the fact that the lessor may still be able to rent out the premises for the same or more rent because of shifting market values, notwithstanding the lack of repair by the lessee. Conversely, if the lack of repairs has impacted significantly on the re-lease or sale value of the property, then it is fair that the lessee should be required to repair the premises.

124.4.2. Repeal section 112(2) because the effect of this subsection is largely replicated in section 124 of the PLA

Section 124 of the PLA is a comprehensive provision about the restrictions on relief against forfeiture for a breach of any covenant of the lease. Section 112(2) of the PLA requires a section 124 notice to be given to the lessee for the breach before the lessor can re-enter the premises or forfeit the lease. The stipulations as to the service and requirements of the notice under section 112(2) is virtually identical, however section 112(2) provides that the notice can be served on a sublessee, the person who last paid rent under the lease, or an agent of the lessee. The Centre is at a loss to imagine when another person other than the lessee or their agent might pay the rent under the lease, so this stipulation is unnecessary.

Both sections address the timeframe for any repairs to be effected. Section 112(2) requires the lessor to allow ‘time reasonably sufficient to enable the repairs to be executed’. Section 124 uses slightly different language but has essentially the same effect: ‘the lessee fails within a reasonable time after service of the notice to remedy the breach.’ The Centre recommends that section 112(2) can be repealed on the basis that it is covered in section 124 of the PLA. Further, the issue will continue to be covered if the proposed drafting provided with Recommendation 134 is adopted.

124.4.3. Repeal section 112(3) and rely on the usual notice provisions in section 347 of the PLA

Section 347 of the PLA sets out the requirements of notices served under the PLA, unless a contrary method of service is provided. Section 112(3) of the PLA provides for some slight modification to the postal service deeming provision in section 347 of the PLA. The two provisions are compared in the table 3 below:

Section 112(3)	Section 347(1A)
<p>Where a notice as referred to in subsection (2) has been sent by post in a registered letter addressed to a person at the person’s last known place of abode in or out of the State, and that letter is not returned through the post office undelivered, then, for the purposes of subsection (2), that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.</p>	<p>A notice so posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post the notice would be delivered.</p>

The Centre is of the view that the provisions are essentially to the same effect and that it is therefore preferable to rely on the usual service of notice provisions in section 347 of the PLA where there has been a breach of a covenant to repair. There appears to be no rationale or justification for the section to deviate from the usual notice requirements under the Act.²⁰¹⁶

124.4.4. Retain section 112(4)

Section 112 has retrospective effect and the Centre is of the view that this should remain the case, particularly in circumstances where the essentials of the provisions will operate the same under the recommended changes.

RECOMMENDATION 121. The Centre recommends amending section 112 in the following way:

- amend section 112(1) to limit recovery of damages for breach of repair covenant to the lesser of the diminution in value of the premises, or the actual cost of repair, and modernise the language;
- repeal section 112(2) on the basis that the effect of this subsection is largely replicated in section 124 (and the redrafted provisions set out at Recommendation 134);
- repeal section 112(3) and rely on the usual notice provisions in section in section 347 (as modified by Recommendation 205); and
- retain section 112(4).

For example, using the Northern Territory provisions as a guide, the sections could be drafted in the following manner:

Section [112] Provisions as to covenants to repair

- (1) This section applies to a claim to recover damages for breach of a covenant, obligation or agreement, whether express or implied or general or specific, to:
 - (a) keep or put premises in good repair during the currency of a lease; or
 - (b) leave or put premises in good repair at the termination of a lease.
- (2) Where subsection (1) applies, the amount of damages recoverable is limited to the lesser of the amount of:
 - (a) the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished; or
 - (b) the actual amount required to repair the premises.
- (3) Damages are not recoverable for a breach of a covenant, obligation or agreement to leave or put premises in good repair at the termination of a lease if it is shown that at or shortly after the termination of the lease:
 - (a) the premises, in whatever state of repair they might be, will be or have been demolished; or
 - (b) structural alterations would be or have been made to the premises that would render valueless the repairs covered by the covenant, obligation or agreement.
- (4) This section applies whether the lease was created before or after the commencement of this Act.

²⁰¹⁶ Note that under Recommendation 205 regular post will be deemed delivered unless the contrary is shown after 5 business days. See paragraph 204.4.2.

Part 8 Division 2 – Surrenders, assignments and waiver

125. Section 113 – Head leases may be renewed without surrendering under-leases

125.1. Overview and purpose

113 Head leases may be renewed without surrendering under-leases

- (1) In case any lease is duly surrendered in order to be renewed, and a new lease made and executed by the head landlord, such new lease shall without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived out of that lease had been likewise surrendered at or before the taking of such new lease.
- (2) Every person in whom any estate for life, or lives, or for years, is from time to time vested because of such new lease and the person's executors and administrators shall be entitled to the rents, covenants, obligations, and duties, and have like remedy for the recovery of the rents, covenants, obligations and duties, and the under-lessees shall hold and enjoy the lands in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued.
- (3) The head landlord shall be entitled to the same remedy by entry in and upon the lands comprised in any such under-lease for the rents and duties reserved by such new lease (so far as the same do not exceed the rents and duties reserved in the lease out of which such under-lease was derived) as the head landlord would have had in case such former lease had been still continued or as the head landlord would have had in case the respective under-leases had been renewed under such new principal lease.
- (4) For a registered lease of registered land, this section is subject to the *Land Title Act 1994*.

The common law position in the United Kingdom prior to 1730²⁰¹⁷ was that upon surrender of the head lease, a sublessee is left without a reversion expectant upon the termination of their sublease.²⁰¹⁸ This meant that, under the common law, the sublessee could remain in the property free from any obligation to observe the covenants and conditions that were contained in the sublease, such as to pay rent, until the end of the sublease term.²⁰¹⁹ Because there is no privity of estate or privity of contract between the head lessor and the sublessee, the head lessor is unable to enforce any of the sublease covenants.²⁰²⁰

Section 113 of the PLA has its origins in the *Landlord and Tenant Act 1730* (4 Geo 2, c 28 repealed)²⁰²¹ and alters the undesirable common law position. The section applies where a lease is surrendered 'for renewal' and then a new lease granted. The effect of the section is that upon the surrender of the head lease, the sublease remains valid.²⁰²² Under the new 'renewed' lease, the lessor can enforce the lease covenants as against the sublessee and can 'insist upon all the other advantages, whether

²⁰¹⁷ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.113.30].

²⁰¹⁸ *Ecclesiastical Commissioners fir England v Tremer* [1893] 1 Ch 166.

²⁰¹⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.113.30].

²⁰²⁰ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 246].

²⁰²¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.113.30].

²⁰²² *Andrews v Hogan* (1952) 86 CLR 223.

by covenant, condition or otherwise, which the old reversioners ... had against the sub-lessee.²⁰²³ Section 113 of the PLA does not provide for any greater rights to the sublessee than he would have had under the sublease.²⁰²⁴

125.2. Issues with the section

Section 113 of the PLA has not been the subject of any litigation.

In the Centre's view, it is impossible to envisage any circumstances in modern commercial leasing practice where a lease would be 'surrendered in order to be renewed'. The *Land Title Act 1994* (Qld) section 67 provides for registered leases to be amended without the need for surrender. There are no other circumstances in modern commercial leasing practice in which a lessee may want to surrender a lease to have it renewed.

The language of the section is outdated and difficult to understand.

125.3. Other jurisdictions

In New South Wales, section 121 of the *Conveyancing Act 1919* (NSW) is cast in almost identical terms. Victoria²⁰²⁵ and New Zealand²⁰²⁶ also have similar provisions .

125.4. Recommendation

The Centre recommends section 113 be repealed. The section has no application in light of section 67 of the *Land Title Act 1994* (Qld) and modern commercial leasing practice.

RECOMMENDATION 122. Section 113 should be repealed.

²⁰²³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.113.90].

²⁰²⁴ *Cihan v Oncu* (2004) 11 BPR 21, 653.

²⁰²⁵ *Property Law Act 1958* (Vic) s 150.

²⁰²⁶ *Property Law Act 2007* (NZ) s 216.

126. Section 114 – Provision as to attornments by tenants

126.1. Overview and purpose

114 Provision as to attornments by tenants

- (1) Where land is subject to a lease—
- (a) the conveyance of a reversion in the land expectant on the determination of the lease; or
 - (b) the creation or conveyance of a rent charge to issue or issuing out of the land;
- shall be valid without any attornment of the lessee.
- (1A) Nothing in subsection (1)—
- (a) affects the validity of any payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to the lessee by the person entitled under the conveyance or grant; or
 - (b) renders the lessee liable for any breach of covenant to pay rent, on account of the lessee's failure to pay rent to the person entitled under the conveyance or grant before such notice is given to the lessee.
- (2) An attornment by the lessee in respect of any land to a person claiming to be entitled to the interest in the land of the lessor, if made without the consent of the lessor, shall be void.
- (2A) Subsection (2) does not apply to an attornment—
- (a) made under a judgment of a court of competent jurisdiction; or
 - (b) to a mortgagee, by a lessee holding under a lease from the mortgagor where the right of redemption is barred; or
 - (c) to any person rightfully deriving title under the lessor.

At common law where property is subject to a lease and the reversion is assigned to another party, it is necessary for the lessee to 'attorn' to the assignee of the reversion.²⁰²⁷ Attornment is formally recognising the transfer of the property to the new lessor and this is required for the assignment to be valid.²⁰²⁸

Section 114 of the PLA applies to all leases and subsection 114(1) has the effect of relieving the lessor who assigns the reversion from the need to have the lessee attorn. The assignment of the reversion will be valid notwithstanding the absence of an attornment.

Subsection 114(1A) provides protection to a lessee who continues to pay rent to the original lessor because he has not yet received notice of the assignment of the reversion.²⁰²⁹

Section 114(2) and 114(2A) set out exemptions to the previous subsections.²⁰³⁰

126.2. Issues with the section

Section 114(1) and 114(1A) of the PLA are still relevant in modern leasing practice today and should be retained.

²⁰²⁷ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 160].

²⁰²⁸ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.114.60].

²⁰²⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.114.60].

²⁰³⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.114.60].

The operation of section 114(2) and 114(2A) is unclear and the QLRC did not comment on the reasons for their inclusion in the PLA.²⁰³¹ The Centre cannot see how the application of these subsections would arise in current practice.

126.3. Other jurisdictions

126.3.1. Australia

New South Wales has a provision with a similar effect.²⁰³² The Victorian²⁰³³ and Tasmanian²⁰³⁴ provisions are cast in almost identical terms as section 114 of the PLA. These provisions are derived from the *Law of Property Act 1925* (UK) section 151.

126.3.2. New Zealand

Section 237 of the *Property Law Act 2007* (NZ) is the equivalent of section 114(1) and (1A) of the PLA. The section reads:

237 Effect of payment by lessee to assignor of reversion

- (1) This section applies to a lease if the lessor has transferred or assigned the reversion expectant on the lease.
- (2) A lessee who pays all or part of the rent or other amounts due under the lease to the transferor or assignor of that reversion is discharged to the extent of that payment if the lessee had no actual notice of the transfer or assignment.
- (3) For the purposes of subsection (2), the registration of a transfer of the reversion is not, in itself, actual notice to the lessee of the transfer, despite anything to the contrary in any other enactment.

Section 238 of the *Property Law Act 2007* (NZ) is the equivalent of section 114(2) and 114(2A) of the PLA. The section reads:

238 Effect of acknowledgement by lessee of another person as lessor

An acknowledgement by a lessee that a person who is not entitled to the reversion expectant on a lease is the lessor has no effect on the person who is so entitled, unless the acknowledgement is made—

- (a) with the consent of the person who is so entitled; or
- (b) under a court order.

The Law Commission (NZ) states that the effect of section 238 of the New Zealand Act is to nullify ‘any attempt by the lessee to treat as lessor a person who is not entitled to the reversion’ without consent of that person so entitled or by court order.²⁰³⁵ However, no indication as to how those circumstances might arise is provided.

²⁰³¹ 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) 84.

²⁰³² *Conveyancing Act 1919* (NSW) s 125.

²⁰³³ *Property Law Act 1958* (Vic) s 151.

²⁰³⁴ *Conveyancing and Law of Property Act 1884* (Tas) s 11A.

²⁰³⁵ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) [365].

126.4. Recommendation

The Centre recommends retaining the effect of section 114(1) and (1A). The provisions should be redrafted to modernise the language and provide greater clarity around the application of the section. This is in line with the overarching principles that inform these recommendations. The New Zealand provision provides a starting point for the redrafting. The Centre further recommends the redrafted sections be relocated to sit together with the revised section 117 of the PLA as this will bring all of the provisions about the effect of an assignment of the reversion into one section. The full recommendation in respect of section 117 is set out at paragraph 129.4.

Section 114(2) and 114(2A) should be repealed on the basis that they have no application.

RECOMMENDATION 123. The effect of section 114(1) and (1A) should be retained and the subsection redrafted to modernise language. The provisions should be relocated to sit with the proposed redrafted section 117. Section 114(2) and (2A) should be repealed.

For example, using the New Zealand the provisions as a guide, the section could be drafted in the following manner:

Section [114] Effect of payment by lessee to assignor of reversion

- (1) This section applies to a lease if the lessor has transferred or assigned the reversion expectant on the lease.
- (2) A lessee who pays all or part of the rent or other amounts due under the lease to the transferor or assignor of that reversion is discharged to the extent of that payment if the lessee had no actual notice of the transfer or assignment.
- (3) For the purposes of subsection (2), the registration of a transfer of the reversion is not, in itself, actual notice to the lessee of the transfer, despite anything to the contrary in any other enactment.

127. Section 115 – When reversion on a lease is surrendered etc. the next estate to be deemed the reversion

127.1. Overview and purpose

115 When reversion on a lease is surrendered etc. the next estate to be deemed the reversion

- (1) When the reversion expectant on a lease of land made either before or after the commencement of this Act is surrendered or merges after the commencement of this Act, the estate which for the time being confers as against the lessee under the lease the next vested right to the land, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the reversion as, but for the surrender or merger of the lease, would have subsisted, be deemed the reversion expectant on the lease.
- (2) This section is subject, in the case of a registered lease of registered land, to the provisions of the *Land Title Act 1994*.

Section 115 of the PLA alters the ‘inconvenient result’²⁰³⁶ that occurred when a head lease was surrendered, and the reversion merged into the fee simple and was extinguished. At common law, because the payment of rent and other covenants were incidents of the sublessor’s reversion, when the head lease was surrendered, the head lessor could not demand rent or enforce the other sublease covenants as against the sublessor.²⁰³⁷ The effect of section 115 of the PLA is to make the estate head lessor the reversion of the sublease, so effectively the head lessor steps into the place of the lessor who has surrendered their lease.²⁰³⁸

The sublessee’s rights are also preserved by the section. The sublessee will effectively become the lessee of the head lessor and will ‘enjoy all of the rights that the lessee of the surrendered head lease enjoyed...’²⁰³⁹ This section only applies to surrendered leases and does not apply to leases determined in any other way.²⁰⁴⁰

127.2. Issues with the section

Section 115 of the PLA is important and remains relevant in modern commercial leasing practices. The provision provides a necessary mechanism to deal with the situation where a head lease is surrendered and confirms the rights of the holder of the reversionary estate and the sublessee.

²⁰³⁶ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) [362].

²⁰³⁷ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) [362].

²⁰³⁸ *Wilson v Jolly* (1948) 48 SR (NSW) 460.

²⁰³⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.115.30]; *Evans v Barboutis* [1957] VR 35.

²⁰⁴⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.115.30].

127.3. Other Jurisdictions

127.3.1. Australia

Section 122 of the *Conveyancing Act 1919* (NSW) is the New South Wales equivalent to section 115 of the PLA. Similar to the Queensland section, the effect of section 122 is to make the head lessor's reversion the reversion expectant on the sublease.²⁰⁴¹

127.3.2. New Zealand

Section 230 of the *Property Law Act 2007* (NZ) refers to where a sub-lessor surrenders the lead lease to the head lessor.²⁰⁴²

The section reads:

230 Merger of reversion not to affect remedies

- (1) This section applies to a lease if the reversion expectant on the lease is merged in a remainder or other reversion, or in a future estate or interest in the land.
- (2) The person entitled to the estate or interest into which that reversion has merged has the same remedies for non-performance or non-observance of the covenants or conditions of the lease, and has the same rights to give notice to the lessee of termination of the lease, as the person who would for the time being (but for the merger) have been entitled to the reversion expectant on the lease would have had.

127.4. Recommendation

The Centre recommends retaining section 115 but with modernised language to provide clarity and assist with interpretation. This is in line with the overarching principles that inform these recommendations. The New Zealand provision set out above at paragraph 127.3.2 may provide a helpful starting point.

RECOMMENDATION 124. Section 115 should be retained with modernised language.

²⁰⁴¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 246].

²⁰⁴² Law Commission (NZ), *A New Property Law Act Report No. 29* (1994) [362].

128. Section 116 – Apportionment of conditions on severance

128.1. Overview and purpose

116 Apportionment of conditions on severance

- (1) Despite the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and despite the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised in the lease, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term on which each severed part is reversionary, or the term in the part of the land as to which the term has not been surrendered, or has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.
- (2) In this section—
right of re-entry includes a right to determine the lease by notice to quit or otherwise, but where the notice is served by a person entitled to a severed part of the reversion so that it extends to part only of the land demised, the lessee may within 1 month determine the lease in regard to the rest of the land by giving to the owner of the reversionary estate in it a counter notice expiring at the same time as the original notice.
- (3) This section applies to—
- (a) leases made after the commencement of this Act; and
 - (b) leases made before the commencement of this Act where the reversionary estate in the lands comprised in the lease is severed or there is an avoidance or cesser of the term as mentioned in this section after the commencement of this Act.

Section 116 of the PLA applies where land which is the subject of a lease is subdivided into parts and then a part or parts are transferred or assigned to another person.²⁰⁴³ This creates a situation where part of the reversion vests in the original lessor, and another part vests in another person. This process is called a severance of the reversion.²⁰⁴⁴

Complementary to sections 117 and 118 of the PLA,²⁰⁴⁵ section 116 operates to maintain the relationship of landlord and lessor in respect of each of the subdivided parts, and to ‘apportion’ each of the covenants between the various parts. The result is that, for example, a purchaser of a subdivided part of the leased land is entitled to terminate the lease for a breach of the lease that relates to his part of the land.²⁰⁴⁶ Conversely, the lessee has the right to enforce landlord’s covenants against the owner of that part.²⁰⁴⁷ As a matter of practicality, commentators point out that some tenant’s covenants, for example, the covenant to pay rent, are not easy to apportion in the absence of an agreement between the parties.²⁰⁴⁸

²⁰⁴³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.116.30].

²⁰⁴⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.116.30].

²⁰⁴⁵ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 170].

²⁰⁴⁶ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 170].

²⁰⁴⁷ *Cardwell v Walker* [2004] 2 P & CR 9.

²⁰⁴⁸ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 170].

128.2. Issues with the section

Section 116 of the PLA, while not commonly relied upon, remains relevant as it is possible to subdivide land that is the subject of a lease, although the Centre suggests the practice is rare. However, the language of the section is archaic and difficult to decipher.

128.3. Other jurisdictions

128.3.1. Australia

New South Wales,²⁰⁴⁹ Victoria,²⁰⁵⁰ Western Australia²⁰⁵¹ and Tasmania²⁰⁵² have provisions cast in similar terms to the PLA. South Australia does not have an equivalent provision.

128.3.2. United Kingdom

The *Law of Property Act 1925* (UK) is the legislation upon which the Australian provisions are modelled. Section 140 of that Act is drafted in almost identical terms as the PLA and other Australian jurisdictions.

128.3.3. New Zealand

Section 235 of the *Property Law Act 2007* (NZ) operates in a similar way to section 116 of the PLA. The section reads:

235 Rights and obligations under lease after severance

- (1) This section applies to a lease if—
 - (a) the reversion expectant on the lease is divided into different parts, and different persons are entitled to the income of those different parts (that is, a severance of the reversion as regards the land); or
 - (b) the lease has terminated for part only of the land comprised in the lease (that is, a severance of the reversion as regards the estate).
- (2) The obligations referred to in section 231 and the rights and remedies to which section 233 applies—
 - (a) must be apportioned; and
 - (b) to the extent required by that apportionment, must remain attached, as the case requires, to—
 - (i) each part of the reversion; or
 - (ii) that part of the land for which the lease has not been terminated; and
 - (c) may, to that extent, be—
 - (i) enforced by the person entitled to enforce those obligations under section 231; or
 - (ii) exercised by the person entitled to exercise those rights and remedies under section 233.

128.4. Recommendation

The Centre recommends retaining the effect of section 116 but amending the provision to provide greater clarity around the application and operation of the section and to modernise the language. This is in line with the underpinning principles that inform these recommendations.

²⁰⁴⁹ *Conveyancing Act 1919* (NSW) s 119.

²⁰⁵⁰ *Property Law Act 1958* (Vic) s 140.

²⁰⁵¹ *Property Law Act 1969* (WA) s 76.

²⁰⁵² *Conveyancing and Law of Property Act 1884* (Tas) s 12.

The New Zealand equivalent provides a starting point for the amended provision.

RECOMMENDATION 125. Section 116 should be retained with modernised language.

For example, using the New Zealand provision as a guide, the section could be drafted in the following manner:

Section [116] Rights and obligations under lease after severance

- (1) This section applies to a lease if the reversion expectant on the lease is divided into different parts, and different persons are entitled to the income of those different parts (that is, a severance of the reversion as regards the land).
- (2) The obligations referred to in section [proposed amended section 118] and the rights and remedies to which section [proposed amended section 117] applies—
 - (a) must be apportioned; and
 - (b) to the extent required by that apportionment, must remain attached, as the case requires, to—
 - (i) each part of the reversion; or
 - (ii) that part of the land for which the lease has not been terminated; and
 - (c) may, to that extent, be—
 - (i) enforced by the person entitled to enforce those obligations under section [proposed amended 118]; or
 - (ii) exercised by the person entitled to exercise those rights and remedies under section [proposed amended section 117].

129. Section 117 – Rent and benefit of lessee’s covenants to run with the reversion

129.1. Overview and purpose

117 Rent and benefit of lessee’s covenants to run with the reversion

- (1) Rent reserved by a lease, and the benefit of every covenant, obligation, or provision contained in the lease, touching and concerning the land, and on the lessee’s part to be observed or performed, and every condition of re-entry and other condition contained in the lease, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part of the reversionary estate, immediately expectant on the term granted by the lease, despite severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or the covenantor’s estate.
- (2) Any such rent, covenant, obligation, or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.
- (3) Where that person becomes entitled by conveyance or otherwise, such rent, covenant, obligation, or provision may be recovered, received, enforced or taken advantage of by the person even though the person becomes so entitled after the condition of re-entry or forfeiture has become enforceable, but this subsection does not render enforceable any condition of re-entry or other condition waived or released before such person becomes entitled.
- (4) This section applies to—
 - (a) leases made after the commencement of this Act; and
 - (b) leases made before the commencement of this Act, but with respect only to rent accruing due after the commencement of this Act and to the benefit of a condition of re-entry or forfeiture for a breach committed after the commencement of this Act of any covenant, condition, obligation or provision contained in the lease.

At common law, when the lessor assigned its interest in the land (the reversion), the covenants in the lease did not pass to the assignee of the reversion.²⁰⁵³ The assignee of the reversion does not have privity of contract with the lessee²⁰⁵⁴ and covenants cannot attach to a reversion because it is not a corporeal ‘thing’.²⁰⁵⁵ This applied to the burden and benefit of all covenants, whether or not they ‘touch and concern’ the land.²⁰⁵⁶

Section 117 of the PLA operates to alter the common law so that the assignee of the reversion has the same rights as the original lessor.²⁰⁵⁷ The section has the effect of deeming that all covenants that ‘touch and concern’ the land are annexed to the reversionary estate immediately expectant upon the termination of the lease.²⁰⁵⁸ Relying on section 117 of the PLA, where covenants in the lease for the benefit of the lessor ‘touch and concern’ the land, there is no need for an express assignment of those

²⁰⁵³ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 159].

²⁰⁵⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.117.30]); *Bickford v Parson* (1848) 5 CB 920, 931.

²⁰⁵⁵ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 159].

²⁰⁵⁶ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 159].

²⁰⁵⁷ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 159].

²⁰⁵⁸ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.117.30]).

covenants.²⁰⁵⁹ This is the case notwithstanding any severance of the estate by way of subdivision.²⁰⁶⁰ It follows then that, subject to a contrary intention,²⁰⁶¹ the assignor will lose its right to sue the lessee for breaches of the lease upon assignment of the reversion.

Section 117(1) comprises of two parts. Firstly, the section deals with rent reserved by the lease, and the benefit of every covenant, obligation or provision that touches and concerns the land. It is noted that covenants expressed to be personal do not ‘touch and concern’ the land and so would not come within the ambit of the section.²⁰⁶² Secondly, the section states that the right of re-entry and ‘other condition contained in the lease’ annexes to the reversionary estate. Commentators are of the view that ‘condition’ in this context ‘has its technical sense of a provision for breach of which the landlord can terminate the lease, either because of the inherent importance of the provision (“essential term”) or because the lease gives an express right to terminate for breach.’²⁰⁶³

The reference to an entitlement to ‘any part’ of the income of the land in section 117(2) refers to situations where the land has been subdivided. The language used in this regard is ‘severance’ and section 116 of the PLA deals with apportionment of the income where the land has been subdivided. This is discussed at paragraph 118.

Section 117(3) is about timing of breaches and waiver of rights. Subject to waiver, the assignee of the reversion may rely on section 117 even where the breach of a condition that has enlivened the right of re-entry occurred before the assignee of the reversion takes their interest.²⁰⁶⁴ This may be where the assignee of the reversion takes the land with knowledge of the breach.²⁰⁶⁵ A lack of knowledge of the breach at the time the assignee takes its interest may not amount to a waiver.²⁰⁶⁶

129.1.1. Contracting out of section 117

As stated above at paragraph 129.1, section 117 of the PLA can be contracted out of,²⁰⁶⁷ although the section does not expressly say so. In *G & A Lanteri Nominees Pty Ltd v Fishers Stores Consolidated Pty Ltd*²⁰⁶⁸ a contract for sale of land that was subject to a lease contained an express condition that the buyer acknowledged the seller/lessor had commenced proceedings against the lessee, and that the buyer would not seek to claim any part of damages that the seller/lessor would recover in those proceedings for rental arrears. The buyer sought to rely on the Victorian equivalent of section 117 of the PLA to make a claim for any damages awarded, arguing that the condition was not sufficient to displace the operation of the provision. The court held that the renunciation of a right to damages

²⁰⁵⁹ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [40.2500].

²⁰⁶⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.30].

²⁰⁶¹ *Re King* [1963] Ch 459, 488; *Dalegrove Pty Ltd v Isles Parking Station Pty Ltd* (1988) 12 NSWLR 546, 55; *Ashmore Developments Pty Ltd v Eaton* [1992] Qd R 1.

²⁰⁶² *Caerns Motor Services Ltd v Texaco Ltd* [1994] 1 WLR 1249, 1226; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 162].

²⁰⁶³ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15 163].

²⁰⁶⁴ C.f. *Holmes v Great Northern Railway Co* [1900] 2 QB 409; *Re King (Deceased)* [1963] Ch 459.

²⁰⁶⁵ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.120].

²⁰⁶⁶ *Atkin v Rose* [1923] 1 Ch 522, 538-549.

²⁰⁶⁷ *Re King* [1963] Ch 459.

²⁰⁶⁸ (2005) V ConvR 54-708; note that the Victorian provision (*Property Law Act 1958* (Vic) s 141) is cast in almost identical terms as section 117 of the PLA.

impliedly excludes the operation of the provision, and operated as an equitable assignment of those rights to the seller.²⁰⁶⁹ This principle has been acknowledged in the Queensland case of *Ashmore v Eaton Development Pty Ltd*²⁰⁷⁰ although the contracting out was not effective in that case.

The Centre is of the view that it is appropriate for the section to remain subject to a contrary intention and that this should be expressly stated in any amendments to the section.

129.1.2. Section 117 and guarantees

Previously, where the performance of the lease was guaranteed by another party, the common law position was that this benefit was collateral to the agreement and did not relate to the land.²⁰⁷¹ Therefore, upon assignment of the reversion, the assignee could not benefit from the guarantee unless it was specifically assigned by deed to the assignee.

The High Court later considered the issue in *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Cambelltown) Pty Ltd (Gumland)*.²⁰⁷² In *Gumland* the court held that ‘the covenants in the guarantees cannot be regarded as collateral obligations not affecting the land, and they run with the land.’²⁰⁷³ The court cited the decision of *Simmons v Lee*²⁰⁷⁴ in which the Queensland Court of Appeal held a covenant is not collateral if it benefits the holder of the reversion for the time being, and a guarantee of the lessee’s performance of the lease covenants which touch and concern the land are considered beneficial to the reversionary interest so the assignee of the reversion could sue the guarantors for non-performance by the lessee.²⁰⁷⁵

The decision also followed the United Kingdom decision of *P & A Swift Investments v Combined English Stores Group*²⁰⁷⁶ in which the court concluded that a ‘covenant by a surety that a tenant’s covenant which touches and concerns the land shall be performed and observed must itself be a covenant that touches and concerns the land.’²⁰⁷⁷

While the cases make it clear that section 117 of the PLA will currently apply to guarantees of covenants that touch and concern the land, (and will therefore be enforceable by the assignee of the reversion against the guarantors), if the recommendations are adopted, the distinction between covenants that ‘touch and concern’ the land and covenants that do not will be abolished. Therefore the Centre has made a recommendation that the amended section also expressly provide that assignees of the reversion have the same rights as against guarantors as the assignor of the reversion. The recommendations in this regard are set out below at paragraph 129.4.

²⁰⁶⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.30].

²⁰⁷⁰ [1992] 2 Qd R 1 (FC).

²⁰⁷¹ *Sacher Investments Pty Ltd v Forma Stereo Consultants Pty Ltd* [1976] 1 NSWLR 5, 11-12.

²⁰⁷² (2008) 234 CLR 237.

²⁰⁷³ *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Cambelltown) Pty Ltd* (2008) 234 CLR 237, [102].

²⁰⁷⁴ [1998] 1 Qd R 671.

²⁰⁷⁵ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.60].

²⁰⁷⁶ *P & A Swift Investments v Combined English Stores Group* [1989] AC 632.

²⁰⁷⁷ *P & A Swift Investments v Combined English Stores Group* [1989] AC 632, 637.

129.1.3. Section 117 and mortgagees

Section 117(2) of the PLA has been held to be a procedural provision only²⁰⁷⁸ and ‘does not create an independent substantive right to sue for rent.’²⁰⁷⁹ Therefore, a mortgagee in possession who consented to the lease does not have a right to sue the lessee for unpaid rent, although such a right may be contained in the mortgage instrument.²⁰⁸⁰

The courts have also extended this assessment to mortgagees suing guarantors and it has been held²⁰⁸¹ that the mortgagee had no independent right to sue the guarantor of a lessee in the absence of a legal assignment of the benefit of the guarantee from the mortgagor.²⁰⁸²

The Centre is of the view that this is appropriate and no amendments to change the section in this regard are recommended.

129.2. Issues with the section

129.2.1. Covenants that ‘touch and concern’ the land

The rules regarding whether or not covenants ‘touch and concern’ the land have been described as ‘arbitrary’²⁰⁸³ and ‘quite illogical’.²⁰⁸⁴ In *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd*,²⁰⁸⁵ the Victorian Court of Appeal, after a review of the cases, noted that the decisions about ‘touch and concern’ ‘illustrate the difficulty of discerning any clear principle or rationale which might be applied and the further difficulty of reasoning from analogy.’²⁰⁸⁶ Commentators note that the case law ‘can give little comfort to a person seeking to give firm advice on the question of whether [an assignee is bound by covenants in a lease]’ and further that ‘serious issues must be raised about the maintenance of such a doctrine which defies any logical explanation and seems to be decided on a case by case basis.’²⁰⁸⁷

In *Gumland*²⁰⁸⁸ the High Court confirmed that the principles in *P & A Swift Investment v Combined English Stores Group plc*²⁰⁸⁹ applied in Australia. A covenant will ‘touch and concern’ the land if:

²⁰⁷⁸ *Turner v Walsh* [1909] 2 KB 484, 494.

²⁰⁷⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.90].

²⁰⁸⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.90].

²⁰⁸¹ *Lensworth Properties Pty Ltd v Ontera Pty Ltd* (unreported, Qld Supreme Court, per Thomas J, 17 February 1994); followed in *Re FAI Leading Pty Ltd* [1993] 2 Qd R 482 where there was no assignment of the rights under the lease for the mortgagee to sue under its own name: Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.90].

²⁰⁸² Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.90].

²⁰⁸³ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [40.2500].

²⁰⁸⁴ *Grant v Edmondson* [1931] 1 Ch 1.

²⁰⁸⁵ (2012) 305 ALR 569.

²⁰⁸⁶ *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd* (2012) 305 ALR 569, [197].

²⁰⁸⁷ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [40.2500].

²⁰⁸⁸ (2008) 234 CLR 237.

²⁰⁸⁹ [1988] 3 WLR 313; [1988] 2 All ER 885 (HL).

NOT GOVERNMENT POLICY

- it effects the mode of occupation of the land, its nature, quality or value and not merely in a collateral way,²⁰⁹⁰ and
- when it was intended upon the proper construction of the express clauses in a lease, that the benefit of a covenant or covenants should be enforceable by the assignee of the lessor.²⁰⁹¹

Covenants that ‘touch and concern’ the land will bind the successors in title, whether or not this is express in the lease.²⁰⁹² Parties to a lease can agree that a particular covenant or covenants are personal. In that case those covenants do not run with the land, notwithstanding they may indeed ordinarily ‘touch and concern’ the land in the absence of such an express agreement.²⁰⁹³ It is therefore critical to construe the lease agreement when considering whether or not successors are bound.²⁰⁹⁴

Lessee’s covenants that have been held to ‘touch and concern’ the land include covenants to:

- pay rent, rates, taxes or other charges;²⁰⁹⁵
- repair buildings and fixtures;²⁰⁹⁶
- keep the premises clean;²⁰⁹⁷
- insure against fire;²⁰⁹⁸
- expend certain moneys on improvement of the premises each year;²⁰⁹⁹ and
- not to assign the lease without the consent of the landlord.²¹⁰⁰

Lessor’s covenants that have been held to ‘touch and concern’ the land include covenants:

- to supply water to the land;²¹⁰¹
- not to build on adjoining land;²¹⁰²
- to maintain parking areas for use with the leased premises;²¹⁰³ and
- to renew a lease if the tenant exercises an option to renew.²¹⁰⁴

²⁰⁹⁰ *Rogers v Hosegood* [1900] 2 Ch 388, 395.

²⁰⁹¹ *Spencer’s Case* (1583) 5 Co Rep 16a.

²⁰⁹² *Property Law Act 1974* (Qld) s 53.

²⁰⁹³ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [40.2500]; *Simmons v Lee* [1998] 2 Qd R 671.

²⁰⁹⁴ *Harbour Estates Ltd v HSBC Bank* [2004] 3 All ER 1057, 1073 [37]; see also ‘Does a break clause pass on assignment of a lease?’ (2005) 79 ALJ 331.

²⁰⁹⁵ *Wix v Rutson* [1899] 1 QB 474.

²⁰⁹⁶ *Williams v Earle* (1868) LR 3 QB 739.

²⁰⁹⁷ *Barnes v City of London Real Property Company* [1918] 2 Ch 19, 33 per Sargent J.

²⁰⁹⁸ *Vernon v Smith* (1821) 106 ER 1094.

²⁰⁹⁹ *Moss’ Empires Ltd v Olympia (Liverpool) Ltd* [1939] AC 544, 511 per Lord Atkin who reasoned that this was more than an obligation or collateral promise by the lessee to pay money.

²¹⁰⁰ *Williams v Earle* (1868) LR 3 QB 739; *Goldstein v Sanders* [1915] 1 Ch 549.

²¹⁰¹ *Jourdain v Wilson* (1821) 106 ER 935.

²¹⁰² *Ricketts v Enfield Churchwardens* [1909] 1 Ch 544.

²¹⁰³ *Hurlfite Pty Ltd v Coles Myer Ltd* (1990) NSW ConvR 55-515.

²¹⁰⁴ *Dalton v City Freehold Investments Co Ltd* (1888) 9 LR (NSW) (Eq) 129; *Merchantile Credits Ltd v Shell Co of Aust Ltd* (1976) 136 CLR 326, 336.

Covenants that have been held to be personal and therefore do not run with the land include:

- an option to purchase the premises;²¹⁰⁵
- an agreement for the lessor to purchase the lessee's fixtures;²¹⁰⁶ and
- payment of money at the end of the lease.²¹⁰⁷

129.2.2. Inconsistent drafting

The other central problem with section 117 of the PLA is the complex and outdated drafting. The section contains contradictory language. In section 117(1), it is suggested that the 'reversionary estate' can only refer to the legal estate²¹⁰⁸ and therefore the provision cannot be relied upon by the assignee of the reversion until the interest is recorded on the freehold land register, subject to the lease. Section 117(2) uses different language and refers to the assignee of the reversion as 'the person from time to time entitled ... to the income ... of the land leased.' Finally, section 117(3) uses different language again and refers to the 'person [who] becomes entitled by conveyance or otherwise...'.²¹⁰⁹

Commentators suggest that the difficulty with having these three different descriptions of the assignee of the reversion arises in the period between settlement of the sale and recording of the interest on the freehold land register.²¹¹⁰ During this time, the assignee's interest is equitable only. The problem is described thusly:

It is possible to argue that an equitable transferee does not become entitled to the rent or the benefit of covenants until an attornment notice is received by the lessee, before which time a lessee could only obtain a proper discharge for rent from the transferor. The lessee may not have any other notice of the fact of the transfer of the reversion.²¹¹¹

If the attornment notice is served then arguably the assignee of the reversion has an estate in the reversion and can rely on section 117 of the PLA, notwithstanding it is not yet recorded on the freehold land register.²¹¹² Commentators reason that it then follows that 'an equitable transferee of the freehold, subject to the lease, who is entitled to the income from the whole of the property could take action to enforce any covenant from the time the so became entitled.'²¹¹³

²¹⁰⁵ *Sandhurst Trustees Ltd v Australian Country Cinemas Pty Ltd* (2006) Q ConvR 54-658; [2006] QSC 165; *Woodall v Clifton* [1905] 2 Ch 257, 279.

²¹⁰⁶ *Lee v Close* (1870) 10 SCR (NSW) 86; *Cheyne v Moses* [1919] St R Qd 74.

²¹⁰⁷ *Re Hunter's Lease* [1942] 1 Ch 124; *Jodaway Pty Ltd v Langton* [2004] 2 Qd R 272.

²¹⁰⁸ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.120].

²¹⁰⁹ *Conveyance* is defined as 'a transfer of an interest in land, and any assignment... or other assurance of property' in Sch 6 Dictionary *Property Law Act 1974* (Qld).

²¹¹⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.120].

²¹¹¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.120].

²¹¹² *Dalegrove Pty Ltd v Isles Parking Station Pty Ltd* (1988) 12 NSWLR 546, 550; *Waterhouse v Waugh* [2003] NSWCA 139, [23]-[25].

²¹¹³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.120]; *Baby Zone (Aust) Pty Ltd v Kiera Street Ventures Pty Ltd* [2016] NSW ConvR 56-368.

The conclusion drawn is that, for the section to operate properly, the drafting needs to be consistent so that the assignee of the reversion can rely upon the section once they have the legal estate.²¹¹⁴

129.3. Other jurisdictions

129.3.1. Australia

New South Wales,²¹¹⁵ Victoria,²¹¹⁶ Western Australia²¹¹⁷ and Tasmania²¹¹⁸ have provisions cast in similar terms to the PLA. South Australia does not have an equivalent provision.

129.3.2. United Kingdom

The *Law of Property Act 1925* (UK) is the legislation upon which the Australian provisions are modelled. Section 141 of that Act is drafted in almost identical terms as the PLA and other Australian jurisdictions.

129.3.3. New Zealand

The *Property Law Act 2007* (NZ) sections 231 to 234, amendments made as part of the overhaul of the property law in 2007,²¹¹⁹ operate in a similar way to the PLA sections 117 and 118, with some differences that are described below.

Section 232 sets out the circumstances in which section 233 will apply. The section reads:

- 232 Rights under lease to which section 233 applies**
- (1) Section 233 applies to all or any of the following rights under a lease:
 - (a) the right to receive the rent payable;
 - (b) the right to enforce every covenant of the lessee, including a covenant relating to a subject matter that was not in existence when the covenant was made;
 - (c) the right to enforce any guarantee of the performance of all or any covenants of the lessee;
 - (d) all rights and remedies of the lessor.
 - (2) In subsection (1)(b), the reference to every covenant of the lessee is,—
 - (a) for a lease that comes into operation before 1 January 2008, a reference to every covenant of the lessee that refers to the subject matter of the lease; and
 - (b) for a lease that comes into operation on or after that date, a reference to every covenant of the lessee, whether it refers to the subject matter of the lease or not.
 - (3) In subsection (1)(d), the reference to the rights and remedies of the lessor under a lease includes a reference to—
 - (a) the right to give any notice under the lease; and
 - (b) the right to take advantage of any condition of the lease; and
 - (c) the right to re-enter or apply for an order of possession of the land; and
 - (d) the right to cancel the lease.

Section 233 operates to transfer the rights under a lease to the assignee of the reversion. The section is an amended form of its predecessor, section 112 of the 1952 Act. The Law Commission (NZ) notes that the ‘distinction between covenants relating to the subject matter of the land [‘touch and

²¹¹⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.117.120].

²¹¹⁵ *Conveyancing Act 1919* (NSW) s 117.

²¹¹⁶ *Property Law Act 1958* (Vic) s 141.

²¹¹⁷ *Property Law Act 1969* (WA) s 77.

²¹¹⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 10.

²¹¹⁹ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994).

concern'] of the lease and purely personal covenants is dispensed with'²¹²⁰ after the commencement of the new Act. In consequence, the section expressly provides the rights of assignees of the reversion to enforce any guarantee of the lease as is the situation at present. The section reads:

Section 233 Benefit of lessee's covenants to run with reversion

- (1) If the reversion expectant on the lease ceases to be held by the lessor (whether by transfer, assignment, grant, operation of law, or otherwise), the rights to which this section applies—
 - (a) run with the reversion; and
 - (b) may be exercised by the person who is from time to time entitled to the income of the land, whether or not the lessee has acknowledged that person as lessor (that is, with or without attornment by the lessee).
- (2) Subsection (1) applies unless a contrary intention appears from the lease or from another circumstance.

Section 234 sets out when the rights in covenants may be exercised and is similar in operation to section 117(3) of the PLA. The section reads:

Section 234 When rights arising from covenants may be exercised

- (1) A person who is entitled under section 233(1) to exercise a right to which that section applies—
 - (a) may exercise that right even though the basis for doing so first arose or accrued before the time at which that person became so entitled; and
 - (b) is the only person entitled to exercise that right.
- (2) Subsection (1)(a) applies unless—
 - (a) the right was waived; or
 - (b) the lessee was released from the obligation to which the right relates.
- (3) Subsection (1)(b) applies unless the person who becomes entitled to exercise the right has agreed to the exercise of that right by some other person (in which case the right may be exercised by the other person to the extent so agreed).

129.4. Recommendation

The Centre recommends that the effect of section 117 be maintained, but the provision be amended so that all covenants in a lease, unless they are expressed to be personal, will run with the land for the benefit of the assignee of the reversion. This means that the doctrine of 'touch and concern' the land will no longer be the test as to whether covenants are enforceable by successors in title. As stated above at paragraph 129.2.1, the concept of 'touch and concern' is a difficult one to describe with any certainty and has been criticised. The Centre is of the view that the doctrine of 'touch and concern' should be abolished (as it has been in New Zealand) by amending section 117 to state that all covenants in leases run with the land upon assignment of the reversion, unless expressed to be personal.

The recommendation to dispense with the concept of 'touch and concern' is similar to the recommendation the Centre has made with respect to the continuing liability of an assignor of a lease (discussed at paragraph 133) and the enforcement of covenants in registered easements (discussed at paragraph 56).

The Centre notes that amending the provision to dispense with the 'touch and concern' requirement will alter the law with respect to the enforcement of guarantees. As discussed above at paragraph 129.1.2, guarantees are enforceable by the assignee of the reversion because they guarantee the

²¹²⁰ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994), 363.

performance of a covenant that ‘touches and concerns’ the land. If the ‘touch and concern’ requirement is removed then the position with respect to guarantees becomes uncertain. The Centre therefore recommends that the amended provision expressly provide that the right to enforce a guarantee of the performance of a lessee’s covenant will run with the land so that the assignee of the reversion can seek to recover damages from the guarantor.

The amended section should also clearly state that the section operates subject to a contrary intention. This is achieved in the proposed draft amendments by the inclusion of the phrase ‘applies unless the covenant is expressed to be personal’ and ‘this section is expressed not to apply in whole or in part.’ If parties wanted to assign the benefit of a personal covenant to the assignee of the reversion, a tripartite Deed of Covenant would have to be signed between the assignor of the reversion, the assignee of the reversion and the lessee, as is the case at present.

The changes to the application of the section should apply upon commencement of the section and the Centre does not suggest the amendments should be applied retrospectively. If the recommended changes are adopted, practitioners will be able to draft lease covenants with the secure knowledge that, unless expressed to be personal, or unless the section is expressed not to apply in whole or in part, those covenants will run with the land. This will provide certainty for both the lessees and lessors and obviate enquiry as to whether any covenant ‘touches and concerns’ the land.

The Centre further recommends redrafting the section to modernise the language and provide clarity around the operation of the section. The section should apply to covenants in leases upon registration. Short leases, which do not require registration, are protected by section 185 of the *Land Title Act 1994* (Qld).

The provisions of the New Zealand legislation, set out above at paragraph 129.3.3, provide a starting point for the amended provisions.

RECOMMENDATION 126. Section 117 should be retained with modernised language and amended to remove inconsistencies and provide that all covenants run with the land unless expressed to be personal.

For example, following the approach in the New Zealand, the provisions could be drafted in the following manner:

Section [1] Rights under lease to which section [3] applies

- (1) Section [2] applies to all or any of the following rights under a lease:
 - (a) the right to enforce every covenant of the lessee;
 - (b) the right to enforce any guarantee of the performance of all or any covenants of the lessee; and
 - (c) all rights and remedies of the lessor.
- (2) This section applies to all leases entered into after the commencement of this Act.

Section [2] Benefit of lessee’s covenants to run with reversion

- (1) If the reversion expectant on the lease ceases to be held by the lessor whether by transfer or assignment, the rights to which this section applies—
 - (a) run with the reversion; and

- (b) may be exercised by the person who is from time to time entitled to the income of the land, whether or not the lessee has acknowledged that person as lessor (that is, with or without attornment by the lessee).
- (2) Subsection (1) applies unless:
 - (a) the covenant is expressed to be personal; or
 - (b) this section is expressed not to apply in whole or in part.

Section [3] When rights arising from covenants may be exercised

- (1) A person who is entitled under section [2](1) to exercise a right to which that section applies—
 - (a) may exercise that right even though the basis for doing so first arose or accrued before the time at which that person became so entitled; and
 - (b) is the only person entitled to exercise that right.
- (2) Subsection (1)(a) applies unless—
 - (a) the right was waived; or
 - (b) the lessee was released from the obligation to which the right relates.
- (3) Subsection (1)(b) applies unless the person who becomes entitled to exercise the right has agreed to the exercise of that right by some other person (in which case the right may be exercised by the other person to the extent so agreed).

130. Section 118 – Obligation of lessor’s covenants to run with the reversion

118 Obligation of lessor’s covenants to run with reversion

- (1) The obligation under a condition or of a covenant or other obligation entered into by a lessor touching and concerning the land shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts of the reversionary estate, despite severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise, and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation may be taken advantage of and enforced against any person so entitled.
- (2) This section applies to—
 - (a) leases made after the commencement of this Act; and
 - (b) leases made before the commencement of this Act so far only as relates to breaches of covenant committed after the commencement of this Act.
- (3) This section takes effect without prejudice to any liability affecting a covenantor or the covenantor’s estate.

Section 118 of the PLA is complementary to section 117, discussed above at paragraph 129. The purpose of the section is to modify the common law rules that say that covenants in a lease do not run with the reversion. Section 118 of the PLA gives lessees and their assigns the same rights and remedies against the assignee of the reversion as they might have had against the original lessor.²¹²¹ As with section 117 of the PLA, section 118 only applies to those covenants that ‘touch and concern’ the land.²¹²²

130.1. Issues with the section

130.1.1. Covenants that ‘touch and concern’ the land

The doctrine of ‘touch and concern’ is discussed in detail above at paragraph 129.2.1 and the same principles apply to the rights of lessors upon assignment of the reversion. For example, in *Sandhurst Trustees Ltd v Australian Country Cinemas Pty Ltd*²¹²³ Chesterman J held that a covenant in a lease that gave the lessee the first right of refusal to purchase the land did not ‘touch and concern’ the land so that the lessee was unable to enforce the covenant as against the assignee of the reversion.²¹²⁴

Another example is found in the case of *Specialist Diagnostic Services Pty Ltd v Healthscope Ltd*²¹²⁵ where the lease contained a covenant that the lessor would not conduct a business of a similar nature, or grant a licence for any other person to do so. The lessor assigned the reversion and the court held that the covenant, which amounted to a restraint of trade, did ‘touch and concern’ the land and the assignee of the reversion was therefore bound by it.

²¹²¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.118.30].

²¹²² *Barnes v City of London Real Property Company* [1918] 2 Ch 19.

²¹²³ [2006] QSC 165; (2006) Q ConvR 54-658.

²¹²⁴ *Sandhurst Trustees Ltd v Australian Country Cinemas Pty Ltd* [2006] QSC 165, 28; (2006) Q ConvR 54-658, 28.

²¹²⁵ (2012) VR 1.

As discussed above at paragraph 129.2.1, the doctrine of ‘touch and concern’ is a difficult concept to apply with any certainty and the enforceability of covenants, upon assignment of the reversion, is decided on a case-by-case basis. The Centre is of the view that this uncertainty is unsatisfactory and should be addressed by amending section 118 of the PLA. The recommendations for section 118 are set out below at paragraph 130.3.

130.1.2. Continuing liability of the lessor/assignor of the reversion

In the United Kingdom there is a view that upon assignment of the reversion, while the assignor of the reversion loses any rights under the lease in favour of the assignee, the lessee is able to sue for breaches of the lease, even after the assignment of his interest in the lease.²¹²⁶ However, in *Duncliff v Caerfelin Properties Ltd*²¹²⁷ Garland J held that the right of a lessee to sue for a breach of the covenant to repair before the assignment of the reversion was lost upon assignment of the reversion.

130.2. Other jurisdictions

130.2.1. Australia

New South Wales,²¹²⁸ Victoria,²¹²⁹ Western Australia²¹³⁰ and Tasmania²¹³¹ have provisions cast in similar terms to the PLA. South Australia does not have an equivalent provision.

130.2.2. United Kingdom

The *Law of Property Act 1925* (UK) is the legislation upon which the Australian provisions are modelled. Section 142 of that Act is drafted in almost identical terms as the PLA and other Australian jurisdictions.

130.2.3. New Zealand

The *Property Law Act 2007* (NZ) section 231 was included as part of the overhaul of the property law in 2007.²¹³² The section reads:

231 Burden of lessor’s covenants to run with reversion

- (1) If the reversion expectant on a lease ceases to be held by the lessor (whether by transfer, assignment, grant, operation of law, or otherwise), the obligations imposed by every covenant of the lessor—
 - (a) run with the reversion; and
 - (b) may be enforced by the person who is from time to time entitled to the leasehold estate or interest against the person who is from time to time entitled to the reversion.
- (2) Subsection (1) applies unless a contrary intention appears from the lease or from another circumstance.
- (3) In subsection (1), the reference to every covenant of the lessor is,—
 - (a) for a lease that comes into operation before 1 January 2008, a reference to every covenant of the lessor that refers to the subject matter of the lease; and
 - (b) for a lease that comes into operation on or after that date, a reference to every covenant of the lessor, whether it refers to the subject matter of the lease or not.

²¹²⁶ *City Metropolitan Properties Ltd v Greycroft Ltd* [1987] 3 All ER839, 840-842.

²¹²⁷ [1989] 2 EGLR 38.

²¹²⁸ *Conveyancing Act 1919* (NSW) s 118.

²¹²⁹ *Property Law Act 1958* (Vic) s 142.

²¹³⁰ *Property Law Act 1969* (WA) s 78.

²¹³¹ *Conveyancing and Law of Property Act 1884* (Tas) s 11.

²¹³² Law Commission (NZ), *A New Property Law Act Report No. 29* (1994).

Section 231 has a similar effect to section 118 of the PLA. However, unlike section 118 of the PLA, section 231 operates to impose the obligations of covenants in a lease upon the assignee of the reversion so that the lessee can enforce all of the lease covenants against successors in title of the original lessor.²¹³³

The predecessor of this section, section 113 of the 1952 Act, required the covenants to relate to the subject matter of the lease before they would run with the reversion. The amended section 'applies to all covenants, including those of a purely personal nature, unless it appears from the lease itself that a covenant is not to run.'²¹³⁴ This is set out at subsection (2), which states that that subsection (1) applies unless the contrary intention appears, either in the lease or by other circumstances. Therefore, a lease could specify or imply that certain covenants are personal to the parties and these would not fall within the operation of section 231.

Subsection (3) specifies that only leases executed after the new Act came into force would be subject to this new position.

This section mirrors the effect of section 223 of the New Zealand Act (equivalent to section 117 of the PLA) which is discussed in detail above at paragraph 129.3.3.

130.3. Recommendation

The Centre recommends that the effect of section 118 be maintained, but the provision be amended so that all covenants in a lease, unless they are expressed to be personal, will run with the land upon assignment of the reversion. This means that the doctrine of 'touch and concern' the land will no longer be the test as to whether covenants are enforceable against successors in title of the reversion.

As stated above at paragraph 129.2.1, the concept of 'touch and concern' is a difficult one to describe with any certainty and has been criticised. The Centre is of the view that the doctrine of 'touch and concern' should be abolished by amending section 118 to state that all covenants in leases run with the land upon assignment of the reversion, unless expressed to be personal.

The recommendation to dispense with the concept of 'touch and concern' is similar to the recommendation the Centre has made with respect to the continuing liability of an assignor of a lease (discussed at paragraph 133) and the enforcement of covenants in registered easements (discussed at paragraph 56).

The amended section should also clearly state that the section operates subject to a contrary intention. This is achieved in the proposed draft amendments by the inclusion of the phrase 'applies unless the covenant is expressed in the lease to be personal.'

The changes to the application of the section should apply upon commencement of the section and the Centre does not suggest the amendments should be applied retrospectively. If the recommended changes are adopted, practitioners will be able to draft lease covenants with the secure knowledge that, unless expressed to be personal, those covenants will run with the land. This will provide certainty for both the lessees and lessors.

²¹³³ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994), 362.

²¹³⁴ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994), 362.

The Centre further recommends redrafting the section to modernise the language and provide clarity around the operation of the section. The section should apply to covenants in leases upon registration. Short leases, which do not require registration, are protected by section 185 of the *Land Title Act 1994* (Qld).

The provisions of the New Zealand legislation, set out above at paragraph 130.2.3, provide a starting point for the amended provisions.

RECOMMENDATION 127. Section 118 should be amended to modernise the language, and aid in interpretation of the section. The amended provisions should remove the ‘touch and concern’ requirement and stipulate that all covenants in leases run with the reversion, unless expressed to be personal.

For example, following the position in the New Zealand, section 118 could be drafted in the following manner:

Section [118] Burden of lessor’s covenants to run with reversion

- (1) If the reversion expectant on a lease ceases to be held by the lessor (former lessor) whether by transfer or assignment the obligations imposed by every covenant of the lessor –
 - (a) run with the reversion; and
 - (b) may be enforced by the person who is from time to time entitled to the leasehold estate or interest against the person who is from time to time entitled to the reversion.
- (2) Subsection (1) applies unless:
 - (a) the covenant is expressed in the lease to be personal; or
 - (b) the section is expressed in the lease not to apply in whole or in part.
- (3) This section applies to all leases entered into after the commencement of this Act.
- (4) The former lessor remains liable for all breaches of the lease covenants committed by the former lessor.

131. Sections 119 and 120 – Waiver of a Covenant in a Lease and Effect of Licences Granted to Lessees

131.1. Overview and purpose

119 Waiver of a covenant in a lease

- (1) Where any actual waiver by a lessor or the persons deriving title under the lessor of the benefit of any covenant, obligation, or condition in any lease is proved to have taken place in any particular instance, such waiver shall not be deemed to extend to any instance, or to any breach of covenant, obligation, or condition save that to which such waiver specially relates, nor operate as a general waiver of the benefit of any such covenant, obligation, or condition.
- (2) Unless a contrary intention appears, this section applies and extends to waivers effected after 28 December 1867.

120 Effect of licences granted to lessees

- (1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only –
 - (a) to the permission actually given; or
 - (b) to the specific breach of any provision or covenant referred to; or
 - (c) to any other matter specifically authorised to be done by the licence;
 and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence.
- (2) Despite any such licence –
 - (a) all rights under covenants, obligations, and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, obligation, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and
 - (b) the condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done.
- (3) Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted –
 - (a) to any 1 of 2 or more lessees to do any act, or to deal with the lessee’s equitable share or interest; or
 - (b) to any lessee, or to any 1 of 2 or more lessees to assign or underlet part only of the property, or to do any act in respect of part only of the property;
 the licence does not operate to extinguish the right of entry in case of any breach of covenant, obligation, or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property (as the case may be), in respect of such shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence.
- (4) This section applies to licences granted after 28 December 1867.

Section 119 of the PLA has the effect that a waiver of any covenant, obligation or condition in a lease in one instance will not operate as a waiver of all future breaches of the relevant covenant, obligation or condition. The effect of the actual waiver by the lessor under section 119 of the PLA is limited to the breach to which it specifically relates. Section 120 of the PLA is related but refers to the grant by the lessor of a ‘licence’ to breach any covenant or provision. The effect of section 120 is that a lessor is not prevented from taking action for a future breach of a covenant or condition which is

‘unauthorised by the relevant licence’. In that situation, the lessor retains his or her full powers in relation to any subsequent breach of the covenant or condition.²¹³⁵

Both sections 119 and 120 of the PLA reverse the position at common law which originated from *Dumpor’s Case*.²¹³⁶ The doctrine set out in that case was that a licence to assign or sub-let in one instance operated as a ‘total waiver of the particular condition against assigning or subletting’.²¹³⁷ The relevant condition was viewed as being an ‘entire thing’ that was not divisible. This meant that once the condition was breached, it was always breached and not ‘capable of being waived or released as to part only.’²¹³⁸ In *Dumpor’s Case* the lease condition in question provided that the lessee and his assigns should not ‘alienate without licence.’²¹³⁹ The court decided that the licence to assign provided by the lessor to the original lessee ‘discharged the condition’ which had the effect that there was no requirement for a licence for any assignments that were made subsequently.²¹⁴⁰

Section 120(3) of the PLA specifically relates to the power of re-entry where the lessee assigns or sublets the property without a licence and a licence is granted to some of the co-lessees but not to all of them. The section preserves the right of re-entry in relation to a breach of a covenant by the lessees who do not have the benefit of the licence. This section addresses the common law position which provides:

A single licence to assign or sublet, whether general or particular, operated as a total waiver of the condition in the lease against assigning or subletting. It was considered that the condition was entire and any partial waiver or release, for example, in favour of one or two lessees only, destroyed the effect of the condition.²¹⁴¹

The QLRC in its report on the proposed Property Law Bill in 1974 discussed the proposed sections 119 and 120 and made the following comment:

²¹³⁵ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.120.30].

²¹³⁶ (1603) 4 Co Rep 119b; 76 ER 1110.

²¹³⁷ V.G Wellings and G.N Huskinson, *Woodfall’s Law of Landlord and Tenant*, (Lawbook Co, 28th ed, 1978) 481 [1-1176].

²¹³⁸ V.G Wellings and G.N Huskinson, *Woodfall’s Law of Landlord and Tenant*, (Lawbook Co, 28th ed, 1978) 481 [1-1176] and Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange 2011) 201 referring to the comment by Lord Eldon in *Brummell v MacPherson* (1807) 14 Ves 173. Although describing the doctrine in this way, Lord Eldon still followed it as the ‘law of the land’. The rule in relation to conditions was not reversed in England until 1859 and for covenants in 1860. For further commentary on the history of the doctrine see Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange 2011) 201-202.

²¹³⁹ Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange 2011) 201.

²¹⁴⁰ Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange 2011) 201.

²¹⁴¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.120.30].

Another consequence of the rule in *Dumpor's Case*,... that conditions were not severable, was that waiver of a condition was treated as a waiver of all future breaches...and this applied also to express licence. This rule was overcome by ss124 and 125 of The Distress Replevin and Ejectment Act (which was based on English legislation passed in 1859 and 1860) and which came into force on 28th December, 1867.²¹⁴²

The QLRC's commentary in relation to the proposed clause 120 is brief and simply notes that:

This clause provides for the case of licences mentioned above.²¹⁴³

A waiver of a breach of covenant or condition for the purposes of sections 119 and 120 does not require a formal written document.²¹⁴⁴ Conduct can be sufficient to establish waiver as explained below:

When a breach of condition sufficiently serious to be a ground of forfeiture of the lease occurs, the lessor is put to his election whether or not to act upon it and bring about the forfeiture, or to continue to recognise the lease. If the landlord elects to do nothing, taking the latter course, the breach is said to have been waived. One important element of waiver is proof of knowledge of the breach causing forfeiture at the time when the acts consistent with continuing the lease are alleged to have occurred. Waiver implies the commission of some positive act, with knowledge of the breach, which unequivocally affirms the lessor's intention to treat the lease as continuing.²¹⁴⁵

Section 119(4) expressly provides that the section applies and extends to waivers effected after 28 December 1867, unless a contrary intention appears.²¹⁴⁶ Similarly, a licence granted to a lessee under section 120(1) is limited in its application to the actual breach or permission given, unless otherwise expressed in the licence.

131.2. Issues with the sections

131.2.1. Are the sections superseded by modern commercial leasing practice?

Sections 119 and 120 will not apply to 'residential tenancy agreements' under the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld).²¹⁴⁷ Accordingly, the provisions are directed at other lease categories apart from residential tenancies. The terms of modern commercial leases usually address issues associated with waiver of covenants and licences to assign. However, where the issue is not expressly addressed in the lease, sections 119 and 120 of the PLA provide clarification in relation to the effect of waivers on future breaches of covenants or conditions which avoids any uncertainty (if any exists in the first place).

²¹⁴² 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) 85.

²¹⁴³ 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) 85.

²¹⁴⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.119.30].

²¹⁴⁵ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.119.30].

²¹⁴⁶ The significance of the 1867 date is that The Distress Replevin and Ejectment Act (Qld) came into force on that date.

²¹⁴⁷ *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) s 27(1).

131.2.2. Uncertainty regarding the scope and purpose of section 120(3) of the PLA

Section 120(3) of the PLA appears to cover the following situation:

- Lessor A enters into a lease with lessee B, C, D and E. The lease contains a term which provides for re-entry if the lessee assigns or sublets without a licence.
- Lessor A grants a licence to lessee B and C to assign part of the property;
- Lessee D and E are not granted a licence and breach the covenant by assigning part of the property;
- Lessor A retains his or her right of entry in relation to the property assigned by Lessee D and E as the assignment was not the subject of a licence.

Essentially, under section 120(3), consent to, or a licence for, a breach which is provided to one or more lessees, does not operate to excuse breaches by any of the other lessees who have not been provided with consent or a 'licence'.²¹⁴⁸ The application of the provision appears to be quite limited and it is not clear how often or even if, such a situation might now arise in practice. Further, if it does arise, it is likely that the terms of lease agreement would address it. Searches of case law databases have not identified any cases which deal with this section or its equivalent in other Australian jurisdictions. The purpose of the provision and its current utility is unclear.

131.2.3. Transparency of legal position if repealed

Both sections 119 and 120 (along with the earlier iterations of the provisions) were intended to overcome the effect of the decision in *Dumpor's Case* which was decided in 1603. It appears that despite concerns that the doctrine in that case was 'extraordinary' and unreasonable it was followed as law in subsequent cases²¹⁴⁹ until the rule was eventually abrogated by statute.²¹⁵⁰ If sections 119 and 120 of the PLA are repealed, the general position is that the rule in *Dumpor's Case* is not revived. However, repeal of the provisions potentially means that the legal position in relation to the abrogation of the rule in *Dumpor's Case* is not transparent. Individuals seeking to determine the position in relation to the rule, in the absence of lease terms dealing with the issue, would need to track back through legislation to identify the repealed provision and understand the effect of section 20 of the *Acts Interpretation Act 1954* (Qld). This adds cost, red tape and reduces transparency of the legal position which raises broader issues of access to justice.

131.2.4. The law has evolved since *Dumpor's Case*

A separate issue relates to the extent to which the legal position has evolved since *Dumpor's Case*. For example, Knox CJ in the High Court decision of *Mulcahy v Hoyne*²¹⁵¹ indicated that a waiver of a covenant for the future, outside the legislation, would have to be in the form of a release or a variation of the contract supported by consideration. The comment was made in the context of one of the claims by the respondent in the proceedings that the lessor had consented to the respondent doing the acts which constituted a breach of covenant and thereby waived the benefit of the covenant.

²¹⁴⁸ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013* (LexisNexis, 2012) 212 [32640].

²¹⁴⁹ See for example *Brummell v MacPherson* (1807) 14 Ves 173 referred to in Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange 2011) 201.

²¹⁵⁰ The rule in *Dumpor's Case* was reversed initially in England in 1859 in relation to conditions (*Law of Property (Amendment) Act 1859*) and then in 1860 (*Law of Property (Amendment) Act 1860*) for covenants.

²¹⁵¹ (1925) 36 CLR 41.

These comments by Knox J were referred to in the case of *JDM Investments Pty Ltd v Todbern Pty Ltd*²¹⁵² in the context of section 120 of the *Conveyancing Act 1919* (NSW). Hamilton J in that case, however, noted that each case ‘must be determined according to its own facts.’²¹⁵³ Court decisions relating to breaches of contract conditions tend to suggest that a contravention of a condition in one instance does not automatically operate to then waive any rights available in relation to future breaches.²¹⁵⁴ These ordinary contract law principles will apply to leases.²¹⁵⁵

131.3. Other jurisdictions

131.3.1. Australia

Most of the other States and Territories have equivalent provisions to sections 119 and 120 of the PLA. A summary of the legislative arrangements in the other jurisdictions is set out below in Table 4. Although the provisions in the other jurisdictions are similar, there are some differences in the manner in which the sections are drafted. For example, both the Northern Territory and the Australian Capital Territory sections are drafted in plain language and in a concise form.

Table 4 – Waiver arrangements in other Australian States and Territories

Jurisdiction	Legislation	Section 119 equivalent?	Section 120 equivalent?
Vic	<i>Property Law Act 1958</i> (Vic)	Yes – s 148	Yes – s 143
NSW	<i>Conveyancing Act 1919</i> (NSW)	Yes – s 120	Yes – ss 123 & 124
ACT	<i>Civil Law (Property) Act 2006</i> (ACT)	Yes – s 423	Yes – ss 420 & 421
WA	<i>Property Law Act 1969</i> (WA)	Yes – s 73	Yes – s 79
NT	<i>Law of Property Act</i> (NT)	Yes – s 132	Yes – s 133
Tas	<i>Conveyancing and Law of Property Act 1884</i> (Tas)	-	Yes – s 16
SA	<i>Landlord and Tenant Act 1936</i> (SA)	-	Yes – ss 47 & 48

131.3.2. New Zealand

Section 273 of the *Property Law Act 2007* (NZ) has a similar effect to sections 119 and 120(1) of the PLA. Although the section refers to a lease, it is deemed to also cover a licence, with any necessary modifications by virtue of section 206 of that Act. The Explanatory Note to the Property Law Bill when

²¹⁵² *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349 at [43]. Hamilton J noted that each case must be determined according to its own facts [44]. Further, that ‘Acts to constitute a waiver must be clear.’

²¹⁵³ *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349, [43] and [44]. See also *Tropical Traders Ltd v Goonan* (1963) 111 CLR 41, 52-53 where the acceptance of late payment by a seller under an instalment contract on 3 occasions where time was of the essence did not mean the seller had waived the requirement that time continued to be of the essence.

²¹⁵⁴ See for example *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349, [43] and [44]. See also *Tropical Traders Ltd v Goonan* (1963) 111 CLR 41, 52-53. For a detailed discussion of the concept of ‘waiver’ and its development in Australia see Jeremy Stoljar, ‘The Categories of Waiver’ (2013) 87 *Australian Law Journal* 482.

²¹⁵⁵ See *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; *Shevill v Builders Licensing Board* (1982) 149 CLR 620; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15187].

discussing the proposed provision indicated that the provision 'carries over the substance of section 115 of the 1952 Act.'²¹⁵⁶

Sections 206, 207 and 273 of the *Property Law Act 2007* (NZ) provide:

273 Effect of waiver

- (1) A waiver by a lessor of the benefit of any covenant or condition of a lease –
 - (a) extends only to the instance or breach to which the waiver particularly relates; and
 - (b) is not to be taken as a general waiver.
- (2) Subsection (1) applies unless the contrary intention appears.

206 Application of Part

- (1) ...
- (3) Sections 214, 243 to 264, and 273 apply, with all necessary modifications, to a licence as if every reference in those sections –
 - (a) to a lease were a reference to a licence;
 - (b) to a lessee were a reference to a licensee; and
 - (c) to a lessor were a reference to a licensor.
- (4) However, sections 214, 243 to 264, and 273 do not confer on a licensee any estate or interest in land.

207 Interpretation

In this Part, unless the context otherwise requires, -

...

Licence means a licence to occupy land in consideration of –

- (c) rent; or
- (d) a payment in the nature of rent; or
- (e) a payment in kind of any form...

131.4. Recommendation

The Centre recommends retaining sections 119 and 120 with the following qualifications:

- the language of the sections requires amendment and simplification to assist with interpretation;
- section 120(3) has no practical utility and the subsection should be repealed;
- combine sections 119 and 120 into a single provision.

This recommendation aims to simplify the waiver provisions by consolidating them into a single provision. Section 273 (and associated provisions) of the *Property Law Act 2007* (NZ) provides one possible model for this approach. This option has the support of QLS.

RECOMMENDATION 128. Section 120(3) should be repealed. The balance of sections 119 and 120 should be amended into a single provision modelled on the *Property Law Act 2007* (NZ).

For example, using the New Zealand provisions as a guide, the section could be drafted in the following manner:

²¹⁵⁶ Explanatory Note, *Property Law Bill* (NZ) 47. Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) provided the same explanation for the inclusion of the proposed provision (then numbered section 219). The Commission also noted that 'It applies to a licence to occupy land by virtue of the extended definition of 'lease': [675].

Section [120] Effect of waiver

- (1) A waiver by a lessor of the benefit of any covenant or condition of a lease –
 - (a) extends only to the instance or breach to which the waiver particularly relates;
and
 - (b) is not to be taken as a general waiver.
- (2) Subsection (1) applies unless the contrary intention appears.

132. Sections 121 – Provisions as to covenants not to assign etc. without licence or consent

132.1. Overview and purpose

121 Provisions as to covenants not to assign etc. without licence or consent

- (1) In all leases whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of premises leased or any part of the premises, without licence or consent, such covenant, condition, or agreement shall –
 - (a) despite any express provision to the contrary, be deemed to be subject –
 - (i) to a proviso to the effect that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the licence or consent; and
 - (ii) if the lease is for more than 40 years and is made in consideration wholly or partially of the erection, or the substantial improvement, addition, or alteration of buildings – to a proviso to the effect that in the case of any assignment, underletting, charging, or parting with the possession (whether by the holders of the lease or any under-lessee whether immediate or not) effected more than 7 years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within 6 months after the transaction is effected; and
 - (b) unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of the licence or consent, but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent.
- (2) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against the making of improvements without licence or consent, such covenant, condition, or agreement shall be deemed, despite any express provision to the contrary, to be subject to the proviso that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right to require as a condition of the licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor, and of any legal or other expenses properly incurred in connection with the licence or consent nor in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of the licence or consent, where such a requirement would be reasonable, an undertaking on the part of the lessee to reinstate the premises in the condition in which they were before the improvement was executed.
- (3) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against the alteration of the user of the leased premises without licence or consent such covenant, condition, or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, despite any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of the licence or consent, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor and of any legal or other expenses incurred in connection with the licence or consent.
- (4) Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the lessor shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

At common law, a lessee has the right to ‘dispose of property, make physical alterations to it, or change its use, unless there is a covenant express or implied to the contrary.’²¹⁵⁷ The lessor is equally entitled to include ‘disposition, alteration and user’ covenants in the relevant lease agreement.²¹⁵⁸ A lessor has a ‘vested interest in ensuring that persons he or she might consider unreliable or undesirable do not take possession of the premises.’²¹⁵⁹ If an absolute covenant was included in the lease, it could be enforced absolutely and if the covenant was qualified, the lessor could still refuse consent, reasonably or unreasonably. Further, if the lessor provided consent under a qualified covenant, he or she was entitled to demand payment of some kind for providing the relevant consent.²¹⁶⁰ This potentially placed a lessee at a disadvantage.

What is described as the ‘first statutory intervention’ to partly address this imbalance occurred in England in 1892.²¹⁶¹ The 1892 provision was in turn incorporated into section 144 of the *Law of Property Act 1925* (UK). That provision is replicated in section 121(b) of the PLA and prohibits the imposition of a fine for a consent or licence provided by the lessor to an assignment, unless there is an express provision to the contrary. The second ‘intervention’ occurred in 1927 with the introduction of section 19 in the *Landlord and Tenant Act 1927* (UK). Section 19 is replicated in section 121(1)(a), (2), (3) and (4) of the PLA. The QLRC explained the operation of the proposed clause 121 in the following way:

Apart from express provision forbidding it, a tenant may assign or underlet without the landlord’s consent. Leases, however, commonly contain a prohibition upon such assignment or underletting without consent, which may be absolute, or qualified by the requirement that such consent shall not be unreasonably withheld.

Clause 121(1)(a) (which in substance follows s.19 of the English Landlord and Tenant Act 1927 and s. 133B of the New South Wales Conveyancing Act) will make it impossible for the landlord to withhold his consent unreasonably, the onus of proving unreasonableness being on the tenant

Clause 121(b) (which is based on s.132 of the New South Wales Act and s.144 of the English Law of Property Act) will prevent the landlord from making payment of a premium a condition of granting his consent unless the lease expressly provides; but in all cases the landlord may require payment of his reasonable legal and other expenses incurred in connection with the licence or consent.

Sub-clause (2) extends the principle of the above legislation to covenants etc. against making of improvements without consent, and sub-cl (3) does the same in respect of covenants against user or alteration of the premises without consent, where no structural alteration is involved.²¹⁶²

²¹⁵⁷ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.2].

²¹⁵⁸ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.3].

²¹⁵⁹ A J Bradbrook, ‘The application of the Principle of Damages to Landlord-Tenant Law (1977) *Sydney Law Review* 15, 22.

²¹⁶⁰ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.3].

²¹⁶¹ *Conveyancing Act 1892* (UK) s 3; Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.8].

²¹⁶² 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) 85.

An earlier QLRC Working Paper noted that the proposed section was 'designed to improve the position of tenants.'²¹⁶³

An overview of the operation of the various parts of section 121 of the PLA is set out below in Parts 132.1.1, 132.1.2 and 132.1.3. A discussion of whether reform of section 121 is needed, the issues raised by the section and associated questions is set out in paragraph 132.2.

132.1.1. Section 121(1) of the PLA - leases containing a covenant, condition or agreement against assigning, underletting, charging or parting with possession of premises leased

Section 121(1) of the PLA applies to all leases that contain a covenant, condition or agreement against assigning, underletting, charging or parting with the possession of premises leased or any part of the premises without licence or consent. It applies irrespective of whether the lease was made prior to or after the commencement of the PLA. The provision makes the covenant or condition against assignment without consent or licence subject to a number of qualifications which are set out in section 121(1)(a) and (b) and include:

- not withholding consent unreasonably; and
- consent not being required where the lease is more than 40 years old and is made in consideration of the erection of buildings or the substantial improvement, addition or alteration of buildings; and
- not requiring the payment of a fine for the lease or consent.

Where there is a qualified covenant requiring consent prior to assignment, the lessee is required to seek consent from the lessor. Failure to do so is a breach of covenant and the lease may be forfeited.²¹⁶⁴

The provisos contained in section 121(1) are discussed in more detail below.

132.1.1.1. Licence or consent not to be unreasonably withheld (ss 121(1)(a)(i))

Section 121(1)(a)(i) of the PLA has the effect that the relevant covenant or condition which prohibits assignment of the lease without a licence or consent is subject to the proviso that the licence or consent must not be unreasonably withheld. The subsection applies despite any express provision to the contrary.

There is significant case law which considers the issue of whether consent has been unreasonably withheld in both Australia and the United Kingdom, with varying approaches adopted when considering this issue.²¹⁶⁵ The Queensland Court of Appeal has noted that:

²¹⁶³ Queensland Law Reform Commission, *Report of the Law Reform Commission on the Law Relating to Relief from Forfeiture of Leases and to Relief from Forfeiture of an Option to Renew and Certain Aspects of the Law Relating to Landlord and Tenant*, Report No. 1 (1970) 17.

²¹⁶⁴ *Property Law Act 1974* (Qld) ss 121(1) and 121(1)(a).

²¹⁶⁵ For further commentary on the various approaches see Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15125]-[15131].

NOT GOVERNMENT POLICY

There is some difference of judicial opinion as to the matters which a lessor is entitled to consider for the purpose of determining whether to refuse consent to an assignment and to which consequently the court may have regard in determining whether consent has been unreasonably withheld.²¹⁶⁶

Other commentators have been more explicit and have described the legal position in relation to the unreasonable withholding of consent in the following way:

Here the law has dug itself into something of a hole, upon the seemingly simple concept of 'reasonableness' encrusting a number of complex and inelastic principles.²¹⁶⁷

Ultimately, whether consent has been unreasonably withheld is a question of fact and will depend on all the circumstances of the case.²¹⁶⁸ The lessee bears the onus of establishing that consent was unreasonably withheld.²¹⁶⁹ There are some general principles which can be extracted from the cases including:

- a lessor is entitled to take into account the effect of the proposed assignment on the lessor's ability to let 'satisfactorily the different parts of their property',²¹⁷⁰
- a lessor may withhold consent if a reasonable person in the lessor's position might have regarded the proposed transaction as damaging to the lessor's property interests even though another person may take a different view, provided the refusal was not designed to achieve some collateral purpose wholly inconsistent with the terms of the lease,²¹⁷¹ and
- it is not reasonable for a lessor to use a request for consent to require from the lessee or proposed assignee benefits beyond which are conferred under the lease.²¹⁷²

The lessor, under subsection 121(1)(a)(i), is not precluded from requiring the payment of a reasonable sum of money for any legal or other expenses incurred in connection with the licence and consent.

Most commercial leases contain a provision permitting assignment, subletting or parting with possession with consent and express the qualification that such consent is not to be unreasonably

²¹⁶⁶ *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 130 per Kelly S.P.J.

²¹⁶⁷ Peter Butt 'When is a landlord acting reasonably in refusing consent' (2001) 76 *Australian Law Journal* 7, 7.

²¹⁶⁸ *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 129 referring to *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513, 521.

²¹⁶⁹ *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 129 referring to *Pimms Ltd v Tallow Chandlers Company* [1964] 2 QB 547, 564.

²¹⁷⁰ See *Pimms Ltd v Tallow Chandlers Company* [1964] 2 QB 547, 570 followed in *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 132; *Boss v Hamilton Island Enterprises Limited* [2009] 2 Qd R 115, 155 per Fraser JA.

²¹⁷¹ *Pimms Ltd v Tallow Chandlers Company* [1964] 2 QB 547, 570 followed in *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 132.

²¹⁷² See for example *Hamilton Island Enterprises Ltd v Boss* [2010] 2 Qd R 115, 155-156 where Hamilton Island Enterprises required, as a condition of consent to an assignment by a sublessee, that the assignee agree to be bound by a code which regulated activities on the island (traffic control, development and entry of persons onto the island etc). Adherence to the code was not a condition of the sublease. For further discussion of this case see Peter Butt, 'Unreasonably Withholding Consent to Assignment of Lease' (2009) 83 *Australian Law Journal* 792, 796 and W D Duncan, 'Court Strikes Down Super-added Condition Placed upon Consent to Lease Assignment' (2009) *Australian Property Law Bulletin* 83 in relation to the decision at first instance which was upheld on appeal.

withheld. In these instances, the lease normally follows the section and the usual tests regarding reasonableness apply.

Where consent to a request for an assignment is refused unreasonably, the lessee has the option to:

- proceed with the relevant assignment (or the 'thing for which consent has been sought'); or
- seek a declaration from the court that consent has been unreasonably withheld.²¹⁷³

132.1.1.2. Lease for a period longer than 40 years and made in consideration of improvement of buildings etc (ss 121(1)(a)(ii))

A covenant against assignment of long 'building leases' is treated differently to other assignments in section 121 of the PLA. The covenant or condition is subject to an additional proviso that any assignment of the lease which occurs more than 7 years before the end of the term does not require consent or licence if notice in writing is given to the lessor within 6 months after the assignment occurs. This qualification will only apply in the case of a lease that:

- extends longer than 40 years; and
- is made in consideration wholly or partially of the:
 - erection of buildings; or
 - substantial improvement, addition or alteration of buildings.

The qualification applies despite any express provision to the contrary. The practical effect of the provision is that a lessor has no opportunity to withhold consent in relation to leases falling within the scope of the section. The provision does not appear to have been the subject of any judicial consideration in Queensland (or New South Wales) and its application is limited to a narrow category of leases.

132.1.1.3. No fine payable for the licence or consent (ss 121(1)(b))

The covenant or condition is also subject to the qualification that a lessor cannot impose a fine or sum of money in the nature of a fine for the licence or consent to assign.²¹⁷⁴ This means that the lessor must either refuse consent (reasonably) 'or grant it gratuitously'.²¹⁷⁵ This proviso is subject to an express provision to the contrary in the lease. This means that the lessor and lessee may agree otherwise in relation to the payment of a fine. Commentary indicates that a refusal by the 'lessor to give consent except upon the payment of a fine, relieves the lessee from the necessity of obtaining consent and similarly allows him or her to ignore the restriction upon assignment in the lease.'²¹⁷⁶

²¹⁷³ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [8.53] and Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [32750.5].

²¹⁷⁴ The term 'fine' is defined in the PLA to include a 'premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium or foregift: *Property Law Act 1974* (Qld) Sch 6.

²¹⁷⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.121.180].

²¹⁷⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.121.180].

However, the lessor retains the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent that is given.²¹⁷⁷

Any request for payment beyond a reasonable sum may potentially constitute a penalty since the High Court decision in *Andrews v ANZ Banking Group Ltd*,²¹⁷⁸ regardless of whether it is contained in a lease clause. However, the issue of whether a request for a reasonable sum of money is a penalty is a matter which would be dealt with separately to the operation of section 121 of the PLA.

132.1.2. Section 121(2) – Unreasonably withholding consent to improvement

Section 121(2) applies to all leases containing a covenant against the making of improvements without licence or consent. The relevant covenant is deemed to be subject to the proviso that the licence or consent is not to be unreasonably withheld, despite any express provision to the contrary. However, the lessor is not precluded under the section from requiring as a condition of the licence or consent:

- the payment of a reasonable sum for any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor; and
- the payment of any legal or other expenses properly incurred in connection with the licence or consent; and
- if reasonable, an undertaking that the lessee reinstate the premises in the condition in which it was before the improvement occurred, where the improvement does not add to the letting value of the holding.

The provision does not imply a right to make improvements and where the lease does not provide a right to make ‘improvement’ the section has no application. The word ‘improvement’ is not defined in the PLA. Generally the word has been interpreted to mean ‘additions or alterations ... which are not mere repairs or renewals’.²¹⁷⁹ Further, an ‘improvement’ is a physical, rather than an economic concept and it may not necessarily be beneficial to the lessor or increase the value of the property.²¹⁸⁰

²¹⁷⁷ Under section 48 of the *Retail Shop Leases Act 1994* (Qld), a retail shop lessee is not liable to pay the lessor’s legal expenses in relation to preparation, renewal or extending the lease but section 48(2) of the Act excludes from that prohibition survey fees on lease plans associated with the registration of the lease, the costs of the mortgagee’s consent, lease duty on the lease and registration fees of the lease.

²¹⁷⁸ *Andrews v Australia New Zealand Banking Group Ltd* (2012) 247 CLR 205. For a full discussion about this High Court decision and its impact generally on the doctrine of penalties see: Sirko Harder, ‘The Relevance of Breach to the Applicability of the Rule Against Penalties’ (2013) 30 *Journal of Contract Law* 52; Bruce Taylor, ‘The High Court’s expansion of the doctrine of penalties in *Andrews v ANZ Banking Group*’ (2013) *Australian Banking & Finance Law Bulletin* 106; Sandra Steel, Marcel Marquardt and Kayley Rozos, ‘Revisiting the Impact of the Penalty Doctrine to Construction Contracts After *Andrews v ANZ*’ (2014) 26 *Australian Construction Law Bulletin* 127; and J W Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and G J Tolhurst, ‘Contractual Penalties: Resurrecting the Equitable Jurisdiction’ (2013) 30 *Journal of Contract Law* 99.

²¹⁷⁹ *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975, 980 per Lord Hoffman. This case was concerned with section 9(1A)(d) of the *Leasehold Reform Act 1967* (UK) which allowed for the price of a premises on the open market to be diminished by the extent to which the value of the house and premises had been increased by any improvement carried out by the tenant or his or her predecessors in title at their own expense.

²¹⁸⁰ *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975, 980 per Lord Hoffman and 984, per Lord Millett.

132.1.3. Section 121(3) – Covenant against alteration of user without consent

Section 121(3) operates in the following way:

- it applies only to leases which contain a covenant, condition or agreement against the alteration of the user of the leased premises without licence or consent;
- it applies despite any express provision to the contrary;
- the covenant, condition or agreement is deemed to be subject to the qualification that no fine or sum of money in the nature of a fine (whether by increase in rent or otherwise), is payable for the licence or consent;
- the lessor still has a right to require the payment of a reasonable sum in respect of any damage to, or diminution in the value of, the premises and any legal or other expenses incurred in connection with the licence or consent; and
- the section will not apply if the ‘alteration’ involves any structural alteration of the premises.

A covenant which requires premises to be used for a particular purpose is a covenant against changing that use, ‘since a covenant not to use premises except in a certain way is a covenant not to use them in any other way.’²¹⁸¹ If the covenant is an absolute prohibition on changing use then the lessor is entitled to enforce the provision and is not required to take into account considerations of reasonableness.²¹⁸² If the covenant prohibits alteration of user except with prior consent, then the lessor under section 121(3) cannot demand money (in the form of a fine or increased rent) in return for consent, unless the alteration in user involves a structural alteration.²¹⁸³ Thomas J in *Re Archos*²¹⁸⁴ when discussing section 121(3) of the PLA noted:

It is also to be noted that whilst s. 121(1) of the *Property Law Act* makes certain provisions in relation to the unreasonable withholding of consents with respect to assignments and underleases, there is a significantly limited provision with respect to covenants and conditions concerning the user of premises. This is contained in s. 121(3) which relevantly provides that in all leases containing a covenant against alteration of the user of the leased premises without consent such covenant shall be subject to a proviso ‘that no fine or sum of money...shall be payable for or in respect of the licence or consent’. Thus the legislature has not seen fit to legislate against the unreasonable withholding of consents to changes of use of premises where the parties have agreed to a limitation of the user.²¹⁸⁵

Where a court determines the reasonableness of the sum requested by the lessor in respect of any damage to or diminution in the value of the premises or neighbouring premises belonging to the lessor, the lessor is bound to grant the licence or consent on the payment of the relevant sum.²¹⁸⁶

²¹⁸¹ *Barina Properties Pty Ltd v Bernard Hastie (Australia) Pty Ltd* [1979] 1 NSWLR 480 at 492. See also Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1578].

²¹⁸² *Barina Properties Pty Ltd v Bernard Hastie (Australia) Pty Ltd* [1979] 1 NSWLR 480 at 487 and *Re Archos* [1994] 1 Qd R 223, 224. See also Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1578].

²¹⁸³ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1578].

²¹⁸⁴ *Re Archos* [1994] 1 Qd R 223, 224.

²¹⁸⁵ *Re Archos* [1994] 1 Qd R 223, 224.

²¹⁸⁶ *Property Law Act 1974* (Qld) s 121(4).

132.2. Issues with the section

132.2.1. Avoidance of section 121(1)(a)(i) in practice

As indicated in paragraph 132.1.1 above, section 121(1)(a)(i) applies despite any express provisions to the contrary whereby the parties contract out of the provision. However, alternative methods have been used to avoid the application of the section. These include:

- drafting the covenant as an absolute prohibition against assigning;²¹⁸⁷
- including as a term of the lease a pre-condition that the lessee must first offer to surrender the lease to the lessor before the lessee's right of assignment with consent arises;²¹⁸⁸
- ensuring the lease includes words to the effect that 'the lessee may assign the lease with consent but consent will not be withheld in the case of a responsible and respectable person.'²¹⁸⁹ The issue then becomes one of whether the proposed assignee is a responsible or respectable person, rather than whether the consent is unreasonably withheld; and
- ensuring the lease term does not refer to the need for consent but does include a list of conditions or criteria which the assignee must satisfy such as:
 - the proposed assignee is a respectable person;
 - all rent is paid up and there are no existing breaches of covenants;
 - if the proposed assignee is a company, the assignee obtains satisfactory directors' guarantees of the lease; and
 - the assignee pays reasonable fees of the lessor in connection with the assignment.²¹⁹⁰

The question in these cases is not whether consent has been unreasonably withheld but whether the conditions have been met and section 121(1)(a)(i) has no application – that is, the issue of consent does not arise at all.²¹⁹¹ This approach was discussed in the case of *Tamsco Ltd v Franklins Ltd*²¹⁹² where Young CJ stated:

...that if one wishes to set down a series of conditions that the tenant must fulfil before the lease can be assigned, one must not make the assignment subject to consent, but rather draft the lease to remove any reference to consent and set out the preconditions.²¹⁹³

²¹⁸⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.790].

²¹⁸⁸ See *Creer v P&O Lines of Australia Ltd* (1971) 125 CLR 84 (which considered s 133B(1) of the *Conveyancing Act 1919* (NSW)). The decision was followed in *Bocardo SA v S&M Hotels Ltd* [1980] 1 WLR 17, 23 which considered s 19(1) of the *Landlord and Tenant Act 1927* (UK), the equivalent of the NSW provision. Megaw LJ in *Bocardo* considered and discusses in some detail the purpose of s 19(1) at 21-23. He notes that the 'effect of s 19(1) of the Act of 1927, on its true analysis, was merely to make statutory an implied term which must already have been implied, if the express words were to have any sensible purpose'.

²¹⁸⁹ See *Moat v Martin* [1950] 1 KB 175, 178-180.

²¹⁹⁰ *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349 – see [30] for a discussion of the legal background in relation to assignment and s 133B(1) of the *Conveyancing Act 1919* (NSW).

²¹⁹¹ *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349. See also Peter Butt, 'Landlord's Refusal to Consent to Assignment' (2001) 75 *Australian Law Journal* 76, 76.

²¹⁹² *Tamsco Ltd v Franklins Ltd* (2001) 10 BPR 19,077.

²¹⁹³ *Tamsco Ltd v Franklins Ltd* (2001) 10 BPR 19,077 at [47]. See also Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.790]. For an illustration of an attempt to avoid the NSW equivalent provision (*Conveyancing Act 1919* (NSW), s 133B see *JB Northbridge Pty Ltd v Winners Circle Group Pty Ltd* [2014] NSWSC 950. In that decision Rein J was unable to 'accept that the draftsman of the lease was seeking to avoid the impact of s 133B', and did not accept that the landlord's consent was not required for an assignment to a new lessee. He further noted that clauses could be drafted to exclude a landlord's need for consent referring to

Both Queensland and New South Wales legislation do not allow for the parties to exclude the operation of the equivalent section 121(1)(a)(i) (and the New South Wales equivalent). However, the legislation in Victoria and Western Australia differs and enables the lessor to exclude the operation of the equivalent provision by the ‘inclusion of an appropriately worded covenant in the lease.’²¹⁹⁴ The practical outcome of this approach is that a lessor would be entitled to withhold consent for any reason, irrespective of the reasonableness.

The position in the United Kingdom is more explicit in relation to withholding consent in the case of certain leases. Section 19(1) of the *Landlord and Tenant Act 1927* (UK) was amended in 1995.²¹⁹⁵ That amendment applies only to ‘qualifying leases’²¹⁹⁶ and only covers ‘assignment’. It allows a lessor and lessee to enter into an agreement which sets out the circumstances in which consent to assign may be withheld and any conditions subject to which consent may be granted.²¹⁹⁷ The relevant ‘circumstances’ or ‘conditions’ must not be framed by reference to ‘any matter falling to be determined by the landlord or by any other purposes of the agreement’, except in the limited circumstances set out in section 19(1C) of the *Landlord and Tenant Act 1927* (UK).²¹⁹⁸ Commentary indicates that as a consequence of this amendment:

where an agreement is made which satisfies these criteria, the landlord may withhold consent to assignment where the circumstances specified in the agreement exist, or grant consent only on the specified conditions, without fear of a legal challenge by the tenant on the grounds that the landlord is acting unreasonably.²¹⁹⁹

Further discussion of the position in other jurisdictions is set out in paragraph 132.3 below.

132.2.2. Utility of section 121(1)(a)(ii) – Lease for period longer than 40 years and made in consideration of improvement of buildings etc

This section effectively only applies to long ‘building leases’ where the lease covenants are, amongst others, to erect a new building on vacant land or demolish and rebuild a new building on improved land. A form of this provision appears to have originally been enacted in section 19(1) of the *Landlord and Tenant Act 1927* (UK) but the rationale for its inclusion in that jurisdiction and its subsequent

authorities including *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349, *Tamsco Ltd v Franklins Ltd* (2001) 10 BPR 19,077 and *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513. See also Dr Stephen Pallavicini and Marie Boustani, ‘JB Northbridge Pty Ltd v Winners Circle Group Pty Ltd, (2014) *Australian Property Law Bulletin* 137 and commentary on the case in *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (online looseleaf) (Thomson Reuters) [90.500].

²¹⁹⁴ A J Bradbrook, ‘The Application of the Principle of Mitigation of Damages to Landlord-Tenant Law’ (1977) *Sydney Law Review* 15, 23.

²¹⁹⁵ This amendment occurred as a result of section 22 of the *Landlord and Tenant (Covenants) Act 1995* (UK).

²¹⁹⁶ These cover new tenancies entered after the 1995 Act came into force and do not cover residential tenancies – that is, it applies to ‘non-agricultural business leases’ see Martin Davey, ‘Privity of Contract and Leases – Reform at Last’, (1996) 59 *Modern Law Review* 78, 91. Davey indicates that ‘Commercial building lease assignments which by law (s 19(1)(b) of the 1927 Act) did not require the landlord’s consent except in the last seven years of the term are now brought within the new modified regime.’ at [91].

²¹⁹⁷ *Landlord and Tenant Act 1927* (UK) s 19(1A).

²¹⁹⁸ These are where the ‘other’ person’s power to determine that matter is required to be exercised reasonably or the lessee is given an unrestricted right to have any such determination reviewed by an independent person: *Landlord and Tenant Act 1927* (UK) s 19(1C)(a) and (b).

²¹⁹⁹ Stuart Bridge, ‘Former Tenants, Future Liabilities and the Privity of Contract Principle: the Landlord and Tenant (Covenants) Act 1995’, (1996) 55 *Cambridge Law Journal* 313, 349.

adoption in Queensland is difficult to ascertain.²²⁰⁰ The scope of the section is limited and arguably it has no current practical application.

Further, a lease of 40 years or more would invariably contain a provision for assignment which required the lessor's consent. It is difficult to see the policy reason behind the section permitting assignment subletting or parting with possession without consent in these circumstances and then only requiring the lessor to be notified 6 months later. Where the lease requires consent to an assignment by the lessor, regardless of the length or nature of the lease, the lessor should be entitled to be notified at the time that the request is sought and not 6 months after the assignment occurs.

The United Kingdom Law Commission in 1985, when reviewing the equivalent provision in the *Landlord and Tenant Act 1927* (UK),²²⁰¹ recommended that the section was not sufficiently useful in its present form to merit preservation and that it should 'cease to have effect.'²²⁰² Amendments made to the *Landlord and Tenant Act 1927* (UK) in 1995 have the effect that this provision will not apply to 'qualifying' leases in relation to any assignment of the lease.²²⁰³ These are essentially new tenancies entered after 1995 other than a residential tenancy.²²⁰⁴ The effect of the amendment to section 19 on leases longer than 40 years has been explained as follows:

This...has removed the practical significance of this provision for most leases granted after 1995. This is because qualified covenants against assignment are generally found in business leases, which will be qualifying leases.²²⁰⁵

And further...

Commercial building lease assignments which by law (s 19(1)(b) of the 1927 Act) did not require the landlord's consent except in the last seven years of the term are now brought within the new modified regime.²²⁰⁶

132.2.3. Clarifying the meaning of the term 'improvement' in section 121(2) and the relevance of 'reinstatement' of premises

Section 121(2) is directed at ensuring that a request for consent or a licence to undertake an improvement is not unreasonably withheld by a lessor. However, there has previously been some issues regarding what the term 'improvement' actually means and whether it encompasses something which improved the value of the premises or whether an alteration was sufficient. As indicated in paragraph 132.1.2 above, the term 'improvement' has been interpreted by current case law to be

²²⁰⁰ Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange, 2011) 202. See pages 197-203 for a discussion of the historical position in relation to the alienation of a lease.

²²⁰¹ *Landlord and Tenant Act 1927* (UK) ss 19(1)(b).

²²⁰² Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [7.78]. For further discussion on this provision see [7.72] – [7.78]. The initial Working Paper on this issue recommended that the provision be extended to apply 'not merely to long building tenancies, but to all long tenancies (and judgment was reserved as to what the minimum length should be); and so as to cover absolute covenants as well as qualified ones.' See Law Commission (UK), *Provisional Proposals Relating to Covenants Restricting Dispositions, Parting with Possession, Change of User and Alterations*, Working Paper No. 25 (1970) [7.75]. This recommendation has not been implemented.

²²⁰³ *Landlord and Tenant Act 1927* (UK) s 19(1D).

²²⁰⁴ *Landlord and Tenant Act 1927* (UK) s 19(1E).

²²⁰⁵ Charles Harpum, Stuart Bridge and Martin Dixon (Thomson Reuters, 8th ed, 2012) *The Law of Real Property* [19-106]

²²⁰⁶ Martin Davey, 'Privity of Contract and Leases – Reform at Last' (1996) 59 *Modern Law Review* 79, 91.

some physical change (alteration) to the premises which is not necessarily beneficial to the lessor and does not necessarily increase the value of the property.²²⁰⁷ The physical change can cover alterations or additions which are not merely repairs or renewals.

There may be some benefit in considering an amendment to the section to better reflect current case law on the meaning of ‘improvement’. This would assist with clarifying the scope of the section.

The effect of section 121(2) does not preclude the lessor requiring as a condition of the licence or consent (where reasonable) an undertaking on the part of the lessee to reinstate the premises in the condition they were in before the improvement. It may be timely for the language in this section to be altered to reflect current practices. For example, in the case of leases involving office space,²²⁰⁸ modern building techniques have evolved so that fit-outs, in some cases, can be easily erected and removed.²²⁰⁹ A direct obligation to reinstate is unusual in a modern commercial lease setting.²²¹⁰

132.2.4. Utility and interpretation of section 121(3) (‘alteration of user’)

One of the key objectives underpinning section 121(3) of the PLA is to imply a proviso against imposing a fine in circumstances where a lessee requested a change in the use of the premises. One concern relates to the potential for a lessor to circumvent the effect of the section in relation to the imposition of a fine. Commentary on the section succinctly summarises this issue as follows:

...there is nothing to prevent the landlord from withholding his consent altogether (however unreasonably), the tenant may be forced, if he is to obtain his change of user, to accept a new lease, and this lease, though it permits the new user, may be granted only on payment of a premium or at a rent which is higher, or on more onerous terms. Even in those cases in which the sub-section seems effectively to prevent the taking of a fine, therefore, the landlord may nonetheless obtain one in this roundabout way.²²¹¹

A second possible issue with section 121(3) relates to the reference to ‘structural alterations’ which are excluded from the proviso set out in the section.²²¹² The Law Commission (UK) noted in relation to the equivalent United Kingdom provision, that:

The provision against fines made in section 19(3) of the 1927 Act does not apply where the change of user involves structural alterations. This seems to us a puzzling feature of the sub-section, because the making of the structural alterations themselves would not be governed by a user covenant, and if they were reasonable they could be carried out with no fine at all by virtue of sub-section (2).²²¹³

²²⁰⁷ *Shalson v Keepers and Governors of the Free Grammar School* [2003] 3 All ER 975; *Skiwing Pty Ltd v Trust Company of Australia* [2006] NSWCA 276.

²²⁰⁸ Retail shop leases are dealt with under *Retail Shop Leases Act 1994* (Qld).

²²⁰⁹ Lessors may commonly pay for fit out as an incentive in which case the property in the fit out remains with the lessor. Where the lessee undertakes the fit out of the premises, in most instances, it can be removed upon the termination of the lease.

²²¹⁰ The lease term is often drafted so as to require the lessee to ‘yield up the premises in good and substantial repair and condition’.

²²¹¹ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.26] and [4.8].

²²¹² A separate issue may arise in relation to whether the imposition of such a premium in the case of a structural alteration is a penalty for the purposes of the expanded category of penalties set out in *Andrews v Australia New Zealand Banking Group Ltd* (2012) 247 CLR 205.

²²¹³ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [6.15] -[6.16].

Where an alteration of user may possibly require structural alteration to make the premises suitable for the new use it is not clear how section 121(2) (relating to ‘improvements’) and section 121(3) will interact.

A third potential issue relates to the rationale for the different treatment of covenants against alteration of user and covenants prohibiting improvements without consent, with the latter category requiring the relevant consent not to be unreasonably withheld. One reason for the difference may be that an alteration of user has a broader impact on the premises and lease and, arguably, a lessor should be able to retain control over the premises and determine whether or not he or she will consent to such a change irrespective of the reason for refusal. However, the rationale is not completely clear.

132.2.5. Changes in commercial leasing landscape since the enactment of the original provisions upon which sections 121(2) and (3) of the PLA are based

As indicated in paragraph 132.1 above, section 121 of the PLA is based on legislation in the United Kingdom which was enacted in the 1920s. The leasing landscape since that time (and since the 1970s in Queensland) has altered. Some of these changes include:

- leases were historically longer in duration than current leases. This meant that a need to reconfigure the premises or alter its use was more likely to arise during the term of a long lease. Leases now tend to be shorter so that if a lessee wants to alter use or reconfigure the premises a new lease is often entered into;
- fit-outs are now often included as a lessor incentive in the lease agreement or the issue is dealt with in the lease. The parties agree on the payment, construction and post lease responsibility for removal. Accordingly, there is rarely a requirement that the lessee reinstate, at least in relation to these fit-outs;
- as discussed in paragraph 132.2.3 above, changes in building practices mean that fit-outs can often easily be erected and dismantled in a short period of time; and
- lessees are now more likely not to request an alteration of user but will move and negotiate fit-out incentives as part of a new lease agreement with a lessor.

These changes in leasing practices raise the question of the utility of section 121(2) and (3) in their current form. In the case of section 121(2), this may mean that the section should be redrafted to simply preserve the proviso that a lessor should not ‘unreasonably’ withhold consent but that the remaining part of the section may be unnecessary and could be dealt with as part of the lease agreement. In the case of section 121(3), the Centre has given consideration to whether the proviso in relation to alteration of user that no fine is payable in respect of a consent or licence for the alteration (and the remaining part of the section) should be removed completely and dealt with as part of usual lease terms.

132.2.6. Other issues – written reasons for refusal and lessee access to compensation

Currently under section 121(1) of the PLA, there is no obligation on the lessor to provide written reasons for a refusal to provide consent to a request for assignment. From the lessee’s perspective, this potentially creates difficulties in making an assessment as to whether or not the lessor’s grounds for withholding consent are reasonable (or unreasonable). This may impede the lessee’s ability to

simply assign on the basis that the refusal was unreasonably withheld or when considering whether to seek a declaration from the court in relation to a refusal.²²¹⁴

Sections 121(2) and (3) provide for the lessor to require payment of a reasonable sum where an improvement or change of use would cause ‘damage to or diminution in the value of the premises or any neighbouring premises’ belonging to the landlord. However, section 121 does not provide for any type of compensation to the lessee for loss arising out of factors such as unreasonable withholding of consent, or delay in providing a decision in response to a request for assignment. In New Zealand, section 228 of the *Property Law Act 2007* (NZ) enables a lessee (where he or she suffers loss) to recover from the lessor any payment made as a condition of the lessor giving consent and damages for any loss suffered because of the lessor unreasonably withholding consent and delay in either giving notice of the consent or the refusal.²²¹⁵

The Law Commission (UK) in 1985 recommended that a lessor should be liable in damages where consent is unreasonably withheld or a decision is unreasonably withheld.²²¹⁶ The *Landlord and Tenant Act 1988* (UK) introduced some of these recommendations in relation to applications for consent or approval on or after 28 September 1988.²²¹⁷ Under the Act, a lessor is obliged to provide or refuse consent within a reasonable time of the lessee making written application. Further, where there is refusal or consent subject to conditions, the lessor is required to serve written notice on the tenant within a reasonable time period of the reasons for refusal or the conditions subject to which consent would be granted.²²¹⁸ A lessee is entitled to claim damages for a breach of these obligations.²²¹⁹

132.3. Other jurisdictions

132.3.1. Australia

New South Wales and the Northern Territory have provisions which are almost identical to section 121 of the PLA. Victoria and Western Australia provisions replicate section 121(1) of the PLA, although section 121(1)(a)(ii) dealing with long building leases is not included in these jurisdictions. Further, a lessor is not precluded from requiring the payment of a reasonable sum in respect of any legal or other expense incurred in relation to the consent. The sections in Victoria and Western Australia are both subject to an express provision to the contrary contained in the lease. Tasmania, South Australia and the Australian Capital Territory do not have a provision which is equivalent to section 121 of the PLA.

The position in each State and Territory is summarised in Table 5 below.

²²¹⁴ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [8.12] - [8.16].

²²¹⁵ *Property Law Act 2007* (NZ) s 228 and s 226(2).

²²¹⁶ Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [8.65].

²²¹⁷ This was the date the *Landlord and Tenant Act 1988* (UK) came into force.

²²¹⁸ *Landlord and Tenant Act 1988* (UK) s 1(3). See also Stuart Bridge, ‘Former Tenants, Future Liabilities and the Privity of Contract Principle: the Landlord and Tenant (Covenants) Act 1995’ (1996) 55 *Cambridge Law Journal* 313, 348.

²²¹⁹ *Landlord and Tenant Act 1988* (UK) s 4.

Table 5: Jurisdictional comparison of section 121 of the PLA

PLA Section	NSW ²²²⁰	Vic ²²²¹	WA ²²²²	NT ²²²³	Tas	SA	ACT
s 121(1)(a)(i)	Yes	Yes ²²²⁴	Yes ²²²⁵	Yes	-	-	-
s 121(1)(a)(ii)	Yes	No	No	Yes	-	-	-
s 121(1)(b)	Yes	Yes	Yes	Yes	-	-	-
s 121(2)	Yes	No	No	Yes	-	-	-
s 121(3)	Yes	No	No	Yes	-	-	-
s 121(4)	Yes	No	No	Yes	-	-	-

132.3.2. New Zealand

Sections 225 to 228 of the *Property Law Act 2007* (NZ) set out the provisions relevant to covenants and conditions not to assign. The regime in New Zealand is different to section 121 of the PLA and operates as follows:

- section 225 – sets out the parameters of the application of sections 226 to 228. Those sections apply if there is a covenant in a lease that the lessee will not, without consent, do one (or more) of the things listed in subsection 225(1)(a) to (f). These matters include transferring or assigning the lease, entering into a sublease, parting with possession or changing the use of the leased premises from a use that is permitted under the lease.²²²⁶ The section also provides that sections 226 to 228 do not prevent a lease from including a covenant binding the lessee absolutely not to do any of the things referred to in subsection (1);²²²⁷
- section 226 – applies to a lessor who receives after 31 December 2007 an application from the lessee requiring consent to do 1 or more of the things referred to in section 225(1)(a) to (f). Under section 226(2) a lessor must:
 - not unreasonably withhold consent; and
 - must within a reasonable time give the consent or notify the lessee in writing that the consent is withheld;
- section 227 sets out the circumstances where consent is deemed to be unreasonably withheld for the purposes of section 226.²²²⁸ These circumstances include where:
 - as a condition of consent the lessor requires the payment of an amount or other consideration or imposes on the lessee any unreasonable condition or precondition;
 - consent is withheld because the lessee is bankrupt or is in receivership or liquidation.

The lessor is not prevented from requiring the lessee, if the lease so provides, to pay the reasonable legal or other expenses of the lessor giving consent. Where the lessor refuses

²²²⁰ *Conveyancing Act 1919* (NSW) s 133B.

²²²¹ *Property Law Act 1958* (Vic) s 144(1).

²²²² *Property Law Act 1969* (WA) s 80.

²²²³ *Law of Property Act* (NT) s 134.

²²²⁴ Unless the lease contains an express provision to the contrary: *Property Law Act 1958* (Vic) s 144(1).

²²²⁵ *Property Law Act 1969* (WA) s 80(1) – ‘unless the lease contains an express provision to the contrary’.

²²²⁶ Creating a mortgage over the leasehold estate or interest is also included in the list: s 225(1)(f).

²²²⁷ *Property Law Act 2007* (NZ) s 225(2). Section 225(3) expressly provides that sections 226 to 228 do not apply if the lease includes a covenant in accordance with subsection 225(2) binding the lessee absolutely not to do any of the things referred to in subsection (1).

²²²⁸ Section 227(2) of the *Property Law Act 2007* (NZ) provides that subsection 227(1) does not limit section 226(2)(a).

consent or gives consent subject to conditions, the lessor is required when requested in writing by the lessee to give written notice of the reasons for the decision;²²²⁹ and

- section 228 – where a lessor withholds consent unreasonably, the lessee or any assignee, sublessee, mortgagee or person in possession of the leased premises who suffers loss can recover damages and any payment made by the lessee.

132.3.3. United Kingdom

The legislative position in the United Kingdom in relation to assignment of leases is effectively the same as in Queensland under section 121 of the PLA. The main difference is that the relevant statutory provisions are set out in two separate Acts as follows:

- section 19(1), (2) and (4) of the *Landlord and Tenant Act 1927* (UK); and
- section 144 of the *Law of Property Act 1925* (UK).²²³⁰

The issue of covenants restricting dispositions, alterations and change of users has been considered extensively in the United Kingdom since approximately 1950.²²³¹ Some of the recommendations made have been implemented. These changes are discussed in further detail in Parts 132.2.1 and 132.2.5 above.²²³²

132.4. Recommendation

As discussed in paragraph 132.2 above there are a number of different issues associated with section 121 of the PLA which could be addressed through some changes to the provisions. The Centre recommends section 121 of the PLA be repealed and replaced with a modified, simpler provision with modernised language. Submissions on section 121 of the PLA were received from the QLS. These will be addressed throughout this discussion.

This recommendation recognises that the current provision is based on legislation initially drafted in 1927. It provides an opportunity to recraft the section in a way that is simple, concise and in line with

²²²⁹ *Property Law Act 2007* (NZ) s 227(3).

²²³⁰ Section 144 of the *Law of Property Act 1925* (UK) deals with the proviso that no fine is to be exacted for a licence or consent to assign (unless the lease contains an express provision to the contrary). The section also indicates that the lessor is not precluded from requiring the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent.

²²³¹ It appears that consideration of the issues commenced with the report by the Leasehold Committee (the Jenkins Committee) in 1950 (Cmnd 7982). The recommendations by the Jenkins Committee were accepted in principle in a Government White Paper, *Government Policy on Leasehold Property in England and Wales* (1953), Cmnd 8713 but these were not implemented: see Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Changes of User*, Report No. 141 (1985) [4.9]. Following this, the Law Commission set up the Landlord and Tenant Working Party to consider these types of covenants ‘afresh’. The Law Commission (UK) published *Provisional Proposals Relating to Covenants Restricting Dispositions, Parting with Possession, Change of User and Alterations*, Working Paper No. 25 in 1970. The Working Party did not agree with the recommendations of the Jenkins Committee: see Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Changes of User*, Report No. 141 (1985) [4.10]. The Law Commission subsequently produced Report No. 141 on these issues in 1985.

²²³² The recommendations in Law Commission Report No. 141 (1985) were implemented in part in the *Landlord and Tenant Act 1988* (c26) (UK).

modern commercial leasing practice. The new provisions will address some of the issues identified in paragraph 132.2 above. The Centre recommends that the new provisions should:

- exclude the exception in relation to building leases (section 121(1)(a)(ii));
- provide a simple approach to the issue of reinstatement, alterations, ‘improvements’ and alterations to user (section 121(2) and (3)); and
- generally simplify the operation of section 121.

In submissions, the QLS agrees that the effect of the section should be retained in some form, with modernised language. The QLS also agrees that the new provisions should not include the exception in relation to building leases currently in section 121(1)(a)(ii). The QLS concurs with the Centre’s recommendations with respect to section 121(2) and (3).

Sections 225 to 228 of the *Property Law Act 2007* (NZ) provide an illustration of one possible approach to re-drafting section 121 of the PLA. Paragraph 132.3.2 above provides an overview of the operation of these sections. The New Zealand approach incorporates additional matters which are not addressed currently in Queensland legislation. These matters include:

- enabling a lessee to recover damages from a lessor where consent is unreasonably withheld;
- a requirement that the lessee be notified in writing that the consent is withheld; and
- details of when consent is deemed to be unreasonably withheld.²²³³

In line with the New Zealand model, the Centre recommends adopting provisions that enable the lessee to recover damages where a lessor has unreasonably withheld consent but this should be limited to consent being withheld to the assignment of the lease only. The QLS was divided on this point and noted that there are often short timeframes for obtaining consent to an assignment of a lease, for example, where the assignment of the lease is part of the sale of a business. On this point, the QLS states: ‘In a typical lease assignment or business sale transaction, the contract does not allow sufficient time to have a court determine the reasonableness or otherwise of the landlord’s refusal so the transaction does not proceed.’

It is also noted by the QLS that the remedy for the lessee where consent to an assignment being unreasonably withheld is to assign the lease without conditions. The QLS concedes that this remedy is seldom obtained as the incoming assignee is unlikely to accept an assignment without the consent of the lessor. In those circumstances, the Centre is of the view that the recommendation to allow the lessee to recover damages for unreasonably withheld consent is entirely appropriate and desirable.

The Centre recommends adding a requirement for the lessee to provide to the lessor sufficient information about the proposed assignee to allow the lessor to make a sound commercial decision about whether or not to consent to the assignment. The lease may also contain covenants imposing an obligation on the lessee to provide further information to the lessor before a decision is made with respect to an assignment of the lease. This recommendation is made in the interests of providing balance between the parties and fairness to the lessor under an obligation to consider whether or not to consent to an assignment.

²²³³ This list of what constitutes unreasonable withholding is non exhaustive: see s 227(2).

It is difficult for the lessee to assess whether the withholding of consent is reasonable or not. The Centre recommends imposing a requirement for the lessor to notify the lessee in writing when consent is withheld and the reasons for that decision. The QLS agrees with this recommendation however expressed concern that the lessor may not have sufficient time to properly consider the request. The QLS notes that the lessor has ‘little opportunity to make judgements and often in a “grey” area where [the lessor] holds incomplete or unclear information, invariably cautioned by their lawyer that they cannot seek collateral benefits and must act reasonably.’ The Centre acknowledges this is a concern and therefore recommends that such written notice is to be provided by the lessor to the lessee within 14 days of receipt of the information which the lessee is required to furnish about the potential assignee.

The requirement to provide written reasons will assist the lessee in assessing whether, in their view, the withholding of consent is reasonable. Further the parties may be able to negotiate about addressing the reasons for withholding consent with a view to obtaining that consent. The written reasons will also provide important, contemporaneous evidence should the matter be litigated in the future.

The Centre does not recommend following the New Zealand approach with respect to specifying circumstances in which consent will be deemed to be unreasonably withheld. This is a matter best left to the courts to decide.

The Centre recommends that section 121 should continue to apply to all leases and that parties should not be able to contract out of the section. This is consistent with the current provision but differs from the New Zealand approach whereby parties are not prevented from including a covenant to prohibit the lessee absolutely from assigning the lease, subleasing, parting with possession of the leased premises, change of use or granting a mortgage over the leasehold, and such a covenant is not invalid. The QLS agrees that parties should not be able to contract out of the provisions. The Centre acknowledges that the drafting practices employed to avoid the operation of the section, as described above at paragraph 132.2.1 above, will likely continue however, it remains the view of the Centre that the section should continue to be expressed to apply to all leases.

The Centre is of the view that the use of the terms ‘improvement’ and ‘structural alteration’ in the current section should not be replicated in the new provisions for the reasons set out above at paragraphs 132.2.3 and 132.2.4. The Centre recommends a simpler approach. The new provisions should include a section that, where alterations have been made without consent, then the lessee is obliged to restore the premises to the condition it was in prior to the alteration. The term ‘alteration’ is intended to cover ‘improvements’ and other alterations whether structural or otherwise. The QLS agrees in submissions that the meaning of ‘improvement’ requires clarification.

The Centre is of the view that this approach will provide that clarity. Where the lessor consent to an alteration, the lessor is not precluded from attaching conditions on that consent, such as a condition that the lessee restore the premises at the end of the lease.

RECOMMENDATION 129. Section 121 should be amended to:

- modernise and simplify the language and operation of section 121;
- exclude the exception in relation to building leases (section 121(1)(a)(ii));
- provide a simpler model for issues regarding ‘improvements’, structural alterations and alterations to user (section 121(2) and (3));
- impose a requirement on the lessee to provide all of the information about the proposed assignee to allow the lessor to make a sound commercial decision about whether or not to consent to the assignment;
- impose a requirement on the lessor to notify the lessee in writing within 14 days that the consent is withheld and the reasons for doing so; and
- enable a lessee to recover damages from a lessor where consent is unreasonably withheld.

For example, using the New Zealand provisions as a guide, the provisions could be drafted in the following manner:

Section [] Lessee cannot assign or transfer without consent of the lessor

- (1) This section applies:
 - (a) to all leases;
 - (b) where the lessor receives after the commencement of this Act a notice from a lessee requesting the lessor’s consent to transfer or assign the lease; and
 - (b) if there is a covenant in a lease that the lessee will not, without the consent of the lessor, assign or transfer the lease to a third party.
- (2) The lessee must –
 - (a) provide to the lessor sufficient information about that third party in order for the lessor to make a sound commercial decision about whether or not to consent to the assignment or transfer of the lease; and
 - (b) comply with any other obligation to provide information provided for in a covenant in the lease.
- (3) The lessor –
 - (a) must not unreasonably withhold consent to assign the lease to a third party (whether or not the covenant expressly provides that consent must not unreasonably be withheld); and
 - (b) must, within 14 business days of receipt of the information set out in subsection (2),—
 - (i) give the consent; or
 - (ii) give the lessee a notice that states that the consent is withheld and the reasons why the consent is withheld.
- (4) If the lessor unreasonably withholds consent then the lessee may assign without the consent of the lessor.
- (5) If the lessor does not give the lessee the notice in subsection (3)(b), or if the notice does not set out the reasons for withholding consent then the lessee may assign without consent.

Section [] Damages may be recovered from lessor if consent is unreasonably withheld

- (1) A person specified in subsection (2) who suffers loss because the lessor unreasonably withholds consent to an assignment may recover from the lessor compensation for any loss suffered because that consent was withheld.
- (2) The persons referred to in subsection (1) are—
 - (a) the lessee; or

- (b) any assignee, sublessee, mortgagee, or person in possession of the leased premises.

Section [] Consent to sublease etc.

- (1) This section applies:
 - (a) to all leases;
 - (b) where the lessor receives after the commencement of this Act a notice from a lessee requesting the lessor's consent to:
 - (i) enter into a sublease;
 - (ii) part with possession of the leased premises;
 - (iii) change the use of the leased premises from a use that is permitted under the lease;
 - (iv) create a mortgage over the leasehold estate or interest;
 - (v) do any of the things referred to in subparagraph (b)(i) to (iv) in relation to any part of the leased premises or for any part of the term of the lease;
 - (c) if there is a covenant in a lease that the lessee will not, without the consent of the lessor, do any of the things in subsection (2).
- (2) The lessor—
 - (a) must not unreasonably withhold consent to do any of the things in subsection (1)(b) whether or not the covenant expressly provides that consent must not unreasonably be withheld; and
 - (b) must, within 14 business days of receipt of the notice from a lessee requesting the lessor's consent,—
 - (i) give the consent; or
 - (ii) give the lessee a written notice that states that the consent is withheld.

133. Continuing Liability of an Assignor of a Lease

133.1. Overview and purpose

At common law, a lease of land creates both an estate in the land for the period specified and a contract between the lessor and lessee.²²³⁴ The original parties to a lease have both privity of estate and privity of contract. A lease agreement will contain covenants that a lessor and lessee are required to comply with. Privity of contract between the original parties to a lease survives assignment of a lease. The obligations of an original lessor or lessee can only be discharged by the execution of a release by those parties supported by consideration. Problems arise particularly when there are breaches of a lease by assignees of the lease. In that situation, an original lessee who has not been discharged might be sued on the lease contract if a lessor is unable to recover their losses caused by the assignee of the lease.²²³⁵

The discussion below is intended to provide context to the issue of whether or not an original lessee who assigns his or her interest in a lease should remain liable for breaches of covenants by the immediate assignee or any subsequent assignees to the lease.

133.1.1. Privity of contract – what does it mean to obligations under the lease after disposition?

Where either the lessor or lessee disposes of their relevant interest, privity of contract between the parties means that an original lessee remains liable to the original lessor to perform all obligations under the lease for the term of the original lease. Similarly, the original lessor remains liable in relation to covenants under the lease applicable to the lessor.²²³⁶ In simple terms, the express covenants in a lease are enforceable between the parties as a matter of contract law.²²³⁷ The problem this situation potentially creates is more acute in relation to the liability of the original lessee, particularly in relation to long leases. If the original lessee assigns the lease, the contractual liability remains for the term of the lease irrespective of further assignments.²²³⁸ This means that if a subsequent assignee falls into arrears and the lessor is unable to recover the amount from the assignee directly, the lessor could claim from the original lessee. Further, if, for example, the original lease included provisions for rent review, the original lessee could be liable for rent increases (or reductions) if an assignee fell into arrears.

A lessor has the discretion to elect to commence proceedings against the original lessee, the assignee in breach or the previous assignees.²²³⁹ The original lessee remains directly and primarily liable to the

²²³⁴ Martin Davey, 'Privity of Contract and Leases – Reform at Last', (1996) 59 *Modern Law Review* 78, 79.

²²³⁵ *Teller Home Furnishers Pty Ltd (in liq) v Horburgh* [1967] VR 313.

²²³⁶ WD Duncan, 'The Continuing Liability of Original Lessees After Assignment of Lease – Time For Reconsideration?', (2005) 12 *Australian Property Law Review* 93, 93.

²²³⁷ Peter Butt, *Land Law*, (Lawbook Co, 6th ed, 2010) [15144].

²²³⁸ Although lessor's remains liable to the original lessee through the duration of the lease after assignment, the practical effect is minimal since lessors 'still tend to be the dominant party in negotiations' and 'rarely undertake extensive liabilities in the terms of the lease which they have been responsible for drafting': see Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995' (1996) 55 *Cambridge Law Journal* 313, 314-315.

²²³⁹ WD Duncan, 'The Continuing Liability of Original Lessees After Assignment of Lease – Time for Reconsideration' (2005) 12 *Australian Property Law Journal* 93, 98.

lessor for the entire term of the lease and cannot demand that the lessor 'exhaust his remedies against the defaulter'.²²⁴⁰ However, the lessor is not able to recover twice and if he or she recovers from the original lessee for breaches committed by the assignee then the original lessee is indemnified by the defaulting assignee.²²⁴¹ In Queensland, the indemnity may not be available in the case of a registered lease unless the transfer of the lease has been registered.²²⁴²

If the assignor (lessee) wishes to escape further liability after an assignment, the lessor and the original lessee (the assignor) must either expressly agree to discharge the obligations under the lease, or a term in the lease must release the assignor from such obligations. Such a discharge would not be implied merely from the fact of an assignment.

As a matter of commercial practice, it is common for a lessor to require as a condition of assignment that the assignee enter into a deed of covenant with the lessor to the effect that the assignee will perform all the covenants in the lease.²²⁴³ If a deed is entered into, this creates privity of contract between the lessor and the assignee which 'obviates the need to inquire whether any individual covenants touch and concern the land as the assignee will be bound, in accordance with her or his contract with the lessor, to perform all the obligations in the lease.'²²⁴⁴

This practice has arisen out of an abundance of caution because of the uncertainty in the law relating to the assignment of leases in Queensland.

Section 62 of the *Land Title Act 1994* (Qld) states in part:

- (1) On registration of an instrument of transfer for a lot or an interest in a lot, all the rights, powers, privileges and liabilities of the transferor in relation to the lot vest in the transferee.
- (2) ...
- (3) Without limiting subsection (1), the registered transferee of a registered lease is bound by and liable under the lease to the same extent as the original lessee.

Subsection 1 sets out that, upon registration of an instrument of transfer (including a transfer of a lease as set out in subsection (3)) 'all of the rights, powers, privileges and liabilities' then vest automatically in the transferee, in this case the assignee. Despite the wording of subsection (1), it has been held in Queensland that the words 'all of the rights, powers, privileges and liabilities' does not include covenants that do not 'touch and concern the land'.

The case of *Jodaway Pty Ltd v Langton*²²⁴⁵ has created some considerable uncertainty about the interpretation and application of section 62 of the *Land Title Act 1994* (Qld). In that case there was a lease granted to the respondents (hereafter called the 'Residents') over a lot in a retirement village by the original proprietor of the village. The lease was registered on the title. In return for granting that lease, the Residents were required to provide an interest-free loan to the original proprietor. There was a clause in the lease that stated that upon determination of the lease, the loan was repayable

²²⁴⁰ Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995' (1996) 55 *Cambridge Law Journal* 313, 315.

²²⁴¹ *Moule v Garrett* (1872) LR 5 Exch 132.

²²⁴² *Murphy v Harris* [1924] St R Qd 187.

²²⁴³ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.850].

²²⁴⁴ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.850].

²²⁴⁵ [2004] Qd R 272.

(less some fees which were calculated according to the length of their residence) to the Residents. The original proprietor went into receivership and the village was transferred (subject to the registered lease) to the applicant (the registered proprietor of the village, hereafter called the 'Subsequent Owners').

The question for the court was whether section 62 of the *Land Title Act 1994* (Qld) had the effect of making the Subsequent Owners liable to repay the loan that was a condition of the grant of the lease? Was this a covenant that 'touched and concerned the land'?

It was held by Mullins J that the covenant in the lease to repay the loan did not run with the land. Her Honour held that:

It was not (and could not be) suggested on behalf of the respondents that the obligation of [the Subsequent Owners] to repay the relevant part of the loan ran with the land. It is not the type of covenant under a lease that can be characterised as touching and concerning the land.²²⁴⁶

Further, Her Honour went on to say:

There appears to be no authority to support a construction of s 62(1) of the LTA that the expression 'the rights, powers, privileges and liabilities of the transferor in relation to the lot' covers rights, powers, privileges and liabilities that do not run with the land.... [Section 62(1) of the LTA] does not have the effect the respondents seek to give it in respect of imposing on the applicant as the assignee of the reversion the obligation to make the repayment of the relevant part of the loan...²²⁴⁷

It follows then that the effect of section 62(3) upon assignment of a lease is that only covenants that 'touch and concern the land' will be assigned. As a result of this decision, the practice of having parties enter into a deed to create privity of contract so that such covenants can be enforced has evolved.

133.1.2. Privity of estate – what does it mean to obligations under the lease after disposition?

Privity of estate exists between any persons who stand in the relationship of lessor and lessee.²²⁴⁸ This means that it will exist between the original lessor and original lessee and any subsequent parties who 'succeed in the interests of the original parties' such as assignees.²²⁴⁹ For example, where a lessor assigns the reversion, there will no longer be privity of estate between the original lessor and the original lessee. However, privity of estate will exist between the new lessor and original lessee. Where both original parties assign their interests in a lease, privity of estate will no longer be present between those parties but it will exist between the assignees.²²⁵⁰

The effect of the existence of privity of estate is that covenants in a lease are enforceable between the parties if the covenants 'touch and concern' the land.²²⁵¹ An assignee will be liable for breaches

²²⁴⁶ *Jodaway Pty Ltd v Langton*[2004] Qd R 272, 17.

²²⁴⁷ *Jodaway Pty Ltd v Langton*[2004] Qd R 272, 19.

²²⁴⁸ Peter Butt, *Land Law*, (Lawbook Co, 6th ed, 2010) [15144].

²²⁴⁹ Peter Butt, *Land Law*, (Lawbook Co, 6th ed, 2010) [15144].

²²⁵⁰ Peter Butt, *Land Law*, (Lawbook Co, 6th ed, 2010) [15144].

²²⁵¹ Butt notes that in the context of privity of estate, the distinction between an assignment and sublease is critical. An assignment is the transfer of the 'whole of the lessee's interest in the lease, where a sublease is the transfer of something less than the whole of the lessee's interest and the original lessee retains his or her own

of covenants that touch and concern the land committed during the 'currency of the assignee's term.'²²⁵² The assignee's liability does not extend to breaches occurring prior to the assignment of the lease to the assignee.²²⁵³

133.1.3. What is the current position in Queensland?

The position in Queensland in relation to non-retail commercial leases remains the same as the common law. In the case of retail shop leases, section 50A of the *Retail Shop Leases Act 1994* (Qld) has the effect that an assignor of a lease may be released from liability under the retail lease covenants upon an assignment if the prescribed disclosure procedure is properly undertaken in respect of both the incoming assignee and the lessor.²²⁵⁴

The issue of the ongoing liability of an assignor was considered briefly in the 1986 QLRC Working Paper.²²⁵⁵ The QLRC noted that:

However, the area where difficulty is seen to arise is that the original lessee remains responsible to his lessor for observing covenants in the lease even though he has assigned the lease to a sublessee and is still responsible if that sublease makes a further assignment.²²⁵⁶

The QLRC considered the adoption of a provision with the effect that in every transfer of a lease there is an implied covenant by the 'transferee with the transferor' to perform and observe all covenants in the lease (express and implied) and to indemnify the transferor against all actions arising out of 'non-observance' of the covenants.²²⁵⁷ The QLRC did not see a need to include a provision in this form.²²⁵⁸

Sections 117 and 118 of the PLA alter the common law position in relation to an assignment of the reversion following the purchase or transfer of freehold land subject to a lease. The common law position was that covenants in the lease were not enforceable between the assignee of the reversion

leasehold interest and creates a new leasehold interest out of it. In the case of a sublease there is no privity of estate between the lessor and sub-lessee. See Peter Butt, *Land Law*, (Lawbook Co, 6th ed, 2010) [15144].

²²⁵² Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.870].

²²⁵³ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.850]. An exception to this general principle may arise where the breach is a continuing breach such as a breach of covenant to keep the premises in repair. In that situation a second assignee may be liable for the whole breach even where part of the damage was caused by the first assignee: at [14.870].

²²⁵⁴ The disclosure process refers to the lessor, assignor and assignee each complying with sections 22B (Assignor's and prospective assignee's disclosure obligations to each other) and section 22C (Lessor's and prospective assignee's disclosure obligations to each other) or any order from QCAT specified in section 22E(2) which is imposed on a disclosing person. The release from liability will only apply if all parties have made proper disclosure. The section does not release any guarantor of the assignor. The extent of the ongoing liability of a guarantor would depend on the terms of the guarantee.

²²⁵⁵ Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986).

²²⁵⁶ Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986) 50.

²²⁵⁷ Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986) 50-51. The QLRC noted that this would give effect to the statutory principle in *Moule v Garrett* (1872) 7 L.R.Ex 101. The Working Paper referred to legislation in other Australian jurisdictions with an equivalent provision. These included: *Property Law Act 1953* (Vic) s 77(1)(c); *Transfer of Land Act* (WA) s 95; and *Real Property Act* (SA) s 152.

²²⁵⁸ The QLRC indicated that 'Once again, the acceptance of a statutory form of indemnity will be considered in the course of revision of the Real Property Act.' See Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986) 51.

(that is, the new owner) and the lessee on the basis that the 'reversion was not land to which covenants could attach.'²²⁵⁹ The effect of section 117 of the PLA is that the benefit of covenants that touch and concern the land will be enforceable by the assignee of the reversion. Section 118 of the PLA has the effect that the assignee of the reversion is required to comply with the lessor's covenants that touch and concern the land.²²⁶⁰

133.2. Issues with the current position

It is clear from the discussion in paragraph 133.1 above that an original lessee may be liable for the defaults of a subsequent assignee of whose identity the lessee is not aware and over whose occupancy they have not consented. The original lessee is never going to be in a position to exercise any degree of control over the assignee of a lease. This simply means that, if the original (or subsequent assignees) are unable to negotiate a release from liability from the original lessor, they remain potentially liable for the defaults of subsequent unknown assignees for the duration of the lease. If there were a rent review provision in the original lease to which the original lessee subscribed, the burden could potentially be greater when rent increased through that mechanism thus increasing the amount of arrears in cases of default. The original lessee could not even be relieved by the bankruptcy of the defaulting assignee.²²⁶¹

The only relief might come when there has been subsequent agreement between the original lessor and a subsequent lessee varying the terms of the lease in a way not contemplated by the terms of the original lease. In that situation the original lessee is not a party to the variation. The liability would then be limited to the position prior to the variation.²²⁶²

The United Kingdom altered the common law position in relation to the ongoing liability of original lessees after assignment by the introduction of the *Landlord and Tenant (Covenants) Act 1995*. That Act effectively abolished the principle of privity of contract between the original lessor and lessee following assignment of the lease by the lessee. The qualifications to, and scope of, this change is discussed in more detail in paragraph 133.3.3 below. The introduction of the *Property Law Act 2007* (NZ) in New Zealand did not alter the common law position regarding the ongoing liability of an original lessee following assignment of the lease.

Whether or not the position in Queensland should be altered is contingent on whether there is a sufficient problem to warrant consideration of reform in this area. It should be noted that there is no suggestion in relation to guarantors of the lessee. The continuing liability of a guarantor would depend upon the terms of the guarantee.²²⁶³ A summary of some of the arguments for and against reform are discussed below.

²²⁵⁹ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.890].

²²⁶⁰ An equivalent provision is set out in section 62 of the *Land Titles Act 1994* (Qld) which provides that on the registration of an instrument of transfer (including a transfer of reversion) for a lot or interest in a lot, all rights and liabilities of the transferor vest in the transferee. 'Rights' is defined in the Act to include the right to sue on the terms of the lease and to recover debts or to enforce liabilities under the lease: *Land Titles Act 1994* (Qld) s 62(4).

²²⁶¹ *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1995] QB 95 (CA).

²²⁶² *Friends Provident Life Office v British Railways Board* [1996] 1 All ER 336 (CA).

²²⁶³ *Simmons v Lee* [1988] 2 Qd R 671 (CA).

133.2.1. Arguments supportive of reform

As discussed above, one of the key issues associated with a lease assignment relates to the ongoing liability of the lessee after assignment of the lease arising from the doctrine of privity of contract. There are a number of issues that potentially arise from this including:

- an original lessee who enters into a long lease and assigns their interest in the lease may be exposed to an action for many years after the assignment. The breach which may give rise to an action on the part of the lessor may relate to an assignee who has taken on the lease following several other assignments;²²⁶⁴
- in a modern leasing context, retaining a claim against an original lessee for breaches of a covenant that potentially may be years from the original assignment of the lease has been described as:
 - faintly ridiculous, especially given the fact that once the lease has been assigned, the original lessee loses not only privity of estate but any control over, or even knowledge of, the actions of the lessor in their acceptance of subsequent assignees;²²⁶⁵
- other practical solutions to this issue have been adopted as standard practice in some commercial leases. For example:
 - in the case of leases to private corporations, a director's guarantee will often be provided or required as a condition of assignment set out in the lease;²²⁶⁶
 - bank guarantees of rent may be required as a condition of providing a lease;
 However, these practices do not release the original (or even subsequent) lessees;
- in a large number of cases lessors do retain some control over the acceptance or rejection of a potential assignee of the lease through the operation of the assignment qualifications;²²⁶⁷ and
- the question of whether it is appropriate in non-retail leases to maintain this right in the lessor in modern leasing practice.

133.2.2. Arguments supportive of retaining existing position

There are some valid reasons for retaining the current position in Queensland. These include:

- the reform in the United Kingdom occurred partly against the background of commercial leases extending for long periods of time. This meant that there was great prospect of multiple assignments of the lease throughout its term, thereby increasing the risk of the original lessee being liable for the breach of an obligation by a subsequent assignee.²²⁶⁸ The

²²⁶⁴ Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 611 [8.15.06].

²²⁶⁵ W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 103.

²²⁶⁶ W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 101.

²²⁶⁷ W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 102

²²⁶⁸ W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 101.

position in Queensland (and Australia more generally) is different in that the volume of cases relating to original lessee liability is not as large due generally to shorter term leases;²²⁶⁹

- although reform to address this issue in the context of retail leases has occurred in Queensland and other Australian jurisdictions, this reform was directed at a ‘specific’ and potentially ‘vulnerable’ market which may be, but not in all cases, distinguishable from the commercial (that is, non-retail) leasing situation;²²⁷⁰ and
- there do not appear to be any significant public or political calls for reform in this area in relation to commercial leases.²²⁷¹

133.3. Other jurisdictions

133.3.1. Australia

The other Australian jurisdictions have not altered the common law position in relation to the ongoing liability of the original lessee following the assignment of a lease in relation to non-retail leases.²²⁷²

The principle of privity of contract and its consequences following a lease assignment remain in Australia. In the case of retail leases, New South Wales, Victoria and South Australia have also abolished the privity of contract rule if certain preconditions are met under the respective retail leasing legislation in those States.²²⁷³

133.3.2. New Zealand

The issue of continuing liability of an assignor of a lease was discussed in New Zealand by the Law Commission (NZ) in 1991 as part of the broader review undertaken of the *Property Law Act 1952* (NZ).²²⁷⁴ The Commission highlighted the following issues of concern arising from the common law position in New Zealand at the time the paper was published:²²⁷⁵

- a lessee assigning a lease remained contractually bound to perform all obligations in the balance for the duration of the lease and any periods of extensions of term or renewal in the original lease;
- the ongoing liability of the original lessee after assignment could potentially extend for years, depending on the term of the lease;
- the original lessee’s rights against any subsequent assignee will depend on the existence of a chain of deeds of indemnity;
- a lessor will usually pursue the original lessee if the current assignee has become insolvent;

²²⁶⁹ W D Duncan, ‘The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration’ 12 (2005) *Australian Property Law Journal* 93, 101.

²²⁷⁰ W D Duncan, ‘The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration’ 12 (2005) *Australian Property Law Journal* 93, 103. See page 102 for a brief summary of the consumer protection aspect of the retail leasing legislation reforms.

²²⁷¹ W D Duncan, ‘The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration’ 12 (2005) *Australian Property Law Journal* 93, 102.

²²⁷² Although the Victorian Law Reform Commission undertook a review of the *Property Law Act 1958* in 2010.

²²⁷³ *Retail Leases Act 1994* (NSW) s 41A; *Retail Leases Act 2003* (Vic) s 62; *Retail and Commercial Leases Act 1995* (SA) s 45A.

²²⁷⁴ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991) [441] – [454].

²²⁷⁵ See Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) [441] – [446].

NOT GOVERNMENT POLICY

- an assignor has concurrent liability with the current lessee. The assignor is not a guarantor of the liability of the current lessee and is not released by dealings between the lessor and current lessee to which the assignor has not consented; and
- the assignor impliedly authorises the assignee (and any successor of the assignee) and the lessor to do whatever the assignor could have done in relation to the lease, including entering into variations of the lease.²²⁷⁶

The Law Commission (NZ) suggested that the position be changed so that the lessee's ongoing liability was as a guarantor rather than as a 'concurrent obligor'.²²⁷⁷ A Final Report produced by the Law Commission (NZ) in 1994 also suggested a more significant change in the form of a provision in the proposed new Property Law Act under which an assignor would automatically be released from future liability after a maximum period of 5 years from the date of the assignment of the lease.²²⁷⁸ The rationale for the addition included:

- placing a cap on the assignor's liability; and
- the assignor would be equated with a guarantor with the consequence that the assignor would also be released by any variation of the lease made without the assignor's consent.²²⁷⁹

Further, the Final Report also included a proposal that the 'touching and concerning' test should not apply so that the benefit and burden of all covenants would pass on assignment.²²⁸⁰

The proposed reform recommendations in England were considered and discounted by the Law Commission (NZ) in both the 1991 Preliminary Paper and 1994 Final Report. The Law Commission (NZ) described the proposal in England at the time in the following way:

The Law Commission of England and Wales in its report entitled *Landlord and Tenant Law: Privity of Contract and Estate* (Law Com No 174 188) has proposed radical change. In essence, that Commission suggests that after an assignment the assignor should be released but that the landlord should be empowered to insist that the assignor guarantee the performance of the immediate assignee. Even that guarantee would lapse when the assignee ceased to be the tenant so that, on a second assignment, the landlord would lose the personal covenant of the original tenant/assignor. This report has not yet been implemented by the legislature.²²⁸¹

The position ultimately adopted by the New Zealand Parliament in the new *Property Law Act 2007* (NZ) did not reflect the Commission's recommendations in relation to the liability of the original

²²⁷⁶ The Law Commission (NZ) referred to the case of *Centrovincial Estates plc v Bulk Storage Ltd* (1983) 46 P&CR 393 in relation to this principle. However, the concern identified by the Commission regarding variations was no longer relevant following the 2007 decision in *Friend's Provident Life Office v British Railways Board* [1996] 1 All ER 336 (CA) which was followed in the New Zealand decision in *Wholesale Distributors Limited v Gibbons Holdings Limited* (2007) 5 NZ ConvC 194,493. This decision clarified that an original lessee is not liable for any greater burden arising from a variation unless the lease expressly allows for such a variation.

²²⁷⁷ Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) [27] and Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 612 [8.15.06].

²²⁷⁸ Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) [28].

²²⁷⁹ Subject to rent reviews and other matters contemplated in the lease document at the time of the assignment: Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) [28].

²²⁸⁰ Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) [8.15.06]. In the case of personal covenants, Bennion et al indicated that the provision would 'operate prospectively only in the case of personal covenants.'

²²⁸¹ Law Commission (NZ), *The Property Law Act 1952*, Preliminary Paper No. 16 (1991) [447].

lessee.²²⁸² Section 241 of the *Property Law Act 2007* (NZ) governs the ongoing liability of the ‘transferor or assignor’ of a lease.²²⁸³ The section operates as follows:

- where there has been a transfer or assignment of a lease, the transferor or assignor remains liable to the lessor for:
 - the payment of the rent payable under the lease; and
 - the observance and performance of all covenants of the lease;²²⁸⁴
- liability does not extend to a covenant that was not binding on the lessee or lessor immediately before the transfer or assignment;²²⁸⁵ and
- where a variation of the lease occurs with the agreement of the transferee or assignee and the lessor without the consent of the transferor or assignor, the liability of the transferor or assignor does not increase beyond that provided for by the lease at the time of the assignment or transfer.²²⁸⁶ The variation can only increase liability of the transferor or assignor to the extent that it is provided for in the lease at the time of transfer.²²⁸⁷

Section 241 will apply to a transfer or an assignment of a lease that comes into operation on or after 1 January 2008, whether or not the lease itself came into operation before, on or after that date.²²⁸⁸ In practical terms, this means that the ‘date of assignment is the relevant date.’²²⁸⁹

A statutory indemnity is also provided to the transferor or assignor (or previous transferor or assignor) under section 242 of the *Property Law Act 2007* (NZ) for non-payment of rent or the breach of any other covenant of the lessee. The indemnity covers the transferor or assignor and anyone claiming through the transferor or assignor and any previous transferor or assignor.²²⁹⁰

The introduction of section 241 in the *Property Law Act 2007* (NZ) does not modify the common law position in relation to the liability of original lessees in New Zealand.²²⁹¹ A significant potential impact of the section is that it extends the continuing liability to assignees who subsequently assign the lease.²²⁹² Prima facie, these assignees are liable for a breach of covenant by a subsequent lessee ‘even when they are not bound by privity of contract or estate.’ This is because the section applies to a

²²⁸² Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (2nd ed, Brookers Ltd, 2009) 612 [8.15.06].

²²⁸³ The terms ‘assignor’ and ‘transferor’ are not defined in the Act.

²²⁸⁴ *Property Law Act 2007* (NZ) s 241(1).

²²⁸⁵ *Property Law Act 2007* (NZ) s 241(3).

²²⁸⁶ *Property Law Act 2007* (NZ) s 241(2).

²²⁸⁷ *Property Law Act 2007* (NZ) s 241(4). Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 613 [8.15.06]. Bennion et al note that: ‘At common law if a subsequent assignee negotiated a variation of the lease, this did not affect the original lessee’s liability which remained measured by the contract to which it was a party. Assignee’s liability was limited to the period of their tenure, their liability dependent on privity of estate.’ At [8.15.06]

²²⁸⁸ *Property Law Act 2007* (NZ) s 239.

²²⁸⁹ Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed 2009) [8.15.06].

²²⁹⁰ *Property Law Act 2007* (NZ) s 242(1)(c).

²²⁹¹ Emma Tait, ‘Liability of Lessees and Assignees of Commercial Leases in New Zealand’, (2008) 39 *Victoria University of Wellington Law Review* 193, 210.

²²⁹² Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd. 2nd ed 2009) 617 [8.15.09].

‘transferor’ or ‘assignor’ and the interaction of sections 241 and 242 suggest it is not limited to the original lessee.²²⁹³

The *Property Law Act 2007* (NZ) did adopt the Law Commission (NZ)’s recommendation that the distinction between personal covenants and those which touch and concern the land should be abolished. Under sections 231 to 233 of the Act, the burden of ‘every lessor covenant and the benefit of every lessee covenant run with the reversion’²²⁹⁴ which has the effect of burdening the assignor further.

133.3.3. United Kingdom

The most significant reform to this area of law has occurred in the United Kingdom by virtue of the *Landlord and Tenant (Covenants) Act 1995* (UK) which commenced on 1 January 1996. The Act, prima facie, abolishes the privity of contract principle.²²⁹⁵ However, this is subject to a number of significant qualifications under the Act. The Act has been described as legislating ‘against the principle of the tenant’s ongoing liability.’²²⁹⁶ The legislation was introduced against a historical backdrop in England of significant criticism of the principle of privity of contract in relation to its application to former lessees under a lease of commercial property, particularly long leases. The reason for the increased concern about the application of the doctrine in the context of commercial leases has been explained in the following way:

The reasons for this would appear to lie in changes to the traditional landlord and tenant relationship which occurred because of developments in the property world. The most notable change was that whereby commercial property came to be seen primarily as an investment vehicle by a class of landlords typically constituted by institutional investors such as banks, life insurance companies and pension funds. This led to the growth of sophisticated upwards only rent review clauses, and an increasing insistence on the provision of an elaborate chain of sureties as landlords sought to shift as much risk of the venture as possible away from themselves and onto other parties. In this changed climate it was only a matter of time before business failed. When that happened former tenants, who had long disposed of their property, would face unexpected ruin as they were made responsible for breaches of covenant occurring after they had disposed of their interest. The dangers were most obvious in relation to non payment of rent or breach of repairing obligations by an assignee over whom the former tenant would have no control.²²⁹⁷

²²⁹³ This is because section 242(1)(c)(ii) contemplates subsequent transferors and assignors. For further commentary on this issue and the alternative interpretation that can be given to ‘transferor’ and ‘assignor’ see Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 617 [8.15.09] and Emma Tait, ‘Liability of Lessees and Assignees of Commercial Leases in New Zealand’, (2008) 39 *Victoria University of Wellington Law Review* 193, 217.

²²⁹⁴ Emma Tait, ‘Liability of Lessees and Assignees of Commercial Leases in New Zealand’, (2008) 39 *Victoria University of Wellington Law Review* 193, 208. These provisions relate to leases coming into operation on or after 1 January 2008.

²²⁹⁵ Martin Davey, ‘Privity of Contract and Leases – Reform at Last’, (1996) 59 *Modern Law Review* 78, 79.

²²⁹⁶ Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 611 [8.15.06].

²²⁹⁷ Martin Davey, ‘Privity of Contract and Leases – Reform at Last’ (1996) 59 *Modern Law Review* 78, 81. For further information regarding the history to the reform see also Stuart Bridge, ‘Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995’ (1996) 55(2) *Cambridge Law Journal* 313, 328-331.

The Law Commission (UK) delivered a Working Paper in 1986 about the issue and ‘provisionally’ proposed that the principle of privity of contract be abolished.²²⁹⁸ Consultation was undertaken in relation to the Working Paper and the Law Commission (UK) produced a report in 1988.²²⁹⁹ That report ‘significantly diluted’ the proposals made in the Working Paper including enabling a lessor to obtain a guarantee from the lessee ‘on assignment a guarantee of the immediate assignee’s liability (but no more) where it was reasonable to do so.’²³⁰⁰ Further reform action did not occur until 1993 and the *Landlord and Tenant (Covenants) Act 1995* was passed in 1995. The final form of the Act is significantly different to the proposed form in the 1988 Law Commission (UK) Report with key differences including only applying to leases after the commencement of the Act rather than all leases as initially contemplated.²³⁰¹

Key features of the Act include:

- the Act applies to leases granted on or after 1 January 1996,²³⁰²
- there is no distinction between legal and equitable assignments, the Act applies in the same way,²³⁰³
- the Act applies to all covenants of a lease, whether or not the covenant has reference to the subject matter of the lease and whether the covenant is express, implied or imposed by law,²³⁰⁴
- the requirement that covenants ‘touch and concern’ or have reference to the subject matter of the lease before the benefits and burdens can pass to assignees of the lease or the reversion is abolished,²³⁰⁵
- a lessee (original or an assignee) is released from the burden of leasehold covenants when he or she assigns the lease.²³⁰⁶ The lessee also ceases to be entitled to the benefit of the lessor covenants of the lease;²³⁰⁷
- this release is potentially subject to the lessee entering into an ‘authorised guarantee agreement’ guaranteeing the performance of the relevant covenant by the next immediate assignee;²³⁰⁸

²²⁹⁸ Law Commission (UK), *Landlord and Tenant Privity of Contract and Estate Duration of Liability of Parties to Leases* Working Paper No. 95 (1986).

²²⁹⁹ Law Commission (UK), *Landlord and Tenant Law Privity of Contract and Estate* Report No. 174 (1988).

²³⁰⁰ Stuart Bridge, ‘Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995’ (1996) 55(2) *Cambridge Law Journal* 313, 328. Bridge notes that at the time of the 1988 Report the justifications for removing the principle of privity of contract following assignment of a lease were being countered by the lessor lobby: [328].

²³⁰¹ Stuart Bridge, ‘Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995’ (1996) 55(2) *Cambridge Law Journal* 313, 330.

²³⁰² *Landlord and Tenant (Covenants) Act 1995* (UK) Annotations Commencement Information.

²³⁰³ *Landlord and Tenant (Covenants) Act 1995* (UK) s 28(1).

²³⁰⁴ *Landlord and Tenant (Covenants) Act 1995* (UK) s 2(1).

²³⁰⁵ *Landlord and Tenant (Covenants) Act 1995* (UK) ss 2 and 3. Commentary on these changes indicate that it now means that there is no need to show privity of estate and sections 141 and 142 of the *Law of Property Act 1925* (UK) are no longer applicable to leases granted on or after 1 January 1996: Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 248 [6.6.1]. These sections are similar to sections 117 and 118 of the *Property Law Act 1974* (Qld).

²³⁰⁶ *Landlord and Tenant (Covenants) Act 1995* (UK) s 5(2)(b).

²³⁰⁷ *Landlord and Tenant (Covenants) Act 1995* (UK) s 5(2)(b).

²³⁰⁸ *Landlord and Tenant (Covenants) Act 1995* (UK) s 16(1) and (2).

NOT GOVERNMENT POLICY

- the assigning lessee will remain liable where the assignment has been made in breach of covenant or assignments made by operation of law;²³⁰⁹ and
- where the lessor assigns the reversion in the leased premises, he or she may be released from the lessor covenants and if released, ceases to be entitled to the benefit of the lessee covenants of the lease as from the assignment.²³¹⁰

Clearly the most significant impact of the Act is the release of the original lessee and all subsequent lessees (where assignments have occurred) from any obligation to perform covenants under the lease once the lease is assigned. However, as highlighted in the summary of the key features of the *Landlord and Tenant (Covenants) Act 1995* (UK) above, the general release is not absolute as a lessor may require the original lessee to enter into an authorised guarantee agreement as a condition of the assignment.²³¹¹ This is to address concerns that the lessor no longer has a remedy if a lessee in possession defaults on the lease.²³¹² The guarantee can only be required in order to guarantee the performance of the covenants for the next immediate assignee, not more generally for subsequent assignees.²³¹³ A lessor can require the lessee to enter into an authorised guarantee agreement where there is a qualified or absolute covenant against assignment.²³¹⁴ The majority of commercial leases will fall within one of these categories and the lessor may be able to require the lessee to provide the guarantee in a large number of cases.²³¹⁵ The ultimate outcome of requiring this guarantee is that the lessor then always has two possible sources to claim from if there is a breach of covenant.²³¹⁶

The *Landlord and Tenant (Covenants) Act 1995* (UK) is not without criticism including the limited case law on the provisions and the fact that the provisions of the Act can be difficult to interpret.²³¹⁷ Other commentators view it as an 'equitable' solution to the problem of ongoing lessee liability after assignment.²³¹⁸

²³⁰⁹ *Landlord and Tenant (Covenants) Act 1995* (UK) s 11.

²³¹⁰ *Landlord and Tenant (Covenants) Act 1995* (UK) s 6. The lessor may apply to be released in accordance with the procedure under section 8 of the Act. Since the decision in *London Diocesan Fund v Phithwa (Avonridge Pty Co Ltd Pt 20 defendant)* [2005] UKHL 70 the lessor can stipulate in the original lease that the lessor's liability ceases when the reversion is assigned and there will not be a need to serve a notice under the Act. These 'Avonridge' clauses are now included in most professionally drafted commercial leases and commentary indicates that they render 'the original landlord immune from liability after he has assigned the reversion and, more importantly, placing the tenant in a position in which he has limited remedies for future breaches of covenant. This is exactly what the LTCA was intended to avoid.' See Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012).

²³¹¹ *Landlord and Tenant (Covenants) Act 1995* (UK) s 16.

²³¹² Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 249 [6.6.2.1].

²³¹³ Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 249 [6.6.2].

²³¹⁴ See *Landlord and Tenant (Covenants) Act 1995* (UK) s 16(3).

²³¹⁵ Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 250 [6.6.2.1.1].

²³¹⁶ Emma Tait, 'Liability of Lessees and Assignees of Commercial Leases in New Zealand' (2008) 39 *Victoria University of Wellington Law Review* 193, 217. See Malcolm Dowden, 'Has the UK Court Created a Lease Guarantee Nightmare?' (2012) 30 *Journal of Property Investment and Finance* 83 for a discussion on the authorised guarantee agreement.

²³¹⁷ Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 249 [6.6.2] referring to the comments of Lightman J in *First Penthouse v Channel Hotels and Properties* [2003] EWHC 2713 where he indicated in relation to section 3 of the Act that '[t]he Act is the product of rushed drafting and its provisions create exceptional difficulties.'

²³¹⁸ See Emma Tait, 'Liability of Lessees and Assignees of Commercial Leases in New Zealand' (2008) 39 *Victoria University of Wellington Law Review* 193, 217.

133.4. Recommendation

The Centre recommends the addition of provisions within the PLA that modify the common law position to the extent that an assignor of a lease will remain liable for breaches of lease covenants for the immediate assignee only, and the lessee is not liable for breaches of the lease covenants for any subsequent assignees. Put simply, the lessee will only be liable for the breaches of the assignor that the lessee introduces to the lessor and the lessor accepts as an assignee. The position of guarantors would be governed by the wording of the guarantee, however, generally where the assignee is no longer liable, then the guarantor would also be relieved of liability. The previous assignees and guarantors would be discharged. The rationale for this recommendation is set out below.

133.4.1. Justice and equity

This recommendation is made on the basis that it is unjust and inequitable for a lessee to potentially be liable for the breaches of covenants by all subsequent assignees, the choice over which the lessee has no control. While the Centre acknowledges that sophisticated parties entering into commercial arrangements are able to protect their own interests, the relationship of lessor and lessee is not one of equal power and control. The commercial reality is that the position of a lessor is superior to that of any lessee and a lessor can within reason place conditions on the acceptance of an assignee such as a new guarantor or a higher bank guarantee. As discussed above at 133.1.1, a lessor is able to pursue any of the assignors (where there has been more than one) as each remains liable for the breaches of the assignee.²³¹⁹ The Centre is of the view that in this day and age this goes beyond what is necessary to protect the interests of the lessor.

133.4.2. Recommendations provide adequate protection for lessors

Under the recommended regime, the lessor would be able to seek damages for any breaches of the covenants of the lease by an assignee from that assignee and its guarantors (if any), the immediate assignor, and the assignor's guarantors (if any). This framework provides adequate protection for the lessor, and reasonably limits the assignor's liability.

133.4.3. Balancing the interests of the parties

As discussed above at 133.2.1, in most commercial leases in Queensland lessors have the ability to refuse to consent to an assignment of a lease, although that consent must not be unreasonably withheld. Commentators say that this is a factor that is relevant to the balance between the rights of the lessor and the lessee.²³²⁰ Altering the common law position as proposed by the Centre is aimed at shifting the balance between those competing interests. In making these recommendations the Centre is seeking to continue to protect the lessor's interests, but also to relieve the assignor of liability when it reasonably should no longer be liable. It is the view of the Centre that it is no longer reasonable for an assignor to be liable for breaches of the lease covenant, once the lease is assigned to a successive assignee, the choice over which it has no control.

133.4.4. Other measures protect lessor

It is typical, in modern commercial leasing practice, for the lessor to seek to ensure their interests are protected by requiring an incoming assignee, as a condition of assignment, to provide a guarantor. In

²³¹⁹ *Lyons and Company Ltd v Knowles* [1943] 1 KB 366.

²³²⁰ W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 96.

the case of a corporation, the directors may also personally guarantee the performance of the lease obligations by the corporation. Further, bank guarantees are often sought in favour of the lessor as an extra security to ensure payment of rent and outgoings or other payments under the lease.

133.4.5. Recommendations compared to retail shop leasing legislation

The Centre has taken into consideration the provisions of the *Retail Shop Leases Act 1994* (Qld), which immediately relieves an assignor and its guarantors upon assignment of the lease. Section 50A(1) of that Act sets out notice requirements that must be complied with, and where the notices are given, section 50A(2) states: ‘when the assignment is entered into, the assignor and any guarantor of the assignor are released from any liability under the lease resulting from a default by the assignee.’ The lessor only has remedies for breach of the lease covenants as against the lessee in possession and its guarantor, if any.

The legislation governing retail shop leases was originally enacted in 1984 as a result of the findings of the ‘Inquiry into Shopping Complex Leasing Practices’ (the Cooper Report).²³²¹ This Report ‘identified a number of inequities between lessees and lessors of large shopping complexes...’²³²² The object of the current *Retail Shop Leases Act 1994* (Qld) is set out in section 3 which states ‘... to promote efficiency and equity in the conduct of certain retail business in Queensland.’ This is achieved by providing a minimum standard for retail shop leases and a cost-effective dispute resolution process for the parties.²³²³ Lessees of retail shops are often retailers ‘whose only capital sits in their businesses, many of whose profit can be marginal, and, because of the shortness of their leases, their business value is not substantial.’²³²⁴ The lessees, in the context of a retail shop lease, have been afforded extra protections as a result of the inequities identified in the Cooper Report. Those parties who come within that Act are not exposed to any future liability, provided the disclosure requirements are met. The release from liability upon assignment is a motivating factor for parties to provide proper disclosure.

Parties to non-retail leases arguably do not require such a degree of protection as provided by the *Retail Shop Leases Act 1994* (Qld). These parties are likely to be more sophisticated and able to protect their own interests in a commercial leasing environment. For this reason, the Centre’s recommendations do not go as far as the measures in the retail shop leasing legislation. The Centre has made recommendations that strike a balance between the rights and obligations of the parties while taking into account their respective positions.

133.4.6. Recourse to previous assignors is uncommon

An examination of the case law confirms that instances where the landlord has resorted to a previous assignor to recover money owing under the lease by an assignor are uncommon. This is likely because of modern leasing practices (as described above at paragraph 133.4.4) that provide a more direct remedy. Further, in the case of corporations, often companies are set up for the sole purpose of a particular venture. Where the lease is assigned to another party, it is often the case that the company

²³²¹ *Report of Committee of Inquiry into Shopping Complex Leasing* (Qld Government Printer, Brisbane, 1981).

²³²² W D Duncan, *Commercial Leases in Australia* (7th ed. Sydney Lawbook Co, 2014) 90 [20.3900].

²³²³ *Retail Shop Leases Act 1994* (Qld) s 4.

²³²⁴ W D Duncan, ‘The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration’ 12 (2005) *Australian Property Law Journal* 93, 102.

will no longer hold assets. Taking proceedings against previous assignees many years after they have sold their lease is not always fruitful.

133.4.7. Continuing liability impinges on business

A corporation that assigns a lease may continue to operate a business. The continuing contingent liability of the corporation under the terms of the assignment and for the duration of a lease may be an impediment to that business. The corporation may want to raise capital or borrow money. The potential risk of the continuing liability may be a factor lenders take into consideration when calculating borrowing power. Investors may also take this exposure to risk into account.

133.4.8. Lessors unlikely to agree to release assignors

In the Centre's experience, a lessor is unlikely to agree to release an outgoing tenant/assignor as part of the terms of the deed of assignment. Notwithstanding that it is uncommon for lessors to pursue a remedy against the assignor, and without the intervention of the legislature, the practice is unlikely to change.

133.4.9. Abolition of the requirement that covenants 'touch and concern the land'

As discussed above at paragraph 133.1.1, there is uncertainty in the law about which covenants in a lease are assigned to the assignor. Section 62(1) and (3) of the *Land Title Act 1994* (Qld), read together, state that all of the rights, powers, privileges and liabilities are transferred upon registration. However, as a result of the decision in *Jodaway Pty Ltd v Langton*²³²⁵ it remains the law that only those covenants that touch and concern the land are transferred. As discussed above, the practice of entering into a 'Deed of Assignment of Lease', thus creating privity of contract, has developed. This adds to parties' costs and reduces efficiency in business practice.

In the United Kingdom, as discussed in paragraph 133.3.3, the requirement that covenants 'touch and concern' or have reference to the subject matter of the lease before the benefits and burdens can pass to assignees of the lease or the reversion has been abolished. The Centre recommends adopting a similar approach. This will be beneficial primarily for two reasons:

- firstly, upon transfer of the lease interest, all of benefits and obligations contained in the covenants will also vest in the transferee so this will alleviate the uncertainty caused by *Jodaway Pty Ltd v Langton*²³²⁶ and the current interpretation of section 62 of the *Land Title Act 1994* (Qld); and
- the need for parties to incur the expense of entering into a deed of assignment will be eliminated, thus promoting business efficacy and more economical practices.

The Centre understands that the legal fees for a Deed of Assignment, even for an uncomplicated matter, can be upwards of \$2,200. Further, the time and cost of arranging to sign the Deed must also be considered.

The Centre recommends that the PLA be amended to include provisions that have the effect of abolishing the 'touches and concerns' requirement. It is further recommended that the provisions

²³²⁵ [2004] Qd R 272.

²³²⁶ [2004] Qd R 272.

specify an exception to this – in the case where a covenant is expressly stated in the lease to be personal. The benefit or burden of such personal covenants will not vest in the transferor or the transferee upon assignment. This is consistent with the approach in the United Kingdom.

133.4.10. UK reform compared

As discussed at paragraph 133.3.3, the United Kingdom has enacted legislation to modify the common law in that jurisdiction. The recommendations for reform made by the Centre have some similarities, however there are some key differences. Table 6 below sets out a comparison of the two frameworks.

Table 6

	Recommendation for Queensland	United Kingdom reforms
Assignor automatically released upon assignment	No	Yes, however lessor can insist that the assignor guarantee the performance of the immediate assignee as a condition of consenting to the assignment: ss 5, 16. <i>Landlord and Tenant (Covenants) Act 1995</i> (UK)
Assignor automatically released upon subsequent assignment	Yes	Yes, if a guarantee was provided then that guarantee lapses upon subsequent assignment ss: 5, 16: <i>Landlord and Tenant (Covenants) Act 1995</i> (UK)
Abolition of the requirement for covenants in the lease to ‘touch and concern the land’ before the benefits and burdens can pass to assignee or reversion	Yes	Yes: ss 2 and 3 <i>Landlord and Tenant (Covenants) Act 1995</i> (UK)

133.4.11. Submissions from the QLS

The Centre received submissions on this point from the QLS. The QLS is of the view that the current law is appropriate and that it should be left to the parties to negotiate a release upon assignment. The QLS noted that the lessor may have incurred considerable capital expenditure to fit out the premises for a particular tenant, on the basis of the financial capacity of that lessee to pay rent for the entire term, thus justifying the outlay by the lessor. While the Centre accepts this might be the case, even if the lessee decides to assign the lease, the lessor will still have the usual remedies as against that lessee and its guarantors. The Centre is therefore of the view that the submission by the QLS that the law should remain the same because of potential capital expenditure of the lessee is not a sufficient basis to change its recommendations.

The QLS is also of the view that the matter should be left to the parties to negotiate. The Centre has these points to make about that submission:

1. as stated above at paragraph 133.4.1, there is an imbalance in the bargaining positions of the lessor and lessee;
2. it is uncommon for lessors to agree to release any assignors upon assignment, as stated above at paragraph 133.4.8; and
3. the lessor retains the property, and the improvements along with any increase in value that result from the fitout.

It therefore remains the view of the Centre that reform in this area is necessary and desirable for the reasons discussed above.

RECOMMENDATION 130. The Centre recommends the addition of provisions within the new PLA that modify the common law position to the extent that an assignor of a lease will remain liable for breaches of lease covenants for the immediate assignee only, and the lessee is not liable for breaches of the lease covenants for any subsequent assignees.

For example, following the position in the United Kingdom, the provisions could be drafted in the following way:

[PART NUMBER]

Section [] Covenants to which this part applies

- (1) This part applies to a covenant in a lease—
 - (a) whether or not the covenant has reference to the subject matter of the lease, and
 - (b) whether the covenant is express, implied or imposed by law.

Section [] Transmission of benefit and burden of covenants

- (1) The benefit and burden of all covenants in leases shall in accordance with this section pass on an assignment of the whole or any part of those premises or of the reversion in them.
- (2) Where the assignment is by the lessee under the lease, then as from the assignment the assignee of the lease—
 - (a) becomes bound by the covenants in the lease to the extent that the assignor was bound by them immediately before the assignment; and
 - (b) becomes entitled to the benefit of the covenants in the lease to the extent that the lessor was bound by them immediately before the assignment.
- (3) Where the assignment is of the reversion by the lessor, then as from the assignment the assignee of the reversion—
 - (a) becomes bound by the covenants in the lease to the extent that the assignor was bound by them immediately before the assignment; and
 - (b) becomes entitled to the benefit of the covenants in the lease to the extent that the lessor was bound by them immediately before the assignment.
- (4) In determining for the purposes of subsection (2) or (3) whether any covenant bound the assignor immediately before the assignment, any covenant which (in whatever terms) is expressed to be personal to the assignor shall be disregarded.
- (5) Any covenant in the lease which is restrictive of the user of land shall, as well as being capable of enforcement against an assignee, be capable of being enforced against any other person who is the owner or occupier of any demised premises to which the covenant relates, even though there is no express provision in the lease to that effect.

- (6) Nothing in this section shall operate in the case of a covenant which (in whatever terms) is expressed to be personal to any person, to make the covenant enforceable by or (as the case may be) against any other person

DIVISION []

Section [] Application of this division

- (1) This division applies to leases:
- (a) entered into after (date of commencement of this provision); and
 - (b) despite any other provision of this Act or any agreement to the contrary.

Section [] Definitions for Division [number]

In this division:

date of assignment is the date the assignee enters into possession of the land under the lease.

lease includes the original term of the lease and any options for further terms that have been exercised.

subsequent assignee is a party who is assigned a lease from a party to whom that same lease had previously been assigned.

subsequent assignment is an assignment of a lease by a subsequent assignee.

Section [] Effect of an assignment of a lease by a lessee

At the date of assignment of a lease by an assignor to an assignee, the assignor and any guarantor remain liable to the lessor for any defaults or breaches of the covenants under that lease by that assignee to the extent that that assignor was liable immediately before the assignment.

Section [] Release of assignor upon subsequent assignment

At the date of assignment that is a subsequent assignment of a lease by an assignee to a subsequent assignee, the assignor and any guarantor of the assignor are released from any liability to the lessor for any defaults or breaches of the covenants under that lease by the subsequent assignee.

134. Section 122 – Involuntary assignment no breach of covenant

134.1. Overview and purpose

122 Involuntary assignment no breach of covenant

Neither the assignment nor the underletting of any lease by the trustee of a bankrupt, or by the liquidator on behalf of a company (other than a liquidator in a voluntary winding up of a solvent company), nor the sale of any lease under an execution, nor the bequest of a lease shall be deemed to be a breach of a covenant, condition, or agreement against the assigning, underletting, parting with the possession, or disposing of the land leased.

Section 122 operates where the lease contains a contractual provisions which restricts assignment by the lessee and the lessee's successors in title.²³²⁷ A trustee in bankruptcy is considered under the common law to be an assign of the bankrupt lessee²³²⁸ and this is the case notwithstanding the trustee obtains the leasehold by operation of law.²³²⁹ Company liquidators have also been held to be bound by a covenant not to assign the lease.²³³⁰ This section reverses this common law rule²³³¹ and applies to liquidators other than in the case of a voluntary winding up where the company is solvent.²³³²

134.2. Recommendation

Section 122 of the PLA remains relevant and is well understood in practice. The Centre recommends the section be retained with modernised language. This is in line with the overarching principles that inform these recommendations. The section could be better set out so that the entire text is not contained in one sentence. This will aid in interpretation of the section.

RECOMMENDATION 131. Section 122 should be retained with modernised language.

²³²⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.122.30].

²³²⁸ *Re Wright* [1949] Ch 729.

²³²⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.122.30].

²³³⁰ *C.f. Riggs; Ex parte Lovell* [1901] KB 16.

²³³¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.122.30].

²³³² *Property Law Act 1974* (Qld) s 122; *Cohen v Popular Restaurants Ltd* [1917] 1 KB 480.

Part 8 Division 3 – Relief from forfeiture

Division 3 of Part 8 (sections 123 to 128) of the PLA is directed at relief from forfeiture and the key sections cover the following areas:

- restriction on, and relief against, forfeiture (section 124);
- powers of the court to protect an under-lessee on forfeiture of a superior lease (section 125);
- recovery of costs and expenses by the lessor (section 126); and
- relief against loss of lessee’s option (section 128).

The provisions operate in the following way:

- section 123 ‘Definitions for div 3’ provides the definitions to be applied to the Division;
- section 123A ‘Application of div 3’ sets up the circumstances in which the Division applies;
- section 124 ‘Restriction on and relief against forfeiture’ cannot be contracted out of and operates in the following way:
 - a right to forfeit a lease and re-enter the leased premises requires a notice in the approved form to the lessee;
 - the lessee has an opportunity to remedy the breach complained of;
 - if the breach complained of is not remedied by the lessee then the lessor may terminate the lease and re-enter the property;
 - the lessee may then apply for relief against the forfeiture of the lease, notwithstanding the breach of the covenant;
 - an application for relief against forfeiture is not an admission that there was a breach of any covenant, or that the lessor has served the necessary notice;
 - there are certain ‘carve-outs’ to which relief against forfeiture of a lease will not apply, such as a lease for a term of one year or less, residential leases, etc.
- section 125 ‘Power of court to protect under-lessee on forfeiture of superior leases’ provides protection for a sub-lessee where the head lease is forfeited;
- section 126 ‘Costs and expenses’ provides for a lessor to recover costs and damages even if the right to forfeit is waived by the lessor or relief is granted to the lessee by a court;
- section 127 ‘Relief against notice to effect decorative repairs’ refers the lessor serving a notice on the lessee requiring it to carry out decorative repairs on the leased premises, and the availability of an order from relief against such a notice;
- section 128 ‘Relief against loss of lessee’s option’ provides that:
 - a lessor must serve a notice on the lessor if it intends to refuse to let a lessee exercise an option contained in a lease to renew a lease or to purchase the property;
 - refusal must be because of a breach of covenant;
 - the lessee may apply to the court for an order that the lease be extended or that the reversion be transferred in accordance with the terms of the option.

The following discussion addresses each of the sections in turn, however the overall recommendation is to retain the effect of most of the current provisions, but with significant redrafting. The purpose of the redrafting is to provide a clear and detailed process, while maintaining the current regime and the associated case law. The recommendations for each section in this Division are interdependent and are made on the basis that, if a recommendation is accepted, all of the changes for each section will be adopted.

135. Section 123 –Definitions for Div 3

135.1. Overview and purpose

123 Definitions for div 3

In this division -

lease includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have the lease granted.

lessee includes an original or derivative under-lessee, a grantee under such a grant, a grantee's executors, administrators, and assigns, a person entitled under such an agreement, and the executors, administrators, and assigns of a lessee.

lessor includes an original or derivative under-lessor, such a grantor, a person bound to grant a lease under such an agreement, and the executors, administrators, and assigns of a lessor.

proceedings include an application commenced by originating summons.

under-lease includes an agreement for an under-lease where the under-lessee has become entitled to have the under-lease granted.

under-lessee includes any person deriving title through or from an under-lessee.

The definitions are provided for the purposes of Division 3.

The definition of 'lease' in section 123 of the PLA is critical for the purpose of the application of these sections. A lease is defined in section 123 of the PLA to include:

an original or derivative under-lease, also a grant as a fee farm rent, or securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have the lease granted.

Equitable leases are clearly covered under the definition of lease in section 123 of the PLA.²³³³

135.2. Issues with the section

135.2.1. Definition of 'lease'

Before a lessor can enforce a right of re-entry or forfeiture for a breach of any covenant, obligation or condition or agreement in the lease under section 124 of the PLA, the lessor must serve a notice on the lessee.²³³⁴ However, section 124 is only applicable where there is a 'lease' which includes 'an agreement for a lease where the lessee has become entitled to have the lease granted'.²³³⁵

An issue which has arisen in practice is whether the following scenario creates an 'agreement for a lease where the lessee has become entitled to have the lease granted'.²³³⁶

- there is an agreement for a lease which does not arise from an option to renew;
- the potential lessee breaches a term of the agreement for lease; and

²³³³ Young, Peter, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed 2012 LexisNexis) [32680.5]. V.G Wellings and G.N Huskinson (eds) *Woodfall's Law of Landlord and Tenant* (1978, 28th ed, Sweet& Maxwell Limited) 171 [1-0417] and Mark Wonnacoott, *The history of the law of landlord and tenant in England and Wales* (Lawbook Exchange 2011) 51.

²³³⁴ *Property Law Act 1974* (Qld) s 124(1).

²³³⁵ *Property Law Act 1974* (Qld) s 123.

²³³⁶ Although the extent of the problem is not reflected in the court decisions relating to the relevant provisions of the *Property Law Act 1974* (Qld).

- the lessor wants to prevent or restrain the lessee from formally taking possession of the property or, alternatively, if the lessee is in possession of the property, the lessor wants to remove the lessee from the premises.

This creates uncertainty for both parties as it is not clear whether the lessor is required to give notice under section 124 of the PLA before enforcing a right of re-entry or forfeiture. The requirement to issue a notice is contingent on the existence of a lease.²³³⁷

The phrase 'entitled to have the lease granted' has been interpreted to mean 'so entitled as if there had been no forfeiture.'²³³⁸ This interpretation of the words:

Presupposes that the lease is susceptible of specific performance; and so where a tenant under an agreement for a lease (as distinct from under a lease actually granted) has breached the agreement in a way that would preclude an order for specific performance, there is no 'lease' for the purposes of section 129, and so no need for the landlord to give notice under that section.²³³⁹

However, the potentially circuitous effect of the words and 'obvious anomaly' of this part of the definition of 'lease' has been articulated in the following way:

...if there had been a breach of condition sufficiently serious to attract the consequence of forfeiture (against which relief was being sought) how could Equity decree specific performance of the agreement so that it could be treated as one such, 'where the lessee has become entitled to have his lease granted'.²³⁴⁰

135.2.1.1. Options to renew

The definition of 'lease' becomes relevant where the lessee is unable to rely upon section 128 of the PLA. In many instances, section 124 of the PLA is used as an alternative option for relief for a lessee by claiming that the lessor cannot exercise a right of re-entry or forfeiture because the lessor failed to provide the required notice to the lessee. In that situation, the lessor's counter-claim is that there is no lease in existence.

There have been differences in the interpretation given to the phrase 'entitled to have the lease granted' in the cases considering this issue in both Queensland and other jurisdictions with equivalent provisions. Part of the reason for the differences can be attributed to the differing terms of the lease clauses relevant to the options to renew and the conditions included in these. This inevitably creates some uncertainty from the perspective of both a lessee and lessor regarding the legal position in cases involving options to renew and when an option to renew becomes an agreement for lease. An overview of some of the approaches taken in relation to this issue by the courts is below:

²³³⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.360].

²³³⁸ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed, 2012, LexisNexis) [32680.5] referring to a number of cases including *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247, 9249 and *Greville v Parker* [1910] AC 335, 339. V.G Wellings and G. N Huskinson, *Woodfall's Law of Landlord and Tenant Vol 1* (1978, 28th ed, Sweet & Maxwell Limited) [1-1934] 866-867.

²³³⁹ Peter Butt, *Land Law* (Lawbook Co., 6th ed 2010). This quote refers to section 129 of the *Conveyancing Act 1919* (NSW). This is the equivalent section to section 124 of the *Property Law Act 1974* (Qld).

²³⁴⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.123.30].

NOT GOVERNMENT POLICY

- the circuitous approach involves reading after the word ‘entitled’, the words ‘but for the forfeiture sued upon’;²³⁴¹
- an entitlement to have a lease granted will cover a situation where a lessee, who at any time, has acquired a right to have his or her lease granted, despite losing the right by subsequent breach of some covenant or condition;²³⁴² and
- immediately upon exercise of the option by the lessee the lessee acquires, in equity, the right to a new lease provided the lessee, at the time of exercise, has complied with all the lease covenants. Subsequent breaches of the original lease cannot affect the grant of the lease.²³⁴³ On this reasoning, the lessor would have to give notice under section 124 of the PLA.²³⁴⁴

The recent Queensland Court of Appeal decision of *Grepo v Jam-Cal Bundaberg Pty Ltd*²³⁴⁵ approached the phrase ‘where the lessee has become entitled to have the lease granted’ in a different way. This case concerned an option to renew a lease and involved consideration of the application of section 128 of the PLA (and section 124). Under the lease, the lessee was entitled to exercise an option to renew by giving the relevant notice of exercise, provided that the lessee was not in breach up until the expiry of the lease. The lessee gave notice of the exercise of the option prior to the expiry of the lease. The lessee breached conditions of the lease after the exercise of the option. The definition of lease became relevant in this case when considering the application of section 128 of the PLA (and section 124). The court considered in detail the authorities relevant to one of the issues in the case regarding when an option to renew becomes an agreement for lease.²³⁴⁶

The court interpreted the obligation in the relevant option clause that the lessee not be in breach of the lease until expiry as a condition precedent to the new lease coming into existence. Holmes JA noted that:

Absent the performance of those conditions, no entitlement to a further term arose. The option could be called an agreement for a lease but it could not be characterized as an agreement for a lease with the lessee then being entitled to the lease so as to meet the definition in s 123, and make available relief under s 124.²³⁴⁷

²³⁴¹ *Shodroske v Hadley* (1908) 27 NZLR 377 approved in *Parker v Greville* (1909) 28 NZLR 461. Note that this decision was overturned by the Privy Council in *Greville v Parker* [1910] AC 335, 339.

²³⁴² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.123.30] referring to the reasoning of Young J in *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247.

²³⁴³ This is the approach adopted by Young J in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1989) 4 BPR 9575.

²³⁴⁴ The decision in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1989) 4 BPR 9575 related to the equivalent New South Wales provisions in the *Conveyancing Act 1919* (NSW) s 128 (definitions) and s 124 (relief against forfeiture). Skapinker approved this approach and noted that the ‘breach can, however, be taken into account in equitable proceedings by the lessee for specific performance of the grant of the new lease when the lessor refuses to grant that new lease by reason of the breach.’: see Skapinker, Diane. ‘A lessor’s rights and obligations on exercise of an option to renew a lease’, (1994) 68 *Australian Law Journal* 217, 220-221.

²³⁴⁵ *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131. This case is also considered in further detail in the context of section 128 of the PLA in paragraph 141.4.1.1.

²³⁴⁶ *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131, [58]-[66] where Holmes JA reviews the various authorities on this issue.

²³⁴⁷ *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131 [64].

The court considered that the lessor was not obliged to grant a new lease because there were breaches of covenants in the lease up to and at the date of the expiry of the lease.²³⁴⁸

In the case of options to renew, the proposed amendments to section 128 of the PLA are intended to clarify that the section extends to breaches of covenants that occur after the notice to exercise the option has occurred. If the proposed amendments are adopted, this will mean that section 128 of the PLA may still apply to situations where:

- the lessee exercised an option to renew by providing the requisite notice;
- a condition of the lease permitting the option to renew also required that the lessee did not breach any covenants up until the expiry of the original lease; and
- the lessee breached covenants after giving the notice to renew but before the lease expired.

This will mean that possible claims relying on section 124 of the PLA and associated issues of determining if an option to renew is a 'lease' will become less common.

135.2.2. Definition of 'lessee' and 'lessor'

While it is reasonable and helpful to provide a definition of 'lessee' and 'lessor', the language of the definition is not in step with modern commercial leasing practice and should be redrafted to provide greater clarity and aid in the interpretation and application of the Division. The inclusion of the words 'original lessor' in the definition of 'lessor' is superfluous and should be removed.

135.2.3. Definition of 'proceedings'

The definition for 'proceedings' in section 123 is outdated and uses language that is no longer in step with the processes for filing applications under the *Uniform Civil Procedure Rules 1999* (Qld).

135.2.4. Definition of 'under-lease' and 'under-lessee'

The term 'sub-lease' and 'sub-lessee' are now more commonly used. While it is reasonable and helpful to provide a definition of 'under-lease' (sub-lease), the language of the definition is not in step with modern commercial leasing practice and should be redrafted as part of the general definition of 'lease'. The definition of 'under-lessee' is superfluous, if the recommendations redrafting the definitions of 'lease', 'lessee' and 'lessor' are adopted, and should be removed.

135.2.5. Definition of 'covenant or condition'

The section may benefit from the inclusion of a definition of 'covenant or condition' as including a covenant or condition required by statute to provide greater clarity and aid in the interpretation and application of the Division.

²³⁴⁸ *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131 [64].

135.3. Other jurisdictions

135.3.1. Australia

Both the Western Australian and Victorian forfeiture provisions define ‘lease’ in a similar way to Queensland which includes ‘an agreement for a lease where the lessee has become entitled to have his lease granted.’²³⁴⁹ The position in New South Wales is similar and provides:

an original or derivative under-lessee, a grantee under such a grant as aforesaid, his or her executors, administrators, and assigns, a person entitled under an agreement as aforesaid, and the executors, administrators, and assigns of the lease.²³⁵⁰

135.3.2. New Zealand

The definition of ‘lease’ under the *Property Law Act 2007* (NZ) includes ‘an agreement to lease’ without the added reference to where the lessee has become entitled to have the lease granted.²³⁵¹ This definition is consistent with the one set out in the predecessor legislation to the 2007 Act.²³⁵² The forfeiture provisions in New Zealand use the term ‘cancellation’ and are, effectively, a code which cannot be contracted out of.²³⁵³ Relief from cancellation is available in New Zealand in the case of both an agreement to lease and where there is a concluded and in force lease.²³⁵⁴

135.4. Recommendation

These recommendations are made on the basis that the proposed draft amendments to Part 8 Division 3 are adopted in full.

135.4.1. Definition of ‘lease’

The Centre recommends, as part of an overall re-drafting of Division 3, that the definition of lease be amended to remove the words ‘where the lessee has become entitled to have the lease granted’ as they add nothing of value to the well accepted principles relating to agreements for lease. This approach aims to remove any uncertainty regarding the interpretation given to those words and avoid the circuitous result described in paragraph 135.2 above.

The Centre further recommends that the definitions be amended to include a definition of ‘agreement to lease’ which specifies that an agreement for lease is an agreement for the lessor to grant a lease ‘that creates an interest in land’. This means that any preconditions in the agreement for lease must be satisfied before the agreement is enforceable by the lessee, and thus creating an interest in land.

The QLS agrees that ‘where the lessee has become entitled to have the lease granted’ should be removed from the definition of ‘lease’.

²³⁴⁹ *Property Law Act 1969* (WA) s 81(5) and *Property Law Act 1958* (Vic) s 146(5(a)). The term is defined in the same way in the United Kingdom: see *Law of Property Act 1925* (UK) s 146(5).

²³⁵⁰ *Conveyancing Act 1919* (NSW) s 128.

²³⁵¹ *Property Law Act 2007* (NZ) s 4.

²³⁵² *Property Law Act 1952* (NZ) s 104A.

²³⁵³ For a discussion on the relevant provisions in the, *Property Law Act 2007* (NZ) see Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (2nd ed, 2009, Bookers Ltd) [8.20.09] 658-662.

²³⁵⁴ Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (2nd ed, 2009, Bookers Ltd) [8.20.09] 662.

135.4.2. Definitions to be amended

The definitions of 'lessee' and 'lessor' should also be redrafted to reflect modern commercial leasing practice.

135.4.3. Definitions to be removed

The Centre recommends that the definition for 'proceedings' be removed on the basis that the *Uniform Civil Procedure Rules 1999* (Qld) now provide for a proceeding to be started by way of 'originating application'. Further, the Centre is of the view that the *Uniform Civil Procedure Rules 1999* (Qld) provide a comprehensive process for applications and it is unnecessary to provide a definition in this section.

The definitions of 'under-lease' and 'under-lessee' should be removed. The better approach is to include definitions of lease, lessee and lessor that account for sub-leasing arrangements. The use of the term 'sub-lease' etc., as opposed to 'under-lease' etc. is more in line with modern commercial leasing practice.

135.4.4. Definitions to be added

The Centre recommends that a definition of 'covenant or condition' as including one required by law be included to provide greater clarity and aid in the interpretation and application of the Division. The proposed redrafting of the Division also requires a definition of 'interested person' to define who has standing to make applications to the court under this Division in certain circumstances. The full discussion with respect to 'interested persons' is set out below at paragraph 137.2.5 and paragraph 137.2.7.

A definition of 'reasonable compensation' is recommended to assist the court in deciding what types of expenses may be considered when making an award for compensation. The definition proposed is inclusive so the court is not limited in its considerations in this regard.

RECOMMENDATION 132. Section 123 should be amended in the following terms:

- remove the words 'where the lessee has become entitled to have the lease granted' in the definition of 'lease';
- remove the definition of 'proceedings', 'under-lease' and 'under-lessee';
- add a definition of 'agreement for lease', 'covenant or conditions', 'interested person' and 'reasonable compensation'.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, section 123 could be amended in the following terms:

Definitions for division 3:

In this division –

agreement for lease means an agreement to grant a lease that creates an interest in land.

covenant or condition includes a covenant or condition implied by statute.

interested person means—

- (a) a sub-lessee; or
- (b) a mortgagee of the estate or interest of a lessee or sub-lessee; or
- (c) a receiver appointed in respect of the estate or interest of a lessee or sub-lessee.

lease includes a lease or sub-lease, and an agreement for lease.

lessee includes a lessee or sub-lessee, their executors, administrators, assigns and successors in title, or a lessee or sub-lessee under an agreement for lease and their executors, administrators, assigns and successors in title.

lessor includes a sub-lessor, a lessor's or sub-lessor's executors, administrators, assigns and successors in title, or a lessor or sub-lessor under an agreement for lease and their executors, administrators, assigns and successors in title.

reasonable compensation may include reimbursement of the lessor's reasonable expenses—

- (a) in giving a notice to remedy breach under section [2](1);
- (b) legal costs or other professional costs incurred for ascertaining the extent of the breach of the lease covenant or condition giving rise to the notice to remedy breach under section [2](1); and
- (c) in doing anything else that the lessor has reasonably done in relation to the breach including taking steps to mitigate loss caused by the breach.

136. Section 123A – Application of div 3

123 Application of div 3

This division does not apply to leases from the State of land held from the State under Coal Mining Act, Land Act, Mineral Resources Act or Housing Act, but does apply to under-leases from the holder of such land.

Section 123A states the application of Division 3. The rules of relief against forfeiture in those Acts set out are generally prohibitive.²³⁵⁵

136.1. Recommendation

These recommendations are made on the basis that the proposed draft amendments to Part 8 Division 3 are adopted in full.

The Centre recommends amending section 123A of the PLA to include the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) as an additional exception to the application of the Division. The proposed amendments will bring the Act in line with current legislation and modern commercial leasing practice. It should be noted that, in any event, section 27(1) of the *Residential Tenancies and Rooming Accommodation Act 2001* (Qld) states that the PLA does not apply to residential tenancy agreements.

The Centre further recommends additional amendments to the section to provide that relief against forfeiture of a lease is not available for a lease of a term of one year or less. Currently this is provided for in section 124(6)(a) of the PLA, however the Centre is of the view that this is more appropriately stated in the ‘application’ section of the Division.

Finally, the stipulation that the Division cannot be contracted out of should be relocated to this section. Currently this is provided for at section 124(9) in the case of relief against forfeiture of a lease and at section 128(2) in respect of the loss of options. The Centre is of the view that this is better located in the ‘application’ provision and sees no reason why it should not apply to the whole Division.

RECOMMENDATION 133. Section 123A should be amended to include the *Residential Tenancies and Rooming Accommodation Act 2008* as an exclusion from the operation of the section.

The section should stipulate that the Division applies to all leases, regardless of when the lease was made, and that the Division cannot be contracted out of.

The section should also state that leases for a term of less than one year are not covered by section 124, that is, relief against forfeiture of the lease is not available in those circumstances.

²³⁵⁵Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.123A.30].

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [1] Application of division 3

- (1) This division does not apply to leases under the following Acts—
 - (a) Coal Mining Act;
 - (b) Land Act;
 - (c) Mineral Resources Act
 - (d) Housing Act;
 - (e) *Residential Tenancies and Rooming Accommodation Act 2008*;
- (2) Where a lease is for a term of 1 year or less:
 - (a) the remedy of relief against forfeiture of the lease for breach of a covenant or condition is not available; however
 - (b) the lessee may apply to court for relief against forfeiture of an option to renew the lease and forfeiture of an option to purchase the reversion.
- (3) Subject to subsection (1), this division applies notwithstanding anything in the lease to the contrary and applies to all leases made before or after the commencement of this Act.

137. Section 124 – Restriction on and relief against forfeiture

137.1. Overview and purpose

124 Restriction on and relief against forfeiture

- (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, obligation, condition or agreement (express or implied) in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice—
- (a) specifying the particular breach complained of; and
 - (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
 - (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same;
- and the lessee fails within a reasonable time after service of the notice to remedy the breach, if it is capable of remedy, and, where compensation in money is required, to pay reasonable compensation to the satisfaction of the lessor for the breach.
- (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action the lessee may, in the lessor's action (if any) or in proceedings instituted by the lessee, apply to the court for relief, and the court, having regard to the proceedings and conduct of the parties under subsection (1), and to all the other circumstances, may grant or refuse relief, as it thinks fit, and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit.
- (3) The making of an application under this section shall not of itself be construed as an admission on the part of the lessee—
- (a) that any such notice as is mentioned in subsection (1) has been served by the lessor; or
 - (b) that any such breach as is mentioned in subsection (1) has occurred or that any right of or cause for re-entry or forfeiture has accrued or arisen;
- and the court may, if it thinks fit, grant relief without making a finding that, or arriving at a final determination whether, any such notice has been served, or any such breach has occurred, or that any such right has accrued or cause arisen.
- (4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease under the directions of any Act of Parliament.
- (5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant or obligation shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.
- (6) This section does not extend—
- (a) to any lease or tenancy for a term of 1 year or less; or
 - (b) to a covenant, condition, or agreement against the assigning, underletting, parting with the possession or disposing of the land leased where the breach occurred before the commencement of this Act; or
 - (c) to a condition for forfeiture on the taking in execution of the lessee's interest in any lease of—
 - (i) agricultural or pastoral land; or
 - (ii) mines or minerals; or
 - (iii) a house used or intended to be used as licensed premises under the *Liquor Act 1992*; or
 - (iv) a house let as a dwelling house; or
 - (v) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor or to any person holding under the lessor; or
 - (d) in case of a mining lease—to a covenant, condition, or agreement for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines, or other things, or to enter or inspect the mine or the workings of the mine; or
 - (e) to a condition for forfeiture on the taking in execution of the lessee's interest in any lease (other than a lease mentioned in paragraph (c)) after the expiration of 1 year from the date of taking in execution, provided the lessee's interest be not sold within such 1 year.

- (6A) But if the lessee's interest be sold within such 1 year this section shall extend and be applicable to such condition for forfeiture.
- (7) The rights and powers conferred by this section are in addition to and not in derogation of any right to relief or power to grant relief had apart from this section.
- (8) The notice mentioned in this section shall be in the approved form.
- (9) This section applies to leases made either before or after the commencement of this Act, and shall have effect despite any stipulation to the contrary.

Before the enactment of the PLA, the courts had limited power to grant relief against forfeiture for breaches other than non-payment of rent.²³⁵⁶ In *Pioneer Gravels (Qld) Pty Ltd v T & T Mining Corp Pty Ltd*²³⁵⁷ Hart J held that the court, in exercising its equitable jurisdiction, did have the power to grant relief against breaches other than for non-payment of rent, without reliance on statute. The enactment of section 124 has confirmed this position and was included to address that previous 'somewhat unsatisfactory state of affairs'²³⁵⁸ where a lessee had no recourse when a lease was forfeited for a breach of a covenant other than the payment of rent.

Most leases contain a covenant that gives the lessor a right of re-entry upon breach by the lessee. Before this right can be exercised, by virtue of section 124 of the PLA, the lessor must serve a 'notice to remedy breach' on the lessee. The section 'does not remove any right of re-entry or forfeiture of the lessor. It merely postpones his right to re-enter until the service of the notice.'²³⁵⁹ If no notice is served then, in most cases, the re-entry by the lessor is void.²³⁶⁰ Also, the lessor must not be in breach of the lease in order to seek re-entry and forfeiture of the lease.²³⁶¹

Section 124 operates to require a lessor to give notice of a breach of a lease covenant to the lessee which:

- sets out the breach complained of;
- requires the lessee to remedy the breach (if the breach is capable of remedy); and
- require the payment of compensation, if applicable.²³⁶²

The lessee is given a 'reasonable time' in which to remedy the breach, and/or pay compensation. If the lessor attempts to exercise a right of re-entry or forfeit the lease by serving the notice in the approved form²³⁶³ then the lessee may apply under this section for relief against forfeiture.²³⁶⁴ If the

²³⁵⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.30].

²³⁵⁷ [1975] Qd R 151.

²³⁵⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.30].

²³⁵⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.90]; *Creswell v Davidson* (1887) 56 LT 811; *Holden v Blaiklock* [1974] 2 NSWLR 262.

²³⁶⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.90]; *Re Riggs; Ex parte Lovell* [1901] 2 KB 16.

²³⁶¹ *Braxco Pty Ltd v Pialba Commercial Gardens Pty Ltd* [2010] QSC 259; *Ace Property Holdings Pt Ltd v Australian Postal Corp* [2011] 1 Qd R 504.

²³⁶² *Property Law Act 1974* (Qld) s 124(1)(a), (b) and (c).

²³⁶³ *Property Law Act 1974* (Qld) s 124(8).

²³⁶⁴ *Property Law Act 1974* (Qld) s 124(2).

notice served under this section is defective then the right of re-entry or forfeiture will not have arisen.²³⁶⁵

Under the *Uniform Civil Procedure Rules 1999* (Qld) rule 10, an application for relief against forfeiture arising out of a breach of any covenant can be made to the Supreme Court or District Court by way of originating application. The application for relief against forfeiture of the lease can be a cross-application in response to an application by the lessor for re-entry and termination of the lease, if those proceedings are on foot, or as an application directly by the lessee for the relief sought.²³⁶⁶

The section does not apply to a tenancy at will or a holding over on a periodic tenancy as the lessor is entitled to serve a notice to quit at any time without any particular cause.²³⁶⁷

137.2. Issues with the section

Section 124 of the PLA is important and should be retained. All other Australian jurisdictions have similar provisions.²³⁶⁸ There is a large body of case law that considers section 124 of the PLA and the Centre does not propose to change the fundamental operation of the section, and Division 3 as a whole. The critical issue with the section is the outdated language. The other minor issues with the section are addressed in turn below.

137.2.1. 'Reasonable time' to remedy breach

The section requires the lessor to give the lessee 'reasonable time' in which to remedy the breach. The term 'reasonable time' is uncertain and this could be addressed to some degree by requiring the lessor to specify an actual time period that is reasonable in the circumstances, having regard to the type of breach and the remedy required.

It is appropriate for a lessor to serve a 'notice to remedy breach' to demand compensation where there is a breach of a covenant or condition which is not capable of remedy.²³⁶⁹ The compensation in and of itself becomes the remedy in these circumstances. If the compensation is not paid the lessor can enforce the right to re-enter the premises. The lessee can then make an application for relief against forfeiture of the lease.

Where there is a 'once and for all breach' that is not capable of remedy, for example a lessee being convicted of breach of a regulation in relation to the occupation of the premises, it may not be necessary to serve a notice under the section. In practice, however, it is common for lessors to serve a notice out of an abundance of caution²³⁷⁰ and as a basis for the lessee to seek relief against forfeiture if desired.

²³⁶⁵ *Keswick Developments Pty Ltd v Keswick Island Pty Ltd* [2012] 2 Qd R 114.

²³⁶⁶ *Property Law Act 1974* (Qld) s 124(2).

²³⁶⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.90]; *Coatesworth v Johnson* (1886) 55 LJBQ 220.

²³⁶⁸ *Conveyancing act 1919* (NSW) s 129; *Property Law Act 1958* (Vic) s 146; *Landlord and Tenant Act 1936* (SA) ss 9 - 12; *Property Law Act 1969* (WA) s 81; *Conveyancing and Law of Property Act 1884* (Tas) s 15.

²³⁶⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.90].

²³⁷⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.90].

137.2.2. Section 124(5) – recommendation for repeal

Section 124(5) of the PLA talks about a lease that has no end date and continues for ‘as long only as the lessee abstains from committing a breach of covenant or obligation’ and states that such a lease continues ‘for any longer term for which it could subsist’ until there is a breach of covenant. A lease with no end date is essentially unheard of in modern commercial leasing practice. Arguably, a lease without an end date is a tenancy at will or holding over on a periodic tenancy (both of which can be terminated by notice) and no notice under section 124 is required in those circumstances. The subsection is outdated and serves no purpose.

137.2.3. ‘Event of default’ treated as breach of covenant

There is some contention over whether there is a need for a notice under section 124 when there has been an ‘event of default’ as described in the lease.²³⁷¹ For example, where there is a covenant in a lease that states that upon an event of default (usually bankruptcy or similar), the lease is automatically terminated. In these circumstances, the question is: is there a breach that requires a section 124 notice, or is the termination by agreement valid without the need for the notice? There is a view that an event of default such as bankruptcy does not provide a breach ‘upon which the Notice to Remedy Breach (by the lessee) can attach.’²³⁷²

In New South Wales, there is obiter to suggest that an event of default is a breach like any other breach and should be subject to the notice requirements, and it follows that relief from forfeiture of the lease is available to the lessee.²³⁷³ Section 124 of the PLA should be amended to provide certainty with respect to ‘events of default’ and the requirements for a notice under the section.

137.2.4. Defective notices

There is a large body of case law around the issue of ‘defective notices’. Commentators note that:

A notice is intended to give a person whose interest is sought to be forfeited, an opportunity of considering his or her position (whether the alleged breach should be admitted, whether it is capable of remedy, whether compensation should be offered and whether relief from forfeiture should be applied for) and take appropriate action before the forfeiture takes place. The test [as to whether or not a notice is defective] is objective.²³⁷⁴

Generally, a notice needs to contain sufficient information and detail to enable the lessee to understand the breach complained of, and must not be ambiguous or capable of misunderstanding.²³⁷⁵ Whether or not a notice is defective will ultimately be a matter of interpretation for the court, however, the Centre is of the view that it would be beneficial to include specific provisions about matters that do not necessarily make a notice defective. This will assist

²³⁷¹ See for example: *Cadogan Estates Ltd v McMahon* [2001] 1 AC 378; *Halliard Property Co Ltd v Jack Segal Ltd* [1978] 1 WLR; *Della Imports Pty Ltd v Birkenhead Investments Pty Ltd* (1987) NSW Conv R 55-358; *Melacare International Ltd v Daley Investments Pty Ltd* (1995) 6 BPR 14005; *Shiloh Spinners Ltd v Harding* [1973] AC 691.

²³⁷² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.90].

²³⁷³ *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* (2004) 17 BPR 32635.

²³⁷⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.180].

²³⁷⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.90]; *Piggott v Middlesex County Council* [1909] 1 Ch 134.

lessees to decide if they have grounds to pursue this defence in court, and potentially avoid adding to the cost of their litigation.

137.2.5. Service of a copy of notice on third parties

Presently, section 124 does not require a copy of the notice to be served on any other party. A mortgagee of the lease, receiver, guarantor and sub-lessee all have a vested interest in the lease and whether or not it is forfeited. In some cases a guarantor may step in and remedy a breach for non-payment of money. A receiver may choose to step in and operate a business until such time as a buyer can be found.²³⁷⁶ In these examples, service of a copy of the notice is essential if those third parties decide to make an application for relief against forfeiture. Standing for third parties to make such an application is discussed below at paragraph 137.2.8.

137.2.6. Lessee gives up its interest in the land

In circumstances where the lessee has given up the interest in the premises, the lessor may still think it prudent to serve a notice under this section. While giving up an interest in the land is likely to be considered a repudiation of the contract, lessors may be reluctant to rely on the common law contractual principles and consider it necessary to serve a notice in any event. The section should be amended so that the lessor who knows, or reasonably believes, the lessee has given up the interest in the premises, is not required to serve the notice to remedy breach on the lessee, but will need to give notice instead to other interested parties, as discussed above at paragraph 137.2.5.

137.2.7. Time limitations to bring an action for relief against forfeiture

Presently section 124 of the PLA does not specify a time limit for bringing proceedings seeking relief against forfeiture of the lease. The Centre is of the view that it is reasonable for a lessee to have a set time in which to make such an application. This will allow a lessor to deal with the property, by releasing it, for example, once the requisite time has passed and no application for relief is made. This is subject to an application for an extension of time by a mortgagee, receiver or liquidator seeking relief of forfeiture of the lease as discussed below at paragraph 137.2.8.

137.2.8. Standing to apply for relief and extension of time

Only the lessee can apply for relief against forfeiture of the lease under section 124 of the PLA. It was noted above at paragraph 137.2.5 that it is reasonable for another party, such as a mortgagee or receiver, to want to maintain the lease interest. As set out above at paragraph 137.2.5, these parties should also be served with a copy of the notice under this section and be able to apply for relief against forfeiture of the lease if necessary.

Provision should also be made for a mortgagee or receiver that has been prejudiced because the copy of the notice under section 124 was not served, or not served within a reasonable time, to apply for an extension of time in which to bring proceedings for relief against forfeiture of the lease.

137.2.8.1. Acceptance of rent not a waiver of rights

The current case law on the issue of whether acceptance of rent after a notice to remedy breach is served is a waiver of the lessor's right to forfeit the lease is an area of law that is 'fraught with

²³⁷⁶ See for example *Valad Investments Pty Ltd v Maloney* [2009] QSC 246.

inconsistent decisions and confusion in the use of terminology.²³⁷⁷ Although the decisions on this matter differ from jurisdiction to jurisdiction, the Centre is of the view that the general position in Queensland should be that a lessor who accepts rent after a notice under section 124 is served does not automatically waive the right to forfeit the lease.

In the interests of justice and equity, this position should be balanced so that a lessor's conduct can be examined to reveal any circumstances that led the lessee to believe otherwise, in which case the right to forfeit the lease and re-enter the property for that breach may have been waived. This view is based on the New Zealand position.

137.3. Overall recommendation

The Centre recommends that the effect of section 124 of the PLA be retained, but redrafted as part of the recommendations for the entire Part 8 Division 3.

The fundamental operation of the section is understood in practice for the most part but redrafting with more detail about how the section operates would be beneficial to practitioners and parties to a lease.

The Centre makes the following recommendations with respect to redrafting the effect of section 124:

- modernise the language of the section;
- retain the requirement of a lessor to serve a notice to remedy breach in the approved form, with some modifications as set out below;
 - require the lessor to nominate a date for remedying the breach or payment of compensation:
 - the time nominated must be reasonable in the circumstances and the lessor must have regard to the type of breach when setting the deadline;
- stipulate that an 'event of default' is a breach of covenant or condition that requires a notice to remedy breach under the section;
- specify that particular omissions or errors do not necessarily render a notice defective:
 - further, allow the lessee to make an offer of reasonable compensation if no amount is stipulated in the notice;
 - particularise that certain expenses, such as costs associated with service of the notice, may form part of a lessor's 'reasonable compensation';
- require the lessor to serve a copy of the notice to remedy breach on other parties who may have an interest in avoiding the forfeiture of the lease:
 - for example, sub-lessees, receivers etc;
- relieve the lessor of the requirement to serve a notice to remedy breach where the lessee has given up the interest in the property or the lessor reasonably believes this to be the case;
- retain the effect of subsection (7) but include a subsection heading 'Lessor can claim damages' for clarity;

²³⁷⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.124.120]; see, for example, *Segal Securities Ltd v Thoseby* [1963] 1 QB 887; *Linsdale Nominees Pty Ltd v Elkharadly* [1979] VR 84; *Mcdrury v Luporini* [2000] 12 NZLR 652.

- set out the powers of the court and allow a broad discretion to make orders as the court sees fit in the circumstances;
- amend the section so that a mortgagee, receiver or a joint tenant have standing to bring proceedings seeking relief against forfeiture of the lease, in addition to the lessee;
 - provide that a mortgagee or receiver of a leasehold can apply for an extension of time in circumstances where service of a copy of the notice to remedy breach was not effected, or not effected in a time so as not to prejudice the mortgagee's or receiver's rights;
- provide that an application for an order for relief must be made either before an order for possession is made by a court, or not less than one month after the lessor has re-entered the premises;
- retain the effect of subsection (3) which provides that an application for relief is not an admission of service of a notice, or that a breach has occurred;
- in line with the current case law in Queensland, amend the section to include a provision that acceptance of rent by the lessor is not a waiver of rights, unless the conduct of the lessor demonstrates otherwise.

RECOMMENDATION 134. Section 124 should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [2] Lessor must serve notice to remedy breach for breach of covenant or condition

- (1) A lessor may exercise a right to re-enter the premises under a covenant or condition in a lease for breach of a covenant or condition only if—
 - (a) the lessor has served on the lessee a notice in the approved form:
 - (i) specifying the particular breach;
 - (ii) if the breach is capable of remedy, requiring the lessee to remedy that breach;
 - (iii) informing the lessee of the lessor's intention to terminate the lease if the breach is not remedied within a specified period; and
 - (iv) if the lessor claims compensation for the breach, requiring the lessee to pay a specified amount of compensation and a time period for that payment; and
 - (b) at the expiry of any period specified in the notice, the breach has not been remedied, or the compensation has not been paid to the lessor.
- (2) Subsection (1) shall apply where a lessor is seeking to exercise a right of re-entry upon the occurrence of an event which, if it occurs, is treated in the lease as being a default by the lessee that gives rise to a right of re-entry in the lessor, as if that occurrence was a breach of covenant or condition in the lease.
- (3) When specifying the time period referred to in subsection (1)(a)(iii) or subsection (1)(a)(iv), the lessor must specify a time period that is reasonable in the circumstances and must have regard to the type of breach and the requirements to remedy that breach.

Section [3] Defects that do not invalidate notice to remedy breach

- (1) The notice to remedy breach required by section [2](1) is not invalid merely because the lessor—
 - (a) may not have specified that the breach is capable of being remedied by the payment of reasonable compensation; or
 - (b) may have specified an amount of compensation that is unreasonable; or
 - (c) may have specified that the breach would be capable of being remedied by the payment of reasonable compensation, but without specifying the amount that the lessor considers reasonable.
- (2) None of the matters set out in subsection (1)(a) to (c) prevents a lessee from offering an amount that the lessee considers to be reasonable compensation for the breach.

Section [4] Lessor must serve a copy of the notice to remedy breach on other parties

- (1) A lessor who has served a notice to remedy breach on a lessee in accordance with section [2](1) shall as soon as practicable, serve a copy of the notice on all of the following whose names and addresses are known to the lessor:
 - (a) any mortgagee or receiver of the leasehold estate or interest;
 - (b) any guarantor under the lease;
 - (c) any sub-lessee of the lease; and
 - (d) any mortgagee or receiver of the estate or interest of a sub-lessee.
- (2) The lessor's failure to comply with subsection (1) does not, in itself, prevent the lessor from exercising a right to terminate the lease.

Section [5] Where the lessee has given up possession of the leased premises

- (1) Despite section [2], if the lessor believes on reasonable grounds that the lessee has given up possession of the leased premises (whether or not the lessee has actually done so) the lessor:
 - (a) does not need to serve a notice to remedy breach under section [2](1) on the lessee;
 - (b) must serve a notice in writing stating that the lessor intends to re-enter the property without first serving a notice in writing demanding possession of the leased premises on all of the following whose names and addresses are known to the lessor:
 - (i) any mortgagee or receiver of the leasehold estate or interest;
 - (ii) any guarantor under the lease;
 - (iii) any sub-lessee of the lease; and
 - (iv) any mortgagee or receiver of the estate or interest of a sub-lessee.
- (2) Subsection (1) applies whether or not there are breaches of other covenants or conditions of the lease and all of the lessor's rights to recover damages and seek compensation for any or all breaches of the lease covenants and conditions are preserved.

Section [6] Lessor may re-enter or make an application for possession

- (1) If the lessee fails to remedy the breach and/or pay the compensation specified in a notice to remedy breach under section [2](1), a lessor may exercise the right of re-entry by—
 - (a) making a demand for possession in writing if the lessee is in possession of the leased premises;
 - (b) peaceably re-entering if the lessee has given up possession of the leased premises; or

- (c) applying to a court for an order for possession of the leased premises if the lessee refuses to give up possession of the leased premises upon written demand as set out in subsection (1)(a).
- (2) If the lessor applies to a court for an order for possession of the leased premises for the purpose of forfeiture of a lease, the forfeiture takes effect—
 - (a) on the making of the order; or
 - (b) on any later date that is specified in the order.
- (3) Re-entry of the leased premises under section [5] or [6] by a lessor does not effect a surrender of the lease by operation of law.

Section [7] Acceptance of rent and outgoings by lessor is not a waiver of lessor's rights

- (1) If a lessor accepts any payments of rent or outgoings after a notice under section [2](1) is served on the lessee, the lessor's acceptance of the rent does not operate as a waiver of the lessor's right under section [6].
- (2) Subsection (1) applies unless the lessor, in accepting the rent or outgoings, causes the lessee reasonably to believe that the lessor no longer intends to exercise the right under section [6].

Section [8] Powers of court in making order for possession

- (1) On an application to a court for an order for possession of the leased premises under section [6](1)(c), the court may make the order for possession of the leased premises and terminate the lease.
- (2) Without limiting the order the court can make – if the court makes the order for possession of the lease premises and terminates the lease under subsection (1), it may also do all or any of the following:
 - (a) order the lessee to pay the rent and outgoings up to the date of forfeiture or any later date on which the lessee yields up possession;
 - (b) order the lessee to pay reasonable compensation for the breach;
 - (c) impose on the lessee or the lessor any other conditions that it thinks fit.

Section [9] Lessor can claim damages

The rights and powers conferred by this section are in addition to and not in derogation of any right to relief or power to grant relief had apart from this section.

Section [10] Relief against forfeiture of lease for breach of covenant or condition

- (1) All or any of the following persons may apply to a court for relief against the forfeiture, or proposed forfeiture, of a lease on the ground of a breach of a covenant or condition of the lease:
 - (a) the lessee;
 - (b) a mortgagee of the leasehold estate or interest;
 - (c) a receiver appointed in respect of the leasehold estate or interest;
 - (d) if 2 or more persons are entitled to the leasehold estate or interest, 1 or more of those persons.
- (2) If an application made in accordance with subsection (1)(d) is not made by all of the joint tenants, the application must be served on every owner of the reversion who is not already a party, unless the court orders otherwise.
- (3) Relief may be sought in—
 - (a) a proceeding brought by the lessor for an order for possession of the leased premises under section [6](1)(c); or
 - (b) a proceeding brought for the purpose of seeking the relief.
- (4) A proceeding referred to in subsection (3)(b) must be brought—

- (a) before an order for possession of the leased premises is made in a proceeding referred to in subsection (3)(a); or
- (b) subject to section [11], if the lessor has re-entered the leased premises, not later than 1 month after the date the date of re-entry.

Section [11] Mortgagee or receiver may apply for extension of time for bringing proceedings

- (1) This section applies to a mortgagee or receiver of a leasehold estate or interest, or a receiver appointed in respect of that estate or interest, who has been prejudiced—
 - (a) by not being served under section [4] with a copy of a notice to remedy breach that is required to be given under section [2](1); or
 - (b) by not being served at a time that is reasonable in the circumstances (whether or not by reason of the failure of the lessor to comply with the relevant section).
- (2) A person to whom this section applies may apply to a court for an extension of—
 - (a) the time specified in section [10](4)(b) for the bringing of a proceeding for relief against the forfeiture, or proposed forfeiture, of the lease; or
 - (b) the time within which to make an application for relief in the lessor’s proceeding for an order for possession of the leased premises.
- (3) The court may grant the application for an extension of time on any conditions that it thinks fit.

Section [12] Application for relief not to constitute admission

- (1) This section applies to an application for relief against the forfeiture, or proposed forfeiture, of a lease.
- (2) The application is not, in itself, to be taken as an admission by the person making it—
 - (a) that there has been a breach of a covenant or condition of the lease by the lessee; or
 - (b) that, because of the breach, the lessor has the right to terminate the lease; or
 - (c) that a notice has been duly served on the applicant in accordance with section [2](1); or
 - (d) that, at the time when the lessor applied to the court for an order for possession of the leased premises or peaceably re-entered the leased premises, the period for the remedying of the breach specified in a notice served in accordance with section [2](1) had expired.
- (3) The court may grant relief against the forfeiture of the lease without determining all or any of the things set out in subsection (2).

Section [13] Powers of court on application for relief

- (1) Without limiting the orders the court can make, in determining an application for relief against the forfeiture, or proposed forfeiture, of a lease, under section [10], a court may grant the relief sought on any conditions (if any) as to expenses, damages, compensation, or any other relevant matters that it thinks fit.
- (2) The court may grant relief against the forfeiture, or proposed forfeiture, of a lease whether or not—
 - (a) the forfeiture is for a breach of an essential term of the lease; or
 - (b) the breach is not capable of being remedied.

138. Section 125 – Power of court to protect under-lessee on forfeiture of superior leases

138.1. Overview and purpose

125 Power of court to protect under-lessee on forfeiture of superior leases

- (1) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, under any covenant, proviso, or stipulation in a lease made either before or after the commencement of this Act or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease, or any part of any estate or interest in the property, make an order staying any such action or other proceeding on such terms as to the court may seem just, and vesting, for the whole term of the lease, or any less term, the property comprised in the lease or any part of any estate or interest in the property, in any person entitled as under-lessee to any estate or interest in such property, upon such conditions as to execution of any deed or other document, payment of proper and reasonable rent, costs, expenses, damages, compensation, giving security, or otherwise as the court in the circumstances of each case, and having regard to the consent or otherwise of the lessor to the creation of the estate or interest claimed by the under-lessee, thinks fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to the under-lessee for a larger area of land or for any longer term than the under-lessee had under the original under-lease.
- (2) Any such order may be made in proceedings brought for the purpose by the person claiming as under-lessee or, where the lessor is proceeding by action or otherwise in the court, may be made in such proceeding.

Section 125 of the PLA is intended to provide protection for a sub-lessee whose estate is under threat because the head lease has been forfeited by the sub-lessor for any reason.²³⁷⁸ At common law a sub-lessee was always protected against a surrender of the head lease²³⁷⁹ and section 115 of the PLA can also extend to sub-lessees. Section 125 of the PLA goes further than the common law by extending some protection to the sub-lessor in the case of forfeiture of the head lease.

The section allows the court to make orders, on terms it sees fit and at its discretion, which see the sub-lessee take the place of the sub-lessor for the remainder of the lease term, or any part thereof as ordered by the court.²³⁸⁰ The section is not litigated often and there is little case law in Queensland.

It should be noted that section 125 is only enlivened where the lessor has effected a forfeiture of the head lease and is proceeding to enforce a right of re-entry.²³⁸¹ Unless and until the head lease is forfeited, it remains in place and the sub-lessee is protected.²³⁸²

²³⁷⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.125.30].

²³⁷⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.125.30].

²³⁸⁰ *Factors (Sundries Ltd v Miller)* [1952] 2 All ER 630.

²³⁸¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.125.30].

²³⁸² *Ashton v Sobelman* [1987] 1 WLR 177; [1987] All ER 755.

138.2. Issues with the section

As stated above, the main issues with section 125 of the PLA is the outdated language. In line with the recommendation for a mortgagee or receiver making an application under section 124 as set out above at paragraph 137.2.7, provision should also be made for an application for extension of time where the sublessee has been prejudiced because the copy of the notice was not served, or not served in a reasonable time.

138.3. Recommendation

The Centre is of the view that, while section 125 is not relied upon often, it should be retained because it provides an important protection to sub-lessees. The language of the section is archaic and should be modernised to allow for easier interpretation and understanding of its operation. This is in line with the principles that inform these recommendations.

Consistent with the operation of the section as it currently stands, the amended provision should set out that the orders made as to the terms of the arrangements and the time should not exceed that of the sub-lease term, but can be made for the whole, or any part, of the sub-leased premises.

RECOMMENDATION 135. Section 125 should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [14] Protection of sub-lessee on forfeiture of superior lease

- (1) If a lessor exercises, or is proposing to exercise, a right to forfeit a lease because of a breach by the lessee of a covenant or condition of the lease, any interested person may apply to a court for relief in—
 - (a) a proceeding brought by the lessor for an order for possession of the leased premises; or
 - (b) a proceeding brought by the interested person for the purpose of seeking the relief.
- (2) A proceeding referred to in subsection (1)(b) must be brought—
 - (a) before an order for possession has been made in a proceeding referred to in subsection (1)(a); and
 - (b) subject to section [15], if the lessor has re-entered the leased premises, not later than 1 month after the date of re-entry.

Section [15] Interested person may apply for extension of time for bringing proceedings

- (1) This section applies to an interested person who has been prejudiced—
 - (a) by not being served under section [4] with a copy of a notice to remedy breach that is required to be given under section [2](1); or
 - (b) by not being served under section [4] with a copy of a notice to remedy breach at a time that is reasonable in the circumstances (whether or not by reason of the failure of the lessor to comply with that section).
- (2) An interested person to whom this section applies may apply to the court for an extension of—

- (a) the time specified in section [14](2)(b) for the bringing of a proceeding for relief under section [14](1); or
 - (b) the time within which to make an application for relief in the lessor's proceeding for an order for possession.
- (3) The court may grant the application for an extension of time on any conditions that it thinks fit.

Section [16] Powers of court on application for relief by sub-lessee

- (1) Without limiting the orders the court can make, on an application for relief made under section [14], the court may order the lessor to enter into a lease of the whole or any part of the land with the interested person.
- (2) An order under subsection (1)—
- (a) may specify a lease for a term—
 - (i) not earlier than the date on which the lessor peaceably re-entered the leased premises or the date on which the forfeiture of the lease took effect under an order for possession of the land in favour of the lessor; and
 - (ii) expiring on or before a date not later than the date on which the original sublease would have expired; and
 - (b) may be made on any conditions the court thinks fit, having regard to the covenants and conditions (if any) in the original sub-lease.
- (3) An order may be made under subsection (1) even though the lessee is not a party to the proceeding.

*Note at recommendation 132 the definition of 'interested person' is to be inserted as follows:

interested person means—

- (a) a sub-lessee; or
- (b) a mortgagee of the estate or interest of a lessee or sub-lessee; or
- (c) a receiver appointed in respect of the estate or interest of a lessee or sub-lessee.

139. Section 126 – Costs and expenses

139.1. Overview and purpose

126 Costs and expenses

- (1) A lessor shall be entitled to recover as a debt due to the lessor from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under this Act.
- (2) The lessor shall be so entitled to recover whether the lessee has or has not rendered forfeiture unenforceable against the lessee under section 124 (2).

This section was enacted as a result of the decision in *Skinnners Co v Knight*.²³⁸³ In that case it was held by Fry LJ that ‘compensation’, for the purposes of the provision in the United Kingdom upon which section 124(1) of the PLA is modelled, does not include a solicitor’s fees, or the cost of a surveyor or valuer when ascertaining the costs of repairs and similar expenses as a result of a breach of covenant by the lessee that gave rise to the right of re-entry.²³⁸⁴ The section overturns the effect of this decision and allows a lessor to recover these amounts by way of compensation.

Importantly, the section only applies in circumstances where the lessor has waived the breach, or where the lessee is relieved of liability for the breach under the Act.

139.2. Issues with the section

Commentators note that the use of the words ‘from which the lessee is relieved’ could only mean ‘relieved by an order of the court’.²³⁸⁵ In that case, ‘one wonders why those words were included, as the payment of “costs” and “expenses” may be an express condition in an order giving relief against forfeiture by court action.’²³⁸⁶

Further, issue must be taken with the ‘even more puzzling’²³⁸⁷ reference to section 124(2) in section 126(2). This provision has been criticised by commentators in the following way:

A lessee could only render forfeiture unenforceable against him, within the meaning of the section, by compliance with the notice served under s 124(1). Section 124(2), expressly mentioned in the instant section, refers only to the right of the court to relieve and seems to have little bearing on the lessor’s waiver of forfeiture after service of the notice, without court action.²³⁸⁸

²³⁸³ [1891] 2 QB 542.

²³⁸⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.126.30].

²³⁸⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.126.30].

²³⁸⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.126.30].

²³⁸⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.126.30].

²³⁸⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.126.30].

139.3. Recommendation

The Centre recommends repealing section 126 on the basis that the proposed re-drafting of Part 8 Division 3 will include a definition of what may constitute ‘reasonable compensation’. Further, a lessor should be entitled to compensation for properly incurred expenses whether or not the breach is waived, and whether or not a court grants relief to the lessee. The court should be given a wide discretion to make any order it sees fit with respect to whether or not to award compensation, and the quantum of that award.

This is reflected in the recommendation for redrafting section 124 of the PLA which includes provisions for the court to award compensation to the lessor if the order for possession of the leased premises and termination of the lease is made (see draft clause section [8] above at Recommendation 134). Conversely, the court can make an order for compensation in circumstances where the lessee’s application for relief against forfeiture is successful (see draft clause section [13] above at Recommendation 134).

RECOMMENDATION 136. Section 126(1) should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

Section 126(2) serves no purpose and should be repealed.

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be repealed on the basis that a definition of ‘reasonable compensation’ be included in the redrafted section 123(1) (set out at Recommendation 132) in the following terms:

reasonable compensation may include reimbursement of the lessor’s reasonable expenses—

- (a) in giving the notice to remedy breach under section [2](1);
- (b) including legal costs or other professional costs incurred for ascertaining the extent of the breach of the lease covenant or condition giving rise to the notice to remedy breach under section [2](1); and
- (c) in doing anything else that the lessor has reasonably done in relation to the breach including taking steps to mitigate loss caused by the breach.

This, coupled with the operation of the proposed section ‘*Section [13] Powers of court on application for relief*’ (set out at Recommendation 134) will replicate the operation of section 126(1):

- (1) Without limiting the orders the court can make, in determining an application for relief against the forfeiture, or proposed forfeiture, of a lease, under section [10], a court may grant the relief sought on any conditions (if any) as to expenses, damages, compensation, or any other relevant matters that it thinks fit.

140. Section 127 – Relief against notice to effect decorative repairs

140.1. Overview and purpose

127 Relief against notice to effect decorative repairs

- (1) After a notice is served on a lessee relating to the internal decorative repairs to a house or other building, the lessee may apply to the court for relief, and if, having regard to all the circumstances of the case (including in particular the length of the lessee's term or interest remaining unexpired), the court is satisfied that the notice is unreasonable, it may, by order, wholly or partially relieve the lessee from liability for such repairs.
- (2) This section does not apply—
 - (a) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed; or
 - (b) to any matter necessary or proper—
 - (i) for putting or keeping the property in a sanitary condition; or
 - (ii) for the maintenance or preservation of the structure; or
 - (c) to any statutory liability to keep a house in all respects reasonably fit for human habitation; or
 - (d) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term.
- (3) This section applies whether the notice is served before or after the commencement of this Act, and has effect despite any stipulation to the contrary.
- (4) The rights and powers conferred by this section are in addition to and not in derogation of any right to relief or power to grant relief had apart from this section.

This section refers only to 'internal decorative repair'²³⁸⁹ obligations and allows the court to 'relieve a lessee from the liability to make decorative repairs where such repairs are unreasonably required by the lessor.'²³⁹⁰ The rationale for the inclusion of the section is described by commentators as being:

...to prevent lessors taking advantage of lessees (who perhaps only have a short term, or if a long lease, a short period remaining before expiry) by forcing them, under threat of forfeiture, to undertake decorative repairs improving the capital value of the demised premises.... It would be inappropriate for a lessor to expect decorative repairs suitable for a 'mansion in Grosvenor Square' to be carried out by a lessee of a 'house in Spitafields.'²³⁹¹

140.2. Issues with the section

140.2.1. Residential leases

Section 127 of the PLA had far more importance when the Act applied to residential leases. As discussed above at paragraph 117.2.2, section 27(1) of the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) now expressly provides that the PLA does not apply to residential tenancy agreements.

²³⁸⁹ *Property Law Act 1974* (Qld) s 127(1).

²³⁹⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.127.30].

²³⁹¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.127.30]; *Proudfoot v Hart* (1890) 25 QBD 42, 51-54.

140.2.2. Commercial leases

It is common practice in modern commercial leasing for parties to agree to express provisions regarding the nature and extent of any repair and maintenance obligations in a lease. The Centre sees little need for the consumer protection element that section 127 of the PLA may provide as parties to a commercial lease are generally sophisticated and able to negotiate positions prior to entry into the lease.

140.3. Recommendation

Section 127 of the PLA has no operation in commercial leasing and should be repealed.

RECOMMENDATION 137. Section 127 should be repealed.

141. Section 128 – Relief against loss of lessee’s option

141.1. Overview and purpose

128 Relief against loss of lessee’s option

- (1) In this section –
 - (a) a reference to an option contained in a lease is a reference to a right on the part of the lessee to require the lessor –
 - (i) to sell, or offer to sell, to the lessee the reversion expectant on the lease; or
 - (ii) to grant, or offer to grant, to the lessee a renewal or extension of the lease, or a further lease, of the demised premises or a part of the demised premises, whether the right is conferred by the lease or by an agreement collateral to the lease; and
 - (b) a reference to a breach by a lessee of the lessee’s obligations under a lease containing an option is reference to a breach of those obligations by an act done or omitted to be done before or after the commencement of this Act in so far as the act or omission would constitute a breach of those obligations if there were no option contained in the lease.
- (2) This section applies to and in respect of leases granted before or after the commencement of this Act and options contained in such leases, and has effect despite any stipulation to the contrary.
- (3) In this section –

prescribed notice means a notice in writing that –

 - (a) specifies an act or omission; and
 - (b) states that, subject to any order of the court under subsection (6), a lessor giving the notice proposes to treat that act or omission as having precluded a lessee on whom the notice is served from exercising an option contained in the lease.
- (4) Where an act or omission that constituted a breach by a lessee of the lessee’s obligations under a lease containing an option would, but for this section, have had the effect of precluding the lessee from exercising the option, the act or omission shall be deemed not to have had that effect where the lessee purports to exercise the option unless, during the period of 14 days next succeeding the purported exercise of the option, the lessor serves on the lessee prescribed notice of the act or omission and –
 - (a) an order for relief against the effect of the breach in relation to the purported exercise of the option is not sought from the court before the expiration of the period of 1 month next succeeding service of the notice; or
 - (b) where such relief is so sought –
 - (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting relief; or
 - (ii) where relief is granted upon terms to be complied with by the lessee before compliance by the lessor with the order granting relief, the lessee fails to comply with those terms within the time stipulated by the court for the purpose.
- (5) Relief referred to in subsection (4) may be sought—
 - (a) in proceedings instituted in the court for the purpose; or
 - (b) in proceedings in the court in which—
 - (i) the existence of an alleged breach by the lessee of the lessee’s obligations under the lease; or
 - (ii) the effect of the breach from which relief is sought; is in issue.
- (6) The court may, in proceedings in which relief referred to in subsection (4) is sought—
 - (a) make such orders (including orders affecting an assignee of the reversion) as it thinks fit for the purpose of granting the relief sought; or
 - (b) refuse to grant the relief sought.
- (7) The court may, in proceedings referred to in subsection (6), take into consideration—
 - (a) the nature of the breach complained of; and
 - (b) the extent to which, at the date of the institution of the proceedings, the lessor was prejudiced by the breach; and
 - (c) the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice; and

- (d) the rights of persons other than the lessor and the lessee; and
 - (e) the operation of subsection (9); and
 - (f) any other circumstances considered by the court to be relevant.
- (8) The court—
- (a) may make an order under subsection (6) on such terms as to costs, damages, compensation or penalty, or on such other terms, as the court thinks fit; and
 - (b) may make any consequential or ancillary order it considers necessary to give effect to an order made under that subsection.
- (9) Subject to any order of the court and to subsections (10) and (11)—
- (a) where—
 - (i) an option is contained in a lease; and
 - (ii) the lessee exercises, or purports to exercise, the option; and
 - (iii) the lease would, but for this paragraph, expire within the period of 14 days after the exercise, or purported exercise, of the option;the lease shall be deemed to continue in force until the expiration of that period; and
 - (b) where—
 - (i) a prescribed notice is duly served on a lessee; and
 - (ii) the lease in respect of which the notice is served would, but for this paragraph, expire within the period of 1 month referred to in subsection (4)(a);the lease shall be deemed to continue in force until the expiration of that period; and
 - (c) where, in relation to a lease continued in force under paragraph (b), relief referred to in subsection (4) is sought by a lessee, the lease shall, subject to subsections (10) and (11) be deemed to continue in force until—
 - (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting the relief; or
 - (ii) effect is given to orders made by the court in granting that relief in so far as they affect the lessor or relate to an assurance to the lessee.
- (10) Subsection (9)(c)—
- (a) does not apply to or in respect of a lease that, but for that paragraph, would continue in force for a period longer than the period for which it is, by the operation of that paragraph, continued in force; and
 - (b) does not, where a lessee fails to comply with terms imposed upon the lessee under subsection (8)(a), operate to continue the lease in force beyond the time of that failure by the lessee.
- (11) Where, under subsection (9), a lease continues in force after the day on which, but for that subsection, it would expire—
- (a) the lease so continues in force subject to the provisions, stipulations, covenants, conditions and agreements in the lease (other than those relating to the term and the option contained in the lease) but without prejudice to any rights or remedies of the lessor or lessee in relation to the lease; and
 - (b) the lessee, if the lease is of registered land and the lessee is in possession of the leased premises, has the protection given by the *Land Title Act 1994* to—
 - (i) if the lessee's interest in the lease is held by the lessee as a registered proprietor—a registered proprietor; or
 - (ii) if the lease is an unregistered short lease (within the meaning of the *Land Title Act 1994*)—the interest of a lessee under a short lease.
- (12) Subject to subsection (13), where, under an option contained in a lease continued in force under subsection (9), the lease is renewed or a new lease is granted, the period during which the lease was so continued in force shall be deemed to be part of the term for which the lease was renewed or the new lease granted, and any lease granted under an exercise of the option shall be expressed to have commenced when the lease containing the option would, but for subsection (9), have expired.
- (13) Subsection (12) does not apply to or in respect of a lease that stipulates for the commencement of any lease granted under an exercise of the option contained in the lease on a day that is later than the day on which the lease so granted would, but for this subsection, commence under subsection (12).

Options to renew leases are often included in lease agreements. Generally, the exercise of the option by the lessee is made dependent or conditional upon the lessee not being in default under the lease.²³⁹² This requires the lessee to perform and observe all the conditions and covenants in the lease. Options are strictly construed and at common law the position was that the option could be lost by reason of 'trivial' breaches on the part of the lessee.²³⁹³ This often resulted in a 'harsh' outcome for lessees. The New South Wales Law Reform Commission looked at this issue in 1968 after a New South Wales Court of Appeal decision, the effect of which was described in the following way by the Commission:

The result of the judgment of the Full Court would appear to be that a breach of a covenant, however trivial and however long before the time for exercise of the option the breach may have occurred, prevents the exercise of the option although the lessor may have waived the breach so far as concerns forfeiture of the original term.²³⁹⁴

The New South Wales Law Reform Commission recognised that 'such a condition could operate harshly' and recommended the inclusion of additional provisions in the *Conveyancing Act 1919* (NSW) (sections 133C to 133G) to extend relief of tenants on application to the court in relation to options and rights of renewal or purchase.²³⁹⁵ The QLRC recommended the inclusion of similar clauses in section 128 when considering this provision in 1974.²³⁹⁶ As with the amendment to the New South Wales provisions, section 128 of the PLA is intended, in part, to 'temper the harshness' of the common law.²³⁹⁷

In essence, section 128 gives a lessee some prospect of relief against a loss of a right to exercise an option to renew. The section applies to both options to purchase the reversion and options to renew leases.²³⁹⁸ The section applies to leases granted before or after the commencement of the PLA and to the options contained in these leases. The section applies irrespective of whether there is any stipulation to the contrary in the lease.²³⁹⁹ Under section 128(4), a lessor who intends to refuse an option to renew a lease on the basis that the lessee has breached an obligation under the lease must provide the lessee with a notice.²⁴⁰⁰ The notice must be in writing, identify the act or omission and state that the lessor proposes to treat the act or omission as precluding the lessee from exercising an

²³⁹² Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.950].

²³⁹³ 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) 87.

²³⁹⁴ New South Wales Law Reform Commission, *Options in Leases*, Report No. 5 (1968). The Court of Appeal decision referred to by the Commission was *Gilbert 1 McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR NSW 122. In that case, the lease had an option to renew subject to the tenant duly and punctually paying the rent. The rent was not paid on the due dates during the term of the lease but the lessor did not object to the lateness and always accepted the payments. The lessor refused to grant the new lease on the ground that the tenant had not punctually paid the rent during the original lease.

²³⁹⁵ New South Wales Law Reform Commission, *Options in Leases*, Report No. 5 (1968).

²³⁹⁶ 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) 87.

²³⁹⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.950].

²³⁹⁸ *Property Law Act 1974* (Qld) s 128(1)(a).

²³⁹⁹ *Property Law Act 1974* (Qld) s 128(2).

²⁴⁰⁰ *Property Law Act 1974* (Qld) s 128(4).

option contained in the lease.²⁴⁰¹ The lessor is required to give the notice within 14 days after the lessee has purported to exercise the option.

Under section 128(4), a lessee does not necessarily lose the right to the option to renew if the lessee has breached an obligation under the lease. However, where the lessor does issue the prescribed notice, the 'deeming effect' of section 128(4) does not apply if:²⁴⁰²

- the lessee does not seek an order for relief against the effect of the breach from the court within 1 month of the lessor's notice being received; or
- where the lessee does seek such relief and:
 - relief is not granted; or
 - relief is granted but the lessee fails to comply with ordered terms within the time stipulated by the court.

The section sets out the procedure for an application for relief to the court, the matters the court may take into consideration and the orders the court can make.²⁴⁰³ The lessor has the burden of proof in relation to establishing breach of the lease.²⁴⁰⁴ The lessee has the burden of proof that relief against loss of option should be ordered.²⁴⁰⁵

141.2. Issues with the section

A recent decision of the Queensland Court of Appeal, *Grepo v Jam-Cal Bundaberg Pty Ltd*²⁴⁰⁶ (**Grepo's case**), has highlighted and illustrated a defect with section 128 of the PLA. In summary, section 128 of the PLA does not adequately address breaches that occur after the exercise of the option but before the expiry of the lease. As discussed in paragraph 141.1 above, commercial leases usually have standard provisions that govern the exercise of an option to renew a lease. These provisions require the lessee to:

- give notice of the exercise of an option to renew within the specified time given; and
- have paid all rent and observed all lessee covenants, up to the date of the expiry of the lease.

Problems arise, however, because an option is usually required to be exercised before the expiration of the lease. At the time of exercising the option, a lessee may not be in breach of the lease. However, the lessee may subsequently be in breach, prior to the expiry of the lease term.

In Grepo's case, the 3 year lease contained an option to renew which the lessee was entitled to exercise by giving the requisite notice, provided the lessee was not in breach of the lease up until the expiry of the lease. An overview of the facts in Grepo's case is below:

²⁴⁰¹ *Property Law Act 1974* (Qld) s 128(3).

²⁴⁰² *Property Law Act 1974* (Qld) ss 128(4)(a) and (b).

²⁴⁰³ *Property Law Act 1974* (Qld) ss 128(5), (6), (7) and (8).

²⁴⁰⁴ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.950].

²⁴⁰⁵ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.950] and Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed 2012 LexisNexis) [32790.1].

²⁴⁰⁶ *Grepo v Jam-Cal-Bundaberg Pty Ltd* [2015] QCA 131.

NOT GOVERNMENT POLICY

- the lessee gave the requisite notice to exercise the option prior to the expiration of the lease;²⁴⁰⁷
- the lessors did not provide a 'prescribed notice' under section 128(4) of the PLA within the relevant 14 day period after the exercise of the option to renew by the lessee;
- the lessors served Notices to Remedy Breaches of Covenant on the lessee during October and December 2012 and also in August 2013 (even though the lease had expired on 30 May 2013);
- after the expiration of the lease, the lessors gave notice to the lessee to deliver up possession;²⁴⁰⁸ and
- the court at first instance did not find that the lessee had breached any clauses of the lease regarding payment of rent, or control of termites so as to disentitle the lessee from exercising the option. The lessors' claim for recovery of possession of the premises from the lessee was dismissed at first instance.

The lessors appealed the decision. The parties raised a number of arguments in the appeal. The lessee claimed:

- that the failure of the lessors to give the notice under section 128(4) meant that the lessors were unable to rely on the breaches which occurred after notice of the exercise of the option was given; and
- as an alternative argument, that an equitable lease had come into existence once the exercise of the option to renew occurred. On that basis, pending the commencement of the new term, the lessee could seek relief against forfeiture relying on section 124 of the PLA. This reliance was on the basis that 'lease', as defined in section 123 of the PLA, included 'an agreement for lease where the lessee had become entitled to have the lease granted.'

The lessors claimed that:

- section 128 of the PLA did not apply at all to breaches which occurred after the 'purported exercise' of the option to renew; and
- section 124 of the PLA was not applicable to relieve the lessee against a possible forfeiture of the agreement for lease. This was because a necessary precondition of the exercise of the option was that there were no breaches up until the expiry of the lease. The lessors claimed this precondition had not been satisfied. The 'agreement for the lease' could not then be described as being 'one where the lessee had become entitled to have the lease granted' as defined under section 123 of the PLA.

A summary of the analysis of section 128 of the PLA by the Court of Appeal is below.²⁴⁰⁹

²⁴⁰⁷ The notice was given on 5 November 2012. The lease expired on 30 May 2013.

²⁴⁰⁸ The notice to deliver up possession was given in October 2013 – the lessors apparently believed that a lease existed.

²⁴⁰⁹ Holmes JA delivered the main judgment in this decision and analysed a number of conflicting New South Wales authorities on a similar provision in the *Conveyancing Act 1919 (NSW)* prior to the amendment of that Act in 2001 to address the uncertainty. The New South Wales decisions are discussed in detail at [38] – [51].

- the expression ‘purported exercise’ of the option to renew occurred at the time the notice of exercise of the option was given;
- the notice of exercise gave ‘notice of intention’ by the lessee to take up the entitlement of a new lease but that right was subject to the precondition that the lessee was not in breach of the lessee’s obligations up until the expiry of the lease;
- this meant that the issue of a new lease was subject to a precondition that there be no breaches of the original lease up until the expiry of that lease; and
- the lessee was not entitled to exercise the option to renew the lease because of the breaches of the lease covenants after the ‘purported exercise’ of the option. As a consequence, section 128 of the PLA does not apply.

In terms of sections 123 and 124 of the PLA the lessee had claimed that an ‘agreement for lease’ came into effect between the date of the exercise of the option and the expiry of the lease. The Court of Appeal formed a different view, set out below:

- the lessors were not obliged to grant a new lease at the time of the exercise of the option and up until the expiry of the lease as the lessee had failed to comply with the precondition of not breaching the lease terms;
- in those circumstances, the lessee’s rights could not be categorised as being based upon ‘an agreement for lease’ whereby the lessee was ‘entitled to have a new lease granted’. This had the effect that the definition of ‘lease’ under section 123 of the PLA could not be satisfied,²⁴¹⁰ and
- as no agreement for lease came into existence sufficiently to satisfy the definition of ‘lease’ under section 123, the lessee could not take advantage of the rights afforded under section 124.

Commentary on this case notes that:

This decision clarifies the position in Queensland in respect of the application of ss 123, 124 and 128 of the *Property Law Act 1974*, with respect to post notice breaches. It leaves a lessee in this position unable to test whether or not the breaches after the purported exercise of an option to renew are of sufficient gravity to bring about a forfeiture of the new lease. By characterising the condition that the lessee not be in breach of the lease until expiry of the term, as a precondition to taking up the new lease, it takes consideration of those breaches out of the statutory framework of protection.²⁴¹¹

This was previously an issue in New South Wales in relation to the equivalent provisions of the *Conveyancing Act 1919* (NSW). The issue related to the effect of the section on breaches which occurred after the lessor had given the prescribed notice and before the lease expired.²⁴¹² This is now

²⁴¹⁰ The term ‘lease’ is defined in section 123 of the *Property Law Act 1974* (Qld) to include ‘an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition, and an agreement for a lease, where the lessee has become entitled to have the lease granted.’

²⁴¹¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.128.300].

²⁴¹² Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed 2012 LexisNexis) [32790.15]; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [15234]. For a detailed discussion of the New South Wales decisions on this provision prior to its amendment in 2001 see *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131, [38]-[51].

clarified by section 133E of New South Wales legislation which applies the section to breaches occurring before or after the exercise of the option.’²⁴¹³ The Explanatory Memorandum to the amending Bill explained the reason for the amendment of the section 133E of the *Conveyancing Act 1919* (NSW) in the following way:

A lease that provides for its renewal, or for purchase of the land demised, at the option of the lessee may make provision for avoidance of the option if the lessee breaches certain specified conditions. Section 133E of the *Conveyancing Act 1919* affords the lessee the right to have a court decide whether a particular breach does or does not operate to preclude the option, but only (as the section now stands) in relation to a breach occurring before service by the lessee of a notice of exercise of the option. The lease may require that such a notice be served a considerable time before expiry of the term of the lease. Schedule 1 [4] repeals and replaces the section in order to extend the jurisdiction of the court to adjudicate with respect to breaches occurring after, as well as those occurring before, service of that notice.²⁴¹⁴

The position now in New South Wales is that a lessor wishing to rely upon breaches occurring after the exercise of the option in order to terminate a lease, must give a ‘prescribed notice’ in relation to those breaches. This enables the ‘seriousness’ of the breaches to be ‘tested to determine whether or not they might lead to a forfeiture of the new lease.’²⁴¹⁵

141.3. Other jurisdictions

The New South Wales provision was the same as Queensland until it was amended in 2001 to address the same issue recently raised in Grepo’s case. Details of section 133E of the *Conveyancing Act 1919* (NSW) and its reform is discussed in paragraph 141.2 above. Western Australia has an equivalent provision to Queensland which is set out in sections 83A to 83E of the *Property Law Act 1969* (WA).²⁴¹⁶ The Western Australian provisions also do not address the issue of breaches of obligations which may occur after the lessee has given notice of the exercise of the option.

141.4. Recommendation

The overarching recommendation with respect to section 128 of the PLA is to redraft the section to modernise the language and provide clarity about the application and operation of the section. There are some recommendations for minor alterations or additions to the operation for the section which are set out below.

141.4.1.1. Grepo’s case

The Centre recommends repealing section 128 on the basis that the proposed re-drafting of Part 8 Division 3 will include amendments that address the problems caused by the interpretation of this provision in Grepo’s case. In essence, breaches of a lease which occur after the service by the lessee of a notice of exercise of the option currently do not fall within the scope of section 128 of the PLA. The proposed amendments to the Division include a subsection in the following terms:

²⁴¹³ The provision was amended by the *Land Titles Legislation Amendment Act 2001* (NSW).

²⁴¹⁴ Explanatory Notes *Land Titles Legislation Amendment Bill 2001* (NSW).

²⁴¹⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.128.300]).

²⁴¹⁶ The unreported Supreme Court decision of *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd & Ors* [2002] WASC 54 considered sections 83A – 83D of the *Property Law Act 1969* (WA).

If the breach of covenant or condition that the lessor intends to rely on occurred before the time the lessee gave notice of intention to exercise an option mentioned in subsection [17](1)(b)(ii) the lessor must give notice in the approved form within 14 days of receiving the notice to exercise option.

This makes it clear that the notice requirements also apply to breaches that occur after the notice of the exercise of the option is given. This enables the court to adjudicate with respect to breaches occurring after, as well as those occurring before, service of the notice of the exercise of the option to renew provided by the lessee.

The QLS agrees that the protection afforded to lessees under section 128 of the PLA should extend to breaches of lease conditions which occur after the notice of exercise of option has been given until the expiry of the lease. The QLS favours appropriate amendments to section 128 of the PLA rather than adopting section 133E of the *Conveyancing Act 1919* (NSW).

141.4.2. Application of the section – section 128(1)

Section 128(1) of the PLA currently sets out what an ‘option contained in a lease’ comprises in the context of the section. The Centre recommends retaining the effect of the subsection, but modernising and simplifying the language regarding the application of the section. This can be achieved by including a provision that sets out that relief against forfeiture of an option to renew or purchase requires that:

- the lease contain a covenant in writing that the lessee may, at the lessee’s option, renew the lease or purchase the leased premises;
- if the exercise of the option to renew or purchase is subject to the fulfilment of any conditions, then those conditions must be satisfied;
- the lessee must be in breach of a covenant or condition in the lease; and
- the lessor is refusing to allow the lessee to exercise the option on the basis of that breach.

141.4.3. Retrospectivity and contracting out

Section 128(2) stipulates that the section applies to all leases made before or after the commencement of the Act, and that the section cannot be contracted out of. The effect of this section should be retained. The proposed draft amendment to section 123A of the PLA (set out at Recommendation 133) retains the effect of the subsection. On that basis section 128(2) can be repealed.

141.4.4. Notice requirements

The Centre recommends retaining the requirement in section 128(3) for a lessor to give the lessee notice of the refusal to allow the exercise of the option. Further, and in line with the recommendations for redrafting section 124 of the PLA, the Centre recommends that the lessor be required to serve a copy of the notice on any mortgagee or receiver of the leasehold estate or interest that is known to the lessor. An example of a notice form is included with the recommendation below.

141.4.5. Standing to apply for relief

Also in line with the recommendations for section 124 of the PLA (set out at Recommendation 134), section 128 should be amended to give standing to a mortgagee, receiver or joint tenant of the lease interest to apply for relief against forfeiture of the lessee’s option.

141.4.6. Time limits

Section 128(4) of the PLA presently allows 14 days from the time of service of the notice to exercise option for the lessor to serve the prescribed notice of refusal to allow exercise of option. Further, section 128(4) states that a lessee has 1 month from service of the notice by the lessor to apply for relief against forfeiture of an option. These timeframes are appropriate and should be retained, however the provision should be redrafted to modernise language and provide clarity.

RECOMMENDATION 138. Section 128 should be repealed on the basis that the recommendations for all of Part 8 Division 3 be adopted.

The Centre recommends adopting provisions that:

- negate the effect of *Grepo's* case by amending the section to state that the section applies to breaches after the notice of exercise of option, as well as those before (see draft section [18](2) and (3));
- redraft section 128(1) but retain its effect (see draft section [17]);
- repeal section 128(2) on the basis that the operation of the section is absorbed by the proposed re-drafted section 123A;
- redraft section 128(3) but retain the effect of the provision requiring the lessor to serve notice of refusal to allow exercise of option (see draft section [18]);
- add further notice requirements on the lessor so that other parties who have an interest in the lease option receive a copy of the notice (see draft section [19]);
- give standing to apply for relief against forfeiture of the option to a mortgagee, receiver or joint tenant of the lease interest (see draft section [20]);
- redraft section 128(4) to clarify the language and operation of the provision, but retain the effect (see draft section [18]);
- redraft section 128(5) to clarify the language and operation of the provision, but retain the effect (see draft section [20]);
- redraft section 128(6) to clarify the language and operation of the provision, but retain the effect (see draft section [22]);
- retain section 128(7) except for paragraph (e) (see draft section [22](3));
- redraft section 128(8) to clarify the language and operation of the provision, but retain the effect (see draft section [22](1) and (2));
- redraft section 128(9) to (13) to simplify the language and operation of the subsections (see draft section [23]).

For example, as part of the recommendations for the redrafting of Part 8, Division 3, the section could be amended in the following terms:

Section [17] Relief from forfeiture of lessee's option to renew or purchase

- (1) This section applies to a lease if—
- (a) the lessor has covenanted in writing with the lessee that,—
 - (i) on the expiry of the term of the lease, the lessee has an option to renew the lease, of all or part of the premises to the lessee; or
 - (ii) on the expiry of the term of the lease, or at some earlier time, the lessee has an option to purchase the reversion; and
 - (b) the exercise of an option referred to in paragraph (a) is conditional on—
 - (i) the fulfilment of any condition or the performance of any covenant or condition of the lessee; or

- (ii) the lessee giving notice, within a specified time or in a specified manner, of the intention to exercise the option; and
 - (c) the lessee has failed to fulfil any condition or is in breach of any covenant.
- (2) Despite any provision of the kind referred to in subsection (1)(b), no breach of any relevant covenant or condition mentioned precludes the lessee's right to exercise the option unless:
- (a) the lessor serves a notice in the approved form on the lessee; and
 - (b) the lessee's rights are extinguished in relation to the notice.

Section [18] Lessor must give notice

- (1) The notice referred to in section [17](2) must:
- (a) inform the lessee that the lessee does not have the right to exercise the option to renew the lease, or transfer the reversion, as the case may be, because of a breach or breaches of covenants or conditions;
 - (b) set out the details of breach or breaches of covenants or conditions the lessor intends to rely;
 - (c) state that the lessee, mortgagee or receiver may apply to a court for relief against the refusal;
 - (d) state that the right to apply for such relief lapses if the application is not made to the court within 1 month of the date of service of the notice; and
 - (e) state that it is advisable for the lessee, mortgagee or receiver to seek legal advice on the exercise of the right to apply to a court for relief against the refusal.
- (2) If the breach of covenant or condition that the lessor intends to rely on occurred before the time the lessee gave notice of intention to exercise an option mentioned in subsection [17](1)(b)(ii) the lessor must give notice in the approved form within 14 days of receiving the notice to exercise option.
- (3) If the breach of covenant or condition that the lessor intends to rely on occurred between the time the lessee gave notice of intention to exercise an option mentioned in subsection [17](1)(b)(ii) and the expiry of the lease the lessor must give notice in the approved form within 14 days of that breach.

Section [19] Lessor must serve a copy of the notice on other parties

A lessor who has served a notice on a lessee in accordance with section [18](1) must, as soon as practicable, serve a copy of the notice on any mortgagee or receiver of the leasehold estate or interest, if known to the lessor.

Section [20] Parties who can apply for relief from forfeiture of lessee's option to renew or purchase

- (1) Any of the following persons may apply to a court for relief from forfeiture of the lessee's option to renew the lease or purchase the reversion:
- (a) the lessee;
 - (b) a mortgagee of the leasehold estate or interest;
 - (c) a receiver appointed in respect of the leasehold estate or interest;
 - (d) if 2 or more persons are entitled to the leasehold estate or interest as joint tenants, 1 or more of those persons on behalf of the other joint tenants.
- (2) If an application made in accordance with subsection (1)(d) is not made by all of the joint tenants, the application must be served on every joint tenant who is not already a party, unless the court orders otherwise.

Section [21] Relief may be sought in proceedings brought by lessor or lessee

An application for relief from forfeiture of lessee's option to renew the lease or purchase the reversion—

- (a) may be made to the court in any proceeding:
 - (i) brought by the lessor for an order for possession of the land; or
 - (ii) brought by the lessee, mortgagee or receiver for the purpose of seeking relief; and
- (b) must be made not later than 1 month after the date on which the lessor serves a notice on the lessee under section [18], and on any mortgagee or receiver under section [19].

Section [22] Relief court may grant on application

- (1) Without limiting the orders the court can make, on an application under section [20], the court may grant relief against the refusal of the lessor to renew the lease, or transfer the reversion, as the case may be.
- (2) In particular, the court may—
 - (a) do either of the following:
 - (i) order the lessor to renew the lease with the lessee, mortgagee, or receiver; or
 - (ii) order the lessor specifically to perform the lessor's covenant or agreement to transfer the reversion, and to execute all necessary assurances for that purpose; and
 - (b) grant relief under paragraph (a)(i) or (ii) on any conditions (if any) the court thinks fit including the payment of compensation.
- (3) When considering an application for relief under section [20], the court make take into consideration any or all of the following:
 - (a) the nature of the breach complained of;
 - (b) the extent to which, at the date of the institution of proceedings, the lessor was prejudiced by the breach;
 - (c) the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice;
 - (d) the rights of persons other than the lessor and the lessee;
 - (e) anything else the court considers relevant.

Section [23] Lease remains in place while application is determined

Where a lease would expire by effluxion of time while an application under section [20] is being determined, the lease is deemed to continue on the same terms and conditions as at the date the application was made to the court until the court makes an order under section [22].

NOTICE OF BREACH OF COVENANT PRECLUDING EXERCISE OF OPTION

Property Law Act 1974, section 128

To (Name and address of lessee)

With reference to the lease of the premises (give exact street address), dated the day of, 20, for a termof commencing on the of and the covenant (give clause number) giving you a right to renew the lease (or purchase the reversion) upon the condition that you performed all covenants during the term of the lease. The lessor (insert full name and street address of the lessor) GIVES YOU NOTICE that it intends not to grant you a right renew the lease (or purchase the premises) based upon your breach/es of the following covenant(s) further details of which are set out below:

Clause X (Rent) You have failed to pay rent in accordance with this clause and your failure to do so has continued until the date of this notice
Particulars are as follows (here set out details of the arrears of rent as at the date of this notice)

Dated this day of, 20

Signed	Lessor (or lessor's solicitor)
--------	--------------------------------

NOTE Under s of the Property Law Act you are entitled to apply to the Supreme Court for relief against forfeiture of the right to exercise the option referred to above provided that you commence proceedings within one calendar month of the date of service of this notice upon you. If you propose to do so, you should seek legal advice as soon as possible. Your failure to seek relief will result in your permanent loss of the right granted by the option.

Part 8 Division 4 – Termination of tenancies

The majority of Part 8 Division 4 deals with the termination of periodic tenancies and sets up the notice requirements and periods for the various types of tenancies.

142. Section 129 – Abolition of yearly tenancies arising by implication of law

142.1. Overview and purpose

129 Abolition of yearly tenancies arising by implication of law

- (1) No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by 1 months' notice in writing expiring at any time.
- (2) This section shall not apply where there is a tenancy from year to year which has arisen by implication before the commencement of this Act, and, in the case of any such tenancy in respect of which the date of its creation is unknown to the lessor or lessee, as the case may be, who is seeking to determine the same, such tenancy shall, subject to any express agreement to the contrary, be determinable by 6 months' notice in writing expiring on the day immediately before the first anniversary of the coming into operation of this Act, or any date afterwards.

Section 129 of the PLA was modelled on the equivalent provision in New South Wales, section 127 of the *Conveyancing Act 1919* (NSW), which has applied in that State since 1920.²⁴¹⁷ Section 129 was introduced to address the common law rule which implied a periodic tenancy from year to year where there was a tenancy but no express agreement as to its duration.²⁴¹⁸

Historically, there was no requirement for formalities for the purpose of granting a lease.²⁴¹⁹ Following the enactment of the *Statute of Frauds 1677*²⁴²⁰ in England, leases not in writing and signed by the parties were to take effect as leases at will, with the exception of leases not exceeding a period of three years and at rack (market) rent.²⁴²¹ However, there were situations where a lease had been agreed by parties but the required formalities had not been complied with before the lessee entered possession and started paying rent.²⁴²² As a consequence of the formality requirements set out in the *Statute of Frauds 1677*, these tenancies were of no effect. The common law courts circumvented the strict formality requirements by implying a year to year tenancy where the parties:

²⁴¹⁷ 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) 87.

²⁴¹⁸ 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) 87.

²⁴¹⁹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1526].

²⁴²⁰ 29 Car 11 c3 s1.

²⁴²¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1526] and WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 128-129.

²⁴²² WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 128.

- could show a lease for a fixed term had been agreed upon; and
- the lessee had entered possession and paid rent pursuant to that agreement.²⁴²³

The tenancy was a tenancy at will when the lessee entered possession. Once the lessee commenced paying rent under the agreement the tenancy stopped being a tenancy at will and became an implied tenancy from year to year which was determinable by six months' notice.²⁴²⁴ Although the implication of a year to year tenancy overcame issues with formality requirements, these types of tenancies also created some practical inconveniences. The Queensland Court of Appeal in the case of *Brisbane City Council v Council Club Inc*²⁴²⁵ described these concerns in the following way:

Tenancies from year to year are subject to some inconvenient incidents of their own. Such a tenancy is determinable only on six months' notice expiring at the end of a completed year of the tenancy.... . Apart from the length of notice required, it is not always easy to say precisely when a particular tenancy began or, in consequence, when it is due to end, so as to fix the time at which the notice to quit should be limited to expire.

Section 129 of the PLA was introduced to address these concerns. The QLRC when considering the introduction of the proposed section 129 of the PLA favoured the 'abolition of the legal implication of yearly tenancies'.²⁴²⁶ In particular, it identified section 127 of the *Conveyancing Act 1919* (NSW) as a model clause.²⁴²⁷ The practical effect of section 129 of the PLA is to convert the tenancy from year to year which would otherwise be implied at law from payment of rent into a tenancy at will, making it determinable by either party by written notice of one month.²⁴²⁸ An illustration of the mischief the section was intended to address is described as follows:

The section was enacted to remove the anomaly caused by the creation of a tenancy from year to year at law from a mere holding over. Without the section, one could envisage a situation where a tenancy for a fixed term expired, under which, say, monthly notice to quit was required and the tenant holding over and paying rent would be in a far better position without the agreement, as then, a yearly tenancy having been created, 6 months' notice would be required to determine it.²⁴²⁹

However, the 'tenancies at will' concept which is attributed to section 129 of the PLA is different to the tenancy at will at common law. This latter tenancy category arises when a person enters a property with the owner's consent and commences paying rent on the basis that either party can

²⁴²³ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1526] and WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 129.

²⁴²⁴ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1526]; WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 129. Six months' notice was the period of notice required to determine a periodic tenancy from year to year. Either party could give notice.

²⁴²⁵ *Brisbane City Council v Council Club Inc* [1995] QCA 163.

²⁴²⁶ 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) 87.

²⁴²⁷ 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) 87.

²⁴²⁸ *Brisbane City Council v Council Club Inc* [1995] QCA 163.

²⁴²⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.129.60].

terminate the tenancy without notice.²⁴³⁰ An act which is inconsistent with the intention of the parties that the tenancy continues is all that is required to determine it.²⁴³¹

142.1.1. Operation of section 129 of the PLA

In order for section 129 of the PLA to operate, a tenancy ‘with no agreement as to its duration’ must exist. The phrase ‘with no agreement as to its duration’ is not defined in the PLA but has been interpreted in case law to mean no agreement between the parties ‘operative at common law to incorporate as part of it a provision that it was to continue for a term of years or be at will or a periodic tenancy’ – that is, no agreement as to duration which is effective to create a legal lease for the period agreed.²⁴³² Section 129 of the PLA is limited in scope and it will not, of course, apply in circumstances where an implied tenancy from year to year would not have arisen at law.²⁴³³ Further, it is generally accepted that it does not apply to:

- an express agreement to create a tenancy from year to year;²⁴³⁴
- tenancies of a periodic nature, regardless of the period chosen. Commentary suggests that if the section did apply to all periodic tenancies then the ‘ludicrous position would be achieved whereby a weekly or fortnightly tenancy would require 1 months’ notice to quit.’²⁴³⁵

The right to terminate a tenancy under section 129 of the PLA has arisen in the following situations:

- a lessee enters possession of premises under a lease which is subsequently declared to be void.²⁴³⁶ For example, where a lease is entered into subject to the consent of a Minister under a statutory provision and this consent is not obtained prior to the lessee entering into possession and paying rent or after the consent is refused by the Minister;²⁴³⁷
- a lessee holds over after the expiry of a fixed term lease and there is no express holding over provision in the lease. If the circumstances of the particular case do not exclude an agreement to ‘hold upon the terms of the old lease’ and the lessee continues to pay rent and retains possession on the same terms and conditions as the expired lease, the tenancy will be

²⁴³⁰ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1534]; WD Duncan, ‘When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?’ (2014) 34 *Queensland Lawyer* 128, 131.

²⁴³¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1534]; WD Duncan, ‘When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?’ (2014) 34 *Queensland Lawyer* 128, 131 referring to *Wheeler v Mercer* [1957] AC 416 at 427 per Lord Simonds. A common law tenancy at will is not assignable: see Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1534].

²⁴³² WD Duncan, ‘When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?’ (2014) 34 *Queensland Lawyer* 128, 129 citing *Dockrill v Cavanagh* (1944) 45 SR (NSW) 78 at 83; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1532] referring to the NSW equivalent provision set out in section 127 of the *Conveyancing Act 1919* (NSW).

²⁴³³ WD Duncan, ‘When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?’ (2014) 34 *Queensland Lawyer* 128, 131.

²⁴³⁴ *Brisbane City Council v The Council Club Inc* [1995] QCA 163. A notice to terminate an express yearly tenancy would need to

²⁴³⁵ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.129.60].

²⁴³⁶ WD Duncan, ‘When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?’ (2014) 34 *Queensland Lawyer* 128, 131.

²⁴³⁷ *Palmdale Insurance Ltd v Sprenger* [1988] 1 Qd R 414 at 418-419 and *Mooloolaba Slipways Pty Ltd v Cashlaw Pty Ltd* [2011] QSC 236 at [79] – [80].

determinable under section 129.²⁴³⁸ This situation can be compared to the expiration of a lease which includes an express holding over provision. In that situation, the tenancy converts into some form of periodic tenancy and will be determinable as a periodic tenancy. The relevant notice provisions in section 130 of the PLA must be complied with,²⁴³⁹

- a lessee is in possession under an unregistered lease exceeding three years. Where a lease has been entered into but does not comply with statutory formalities especially in relation to registration of the lease under the *Land Title Act 1994* (Qld) or *Land Act 1994* (Qld);²⁴⁴⁰ and
- a lessee enters possession during negotiations for lease and the lessee commences rental payment but negotiations are never concluded. This situation arose in the case of *Brisbane City Council v Council Club Inc.*²⁴⁴¹ The lease in this case was never finalised and executed and the Club remained in occupation for over 18 years paying a nominal rent. The lessor gave notice under section 129 of the PLA. The Club indicated that the Council was required to give 6 months' notice to quit on the basis that it had a year to year tenancy. The court found that the arrangement was an implied tenancy from year to year with no agreement as to its duration at law and the notice given under section 129 of the PLA was appropriate.²⁴⁴²

However, there is still a significant degree of uncertainty regarding the full extent of the application of section 129 of the PLA. This is discussed in further detail below.

142.2. Issues with the section

There is consensus amongst commentators that the most significant issue arising from section 129 of the PLA relates to the uncertainty associated with determining whether or not it applies to the particular lease or tenancy which is under consideration.²⁴⁴³ Further, there is 'poor understanding' of the limited circumstances leading to the creation of a 'tenancy at will' under section 129²⁴⁴⁴ and the subtle differences between that type of tenancy and a tenancy at will arising by operation of law which can only be terminated under section 137 of the PLA.

The QLRC reconsidered section 129 of the PLA in its 1986 Working Paper and noted that early commentary on the section which suggested that it was directed at the situation involving a tenant

²⁴³⁸ WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 133.

²⁴³⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.129.60] and WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 131-132 referring to the cases of *Palmdale Insurance Ltd v Sprenger* [1988] 1 Qd R 414 (FC) and *Mooloolaba Slipways Pty Ltd v Cashlaw Pty Ltd* [2011] QSC 236 at [79]-[80].

²⁴⁴⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.129.60].

²⁴⁴¹ [1995] QCA 163.

²⁴⁴² WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.

²⁴⁴³ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co., 4th ed, 2015) [14.220]; WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 128.

²⁴⁴⁴ This type of tenancy has been described as a 'statutory tenancy at will'.

holding over and the requirement that six months' notice would still be required to be given.²⁴⁴⁵ The QLRC indicated that:

The problem with the original version of the section is that it is not entirely clear whether it applies to the other circumstances in which yearly or indeed other periodic tenancies might be implied from payment of rent.²⁴⁴⁶

The amendment proposed by the QLRC was intended to remove uncertainties associated with the application of section 129 of the PLA by clarifying that the section 'applies to all circumstances where a periodic tenancy would otherwise be implied from payment of rent'.²⁴⁴⁷ The amendment proposed to the section was not implemented.²⁴⁴⁸

Cases which have come before the court in relation to section 129 of the PLA (or the equivalent New South Wales provision) will often involve a dispute as to whether or not the subject lease can be properly characterised as one where 'there is no agreement as to its duration at law'.²⁴⁴⁹ For example, in *Brisbane City Council v Council Club Inc*²⁴⁵⁰ one of the issues under appeal was whether section 129 of the PLA applied. The Council Club did not dispute that the premises were 'held on a tenancy from year to year'; rather it claimed that the tenancy was the product of actual agreement by the parties to be 'inferred from the circumstances so identified, not of any mere implication or presumption of law'.²⁴⁵¹ Clearly, the origin of the lessee's right to possession is important in these cases.²⁴⁵²

The complexity associated with determining whether or not the tenancy in question is one which falls within the scope of section 129 of the PLA can be illustrated by the practical guidance provided by Duncan to practitioners who may need to consider whether notice under section 129 of the PLA is required:

Questions to be considered by practitioners dealing with this situation might be:

- 1) Is there in existence an agreement for lease?
- 2) Is it a lease for a period exceeding three years or a term created by the exercise of an option?
- 3) Did the lessee take possession in the first instance under this lease and have the impression that this lease was valid and enforceable?
- 4) Is there some factor which denies that agreement full efficacy through informality or lack of registration or something else, for instance, Ministerial consent?
- 5) Can the lessee force the lessor to comply with the formalities?
- 6) Are any parties in breach of the lease?

²⁴⁴⁵ Queensland Law Reform Commission, *Working Paper on a Bill to Amend the Property Law Act 1974-1985* (No. 30, 1986), 33.

²⁴⁴⁶ Queensland Law Reform Commission, *Working Paper on a Bill to Amend the Property Law Act 1974-1985* (No. 30, 1986), 33.

²⁴⁴⁷ Queensland Law Reform Commission, *Working Paper on a Bill to Amend the Property Law Act 1974-1985* (No. 30, 1986), 33.

²⁴⁴⁸ The proposal in the Working Paper in relation to amending section 129 of the PLA was also endorsed in the Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974 – 1986 Report No. 37* (1987).

²⁴⁴⁹ WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.

²⁴⁵⁰ *Brisbane City Council v Council Club Inc* [1995] QCA 163.

²⁴⁵¹ *Brisbane City Council v Council Club Inc* [1995] QCA 163, 5-8.

²⁴⁵² Duncan indicates that 'In most cases in which s 129 can be invoked, there is an informal lease somewhere in the background': See WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.

- 7) Has the freehold to which the lease is subject been transferred since the commencement of the lease?²⁴⁵³

142.3. Other jurisdictions

142.3.1. Australia

As indicated in paragraph 142.1 above, section 129 of the PLA is based on the New South Wales provision set out in section 127 of the *Conveyancing Act 1919* (NSW). The Northern Territory also has a similar provision.²⁴⁵⁴ The form of the provision in Western Australia is slightly different to the other jurisdictions. Section 71 of the *Property Law Act 1969* (WA) provides only that no tenancy from year to year is implied by payment of rent. Section 72 of that Act then sets out the process for the termination of a periodic tenancy or 'a tenancy of uncertain duration'.²⁴⁵⁵ The other Australian jurisdictions (Victoria, South Australia and Tasmania) do not appear to have a similar provision to section 129 of the PLA.

142.3.2. New Zealand

Prior to 2007, section 105 of the *Property Law Act 1952* (NZ) provided:

105 Tenancy from year to year not to be implied

No tenancy from year to year shall be created or implied by payment of rent; and if there is a tenancy it shall be deemed in the absence of proof to the contrary to be a tenancy determinable at the will of either of the parties by one month's notice in writing.

Section 105 of the New Zealand Act was reviewed as part of the broader review undertaken of the *Property Law Act 1952* (NZ). When the section was first considered by the Law Commission (NZ) in 1991 there had not been a definitive decision on the interpretation of the section by the Court of Appeal. The generally accepted interpretation of the section in first instance decisions was that it abolished 'all tenancies by implication of the law and replaces the difficult and complicated rules which prevail at common law with one uniform rule for the determination of the nature of all indefinite tenancies.'²⁴⁵⁶ The Law Commission (NZ) noted that a more restrictive view had been taken of the equivalent provision in Australia which meant that the section was not applicable unless at common law the tenancy would have been treated as a tenancy from year to year.²⁴⁵⁷ The Law Commission (NZ) indicated that the position should be clarified in New Zealand by rewriting section 105 to confirm the view taken by New Zealand courts.²⁴⁵⁸

The section was considered further by the Law Commission in 1994 when a replacement section was proposed. The intended effect of the proposed new section is summarised below:

Sub-section (1) applies whenever a lessee is in possession of any land under a lease entered into at any time, but no agreement, either express or implied, has been made between the lessee and the lessor as to the duration of the term. The lease is then deemed to be terminable at the will of

²⁴⁵³ WD Duncan, 'When can a tenancy be terminated under s 129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.

²⁴⁵⁴ *Law of Property Act* (NT) s 144.

²⁴⁵⁵ *Property Law Act 1969* (WA).

²⁴⁵⁶ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991) [604].

²⁴⁵⁷ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991) [605].

²⁴⁵⁸ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991), [605].

either party by not less than 20 working days' notice in writing given at any time. The new section omits the reference contained in s 105 to tenancies from year to year, and thus confirms the view taken at first instance in New Zealand decisions, that the operation of the section is not to be confined to situations in which at common law there would have been a tenancy from year to year. (In Australia the opposite position has prevailed).²⁴⁵⁹

The final revised version of section 105 is now set out in sections 210 and 211 of the *Property Law Act 2007* (NZ).

142.4. Recommendation

The Centre recommends retaining section 129 of the PLA but with modernised language to aid in interpretation and provide clarity around the application and operation of the section. The amendments should address the key issue in relation to section 129 of the PLA being the absence of clarity in relation to the circumstances in which it will apply. This has been an ongoing concern since at least 1986 with the proposed repeal and replacement of the section by the QLRC with the primary intent of removing uncertainties and simplifying the provision.²⁴⁶⁰ The term 'no agreement as to its duration' has proven to be problematic when determining whether a tenancy falls within the scope of section 129 of the PLA and the reference to a 'tenancy determinable at the will' of either party adds to the general confusion when interpreting section 129 and differentiating it from a proper tenancy at will subject to section 137 of the PLA.

The QLS supports clarifying the application and operation of section 129 of the PLA and is of the view that the New Zealand drafting appears to provide a workable model.

RECOMMENDATION 139. Section 129 should be retained with modernised language.

For example, using the New Zealand provisions as a guide, the provision could be drafted in the following manner:

Section [129] Abolition of yearly tenancies by implication of law

- (1) This section applies to a lease if—
 - (a) the lessee is in possession of the land, although the lessor and the lessee have not agreed, expressly or by implication, on the duration of the term of the lease; or
 - (b) the lessee remains in possession of the land with the lessor's consent, although the term of the lease has expired and the lessor and the lessee have not agreed, expressly or by implication that the lessee may continue in possession for some other period.
- (2) A lease to which this section applies—
 - (a) is terminable at will; and
 - (b) may be terminated, at any time, by the lessor or the lessee giving not less than 20 days' written notice to the other party to the lease.

²⁴⁵⁹ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) [537].

²⁴⁶⁰ Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974 – 1986* Report No. 37 (1987) 10.

143. Section 130 – Notice of termination of tenancy

143.1. Overview and purpose

130 Notice of termination of tenancy

- (1) Subject to the other provisions of this division, a weekly, monthly, yearly, or other periodic tenancy may be terminated by either the landlord or the tenant upon notice to the other and, unless otherwise agreed upon, the notice—
- (a) shall satisfy the requirements of section 131 ; and
 - (b) shall be given in the manner prescribed by section 132 ; and
 - (c) shall be given in sufficient time to provide the period of notice required by section 133, 134, 135 or 136, as the case may be.
- (2) Subject to section 129, any other kind of tenancy determinable on notice may, unless otherwise expressly agreed upon, be terminated as provided by sections 131 and 132 .
- (3) In this section—
yearly tenancy means a tenancy from year to year other than a tenancy from year to year arising by implication before the commencement of this Act.

Section 130 of the PLA ‘provides an exclusive code to the determination of tenancies by notice, except, a determination of the special type of tenancy encompassed by s 129 [a yearly tenancy arising by implication of law before the commencement of the 1974 Act].’²⁴⁶¹ As discussed above at paragraph 117.2.2, the PLA does not apply to residential tenancies, and the termination of leases in this regard is governed by the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

143.2. Other jurisdictions

Western Australia²⁴⁶² is the only other Australian jurisdiction to have a provision regarding termination of periodic tenancies, or tenancies of ‘uncertain duration’, however the legislation in that State is less comprehensive than Part 8 Division 4 of the PLA. New Zealand does not have equivalent provisions.

143.3. Issues with the section

The primary issue with section 130, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

143.4. Recommendation

The Centre recommends retaining section 130 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 140. Section 130 should be retained with modernised language.

²⁴⁶¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.130.30].

²⁴⁶² *Property Law Act 1969* (WA) s 72.

144. Section 131 – Form and contents of notice

144.1. Overview and purpose

131 Form and contents of notice

- (1) A landlord or a tenant may give notice to terminate either orally or in writing, but a notice by a landlord to a tenant shall not be enforceable under division 5 unless it is in writing.
- (2) A notice in writing—
 - (a) shall be signed by the person giving the notice or by the person’s agent; and
 - (b) shall identify the land or premises in respect of which the notice is given; and
 - (c) shall state the date on which the tenancy is to terminate or that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice.
- (3) A notice may state both—
 - (a) the date on which the tenancy is to terminate; and
 - (b) that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice;
 and, if it does state both, and the date on which the tenancy is to terminate is incorrectly stated, the notice shall be effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.
- (4) A notice need not be in a particular form, but a notice by a landlord to a tenant, or by a tenant to a landlord, may be in the approved form.

Section 131 of the PLA sets out the requirements for a valid notice to terminate a periodic tenancy. If the lease contains methods of giving notice to terminate a periodic tenancy then such clauses must be carefully drafted to ensure compliance with this section.²⁴⁶³ A notice may be given orally, however a lessor cannot enforce an oral notice²⁴⁶⁴ therefore best practice is to give the notice in writing.

144.2. Issues with the section

The primary issue with section 131, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

144.3. Recommendation

The Centre recommends retaining section 131 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 141. Section 131 should be retained with modernised language.

²⁴⁶³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.131.30].

²⁴⁶⁴ *Re Coyle; Ex parte McGrath* (1943) 60 WN (NSW) 145.

145. Section 132 – Manner of giving notice

145.1. Overview and purpose

132 Manner of giving notice

- (1) Notice to terminate shall be sufficiently given if delivered personally to the tenant or, as the case may be, to the landlord or the landlord's agent.
- (2) Where the tenant is absent from the land or premises, or is evading service, the notice may be given to the tenant—
 - (a) by delivering it to some person apparently over the age of 18 years and apparently residing on or in occupation of the land or premises; or
 - (b) by delivering it to the person by whom the rent is usually paid, if such person is apparently over the age of 18 years; or
 - (c) by posting it up in a conspicuous place upon some part of the land or premises; or
 - (d) by sending it by registered post to the tenant at the tenant's usual or last known place of abode or business.
- (3) Where a tenant has died and probate or letters of administration of the tenant's estate have not been granted, any notice to terminate which might have been given to the legal personal representative of the deceased tenant had probate or letters of administration of the tenant's estate been granted shall be sufficiently given if—
 - (a) where any person is or persons are apparently residing on or in occupation of the land or premises—it is delivered to any of such persons apparently over the age of 18 years; and
 - (b) in any other case—it is advertised twice in a daily newspaper circulating in the district in which the land or premises are situated.
- (3A) Where a proceeding for the recovery of the possession of land or premises is taken in reliance on a notice to terminate given in a manner provided in subsection (3)(a), any occupier of the land or premises or other person claiming an interest in the land or premises shall be entitled to be heard in the proceeding and the contesting of the proceeding shall not of itself be regarded as an act of administration or as intermeddling in the estate of the deceased tenant or as constituting the person so contesting the proceeding an executor *de son tort* of the deceased tenant.
- (4) Nothing in this section shall affect the right of a landlord to give notice to terminate otherwise than as provided in this section.

While not an exclusive code,²⁴⁶⁵ section 132 of the PLA sets out comprehensive instructions for effecting service of a notice to terminate a periodic tenancy. Personal service is not necessary²⁴⁶⁶ for the notice to be effective. Subsection (2) deals with service of notice on a lessee who is absent or avoiding service. Subsection (3) deals with a deceased lessee. Subsection (3A) allows an occupier or other person with an interest in the leased premises to be heard in proceedings for recovery of the premises.

145.2. Issues with the section

The primary issue with section 132, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

²⁴⁶⁵ *Property Law act 1974* (Qld) s 132(4).

²⁴⁶⁶ *Property Law act 1974* (Qld) s 132(1).

145.3. Recommendation

The Centre recommends retaining section 132 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 142. Section 132 should be retained with modernised language.

146. Section 133 – Notice to terminate weekly tenancy

146.1. Overview and purpose

133 Notice to terminate weekly tenancy

- (1) A notice to terminate a weekly tenancy shall be given on or before the last day of 1 week of the tenancy to be effective on the last day of the following week of the tenancy.
- (2) In this section—
week of the tenancy means the weekly period on which the tenancy is based and not necessarily a calendar week, and, unless otherwise expressly agreed upon, the week shall be deemed to begin on the day on which the rent is payable.

The notice period required to terminate a weekly tenancy has previously been the subject of considerable litigation.²⁴⁶⁷ At common law the better view was that one week’s notice was sufficient to terminate a weekly tenancy.²⁴⁶⁸ A notice given at common law may nominate the date of termination as the last day of the weekly rent cycle, or the following day.²⁴⁶⁹

This section modifies the common law so that a notice to quit may be given on or before the first day of the weekly rent cycle, (whatever that day of the week that may be), and must nominate the date the tenancy is to terminate as the last day of that rent cycle. The effect of this is that, under this section, there does not have to be 7 *clear* days for the notice to be effective.²⁴⁷⁰ However, if the notice nominates a date that spills over into the next weekly rent cycle, it is not effective.²⁴⁷¹

146.2. Issues with the section

The primary issue with section 133, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

146.3. Recommendation

The Centre recommends retaining section 133 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 143. Section 133 should be retained with modernised language.

²⁴⁶⁷ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.133.30]; see, for example, *Queens Club Garden Estates v Bignell* [1924] 1 KB 117.

²⁴⁶⁸ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.133.30].

²⁴⁶⁹ *Schnabel v Allard* [1967] 1 QB 627.

²⁴⁷⁰ *Schnabel v Allard* [1967] 1 QB 627.

²⁴⁷¹ *Bathavon Rural District Council v Carlile* [1958] 1 QB 461 (CA).

147. Section 134 – Notice to terminate monthly tenancy

147.1. Overview and purpose

134 Notice to terminate monthly tenancy

- (1) A notice to terminate a monthly tenancy shall be given on or before the last day of 1 month of the tenancy to be effective on the last day of the following month of the tenancy.
- (2) In this section—
month of the tenancy means the monthly period on which the tenancy is based and not necessarily a calendar month, and, unless otherwise expressly agreed upon, the month shall be deemed to begin on the day on which the rent is payable.

The general position at common law is that where rent is payable on a monthly basis, a monthly tenancy is inferred, but this is not conclusive evidence and can be rebutted by evidence indicating otherwise.²⁴⁷² A weekly tenant who pays rent one month in advance may be entitled to one month's notice in the absence of any other indicia of a weekly tenancy.²⁴⁷³

Similar to weekly tenancies, a notice to terminate a monthly tenancy at common law must expire on the last day of the monthly rent cycle. The effect of section 134 is the same as the common law, however subsection (2) modifies the harsh common law position where the first day of a monthly tenancy cycle must be proven for a notice to be effective.²⁴⁷⁴ For example, in *Lemon v Lardeur*²⁴⁷⁵ a notice to terminate a monthly tenancy was held to be invalid because no evidence was given as to the start date of the tenancy. Therefore, the court held that there was no way to determine that the date nominated in the notice for the termination of the monthly tenancy was the last day of the monthly tenancy.

Section 134(2) allows for the calculation of the tenancy by calendar month or by another method.²⁴⁷⁶ Further, according to subsection (2), where there is no evidence of a starting date the start of the monthly tenancy is deemed to be on the anniversary of the payment of rent.²⁴⁷⁷

It is important to distinguish this type of monthly tenancy from a tenancy under section 129 of the PLA which is determinable at one month's notice expiring at any time.

147.2. Issues with the section

The primary issue with section 134, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

²⁴⁷² Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.134.30]; see for example *Amad v Grant* (1947) 74 CLR 327.

²⁴⁷³ *Cohen v Milner* [1960] VR 499.

²⁴⁷⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.134.30].

²⁴⁷⁵ [1946] KB 613.

²⁴⁷⁶ *Property Law Act 1974* (Qld) s 134(2) '...not necessarily a calendar month...'

²⁴⁷⁷ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.134.30].

147.3. Recommendation

The Centre recommends retaining section 134 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 144. Section 134 should be retained with modernised language.

148. Section 135 – Notice to terminate yearly tenancy

148.1. Overview and purpose

135 Notice to terminate yearly tenancy

- (1) A notice to terminate a yearly tenancy shall be given on or before the first day of the period of 6 months ending with the last day of any year of the tenancy to be effective on the last day of that year of the tenancy.
- (2) In this section—
year of the tenancy means the yearly period on which the tenancy is based and not necessarily a calendar year, and, unless otherwise expressly agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

In line with the common law position, notice to terminate a yearly tenancy requires only 6 months notice,²⁴⁷⁸ unless the parties agree otherwise.²⁴⁷⁹ The end date of the tenancy is calculated as at midnight of the day immediately preceding the anniversary of the commencement of the tenancy. To use an example provided by commentators,²⁴⁸⁰ a tenancy that commences on 18 July will end each year on 17 July²⁴⁸¹ but continues to ‘roll over’ unless and until a notice to terminate the tenancy is served with the requisite 6 month notice period.²⁴⁸² In this scenario, a notice to terminate the tenancy has to be served on or before 18 January and must expire on 17 July.

Where there is no commencement date agreed by the parties, section 135(2) deems the date of commencement of the tenancy as the date on which the tenant first became entitled to possession of the leased premises.

148.2. Issues with the section

The primary issue with section 135, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

148.3. Recommendation

The Centre recommends retaining section 135 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 145. Section 135 should be retained with modernised language.

²⁴⁷⁸ *Landale v Menzies* (1909) 9 CLR 89.

²⁴⁷⁹ *Allison v Scargall* [1920] 3 KB 443.

²⁴⁸⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.135.30].

²⁴⁸¹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.135.30].

²⁴⁸² *Youngmin v Heath* [1974] 1 WLR 135; [1974] 1 All ER 461.

149. Section 136 – Notice to terminate other periodic tenancy

149.1. Overview and purpose

136 Notice to terminate other periodic tenancy

- (1) A notice to terminate a periodic tenancy other than a weekly, monthly, or yearly tenancy shall be given on or before the last day of any period of the tenancy to be effective on the last day of the following period of the tenancy.
- (2) In this section—
period of the tenancy means the period on which the tenancy is based, and, unless otherwise expressly agreed upon, such period shall be deemed to begin on the day on which the rent is payable.

Section 136 of the PLA does not apply to weekly, monthly or yearly tenancies and these terms are dealt with by sections 133, 134 and 135 of the PLA respectively. These are discussed above at paragraphs 146 to 148.

A lease for a term can be for any time period²⁴⁸³ and does not necessarily have to be for a month or a week or another familiar time reckoning. The only essential elements of a lease for a term are:

- that the lease gives the lessee the right to exclusive possession of the leased premises; and
- that the lease is for a specified period.²⁴⁸⁴

Therefore, a lease for a term can be for a term of any duration,²⁴⁸⁵ and like all leases for terms, will continue until proper notice to quit has been served on the lessee.²⁴⁸⁶

Unless the parties agree otherwise,²⁴⁸⁷ notice to terminate must be given on or before the last day of the tenancy, and will terminate the lease on the last day of the next tenancy period. For example, a lease for 6 months commencing on 1 July and expiring on 31 December requires notice to terminate to be served on or before 31 December to end the lease on the following 30 June.

Section 136(2) deems the commencement date to begin on the day on which rent is payable unless the parties agree otherwise.

149.2. Issues with the section

The primary issue with section 136, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

²⁴⁸³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.136.30].

²⁴⁸⁴ *Fink v McIntosh* (1945) 46 SR (NSW) 47.

²⁴⁸⁵ As distinguished from a lease at will or sufferance.

²⁴⁸⁶ *Fink v McIntosh* (1945) 46 SR (NSW) 47.

²⁴⁸⁷ *Land Settlement Assn Ltd v Carr* [1944] 2 All ER 126.

149.3. Recommendation

The Centre recommends retaining section 136 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 146. Section 136 should be retained with modernised language.

150. Section 137 – Notice to terminate other tenancies

150.1. Overview and purpose

137 Notice to terminate other tenancies

- (1) A notice to terminate a tenancy, including a tenancy at will, must be for a reasonable period.
- (2) What constitutes a reasonable period of notice depends on the circumstances, including the nature of the tenancy, the circumstances surrounding the creation of the tenancy, the terms (if any) of the tenancy, and any proper implications from the agreement (if any) of the parties with respect to the tenancy.
- (3) Subsection (1) does not apply to—
 - (a) a tenancy for which a period of notice has, expressly or impliedly, been agreed on by the parties; and
 - (b) a weekly, monthly, yearly or other periodic tenancy subject to this Act with respect to notices to terminate; and
 - (c) a tenancy at will arising because of the abolition by this Act of the implication of a tenancy from year to year.

Where there is no agreement between the parties, and where sections 133, 134 and 135 of the PLA do not apply, section 137 says the notice period required to terminate a tenancy will be a ‘reasonable period.’²⁴⁸⁸ This section is particularly relevant to tenancies at will.²⁴⁸⁹ A tenancy at will is described as arising ‘where one person lets land to hold at the will of the lessor.’²⁴⁹⁰

If a lease provides that the tenancy can be terminated ‘at any time’ or similar words, then section 137 will not apply and no ‘reasonable period’ for notice is required.²⁴⁹¹

150.2. Issues with the section

The primary issue with section 137, and the balance of Part 8 Division 4, is the language, which is not in line with contemporary statutory drafting practice. The operation of the Division remains relevant and otherwise should be retained.

150.3. Recommendation

The Centre recommends retaining section 137 but the section should be redrafted to modernise the language and aid in interpretation. This is in line with the overarching principles that inform these recommendations.

RECOMMENDATION 147. Section 137 should be retained with modernised language.

²⁴⁸⁸ *Property Law Act 1974* (Qld) s 137(2)(a) and (b).

²⁴⁸⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.137.60].

²⁴⁹⁰ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.137.60].

²⁴⁹¹ *Bridges v Potts* (1864) 17 CB NS 314; 144 ER 127.

151. Section 138 – Tenants and other persons holding over to pay double the yearly value

151.1. Overview and purpose

138 Tenants and other persons holding over to pay double the yearly value

Where any tenant for years, including a tenant from year to year or other person who is or comes into possession of any land by, from or under or by collusion with such tenant, wilfully holds over any land after –

- (a) determination of the lease or term; and
- (b) after demand made and notice in writing has been given for the delivery of possession of the land by the lessor or landlord or the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;

then the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of such land, be liable to the person so kept out of possession at the rate of double the yearly value of the land so detained for so long as the land shall have been so detained, to be recovered by action in any court of competent jurisdiction.

Section 138 of the PLA originated from section 1 of the *Landlord and Tenant Act 1730* (UK) which was held to apply in Queensland.²⁴⁹² The QLRC described the purpose of that section to 'discourage tenants from holding over after determination of their lease or tenancy by penalising them at the rate double the yearly value of the premises.'²⁴⁹³ The QLRC also noted that the section did not apply to weekly tenancies or periodic tenancies for any period less than from year to year and did not consider there was any real justification for extending the provision to weekly and other short periodic tenancies. The rationale for not extending the provision in this way was explained by the QLRC in the following way:

...such tenancies are generally of less valuable premises; they can be readily determined; there are summary procedures for recovery of possession; and, apart from the Act in question, the lessor in such cases remains entitled to damages in the form of mesne profits (which may be greater than the rent payable where the market value is higher than the agreed rent...).²⁴⁹⁴

Section 138 is similar to section 27 of the PLA. Section 27 of the PLA originated from section 1 of the *Landlord and Tenant Act 1730* (UK) which was held to apply in Queensland.²⁴⁹⁵ Section 1 of that Act applied also to yearly tenants which is now covered in section 138. The QLRC decided to separate the

²⁴⁹² See *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28 and *Trivett v Hurst* [1937] St R Qd 265 referred to 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) 90-91.

²⁴⁹³ 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) 90.

²⁴⁹⁴ 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) 91.

²⁴⁹⁵ See *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28 and *Trivett v Hurst* [1937] St R Qd 265 referred to 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) 90-91.

holding over provisions relevant to life tenancies and yearly tenancies on the basis that a life tenancy is a freehold estate and more appropriately addressed in the freehold land part of the PLA.²⁴⁹⁶

The effect of section 138 is that where any lessee for years wilfully holds over after the determination of a lease and demand is made and a notice in writing is given for the delivery of possession, double the yearly value of the land will be recoverable in any court of competent jurisdiction.²⁴⁹⁷

151.2. Issues with the section

151.2.1. Establishing that the holding over was ‘wilful’

The term ‘wilfully’ has been considered by the courts. It has been interpreted to mean a ‘contumacious act of the lessee’.²⁴⁹⁸ In *French v Elliott*²⁴⁹⁹ the term ‘wilfully holds over’ was considered by Paull J who indicated:

It has been held that ‘wilfully’ means ‘contumaciously’, but I can see no reason why the old English word ‘wilfully’ does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumacious tenant. It deals only with the moment of time when the tenancy comes to end. At that moment of time a tenant may say ‘I shall stay on. I think I have the right to do so.’ His staying on is not wilful. On the other hand, a tenant may say: ‘I will stay on, although I know I have no right to do so.’ That is will, and well illustrates the now sometimes forgotten distinction between ‘I shall’ and the insistent ‘I will’. In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place.²⁵⁰⁰

It can be difficult to obtain evidence that a holding over was wilful within the meaning of the provision. It is arguably simple to raise a bona fide right to possession through other mechanisms such as obtaining legal advice to that effect. For example, this occurred in the case of *Grainger v Williams*²⁵⁰¹ where the Supreme Court considered the equivalent provision to section 138 of the PLA found in the Imperial Statute, 4 Geo 2, c 28 (1731), section 1 in force in Western Australian. In that case the tenant allegedly ‘holding over’ had received legal advice which led them to believe that they had a right to do so.²⁵⁰² Simmonds J concluded on that basis that there could not be wilfulness in those circumstances and that the claim under the Imperial Statute could not be justified.²⁵⁰³

151.2.2. Calculation of ‘double the yearly value of the land’

There have also been difficulties associated with determining how ‘double the yearly value of the land’ is calculated. The phrase has been interpreted in a number of different ways. The first approach is that it means double the value of the premium on the lease – that is, what the lease is worth.²⁵⁰⁴ The

²⁴⁹⁶ 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) 19.

²⁴⁹⁷ Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [14.450].

²⁴⁹⁸ *Trivett v Hurst* [1937] St R Qd 265, 271.

²⁴⁹⁹ *French v Elliott* [1959] 3 All ER 886, 874. This case considered section 1 of the *Landlord and Tenant Act 1730* (UK) (the equivalent provision to section 138 of the PLA).

²⁵⁰⁰ *French v Elliott* [1959] 3 All ER 886, 874.

²⁵⁰¹ [2005] WASC 286.

²⁵⁰² *Grainger v Williams* [2005] WASC 286, [22].

²⁵⁰³ *Grainger v Williams* [2005] WASC 286, [23].

²⁵⁰⁴ *Trivett v Hurst* [1937] St R Qd 265 at 275.

alternative approach is to calculate it as double the yearly rent.²⁵⁰⁵ A more recent approach is set out in the decision of Simmonds J in *Grainger v Williams*.²⁵⁰⁶ Although the relevant provision of the Imperial statute was held not to apply, Simmonds J still considered the issue of the 'yearly value' on the basis that some of the issues that arose were also relevant to the alternative claims made for damages for trespass and for mesne profits.²⁵⁰⁷ Simmond J's approach is described below:

That 'double yearly value' was in the nature of damages which might have been received for 'the use of the freehold and everything connected with it during the time possession was withheld' (at [25]) equating the damages concept with mesne profits being damages for trespass payable by a lessee in possession after forfeiture of a lease (at [52]).²⁵⁰⁸

151.2.3. Alternative remedy available

A person in possession of land not paying rent or remaining upon land without a legal right would be a trespasser and liable to damages for trespass which is generally calculated at the rate of the rental.²⁵⁰⁹ Those damages can only be claimed from the time when the 'defendant ceased to hold as tenant and became a trespasser.'²⁵¹⁰ In a number of cases, mesne profits and the equivalent to section 138 of the PLA have been pleaded in the alternative.²⁵¹¹

151.2.4. The provision is out of step with commercial practice

The imposition of a 'penalty' or consequence in the form set out in section 138 of the PLA is out of step with commercial expectations in modern leasing practice. The historical origins of the equivalent eighteenth century provisions developed against the backdrop of the prevalence of year to year tenancies arising more frequently by operation of law because of the absence of written agreements. Tenants who held over leases would often do so for extended periods of time to the detriment of the lessor. The rationale for the introduction of these historical provisions is no longer consistent with current leasing practices, particularly in the commercial context.²⁵¹²

151.3. Other jurisdictions

Western Australia, Tasmania and the Northern Territory appear to be the only other jurisdictions in Australia which have retained the equivalent provision to section 138 of the PLA.²⁵¹³

²⁵⁰⁵ *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28.

²⁵⁰⁶ *Grainger v Williams* [2005] WASC 286.

²⁵⁰⁷ *Grainger v Williams* [2005] WASC 286, [24].

²⁵⁰⁸ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.27.60]).

²⁵⁰⁹ Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) [2.6], [17.17]. Damages for trespass are known as 'mesne profits'.

²⁵¹⁰ Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) [17.17]. See also *Grainger v Williams* [2005] WASC 286, [57].

²⁵¹¹ See for example, *Grainger v Williams* [2005] WASC 286, *French v Elliott* [1959] 3 All ER 886 and *Warne v Nolan* [2001] QSC 053. In the Queensland case of *Warne v Nolan* a claim for damages pursuant to section 138 of the *Property Law Act 1974* (Qld) was pleaded in the alternative to the claim for damages for trespass. The claim under section 138 of the PLA was ultimately not considered by Justice Muir.

²⁵¹² The *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) excludes the application of the *Property Law Act 1974* (Qld) to 'residential tenancy agreements' under that Act (see section 27(1)).

²⁵¹³ In Western Australia, the provision is found in section 1 of the Imperial statute, 4 Geo 2, c 28 (1731). The Tasmanian provision is contained in *Landlord and Tenant Act 1935* (Tas) s 9. The Northern Territory has a holding over provision in relation to a life tenant and holding over leased premises in sections 27 and 152 of the *Law of Property Act* (NT).

151.4. Recommendation

The Centre recommends section 138 be repealed. This approach has the support of the QLS. The section is out of step with current commercial practice and the basis upon which it was introduced is no longer relevant.

There is an alternative and appropriate remedy available to address a situation where a lease is held over by a tenant. Section 138 of the PLA does not add anything additional to this alternative remedy.

The section has been the subject of only a limited number of situations in Queensland. There are a number of issues associated with section 138 of the PLA. Primarily, there is an absence of clarity regarding how the calculation of 'double the yearly value' should be undertaken.

Further, establishing that a holding over is wilful has been shown from the few decisions to be very difficult from an evidentiary perspective. The current utility of the section is questionable, particularly as an alternative remedy is available in the form of a claim for damages for trespass as compensation for use and occupation of the land. The section itself is often pleaded in the alternative to a claim for damages.

Note that if it is decided that the section should be retained, any changes to the section should be consistent with any changes to section 27 of the PLA.

RECOMMENDATION 148. Section 138 should be repealed.

152. Section 139 – Tenant holding over after giving notice to be liable for double rent

152.1. Overview and purpose

139 Tenant holding over after giving notice to be liable for double rent

- (1) Where a lessee who has given notice of intention to quit the land held by the lessee at a time specified in such notice does not accordingly deliver up possession at the time so specified, then, the lessee shall after that time be liable to the lessor for double the rent or sum which would have been payable to the lessor before such notice was given.
- (2) Such lessee shall continue to be liable for such double rent or sum during the time the lessee continues in possession, to be recovered by action in any court of competent jurisdiction.

Section 139 of the PLA is a re-enactment of historical English and Queensland provisions. The QLRC summarised the background to the provision as follows:

Section 18 of the Distress for Rent Act 1737 was intended to provide for the converse case, i.e. where a tenant gives notice of his intention to quit but fails to deliver up possession on due date, and this section has been re-enacted in Queensland in s.38 of the The Distress Replevin and Ejectment Act of 1867.

By contrast with the earlier statute, the notice contemplated by the Act of 1737 need not be in writing; the better view is that short periodic tenancies are within its scope: see Woodfall,and the lessor's claim is limited to double rent; which may be less than the value of the premises on the open market.²⁵¹⁴

The effect of section 139 of the PLA is to make the lessee liable for double the rent payable under the tenancy where the lessee gives notice of intention to quit the land but fails to deliver up possession. The notice given by the lessee does not need to be in writing. The section has rarely been the subject of any court proceedings in Queensland. However, it was successfully relied upon in a cross-claim in Federal Court case of *Pacific National (ACT) Limited v Queensland Rail*.²⁵¹⁵

152.2. Issues with the section

152.2.1. The provision is out of step with commercial practice

As is the case with section 138 of the PLA, the imposition of a 'penalty' or consequence in the form set out in section 139 of the PLA is out of step with commercial expectations in modern leasing practice. The historical origins of the equivalent eighteenth century provisions developed against the backdrop of the prevalence of year to year tenancies arising more frequently by operation of law because of the absence of written agreements. Tenants that held over leases would often do so for extended periods of time to the detriment of the lessor. The rationale for the introduction of these

²⁵¹⁴ 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) 91.

²⁵¹⁵ [2006] FCA 91. The plaintiff in the proceedings, National Rail, failed in its estoppel claim and claims under the *Trade Practices Act 1974* (Cth) in relation to a container terminal it occupied but which was owned by the defendant, Queensland Rail (QR). QR cross-claimed in the proceedings including a claim under section 139 of the *Property Law Act 1974* (Qld).

historical provisions is no longer consistent with current leasing practices, particularly in the commercial context.²⁵¹⁶ In the absence of this provision, the claim to double rent would now be treated as a penalty under the general law. The objectives of a contemporary statute should not be to create a penalty without justification, particularly in circumstances such as these where ordinary remedies are more than adequate.

152.2.2. Rules of the court more efficient

Historically, removing tenants who were holding over was often a protracted process. The *Uniform Civil Procedure Rules 1999* (Qld) are now more efficient in providing summary and expeditious processes to remove defaulting tenants from land.

152.3. Other jurisdictions

Tasmania and the Northern Territory have provisions equivalent to section 139 of the PLA.²⁵¹⁷ It is significant that the most populous jurisdictions in Australia do not have this provision.

152.4. Recommendation

The Centre recommends repealing section 139 of the PLA because the section has no current relevance in relation to current leasing practices. Repeal of the section has the support of the QLS.

RECOMMENDATION 149. Section 139 should be repealed.

²⁵¹⁶ The *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) excludes the application of the *Property Law Act 1974* (Qld) to 'residential tenancy agreements' under that Act (see section 27(1)).

²⁵¹⁷ *Landlord and Tenant Act 1935* (Tas) s 10 and *Law of Property Act* (NT) subsection 152(1)(b).

153. Part 8 Division 5 (sections 140 to 152) – Summary recovery of possession

153.1. Overview and purpose

Part 8, Division 5 of the PLA²⁵¹⁸ (**Division 5**) comprises a number of provisions commencing from section 140 and ending with section 152.²⁵¹⁹ Division 5 provides for the summary recovery of possession of land by a landlord against the tenant or any person claiming under the tenant and in actual occupation of the land where the tenant or person fails to deliver up possession of the land.²⁵²⁰ Two of the key provisions of the Division are extracted below.

141 Summary proceedings for recovery of possession

- (1) When the term or interest of the tenant of any land held by the tenant as tenant for any term of years or for any lesser estate or interest whether with or without being liable for payment of rent –
 - (a) has expired by effluxion of time; or
 - (b) has been determined by notice to terminate or demand of possession;
 and the tenant or any person claiming under the tenant and in actual occupation of the land or any part of the land fails to deliver up possession of such land or part, the landlord may by complaint under this division proceed to recover possession of that land or part of it.
- (2) The power to recover possession of any land or part of land conferred by this division shall be in addition to, and not, except where otherwise provided, in derogation from, any other power, right, or remedy of the landlord.

142 Mode of proceeding

- (1) Subject to this Act proceedings under this division for the recovery of possession of any land referred to in section 141 may be heard and determined by a Magistrates Court in a summary way under the *Justices Act 1886*, upon the complaint in writing of the landlord or the landlord's agent.
- (2) The complaint shall be heard and determined at a place where it could be heard and determined were it a complaint for a breach of duty committed in the Magistrates Courts district within which the land concerned is situated or, where the land concerned is situated in more than 1 such district, in any of those districts.

153.1.1. Scope of Division 5

The scope of Division 5 is limited in so far as the recovery of possession of land by landlords against tenants is concerned. Firstly, the Division does not apply to 'residential tenancy agreements' under the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) by virtue of section 27(1) of that Act.²⁵²¹ Secondly, there are limits to the categories of non-residential tenancies which the Division covers. Commentary on the Division summarises the application of the Division in the following way:

It does not apply where a tenancy has been determined by way of forfeiture, but it does apply to tenancies by attornment created by mortgages. Its basic application is to:

²⁵¹⁸ The Centre gratefully acknowledges the contribution of Stephen Lumb, Barrister, Brisbane in relation to the review of Part 8, Division 5 of the *Property Law Act 1974* (Qld).

²⁵¹⁹ For a detailed overview of the legislative history of Part 8, Division 5 of the *Property Law Act 1974* (Qld), including earlier recovery of possession legislation in Queensland see Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.8.DIV.5.30].

²⁵²⁰ This discussion of Division 5 adopts the terminology used in the Division which refers to 'landlord' and 'tenant'.

²⁵²¹ Section 27(1) of the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) provides that 'The *Property Law Act 1974* does not apply to residential tenancy agreements.'

- (a) the holding over of fixed term tenancies which have expired by effluxion of time, where notice has been given; or
- (b) periodic tenancies which have been determined by notice.

It also applies to land held by a tenant of any lesser estate, with or without liability for payment of rent. This may contemplate tenancies at will or sufferance which can be terminated merely by demand for possession. The tenancy at will contemplates the situation where the tenant whose lease has expired, holds over with the landlord's permission – without having paid rent on a periodic basis..... a tenant at sufferance could fall within the ambit of this Division, that is, a tenant who initially entered under a valid tenancy, but holds over without the landlord's assent or dissent.²⁵²²

The power to recover possession under Division 5 is in addition to any other power, right or remedy of the landlord, except where otherwise provided.²⁵²³

153.1.2. Operation of Division 5

Section 141 of the PLA enables a landlord to proceed to recover possession of land where the term or interest of the tenant has:

- expired by effluxion of time; or
- been determined by notice to terminate or demand possession.²⁵²⁴

The relevant tenancy under section 141 of the PLA can be for any term of years or for any lesser estate or interest, with or without any liability on the part of the tenant for rent. Proceedings initiated under Division 5 in relation to land referred to in section 141 of the PLA may be heard and determined by a Magistrates Court in a summary way under the *Justices Act 1886* (Qld).²⁵²⁵

Division 5 refers to both recovery of possession and the delivering up of possession. However, the latter phrase is used in the context of the tenant failing to deliver up possession of the land. It is generally accepted that the legislature in using this phrase was not intending to make any distinction between an action to recover possession of land and action for delivery of possession.²⁵²⁶ The relief provided under Division 5 is for recovery of possession by the landlord of the relevant land in circumstances where the tenant has failed to deliver up possession.

²⁵²² Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.141.30].

²⁵²³ *Property Law Act 1974* (Qld) s 141(2).

²⁵²⁴ *Property Law Act 1974* (Qld) s 141(1).

²⁵²⁵ *Property Law Act 1974* (Qld) s 142(1).

²⁵²⁶ This can be compared to the Supreme Court decision in *Finance Allotments Pty Ltd v Young* [1961] Qd R 452 in the context of mortgages where there was a distinction between 'delivery of possession' and 'recovery of possession'. The claim made in that case in the statement of claim was to 'recover the possession of the lands' and the plaintiff then subsequently claimed the 'delivery of possession' by the mortgagee of the relevant land. Gibbs J indicated that 'it is quite erroneous to regard 'recovery of possession' and 'delivery of possession' as interchangeable terms [455]. In the context of the relevant civil procedure rules in place in 1961, Gibbs J noted that 'Although both a judgment for recovery of land and a judgment for the delivery of possession of land may be enforced by a writ of possession, where the judgment is to deliver up possession of land the writ of possession can only be sued out on filing an affidavit under 'O51, r2, showing that the judgment was served and that it had not been obeyed' [455].

The landlord or landlord's agent must make a complaint in writing in order to commence proceedings.²⁵²⁷ The contents of the complaint for the purposes of Division 5 are prescribed in section 143(1) of the PLA and must be in an approved form.²⁵²⁸ The complaint must contain:

- a brief description of the land or premises to identify the land;
- where the land is situated;
- details of the landlord;
- a statement that the land was held under a tenancy and (where practicable) the nature of the tenancy under which the land was held;
- the date on which the tenancy expired by effluxion of time or determined by a notice to terminate or demand of possession; and
- a statement that the defendant failed to deliver up possession.

The process after a complaint is made by the landlord is as follows:

- a Justice may issue a summons directed to the defendant requiring the defendant to appear at the Magistrates Court to answer the complaint;²⁵²⁹
- the complaint can be heard and determined in the defendant's absence;²⁵³⁰
- the court may order that a warrant be issued against the defendant requiring and authorising any person to whom it is addressed to take and give possession of the land the subject of the complaint to the landlord;²⁵³¹
- the order may be made where the defendant fails to appear or fails to show to the court's satisfaction reasonable cause why such a warrant should not be issued;²⁵³²
- the warrant is sufficient authority to the person it is addressed to enter (by force if necessary) into and upon the land;²⁵³³ and
- the complaint may also include a further complaint that the defendant is indebted to the landlord for rent or mesne profits (or both).²⁵³⁴

153.1.3. Other provisions of Division 5

The other provisions of Division 5 are:

- section 148 which provides for a rehearing of the complaint where:
 - the defendant failed to appear at the hearing of the complaint and the order that the warrant be issued was made ex parte; and
 - the defendant makes an application for a rehearing within 7 days after the date on which the order was made; and
 - the Magistrate considers there is a proper reason to do so;²⁵³⁵

²⁵²⁷ *Property Law Act 1974* (Qld) s 142(1).

²⁵²⁸ *Property Law Act 1974* (Qld) s 143(1).

²⁵²⁹ *Property Law Act 1974* (Qld) s 144(1).

²⁵³⁰ *Property Law Act 1974* (Qld) s 144(3).

²⁵³¹ Where the complaint was made by an agent, the agent (or landlord's agent) can be given possession of the land: *Property Law Act 1974* (Qld) ss 145(1) and 146(1).

²⁵³² *Property Law Act 1974* (Qld) ss 145(1) and (2).

²⁵³³ *Property Law Act 1974* (Qld) s 146(2).

²⁵³⁴ *Property Law Act 1974* (Qld) s 147(1).

²⁵³⁵ *Property Law Act 1974* (Qld) s 148(1).

- section 149 which sets out the powers of the court on an application under Division 5. For example, the section confirms that the powers conferred under Division 5 are in addition to the powers of the court under the *Justices Act 1886* (Qld).²⁵³⁶ In relation to a claim for rent or mesne profits, the court has and may exercise all or any of the powers conferred by the *Magistrates Courts Act 1921* (Qld) on a Magistrates Court;²⁵³⁷
- section 150 which has the effect that no action or prosecution can be brought against the Justice who constituted a court which issued a warrant under Division 5.²⁵³⁸ The section also extends the protection to a clerk of the court who issues a warrant and persons who execute warrants;²⁵³⁹
- section 151 which provides protection to a landlord against a trespass action where there has been some irregularity or informality in the manner of obtaining possession.²⁵⁴⁰ However, the party ‘aggrieved’ may bring an action for any such irregularity or informality;²⁵⁴¹ and
- section 152 which provides that a landlord who does not have a lawful right of possession at the time the warrant was executed is not protected from the consequence of a civil action by pleading the issue and execution of the warrant.²⁵⁴²

153.2. Issues with the Division

Recovery of possession of land under Division 5 does provide a simplified and reasonably expeditious process. Some benefits of the Division to tenancies which fall within its scope include:

- the Magistrates Court is a lower cost jurisdiction than the District Court or Supreme Court so it is potentially more accessible to the parties;
- a broader category of complainants can make a complaint. For example, the landlord’s agent or solicitor;²⁵⁴³ and
- proceedings do not depend on the valuation of the land.²⁵⁴⁴

However, these advantages need to be considered in the context of the other matters raised below.

153.2.1. Division 5 is limited in scope

The language used in section 141 of the PLA creates some uncertainty regarding the precise scope of the tenancies to which Division 5 applies. The section refers to ‘the term or interest’ of the tenant of any land held by the tenant as a tenant for any term of years ‘or for any lesser estate or interest’. The

²⁵³⁶ *Property Law Act 1974* (Qld) s 149(1).

²⁵³⁷ *Property Law Act 1974* (Qld) s 149(3).

²⁵³⁸ *Property Law Act 1974* (Qld) ss 150(a).

²⁵³⁹ *Property Law Act 1974* (Qld) ss 150(b) and (c).

²⁵⁴⁰ *Property Law Act 1974* (Qld) s 151.

²⁵⁴¹ *Property Law Act 1974* (Qld) s 151.

²⁵⁴² *Property Law Act 1974* (Qld) s 152(1).

²⁵⁴³ *Property Law Act 1974* (Qld) s 142(1) where a complaint can be made by the landlord or landlord’s agent. ‘Agent’ is defined in section 140 of the *Property Law Act 1974* (Qld) to mean a person usually employed by the landlord in the letting of the land or in the collection of the rents of the land; or a person specifically authorised in writing to act in the particular matter by the landlord; or a solicitor authorised to act on behalf of the landlord.

²⁵⁴⁴ However, it is conceded in commentary on Division 5 that a Magistrates Court has its own jurisdictional limit of \$150,000 and no jurisdiction to hear proceedings for the recovery of land irrespective of value except by virtue of Division 5 of the PLA. See Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.141.90].

phrase ‘any lesser estate or interest’ is often found in conjunction with the reference to ‘fee simple’. The reference is less clear in the context in which it appears in section 141 of the PLA. Further, factual questions will arise in relation to whether a particular category of tenancy will fall within the scope of Division 5. Some of the possible questions include:

- has the tenancy expired by effluxion of time?;
- has the tenancy been determined by notice to terminate?; and
- has the tenancy been determined by a demand for possession?

In the case of tenancies determined by notice to terminate, technical arguments could be raised about the appropriateness of the notice given under Part 8, Division 4 of the PLA which can impact on whether Division 5 can be relied upon in that situation.²⁵⁴⁵ In circumstances where there is the potential for genuine dispute in relation to such matters, it is likely clients would be advised to commence proceedings in the District Court or Supreme Court (whichever is appropriate) rather than risk a finding that Division 5 has no application.

A number of tenancies clearly do not fall within the scope of Division 5 including:

- residential tenancy agreements under the *Residential Tenancies and Rooming Act 2008* (Qld),²⁵⁴⁶ and
- tenancies which have been determined by forfeiture. Relief against forfeiture is only available in the Supreme Court.

The current policy reason underpinning Division 5 is not clear. The Division provides an alternative mechanism for the recovery of possession for only a limited pool of tenancies. In this respect, there is no monetary limit imposed on the value of the tenancy the subject of the claim in a Magistrates Court made pursuant to Division 5. The focus is on the nature of the tenancy. This is despite the fact that a Magistrates Court has its own jurisdictional limit of \$150,000 and no jurisdiction to hear proceedings for the recovery of land, except by virtue of Division 5.

153.2.2. Uncertainty regarding whether Division 5 is used in practice

It is not clear whether the remedy provided for in Division 5 is one which is commonly sought in practice, even where the relevant tenancy falls within the scope of the Division.²⁵⁴⁷ Notices to quit under the PLA which are issued under Part 8, Division 4 would also be used by mortgagees seeking possession of mortgaged premises where there is an attornment clause in the mortgage constituting the mortgagor as a periodic tenant (weekly or monthly etc) for the purpose of potential ‘ejectment’ from the land. Although it is accepted that Division 5 applies to tenancies by attornment created by mortgages, in practice, proceedings relating to recovery of possession are usually commenced in the

²⁵⁴⁵ For example, a notice under section 130 of the *Property Law Act 1974* (Qld). Section 131 sets out the form and content of the notice given and indicates that it is not enforceable under Division 5 unless it is in writing.

²⁵⁴⁶ Applications can be made to QCAT under Chapter 6, Part 2 of the *Residential Tenancies and Rooming Act 2008* (Qld) arising from the failure of a tenant to leave premises. QCAT can make a termination order. A ‘termination order’ is an order of a Tribunal terminating a residential tenancy agreement or rooming accommodation agreement: *Residential Tenancies and Rooming Act 2008* (Qld) schedule 2.

²⁵⁴⁷ Searches of the publicly available Magistrates Courts decisions from 2006 do not identify any cases brought under Division 5. Clearly, further evidence from the Magistrates Courts’ decisions would be needed to confirm the extent to which the Division is used in practice.

District Court (or Supreme Court), rather than relying on Division 5 of the PLA.²⁵⁴⁸ As indicated in paragraph 153.2.1 above, arguments about the nature of a tenancy and the application of the Division are best conducted in the District or Supreme Courts as these could become quite complex.

153.2.3. Alternative option for recovery of possession under the *Uniform Civil Procedure Rules 1999 (Qld)*

The power to recover possession of land under Division 5 is in addition to any other power, right or remedy of the landlord.²⁵⁴⁹ In modern leases, the usual practice is that an express term is included in the lease agreement providing for re-entry and taking of possession of the land by the lessor in the event of default. If there is no such express term in the lease agreement, there is implied in every lease²⁵⁵⁰ of land that in the event of the defaults specified in the lease, the lessor may re-enter upon the demised premises (or part of the premises) and determine the estate of the lessee in the premises.²⁵⁵¹ Landlords in Queensland may seek to recover possession of land from a tenant and to enforce such an order under the UCPR in conjunction with section 90 of the *Civil Proceedings Act 2011 (Qld) (CPA)*. A landlord may seek an order that it is entitled to possession of the leased premises or for recovery of possession of land or an order for possession of land.²⁵⁵² The advantage of this procedure is that it is not dependent upon the nature of any particular leasehold or tenancy arrangement. The critical issue is whether the landlord is entitled to possession of the land.²⁵⁵³

153.2.4. The process under the UCPR

Other than an appeal, there are two types of originating process under the UCPR, namely an application and a claim.²⁵⁵⁴ A landlord may commence proceedings by way of an application if a substantial dispute of fact is unlikely²⁵⁵⁵ or otherwise, by way of a claim.²⁵⁵⁶ An originating application does not require the filing of a statement of claim and can be supported by way of affidavit. The position in relation to a landlord commencing proceedings by way of claim is slightly different and the claim must state briefly the nature of the claim made or relief sought in the proceeding and must attach a statement of claim.²⁵⁵⁷ Once a claim is served, the defendant then has 28 days after the date

²⁵⁴⁸ Section 68(1)(b)(i) of the *District Court Act 1967 (Qld)* gives the District Court jurisdiction for enforcing, by delivery of possession, of any mortgage, encumbrance, charge or lien where the amount owing does not exceed the monetary limit. See for example *Cuppaidge v Baldwick & Baldwick* [2000] QDC 252 where proceedings were commenced in the District Court for the recovery of possession of mortgaged land. Although the proceedings were commenced by the plaintiff who was the assignee of the bank's interest under the mortgage, the application before the court related to striking out certain paragraphs of the defence filed by the defendants to the District Court action.

²⁵⁴⁹ *Property Law Act 1974 (Qld)* s 151(2).

²⁵⁵⁰ Within the meaning of the *Property Law Act 1974 (Qld)*.

²⁵⁵¹ *Property Law Act 1974 (Qld)* s 107(d). The section applies to leases made after the commencement of the PLA.

²⁵⁵² See *Viclee Nominees Pty Ltd v Team Venture Pty Ltd* [2009] QSC 47 as an illustration of a Supreme Court proceeding where the plaintiff sought, and was granted, an order that it was entitled to possession of the premises it leased to the defendant.

²⁵⁵³ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.141.90].

²⁵⁵⁴ See UCPR rule 8(2). A claim is governed by UCPR rule 22 and a statement of claim must be attached to the claim. An application is governed by UCPR rule 26 and the originating document is referred to as an Originating Application (see Form 5).

²⁵⁵⁵ UCPR rules 11(a) and 25.

²⁵⁵⁶ UCPR rule 9.

²⁵⁵⁷ UCPR rule 22.

of service to file a notice of intention to defend. This notice must also attach the defendant's defence.²⁵⁵⁸

If the defendant does not file a notice of intention to defend a claim within the time period:

- if the landlord's claim for relief is for recovery of possession of land only, the landlord may file a request for a judgment for recovery of possession of the land as against the defendant (and costs);²⁵⁵⁹ and
- if the landlord's claim for relief is for recovery of possession of land together with a claim for debt or liquidated demand (such as rent) under UCPR rule 283, the landlord is entitled to a judgment against the defendant on all or any of the claims for relief the landlord could request under those rules if that were the only claim for relief against the defendant.²⁵⁶⁰

If the defendant does file a notice of intention to defend, there is provision in the UCPR for the landlord to apply for summary judgment in the proceeding if the landlord can satisfy the court that the defendant has no real prospect of successfully defending all or part of the landlord's claim and there is no need for a trial of the claim or part of the claim.²⁵⁶¹

153.2.5. If an order for possession of land is made, how can it be enforced?

A person entitled to enforce an order (other than an order for the payment of money into court) may obtain an enforcement warrant from the court under section 90(1) of the CPA. An enforcement warrant may contain an order directed to enforcing the original order, including an order authorising an enforcement officer to enter and deliver possession of land.²⁵⁶² These provisions are complemented by the following provisions in the UCPR:

- rule 896 which provides that an order for the possession of land may be enforced by an enforcement warrant under rule 915; and
- rule 915 which provides that a court may issue an enforcement warrant in the approved form authorising an enforcement officer to enter on the land described in the warrant and deliver possession of the land and appurtenances to the person entitled to possession.

153.2.6. In which jurisdiction can the proceedings be brought?

A proceeding to recover possession of land can be commenced in either the Supreme Court or, if it has jurisdiction, the District Court. The District Court has jurisdiction to hear and determine an action to recover possession of any land where the value of the land does not exceed the monetary limit of the District Court which is \$750,000.²⁵⁶³ The determination of the monetary limit in relation to the

²⁵⁵⁸ See UCPR rules 137 and 139.

²⁵⁵⁹ UCPR rule 287. However, the plaintiff is not entitled to the judgment if the plaintiff's claim is for 'delivery of possession under a mortgage.': UCPR rule 286(4).

²⁵⁶⁰ UCPR rule 287. See also *RHG Mortgage Corporation Limited v Property Angels Investments Pty Ltd* [2011] QDC 066, 9.

²⁵⁶¹ UCPR rule 292.

²⁵⁶² *Civil Proceedings Act 2011* (Qld) s 90(2)(d).

²⁵⁶³ *District Court of Queensland Act 1967* (Qld) s 68(1)(b)(xi). The value of the land is determined by reference to the most recent valuation made by the valuer-general under the *Land Valuation Act 2010* (Qld) current at the time of instituting the proceeding. If there is no such valuation in respect of the land, the current market value of the land exclusive of improvements.

recovery of possession of leased premises can be problematic in those cases involving recovery of part of the land, for example, a shop within a shopping centre (small or large). Commentary on the issue of valuation notes that ‘problems arise with individual tenancies in large complexes where there is no separate valuation of the demised premises.’²⁵⁶⁴

153.2.7. Injunctive or declaratory relief not available under Division 5

If a tenant (defendant) wished to seek declaratory relief in response to a complaint seeking recovery of possession, the tenant would need to seek such relief in the Supreme Court. In those circumstances, the Magistrates Court could stay the Division 5 proceedings pending the hearing of the other proceeding but would not be obliged to do so.²⁵⁶⁵ This creates a potential procedural disadvantage for tenants in relation to seeking appropriate declaratory or injunctive relief where there is a valid basis to do so. In the absence of Division 5, the landlord would be required to commence proceedings in either the District Court or the Supreme Court depending on the monetary jurisdiction. In those circumstances, a tenant could seek declaratory or injunctive relief by way of counterclaim in the same proceeding.²⁵⁶⁶ That would avoid the possibility of split proceedings.

153.3. Recommendation

The Centre recommends repealing Division 5. This recommendation is made on the basis that there is an alternative process under the UCPR for lessors to seek recovery of possession of land which would be available in relation to the limited number of tenancies that actually fall within the scope of Division 5. Further, the repeal of the Division would also be justified on the basis that it does not appear to be used widely in practice.

The repeal of the Division has the support of the QLS, which agrees that the Division has no utility in light of the UCPR processes available.

RECOMMENDATION 150. Part 8 Division 5 (sections 140 to 152) should be repealed.

²⁵⁶⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.141.90].

²⁵⁶⁵ See *Boyd v Halstead, Ex Parte Halstead* [1985] 2 Qd R 249. If Division 5 was not available under the *Property Law Act 1974* (Qld), a landlord would be required to commence proceedings in either the District Court or Supreme Court depending on the monetary jurisdiction. The monetary jurisdiction is determined by the value of the land upon which the demised premises are situated.

²⁵⁶⁶ If in the District Court, this would occur by virtue of section 69 of the *District Court Act 1967* (Qld).

154. Part 8 Division 6 (sections 153 to 167) – Agricultural holdings

154.1. Overview and purpose

Part 8, Division 6 of the PLA (**Division 6**) encompasses a large number of provisions commencing from section 153 and ending with section 167. The definitions relevant to Division 6 are extracted below.

153 Definitions for div 6

(1) In this division –

absolute owner means the owner or person capable of disposing by appointment or otherwise of the fee simple or whole interest in a holding, although the land or the person's interest in the land is mortgaged or encumbered or charged.

compensation means compensation payable under this division or compensation payable under any **agreement** which by this division is deemed to be substituted for compensation under this division.

contract of tenancy means a letting of a holding for a term, or for lives, or for lives and years, or from year to year, under a contract entered into at any time after 1 January 1905.

determination of tenancy means the cesser of a tenancy by effluxion of time or from any other cause.

holding means any parcel of agricultural land (which expression includes land suitable for dairying purposes) of an area of not less than 5 acres held by a tenant under a landlord.

landlord means the person for the time being entitled to possession of a holding, as the absolute owner of the land, subject to a contract of tenancy.

tenant means the person in possession of a holding under a contract of tenancy.

(2) The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under this division.

154.1.1. History

At common law in certain circumstances, physical objects attached to the land are regarded as part of the land – that is, 'whatever is attached to the soil becomes part of it.'²⁵⁶⁷ The individual who owned the fixture loses his or her property in it and title in the object vests in the owner of the land or soil.²⁵⁶⁸ Many exceptions to the application of the common law rule have developed over the years including where a fixture was erected by a tenant for 'ornament or convenience or for the purpose of trade'.²⁵⁶⁹ Historically, however, agricultural fixtures have not fallen within any of the exceptions to the common law rule. In this respect, the QLRC when discussing the inclusion of this Division in the PLA noted:

²⁵⁶⁷ Lynden Griggs, 'The Doctrine of Fixtures: Questionable Origin, Debatable History, and a Future that is Past' (2001) 9 *Australian Property Law Journal* 1, 1.

²⁵⁶⁸ Lynden Griggs, 'The Doctrine of Fixtures: Questionable Origin, Debatable History, and a Future that is Past' (2001) 9 *Australian Property Law Journal* 1, 2; Anne Wallace et al, *Real Property Law in Queensland* (Lawbook Co, 4th ed, 2015) [4.210]. For an overview of the historical basis of the rule of fixtures see Lynden Griggs, 'The Doctrine of Fixtures: Questionable Origin, Debatable History, and a Future that is Past' (2001) 9 *Australian Property Law Journal* 1, 2-3.

²⁵⁶⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.8.DIV.6.30].

NOT GOVERNMENT POLICY

By virtue of the decision in Elwes v Maw (1802) 3 East. 38, fixtures erected by a tenant for agricultural purposes are not so removable, which means that these become at common law once and for all the property of the landlord when affixed to the realty. That decision.....has in England been gradually eroded by a line of statutes.. There is a similar statute in New South Wales... and legislation to similar effect exists in other Australian States.

In general, the approach of this legislation to the problem of agricultural fixtures has been twofold: (1) to confer on the tenant a right to remove fixtures erected by him, provided that this is done during the tenancy or within a reasonable period thereafter (in England, two months), that it is done without causing substantial or avoidable damage, and that the tenant gives notice of his intention to remove, so as to afford to the landlord an opportunity of buying the improvements; and (2) to confer on the tenant a right to compensation for certain specified improvements, including fixtures, made but not removed by him.

In Queensland for some reason which is not entirely clear, the corresponding local statute The Agricultural Holdings Act of 1905 ... adopted only the latter alternative, and conferred on the tenant no general right of removal of fixtures erected by him except in the case of fruit trees (s.15).²⁵⁷⁰

Division 6, as proposed by the QLRC, generally followed the terms of the *Agricultural Holdings Act 1905* (Qld) subject to some changes as follows:

- the QLRC raised concerns that the *Agricultural Holdings Act 1905* (Qld) did not prohibit contracting out of the compensation provisions of that Act. The QLRC noted that the effect of this was that most of the professionally drafted agricultural tenancy agreements contained a provision excluding the Act, so that the tenant:

is placed in the same position, as regards improvements, as prevails at common law under the rule in Elwes v Maw. He cannot remove fixtures because of that rule, and he cannot claim the statutory compensation for improvements because the provisions of the Act are excluded by agreement.²⁵⁷¹

- the QLRC's solution to this issue was to incorporate clause 153(2) (now section 154(2)) which provided 'that any agreement having the effect of taking away or limiting the tenant's right to compensation for improvements should be unenforceable except in respect of such improvements as are particularly specified in the tenancy agreement.'²⁵⁷² The rationale for including this subsection was to limit the use of provisions in lease agreements excluding the right to compensation which the QLRC considered were becoming standard form;²⁵⁷³ and
- including a provision which allows a tenant to remove fixtures erected by him or her, subject to some limits. The parties would also be able to contract out of such a provision. The QLRC

²⁵⁷⁰ 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) 93-94.

²⁵⁷¹ 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) 95.

²⁵⁷² 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) 94.

²⁵⁷³ 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) 95.

noted that this would place agricultural tenants on the same level as other tenants in relation to removal of fixtures.²⁵⁷⁴

The object of Division 6 is to give agricultural tenants the right to remove tenant's fixtures and the right to compensation where fixtures installed by the tenant cannot be removed at the termination of the tenancy. The rationale for the legislation comes from the principle that tenant's fixtures at law did not include agricultural fixtures at the conclusion of any lease.

154.1.2. Application of provision

Division 6 applies to a contract of tenancy entered into after the commencement of the PLA.²⁵⁷⁵ A 'contract of tenancy' is defined under the PLA to mean:

a letting of a holding for a term, or for lives, or for lives and years, or from year to year, under a contract entered into at any time after 1 January 1905.²⁵⁷⁶

The term covers a single contract.²⁵⁷⁷ A 'holding' means:

any parcel of agricultural land (which expression includes land suitable for dairying purposes) of an area of not less than 5 acres held by a tenant under a landlord.²⁵⁷⁸

The term 'agriculture' will extend to a wide variety of farming activity as long as the area of land is at least 5 acres.²⁵⁷⁹ A landlord under Division 6 is defined as an absolute owner of the holding (subject to a contract of tenancy) entitled to possession of the holding.²⁵⁸⁰

A provision in a contract of tenancy is unenforceable if it limits the right of a tenant to compensation in respect of an improvement unless the contract of tenancy:

- specifies the improvement;
- places an obligation upon the tenant to make such an improvement within the terms of the tenancy; and
- specifies the amount of compensation payable (if any).²⁵⁸¹

The provisions of Division 6 are expressly stated to be in addition to any other right, power or privilege of a tenant arising under an agreement or otherwise.²⁵⁸²

²⁵⁷⁴ 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) 95.

²⁵⁷⁵ *Property Law Act 1974* (Qld) s 154(1)(b).

²⁵⁷⁶ *Property Law Act 1974* (Qld) s 153.

²⁵⁷⁷ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.153.60].

²⁵⁷⁸ *Property Law Act 1974* (Qld) s 153.

²⁵⁷⁹ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.153.120].

²⁵⁸⁰ Commentary about mortgagees and Division 6 suggests that the definition of landlord would exclude mortgagees and that 'on default under a mortgage, the mortgagee is capable of disposing of the whole interest in the holding and ... for the purposes of the section may become a landlord upon default only.' See Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.153.150].

²⁵⁸¹ *Property Law Act 1974* (Qld) s 154(2).

²⁵⁸² *Property Law Act 1974* (Qld) s 154(3).

Division 6 does not apply to a lease or licence from the Crown under any law in force relating to the leasing and occupying of Crown land.²⁵⁸³ Most of the larger pastoral properties in Queensland are still State lease-holdings which are subject to a separate regime under the *Land Act 1994* (Qld). The arrangements in relation to fixtures and improvements under that Act depend on the type of improvement and the way in which the lease ended. Section 157(2) of the *Land Act 1994* (Qld) provides that, subject to both Chapter 5, Part 5 of the Act and the conditions of a lease, the improvements on the lease become the property of the State when the lease expires. However, if a lease is forfeited or surrendered the former lessee can only remove the lessee improvements with the written approval of the Minister.²⁵⁸⁴ Commentary on this issue suggests that:

..the State's rights during the term of a lease to improvements that are fixtures (which are the same as those it has in respect of land in general the subject of a lease) will be subject to the rights it has granted to the lessee in relation to their use and enjoyment and 'will not [if the right of removal is subsisting] stand in the way of ... [a lessee] exercising dominion over them once the ... [lease] is no longer in force.'²⁵⁸⁵

Under the *Land Act 1994* (Qld), where a lease is forfeited, surrendered or expires and the State receives payment from an incoming lessee or buyer for improvements on the land, then the State must pay the amount to the previous lessee.²⁵⁸⁶

154.1.3. How does Division 6 operate?

An overview of the key provisions in Division 6 is set out below.

154.1.3.1. Section 155 – Tenant's property in fixtures

Section 155(1) gives the tenant a right to remove certain fixtures at any time during the tenancy or within 2 months after the tenancy has terminated. The fixture remains the property of the tenant for as long as the tenant has a right of removal under the PLA. The fixtures that a tenant is able to remove under section 155(1) are any engine, machinery, fencing or other fixture affixed to a holding by the tenant of the holding and any building erected by the tenant on the holding.²⁵⁸⁷ The tenant must not do any avoidable damage to any other building or other part of the holding when removing a fixture or building under section 155(1) of the PLA.²⁵⁸⁸

The right of removal is subject to:

- the tenant performing his or her obligation under the lease, including paying all rent owing; and
- the tenant giving notice of intention to remove the fixture at least 1 month before both the exercise of the right and termination of the tenancy.²⁵⁸⁹

²⁵⁸³ *Property Law Act 1974* (Qld) s 154(2).

²⁵⁸⁴ *Land Act 1994* (Qld) s 243(1) and 327I.

²⁵⁸⁵ Extracted from Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters (Chris Boge (Land Act 1994)) [Thomson Reuters] 22585 [L246.8].

²⁵⁸⁶ *Land Act 1994* (Qld) s 247.

²⁵⁸⁷ A tenant is not entitled to remove a building on the holding if the tenant is entitled to compensation under the PLA (or otherwise) in relation to the building.

²⁵⁸⁸ *Property Law Act 1974* (Qld) s 155(4).

²⁵⁸⁹ *Property Law Act 1974* (Qld) s 155(2).

If the landlord gives the tenant a counter notice before the notice period expires in writing electing to purchase a fixture or building, the right to remove the fixture under section 155(1) ceases, in addition to it no longer remaining the property of the tenant.²⁵⁹⁰ However, the landlord is liable to pay the tenant fair value of that fixture or building.²⁵⁹¹

The section applies subject to any agreement to the contrary contained in the contract of tenancy.²⁵⁹²

154.1.3.2. Section 156 – Tenant’s right to compensation

Section 156 of the PLA provides a tenant with a right to compensation in relation to certain specified fixtures and improvements that are not removed by the tenant under section 155.²⁵⁹³ These improvements are set out in schedule 4, Parts 1 and 2 and include:

- drainage of land;
- erection or enlargement of buildings;
- making of fences;
- formation of silos;
- making of water meadows or works of irrigation;
- making of dams for the conservation of water, or wells;
- clearing of land;
- liming of land;
- manuring or fertilising of land with purchased artificial or other purchased manures or fertilisers;
- laying down pasture with clover, grass, lucerne, sainfoin, or other seeds sown more than 2 years prior to the determination of the tenancy;
- making of plantations of bananas or pineapples;
- planting of sugarcane; and
- planting of orchards with fruit trees permanently set out.

Commentary on this section notes that:

This section alters the common law rule that a tenant was not entitled to compensation where the tenant had improved the land and quit the holding. Such a rule could always be altered by a compensation agreement contained in the lease itself. Compensation is now governed by this Division.²⁵⁹⁴

The improvements included in schedule 4 have not been amended since the PLA came into force in 1975.

²⁵⁹⁰ *Property Law Act 1974* (Qld) s 155(3).

²⁵⁹¹ *Property Law Act 1974* (Qld) s 155(3).

²⁵⁹² *Property Law Act 1974* (Qld) s 155(5).

²⁵⁹³ In some cases it may be difficult to remove some fixtures or improvements such as fencing which is why a tenant is unable to rely upon section 155 of the PLA in relation to objects of this type: Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.156.30].

²⁵⁹⁴ Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.156.30].

154.1.3.3. Section 157 – Intended improvements

Section 157 of the PLA is closely linked to section 156. Compensation is not payable in relation to any improvement under schedule 4, Part 1 unless, prior to carrying out the particular improvement, the tenant has given the lessor ‘not more than three months’ nor less than two months’ written notice of her or his intention to do so.²⁵⁹⁵ The landlord may object to the proposed improvements and refer the matter to arbitration.²⁵⁹⁶ The arbitrator has two options under section 157 as follows:

- if satisfied that the proposed improvement will increase the value of the holding to an incoming tenant and will be a ‘suitable and desirable’ improvement, the arbitrator shall make an award accordingly and the tenant will be entitled to compensation for every improvement made under the award;²⁵⁹⁷ and
- if satisfied that the improvement will not increase the value of the holding to an incoming tenant, and will be an ‘unsuitable and undesirable improvement’, the tenant shall not be entitled to compensation if the tenant makes the improvements notified.²⁵⁹⁸

If the tenant and landlord do not enter an agreement within 1 month after the notice is given or if the matter is referred to arbitration, then within 1 month after the award by the arbitrator is made, the landlord may undertake to make the improvement and charge the tenant interest for the improvements at the rate specified in the section.²⁵⁹⁹ The landlord is not able to make the improvement if the notice of the tenant is previously withdrawn.²⁶⁰⁰ The tenant is entitled to make the improvement and claim compensation in default of any agreement or the lessor not making the improvement within a reasonable period of time.²⁶⁰¹

154.1.3.4. Section 158 – Agreements

This section enables a landlord and tenant to dispense with any notice required under Division 6 by agreement or conduct and enter into an agreement regarding by whom and the mode in which any improvement is to be made in addition to payment of compensation or other money.²⁶⁰² This provision is subject to section 154(2) which provides that a contract of tenancy will be unenforceable in so far as it takes away or limits the right of a tenant to compensation in relation to an improvement.²⁶⁰³ The matters required to be included in the tenancy agreement under section 154(2) are:

- the particular improvement or improvements;
- that the tenant is required to make the improvement; and

²⁵⁹⁵ *Property Law Act 1974* (Qld) s 157(1). The section only refers to improvements listed in Part 1 of schedule 4. These proposed improvements will require notice in accordance with s 157 of the PLA. However, the section does not apply to improvements listed in Part 2 of schedule 4. As a consequence, any lack of notice will not affect a tenant’s right to compensation.

²⁵⁹⁶ *Property Law Act 1974* (Qld) s 157(2).

²⁵⁹⁷ *Property Law Act 1974* (Qld) s 157(2A).

²⁵⁹⁸ *Property Law Act 1974* (Qld) s 157(2B).

²⁵⁹⁹ *Property Law Act 1974* (Qld) s 157(3).

²⁶⁰⁰ *Property Law Act 1974* (Qld) s 157(3).

²⁶⁰¹ *Property Law Act 1974* (Qld) s 157(4).

²⁶⁰² *Property Law Act 1974* (Qld) s 158(1)(a).

²⁶⁰³ *Property Law Act 1974* (Qld) s 158(1)(b).

- the compensation (if any) that is payable in relation to the improvement.

If the agreement provides for compensation then this is deemed to be substituted for any compensation payable under Division 6 and no further right to compensation will be available under that Division.²⁶⁰⁴

154.1.3.5. Section 164 - Contract of tenancy and mortgagee in possession

Section 164(1) of the PLA enables a tenant to claim compensation from a mortgagee where it is or would have been due to the tenant from the mortgagor. The entitlement arises where there is a contract of tenancy with the mortgagor and the land is mortgaged at the time the contract is made or is subsequently mortgaged and the mortgagee enters into possession of the holding.²⁶⁰⁵ The mortgagee in possession is required to give the tenant 6 months written notice that the mortgagee intends to 'deprive the tenant of possession of the holding'.²⁶⁰⁶ The mortgagee has additional obligations in relation to paying compensation and is required to pay for the tenant's crops and any expenditure made by the tenant in the expectation of holding the land for the full term of the tenancy which is being brought to an early end.²⁶⁰⁷ In all other respects, the mortgagee is effectively deemed to be the landlord.²⁶⁰⁸

154.1.3.6. Other provisions

The other provisions of Division 6 are:

- section 159 which provides that, in the absence of an agreement between the parties, every matter or question arising under Division 6 shall be determined by arbitration under schedule 5. That schedule sets out the applicable arbitration rules;
- section 160 sets out the notice requirement for a claim for compensation. Under the section a claim for compensation is not enforceable unless at least two months before the 'determination of the tenancy' the tenant gives notice in writing to the landlord claiming compensation.²⁶⁰⁹ A landlord is entitled to claim a set-off by giving notice within one month of the tenant's notice of intended claim;²⁶¹⁰
- section 161 sets out a number of rules to guide the arbitrator in ascertaining the amount of compensation payable to the tenant in respect of any improvements made by the tenant. The rules also include specified set offs against improvements which the arbitrator can take into account including any sum due to the landlord from the tenant for rent or otherwise;²⁶¹¹
- section 162 enables the recovery of an arbitrator's award in the District Court if it is not paid within 14 days;
- section 163 addresses the situation where the landlord is a trustee entitled to receive the rents and profits;

²⁶⁰⁴ *Property Law Act 1974* (Qld) s 158(2).

²⁶⁰⁵ *Property Law Act 1974* (Qld) s 164(1).

²⁶⁰⁶ *Property Law Act 1974* (Qld) s 164(2).

²⁶⁰⁷ *Property Law Act 1974* (Qld) s 164(3).

²⁶⁰⁸ *Property Law Act 1974* (Qld) s 164(4).

²⁶⁰⁹ *Property Law Act 1974* (Qld) s 160(1).

²⁶¹⁰ *Property Law Act 1974* (Qld) s 160(2).

²⁶¹¹ *Property Law Act 1974* (Qld) s 161(c).

- section 165 permits an incoming tenant to be compensated by a landlord where that tenant has paid compensation directly to the outgoing tenant with the written consent of the landlord;
- section 166 provides that a tenant does not lose his or her right to compensation because of a change or changes in 'tenancy';²⁶¹² and
- section 167 enables the landlord (or any person authorised by the landlord) to enter the holding for the purpose of viewing the 'state' of the holding.

154.2. Issues with the Division

154.2.1. The Division is not known well and relied upon rarely in practice

Written feedback from experienced rural practitioners suggests that this part of the PLA is not generally used or relied upon in practice. The parties to leases that would fall within the scope of Division 6 conduct business by agreements which include clauses addressing the installation and removal of fixtures and improvements. There is an absence of any significant case law in Queensland in relation to Division 6. The last case in Queensland was in 1999 and was an application seeking a declaration that an oral arrangement entered into between the parties was not a contract of tenancy for the purpose of section 153 of the PLA.²⁶¹³ There have been decisions under the previous Queensland Act in 1933 and 1955.²⁶¹⁴ Clearly, to the extent that the Division has been used, court decided disputes have been limited.

154.2.2. The Division is out of step with commercial practice

The section arguably serves little purpose. As indicated above, it seems that the general practice in Queensland is to deal with issues of improvements in relation to agricultural holdings in the terms of the lease. The view in practice appears to be that the appropriate time to address the issue of fixtures and improvements is when the terms of the lease are being negotiated and to have the agreed terms clearly documented in the lease. The clauses dealing with improvements will often include a term that compensation for the relevant improvements have been taken into account when calculating the consideration or rent payable and that no additional compensation is payable. A summary of some of the key matters often addressed in lease agreements for agricultural holdings include:

- the condition of, and maintenance responsibility for, existing fencing and sheds;
- use of water entitlements. This can cover maintenance responsibility for water pumps and dealings with water entitlements more generally. In the case of bores, these are usually identified in the lease along with information about whether or not they are equipped with pumps (working or not working). Submersible pumps can usually be removed at the end of

²⁶¹² Duncan and Vann *Property Law and Practice in Queensland* WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.166.30].

²⁶¹³ See *Zoch v Burke* [1999] QSC BC9906260. The declaration sought was refused as the parties were directed to file a statement of claim and notice of intention to defend and defence respectively to enable the application for the relief sought to be properly considered.

²⁶¹⁴ See *Wylie & Gibson v McDermott* [1933] St R Qd 1 and *Re Brown; Morrison's Arbitration* [1955] St R Qd 223. In *Re Brown* the parties could not agree on compensation payable under the *Agricultural Holdings Act 1905* (Qld) for improvements made. The matter went to arbitration and the Arbitrator subsequently referred it to the Full Court for opinion.

the lease if a tenant has installed them and obligations in relation to larger pumps for irrigation are usually included in the lease terms;

- husbandry obligations for the land;
- entitlement to crops that may be planted towards the end of the lease; and
- removal of improvements constructed with the lessor's consent. The relevant clause may permit the removal of these by the lessee at his or her cost, without any rights of compensation.

154.2.3. Not all agricultural tenancies are formed with the benefit of legal advice and a detailed agreement

There are, undoubtedly, contracts of tenancies created by short letters or emails between the landlord and the tenant and possibly an agent which are not reviewed by a legal practitioner at all and which do not incorporate terms regarding fixtures and improvements. Again, evidence from practitioners suggests that they only see a small percentage of lease and share-farming transactions that actually take place. Accordingly, the value of Division 6 may be its role as a default regime where the relevant issues are not addressed in the agreement reached between the parties.

154.2.4. Other issues with Division 6

154.2.4.1. Schedule 4 of the PLA requires updating

As indicated in paragraph 154.1.3.2 above, section 156 of the PLA provides a tenant with a right to compensation in relation to certain specified improvements that are not removed by the tenant under section 155. The improvements are prescribed and set out in schedule 4 of the PLA. However, the categories listed have not been reconsidered or revised since the PLA commenced in 1975. Changes in land use practices since 1975 have not been considered for the purposes of the improvements listed in the schedule. Further, it is unclear what is covered by the term 'wells' for the purpose of Item 6, Part 1 of the schedule and whether a bore is covered. Other uncertainties include:

- whether the term 'works of irrigation' includes pipelines or centre pivots;
- updating Part 2 of schedule 4 to expressly identify the increased adoption of leucaena-grass pastures which is commonly planted as an improvement; and
- addressing improvements such as cell grazing fencing²⁶¹⁵ and contour banking.²⁶¹⁶

154.2.4.2. Arbitration in the absence of agreement between the parties

Division 6 has adopted an arbitration process for any matter or question arising under the Division where the parties have not reached agreement.²⁶¹⁷ Matters or questions that may arise under the Division include the amount of compensation the tenant is entitled to under section 156 of the PLA. The arbitration process to be followed in relation to an issue arising under Division 6 is set out in schedule 5 of the PLA.²⁶¹⁸ In relation to assessing the amount of compensation payable to a tenant

²⁶¹⁵ Fixed cell grazing systems can require significant infrastructure outlays for fencing and stock water systems and associated labour etc.

²⁶¹⁶ Contour banking can require significant financial outlay and once undertaken can benefit the land in terms of erosion control (and prevention) for an extended period of time.

²⁶¹⁷ *Property Law Act 1974* (Qld) s 159(1).

²⁶¹⁸ *Property Law Act 1974* (Qld) s 159(1).

for improvements, section 161 of the PLA sets out rules which the arbitrator is required to use as a 'guide'.

Leaving aside the separate issue of the appropriateness of the use of arbitration in relation to this Division more generally, there are some other aspects of the arbitration framework under Division 6 which requires further consideration including:

- the default referral of the choice of arbitrator to the Minister in the absence of agreement between the parties;²⁶¹⁹ and
- whether the absence of a requirement that the relevant arbitrator appointed have any specific expertise in relation to agricultural matters, including valuation skills is an issue in practice.

The other more general issue is whether arbitration is the most appropriate dispute resolution mechanism for the purposes of Division 6. In New South Wales agricultural fixtures and improvements are regulated under *Agricultural Tenancies Act 1990* (NSW). An 'owner' or tenant can apply to the Civil and Administrative Tribunal for determination of any disputes arising under that Act. The operation of the *Agricultural Tenancies Act 1990* (NSW) is discussed in more detail in paragraph 154.3 below.

154.2.4.3. Crops planted towards the end of a tenancy

It appears that in practice there is some uncertainty regarding the approach in relation to crops planted towards the end of a tenancy, particularly where these do not produce a yield until after the tenancy comes to an end. Division 6 does not specifically address this issue and there does not appear to be a settled and accepted approach in practice.

154.3. Other jurisdictions

154.3.1. Australia

New South Wales, Victoria and Tasmania have legislation in place which provides a statutory right to remove agricultural fixtures. Table 7 below sets out a brief overview of the rights provided.

²⁶¹⁹ *Property Law Act 1974* (Qld) schedule 5, Pt 1, item 1

Table 7 – Removal of fixtures in other jurisdictions

Jurisdiction	Application	Fixture or Improvement	Fixture property of tenant?	Tenant can remove fixtures?	Notice required?
NSW ²⁶²⁰	Farm ²⁶²¹	Both ²⁶²²	Yes ²⁶²³	Yes ²⁶²⁴	Yes ²⁶²⁵
Victoria ²⁶²⁶	Rented premises	Fixture, renovated, altered or added to rented premises ²⁶²⁷	Yes	Yes	No ²⁶²⁸
Tasmania ²⁶²⁹	Farm lands or	Farm-building, other building, engine, machinery ²⁶³⁰	Yes	Yes	Yes ²⁶³¹

In Victoria, the tenant’s statutory entitlement to remove fixtures is not available if the lease provides otherwise or the landlord and tenant agree otherwise.²⁶³² These jurisdictions vary in the case of ‘improvements’. The Tasmanian legislation appears to only address the issue in relation to tenant’s right to remove fixtures (and buildings) erected with the consent of the landlord. The Victorian provision also expressly relates only to the removal of fixtures installed on a ‘rented premises’ and ‘renovations, alterations or additions to rented premises’. Neither the Tasmanian nor the Victorian legislation explicitly refer to improvements. The *Agricultural Tenancies Act 1990* (NSW) regulates both fixtures added, and improvements made to, farms in New South Wales. The Act distinguishes

²⁶²⁰ *Agricultural Tenancies Act 1990* (NSW).

²⁶²¹ ‘Farm’ is defined to mean ‘a piece of land not less than 1 hectare in area occupied or used by a tenant and which is wholly or mostly used or intended to be used for agricultural purposes. The term ‘agricultural purposes’ is then defined to mean ‘grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping, horticulture, vegetable growing, the growing of crops of any kind, forestry, or any combination of those things: *Agricultural Tenancies Act 1990* (NSW) s 4(1).

²⁶²² The term ‘improvement’ means any work or thing carried out on a farm in the course of a tenancy, being a work or thing that would be of value to an incoming tenant, but does not include the repair or replacement of any work or thing on the farm when the tenant first became a tenant: *Agricultural Tenancies Act 1990* (NSW) s 4(1). The term ‘fixture’ is defined in the context of section 10 to include a building: see s 10(6).

²⁶²³ This is not expressly stated but it is implicit as the fixture becomes the property of the owner of the land if the owner decides to purchase the fixture from the tenant: *Agricultural Tenancies Act 1990* (NSW) s 10(4).

²⁶²⁴ It is an implied term of the tenancy that the fixture can be removed by the tenant: *Agricultural Tenancies Act 1990* (NSW) s 10(1)). In the case of fixtures, compensation is payable where the owner decides to purchase the fixture: *Agricultural Tenancies Act 1990* (NSW) s 10(4). The compensation to be paid needs to be ‘fair’.

²⁶²⁵ The tenant must provide reasonable oral or written notice to the owner: *Agricultural Tenancies Act 1990* (NSW) s 10(3).

²⁶²⁶ *Property Law Act 1958* (Vic).

²⁶²⁷ The Act refers to ‘fixtures on, or renovated, altered or added to, a rented premises’: *Property Law Act 1958* (Vic) s 154A(1).

²⁶²⁸ Any removal of fixtures must occur before the agreement terminates or during any extended period of possession of the premises: *Property Law Act 1958* (Vic) s 154A(1).

²⁶²⁹ *Landlord and Tenant Act 1935* (Tas).

²⁶³⁰ Either for agricultural purposes or for the purposes of trade and agriculture. Consent of the landlord is required for the erection of the buildings and fixtures.

²⁶³¹ Compensation is payable if after receiving notice from the tenant to remove the fixtures the landlord elects to purchase them. The compensation payable is the ‘value’ of the fixtures and buildings: *Landlord and Tenant Act 1935* (Tas) s 26(2).

²⁶³² *Property Law Act 1958* (Vic) s 154A(3).

between improvements carried out by the tenant and fixtures affixed to a farm by a tenant. As discussed above, the Act provides the tenant with a right to remove these fixtures.²⁶³³ However, there are a number of sections in the Act which address the issue of improvements carried out by tenants with or without consent of the landlord.²⁶³⁴ Further, improvements carried out by the ‘owner’ of the farm with or without the consent of the tenant also fall within the scope of the Act.²⁶³⁵ The word ‘improvement’ is defined to mean:

any work or thing carried out on a farm in the course of a tenancy, being a work or thing that would be of value to an incoming tenant, but does not include the repair or replacement of any work or thing on the farm when the tenant first became a tenant, except as provided by this Act.

Compensation is payable to a tenant under the New South Wales Act for improvements made by the tenant.²⁶³⁶

There is no statutory right given to a tenant in the Australian Capital Territory, Northern Territory, South Australia or Western Australia to remove fixtures affixed to agricultural land during a tenancy.

154.3.2. New Zealand

New Zealand has adopted a single provision in its *Property Law Act 2007* (NZ) to specifically address the issue of the removal of fixtures affixed by a lessee.²⁶³⁷ A lessee has a right to remove any ‘trade, ornamental or agricultural fixture’ that the lessee has affixed to any leased premises.²⁶³⁸ The removal of the fixture must occur either while the lessee is in lawful possession of the premises or during a reasonable period after the lessee ceases to be in lawful possession of the premises.²⁶³⁹ The general right of removal is subject to agreement to the contrary between the lessee and lessor.²⁶⁴⁰ The exercise of the removal right is subject to some conditions including the requirements that the lessee:

- causes as little damage as possible to the leased premises; and
- making good any damage caused during the removal; and
- compensating the lessor if any damage is not made good by the lessee.²⁶⁴¹

The section does not cover ‘improvements’ made by the lessee during the tenancy. The Law Commission (NZ) when discussing the issue of agricultural fixtures noted that:

The Law Commission has the impression that lessees of New Zealand farms and their advisers do not place much (if any) reliance upon this Imperial Act; that people taking leases of farms either ensure that they have express written agreement enabling them to remove fixtures or incorrectly rely upon the general exception for trade fixtures without realising that it does not apply.²⁶⁴²

²⁶³³ *Agricultural Tenancies Act 1990* (NSW) s 10(1).

²⁶³⁴ *Agricultural Tenancies Act 1990* (NSW) ss 6 & 7.

²⁶³⁵ *Agricultural Tenancies Act 1990* (NSW) ss 8 & 9.

²⁶³⁶ *Agricultural Tenancies Act 1990* (NSW) s 15. An owner is also entitled to compensation if the owner is responsible for the improvement: s 16.

²⁶³⁷ Section 266 of the *Property Law Act 2007* (NZ) uses the terms ‘lessee’ and ‘lessor’.

²⁶³⁸ *Property Law Act 2007* (NZ) s 266(1).

²⁶³⁹ *Property Law Act 2007* (NZ) s 266(1)(a)(b).

²⁶⁴⁰ *Property Law Act 2007* (NZ) s 266(2).

²⁶⁴¹ *Property Law Act 2007* (NZ) s 266(3)(a)-(d).

²⁶⁴² Law Commission (NZ), *The Property Law Act 1952*, Preliminary Paper No. 16 (1991) 190 [593]. The Imperial Act was the Landlord and Tenant Act 1851 s 3.

The Law Commission (NZ) agreed with an earlier proposal that it was unnecessary to have a separate regime for agricultural fixtures and that these should be treated in the same way as trade fixtures.²⁶⁴³

154.4. Recommendation

The Centre recommends repealing Part 8 Division 6 of the PLA (sections 153 to 167) on the basis that it is not in line with modern commercial leasing practice. The QLS confirmed in its submissions that, in practice, these matters are dealt with during the lease negotiation process and therefore this approach has the support of the Society.

RECOMMENDATION 151. Part 8 Division 6 (sections 153 to 167) should be repealed.

²⁶⁴³ Law Commission (NZ), *The Property Law Act 1952* (Preliminary Paper No. 16, (1991) 190 [595] and [596]. The Final Report did not alter the position: Law Commission (NZ), *A New Property Law Act*, Report No. 29, (1994) 26 [96].

Part 9 – Powers of attorney

Part 9 of the PLA – Powers of attorney – comprised of sections 168 to 175. These sections were repealed by *Powers of Attorney Act 1998* (Qld) section 182.

Part 10 – Incorporeal hereditaments, appurtenant rights and rights of way

Part 10 considers provisions of the PLA which are described in the Act as ‘Incorporeal hereditaments and appurtenant rights’. These sections are:

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

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

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

155.1. Overview and purpose

176 Prohibition upon creation of rent charges

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

177 Release of part of land subject to rent charge

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

A rent charge is a device that charges rent over land outside the relationship of landlord and tenant. The charge gives the chargee a right to distrain on the land concerned.²⁶⁴⁴ The QLRC noted in its discussion of rent charges in 1973 that in respect of land under the *Real Property Act 1861* the ‘place of rent charges’ is taken by ‘incumbrances’ which was defined widely under that Act.²⁶⁴⁵ The QLRC recognised that rent charges are ‘virtually unknown’ as they could only be created in Queensland in respect of old system land.²⁶⁴⁶

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

...as a measure of simplification of real property law, and because of the general inutility of rent charges under modern conditions, we propose that the creation of rent charges should no longer be possible in the future.²⁶⁴⁷

Section 177 of the PLA was introduced to preserve the effect of previous Queensland legislation which reversed the common law position in relation to the release of a rent charge. Under the common law, release from a rent charge of part of the land charged had the effect that the whole of the rent charge was extinguished.²⁶⁴⁸ Prior to the enactment of the PLA, section 40 of the *Distress Replevin and Ejectment Act 1867* in Queensland reversed the common law position and provided that the release

²⁶⁴⁴ The right to distrain for rent was abolished by section 103 of the *Property Law Act 1974* (Qld). That section was omitted in 1992 by the *Statute Law (Miscellaneous Provisions) Act (No.2) 1992* (Qld).

²⁶⁴⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

²⁶⁴⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

²⁶⁴⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

²⁶⁴⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.177.30].

from a rent charge of part of the land charged did not extinguish the whole rent charge.²⁶⁴⁹ The QLRC when considering the proposed clause 177 indicated that:

It is perhaps doubtful whether s 40 applies to, or is necessary for, incumbrances registered under The Real Property Acts. The extent of the identity between an incumbrance and a rent charge is by no means clear despite some dicta in Mahoney v Hoskin (1912) 14 CLR 379, 384. Both because of this, and to preserve s 40 for the benefit of any existing rent charges issuing out of land under the general law, it seems desirable to retain a provision in the form of that in The Distress Replevin and Ejectment Act, which it is proposed will be repealed in toto.²⁶⁵⁰

Section 177 of the PLA was therefore enacted to preserve the effect of the previous legislation and to address the wide definition of ‘incumbrance’ in the *Real Property Act 1861*. This definition has not been replicated in the *Land Title Act 1994* (Qld). Section 177 of the PLA only applies to rent charges existing at the time the PLA commenced.²⁶⁵¹

155.2. Issues with the section

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

155.3. Other jurisdictions

155.3.1. Australia

The position in other Australian jurisdictions is slightly different because of the ongoing existence of old system land in these jurisdictions.²⁶⁵² In this respect, section 176 of the PLA is not replicated in any of the States or Territories. However, each jurisdiction has a provision which has an equivalent effect to section 177 of the PLA.²⁶⁵³

155.4. Recommendation

The Centre recommends that sections 176 and 177 of the PLA be repealed. This recommendation is made on the basis that there is no remaining old system land in Queensland and the fact that a rent charge is not an interest registrable under the *Land Title Act 1994* (Qld) or the *Land Act 1994* (Qld).

²⁶⁴⁹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

²⁶⁵⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100.

²⁶⁵¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.177.30].

²⁶⁵² The position in the Northern Territory is different to the other jurisdictions. The *Law of Property Act 2000* (NT) only refers to rent charges in the context of mortgages. A rent charge is included under the definition of mortgage set out in section 4 of the *Law of Property Act 2000* (NT).

²⁶⁵³ *Conveyancing Act 1919* (NSW) s 18; *Property Law Act 1958* (Vic) s 70; *Law of Property Act 1936* (SA) s 38; *Property Law Act 1969* (WA) s 43.

NOT GOVERNMENT POLICY

The Centre concludes that both sections 176 and 177 serve no purpose and should be repealed. This recommendation has the support of the QLS.

RECOMMENDATION 152. Section 176 should be repealed.

RECOMMENDATION 153. Section 177 should be repealed.

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

156.1. Overview and purpose

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

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

198A Prescriptive right of way not acquired by user

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

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

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

...the method by which English law gives legal recognition and effect to various kinds of *de facto* situations in which the relevant state of affairs has continued unchallenged for so long that to deny it legal recognition would, it is said, amount to injustice.²⁶⁵⁴

Generally, any right which is able to exist at law as an easement can be acquired by prescription.²⁶⁵⁵ At common law, an easement acquired by prescription is a legal proprietary interest in the ‘servient land which would endure in favour of successive owners of the dominant land and would bind successors in title of the servient land.’²⁶⁵⁶ The subject matter of a prescriptive easement can vary and the easements are generally categorised as either negative or positive.²⁶⁵⁷ A negative prescriptive easement may involve a dominant owner restraining the servient owner from ‘freely using the servient land’²⁶⁵⁸ (for example, rights to light). Positive prescriptive easements are rights which ‘allow

²⁶⁵⁴ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 129 [5.1] referring to the Law Reform Committee, *Fourteenth Report (Acquisition of Easements and Profits by Prescription)* (Cmnd 3100) (1966) 5.

²⁶⁵⁵ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 131 [5.4].

²⁶⁵⁶ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 7.

²⁶⁵⁷ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 12-13.

²⁶⁵⁸ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 12-13.

the dominant owner to make use of, or install certain facilities on the servient owner's land'.²⁶⁵⁹ These types of easements include rights of way and rights to parking.²⁶⁶⁰

Originally, if an easement had been 'enjoyed since time immemorial' the law presumed that a grant of the easement had been made before 'legal memory began'.²⁶⁶¹ The *Statute of Westminster 1275* subsequently altered the 'time immemorial' concept and fixed the legal memory date as the coronation of Richard I in 1189.²⁶⁶² The position in relation to this fixed date also evolved as it became more difficult to establish that the grant had been made prior to 1189.²⁶⁶³

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

This presumption was applied where a claim by prescription failed. The courts, being anxious to protect rights enjoyed peacefully for a long period of time, decided that if the right had been enjoyed for a substantial period (20 years was treated as sufficient) a presumption was raised that the enjoyment had originated in a grant that had subsequently been lost. The justification for the doctrine is that the uninterrupted user for such a length of time cannot otherwise be explained.²⁶⁶⁴

The doctrine of lost modern grant enables a claim to a prescriptive easement on the basis of 20 years uninterrupted use and that the 'state of affairs between the parties cannot otherwise be explained.'²⁶⁶⁵ Eventually, in the United Kingdom, the *Prescription Act 1832* was enacted which enabled the acquisition of easements by enjoyment for 20 years without interruption. The Act made the right absolute and indefeasible, subject to some exceptions.²⁶⁶⁶

However, a rule connected to 1189 was not appropriate for Australia and prescription at common law did not form part of Australian law.²⁶⁶⁷ In Queensland, common law prescriptive rights did not apply as the *Prescription Act 1832* (Imp) never became part of Queensland law.²⁶⁶⁸ The only way rights of long user could apply in Queensland is by fiction of a lost modern grant where user would have to be shown for a continuous period of 20 years. There is doubt as to whether the doctrine of lost modern grant could apply under the Torrens system in Queensland. It is arguable that it has not applied since 1 December 1975.²⁶⁶⁹

²⁶⁵⁹ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 12.

²⁶⁶⁰ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 12.

²⁶⁶¹ Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 681 [15.170].

²⁶⁶² Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 681 [15.170].

²⁶⁶³ For further detail on this issue see Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 681 [15.170].

²⁶⁶⁴ Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 681-682 [15-170].

²⁶⁶⁵ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 10.

²⁶⁶⁶ Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1322 [28-094].

²⁶⁶⁷ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1667].

²⁶⁶⁸ *Boulter v Jochheim* [1921] St R Qd 105 at 124 and *Miscamble v Phillips* [1936] St R Qd 136 (which primarily dealt with adverse possessory rights).

²⁶⁶⁹ Carmel MacDonald et al *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 683, [15.170].

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

Historically, there is ‘no natural right to light.’²⁶⁷⁰ This meant that an owner of land could build in a way which stopped light entering into the owner’s neighbour’s windows, subject to the existence of an easement of light or other right.²⁶⁷¹ Long established rights to light are sometimes called ‘ancient lights’.²⁶⁷² An easement of light has been described as ‘perhaps the most difficult easement to acquire by prescription’.²⁶⁷³ The *Prescription Act 1832* which was enacted in the United Kingdom includes a specific provision addressing the issue of access to light. Section 3 of that Act provides that the actual enjoyment of the access of light for 20 years without interruption will make the right absolute and indefeasible, subject to some exceptions.²⁶⁷⁴

The issue of access to light arose in Australia in the 1904 High Court decision of *Delohery v Permanent Trustee Co of NSW*.²⁶⁷⁵ In that case, the appellant brought proceedings against the respondents seeking an injunction to restrain them from diminishing the light coming into some of the appellant’s windows as a consequence of the construction of a building. One of the key issues before the High Court was whether the law of England as to ancient lights was part of the law introduced into New South Wales either upon settlement of that colony or by virtue of the Statute, 9 Geo IV c 83 which provided that all laws and statutes in force within England at the time of passing the Act in 1828 were in force in New South Wales.²⁶⁷⁶ The High Court decided that the law of prescription of ancient lights by modern grant applied in New South Wales within the meaning of the Imperial legislation and became part of the law of the colony at that time (1828), even if it had not been brought into that State by the first colonists.²⁶⁷⁷

Following this decision, the *Ancient Lights Declaratory Act 1906* was enacted in Queensland (and New South Wales and Victoria) which provided that from the commencement of the Act (1 March 1907) no right to the access or use of light to or for any building should be capable of coming into existence by reason only of the enjoyment of such access or use for any period.²⁶⁷⁸ Both Victoria and New South Wales subsequently amended the Act to extend it to air. The QLRC noted that this change was made

²⁶⁷⁰ Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1258 [27-031] and 1339 [30-010].

²⁶⁷¹ Charles Harpum, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1339 [30-010].

²⁶⁷² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.178.30].

²⁶⁷³ Charles Harpum, Stuart Bridge and Martin Dixon, *the Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1322 [28-094].

²⁶⁷⁴ Harpum, Charles, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Thomson Reuters, 8th ed, 2012) 1322 [28-094] and Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 11.

²⁶⁷⁵ [1904] 1 CLR 283.

²⁶⁷⁶ *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 297. Griffith CJ noted that the question of whether the statute applied in New South Wales was of ‘interest, not only to the State of New South Wales, but also to the States of Victoria and Queensland, which in 1828 formed part of New South Wales, and to the State of Tasmania, to which the Act also applies.’: at 297.

²⁶⁷⁷ *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283, 313.

²⁶⁷⁸ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 100-101.

in response to another High Court decision²⁶⁷⁹ which found that ‘a right to the uninterrupted passage of air to the doors and windows of a building was capable of subsisting as an easement created by express grant.’ The potential flow-on effect of this was the possible creation of an easement allowing the uninterrupted passage of air to the doors and windows of a building by long continuous user in accordance with the principle in *Delohery v Permanent Trustee Co of New South Wales*.²⁶⁸⁰ The inclusion of air in the Victorian and New South Wales legislation was intended to address this possible extension.

Section 178 of the PLA replicates the position under the earlier *Ancient Lights Declaratory Act 1906* but with the addition of the words ‘or air’ to the original section which abolished the right of ancient lights.²⁶⁸¹

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

Section 198A of the PLA was added to the Act as an amendment in 1975.²⁶⁸² As indicated in paragraph 156.1.1 above, the position in Queensland in relation to a right to a prescriptive easement was that there was never a re-enactment of the *Prescription Act 1832* from England²⁶⁸³ and as of 1 December 1975 when the PLA commenced, common law prescriptive rights applied.²⁶⁸⁴ However, the common law right of prescription applied to rights of long use prior to 1189 and, as a result, could not have applied in Queensland. Commentary on section 198A notes that:

Therefore, in relation to rights acquired by prescription mentioned in s 198A(1) and (2), the position is purely of academic interest. What may have had application is a right to an easement by way of long user, pursuant to the fiction of a modern lost grant prior to 1 December 1975.²⁶⁸⁵

Section 198A(1) of the PLA has the effect that after the commencement of the PLA, long use alone is not sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of lost grant. This means that no future prescriptive rights of way may be established in Queensland.²⁶⁸⁶ If it is established that an easement of way or right of way over land existed at the commencement of the PLA, section 198A(2) of the PLA has the effect that the existence and continued existence of the easement or right is not affected by section 198A(1) of the PLA.²⁶⁸⁷ Subsection 198A(2) effectively preserves prescriptive rights of way in existence before 1 December 1975.²⁶⁸⁸

²⁶⁷⁹ *Commonwealth v Registrar of Titles* (1918) 24 CLR 348.

²⁶⁸⁰ *Delohery v Permanent Trustee Co of NSW* (1904) 1 CLR 283.

²⁶⁸¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.178.30]. Butt has indicated that section 179 of the *Conveyancing Act 1919* (NSW) (the equivalent provision to section 178 of the PLA) does not affect the ‘applicability of the reasoning in *Delohery*’s case to other prescriptive easements: see Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1668].

²⁶⁸² *Property Law Act Amendment Act 1975* ss 2 and 17.

²⁶⁸³ See *Boulter v Jochheim* [1921] St R Qd 105 at 124 and *Miscamble v Phillips* [1936] St R Qd 136 (this case dealt primarily with adverse possessory rights).

²⁶⁸⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.198A.30].

²⁶⁸⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.198A.30].

²⁶⁸⁶ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 181 [6.24].

²⁶⁸⁷ *Property Law Act 1974* (Qld) s 198A(2).

²⁶⁸⁸ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 181 [6.25].

156.2. Issues with the sections

The position in relation to easements of light, air and right of way acquired by prescription is clear under the PLA. In the case of light and air, from 1 March 1907, no such right can come into existence by virtue of long use or relying on the fiction of lost grant.²⁶⁸⁹ In the case of easements of right of way, from 1 December 1975 in Queensland, long user is not sufficient to establish an easement of way or right by prescription or fiction of lost grant under section 198A(1) of the PLA. However, that provision does not impact on an easement of right of way which is established as existing as at 1 December 1975. Despite these provisions, there is still significant uncertainty in Queensland in relation to the following matters:

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

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

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

The law of easements acquired by prescription developed and evolved within the framework of old system English conveyancing, where title was acquired through title deeds, rather than by registration.²⁶⁹⁰ One commentator has indicated that:

Subject to an exception to be mentioned shortly, the place of prescriptive easements and profits in the Torrens system is conjectural. Prescriptive rights arise by operation of law from the acts of the parties, without formal documentation. Therefore, unless later formalised by the execution of appropriate documents, prescriptive easements and profits are not registrable.²⁶⁹¹

In a Torrens system, ideally, ‘interests should not run with land unless they are registered or recorded on title.’²⁶⁹² Clearly, the possible existence of an interest which runs with the land but is not registered is inconsistent with the policy underpinning a system of registered title.²⁶⁹³ Further, these interests have the ‘potential to impair’ the ‘reliability and consistency’ of the relevant land register.²⁶⁹⁴

Burns²⁶⁹⁵ highlights two counter arguments to the reasoning above as follows:

²⁶⁸⁹ *Property Law Act 1974* (Qld) s 178.

²⁶⁹⁰ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 21.

²⁶⁹¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1683].

²⁶⁹² Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) 51.

²⁶⁹³ In *Williams v State Transit Authority of New South Wales* (2004) 60 NSWLR 286 the Supreme Court of New South Wales held that prescriptive easements have only a minimal role to play in the Torrens system in that state: see Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 5.

²⁶⁹⁴ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 36.

²⁶⁹⁵ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3.

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

However, in Queensland, prescriptive easements are not exceptions to indefeasibility. Further, these easements cannot be acquired over Torrens land if they are created after the relevant land is registered.²⁶⁹⁶ Prescriptive easements acquired before land in Queensland was brought under the Torrens system may have fallen within the scope of omitted or misdescribed easements in the freehold land register.²⁶⁹⁷

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

Certainty of rights is an essential aspect of electronic title registration and electronic conveyancing. A common theme identified in the different law reform reports which have considered the ongoing relevance of easements by prescription has been the need to ensure that the 'land registration reflects to the greatest extent possible the title position of any given parcel of land.'²⁶⁹⁸ There are, of course, exceptions to indefeasibility and the scope of these exceptions should be clearly articulated in the relevant legislation.

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

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

The position in relation to the application of the doctrine of lost modern grant in relation to Crown land is not completely clear in Queensland. Generally, the view has been that rights of way by prescription cannot be claimed against Crown land.²⁶⁹⁹ However, obiter dicta of Master Weld in *Connellan Nominees Pty Ltd v Camerer*²⁷⁰⁰ created uncertainty in relation to the possibility of an easement being created by the fiction of lost modern grant in respect of a Crown lessee.²⁷⁰¹ It is unclear if such an easement could be acquired as against the Crown. Master Weld stated that:

²⁶⁹⁶ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 271 [11.28] and *Land Title Act 1994* (Qld) ss 185(1)(c) and 185(3).

²⁶⁹⁷ *Land Title Act 1994* (Qld) ss 185(1)(c) and 185(3)(a).

²⁶⁹⁸ Law Reform Committee of South Australia, *Prescription and Limitation of Actions*, Report 76 (1987) 47 referring to comments made by the Ontario Law Reform Commission in its 1969 Report on Limitation of Actions.

²⁶⁹⁹ See Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 182 [6.25] for a discussion of this point and the differing views on it.

²⁷⁰⁰ *Connellan Nominees Pty Ltd v Camerer* [1988] 2 Qd R 248.

²⁷⁰¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.198A.60]).

Consistently with that view the *Land Act* certainly applies s 282 to the creation of easements by way of registration thereof and the approval of the Minister. It does not necessarily exclude the application of the common law or general law of prescription to land held by lessees from the Crown nor the application of s 198A to such land. It cannot be concluded that it has been demonstrated to the point of clarity that an easement could not be acquired against the first or second defendant in their capacities as lessees from the Crown by virtue of prescription or the doctrine of lost modern grant consistently with s 198A of the *Property Law Act* prior to 1 December 1975 because ss 282 and 283 of the *Land Act* exclude the possibility, and it is quite within the authorities which have been mentioned for an easement so acquired to be regarded as an omitted easement when the second defendant's lease for land held thereunder became the subject of a deed of grant registered under the *Real Property Act*.²⁷⁰²

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

However, commentary suggests that:

Apart from the issue of satisfactory evidence being available after such a long time, it is highly likely that the person asserting the right to the easement of right of way would make an application under s 180 of the *Property Law Act 1974* to have a statutory right of user imposed. Although s 180(8) states that the section does not bind the Crown, a right could still be imposed over the interest of a lessee or sublessee from the Crown who is not protected, subject to Ministerial approval of the grant.²⁷⁰³

As indicated in paragraph 156.2.2 above, if a right of long user is raised, a clear legislative process should be set out which enables the assessment of such a claim.

156.2.4. Use of section 180 of the PLA

Section 180 of the PLA enables the Supreme Court to impose statutory rights of user over land.²⁷⁰⁴ A 'statutory right of user' provided for in section 180 includes any right of way over, or access to, or entry upon land and any right to carry and place any utility on, across, over, under, into or through land.²⁷⁰⁵ There are a number of matters which the court must be satisfied of before granting an order under section 180 including: that the order is consistent with the public interest; that the dominant land should be used in the manner proposed; and that the owner of the servient land be adequately compensated for any loss or disadvantage the owner may suffer.²⁷⁰⁶ Section 180 of the PLA does not bind the Crown but it can apply to a lease under the *Land Act 1994* (Qld).²⁷⁰⁷

Section 180 of the PLA is the subject of detailed analysis which is set out at paragraph 158.

²⁷⁰² *Connellan Nominees Pty Ltd v Camerer* [1988] 2 Qd R 248, 254-255.

²⁷⁰³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.198A.60]).

²⁷⁰⁴ Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 42. Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 688 [15.270].

²⁷⁰⁵ *Property Law Act 1974* (Qld) s 180(7). The word 'utility' is defined in s 180(7) to include any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines etc.

²⁷⁰⁶ *Property Law Act 1974* (Qld) s 180(3)(a) and (b).

²⁷⁰⁷ This means that, currently, rights cannot be granted in this way under the *Land Act 1994* (Qld).

156.3. Other jurisdictions

156.3.1. Australia

156.3.1.1. Light and air

New South Wales, South Australia and Victoria have legislative provisions equivalent or similar to section 178 of the PLA.²⁷⁰⁸ In Western Australia, the grant or instrument creating a right of access or use of light (or air) for any period of time must be registered against the title of the servient tenement.²⁷⁰⁹ The additional requirement in the case of a grant for a term exceeding 21 years is the written consent of the Governor.²⁷¹⁰

The New South Wales, Queensland, Western Australian and Victorian provisions also abolish prescriptive easements of air.²⁷¹¹ The South Australian provision abolishing the future creation of easements of light by prescription does not extend to air.²⁷¹² In Tasmania, both prescriptive easements of air and light were abolished by the *Prescription Act 1934* (Tas).²⁷¹³

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

156.3.1.2. Prescriptive right of way not acquired by user

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

156.3.1.3. Prescriptive easements generally

There is significant variation between the Australian jurisdictions regarding the treatment of prescriptive easements and whether or not these can be acquired over Torrens system land.²⁷¹⁴ The

²⁷⁰⁸ See *Conveyancing Act 1919* (NSW) s 179; *Law of Property Act 1936* (SA) s 22; *Property Law Act 1958* (Vic) ss 195 (light) and 196 (air); *Prescription Act 1934* (Tas) s 9 (repealed by s 22 of the *Land Titles Amendment (Law Reform) Act 2001*) (Tas). Section 1381 of the *Land Titles Act 1980* (Tas) provides that the relevant Division supersedes the rules of the common law for the acquisition of easements by prescription and that the doctrine of lost modern grant for the acquisition of easements is abolished. In the case of the Australian Capital Territory, Burns notes that the '*Ancient Lights Declaratory Act 1904* (NSW), the initial legislation which dealt with the issue in NSW, applies to the ACT.': see Fiona Burns, 'The Future of Prescriptive Easements in Australia and England' (2007) 31 *Melbourne University Law Review* 3, 17.

²⁷⁰⁹ *Property Law Act 1969* (WA) s 121(a).

²⁷¹⁰ *Property Law Act 1969* (WA) s 121(b).

²⁷¹¹ In the case of Victoria, the abolition of prescriptive easements of air is set out under a separate section in the *Property Law Act 1958* (Vic) (s 196).

²⁷¹² The South Australian provision abolishing the future creation of easements of light by prescription does not extend to air. For a discussion on the legal position in South Australia in relation to easements of light, see Adrian J Bradbrook, and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 236-237 [9.5]-[9.6].

²⁷¹³ *Prescription Act 1934* (Tas) ss 9 and 10. This Act was repealed by s 22 of the *Land Titles Amendment (Law Reform) Act 2001* (Tas). That Act also made amendments to the *Land Titles Act 1980* (Tas) and has re-enacted certain aspects of prescription at common law in a statutory form.

²⁷¹⁴ Adrian J Bradbrook, and Susan V MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 131 [5.4].

High Court decision of *Delohery v Permanent Trustee Co of NSW*²⁷¹⁵ confirmed that the doctrine of lost modern grant existed in Australia. As discussed in paragraph 156.3.1.1, various jurisdictions then enacted legislation abolishing the right to ancient lights (and air at a later time) but did not address the issue of the abolition of prescriptive easements more generally.²⁷¹⁶ The *Prescription Act 1832* is recognised as applying in two Australian states. In other jurisdictions, that Act has never been applicable.²⁷¹⁷

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

156.3.1.3.1. Tasmania

Section 138I(1) of the *Land Titles Act 1980* (Tas) abolishes the doctrine of lost modern grant and expressly provides that the Act supersedes the rules of common law for the acquisition of easements by prescription.²⁷¹⁸ However, the Act has ‘reenacted’ certain aspects of prescription at common law in a statutory form.²⁷¹⁹ The Tasmanian model enables the Recorder to make a vesting order for the creation of an easement. If such an order is made, the easement must be recorded in the register.²⁷²⁰ If a landowner has for 15 years (or no more than 30 years in the case of a person under disability) exercised rights which may amount to an easement at common law, the landowner can apply to the Recorder for a vesting order.²⁷²¹ There are a number of matters which the landowner must establish for the purposes of the application.²⁷²² These matters have been described as essentially copying the common law rules for the acquisition of an easement by lost modern grant.²⁷²³ The landowner is required to notify the owner of the servient tenement before lodging an application for an easement.²⁷²⁴

The Tasmanian Law Reform Institute reviewed the law of easements in 2009 and 2010. The Issues Paper which was released by the Institute in 2009 sought views on a number of issues relating to prescriptive easements.²⁷²⁵ These included whether easements of this type should be permitted in a

²⁷¹⁵ (1904) 1 CLR 283, 297.

²⁷¹⁶ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 16.

²⁷¹⁷ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 15. The *Prescription Act 1832* has never applied in New South Wales, Queensland and Victoria.

²⁷¹⁸ *Land Titles Act 1980* (Tas) s 138I(1) and (2).

²⁷¹⁹ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Issues Paper No. 13 (2009) 27 [3.5.2].

²⁷²⁰ *Land Titles Act 1980* (Tas) s 138Q.

²⁷²¹ *Land Titles Act 1980* (Tas) s 138J(1).

²⁷²² *Land Titles Act 1980* (Tas) s 138L.

²⁷²³ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 164 [5.58].

²⁷²⁴ *Land Titles Act 1980* (Tas) s 138K.

²⁷²⁵ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Issues Paper No. 13 (2009) 32 [3.5.12].

Torrens land system. Feedback was also sought on the specific arrangements under the *Land Titles Act 1980* (Tas) in relation to claiming an easement based on possession.

The Tasmanian Law Reform Institute made a number of recommendations in its Final Report including that the ‘codification of the requirement to claim a prescriptive easement’ should remain in the *Land Titles Act 1980* (Tas).²⁷²⁶ The Institute noted in the Final Report that, if the current regime in Tasmania remained in its present form, it was likely that legal practitioners would make greater use of section 84J of the *Conveyancing Law and Property Act 1884* (Tas) which gives the Supreme Court jurisdiction to impose an easement on title in certain circumstances.²⁷²⁷ This provision operates in a similar way to section 180 of the PLA.

156.3.1.3.2. South Australia

The *Prescription Act 1832* (UK) was not expressly adopted in South Australia. However, case law has established that the Act forms part of the law in South Australia.²⁷²⁸ In terms of the Torrens system and prescriptive easements, these types of easements are not a general exception to indefeasibility. However, where an easement has been omitted or described incorrectly in any certificate or other instrument of title, the easement prevails subject to the provisions of the Act.²⁷²⁹

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

On the whole the Committee is of the view that it would be best to repeal the Prescription Act, abolish the doctrine of lost modern grant, and provide that easements may no longer be created by prescription. There is in our view no reason why a person who wishes to acquire an easement over someone else’s land should not adopt the straightforward course of asking for it, and having it registered pursuant to section 88 of the Real Property Act if granted.²⁷³⁰

156.3.1.3.3. New South Wales

The position in New South Wales is similar to South Australia. The *Real Property Act 1900* (NSW) has the effect that an easement is not an exception to indefeasibility except where there has been an omission or misdescription of an easement subsisting immediately before the land was brought under the provisions of the Act or validly created at or after that time under the Act or any other Act.²⁷³¹ In the case of the creation of new prescriptive easements over Torrens land in New South Wales, the position seems to be that these cannot be created.²⁷³²

²⁷²⁶ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report (2010) 47.

²⁷²⁷ Tasmania Law Reform Institute, *Law of Easements in Tasmania*, Final Report (2010) 46 [3.5.24].

²⁷²⁸ See Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 153 [5.45] for further discussion on the application of this Act in South Australia.

²⁷²⁹ *Real Property Act 1886* (SA) s 69(d). This section expressly refers to a right-of-way under the provisions of the *Rights-of-Way Act 1881* as well as ‘other’ easements. Where a right-of-way easement prevails, it is also subject to the *Rights-of-Way Act 1881*.

²⁷³⁰ Law Reform Committee of South Australia, *Prescription and Limitation of Actions* Report 76 (1987) 54.

²⁷³¹ *Real Property Act 1900* (NSW) s 42(1)(a1).

²⁷³² See *Williams v Transit Authority of New South Wales and Ors* (2004) 60 NSWLR 286.

156.3.1.3.4. Victoria

All easements in Victoria, including those acquired by prescription, are exceptions to indefeasibility under the *Transfer of Land Act 1958* (Vic).²⁷³³ The doctrine of lost modern grant is the 'only rule of prescription under which easements can be acquired in Victoria.'²⁷³⁴

In 1989 the Law Reform Commission of Victoria (as it was then called) issued a Discussion Paper entitled *Easements and Covenants*.²⁷³⁵ That paper proposed the abolition of both the right to obtain an easement by long use and the opportunity to acquire an easement by long use.²⁷³⁶ The Commission indicated that these easements were appropriate in England where there was no planning control and the 'complexity of conveyancing made formal creation of easements extremely difficult.'²⁷³⁷ The rationale for the proposal to abolish these types of easements was based on the existence of a good land planning system and a simple, accessible conveyancing process, and on the fact that a person who needed an easement could purchase it from a neighbour.²⁷³⁸ No further action in relation to the Discussion Paper was taken.

In 2010 the VLRC published a Consultation Paper, *Easements and Covenants*.²⁷³⁹ This paper was followed by a Final Report later in the same year.²⁷⁴⁰ The VLRC in its Final Report recommended the abolition of the rule of law which enabled a person to acquire an easement by long user under the fiction of lost modern grant.²⁷⁴¹ The Commission also recommended that the Victorian Civil and Administrative Tribunal should be able to order the creation of easements under the *Property Law Act 1958* (Vic) if the easement is:

- reasonably necessary for the effective use or development of other land that will have the benefit of the easement; and
- consistent with the reasonable use and enjoyment of the lot or lots over which the easement is sought.²⁷⁴²

These recommendations have not been adopted in Victoria to date.

²⁷³³ *Transfer of Land Act 1958* (Vic) s 42(2)(d) which refers to 'any easements howsoever acquired subsisting over or upon or affecting the land.'

²⁷³⁴ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989) 60 [7.2].

²⁷³⁵ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989).

²⁷³⁶ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989) 1, 12 [10]-[11].

²⁷³⁷ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989) 12 [10].

²⁷³⁸ Law Reform Commission of Victoria, *Easements and Covenants* Discussion Paper No. 15 (1989).

²⁷³⁹ Victorian Law Reform Commission, *Easements and Covenants* Consultation Paper (2010).

²⁷⁴⁰ Victorian Law Reform Commission, *Easements and Covenants* Final Report (2010).

²⁷⁴¹ Victorian Law Reform Commission, *Easements and Covenants* Final Report (2010) 55, Recommendation 17.

²⁷⁴² Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) 41, Recommendation 6. Recommendation 7 provides that VCAT is empowered to make an order for the grant of an easement only if satisfied of three matters including that the use of the land having the benefit of the easement will not be inconsistent with the public interest and the owner of the burdened land can be adequately compensated for any loss or disadvantage arising from the imposition of the easement.

156.3.1.3.5. Western Australia

Commentary on the position in Western Australia indicates that the *Prescription Act 1832* (UK) applies but this is due to the operation of an old Imperial statute rather than state legislation.²⁷⁴³ Further, the position in Western Australia is similar to Victoria in relation to exceptions to indefeasibility. Under the relevant legislation the exception to indefeasibility extends to ‘any public rights of way and to any easements acquired by enjoyment or user’.²⁷⁴⁴ A prescriptive easement can still be acquired in Western Australia under the doctrine of lost modern grant.

156.3.1.3.6. Australian Capital Territory

The position in the Australian Capital Territory is unclear in terms of whether prescriptive easements still bind a registered proprietor in the ACT. Section 58(1)(b) of the *Land Titles Act 1925* (ACT) provides that ‘any right of way or other easement created in or existing upon the same land which is not described, or is misdescribed in the relative certificate of title’ is an exception to indefeasibility.²⁷⁴⁵

156.3.1.3.7. Northern Territory

The Northern Territory legislation does not address the issue of prescription in any form.²⁷⁴⁶ Commentary suggests that the better view is that prescriptive easements have no ongoing role in the Northern Territory and that the ‘silence’ on these easements ‘arguably constitutes another form of indirect abolition of prescriptive easements.’²⁷⁴⁷ The Northern Territory legislation does provide for indefeasibility of title. It also covers the continuing effect of easements that were registered but subsequently omitted and sets out a process of granting and registering easements. However, the legislation does not include a provision which establishes prescriptive easements as an exception to indefeasibility of title.²⁷⁴⁸

156.3.2. New Zealand

156.3.2.1. Light and air

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

²⁷⁴³ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 20. The Imperial legislation is 6 Will IV No 4 (1836) (WA). See also Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 153 [5.44].

²⁷⁴⁴ *Transfer of Land Act 1893* (WA) s 68(1A).

²⁷⁴⁵ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 26. Burns indicates that: ‘The language of the provision appears sufficiently wide to include prescriptive easements which existed prior to registration or were subsequently created over the land. On the other hand, the reference to a lack of description may simply refer to easements which were registered, but later omitted.’

²⁷⁴⁶ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 20.

²⁷⁴⁷ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 27-28.

²⁷⁴⁸ Fiona Burns, ‘The Future of Prescriptive Easements in Australia and England’ (2007) 31 *Melbourne University Law Review* 3, 28. See *Land Titles Act 2000* (NT) s 188, s 189(1)(c).

- the grant is granted on or after 24 November 1927;²⁷⁴⁹
- the grant is granted by deed or by an instrument registrable under the *Land Transfer Act 1915* or the *Land Transfer Act 1952*;²⁷⁵⁰
- the deed or instrument accurately defines the area on and over the burdened land to which the right of access of light or air is intended to be provided.²⁷⁵¹

Section 300 of the *Property Law Act 2007* (NZ) provides that an easement which is enforceable under section 299 will have effect and continue to have effect even if any of the buildings erected on the dominant tenement are altered or destroyed and replaced by other buildings.²⁷⁵²

156.3.2.2. Easements by prescription

Section 296 of the *Property Law Act 2007* (NZ) has the effect that from 1 January 2008 easements cannot be acquired by prescription in New Zealand.²⁷⁵³ The section also abolishes the fiction of the lost modern grant.²⁷⁵⁴ The rationale for the introduction of section 296 of the *Property Law Act 2007* (NZ) is explained as follows:

... the rules concerning prescription relate only to deeds system land which has not been brought under the *Land Transfer Act 1952*. The new s 222 has the effect of preventing the maturing of further prescriptive rights. That has very little, if any, practical importance as it is unlikely that any such rights are presently in the course of arising. Subsection (2) formally abolishes the rule of law relating to the fiction of the lost modern grant. Subsection (3) preserves prescriptive rights which have already matured.²⁷⁵⁵

156.4. Recommendation

The Centre's recommendations are set out below.

156.4.1. Repeal section 178 and section 198A of the PLA

The Centre recommends repealing section 178 and section 198A of the PLA. This approach has the support of the QLS. The Society commented that easement by prescription is 'a concept of considerable antiquity and complexity that is inconsistent with the principle that an easement over a lot or part of it be only created by registering an instrument of easement under section 82 of Land Title Act'.

156.4.2. No interest created by prescription

The Centre recommends the insertion of a provision declaring that no interest under either the *Land Title Act 1994* (Qld) or the *Land Act 1994* (Qld) can be created by prescription or through the fiction of lost modern grant irrespective of when created, from the time the amendment is passed. The QLS concur, stating that such a statement will 'provide certainty and clarity to the legal position'.

²⁷⁴⁹ *Property Law Act 2007* (NZ) s 299(2) – this is the date on which the *Property Law Amendment Act 1927* came into force).

²⁷⁵⁰ *Property Law Act 2007* (NZ) s 299(3).

²⁷⁵¹ *Property Law Act 2007* (NZ) s 299(4).

²⁷⁵² *Property Law Act 2007* (NZ) ss 300(1) and (2).

²⁷⁵³ *Property Law Act 2007* (NZ) s 296(1).

²⁷⁵⁴ *Property Law Act 2007* (NZ) s 296(2).

²⁷⁵⁵ Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) 384 [680].

156.4.3. Providing in legislation that easements may only be sought under section 180 of the PLA as statutory rights of user.

The QLS raised concerns about existing rights that were present before 1975 if the recommendation resulted in those existing rights being extinguished. The Society states 'QLS does not support any proposal resulting in the abolition of pre-existing rights and requiring the person enjoying those rights to proceed under section 180.'

The Centre remains of the view that it is appropriate to have matters concerning the creation of easements heard under section 180 of the PLA. A number of law reform commissions have identified the advantages of utilising judicial power to 'force the creation of easements against unwilling land owners, in circumstances where necessity or reasonable necessity demands'.²⁷⁵⁶ The Centre does not see any disadvantage to applicants, who would have to litigate the matter in court to establish the right in any event. Applications would now simply be heard under section 180 and would be decided on those criteria. Material facts about the length of use can be brought before the court in a section 180 application and the cases would be decided on their merit.

The QLS concedes that instances acquired by prescription are rare. The Centre sees no compelling argument to retain the rights moving forward when parties have a remedy under section 180 in any event.

RECOMMENDATION 154. Section 178 should be repealed.

RECOMMENDATION 155. Section 198A should be repealed.

RECOMMENDATION 156. Insert provisions that:

- declare that no interest under either the *Land Title Act 1994* or the *Land Act 1994* can be created by prescription or through the fiction of lost modern grant irrespective of when created, from the time the amendment is passed; and
- declare that easements that may previously have been created by prescription (long user) or by the fiction of lost modern grant may only be sought under section 180 as statutory rights of user.

²⁷⁵⁶ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1686].

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

157.1. Overview and purpose

179 Right to support of land and buildings

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

Section 179 of the PLA was introduced to address a perceived inadequacy of the common law in relation to the right to support of land. At common law, an owner of land is entitled not to have the support to land in its natural state removed.²⁷⁵⁷ This is said to be an ‘incident’ of land itself.²⁷⁵⁸ If the adjoining landowner removes the support by excavating, or some other means, that landowner is liable in nuisance.²⁷⁵⁹ However, there is no natural right at common law for a building to be supported by adjoining land, which means that:

The owner of the adjacent soil may with perfect legality dig that soil away, and allow his neighbour’s house, if supported by it, to fall in ruins to the ground.²⁷⁶⁰

The common law also does not provide for a right to support of land by water. This has the effect that no right of action is available where drainage from an adjoining property on to neighbouring land causes damage to buildings.²⁷⁶¹

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

We have little doubt that, with advances in modern engineering techniques, an owner both can and should, and in practice almost invariably does, take precautions against damage to his neighbour’s building caused by subsidence arising from excavations on adjoining land, and we share the view of the Law Commission that there should be a legal obligation to avoid damage to buildings as well as to land deriving natural support from such land. We also agree with the Commission’s view that a right to continue to have land naturally supported by water should be recognised, as it is in Scotland.²⁷⁶²

The position in Queensland now as a result of section 179 of the PLA is that an obligation is attached to ‘any land’ not to do anything which withdraws support from any other land, building, structure or erection placed on or below the land. The obligation is not restricted to landowners but extends to

²⁷⁵⁷ *Dalton v Angus* (1881) 6 App Cas 740, 791.

²⁷⁵⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.179.60].

²⁷⁵⁹ *Dalton v Angus* (1881) 6 App Cas 740.

²⁷⁶⁰ *Dalton v Angus* (1881) 6 App Cas 740, 804. An obligation not to remove support could, of course, be imposed by an easement.

²⁷⁶¹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 101.

²⁷⁶² Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

all persons whose actions result in support being withdrawn.²⁷⁶³ Further, there is no longer a distinction between support for land and buildings and support derived from water or otherwise.²⁷⁶⁴ In terms of the right to support of land, section 179 of the PLA has been described as not ‘extending the common law rules’ and ‘merely codifying the status quo.’²⁷⁶⁵

There are no other legislative provisions in Queensland which deal with the right to support of land and buildings. Issues associated with right to support can arise in the context of retaining walls. The *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) (**Dividing Fences Act**) does not directly deal with retaining walls.²⁷⁶⁶ However, the issue of retaining walls may arise indirectly where it may be necessary to carry out work on the retaining wall for the purpose of resolving a dispute about a dividing fence.²⁷⁶⁷ In this respect, under section 35(1)(f) of the Dividing Fences Act, QCAT has a general power to order that any other work be carried out that is necessary in order to carry out the fencing work ordered under the section. This can include work for a retaining wall. The QLRC has released a Discussion Paper as part of a broader review of the Dividing Fences Act.²⁷⁶⁸ One of the issues for consideration set out in its Terms of Reference for that review was whether the ‘scope of the Act should be expanded to include disputes about retaining walls built on neighbouring properties’ boundaries.²⁷⁶⁹ The resulting QLRC report concluded in the negative.²⁷⁷⁰ In coming to this conclusion, the QLRC noted:

- the issue of retaining wall disputes between neighbours is a ‘significant area of concern’;
- many retaining walls are not built on boundaries, but rather are positioned wholly within the boundary of one property;
- providing a statutory remedy where retaining walls are located on the common boundary does not sufficiently resolve the ‘wider and more complex legal and technical issues that often underlie disputes around retaining walls, and may have unintended consequences’; and

²⁷⁶³ *De Pasquale Bros Pty Ltd v Cavanah Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, [43]. An engineer’s actions on its client’s land led to a withdrawal of support of a building on adjoining land. The court held the professional engineer liable under s 179 to make good the damage.

²⁷⁶⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.179.60]).

²⁷⁶⁵ Adrian J Bradbrook and Susan V MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 200 [7.4].

²⁷⁶⁶ The term ‘retaining wall’ is defined in the *Neighbourhood Disputes (Dividing Fences and Trees) Act 2011* (Qld) sch (definition of ‘retaining wall’).

²⁷⁶⁷ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015) [2.79].

²⁷⁶⁸ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015).

²⁷⁶⁹ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015), Appendix A Terms of Reference. Retaining walls are subject to other requirements under Queensland legislation including the *Building Act 1975* (Qld) and the *Planning Act 2016* (Qld). For further detail about these other requirements see Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Discussion Paper No. 72 (June 2015) [2.84].

²⁷⁷⁰ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No. 72 (December 2015). The final report was tabled in Parliament on 11 May 2016.

- there is a lack of publicly available resources about property owners' rights and responsibilities with respect to the construction, maintenance and repair of retaining walls.²⁷⁷¹

Section 179 of the PLA has only been considered in detail in one case in Queensland, *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd*.²⁷⁷² Chesterman J indicated in that case that because section 179 of the PLA extends the applicability of the common law to buildings:

It would be sensible to construe the section, unless its language clearly prevents such a course, so that the statutory obligation with respect to buildings is the same in scope and content as the common law obligation with respect to natural land.²⁷⁷³

Applying this reasoning, the person whose actions led to the withdrawal of support is 'liable to make good the damage'.²⁷⁷⁴ Further, section 179 of the PLA is contravened if a person did something on the relevant land which withdrew support from it or created the nuisance.²⁷⁷⁵ It is a question of fact, not of law, whether a person has created a nuisance or has caused the withdrawal of support.²⁷⁷⁶ Chesterman J considered that 'it was evident that the section confers a private right of property' and damages or an injunction may be sought for the breach of the right.²⁷⁷⁷ The type of injunctions which may be available include a mandatory injunction requiring something to be done or a *quia timet* injunction which may be available where harm has not yet manifested but is considered to be imminent.²⁷⁷⁸

However, at common law nuisance is not actionable per se and actual damage must be proved, subject to some limited exceptions.²⁷⁷⁹ In nuisance cases, the harm suffered by the 'plaintiff will generally take the form of either physical injury to land or an interference with personal enjoyment of it.'²⁷⁸⁰ Further, the interference with the use and enjoyment of land needs to be 'unreasonable'.²⁷⁸¹ This concept is not considered solely from the defendant's perspective – it is a question of 'whether what has been done is reasonable' from both the defendant's and plaintiff's perspectives.²⁷⁸² In the case of the removal of support to a plaintiff's land, liability at common law is strict and it is not necessary to establish fault on the part of the defendant.²⁷⁸³

157.2. Issues with the section

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

As indicated above, there has only been one decision in Queensland considering the application of section 179 of the PLA. The interpretation given to the section in that case is that the provision simply

²⁷⁷¹ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No. 72 (December 2015) pp 56, 57.

²⁷⁷² [2000] 2 Qd R 461.

²⁷⁷³ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 472 [48].

²⁷⁷⁴ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 472 [48].

²⁷⁷⁵ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 473 [49].

²⁷⁷⁶ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 473 [52].

²⁷⁷⁷ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461, 473 [53].

²⁷⁷⁸ *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245, 248.

²⁷⁷⁹ R P Balkin and J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 465 [14.6].

²⁷⁸⁰ R P Balkin and J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 479 [14.30].

²⁷⁸¹ Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 189 [5.1.2].

²⁷⁸² R P Balkin, J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 474 [14.20].

²⁷⁸³ R P Balkin, J L R Davis, *Law of Torts* (Butterworths, 5th ed, 2011) 464 [14.2].

imports the common law obligation with respect to natural land so that it applies to buildings. However, the precise scope of the section remains untested. For example, it is not clear if the section extends to a reduction of support that is not a complete withdrawal of support.

A number of scenarios are set out below and analysed to assess whether section 179 would apply to the situation based on the interpretation of Chesterman J in the decision of *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd*.²⁷⁸⁴

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

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

The usual remedy sought for a nuisance action is an injunction, rather than damages. Damages at common law cannot be claimed until damage has been suffered. Injunctions can be mandatory, which require the doing of a positive act such as reinstating support, or prohibitory, which require the defendant to refrain from doing an act or to cease doing an act.²⁷⁸⁵ In the case of anticipated harm occurring, a *quia timet* injunction is likely to be sought. This type of injunction is usually framed in mandatory terms requiring the defendant to do something to prevent the damage occurring, although it can also be presented as a negative obligation not to do something.²⁷⁸⁶ It is possible to have equitable damages awarded in place of a *quia timet* injunction to compensate for the cost of taking steps to prevent or abate a nuisance.²⁷⁸⁷ These remedies would be available in the case of a contravention of section 179 of the PLA.

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

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

²⁷⁸⁴ *De Pasquale Bros Pty Ltd v Cavanagh Biggs & Partners Pty Ltd* [2000] 2 Qd R 461.

²⁷⁸⁵ Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 206 [5.1.7.1.1].

²⁷⁸⁶ Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 208 [5.1.7.1.3].

²⁷⁸⁷ *Barbagallo v J & F Catelan Pty Ltd* [1986] 1 Qd R 245; Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 209 [5.1.7.2].

likelihood of success if the matter proceeds to hearing to justify ‘preserving the status quo’ in the interim.²⁷⁸⁸

Scenario 3: The owner of Property A excavates near the common boundary of her property and Property B. She builds a retaining wall to support the land to Property B. There is no building present on Property B. The excavation potentially will ‘impede or increase the expense of future building operations on the land.’²⁷⁸⁹

In this scenario it is not clear whether a claim that the obligation imposed on Property A under section 179 of the PLA has been breached would succeed. If at the time of the excavation the owner of Property A built a retaining wall which ensured that the support to Property B was not withdrawn, it is unlikely section 179 has been breached. There is no building erected on the land and section 179 of the PLA does not appear to cover anticipated buildings or structures. The section is framed in terms of buildings that have already been placed on the relevant land. A cause of action in nuisance for withdrawal of support is also unlikely to be available as it does not extend to a right to support of buildings or anticipated buildings.²⁷⁹⁰

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

Retaining walls located on boundaries are not covered under section 179 of the PLA. Further, as discussed in paragraph 157.1 above, they also do not fall within the scope of the Dividing Fences Act, except to the extent that a dividing fence is located on the retaining wall. It is not clear what cause of action would be available in this case, if any. It will largely depend on all the relevant factors in the case. The position would be the same if the collapse of the retaining wall then led to the subsidence of the land – that is, section 179 of the PLA would not apply.

As noted above, the QLRC in its review of the Dividing Fences Act concluded that the Act should not be extended to include disputes about retaining walls built on neighbouring properties’ boundaries.²⁷⁹¹

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

As with Scenario 4, section 179 of the PLA will not apply to this situation as the retaining wall is located on the boundary and the obligation not to withdraw support relates to actions on one property which withdraws support from any other land or building (structure or erection). However, possible causes of action in this case would include negligence or nuisance, depending on the details of the case, since the acts of the owner of Property A have caused the collapse of the retaining wall.

²⁷⁸⁸ R P Balkin and JLR Davis, *Law of Torts* (Butterworths, 5th ed, 2013) 795 [27.51].

²⁷⁸⁹ See *Kebewar Pty Ltd v Harkin* (1987) 9 NSWLR 738; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [223].

²⁷⁹⁰ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [223].

²⁷⁹¹ Queensland Law Reform Commission, *Review of the Neighbourhood Disputes (Dividing Fences and Trees) Act 2011*, Report No. 72 (December 2015) 56 -57 and Recommendation 2-10.

157.2.2. Section 179 of the PLA underutilised in practice

Section 179 of the PLA has only been the subject of limited Supreme Court decisions and was pleaded in addition to a claim for negligence based on the same facts.²⁷⁹² The absence of case law suggests either that issues associated with support are dealt with between the relevant parties or, as suggested by the QLRC in 1973, that with ‘advances in modern engineering techniques’ an owner of land would in practice take steps to avoid damage to neighbouring properties caused by excavation or other activities which could lead to withdrawal of support on the other property.²⁷⁹³ In the case of commercial building projects in Queensland, it is usual to have underpinning agreements in place between the owner of the proposed new building and the owners of neighbouring commercial buildings to support the land during construction. These agreements effectively operate as temporary easements of support.

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

Currently under section 179 of the PLA, omissions to act do not fall within the scope of the section. An omission in the context of a right of support would include ‘failing to take action to prevent a loss of support from occurring.’²⁷⁹⁴ Conversely, an act of commission covered by section 179 of the PLA would include the excavation of a hole.²⁷⁹⁵ The New South Wales Law Reform Commission (**NSWLRC**) originally anticipated that the replacement of the common law right to support with a duty of care based in negligence would impose an obligation on a person to take reasonable care that the person ‘does not do or omit to do anything to land which might cause loss or damage by removing the relevant support provided by that land to other land.’²⁷⁹⁶ The proposed amendment to the *Conveyancing Act 1919* (NSW) recommended by the NSWLRC expressly included a duty of care not to omit to do anything.²⁷⁹⁷ The *Conveyancing Amendment (Law of Support) Bill 2000* (NSW) in its original form provided that the duty of care in relation to support for land did not extend to an ‘omission’ by the Crown (or by a local or public authority) in relation to supporting land.²⁷⁹⁸ There was very limited discussion in the report regarding the reasons for the inclusion of acts of omission within the duty of care created in the section. However, omissions were excluded from the Bill during its passage through Parliament.

²⁷⁹² *De Pasquale Bros Pty Ltd v Cavanagh Briggs & Partners Pty Ltd* [2000] 2 Qd R 461, [42]. The section was relied upon in the case of *Hulin v Bill Qui Constructions Pty Ltd* [2007] QSC 108 along with alternative claims for damages for nuisance, a mandatory injunction or equitable damages for negligence, or damages for trespass. However, this case dealt with the defendant’s application to have the proceeding heard and determined in the Commercial and Consumer Tribunal, rather than the Supreme Court. Accordingly, the substantive claims in the case were not considered. The proceedings relating to the substantive claims do not appear to have proceeded any further following the decision dismissing the application to have the matter transferred from the Supreme Court.

²⁷⁹³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend And Reform The Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

²⁷⁹⁴ New South Wales, *Hansard*, Legislative Council, 13 April 2000, 4678 (Carmel Tebbutt).

²⁷⁹⁵ New South Wales, *Hansard*, Legislative Council, 13 April 2000, 4678 (Carmel Tebbutt).

²⁷⁹⁶ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 48 [4.8].

²⁷⁹⁷ Explanatory Note, *Conveyancing Amendment (Law of Support) Bill 2000* (NSW) [4678].

²⁷⁹⁸ Explanatory Note, *Conveyancing Amendment (Law of Support) Bill 2000* (NSW).

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

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

This is consistent with the situation in Queensland, where section 179 of the Property Law Act imposes a similar duty in relation to acts of commission but not in relation to acts of omission.²⁷⁹⁹

The issue has been considered judicially in New South Wales and it is now accepted that section 177 of the *Conveyancing Act 1919* (NSW) does not extend to omissions.²⁸⁰⁰ The New South Wales arrangement in relation to the right to support is discussed at paragraph 157.3.1.1 below.

It is clear there is a strong policy rationale for the express inclusion in section 179 of the PLA of an omission to act (whatever form the section eventually takes). Withdrawal of support cases where section 179 of the PLA may apply often arise in the context of excavation occurring on property A which causes land to collapse or buildings to be damaged on property B. If nothing is done by the person responsible on property A to shore up support to property B, this will still be characterised as an act which has led to the withdrawal of support for the purposes of section 179 of the PLA. The issue may be more relevant if recommendations below are adopted and the position under the PLA reflects the approach of New South Wales and imports a duty of care in relation to the right of support for land.

157.2.4. No concept of ‘reasonableness’ and ‘fault’ in section 179 of the PLA

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

The NSWLRC identified strict liability in nuisance in support cases as one of the problems with the common law position.²⁸⁰¹ The inclusion of concepts of fault and reasonableness of actions would potentially bring the obligation under section 179 of the PLA closer to a ‘negligence-style’ duty of care.²⁸⁰² The NSWLRC, when discussing the possible reform options, observed that:

²⁷⁹⁹ New South Wales, *Hansard*, Legislative Council, 13 April 2000, 4678 (Carmel Tebbutt).

²⁸⁰⁰ *Piling v Prynew; Nemeth v Prynew* [2008] NSWSC 118.

²⁸⁰¹ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 46-47 [4.3].

²⁸⁰² Butt describes section 177 of the *Conveyancing Act 1919* (NSW) as imposing a ‘negligence-style’ duty of care: see Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [228].

In support cases, the gist of the action is physical damage, or the threat of it, generally occasioned by an isolated unintentional event, rather than an ongoing state of affairs. In this regard it more closely resembles negligence than a typical nuisance case such as emission of noxious fumes from a factory.²⁸⁰³

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

In contrast with s 179 of the *Property Law Act 1974* (Qld), the proposed duty of care will not prohibit every withdrawal of support. It seems likely that some degree of support could result, for example, from changes to other land, but in the Commission's view these should not be actionable if they are of a trivial nature and do not cause any damage to affected land. ... [I]t is not intended that construction of a residence in a predominantly residential area will entail an obligation to maintain support to neighbouring land sufficient to carry the burden of multi-storey buildings which, as a technical possibility, might be built there at some time in the future.²⁸⁰⁴

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

An advantage of such an approach may be that apportioning damages would be undertaken on the basis of fault so arguably it may be a fairer process for the parties.²⁸⁰⁵ A further issue which will arise from any amendment of section 179 which incorporates a negligence-style duty of care is addressing the issue of the common law right to bring a cause of action in nuisance in relation to the removal of support to land. New South Wales dealt with this issue by abolishing any common law right to bring such an action in that limited situation.

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

The possibility of including a procedure within a statutory provision to regulate the exercise of a statutory right to support was raised when the United Kingdom Law Commission reviewed appurtenant rights in a Working Paper in 1971.²⁸⁰⁶ The proposal in the paper was that a right of support of a building by land should exist in a statutory form and that a procedure be included in the legislation to regulate excavations which gave rise to a potential danger of withdrawing support. The details of the procedure were not particularised in the Working Paper but the Law Commission indicated that it could be based on section 50 of the *London Building Acts (Amendment) Act 1939* (UK).²⁸⁰⁷ An overview of this section is below:

²⁸⁰³ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) [3.35].

²⁸⁰⁴ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 52 [4.14].

²⁸⁰⁵ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 49 [4.10].

²⁸⁰⁶ Law Commission (UK), *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971) [61]-[62].

²⁸⁰⁷ Law Commission (UK), *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971) [62].

- the procedure in the section is triggered if the owner proposes to erect within a specified distance of an adjoining building a structure with a level lower than the building on the adjoining land;²⁸⁰⁸
- a notice must be served by the building owner at least one month before the commencement of the building;²⁸⁰⁹
- the notice must include plans and depth of excavation;
- the adjoining owner can serve notice in writing on the building owner that he or she disputes the necessity of the underpinning or requires more strengthening. The serving of this notice has the effect that a 'difference' has been deemed to have arisen between the parties;²⁸¹⁰
- where there is a difference between the owners, the matter is determined by a surveyor's award.²⁸¹¹ A party can appeal to the court against the award;²⁸¹²
- the building owner must compensate the adjoining owner or occupier for any inconvenience, loss or damage as a result of any work executed;
- the building owner must provide plans of the completed works if requested.

The Law Commission identified some advantages of this approach including ensuring that both the stability of an existing building is not put in unnecessary danger and the development of land is not discouraged by a neighbouring owner's right to support.²⁸¹³

157.3. Other jurisdictions

157.3.1. Australia

157.3.1.1. New South Wales

New South Wales is the only other Australian jurisdiction to have altered the common law in relation to the right to support of land. Section 177 of the *Conveyancing Act 1919* (NSW) was added in 2000 following a review of the law relating to the right to support from adjoining land undertaken by the NSWLRC in 1997.²⁸¹⁴ Prior to 2000 the common law principles relevant to the right to support applied in New South Wales. The NSWLRC identified a number of problems with the common law including:

- it extended only to land in its natural state and did not cover buildings or other improvements;
- there is no right to support by water;
- strict liability in nuisance offended the 'common notion that liability should be fault based' and is 'out of step' with developments in the law of negligence;
- uncertainty in applying the law of nuisance in right of support for land situations. In particular, whether it should apply to:

²⁸⁰⁸ *London Building Acts (Amendment) Act 1939* (UK) s 50(1).

²⁸⁰⁹ *London Building Acts (Amendment) Act 1939* (UK) s 50(2).

²⁸¹⁰ *London Building Acts (Amendment) Act 1939* (UK) s 50(2).

²⁸¹¹ *London Building Acts (Amendment) Act 1939* (UK) s 55. The parties can either agree on a surveyor or if there is no agreement, appoint a surveyor each and those surveyors will appoint a third surveyor.

²⁸¹² *London Building Acts (Amendment) Act 1939* (UK) s 55.

²⁸¹³ Law Commission (UK), *Transfer of Land: Appurtenant Rights*, Working Paper No. 36 (1971) 31 [62].

²⁸¹⁴ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997).

- cases where there is continuing interference with enjoyment of land in addition to isolated cases; and
- both physical and non-physical damage.²⁸¹⁵

The NSWLRC identified in its report that the common law position was unsuited to modern conditions, other legislative intervention was piecemeal and unsatisfactory and there were anomalies in the application of the common law in relation to where the burden of liability ought to lie.²⁸¹⁶ The NSWLRC recommended, among other things, that the law of nuisance in relation to the withdrawal of support be abolished and that ‘everyone must take reasonable care’ in relation to removing support provided by land to other land.²⁸¹⁷

The position in New South Wales is significantly different to the Queensland approach to the right of support for land. In New South Wales any right at common law to bring an action in nuisance in respect of removal of support provided to land has been abolished.²⁸¹⁸ An express duty of care now exists in relation to the right of support for land. However, the duty is limited to not doing anything on or in relation to supporting land²⁸¹⁹ that removes the support provided by the supporting land to any other land.²⁸²⁰ Other key features of section 177 of the *Conveyancing Act 1919* (NSW) include:

- the duty of care is owed by any person and is not limited to the owner of the supporting land;
- acts of omission are not covered under the section;²⁸²¹
- there is no obligation to maintain support;
- support provided by a building or structure on supporting land is not covered under the section except to the extent that the building or structure has replaced the support that the supporting land in its natural or reclaimed state had provided to the supported land;²⁸²² and
- the duty imposed under the section can be excluded or modified by express agreement.²⁸²³ If this agreement is included in a registered easement for removal of support relating to that land, the agreement will apply to any successor in title of the supported land.²⁸²⁴

157.3.1.2. Western Australia

The Law Reform Commission of Western Australia considered the issue of withdrawal of support as part of a broader review of the rights and obligations of adjoining owners when one alters the ground

²⁸¹⁵ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) [4.3] 46-47.

²⁸¹⁶ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) [1.7], [1.8] and [1.9] 3-4.

²⁸¹⁷ New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) 49-51.

²⁸¹⁸ *Conveyancing Act 1919* (NSW) s 177(8).

²⁸¹⁹ ‘Supporting land’ includes ‘the natural surface of the land, the subsoil of the land, any water beneath the land and any part of the land that has been reclaimed.’: *Conveyancing Act 1919* (NSW) s 177(3).

²⁸²⁰ *Conveyancing Act 1919* (NSW) s 177(2). The Act also provides that a ‘reference to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support’.

²⁸²¹ *Piling v Prynew; Nemeth v Prynew* [2008] NSWSC 118, [62]-[63]; Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) [33780.5].

²⁸²² *Conveyancing Act 1919* (NSW) s 177(4).

²⁸²³ *Conveyancing Act 1919* (NSW) s 177(5).

²⁸²⁴ *Conveyancing Act 1919* (NSW) s 177(6).

levels on his or her land.²⁸²⁵ The Commission recommended the enactment of a provision similar to section 179 of the PLA to extend the right of support which currently exists for land of an adjoining owner to buildings and other structures erected upon that land.²⁸²⁶ However, this recommendation was not adopted in Western Australia.

157.3.2. New Zealand

New Zealand courts have applied general negligence principles with respect to excavation works that affect neighbouring buildings. The principles in *Dalton v Angus*²⁸²⁷ were not followed in New Zealand. The New Zealand Court of Appeal applied the ordinary principles of negligence in the case of *Bognuda v Upton & Shearer Ltd.*²⁸²⁸ In that case, Turner J stated:

The theory of prescriptive acquisition assumes (in England, where prescriptive acquisition is possible) a right in the proprietor of adjoining land to excavate on his own land so as to interrupt the period of enjoyment. And he must be free from any duty, in the conduct of such an excavation, which the law of negligence might otherwise impose upon him. But in New Zealand, where the conditions are totally different, and it is impossible by virtue of the statute for such rights to be acquired by prescription, there would seem to be no reason, if logic and convenience recommend such a course, why the law of negligence should not be held to apply to excavation...²⁸²⁹

The dynamic expansion of negligence as a cause of action led ultimately to a pronouncement by the Lords (in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*) that modern commercial conditions necessitated the recognition of the extension of the action in negligence to misrepresentations, in circumstances where the relationship between representor and representee reasonably gave rise to a duty to take care. I think that the same conditions, and the same kind of legal development, require the same kind of extension in the law of negligence to the field of excavation of neighbouring properties.²⁸³⁰

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

157.4. Recommendation

The Centre recommends repealing section 179 and replacing it with provisions that apply 'duty of care' principles, modelled in part on the New South Wales legislation as set out above at paragraph 157.3.1.1. The Centre accepts that, although not frequently litigated, some continuing version of section 179 of the PLA is required to give parties a remedy where support for land is removed, and this is particularly relevant in the case of retaining walls. The QLS agrees, stating: 'in the Committee's experience, section 179 of the PLA is probably rarely litigated but it has important practical application and is often relied upon in practice.' However, the Centre is of the view that both the common law and the provision as it currently stands are unsatisfactory and can lead to unjust results.

²⁸²⁵ See Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Discussion Paper (Project No. 44) (September 1984) and Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Report (Project No. 44) (February 1986).

²⁸²⁶ Law Reform Commission of Western Australia, *Alteration of Ground Levels*, Report (Project No. 44) (February 1986) 13 [2.18]. The Commission also made other recommendations which reflected the legislative landscape in Western Australia at that time including an obligation under the *Local Government Act 1960-1985* (WA) which required an owner of land in prescribed circumstances to take certain steps to prevent a building on adjoining land from being damaged due to excavation undertaken as preparation for the building works.

²⁸²⁷ *Dalton v Angus* (1881) 6 App Cas 740.

²⁸²⁸ *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741.

²⁸²⁹ *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741, 761.

²⁸³⁰ *Bognuda v Upton and Shearer Ltd* [1972] NZLR 741, 766.

Consider the following example: there are neighbouring properties and a retaining wall on the property boundary that provides support from Property B to Property A on the higher block. Under the law as it currently stands, the owner of Property B on the lower side is strictly liable to maintain the wall which provides support to Property A. The owner of Property A installs a swimming pool on the land and the pool creates greater stress on the retaining wall, and water leaking from the pool damages the structure, causing it to weaken. The obligation to repair the wall and maintain support for the neighbouring property remains with the owner of Property B, notwithstanding the wall is now failing because of the actions of the owner of Property A.

In order to provide parties in circumstances such as these a fairer outcome, the Centre recommends adopting a 'duty of care/negligence' approach that will remove the 'strict liability' of the current provision and allow for an assessment to be made by a court about:

- whether or not a party has breached its duty of care in relation to maintaining support;
- whether the plaintiff has contributed to the negligence, and the extent of that contribution;
- what contributions the parties should make to fix the damage arising from the breach; and
- any other remedy the court sees fit such as injunctive relief or other damages.

The Centre notes that the New South Wales provisions discussed above at paragraph 157.3.1.1 provide a starting point. However, the Centre is of the view that this legislation does not go far enough and recommends modifying the New South Wales approach to:

- impose a corresponding duty on the owner of the supported property to not do, or fail to do anything that removes or reduces support;
- confirm that the section also operates in respect of support provided by structures on property boundaries (retaining walls);
- provide that the operation of the section includes omissions as an act giving rise to an action in negligence which imports a positive obligation on property owners to maintain support structures; and
- capture acts or omissions that are done in relation to either the supported land or the supporting land.

The Centre recommends the new provisions reflect the New South Wales model so that:

- the parties will be able to agree to contract out of the provisions; and
- any common law right to an action in nuisance is abolished.

157.4.1. Retaining walls

The scope of the recommended provision covers the support of neighbouring land generally and has been expanded to include the matter of structures on property boundaries that provide support (retaining walls).

Under this approach the owner of Property A may bring an action in negligence as against the owner of Property B if the retaining wall fails. In the course of those proceedings, the owner of Property B may argue contributory negligence by the owner of property A because of the water damage and additional stress on the wall caused by the swimming pool. It would then be at the discretion of the court as to the contributions to be made by each party to repair the wall and reinstate support.

Further, if the owner of Property B took reasonable steps in relation to maintaining support to Property A, then it is possible that a duty of care may not have been breached which means the owner of Property A will potentially bear the cost of remediation alone.

157.4.2. Acts and omissions

The extension of liability to include omissions has the support of the QLS. It was stated: ‘QLS considers that in principle, it is appropriate that omissions fall within the scope of the section. That is, if an owner builds a structure to provide support to adjoining land as a consequence of excavating the land, it seems reasonable that this owner then be responsible for the maintenance of the supporting structure.’

157.4.3. Corresponding duty from owner of the supported land

The Centre is of the view that, to completely address the deficiencies in the law, the new provisions should provide a corresponding duty on the owner of supported land to the owner of the supporting land not to do anything to adversely impact that support. Returning again to the example above, in those circumstances the owner of Property B would not have to wait until the retaining wall collapses and an action in negligence brought against him by the owner of Property A. The owner of Property A can attend to the maintenance and repair of the wall before the support is lost or reduced, and then seek a damages from the owner of Property B for a breach of his duty. Again, it would then be up to the court (where the parties are unable to come to an agreement themselves) to decide on the contribution of each party, based on the evidence as to the conduct of the parties. Another common example is where the supported land has trees with invasive root systems which damage retaining walls, causing them to fail. The proposed regime would allow the owner of the supporting property to sue the owner of the supported property for breach of duty, and thus avoid liability for the damage that was caused through no fault of their own.

157.4.4. ‘Owner of land’

The Centre recommends the term ‘owner’ be defined to include ‘any person with a legal or equitable estate in land’. This replicates the first limb of section 36 and schedule 1 of the *Acts Interpretation Act 1954* (Qld) which defines an ‘interest in land’ as ‘a legal or equitable estate in the land or other property...’.²⁸³¹ By way of example, an owner of land that is leased may refuse to bring an action for negligence notwithstanding the lessee stands to suffer damage as a result of that negligence. The damage may perhaps be to buildings, stock and equipment or interruption in trade of the lessee. If this recommendation is adopted, standing to bring an action directly is imparted to anyone with an interest in the land, including the lessee. This may be particularly important where a party with an interest in land needs to seek injunctive relief to avoid damage caused by the removal of support.

157.4.5. Contracting out

In line with the New South Wales model, the Centre is of the view that parties should be able to contract out of the provision completely or to a degree as decided by the parties. Such an agreement should be able to be registered as an easement on the freehold land register. Agreements would then ‘run with the land’ and can be enforced by and against successors in title. The agreement would also bind occupiers of the land, including lessees.

²⁸³¹ *Acts Interpretation Act 1954* (Qld) Sch 1.

157.4.6. Abolition of action in nuisance

The Centre recommends that the new provisions specifically abolish any common law right to an action in nuisance to prevent claims under the ‘strict liability’ regime. New South Wales has taken this approach.

157.4.7. Rationale for new regime

The Centre acknowledges that the QLS is of the view that section 179 of the PLA does not require any modification to the application or operation of the section. However, it is the Centre’s firm view that reform of the current law is required to provide a fairer framework for property owners. This echoes the thoughts of the NSWLRC which stated in relation to the application of the law similar to that currently in Queensland: ‘...the victim has insufficient redress... an innocent actor can be unjustly burdened, and that an actor whom the Commission believes ought to bear the burden escapes liability.’²⁸³² Mr Justice Richardson, in *Blewman v Wilkinson*²⁸³³ opined:

...the law concerning rights to lateral and subjacent support took shape in the second half of the last century, before the development of the concept of tortious negligence. An action for negligence has clearly expanded into this field and a landowner ... owes a duty ... to take reasonable care to ensure that the development is properly planned and carried out.

The Centre again acknowledges that the QLS prefers to maintain the current ‘strict liability’ approach, however the Centre believes it has outlined a compelling argument for reform in this area. The law of negligence allows the court to make a finding about where the liability lies after consideration of all the facts.

The case of *Fennell v Robson Excavations Pty Ltd*²⁸³⁴ provides a good example of how imposing strict liability in respect of support for land can lead to unjust results. In that case, a developer employed an excavator to excavate land. This was done in a proper fashion, creating a ‘sound, stable bank of earth which presented no immediate threat to the plaintiffs’ land, building or improvements.’²⁸³⁵ The court held that the excavation was conducted entirely at the direction of the developer and accepted that the excavator operator reasonably believed that the developer would erect a retaining wall. It transpired that the developer, who went into liquidation, did not erect the retaining wall and after six months and heavy rain, the plaintiff’s property lost support. The trial judge in the first instance found for the plaintiff and the excavator operator was liable for the damage caused.

On appeal the Court of Appeal held that the strength of authority supported the position that the person who created the nuisance was personally liable for it. This was held to be the case notwithstanding that the excavation operator was not the occupier of the supporting land, that he was employed or contracted to do the excavation, and that he was powerless to abate the damage. The court focused on the causal connection between the actions of the excavator operator and the damage. His Honour Mr Justice Glass was caused to comment in this case, to find the excavator operator liable ‘is offensive to basic notions of fairness’²⁸³⁶ but nevertheless, that was the ultimate

²⁸³² New South Wales Law Reform Commission, *The Right to Support From Adjoining Land*, Report 84 (1997) [4.3] 4.

²⁸³³ (1989) 18 NSWLR 119, 134.

²⁸³⁴ [1977] 2 NSWLR 486.

²⁸³⁵ [1977] 2 NSWLR 486.

²⁸³⁶ [1977] 2 NSWLR 486.493.

finding of the court. In the Centre’s view, applying the law of negligence to this fact scenario would likely have resulted in the developer being vicariously liable for the actions of the excavation operator.²⁸³⁷ Further, the developer’s contribution to the negligence, by not erecting the retaining wall, would be accounted for and lead to a more just result.

RECOMMENDATION 157. Section 179 should be repealed and replaced with provisions that provide for a duty of care/negligence regime to regulate support for land.

For example, using the New South Wales provisions as a guide, the section could be drafted in the following manner:

Section [179] Duty of care in relation to support for land

- (1) In this section –
 - occupier** includes a lessee or a mortgagee in possession, if that mortgagee in possession has the exclusive management and control of the land.
 - owner** includes an occupier of the land.
 - structure** includes buildings and other improvements on the land.
 - supporting land** is the land and any structure on the supporting land that provides support to other land and includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.
 - supported land** is land and any structures on the land that are provided with support by supporting land.
- (2) This section applies –
 - (a) notwithstanding the supporting land and supported land may not share a common boundary;
 - (b) to any support, including provided by structures anywhere on the land or common boundaries.
- (3) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land such that:
 - (a) the owner of supporting land owes a duty of care to the owner of supported land not to do any acts or omissions that adversely affects the support provided by the supporting land; and
 - (b) the owner of supported land owes a duty of care to the owner of supporting land not to do any acts or omissions that adversely affects the support provided by the supporting land.
- (4) A reference in this section to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support.
- (5) The duty of care in relation to support for land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed.
- (6) Any agreement referred to in subsection (5):
 - (a) has effect in relation to any agent of the person on whom the duty lies; and
 - (b) can take the form of an easement; and
 - (c) if the easement referred to in subsection (6)(b) is registered then it is binding on successors in title.
- (7) Any right at common law to bring an action in nuisance for acts or omissions that adversely affect the support provided by supporting land is abolished.

²⁸³⁷ This is subject to a finding the excavator operator is not a contractor, or any indemnity in the contract for service the parties may have entered into.

- (8) Any action in negligence that is commenced after the commencement of this section may be wholly or partly based on something that was done before the commencement of this section.

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

158.1. Overview and purpose

180 Imposition of statutory rights of user in respect of land

- (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (***the dominant land***) that such land, or the owner for the time being of such land, should in respect of any other land (***the servient land***) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
- (2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable –
 - (a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and
 - (b) on 1 or more occasions; or
 - (c) until a date certain; or
 - (d) in perpetuity or for some fixed period;
 as may be specified in the order.
- (3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that –
 - (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
 - (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
 - (c) either –
 - (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or
 - (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.
- (4) An order under this section (including an order under this subsection) –
 - (a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the court to be just; and
 - (b) may include such other terms and conditions as may be just; and
 - (c) shall, unless the court otherwise orders, be registered as provided in this section; and
 - (d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or extinguished by order of the court where it is satisfied that –
 - (i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or
 - (ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made; and
 - (e) shall when registered as provided in this section be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the servient land or the dominant land, whether or not such persons are parties to proceedings or have been served with notice or not.
- (5) The court may –
 - (a) direct a survey to be made of any land and a plan of survey to be prepared; and
 - (b) order any person to execute any instrument or instruments in registrable or other form necessary for giving effect to an order made under this section; and
 - (c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
 - (d) give directions for the conduct of proceedings; and
 - (e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.

- (6) In any proceedings under this section the court shall not, except in special circumstances, make an order for costs against the servient owner.
- (7) In this section –
owner includes any person interested whether presently, contingently or otherwise in land.
statutory right of user includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land.
utility includes any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility.
- (8) This section does not bind the Crown.

Section 180 of the PLA enables the Supreme Court to impose a statutory right of user on servient land where it is reasonably necessary in the interests of the effective use of the dominant land. The section was included in the PLA partly to address problems associated with access to individual residential or commercial properties which required access for services and utilities or to public highways.²⁸³⁸ The QLRC viewed the titles registration system as ‘accentuating’ the problems as it precluded recognition of easements which ‘would ordinarily be implied or imposed at law or in equity.’²⁸³⁹ The QLRC noted that:

There seems to be no reason why the court should not have the power to create such rights in favour of the dominant land and to impose them on the servient land where this is necessary in the interests of effective user of the dominant land.²⁸⁴⁰

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

any right of, or in the nature of, a right of way over, or of access to, or of entry upon land, and any right to carry and place any utility upon, over, across, through, under or into land.²⁸⁴¹

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

any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility.²⁸⁴²

Section 180 of the PLA operates in the following way:

- on application of the owner of the dominant land, the Supreme Court may impose on the servient land a statutory right of user in the form of an easement or licence etc. where it is reasonably necessary in the interests of effective use in any reasonable manner of the dominant land;²⁸⁴³

²⁸³⁸ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

²⁸³⁹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

²⁸⁴⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 102.

²⁸⁴¹ *Property Law Act 1974* (Qld) s 180(7).

²⁸⁴² *Property Law Act 1974* (Qld) s 180(7).

²⁸⁴³ *Property Law Act 1974* (Qld) s 180(1).

- a statutory right of user shall not be ordered unless the court is satisfied that:
 - it is consistent with the public interest that the dominant land should be used in the manner proposed;²⁸⁴⁴ and
 - the owner of the servient land can be adequately recompensed in money for any loss or disadvantage from the imposition of the obligation;²⁸⁴⁵ and
 - the owner of the servient land has refused to agree to accept the imposition of such obligation and such refusal is unreasonable in the circumstances or there is no one with the capacity to agree to the obligation.²⁸⁴⁶
- the statutory right of user may take the form of an easement, licence or otherwise;²⁸⁴⁷
- an order made by the court must include, except in special circumstances, provision for payment by the applicant of compensation or consideration as in the circumstances appears just.²⁸⁴⁸ The order must be registered and once this occurs the order is binding on all persons;²⁸⁴⁹
- the order imposing the obligation can be modified or extinguished where the court is satisfied that the statutory right of user is no longer reasonably necessary or in the interests of effective use of the dominant land or some material change in circumstances has taken place since the order imposing the order was made;²⁸⁵⁰
- an order for costs against the servient owner must not be made, except in special circumstances;²⁸⁵¹
- the section does not bind the Crown.²⁸⁵²

There is significant case law considering the application of section 180 of the PLA. A summary of the key principles to be applied in section 180 cases was set out in the Supreme Court decision of *Lang Parade Pty Ltd v Peluso*.²⁸⁵³ The summary provided by Douglas J is below:

- (a) One should not interfere readily with the proprietary rights of an owner of land.
- (b) The requirement of 'reasonably necessary' does not mean absolute necessity.
- (c) What is 'reasonably necessary' is determined objectively.
- (d) Necessary means something more than mere desirability or preferability over alternative means; it is a question of degree.
- (e) The greater the burden of the imposition that is sought, the stronger the case needed to justify a finding of reasonable necessity.

²⁸⁴⁴ *Property Law Act 1974* (Qld) s 180(3)(a).

²⁸⁴⁵ *Property Law Act 1974* (Qld) s 180(3)(b).

²⁸⁴⁶ *Property Law Act 1974* (Qld) s 180(3)(c).

²⁸⁴⁷ *Property Law Act 1974* (Qld) s 180(2).

²⁸⁴⁸ *Property Law Act 1974* (Qld) s 180(4)(a).

²⁸⁴⁹ *Property Law Act 1974* (Qld) ss 180(4)(c) and (e). The court can order otherwise in terms of registering the obligation.

²⁸⁵⁰ *Property Law Act 1974* (Qld) s 180(4)(d).

²⁸⁵¹ *Property Law Act 1974* (Qld) s 180(6).

²⁸⁵² *Property Law Act 1974* (Qld) s 180(8).

²⁸⁵³ *Lang Parade Pty Ltd v Peluso* [2006] 1 Qd R 42, [23]. The summary of the principles to be applied when considering section 180 cases set out by Douglas J in that case has been endorsed in subsequent decisions including *Tran v Cowan* [2006] QSC 136, [37], *Steer v Hemmings* [2010] QSC 460 and by the Queensland Court of Appeal in *The Proprietors Cathedral Village Building Units Plan No 106957 v Cathedral Place Community Body Corporate* [2013] QCA 264.

- (f) For a right of user to be reasonably necessary for a development, the development with the right of user must be (at least) substantially preferable to development without the right of user.
- (g) Regard must be had to the implications or consequences on the other land of imposing a right of user.²⁸⁵⁴

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

Indeed, so many and varied are the applications of the section and its interstate counterparts, and so many and varied the judicial responses to applications, that it is often difficult to predict whether a court will approve an application for the grant of an easement.²⁸⁵⁵

There are still some aspects of section 180 of the PLA which remain uncertain and potentially raise issues of clarity. These issues are identified and discussed in paragraph 158.2 below.

158.2. Issues with the section

158.2.1. Is there a need to include the term ‘development’ in section 180(1) of the PLA?

Section 180(1) of the PLA refers to the imposition of a statutory right of user where it is ‘reasonably necessary in the interests of effective use in any reasonable manner of any land’. In New South Wales, section 88K(1) of the *Conveyancing Act 1919* (NSW), which is similar in effect to section 180 of the PLA, refers to ‘effective use or development’. It is not clear whether the absence of the term ‘development’ in section 180(1) of the PLA has the effect of narrowing the scope of the section. A Queensland decision which considered a request for a statutory easement for development purposes is *Re Worthston Pty Ltd*.²⁸⁵⁶ The application for a right of statutory user in that case was for an easement which, when the subdivision of the relevant land was completed, would have become a dedicated road. If the statutory right of user was granted the potential purchaser’s proposed subdivision could proceed immediately, rather than being subject to a decision of the servient owner.²⁸⁵⁷ Carter J indicated that the section should not ‘generally be available as a means of resolving a dispute between competing sub-dividers or to effectively limit or fetter in any way the discretion which a planning authority has in relation to matters of land development.’²⁸⁵⁸ His Honour stated that the wide language of section 180 of the PLA did not preclude the making of an order in the circumstances of the case, but that the circumstances needed to be ‘very special ones before an order was made’.²⁸⁵⁹ In his view, the real purpose of the application for the statutory right of user in the case before him was to partly pre-empt the decision of the relevant planning authority and that it was a matter for the Brisbane City Council to decide the issue.²⁸⁶⁰

The difference between section 180(1) of the PLA and section 88K of the *Conveyancing Act 1919* (NSW) was discussed in the case of *Tregoyd Gardens Pty Ltd v Jervis*.²⁸⁶¹ Hamilton J in that case made the following comments:

²⁸⁵⁴ *Lang Parade Pty Ltd v Peluso* [2006] 1 Qd R 42, [23].

²⁸⁵⁵ Peter Butt, ‘Compulsory Easements’ (2006) 80 *Australian Law Journal* 557, 559.

²⁸⁵⁶ [1987] 1 Qd R 400.

²⁸⁵⁷ *Re Worthston Pty Ltd* [1987] 1 Qd R 400.

²⁸⁵⁸ *Re Worthston Pty Ltd* [1987] 1 Qd R 400, 408.

²⁸⁵⁹ *Re Worthston Pty Ltd* [1987] 1 Qd R 400, 407.

²⁸⁶⁰ *Re Worthston Pty Ltd* [1987] 1 Qd R 400, 407.

²⁸⁶¹ (1997) 8 BPR 15,845.

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

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

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

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

Section 180 of the PLA makes provision for the payment of compensation to the owner of servient land where a statutory right of user is granted. However, the basis for the determination of the amount of compensation is not always clear. Section 180(4)(a) of the PLA provides for the payment ‘of such amount by way of compensation or consideration as in the circumstances appears to the court to be just.’ An issue which has not been completely resolved in the case law is the meaning of the words ‘compensation’ and ‘consideration’ and the relevance of any benefit obtained or appreciation in value of the dominant tenement through the imposition of a right of user to the quantification of compensation or consideration payable.²⁸⁶² Section 88K(4) of the *Conveyancing Act 1919* (NSW) only refers to ‘compensation’. The case law considering this issue in both New South Wales and Queensland is not settled.²⁸⁶³ The issue was recently considered in Queensland in the case of *Peulen & Anor v Agius*.²⁸⁶⁴ Chief Justice de Jersey expressed the following views in relation to the issue of ‘compensation’ and ‘consideration’ in section 180(4)(a) of the PLA:

- the inclusion of the word ‘consideration’ would be otiose if the term was interpreted to mean ‘consideration for loss or damage’ as it would be coextensive with ‘compensation’. The better approach is that the word ‘consideration’ justified the court considering the benefit to the dominant tenement in quantifying the value of compensation to be awarded;²⁸⁶⁵
- however, this does not mean that the court ‘should’ consider the benefit to the dominant tenement. Calculating compensation is ‘unquestionably’ a discretionary decision of the court;²⁸⁶⁶

²⁸⁶² Bill Dixon, ‘Compensation or consideration for a statutory right of user?’(2015) 35 *Queensland Lawyer* 54, 55.

²⁸⁶³ *Peulen & Anor v Agius & Anor* [2015] QSC 137, [87].

²⁸⁶⁴ [2015] QSC 137.

²⁸⁶⁵ *Peulen & Anor v Agius* [2015] QSC 137, [89].

²⁸⁶⁶ *Peulen & Anor v Agius* [2015] QSC 137, [90].

- the weight of the case law in New South Wales and Queensland suggests that the ‘primary focus of any award under section 180(4)(a) should be compensation for loss, damage or harm.’ In this respect, ‘it would not be common for the court to determine the amount payable to the owner of the servient tenement by reference to the benefit to the owner of the dominant as a result of the imposition of the statutory right of user.’²⁸⁶⁷

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

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

Section 180(6) of the PLA expressly provides that costs must not be ordered against the servient owner arising from an order imposing a statutory right of user except in special circumstances. Commentary suggests that special circumstances ‘might only arise where the servient owner has deliberately acted to subvert the process to pursue an ulterior plan consistent with an abuse of process.’²⁸⁶⁸ The issue of costs under section 180 has been considered in a number of cases in Queensland.²⁸⁶⁹ Although the success of applications for costs in these cases has varied, there are some general comments about ‘special circumstances’ which can be made as follows:

- a dishonest defence of the servient owner may be a special circumstance. In the case of *Tran & Anor v Cowan & Ors*²⁸⁷⁰ both parties bought their land in full knowledge that they would share a common drive way through an easement over part of the respondent’s land. The registration of the easement was omitted through oversight and the respondent contended dishonestly that they had no knowledge of the easement and defended the section 180 application on the basis that ‘their rights of property, innocently acquired, should not be diminished’.²⁸⁷¹ Indemnity costs were ordered in this case;
- special circumstances existed where, along with other factors, the servient owners were not just relying on their rights under section 180 but actually sought to exploit their position commercially and unrealistically by attempting to extract a higher amount of compensation;²⁸⁷²
- the fact a respondent is motivated to refuse to accept the imposition of a statutory right of user for reasons unrelated to the subject matter of a section 180 application is not necessarily a ‘special circumstance’.²⁸⁷³

²⁸⁶⁷ *Peulen & Anor v Agius* [2015] QSC 137, [90].

²⁸⁶⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.180.510].

²⁸⁶⁹ See for example: *Re: De Pasquale Bros P/L & NJF Holdings P/L* [2000] QSC; *Graham and Anor v Murphy & Anor* [2013] QSC 21; *Griffiths v Bradshaw (No 2)* [2015] QSC 194 (which did not provide any significant analysis of section 180(6)); and *Tran & Anor v Cowan & Ors* [2006] QSC 162.

²⁸⁷⁰ [2006] QSC 162.

²⁸⁷¹ *Tran & Anor v Cowan & Ors* [2006] QSC 162, [5]. In the case of *Re: De Pasquale Bros P/L & NJF Holdings P/L* [2000] QSC 004 costs were ordered against the servient owner. However, this case was distinguished in the decision of *Graham and Anor v Murphy & Anor* [2013] QSC 21 where McMeekin J noted that the ‘level of perversity in the respondents’ conduct in *De Pasquale*’ was not present in the case before him: at [96].

²⁸⁷² *Lang Parade Pty Ltd v Peluso* [2004] QSC 133.

²⁸⁷³ *Griffiths v Bradshaw (No 2)* [2015] QSC 194, [15].

McMeekin J in *Graham and Anor v Murphy & Anor*,²⁸⁷⁴ when considering whether an order for costs should be made under section 180(6), indicated that:

The underlying premise of the legislation is that the legislature expected there to be opposition and unreasonable opposition, to requests to impose on the property rights of others. The jealous guarding of one's rights is all that one might expect in these cases.²⁸⁷⁵

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

158.2.4. Broadening the definition of 'utility' to cover 'cables'

The definition of 'utility' in section 180(7) does not expressly refer to cables (for example, computer data cables). However, as it is an inclusive definition it is arguably broad enough to encompass cables, particularly considering the reference in the definition to 'other service pipes or lines'. There may be some advantages, particularly for purposes of clarity, to expressly include a reference to cables in the definition.²⁸⁷⁶

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

It is not unusual for construction cranes (or scaffolding) to encroach into the airspace of neighbouring properties when larger developments are being undertaken.²⁸⁷⁷ Section 180 of the PLA has been used in Queensland for the purpose of obtaining a statutory right of user on servient land to enable the use of these cranes for the duration of the relevant development.²⁸⁷⁸ In the case of section 88K of the *Conveyancing Act 1919* (NSW), one of the reasons for its introduction was to address the issue of the use of cranes for larger developments which inevitably encroach into the airspace of neighbouring land.²⁸⁷⁹ During the Second Reading speech of the Bill it was acknowledged that:

All that these provisions reflect is a realisation that private development may also be beneficial for the public, and that such developments should not be unreasonably frustrated or held to ransom.²⁸⁸⁰

There is no explicit reference in section 180 of the PLA to airspace and the term 'land' is not defined in the PLA.²⁸⁸¹ However, it is an accepted principle that land extends to airspace, subject to some

²⁸⁷⁴ [2013] QSC 21.

²⁸⁷⁵ *Graham and Anor v Murphy & Anor* [2013] QSC 21, [96].

²⁸⁷⁶ Schedule 6 of the *Body Corporate and Community Management Act 1997* (Qld) defines the term 'utility infrastructure' to mean a number of things including 'cables, wires, ... by which lots ... are supplied with utility services. The term 'utility services' is then defined to mean a number of things including '(f) a computer data or television service'.

²⁸⁷⁷ Bill Dixon, 'Cranes, Claims and a Statutory Right of User' (2005) 26 *Queensland Lawyer* 61, 63.

²⁸⁷⁸ *Lang Parade Pty Ltd v Peluso* [2005] QSC 112.

²⁸⁷⁹ New South Wales, Second Reading, Legislative Assembly, Property Legislation Amendment (Easements) Bill (4 December 1995) 4000 (JW Shaw).

²⁸⁸⁰ New South Wales, Second Reading, Legislative Assembly, Property Legislation Amendment (Easements) Bill (4 December 1995) 4000 (JW Shaw).

²⁸⁸¹ Section 36 of the *Acts Interpretation Act 1954* (Qld) provides that land includes 'messuages, tenements and hereditaments, corporeal or incorporeal, of any tenure or description, and whatever may be the interest in land.'

limitations. In the *Property Law Act 2007* (NZ), for the purposes of dealing with wrongly placed structures, land is defined to include airspace over land.²⁸⁸²

158.3. Other jurisdictions

158.3.1. Australia

New South Wales introduced section 88K of the *Conveyancing Act 1919* (NSW) in 1995.²⁸⁸³ The section allows the Supreme Court to make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.²⁸⁸⁴ The order may be made if the court is satisfied of the matters set out in section 88K(2)(a) to (c), which include that the use of the land in accordance with the easement will not be inconsistent with the public interest. The section also provides for the court to order the payment of compensation as the court considers appropriate, unless there are special circumstances.²⁸⁸⁵

Tasmania and the Northern Territory have provisions in place which allow the relevant Supreme Court to order a statutory right of user in relation to the servient land. The provisions are in a similar form to section 180 of the PLA.²⁸⁸⁶ Victoria does not have an equivalent provision to section 180 of the PLA, however the Victorian Law Reform Commission did recommend in 2010 that the *Property Law Act 1958* (Vic) should empower the Victorian Civil and Administrative Tribunal to make an order granting an easement over land where, amongst other factors, the easement is reasonably necessary for the effective use or development of other land.²⁸⁸⁷ This recommendation has not been implemented in Victoria.

158.3.2. New Zealand

The *Property Law Act 2007* (NZ) does not have an equivalent provision to section 180 of the PLA. However, Part 6 of the Act sets out a number of special powers of the court in relation to authorising entry onto or over neighbouring land, granting relief for wrongly placed structures and granting access to landlocked land.²⁸⁸⁸

158.4. Recommendation

The Centre confirms that section 180 of the PLA is an important provision and should remain in place, but with some minor amendments, mostly directed at broadening the scope of the section. The specific recommendations are set out in turn below.

²⁸⁸² *Property Law Act 2007* (NZ) s 321.

²⁸⁸³ Section 88K was inserted in the *Conveyancing Act 1919* (NSW) by the *Property Legislation Amendment (Easements) Act 1995* (NSW). The section commenced on 12 February 1996.

²⁸⁸⁴ *Conveyancing Act 1919* (NSW) s 88K(1).

²⁸⁸⁵ *Conveyancing Act 1919* (NSW) s 88K(4).

²⁸⁸⁶ See *Conveyancing and Law of Property Act 1884* (Tas) s 84J and *Law of Property Act 2000* (NT) ss 163-164.

²⁸⁸⁷ See Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010), Recommendations 6 and 7. The Law Reform Commission preferred the New South Wales approach to the imposition of an easement over land. The recommendation has not been implemented to date.

²⁸⁸⁸ See *Property Law Act 2007* (NZ) ss 319 and 320 (entry onto neighbouring land); ss 321-325 (wrongly placed structures); ss 326-331 (landlocked land).

158.4.1. Insert the word ‘development’ into section 180(1)

As discussed at paragraph 158.2.1, the benefit of inserting the word ‘development’ into subsection (1) is to broaden the scope of the section to the same operation as the New South Wales equivalent. This will allow ‘purely private development’ to proceed on land whereas in the absence of such a provision, the development ‘would not be able to proceed without the acquisition [of an easement], against the provision for compensation to be made.’²⁸⁸⁹

This approach has the support of the QLS, and in submissions to the Centre the Society notes that there is ‘no disadvantage to this approach’. The Society comments that this, ‘is consistent with the position adopted by Douglas J in *Lang Parade Pty Ltd v Peluso [2005]* ... is appropriate to ensure one owner cannot unreasonably refuse to grant access rights to an adjoining owner and thereby encourage appropriate development and enable land to be used for its full potential.’

158.4.2. Benefit to the dominant land as a basis for calculating compensation

The matter of whether the court should take the benefit to the dominant land into account when assessing the amount of compensation or consideration to be paid to the owner of the servient land is something that should be left up to the discretion of the court. The Centre does not recommend any amendments to the section that attempt to guide the court in this regard. The better view is that while the court has the discretion to consider this factor, it should be left to the court to decide on a case by case basis whether or not the benefit to the dominant land (and likely an increase in its commercial value) is to be used as a basis for calculating compensation or consideration. The QLS agrees that the section needs no further amendments and the matter should be left solely to the court to decide.

158.4.3. Costs under subsection 180(6)

No changes are recommended with respect to the operation of section 180(6) on the basis that the case law is reasonably consistent and further guidance and principles are likely to be extracted from future cases considering the section. The QLS agrees that the subsection does not need to be amended.

158.4.4. Definition of ‘utility’

The Centre recommends, for the removal of all doubt, that the definition of ‘utility’ in section 180(7) be amended to include ‘cables’. However, as noted in the discussion above at paragraph 158.2.4, this is not critical as it is likely the definition is broad enough to capture cables in any event.

158.4.5. Definitions in section 180(7)

No changes are recommended with respect to the definition in section 180(7) on the basis that the law in this area is well settled and it goes without saying that ‘land’ includes airspace. The QLS agrees that the subsection does not need to be amended.

The Centre recommends amending the definition of ‘owner’ to read ‘means person with a legal or equitable estate in the land’. This more suitably expresses what an owner of land is, and appropriately

²⁸⁸⁹ *Tregoyd Gardens Pty Ltd v Jervis* (1997) 8 BPR 15,845.

replicates the first limb of the definition of an interest in land in schedule 1 of the *Acts Interpretation Act 1954* (Qld).²⁸⁹⁰

158.4.6. Section does not bind the Crown

The Centre recommends that further consideration be given to the effect of section 180(8) and, as a matter of policy, if there is any justifiable reason why the Crown should not be bound by the section.²⁸⁹¹ The Centre expresses no view one way or the other.

158.4.7. Easements in gross in favour of local governments or other statutory authorities

In submissions received from the QLS, the Society has identified a practical shortcoming in the operation of section 180 of the PLA. The QLS notes that ‘it appears to limit the power of the courts to granting rights in favour of “dominant land” and does not extend to the grant of easements in gross in favour of local governments or other statutory authorities.’ The QLS helpfully set out the circumstances in which this issue arises:

It is quite common in practice for developers to construct infrastructure for storm water, sewerage, water, electrical or other services through land adjoining the development site in order to connect to existing infrastructure. In some cases this may be the only practical or feasible way of providing services to the development site.

A commonly encountered issue is the question of overland flow drainage in semi-rural areas which are undergoing more intensive subdivision and development. In the past it was common for Councils to merely require a lawful point of discharge from the development site and this could be satisfied by an agreement with the adjoining owner to allow stormwater to discharge onto the owner’s land. However, increasingly, developers are being required, as a condition of development approvals, to ensure that stormwater is taken by pipe through adjoining land to a creek or a connection to the local stormwater drainage system and to procure the grant of easements in gross in favour of the local government or other relevant authority over this infrastructure.

QLS is aware of situations in which an adjoining owner (a competing land developer) has refused to grant an easement or requires significant financial concessions simply to gain a commercial advantage. QLS believes section 180 should be amended to permit the Courts to order the grant of an easement in gross over servient land at the request of an owner / developer. The developer would remain responsible for payment of compensation or satisfaction of other conditions determined by the Court as appropriate.

The Centre agrees that this problem could be addressed by including an amendment to section 180 that allows an application for an easement in gross in favour of a local authority. It would then be the court that decides what is reasonable compensation or consideration for that easement, if it is granted. This, in turn, would prevent competing developers unreasonably refusing to grant the easement, or from demanding excessive compensation or consideration for same.

²⁸⁹⁰ *Acts Interpretation Act 1954* (Qld) Sch 1.

²⁸⁹¹ See for example *Devine v Emu Park Historical Museum Society Inc* [2013] 1 Qd R 23; [2012] QSC 117.

RECOMMENDATION 158. Section 180 should be amended in the following terms:

- amend subsection (1) to insert the word ‘development’: ‘*Where it is reasonably necessary in the interests of effective use and development in any reasonable manner...*’
- amend the definition of ‘utility’ in subsection (7) to include ‘cables’;
- amend the definition of ‘owner’ in subsection (7) to read ‘means any person with a legal or equitable estate in the land’;
- consider repealing subsection (8) so that the Crown is bound by the section; and
- add a subsection that allows for a party to apply under this section for an easement in gross in favour of a local authority, thus broadening the scope of the section.

For example, a subsection to broaden the scope of the section to include applications for an easement in gross in favour of a local authority could be drafted in the following manner:

- (1A) On the application of an owner of the dominant land but subject to this section, the court may:
- (a) take into account the conditions of any approved plan for development of the dominant land; and
 - (b) make an order that an easement in gross be granted in favour of a public utility provider under section 81A of the *Land Title Act 1994* or schedule 6 of the Land Act.
- (1B) In making an order under subsection (1A), the court must be satisfied that:
- (a) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
 - (b) either –
 - (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner’s refusal is in all the circumstances unreasonable; or
 - (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.

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

159.1. Overview and purpose

181 Power to modify or extinguish easements and restrictive covenants

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

affected by an easement or restriction, and the nature and extent of it, and whether the same is or would in any given event be enforceable, and if so by whom.

- (7) Notice of any application made under this section shall, if the court so directs, be given to the local government in whose area the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as the court, either generally or in a particular instance, may order.
- (8) An order under this section shall, when registered, entered or endorsed, be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the easement, or interested in enforcing the restriction and whether such persons are parties to the proceedings or have been served with notice or not.
- (9) The court may –
 - (a) direct a survey to be made of any land and a plan of survey to be prepared; and
 - (b) order any person to execute any instrument or instruments in registrable or other form necessary for giving effect to an order made under this section; and
 - (c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
 - (d) give such directions for the conduct of proceedings; and
 - (e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.

Section 181 of the PLA enables the Supreme Court to order the modification or extinguishment (whole or partial) of an easement or restrictive covenant on the application of any person interested in the relevant land. The section is modelled on section 84 of the *Law of Property Act 1925* (UK).²⁸⁹² The section applies to both easements and restrictive covenants. Easements can include bare easements which may provide for right of way but which do not include any terms which govern the easement such as repair and maintenance.²⁸⁹³ An easement may also include significant detail regarding the terms which are set out in the instrument of easement. Restrictive covenants are not registrable in Queensland. However, certain statutory covenants in favour of the State or a local government and covenants in a building management statement may be registered in certain limited circumstances under the *Land Title Act 1994* (Qld).²⁸⁹⁴ The use of section 181 of the PLA in relation to restrictive covenants, to date, has been limited. For this reason, this Report will primarily use the term easement when considering section 181. Further discussion regarding the scope of section 181 of the PLA is set out in paragraph 159.2.2.

The impact of making an order to extinguish or modify an easement is significant as it may affect a proprietary right of the dominant tenement owner.²⁸⁹⁵ Commentary on the consequences of making an order under the section provides:

²⁸⁹² Section 84 of the *Law of Property Act 1925* (UK) was substantially amended by section 28 of the *Law of Property Act 1969* (UK). This accounts for the variations between section 181 of the PLA and other jurisdictions such as New South Wales and Victoria where the equivalent provisions were also based on the unamended version of section 84 of the *Law of Property Act 1925* (UK).

²⁸⁹³ Stephen Lumb, 'Modifying Easements: Living in the Past' (2014) 4 *Property Law Review* 136, 136.

²⁸⁹⁴ The limited situations in which restrictive covenants can be registered are set out in sections 54A and 97A of the *Land Title Act 1994* (Qld). All freehold land in Queensland is registered under the *Land Title Act 1994* (Qld). That Act does not provide for the registration of a restrictive covenant, subject to the limited circumstances discussed previously. See Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 704 [15.370].

²⁸⁹⁵ Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) [15.370] 705.

NOT GOVERNMENT POLICY

This section has the far reaching consequence of permitting a court (intended to be the Local Government Court) exercising the jurisdiction of the Supreme Court, to modify or extinguish what would otherwise be perfectly enforceable agreements, to take account of changes in the use and enjoyment of the land since the creation of those agreements.²⁸⁹⁶

Judicial comments have noted that the court should take a cautious approach to making an order that modifies or extinguishes an easement.²⁸⁹⁷ Keane JA in the Court of Appeal decision *Averono v Mbuzi & Anor* said:

It is well established that the courts should approach an application for extinguishment of an easement on the footing that it is 'a serious inroad upon the proprietary right which is vested' in the owner of the dominant tenement.²⁸⁹⁸

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

- extinguishes the covenant or easement in its entirety,²⁸⁹⁹
- partially extinguishes the covenant or easement. For example, reducing the area of a right of way,²⁹⁰⁰
- modifies the covenant or easement. For example, modifying a covenant or easement to enable the construction of a building which would otherwise breach the covenant or affect the easement.²⁹⁰¹

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

- the easement 'ought to be deemed' obsolete having regard to the matters in subsection 181(1)(a) including a change in the user of any land having the benefit of the easement or restriction, or in the character of the neighbourhood or other circumstances the court may deem material;²⁹⁰² or
- the continued existence of the easement would impede some reasonable user of the servient tenement; and
 - the easement in impeding that user does not secure to persons entitled to the benefit of it any practical benefits of substantial value, utility, or advantage to them; and
 - money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from extinguishment or modification;²⁹⁰³ or

²⁸⁹⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.181.90]).

²⁸⁹⁷ Queensland cases include *Averono v Mbuzi* [2005] QCA 295, [19] and *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158, [57].

²⁸⁹⁸ [2005] QCA 295, [19].

²⁸⁹⁹ See *Re Eddowes* [1991] 2 Qd R 381 where the court extinguished an easement of way. The easement had not been used for an extended period (years) as it had been fenced off. See Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 583 [19.74].

²⁹⁰⁰ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 584 [19.74].

²⁹⁰¹ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 584 [19.74].

²⁹⁰² *Property Law Act 1974* (Qld) s 181(1)(a).

²⁹⁰³ *Property Law Act 1974* (Qld) s 181(1)(b)(i).

NOT GOVERNMENT POLICY

- the continued existence of the easement would impede some reasonable user of the servient tenement; and
 - the easement in impeding that user is contrary to public interest; and
 - money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from extinguishment or modification;²⁹⁰⁴ or
- persons of full age and capacity entitled to the easement have agreed to the easement being modified or wholly or partially extinguished;²⁹⁰⁵ or
- persons of full age and capacity entitled to the easement by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part;²⁹⁰⁶ or
- the proposed modification or extinguishment will not 'substantially injure' the persons entitled to the easement.²⁹⁰⁷

The court is required to take into account the specified planning material in determining if the case falls within section 181(1)(a) and (b). In addition, the court is required to take into account the material more generally for the purpose of determining if an easement or restriction should be modified or extinguished.²⁹⁰⁸

Other relevant aspects of section 181 of the PLA include:

- the court retains a residual discretion to reject an application to modify or extinguish an easement, even if the applicant has satisfied one of the conditions in section 181(1). This is consistent with the significant impact on proprietary rights that an order under section 181 can have;²⁹⁰⁹
- an order which extinguishes or modifies an easement may also require the applicant to pay any person entitled to the benefit of the easement a sum which the court thinks is just:
 - to compensate that person for any loss or disadvantage suffered as a result of the modification or extinguishment; or
 - to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration being received for the land affected by it;²⁹¹⁰
- an application for modification or extinguishment will stay proceedings in an action to enforce the easement or covenant until the application for extinguishment or modification has been determined (unless otherwise ordered by the court);²⁹¹¹

²⁹⁰⁴ *Property Law Act 1974* (Qld) s 181(1)(b)(ii).

²⁹⁰⁵ *Property Law Act 1974* (Qld) s 181(1)(c).

²⁹⁰⁶ *Property Law Act 1974* (Qld) s 181(1)(c).

²⁹⁰⁷ *Property Law Act 1974* (Qld) s 181(1)(d).

²⁹⁰⁸ *Property Law Act 1974* (Qld) s 181(2).

²⁹⁰⁹ For a detailed list of the cases which support the existence of this residual discretion see Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 575 [19.62].

²⁹¹⁰ *Property Law Act 1974* (Qld) s 181(4).

²⁹¹¹ *Property Law Act 1974* (Qld) s 184(5).

- the court can make a declaration whether or not land is affected by an easement (or covenant) and the nature and extent of it and whether it is enforceable and if so, by whom. Any person interested can make an application;²⁹¹²
- an order under section 181 is binding on all persons once registered.²⁹¹³

159.2. Issues with the section

Modification and extinguishment cases have generally considered restrictive covenants rather than easements.²⁹¹⁴ Commentary suggests that there are only a limited number of reported cases where applications for modification or extinguishment of restrictive covenants or easements have been successful.²⁹¹⁵ The discussion below identifies a number of different aspects of section 181 of the PLA which may require clarification.

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

Section 181(1)(a) of the PLA requires an applicant to show that, because of: a change in user of any land having the benefit of the easement or restriction; or the character of the neighbourhood; or other circumstances of the case considered material, the easement or restriction ought to be deemed obsolete. The term ‘obsolete’ has been considered in a number of cases. In *Re Rollwell Australia Pty Ltd*²⁹¹⁶ de Jersey CJ said:

The ordinary meaning of ‘obsolete’ is disused, discarded, antiquated; or as put in some cases, no longer relevant to the circumstances presently obtaining.²⁹¹⁷

In that case, de Jersey CJ accepted that the easement in question had not been used for a very long time but that it had not been ‘discarded’ or ‘abandoned’ and that the potential use of the easement prevented a conclusion that it was obsolete.²⁹¹⁸

Keane JA in the Court of Appeal decision *Averono & Anor v Mbuzi & Anor*²⁹¹⁹ indicated that:

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

Obsolescence has also been established where a covenant or easement is incapable of fulfilment or ‘serves no present useful purpose’.²⁹²⁰

²⁹¹² *Property Law Act 1974* (Qld) s 181(6).

²⁹¹³ *Property Law Act 1974* (Qld) s 181(8).

²⁹¹⁴ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 570 [19.53].

²⁹¹⁵ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 572 [19.55].

²⁹¹⁶ (1999) Q ConvR 54-521 [11].

²⁹¹⁷ *Re Rollwell Australia Pty Ltd* (1999) Q Conv R 60,195 (54-521) [11]; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.181.150].

²⁹¹⁸ *Re Rollwell Australia Pty Ltd* (1999) Q Conv R 60,195 (54-521), [11].

²⁹¹⁹ [2005] QCA 295 [20].

²⁹²⁰ See *Effeney v Millar Investments Pty Ltd* [2011] NSWSC 708, [200]; *Re Mason* [1962] NSW 762. For further case law references see Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (LexisNexis, 2012) 168 [32253.10].

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

- a restrictive covenant over a lot which was created in 1921 limiting the number of dwellings which could be built on the lot was held not to be obsolete as ‘the original purpose for imposing the restriction could still be served’ despite the later change of character of the nearby area with the construction of modern housing developments of mixed and varied character. The original purpose for imposing the restriction was to confine the use to residential purposes and control the number of houses that might be constructed on the property;²⁹²¹
- an easement of right of way which had not been used for any purpose since 1964 was held not to be obsolete. There was some suggestion in the case that the original purpose of the easement was to provide access to a water pump but this access was no longer necessary because of town water access which had been available for approximately 30 years. However, the ‘dominant tenement submitted that there may be no need to use the easement but it merely needed a potential for use, particularly considering the redevelopment potential of the dominant tenement.’²⁹²² The potential use of the easement was sufficient to prevent the court accepting that it was obsolete;
- an access easement to an arterial road granted in 1938 was deemed obsolete following the subdivision of a dominant tenement of 213 acres because it served no practical benefit. The easement was undesirable as a result of increased traffic from the subdivision of the lot into 266 lots and increased traffic. It was found that actual access to that arterial road was ‘impossible or impractical’;²⁹²³
- a right of way easement was granted in 1970 in favour of land on which a house was constructed. The land subsequently became part of common area. Fifteen years later a wire fence was erected preventing the use of the right of way in order to prevent trespassers. No further use had been made of the easement and the court granted the application to extinguish on the basis that it was obsolete.²⁹²⁴

Despite the case law which has considered this issue, it can be difficult to establish that an easement is ‘obsolete’.²⁹²⁵ The inclusion of the word ‘obsolete’ in section 181(1)(a) has the potential to create an inflexible provision that is unable to operate in a way intended – that is, to extinguish easements or covenants that should not exist any longer. If the discretion of the court is not linked to the concept of obsolescence, then there may be greater flexibility in the application of the section to a broader category of easements.

The VLRC recommended the removal of the term in the context of section 84 of the *Property Law Act 1958* (Vic) (which is similar to section 181 of the PLA).²⁹²⁶ The word ‘obsolete’ was reviewed by the

²⁹²¹ *Re Pivotal Pty Ltd* [2000] VSC 264. See commentary in Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [10.550] on this case.

²⁹²² *Re Rollwell Australia Pty Ltd* (1999) Q Conv R 60,195 (54-521), [11] and Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.181.150].

²⁹²³ *Re Wenck* [2004] QSC 15.

²⁹²⁴ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 595 [19.89] discussing *Re Eddowes* [1991] 2 Qd R 381.

²⁹²⁵ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [16128].

²⁹²⁶ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 125-126.

Commission as part of a broader review of easements and covenants in Victoria in 2010.²⁹²⁷ Since 2005 in Victoria, there have been two distinct lines of judicial authority in relation to the meaning of 'obsolete' in section 84 of the *Property Law Act 1958* (Vic). The traditional view was that a covenant was obsolete only if 'its original purpose could no longer be served.' The VLRC noted that the test has been hard to meet and courts have not regarded a covenant as obsolete where the 'covenant continues to have any value for the persons entitled to the benefit of it.'²⁹²⁸ However, in the Supreme Court decision of *Stanhill Pty Ltd v Jackson*²⁹²⁹ the word 'obsolete' was given its ordinary meaning so that the test is 'whether the covenant is outmoded or out of date.'²⁹³⁰ The VLRC noted that:

The 'obsolescence' requirement in section 84 has introduced a higher threshold to be satisfied. We consider that this ambiguous statutory constraint on the equitable doctrine of changed circumstances should be removed.²⁹³¹

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

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

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

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

This provision appears to provide a broad discretion to the court to modify or extinguish an easement or covenant if satisfied of one or more of the matters set out in the section, without the requirement to also satisfy a concept such as obsolescence.²⁹³²

159.2.2. Power to 'modify'

159.2.2.1. Adding terms to existing easements

Section 181(1) of the PLA gives the court the power to modify or extinguish an easement or restriction arising under covenant. The power conferred under the section includes a power to add such further provisions restricting the user or building on the land as appears to be reasonable to the court and as

²⁹²⁷ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010).

²⁹²⁸ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 126.

²⁹²⁹ (2005) 12 VR 224.

²⁹³⁰ *Stanhill Pty Ltd v Jackson* (2005) 12 VR 224, 237-238.

²⁹³¹ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 126 [8.86].

²⁹³² The *Property Law Act 1952* (NZ) also did not use the term 'obsolete' in section 126G(1) prior to the introduction of the 2007 legislation.

may be accepted by the applicant.²⁹³³ The court may refuse to modify an easement or restriction without such addition.²⁹³⁴

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

The word 'modify' has as its primary meaning to 'limit or restrain'. In my view, the court's power to modify an easement is a power to limit or restrain rights given under an easement. ... The word 'modify' does not have the same meaning as change, amend or vary.²⁹³⁵

The case law has established that the power to modify does not extend to relocating an easement.²⁹³⁶ The reason for this is that relocation of an easement 'destroys' the easement and essentially grants a new one.²⁹³⁷

One of the issues relevant to the concept of modification is whether or not the term is broad enough to enable the addition of terms to an existing instrument of easement. This is particularly relevant in the case of a bare easement which may not include any terms regarding obligations associated with the easement. For example, a bare easement for access may not include any information about responsibilities and rights for the upkeep or maintenance of the easement.²⁹³⁸ The absence of detail surrounding these responsibilities may lead to disputes. If the owner of the servient tenement wants to add a provision to an easement, for example, one which requires both land owners to contribute equally to repairs and maintenance, it is unclear if this is possible through the process in section 181 of the PLA.

It is clear that under section 181(3), the power to modify will also include the power to add restrictive provisions. This section is inclusive and the power to include positive obligations such as repair and maintenance is not expressly excluded. However, as suggested by Lumb, the power to add further restrictive provisions when modifying is unlikely to extend to include 'new terms as to the use, ownership or maintenance of the servient land.'²⁹³⁹ The reason for this view has been articulated in the following way:

... this conclusion is fortified by the fact that such an obligation amounts to a positive (personal) covenant and, ordinarily, would not run with the land; it does not fall within the ambit of a restriction on the user or the building on the land.²⁹⁴⁰

The position in the Northern Territory regarding the addition of new terms is clear as section 177(4) of the *Law of Property Act* (NT) provides that the power to modify includes a power to include new terms as to the use, ownership or maintenance of the servient land.²⁹⁴¹ However, the Northern Territory legislation enables the burden of a positive covenant to bind successors in title which may

²⁹³³ *Property Law Act 1974* (Qld) s 181(3).

²⁹³⁴ *Property Law Act 1974* (Qld) s 181(3).

²⁹³⁵ *Hoy v Allerton*(2002) Q Conv R 54-559 [2001] QSC 440 at [29]-[30].

²⁹³⁶ *Lolakis v Konitas* [2002] NSWSC 889 [67].

²⁹³⁷ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [16129].

²⁹³⁸ Stephen Lumb, 'Modifying Easements: Living in the Past' (2014) 4 *Property Law Review* 136, 138.

²⁹³⁹ Stephen Lumb, 'Modifying Easements: Living in the Past' (2014) 4 *Property Law Review* 136, 139-140.

²⁹⁴⁰ Stephen Lumb, 'Modifying Easements: Living in the Past' (2014) 4 *Property Law Review* 136, 139.

²⁹⁴¹ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 588 [9.78].

partly explain the broad power under section 177 to add new terms which could extend to positive covenants.

159.2.2.2. Modifying covenants in building management statements

A building management statement (**BMS**) may be registered in Queensland under section 54A(1) of the *Land Title Act 1994* (Qld). A BMS in Queensland contains provisions benefiting and burdening the lots to which it applies.²⁹⁴² However, the *Land Title Act 1994* (Qld) does not currently expressly provide that these provisions bind successors in title.²⁹⁴³ Clause 224 of the now lapsed Land, Explosives and Other Legislation Amendment Bill 2017 proposed changes to the *Land Title Act 1994* (Qld) which would expressly provide that a BMS binds successors in title.²⁹⁴⁴

Where rights of access, support or shelter or other rights in the nature of an easement are set out in a BMS these are declared under the *Land Title Act 1994* (Qld) to operate according to the terms of the BMS and may be effective, despite the absence of a formal registered easement establishing the right.²⁹⁴⁵ A BMS can be amended, extinguished (or partially extinguished) in certain circumstances. The instrument of amendment or extinguishment must be signed by the registered owners of all lots to which the BMS applies.²⁹⁴⁶ There is no default process set out in the *Land Title Act 1994* (Qld) to cover the situation where the signature of the registered owner of all lots cannot be obtained.

The position in relation to statutory covenants under section 97A of the *Land Title Act 1994* (Qld) is different. There is a provision which expressly provides that a positive or negative covenant is binding on a successor in title. Further, a covenant under section 97A can be released or amended in certain circumstances.²⁹⁴⁷ Section 97DA of the *Land Title Act 1994* (Qld) also expressly provides that section 181 of the PLA applies to a registered covenant.

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

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

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

²⁹⁴² *Land Title Act 1994* (Qld) s 54A(2)(b).

²⁹⁴³ Section 54A(2)(b) of the *Land Title Act 1994* (Qld) includes a statement in relation to a BMS that it contains provisions benefiting and burdening the lots to which it applies. It does not explicitly provide that it binds successors in title. This can be compared to section 97A(4)(b) of the *Land Title Act 1994* (Qld) which expressly provides that a positive or negative covenant is binding on the covenantor and the covenantor's successors in title. These covenants must relate to the lot or a building on, or proposed to be built on, the lot and be aimed at, amongst other things, directly preserving a native animal or a natural feature of the lot that is of cultural or scientific significance.

²⁹⁴⁴ The proposed amendment to section 54D of the *Land Title Act 1994* (Qld) is '(3) A registered building management statement binds the successors in title to the registered owner of each lot to which the statement applies.'

²⁹⁴⁵ *Land Title Act 1994* (Qld) s 54A(3).

²⁹⁴⁶ *Land Title Act 1994* (Qld) s 54E(2) (in the case of amendment) and s 54H(2) (in the case of extinguishment). The additional requirement in the case of extinguishment or partial extinguishment is the consent of all registered mortgagees: s 54H(4)(a) and (b).

²⁹⁴⁷ *Land Title Act 1994* (Qld) s 97C (amendment of covenant) and s 97D (release of a covenant).

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

Section 181(1)(a) and the meaning of obsolete is discussed at paragraph 159.2.1 above. Lumb suggests:

In light of the meaning given to the word ‘obsolete’ ... it would be a rare case in which a court could hold that facts which demonstrate that an easement had been ‘abandoned’ for the purposes of s 181(1)(c) do not also justify a conclusion that the easement should be deemed ‘obsolete’ for the purposes of s 181(1)(a) (because it serves no presently useful purpose).²⁹⁴⁸

159.2.3.2. Uncertainty regarding whether s 181(1)(d) of the PLA has to be satisfied in addition to one or more of s 181(1)(a)-(c)

There is a suggestion that section 181(1)(d) of the PLA is a cumulative requirement to some of the other pre-conditions in section 181(1).²⁹⁴⁹ There is some judicial authority which may support this view, specifically the decision of Ambrose J in *Eucalypt Group Pty Ltd v Robin*²⁹⁵⁰ where His Honour indicated that to succeed under section 181(1)(b), section 181(1)(d) must also be satisfied. However, in the judgment when quoting section 181, the ‘or’ has been left out and MacDonald et al suggest that the view of Ambrose J could be in error.²⁹⁵¹ In *Hoy v Allerton & Anor*²⁹⁵² there also appears to be an assumption that section 181(1)(d) must be satisfied. However, there is no analysis in that case of any of the other subsections and it may be that section 181(1)(d) was the only precondition that could be satisfied based on the facts in that case.

Commentary on section 181 of the PLA and its interstate equivalents generally supports a view that the preconditions are alternatives – that is, only one of the preconditions needs to be satisfied in order to satisfy section 181(1).²⁹⁵³ There is some Queensland case law which supports this approach as well. In *Ex parte Proprietors of ‘A Veril Court’ Building Units Plan No. 200*²⁹⁵⁴ both sections 181(1)(b) and (d) were pleaded in the alternative and relief was ultimately granted on the basis of section 181(d). Matthews J considered that the easement in question did secure ‘practical benefits of substantial value’ and he was not satisfied that money ‘would be an adequate compensation for the loss of it.’ Further, His Honour noted that sections 181(1)(b)(i) and 181(1)(d) ‘may be considered from different points of view and that section 181(1)(d) has room for application in circumstances not available in respect of the other subsection’.²⁹⁵⁵ In *Hildon P/L v JY Building Material & Construction P/L*²⁹⁵⁶ Martin J indicated that an applicant seeking an order under section 181 of the PLA has the onus of establishing facts ‘sufficient to enliven one of the alternatives in section 181(1)’ and that the section ‘allows for a

²⁹⁴⁸ Stephen Lumb, ‘Modifying Easements: Living in the Past’ (2014) 4 *Property Law Review* 136, 141.

²⁹⁴⁹ Stephen Lumb, ‘Modifying Easements: Living in the Past’ (2014) 4 *Property Law Review* 136, 138.

²⁹⁵⁰ [2003] 2 Qd R 488 at [79], [84] and [95].

²⁹⁵¹ Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010).

²⁹⁵² [2001] QSC 440.

²⁹⁵³ Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 711 [15.390].

²⁹⁵⁴ [1983] 1 Qd R 66 at 70.

²⁹⁵⁵ *Ex parte Proprietors of ‘A Veril Court’ Building Units Plan No. 200* [1983] 1 Qd R 66 at 70.

²⁹⁵⁶ [2007] QSC 301 [11] and [15].

change to be made to an easement or a restrictive covenant upon demonstrating that the case falls into at least one of the four categories set out in section 181(1) ...'.²⁹⁵⁷

159.3. Other jurisdictions

159.3.1. Australia

Each Australian jurisdiction has a provision which addresses the issue of modification or extinguishment of restrictive covenants and/or easements. Victoria was the first State to introduce a section in 1918, with New South Wales following in 1919.²⁹⁵⁸ The Queensland, Tasmanian and Northern Territory provisions were modelled on section 84 of the *Law of Property Act 1925 (UK)*²⁹⁵⁹ following its amendment in 1969. This has resulted in some slight variation among the jurisdictions. A brief overview of the position in each State and Territory is set out below.

159.3.1.1. New South Wales

Section 89 of the *Conveyancing Act 1919* (NSW) sets out the power of the Supreme Court in New South Wales in relation to making an order to modify or extinguish easements, certain covenants and profits a prendre. The section applies to both land under Torrens and old system title.²⁹⁶⁰

One point of difference in the New South Wales legislation since 2009 is the inclusion of a 'deemed abandonment' provision in section 89(1A) which affects applications made in respect of easements where there is evidence of non-user for a period in excess of 20 years before the application has been made to the court. Queensland does not have an equivalent provision.²⁹⁶¹ The New South Wales section does not include an equivalent to section 181(3) of the PLA which provides that the power conferred under section 181(1) includes a power to impose further provisions restricting the user or the building on the land.²⁹⁶²

159.3.1.2. Northern Territory

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

²⁹⁵⁷ *Hildon P/L v JY Building Material & Construction P/L* [2007] QSC 301 [11] and [15]. In *Oldfield v Gold Coast City Council* [2010] 1 Qd R 158, 174 [55] the Court of Appeal acknowledged the alternative nature of the conditions in section 181 when it commented that: 'In the circumstances of this case, even if the appellants had brought themselves within s 181(1)(b) or (d), it would have been appropriate to exercise the court's discretion against giving the relief sought.'

²⁹⁵⁸ Adrian J Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (Butterworths, 3rd ed, 2011) 569 [19.51].

²⁹⁵⁹ Section 84 of the *Law of Property Act 1925 (UK)* only applies to restrictive covenants.

²⁹⁶⁰ *Conveyancing Act 1919* (NSW) s 89(8).

²⁹⁶¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.181.300]. Commentary on this section indicates that the purpose of the 'subsection was clearly to parallel s 49 of the *Real Property Act 1900*, which enables the Registrar-General to treat an easement as abandoned on evidence of 20 years' non-use.': see Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [16127].

²⁹⁶² The New South Wales provision was based on the 1925 version of the *Law of Property Act 1925 (UK)* which was amended in 1969 to empower the court to impose restrictive conditions.

- section 177(4) of the Act expressly provides that modification of an easement or covenant includes power to amend the instrument creating the easement or covenant to include new terms as to the use, ownership or maintenance of the servient land. The provision in section 181(3) of the PLA is limited to adding provisions ‘restricting the user or the building on the land’;
- section 177(3) provides that the court, in determining whether to make the order, is required to take into account the operation of the *Planning Act* (NT) and in particular the provisions of the planning scheme, within the meaning of that Act, applying to the land. In Queensland, the court is required to take into account the specified planning material in determining if the case falls within section 181(1)(a) and (b). In addition, the court is required to take into account the material for the purpose of determining if an easement or restriction should be modified or extinguished.²⁹⁶³

159.3.1.3. Victoria

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

Victoria has had a provision for judicial removal of covenants since 1918. Section 84 ... is based on an English provision that Victoria adopted in 1928, and which is also the parent provision for equivalent legislation in many other jurisdictions. Section 84 has not been updated in line with reform trends in other jurisdictions since 1928.²⁹⁶⁴

One of the issues considered during the VLRC’s review was whether section 84 should also be extended to easements. In the consultation paper released in 2010 the Commission sought feedback on this issue.²⁹⁶⁵ The Final Report made a number of recommendations including that section 84 of the *Property Law Act 1958* (Vic) be amended to include the power to remove or vary by order easements created other than by operation of statute.²⁹⁶⁶ Other recommendations included providing the court with a broad discretion when deciding whether to grant an order modifying or extinguishing an easement or restrictive covenant taking into account a number of matters, including ‘any other fact which the court or VCAT considers to be material.’²⁹⁶⁷ The recommendations have not been adopted to date.

159.3.1.4. Tasmania

The process for extinguishing or modifying an easement or covenant in Tasmania is set out in section 84C of the *Conveyancing and Law of Property Act 1884* (Tas). In Tasmania, an application for an order for extinguishment or modification is made to the Recorder of Titles.²⁹⁶⁸ A person aggrieved by the decision of the Recorder of Titles may appeal to the Supreme Court.²⁹⁶⁹ Further, the Recorder of Titles

²⁹⁶³ See *Property Law Act 1974* (Qld) s 181(2).

²⁹⁶⁴ Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) 116 [8.3].

²⁹⁶⁵ Victorian Law Reform Commission, *Easements and Covenants*, Consultation Paper 9 (2010) 144 [16.34].

²⁹⁶⁶ See Victorian Law Reform Commission, *Easements and Covenants*, Final Report (2010) Recommendation 41. A number of other recommendations were made in relation to amendments to section 84: see Rec 42-47.

²⁹⁶⁷ Victorian Law Reform Commission, *Easements and Covenants*, Final Report 22 (2010) 130, Recommendation 46.

²⁹⁶⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 84C(1).

²⁹⁶⁹ *Conveyancing and Law of Property Act 1884* (Tas) s 84F(3).

(or an interested person) may apply to the Supreme Court to have the matter removed to that court.²⁹⁷⁰

Once the Recorder of Titles has received the application, the Recorder can give directions regarding giving notice of the application to specified persons including the manner in which the notices are given.²⁹⁷¹ An application can be made for discharge or modification notwithstanding that there is uncertainty regarding the existence or nature of the overriding interests to which the application relates.²⁹⁷² It is prima facie evidence that the relevant interest is obsolete where rights conferred have not been exercised for 20 years.²⁹⁷³ The provision expressly provides that the power to modify an interest includes a power to create (in addition to or in substitution of the relevant interest) a further overriding interest which has the effect of restricting the user of the land or creating rights over the land which appear to the Recorder to be reasonable in the circumstances and which are accepted by the applicant.²⁹⁷⁴

In addition to the power to modify or extinguish, the Recorder of Titles also has power to declare whether land is subject to a covenant or easement and to declare the nature and extent of that covenant or easement.²⁹⁷⁵

159.3.1.5. Western Australia

In Western Australia, section 129C of the *Transfer of Land Act 1893* (WA) governs the power of the Supreme Court to extinguish or modify restrictive covenants and easements. The provision applies only to land under the operation of the Torrens system.²⁹⁷⁶ It is in similar (but not identical) terms to section 181 of the PLA.

159.3.1.6. South Australia

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

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

²⁹⁷⁰ *Conveyancing and Law of Property Act 1884* (Tas) s 84G(1).

²⁹⁷¹ *Conveyancing and Law of Property Act 1884* (Tas) s 84E(2).

²⁹⁷² *Conveyancing and Law of Property Act 1884* (Tas) s 84(2).

²⁹⁷³ *Conveyancing and Law of Property Act 1884* (Tas) s 84C(3).

²⁹⁷⁴ *Conveyancing and Law of Property Act 1884* (Tas) s 84C(4). Section 84C(5) sets out the provisions which an order under section 84C(4) may contain including a provision extinguishing all overriding interests to which the land may be subject.

²⁹⁷⁵ *Conveyancing and Law of Property Act 1884* (Tas) s 84B(1).

²⁹⁷⁶ *Transfer of Land Act 1893* (WA) s 129C(1).

The section is different to the other jurisdictions. For example, the Registrar-General is not permitted to act under section 90B(1) except on the application, or with the written consent of the proprietor of the dominant land and the servient land and with the written consent of all other persons specified in the section. The requirement for consent can be dispensed with in certain circumstances.²⁹⁷⁷ There are separate subsections which apply specifically to rights of way.²⁹⁷⁸

159.3.2. New Zealand

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

- there has been a change since the creation of the easement or covenant in all or any of the following:
 - the nature or extent of the use being made of the benefited land, the burdened land or both;
 - the character of the neighbourhood; any other circumstance the court considers relevant; or
- the continuation in force of the easement or covenant in its existing form would impede the reasonable use of the burdened land in a different way, or to a different extent, from that which could reasonably have been foreseen by the original parties to the easement or covenant at the time of its creation; or
- every person entitled who is of full age and capacity has agreed that the easement or covenant should be modified or extinguished or may reasonably be considered by his or her acts or omissions to have abandoned, or waived the right to, the easement or covenant, wholly or in part; or
- the proposed modification or extinguishment will not substantially injure any person entitled.

Sections 317 of the *Property Law Act 2007* (NZ) states that the court may, on application, modify or extinguish an easement and section 316 sets out the procedure for an application under section 317.

159.4. Recommendation

The Centre recommends retaining section 181 of the PLA, with some minor amendments to provide additional clarity about the operation of the provision. This approach has the support of the QLS which notes that:

Even though an existing easement may not be used, it is still a valuable property right which benefits the grantee. It is therefore appropriate to continue to require applicants to meet the relatively high threshold of the conditions in the provision before the provision is enlivened.

159.4.1. 'Obsolete' requirement should remain

The Centre does not recommend adopting the New Zealand approach of giving the court a wide discretion when deciding whether an easement or restriction should be modified or extinguished because of a change in use or other circumstances. The QLS agrees with this position, noting that a

²⁹⁷⁷ *Real Property Act 1886* (SA) s 90B(3).

²⁹⁷⁸ *Real Property Act 1886* (SA) s 90B(3b)–(3d).

broad discretion for the court to modify or extinguish easements ‘could give rise to a range of novel legal arguments.’ The QLS further notes that ‘the extinguishment of an easement should not be for the convenience of one owner.’ The Centre therefore recommends that the requirement that the easement or restriction is ‘obsolete’ be retained as it provides a protective measure for the party that benefits from it.

159.4.2. Allow for the addition of new terms and positive covenants to an existing easement

The Centre recommends that section 181 of the PLA be amended to clarify that the court has the power to place additional terms on an existing easement. This will resolve the uncertainty about whether or not this power exists under the current provision. This approach has the support of the QLS.

159.4.3. Modification or extinguishment of a BMS

The Centre recommends that section 181 of the PLA be amended to allow for the court to make orders for the modification or extinguishment of a BMS. This will overcome the difficulties raised by the QLS in submissions to the Centre, whereby it was noted:

BMSs are becoming very common. BMSs are typically drafted prior to a building being constructed. The original developer, when drafting the BMS, is invariably unable to contemplate every potential future outcome of the operation of the development so inevitably changes are desirable and necessary. However, when construction is completed and all lots are ultimately sold, it is practically impossible to have every owner sign an Amendment of the BMS.

However, the Centre is of the view that an applicant need not make out the ‘obsolete’ element when seeking an order under section 181 of the PLA for modification or extinguishment of a BMS. The burden of this requirement is too great with respect to these documents. The standard should be less onerous, for example, ‘reasonably necessary’ or similar.

The Centre also recommends further amendment to the *Land Title Act 1994* (Qld) to stipulate that a BMS can be the subject of an application under section 181 of the PLA and modified or extinguished in circumstances where such modification is reasonably necessary and all of the lot owner signatures cannot be obtained in accordance with section 54E of the *Land Title Act 1994* (Qld).

159.4.4. Clarification of operation of 181(a) to 181(d)

The Centre recommends amending section 181 of the PLA to clarify that sections 181(1)(a)-(d) are alternative provisions and that section 181(1)(d) is not required to be satisfied in addition to one or more of the other conditions.

Citing the possible uncertainty as a result of the case law raised in the preceding discussion at paragraph 159.2.3.2, the QLS supports clarifying the section to ensure that these are interpreted as alternatives.

RECOMMENDATION 159. Section 181 should be amended in the following terms:

- retain the requirement that an easement or restriction be deemed ‘obsolete’ before modification or extinguishment;
- include a subsection in section 181 that allows the court to modify an easement to include new terms of use (*proposed drafting is set out below*);
- allow for the court to make orders for the modification or extinguishment of a building management statement (**BMS**) in circumstances where the existing process cannot be used because the signatures of all of the existing lot owners cannot be obtained and where the modification or extinguishment is reasonably necessary in the circumstances.

The *Land Title Act 1994* should be amended to note that a BMS can be the subject of an application under section 181 and modified or extinguished in circumstances where such modification is reasonably necessary and all of the lot owners’ signatures cannot be obtained in accordance with section 54E of the *Land Title Act 1994*.

For example, with respect to the recommendation at paragraph 159.4.2, using the Northern Territory provisions as a guide, a subsection could be added to section 181 drafted in the following manner:

- (xx) The power of the court to make an order modifying an easement or covenant includes power to amend the instrument creating the easement or covenant to include new terms as to the use, ownership or maintenance of the servient land.

Part 11 – Encroachment and mistaken improvements

160. Part 11 Division 1 – Encroachment (ss 182-194) Encroachment of buildings

160.1. Overview and purpose

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 mortgagee 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.

188 Encroaching owner—compensation and conveyance

Wherever the court sees fit, and in particular where the encroaching owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court may determine—

- (a) by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately; and
- (b) to whom, for whose benefit and upon what limitations the conveyance, transfer, or lease of the subject land or grant in respect of the land is to be made.

189 Adjacent owner—compensation and conveyance

Wherever the court sees fit, and in particular where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court may determine—

- (a) to whom, for whose benefit, and in what proportions the compensation is to be paid or applied; and
- (b) by whom the conveyance, transfer, or lease of the subject land or grant in respect of the subject land is to be made.

190 Vesting order

Wherever the court may make or has made an order under this division with respect to the subject land, the court may make such vesting order as it may deem proper instead of or in addition to the order, or in default of compliance with the order.

191 Boundaries

- (1) Where any question arises as to whether an existing building encroaches or a proposed building will encroach beyond the boundary, either of the owners of the contiguous parcels of land may apply to the court for the determination under this division of the true boundary.
- (2) On the application the court may make such orders as it may deem proper for determining, marking, and recording the true boundary.
- (3) This section applies to buildings erected either before or after the commencement of this Act.

192 Suit, action or other proceeding

- (1) In any suit or proceeding before the court, however originated, the court may, if it sees fit, exercise any of the powers conferred by this division, and may stay the suit or proceeding on such terms as it may deem proper.
- (2) Where any action or proceeding is taken or is about to be taken at law by any person, and the court is of opinion that the matter could more conveniently be dealt with by an application under this division, the court may grant an injunction, on such terms as it may deem proper, restraining the person from taking or continuing the action or proceedings at law.
- (3) In any action at law a judge may, if the judge is of opinion that the matter could more conveniently be dealt with by an application under this division, stay the action or proceeding on such terms as the judge may deem proper.

193 Persons interested

In any application under this division the court may require—

- (a) that notice of the application shall be given to any person interested; and
- (b) that any person who is or appears to be interested shall be made a party to the application.

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.

160.2. 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.’²⁹⁷⁹ The PLA adopted the provisions of the *Encroachment of Buildings Act 1955* (Qld) into Part 11, Division 1 ‘without material alteration.’²⁹⁸⁰

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.²⁹⁸¹

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

²⁹⁷⁹ 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.

²⁹⁸⁰ 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.

²⁹⁸¹ *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.²⁹⁸² 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.²⁹⁸³

160.3. 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.²⁹⁸⁴

A ‘building’ is defined in the PLA to mean ‘a substantial building of a permanent character and includes a wall.’²⁹⁸⁵ 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.²⁹⁸⁶

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.²⁹⁸⁷ The definition of building has been interpreted broadly and has included a concrete driveway,²⁹⁸⁸ concrete block wall, retaining wall and protruding floor beams.²⁹⁸⁹ However, structures such as an extension of tiling around a swimming pool, a swimming pool pump and filter²⁹⁹⁰ or courtyard paving have been held not to be a building.²⁹⁹¹ Where the encroachment falls outside the

²⁹⁸² 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.

²⁹⁸³ 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.

²⁹⁸⁴ *Property Law Act 1974* (Qld) s 182.

²⁹⁸⁵ *Property Law Act 1974* (Qld) s 182.

²⁹⁸⁶ *Ex parte Van Achterberg* [1984] 1 Qd R 160, 162.

²⁹⁸⁷ *Ex parte Van Achterberg* [1984] 1 Qd R 160, 162.

²⁹⁸⁸ *Clark v Wilkie* (1977) 17 SASR 134 and *Gladwell v Steen* [2000] SASC 143 applying *Clarke v Wilkie*.

²⁹⁸⁹ See commentary and cases referred to in Carmel MacDonald et al, *Real Property Law in Queensland* (3rd ed, 2010, Lawbook Co), 107 [4.160].

²⁹⁹⁰ *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 A-JA did not consider that it was a substantial building of a permanent character for the purposes of the *Encroachment of Buildings Act 1922* (NSW).

²⁹⁹¹ See commentary and cases referred to in Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010), 107 [4.160].

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.²⁹⁹²

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).²⁹⁹³ 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.²⁹⁹⁴

Part 11, Division 1 has the following features:

- the Division applies despite the provision of any other Act.²⁹⁹⁵ 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.²⁹⁹⁶ 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';²⁹⁹⁷
- 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;²⁹⁹⁸
- 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
 - 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

²⁹⁹² Carmel MacDonald et al, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010), 106 [4.160].

²⁹⁹³ 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).

²⁹⁹⁴ See for example *Ex parte Van Achterberg* [1984] 1 Qd R 160 where the weldmesh fence was held to be a building.

²⁹⁹⁵ *Property Law Act 1974* (Qld) s 183.

²⁹⁹⁶ *Property Law Act 1974* (Qld) s 184(1).

²⁹⁹⁷ *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).

²⁹⁹⁸ *Property Law Act 1974* (Qld) s 185(1).

NOT GOVERNMENT POLICY

- the loss and damage to the encroaching owner if required to remove the encroachment; and
- the circumstances in which the encroachment was made,²⁹⁹⁹
- 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;³⁰⁰⁰
- 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;³⁰⁰¹
- the order for compensation may be registered in the land registry and operate as a charge;³⁰⁰²
- 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;³⁰⁰³
- the parties can apply for determination of the true boundary where this arises as a question;³⁰⁰⁴
- 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;³⁰⁰⁵
- 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.³⁰⁰⁶ This provision inevitably has the effect of encouraging settlement.³⁰⁰⁷

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, applicants seeking relief are limited to adjacent or encroaching owners of those contiguous lots (or their successors in title).³⁰⁰⁸ The encroachment provisions are unavailable where a building is

²⁹⁹⁹ *Property Law Act 1974* (Qld) s 185(2).

³⁰⁰⁰ *Property Law Act 1974* (Qld) s 186(1).

³⁰⁰¹ *Property Law Act 1974* (Qld) s 186(2).

³⁰⁰² *Property Law Act 1974* (Qld) s 187(1).

³⁰⁰³ *Property Law Act 1974* (Qld) s 192; Carmel MacDonald et al, *Real Property Law in Queensland* (3rd ed, 2010, Lawbook Co), 107 [4.160].

³⁰⁰⁴ *Property Law Act 1974* (Qld) s 191(1).

³⁰⁰⁵ *Property Law Act 1974* (Qld) s 193.

³⁰⁰⁶ *Property Law Act 1974* (Qld) s 194.

³⁰⁰⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.11.DIV.1.30].

³⁰⁰⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.11.DIV.1.30].

constructed entirely on the wrong land.³⁰⁰⁹ 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.³⁰¹⁰

160.4. Issues with the Division

160.4.1. 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.³⁰¹¹ 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.³⁰¹²

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.’³⁰¹³

These underlying policy reasons for the encroachment provisions remain equally applicable and valid in Queensland.³⁰¹⁴

160.4.2. 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.³⁰¹⁵ 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.³⁰¹⁶ Where the court

³⁰⁰⁹ 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.

³⁰¹⁰ For the list of possible applicants see *Property Law Act 1974* (Qld) s 198(1).

³⁰¹¹ 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.

³⁰¹² Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.36].

³⁰¹³ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.63].

³⁰¹⁴ 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.

³⁰¹⁵ *Property Law Act 1974* (Qld) s 185(1)(a).

³⁰¹⁶ *Property Law Act 1974* (Qld) s 186(1).

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. 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.³⁰¹⁷ 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.³⁰¹⁸ 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 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.³⁰¹⁹

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.'³⁰²⁰ 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.³⁰²¹

³⁰¹⁷ 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.

³⁰¹⁸ *Property Law Act 1969 (WA)* s 122(4).

³⁰¹⁹ 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.

³⁰²⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.67].

³⁰²¹ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.67].

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.³⁰²²

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.³⁰²³

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’. The court has broad discretion to grant relief if it considers it just and equitable in the circumstances that relief should be granted.³⁰²⁴ 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.³⁰²⁵ 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.³⁰²⁶ The calculation of 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.³⁰²⁷

160.4.3. ‘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*³⁰²⁸ (**Tallon case**) one of the issues was whether the court should order

³⁰²² 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).

³⁰²³ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 56 [4.69] and Recommendation 20, 59.

³⁰²⁴ *Property Law Act 2007* (NZ) s 323(2).

³⁰²⁵ *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).

³⁰²⁶ See for example, *Property Law Act 1974* (Qld) ss 124(1) and (2), 125(1), 128(8) and 180(4).

³⁰²⁷ Note, however, that at Recommendation 151 the Centre has recommended the relevant provisions be repealed.

³⁰²⁸ *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No. 5157* [1997] 1 Qd R 102.

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.³⁰²⁹

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*.³⁰³⁰ 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.’³⁰³¹

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(1)(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.’³⁰³²

The New Zealand legislation appears to accommodate this type of situation. As discussed in detail in paragraph 160.5.7 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.³⁰³³

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.³⁰³⁴

160.4.4. 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 Part 11 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’.³⁰³⁵ The operation of the New Zealand provisions are discussed in detail in Part 160.5.7

³⁰²⁹ *Tallon v The Proprietors of Metropolitan Towers Building Units Plan No. 5157* [1997] 1 Qd R 102, 107.

³⁰³⁰ *Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471.

³⁰³¹ *Amatek Ltd v Googoorewon Pty Ltd* (1993) 176 CLR 471, 477.

³⁰³² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.185.30].

³⁰³³ *Property Law Act 2007* (NZ) s 312.

³⁰³⁴ *Property Law Act 2007* (NZ) s 325.

³⁰³⁵ 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

below. There is no clear statement which comprehensively explains the rationale for the approach in New Zealand of combining the provisions. The Law Commission (NZ) 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.³⁰³⁶ 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.³⁰³⁷ 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 (NZ) 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.'³⁰³⁸

The subsequent final report by the Law Commission (NZ) 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:

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.³⁰³⁹

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;

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].

³⁰³⁶ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (July 1991), 202 [629].

³⁰³⁷ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (July 1991), 202 [630].

³⁰³⁸ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (July 1991), 202 [630].

³⁰³⁹ Law Commission (NZ), *A New Property Law Act Report No. 29* (June 1994), 27-28 [102].

- ensuring the relevant land owner over which a structure has been placed is not unjustifiably enriched; and
- providing a compensation process, where appropriate.

160.5. Other jurisdictions

160.5.1. 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, is 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 summary of the legislation in each of these jurisdictions and the recommendations made by the VLRC in 2010 is set out below.

160.5.2. 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.³⁰⁴⁰

160.5.3. 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*.’

160.5.4. 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.³⁰⁴¹ The legislation does not make any specific provision for costs, unlike in Queensland and other jurisdictions.³⁰⁴²

³⁰⁴⁰ *Encroachment of Buildings Act 1922* (NSW) s 2 where ‘court’ is defined to mean the Land and Environment Court.

³⁰⁴¹ *Encroachment Act 1944* (SA) s 3.

³⁰⁴² *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.

160.5.5. 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;
- 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.³⁰⁴³ 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.³⁰⁴⁴ 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.³⁰⁴⁵

160.5.6. 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.³⁰⁴⁶ 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.³⁰⁴⁷ 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 VLRC noted that the remedies available at common law do not give 'courts the full range of powers needed to resolve encroachment problems.'³⁰⁴⁸ For example, encroaching owners cannot initiate proceedings

³⁰⁴³ *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).

³⁰⁴⁴ *Property Law Act 1969* (WA) s 122(6).

³⁰⁴⁵ *Property Law Act 1969* (WA) s 122(2).

³⁰⁴⁶ 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.

³⁰⁴⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.37].

³⁰⁴⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.38].

nor are they able to request that the court grant them a property right in the land over which their building is encroaching.³⁰⁴⁹

The VLRC consulted on whether Victoria should have a discretionary relief provision for building encroachments.³⁰⁵⁰ 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 Magistrates' Court to grant discretionary relief in respect to an encroachment by a building.'³⁰⁵¹ 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.'³⁰⁵² 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.³⁰⁵³ 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.³⁰⁵⁴ 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.

160.5.7. 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.³⁰⁵⁵

³⁰⁴⁹ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 52 [4.38].

³⁰⁵⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010), 82 [12.52].

³⁰⁵¹ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 58 [4.77] Recommendation 15.

³⁰⁵² Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 53 [4.42].

³⁰⁵³ 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].

³⁰⁵⁴ This is available under *Limitations of Actions Act 1958* (Vic) s 18.

³⁰⁵⁵ *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 at paragraph 160.4.4, 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 distinction 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.³⁰⁵⁶ 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.³⁰⁵⁷ The Supreme Court can grant relief if it considers it is just and equitable to do so.³⁰⁵⁸ 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.³⁰⁵⁹ In Queensland, the giving of notice of the application is discretionary.³⁰⁶⁰

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, to 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.³⁰⁶¹ 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.³⁰⁶² 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.'³⁰⁶³

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).³⁰⁶⁴ 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 omission in relation to the placing of a wrongly placed structure or the fixing or ascertaining of any boundary of

³⁰⁵⁶ 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).

³⁰⁵⁷ *Property Law Act 2007* (NZ) s 322(1).

³⁰⁵⁸ *Property Law Act 2007* (NZ) s 323(2).

³⁰⁵⁹ *Property Law Act 2007* (NZ) s 322(3).

³⁰⁶⁰ *Property Law Act 1974* (Qld) s 193.

³⁰⁶¹ *Property Law Act 2007* (NZ) s 325.

³⁰⁶² *Property Law Act 2007* (NZ) s 324(1).

³⁰⁶³ *Property Law Act 2007* (NZ) s 325(1)(f).

³⁰⁶⁴ *Property Law Act 2007* (NZ) s 323(3).

the land affected by the structure or the land intended for the structure.³⁰⁶⁵ 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).³⁰⁶⁶

The new provisions relating to wrongly placed structures also include a provision enabling the vesting of curtilage and for access to the structure.³⁰⁶⁷

160.6. Recommendation

Section 182 should be retained with modernised language. It is clear that the rationale remains for the inclusion of an encroachment provision. The QLS agrees that section 182 of the PLA should be retained.

The Centre is of the view that 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. The QLS agrees, stating that it ‘appears logical that if an owner is deprived of the use of part of its land as a consequence of the encroachment that the minimum compensation to which the owner should be entitled will be the value of the land.’

The Centre further recommends retaining the effect of imposing a penalty amount of three times the unimproved capital value of the subject land. The Centre thinks this is appropriate where the encroaching owner cannot satisfy the court that the encroachment was not unintentional and did not arise from negligence. While the QLS considers that the ‘rationale for requiring additional compensation when the encroachment is intentional or arose from negligence ... remains valid’ the Society suggests that it should be left to the court to determine whether the compensation should be more than the unimproved capital value of the subject land. The Centre acknowledges this view but remains convinced that the current calculation is appropriate as it acts as a penalty for intentional or negligent acts.

The Centre recommends that as part of the modernisation of the section, the term ‘unimproved capital value’ should be updated to ‘market value’ or a similar term to reflect the current measure of property value. This is more in step with the language used in commercial property dealings. The QLS agrees with this recommendation.

The Centre does not recommend any allowances where the encroachment was not erected by the current owner so that that owner may escape liability. The Centre is of the view that every subsequent owner has the right to do a survey of the land if they suspect there is an encroachment. It is the duty of every landowner to ensure there is no encroachment onto neighbouring land. Further, if the previous landowner has become insolvent or bankrupt, or cannot be located, then there may be no defendant to bring action against. Therefore a future owner’s liability should not be carved out from the operation of the section.

From a policy point of view, the QLS considers that, because an encroaching owner has the benefit of the encroachment, it should be required to pay compensation. However, a subsequent owner should

³⁰⁶⁵ *Property Law Act 2007* (NZ) s 323(4).

³⁰⁶⁶ *Property Law Act 2007* (NZ) s 323(5).

³⁰⁶⁷ *Property Law Act 2007* (NZ) s 321.

not be automatically liable for the excess compensation as a result of actions of a previous owner. On that basis, the answer would be 'yes'.

Finally, the Centre recommends the definition of 'subject land' be expanded to accommodate land 'reasonably required as curtilage and for access' to the encroachment. The QLS agrees the court should have the discretion to make an order with respect to land immediately adjacent to the encroaching structure which may be reasonably required for access, maintenance or to effectively use the encroaching improvement.

RECOMMENDATION 160. Part 11 Division 1 (sections 182 to 194) should be retained with modernised language, and minor amendments including:

- the term 'unimproved capital value' should be updated to 'market value' or a similar term; and
- the definition of 'subject land' be expanded to accommodate land 'reasonably required as curtilage and for access' to the encroachment.

161. Part 11, Division 2 – Improvements under mistake of title (ss 195-198)

161.1. 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 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.³⁰⁶⁸ 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.³⁰⁶⁹ 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 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.³⁰⁷⁰

The sections in Part 11, Division 2 of the PLA are based on provisions in legislation from both Western Australia and Ontario, Canada.³⁰⁷¹ The Division comprises sections 195 to 198 and operates in the following way:

- the Division applies despite the provisions of any other Act;³⁰⁷²
- 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;³⁰⁷³

³⁰⁶⁸ Carmel MacDonald et al, *Real Property Law in Queensland* (3rd ed, 2010, Lawbook Co), 111 [4.210].

³⁰⁶⁹ 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.

³⁰⁷⁰ 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.

³⁰⁷¹ *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.

³⁰⁷² *Property Law Act 1974* (Qld) s 195.

³⁰⁷³ *Property Law Act 1974* (Qld) s 196.

- 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;³⁰⁷⁴
- 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.³⁰⁷⁵ In this respect, Carter J in the Supreme Court decision of *Ex parte Karynette Pty Ltd*³⁰⁷⁶ 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.’³⁰⁷⁷ If the improver discovers the mistake and continues to make the improvement, in some cases the improver will still be able to obtain relief for all the improvements made;³⁰⁷⁸
- there is a broad group of applicants specified in the Act who may potentially apply for relief including:³⁰⁷⁹
 - 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:³⁰⁸⁰
 - 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.³⁰⁸¹

³⁰⁷⁴ 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 [PLA.196.30].

³⁰⁷⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.196.60].

³⁰⁷⁶ *Ex parte Karynette Pty Ltd* [1984] 2 Qd R 211.

³⁰⁷⁷ *Ex parte Karynette Pty Ltd* [1984] 2 Qd R 211, 212.

³⁰⁷⁸ 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.

³⁰⁷⁹ *Property Law Act 1974* (Qld) s 198.

³⁰⁸⁰ *Property Law Act 1974* (Qld) s 197(1).

³⁰⁸¹ 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]

161.2. Issues with the Division

Historically, there has been debate about whether a person should be compensated for placing an improvement on another person's land by mistake.³⁰⁸² 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.³⁰⁸³ Mistaken improvement provisions were introduced 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.³⁰⁸⁴

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'.³⁰⁸⁵ 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.

161.3. Other jurisdictions

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.

161.3.1. 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

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.

³⁰⁸² S J Stoljar, 'Mistaken Improvement of Another's Property' (1980) 14(3) *Western Australian Law Review* 199, 199.

³⁰⁸³ S J Stoljar, 'Mistaken Improvement of Another's Property' (1980) 14(3) *Western Australian Law Review* 199, 199, 200.

³⁰⁸⁴ 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.

³⁰⁸⁵ 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.

Queensland provisions and the nature of the mistaken belief required is the same, there are some differences including:

- 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.’³⁰⁸⁶ 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.

161.3.2. 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.³⁰⁸⁷ 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.³⁰⁸⁸ 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.

161.3.3. 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.’³⁰⁸⁹ 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.’³⁰⁹⁰

The VLRC consulted broadly on this issue and sought feedback on its proposal that a mistaken improver relief provision be introduced into Victoria.³⁰⁹¹ The Commission, in its Final Report recommended that such a provision be available in Victoria. Some features of the proposed provision include:

³⁰⁸⁶ *Encroachment of Buildings Act 1982* (NT) s 3.

³⁰⁸⁷ 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.

³⁰⁸⁸ *Property Law Act 1969* (WA) s 123(2)(a) and (b).

³⁰⁸⁹ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report 20 (2010), 58-59.

³⁰⁹⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010), [12.8] 76.

³⁰⁹¹ 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;³⁰⁹²
- it will apply to lasting improvements made upon land owned by another;³⁰⁹³
- 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’;³⁰⁹⁴
- the court should have broad discretion and powers to make an order that is just and equitable in each case;³⁰⁹⁵
- the determination of the amount of any compensation payable should be left to the court;
- the VLRC viewed the Queensland provisions as providing a good example of the kinds of relief that a court should be able to grant;³⁰⁹⁶
- the Supreme Court, the County Court and the Magistrates’ Court should all be empowered to grant discretionary relief, rather than VCAT.³⁰⁹⁷

161.3.4. 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 paragraph 160.5.7.

161.3.5. 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.³⁰⁹⁸ 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’;
- 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;

³⁰⁹² Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 62 [4.99].

³⁰⁹³ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 63 Recommendation 23.

³⁰⁹⁴ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 62 [4.99].

³⁰⁹⁵ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 61 [4.95].

³⁰⁹⁶ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 62 [4.97].

³⁰⁹⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report (2010), 63 [4.106] and Recommendation 23.

³⁰⁹⁸ 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).

- 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.³⁰⁹⁹

161.4. Recommendation

The Centre recommends retaining Division 2, Part 11 with modernised language. There do not appear to be any significant issues with the operation of these sections. The Division could be amended slightly to declare that it does not apply to fences to put the issue beyond doubt. This approach has the support of the QLS.

Further, as discussed at paragraph 215.5.3.12, the term ‘other encumbrance’ in section 197(2)(b) should refer to ‘any other registered interest’.

RECOMMENDATION 161. Part 11 Division 2 (sections 195 to 198) should be retained with modernised language. Consider adding an additional subsection that provides the Division does not apply to fencing.

³⁰⁹⁹ The relevant Nova Scotia provision also deals with encroachment on adjoining land: see s 76(3).

Part 11A – Rights of way

162. Section 198A – Prescriptive right of way not acquired by user

Section 198A of the PLA is discussed above at paragraph 156.

Part 12 – Equitable interests and things in action

163. Section 199 – Statutory assignments of things in action

163.1. Overview and purpose

199 Statutory assignments of things in action

- (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice –
- (a) the legal right to such debt or thing in action; and
 - (b) all legal and other remedies for the same; and
 - (c) the power to give a good discharge for the same without the concurrence of the assignor.
- (2) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice –
- (a) that the assignment is disputed by the assignor or any person claiming under the assignor; or
 - (b) of any other opposing or conflicting claims to such debt or thing in action;
- the debtor may, if the debtor thinks fit, either call upon the persons making claim to the debt or other thing in action to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to relief of trustees.

Section 199 of the PLA reproduces section 5(6) of the *Judicature Act 1876* (UK). Historically, assignments of choses in action were recognised in equity only and not at law. The *Judicature Act 1876* (UK) altered this position so that assignments were recognised at law also if certain criteria were satisfied. The QLRC indicated that the existing statutory regime worked well but that ‘its proper place’ was in legislation dealing with property law rather than ‘a statute concerned primarily with matters of procedure.’³¹⁰⁰ Section 199 of the PLA replicates the provision in the 1876 Act. The section does not change the equitable rules relating to assignments of choses in action. It enables the ‘assignee to sue the debtor without having to join the assignor to the proceedings.’³¹⁰¹

Section 199 of the PLA is directed at the assignment of debts or other legal things in action.³¹⁰² The section is largely procedural in nature. The term ‘legal thing in action’ and ‘chose in action’ are used interchangeably in commentary relating to assignments and are synonymous. A ‘chose in action’ has been defined in the following way:

The term ‘chose in action’ is used to describe all personal rights of property that can only be claimed or enforced by action and not by taking physical possession. Choses in action can refer to both a right enforceable by action, such as a debt, and the right of action itself.³¹⁰³

³¹⁰⁰ 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) 106.

³¹⁰¹ Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 75 [5.47].

³¹⁰² A right arising under a contract would fall within the scope of ‘other legal things in action’: see SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 371 [14.3.2.2].

³¹⁰³ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 370 [14.3.2.2].

A legal thing in action will include a variety of actions including for damages.³¹⁰⁴ A key feature of a thing in action is that the right is proprietary in character, rather than personal. A personal right is not a legal thing in action as it is not property.³¹⁰⁵

Under section 199, an assignee is given the legal right to claim the debt or thing in action, in addition to all legal and other remedies which were available to the assignor.³¹⁰⁶ Further, the assignee is provided with the power to give a good discharge to the debt or receipt for the chose in action without the concurrence of the assignor.³¹⁰⁷ However, a number of pre-conditions must be satisfied before the assignment under section 199 is perfected. These include:

- the assignment must be in writing under the hand of the assignor;
- the assignment must be absolute and not by way of charge only;
- express notice in writing must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or thing in action.³¹⁰⁸

The section expressly provides that the assignment from the date of the notice will be subject to equities having priority over the right of the assignee.³¹⁰⁹

Any assignment under section 199 of the PLA must be absolute. This means that there must be an existing property interest where the assignee is able to take title to the legal thing in action 'in such a way as to exercise complete control over it and be able to deal with it as they wish.'³¹¹⁰ The rationale for why an assignment must be absolute rather than conditional is explained in the following way:

The basic reason why the assignment must be absolute is to ensure that the debtor or other person is protected, in that at all times he or she knows to whom payment must be made. Furthermore, the requirement that the assignment must be absolute enables the assignee to sue on the debt or chose in action in his or her name because an absolute assignment means that the assignor no longer has any interest at all in the debt or chose in action.³¹¹¹

163.2. Issues with the section

Section 199 of the PLA simply replicates the equivalent provision in the *Judicature Act 1876* (UK). All other Australian jurisdictions have similar legislative provisions with some slight variations discussed in paragraph 163.3.1 below. There is also an established body of case law in Queensland which has considered the section and the interpretation of the section is relatively settled.³¹¹²

³¹⁰⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.199.120].

³¹⁰⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.199.120].

³¹⁰⁶ *Property Law Act 1974* (Qld) ss 199(1)(a) and (b).

³¹⁰⁷ *Property Law Act 1974* (Qld) s 199(1)(c).

³¹⁰⁸ *Property Law Act 1974* (Qld) s 199(1).

³¹⁰⁹ *Property Law Act 1974* (Qld) s 199(1). The section does not apply to an agreement to assign a future chose in action or the assignment of part of a debt.

³¹¹⁰ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 380 [14.3.3.2.b].

³¹¹¹ Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 76 [5.51].

³¹¹² The equivalent provisions in the other Australian jurisdictions also have a body of case law relevant to the interpretation of these provisions.

163.2.1. *Personal Property Securities Act 2009 (Cth) and section 199 of the PLA*

The *Personal Property Securities Act 2009 (Cth) (PPSA)* was enacted well after the commencement of section 199 of the PLA. The PPSA deals with security interests in personal property. The term ‘personal property’ covers all forms of property, including a licence, other than real property.³¹¹³ A security interest is an interest in personal property provided for by a transaction that secures payment or performance of an obligation.³¹¹⁴ One possible issue arising from the introduction of the PPSA is the interaction between this Act and section 199 of the PLA.³¹¹⁵ This issue was canvassed in the Victorian context in 2010 and the VLRC noted that:

In our research on the interaction of the Property Law Act with the PPSA, we also determined that there are two ways in which section 134 could apply to PPSA security interests. First, PPSA security interests are themselves ‘things in action’, so section 134 would apply to any assignment of a PPSA security interest. Secondly, a thing in action which is being assigned may be the subject of a PPSA security interest.³¹¹⁶

The VLRC concluded that there did not appear to be any inconsistency in the application of section 134 of the *Property Law Act 1958 (Vic)* and the PPSA but noted that ‘section 134 is subject to the requirements of the PPSA.’³¹¹⁷ It is possible to reach the same conclusion in the Queensland context as section 199 of the PLA and section 134 of the *Property Law Act 1958 (Vic)* are very similar in the way they are drafted and the effect of each provision.

163.2.2. *Electronic communications and section 199 of the PLA*

A separate issue which will require further consideration relates to the application of electronic methods of communication and electronic signatures to section 199. For example, will electronic communication satisfy the requirement for writing and signing under section 199 of the PLA? For a full discussion on electronic writing and signatures with respect to the PLA generally, see paragraph 13 above.

163.2.3. *Assigning any part of a debt or legal thing in action*

Part of a debt or thing in action cannot be assigned at law under section 199 of the PLA, although such an assignment is recognised at equity.³¹¹⁸ A further issue relevant to possible reform of section 199 relates to whether or not the assignment of a part debt should be permitted under the section. An assignment of part of a debt is not an absolute assignment because the assignor still has an interest in the debt or thing in action and usually needs to be joined in any proceedings the assignee commences against the debtor. Further,

³¹¹³ *Personal Property Securities Act 2009 (Cth)* s 10.

³¹¹⁴ *Personal Property Securities Act 2009 (Cth)* s 12.

³¹¹⁵ The *Personal Property Securities Act 2009 (Cth)* was recently reviewed and a Final Report issued in 2015. The recommendations made in that Report do not alter the Centre’s conclusions reached in relation to the interaction between section 199 of the PLA and the PPSA.

³¹¹⁶ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 39 [3.53].

³¹¹⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 39 [3.54].

³¹¹⁸ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 374 [14.3.3.1].

...if parts of a debt owing by one debtor were assigned to several parties, each of these assignees, having an interest in the whole, would have to be joined in any action to recover the debt and this was impracticable.³¹¹⁹

The Western Australian legislation has accommodated the assignment of part of a debt or legal chose in action since it was enacted.³¹²⁰ In New Zealand, the issue of whether a part debt should be permitted under the statutory assignment provisions was considered in 1992. The Law Commission (NZ) suggested that the new Act could provide that:

...a part of a debt or other legal or equitable thing in action may be assigned absolutely but that the assignee may not recover judgment for that part unless every person entitled to any part of it is joined in the proceedings. This reform would not improve the procedure which must be followed but would enable the assignment to be a legal assignment, as well as making the procedure explicit.³¹²¹

The new *Property Law Act 2007* (NZ) allows the assignment of part of a thing subject to the procedural requirement in section 52(4)(a) that the assignor be joined in any proceedings brought by way of enforcement against the debtor. The procedure for the assignment of a thing in action is set out in Part 2, subpart 5 of the Act. The term 'thing in action' is defined to mean the right to receive payment of a debt and a part of a thing in action.³¹²² Section 49(5) of the Act provides that, if only a part of a thing in action is assigned, the rights and obligations under sub-part 5 of the assignor and debtor relate only to the part assigned.

In Queensland, the obvious practical effect of such a change is that the assignment of any part of a debt or legal thing in action would then be a legal assignment which would provide certainty in relation to the procedure for the assignment of a part debt. It is not clear whether there is any impetus (or need) for this kind of change in Queensland.

163.2.4. Equitable thing in action

An equitable thing in action, such as the beneficial interest under a trust or will, is not expressly assignable at law under section 199 of the PLA. However, these interests are assignable at equity in whole or in part.³¹²³ The section refers to notice being given to the 'debtor, trustee or other person'. This reference has been used in case law to support a view that an equitable thing in action may also be assigned under the legislative provisions.³¹²⁴ The reasoning for this view is that there would be no

³¹¹⁹ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 380 [14.3.3.2.c].

³¹²⁰ *Property Law Act 1969* (WA) s 20(3). (The position in the United Kingdom is similar to section 199 of the *Property Law Act 1974* (Qld). Section 136 of the *Law of Property Act 1925* (UK) does not provide for the legal assignment of part debts).

³¹²¹ Law Commission (NZ), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 62 [232].

³¹²² *Property Law Act 2007* (NZ) s 48.

³¹²³ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 375 [14.3.3.1.c]. There are writing requirements for a disposition of an equitable interest or trust under section 11 of the *Property Law Act 1974* (Qld).

³¹²⁴ See SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 376 [14.3.3.2] for further discussion on this issue.

reason for the reference to trustee unless a beneficial interest under a trust could be assigned under the provisions.³¹²⁵ Commentary on this issue notes that:

Doubt has, however, been raised by a number of commentators because of the inability to legally assign an equitable chose or the fact that, procedurally, it adds nothing to the position of an equitable assignee.³¹²⁶

In New Zealand, an equitable thing in action has always been assignable at law under section 130 of the *Property Law Act 1952* (NZ) (now repealed) and section 50(1) of the *Property Law Act 2007* (NZ).

163.2.5. Assignment of future interests

A final issue relates to whether any consideration should be given to allowing certain future interests to fall within the scope of section 199 of the PLA. The terms ‘future interest’ or ‘expectancy’ are often used interchangeably and refer to property that may come into existence at a future point, but is not yet in existence.³¹²⁷ Future property is not assignable at law for this reason and as a result an immediate disposition to another person is not possible.³¹²⁸ However, the assignment of future property when it comes into existence is possible in equity if there is valuable consideration.³¹²⁹

The difficulty in relation to the legal assignment of future interests was explained by the Law Commission (NZ) in the following way:

The difficulty over an attempt to assign a future debt also comes down to the question of consideration. Property can be gifted by a conveyance which has immediate effect. Because a future debt is not property, an attempt to assign it amounts to no more than an agreement to do so. An agreement to do an act in the future, like any other species of ordinary contract, requires consideration.³¹³⁰

The Law Commission (NZ) in its Report on the proposed new Property Law Act indicated that the proposed section in the new Act dealing with the assignment of future interests clarified ‘the law relating to attempts to assign without consideration moneys to accrue in the future pursuant to existing rights (e.g. the assignment of a future income stream which may arise from an existing partnership agreement).’³¹³¹ Section 49(2) of the *Property Law Act 2007* (NZ) provides that a thing in action that is not capable of being assigned cannot be assigned under subpart 5. However, this provision is made subject to section 53 of the Act.³¹³² Section 53 of the *Property Law Act 2007* (NZ) now provides for the assignment of amounts payable in the future and is framed in the following way:

³¹²⁵ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 376 [14.3.3.2].

³¹²⁶ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 376 [14.3.3.2]. For a detailed discussion of the reasons why the equivalent provision in New South Wales (*Conveyancing Act 1919* (NSW) s 12) does not accommodate the assignment of equitable things in action see: R P Austin, ‘The Conveyancing Act, 1919 (As Amended) Section 12 and Equitable Choses in Action’ (1976) 7 *Sydney Law Review* 394.

³¹²⁷ Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 80 [5.59].

³¹²⁸ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 397 [14.4.5].

³¹²⁹ Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 80 [5.59].

³¹³⁰ Law Commission (NZ), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 69 [233].

³¹³¹ Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 15 [45].

³¹³² *Property Law Act 2007* (NZ) s 49(3).

An assignment of an amount that will or may be payable in the future under a right already possessed by the assignor (whether the right arises before, on, or after 1 January 2008) is to be treated as an assignment of a thing in action.

The New Zealand legislation does not have the effect of making a future interest assignable at law. The subpart provides for the assignment either at law or in equity and the assignment of a future amount will still only be treated as an assignment in equity under the provisions.

163.3. Other jurisdictions

163.3.1. Australia

Each Australian jurisdiction has a similar provision to section 199 of the PLA.³¹³³ Western Australia is the only legislation which expressly provides that ‘any debt or other legal chose in action will include a part of any debt or other legal chose in action.’³¹³⁴ In the Australian Capital Territory, section 205(1) of the *Civil Law (Property) Act 2006* (ACT) includes a note which indicates that an example of a ‘thing in action’ includes ‘rights under a trust’.

163.3.2. New Zealand

The approach to assignments is drafted quite differently under the *Property Law Act 2007* (NZ) compared to section 199 of the PLA. Prior to the 2007 Act, section 130 of the *Property Law Act 1952* (NZ) was in a similar form to section 199, although the New Zealand provision expressly included ‘legal or equitable’ things in action as being assignable. The relevant process and the consequences of assignment are now set out in sections 48 to 53 of the 2007 Act. The rationale for the significant change in approach under the new Act is not clearly articulated by the Law Commission (NZ). The Commission noted that the new sections go further than its predecessor in section 130 and that:

It allows any thing in action, that is, a right enforceable only by bringing legal proceedings as opposed to a right which can be enforced by taking possession, to be assigned at law by a writing signed by or on behalf of the assignor. Unlike s 130, it does not postpone the effectiveness in law of the assignment as between assignor and assignee until notice of the assignment has been given to the debtor. It separates the effect of the assignment from the effect on the debtor of the notice. But, under the new section, as under s 130, it is only absolute assignments (and not those which are conditional or by way of charge only) which are capable of taking effect at law. The section also deals with the effectiveness and completion of equitable assignments, clarifies the law relating to attempts to assign without consideration moneys to accrue in the future pursuant to existing rights (eg, the assignment of a future income stream which may arise from an existing partnership agreement), and deals with assignments of part of a thing in action, permitting such a part to be assigned at law (which cannot be done at present), subject to the observance of a procedural requirement for the joining of the assignor in any proceedings brought by way of enforcement against the debtor.³¹³⁵

The provisions in New Zealand appear to codify the procedure and effect of the assignment of both legal and equitable things in action and adopt a ‘catchall’ approach to statutory assignments. The

³¹³³ *Conveyancing Act 1919* (NSW) s 12; *Law of Property Act 2000* (NT) s 182; *Law of Property Act 1936* (SA) s 15; *Conveyancing and Law of Property Act 1884* (Tas) s 86; *Property Law Act 1969* (NSW) s 12; *Property Law Act 1969* (WA) s 20; *Civil Law (Property) Act 2006* (ACT) s 205.

³¹³⁴ *Property Law Act 1969* (WA) s 20(3).

³¹³⁵ Law Commission (NZ), *A New Property Law Act Report No. 29* (1994) 14-15 [45]-[46].

provisions in the sub-part extend beyond what is contained in section 199 of the PLA. A brief overview of the operation of the subpart is below:

- a number of definitions are set out in section 48 which are relevant to the sub-part;
- details of the application of the sub-part and the limits are set out in section 49;
- the absolute assignment in writing of a legal or equitable thing in action, signed by the assignor passes to the assignee:
 - all the rights of the assignor in relation to the thing in action; and
 - all the remedies of the assignor in relation to the thing in action; and
 - the power to give a good discharge to the debtor.³¹³⁶
- the effect of section 50(1) applies irrespective of whether the assignment is given for valuable consideration;³¹³⁷
- a legal or equitable thing in action is to be treated as having been assigned in equity (whether the assignment is oral or in writing) in the circumstances set out in the section;³¹³⁸
- section 51 sets out the further consequences of assignment of a thing in action including that payment of all or part of the debt to the assignor by a debtor who does not have actual notice of the assignment discharges the debtor to the extent of the payment. A debtor with actual notice of an assignment owes the debt to the assignee;
- section 52 provides that registration of an assignment under an enactment does not, of itself, give actual notice of the assignment to the debtor and section 52(1) overrides anything to the contrary in the enactment under which the assignment is registered;
- the assignment of an amount payable in the future is to be treated as an assignment of a thing in action.³¹³⁹

163.4. Recommendation

The Centre recommends that the effect of section 199 of the PLA should be retained but amended to allow for the assignment at law of any part of a debt or legal thing in action. This has the support of the QLS. The language of the section should be modernised and set out clearly in a way that assists with the interpretation of the section.

The Centre does not recommend an approach that makes future interests assignable at law. As discussed above at paragraph 163.2.5, a future interest is assignable in equity provided there is consideration. The issues identified by the Law Commission (NZ), as set out at paragraph 163.2.5, apply equally in Queensland. The Centre is of the view that an assignment of a future interest should remain an equitable assignment, and continue to require consideration. The Centre recommends no change to the law with respect to future property which remains unassignable at law or in equity.

The Western Australian legislation provides a helpful guide as to how amendments to section 199 of the PLA might be drafted.

³¹³⁶ *Property Law Act 2007* (NZ) s 50(1).

³¹³⁷ *Property Law Act 2007* (NZ) s 50(5).

³¹³⁸ This aspect of the *Property Law Act 2007* (NZ) is discussed in more detail in relation to section 200 of the *Property Law Act 1974* (Qld).

³¹³⁹ *Property Law Act 2007* (NZ) s 53.

RECOMMENDATION 162. Section 199 should be amended to modernise the language and to allow for the assignment at law of a partial debt or other legal thing in action.

For example, using the Western Australian provision as a guide, the section could be drafted in the following manner:

Section [199] Assignment of debts and choses in action

- (1) Subject to subsection (2), any absolute assignment of any debt or other legal chose in action, is effectual in law, to pass and transfer from the date of the notice —
 - (a) the legal right to that debt or chose in action;
 - (b) all legal and other remedies for the debt or chose in action; and
 - (c) the power to give a good discharge for the debt or chose in action, without the concurrence of the assignor.
- (2) An assignment under subsection (1):
 - (a) to be effective, requires express notice in writing to be given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim that debt or chose in action;
 - (b) must be made in writing and signed by the assignor;
 - (c) must not purport to be by way of charge only; and
 - (d) is subject to equities having priority over the right of the assignee.
- (3) Where the debtor, trustee, or other person liable in respect of the debt or chose in action referred to in subsection (1) has notice—
 - (a) that the assignment so referred to is disputed by the assignor, or any person claiming under him or her; or
 - (b) of any other opposing or conflicting claims, to the debt or chose in action, he or she may, if he or she thinks fit, either call upon the persons making claim thereto to interplead concerning the debt or chose in action, or pay the debt or other chose in action into court, under the provisions of the *Trusts Act 1973*.
- (4) For the purposes of this section **any debt or other legal chose in action** includes a part of any debt or other legal chose in action.

164. Section 200 – Efficacy in equity of voluntary assignments

164.1. Overview and purpose

200 Efficacy in equity of voluntary assignments

- (1) A voluntary assignment of property shall in equity be effective and complete when, and as soon as, the assignor has done everything to be done by the assignor that is necessary in order to transfer the property to the assignee –
- (a) even though anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and
 - (b) provided that anything so remaining to be done is such as may afterwards be done without intervention of or assistance from the assignor.
- (2) This section is without prejudice to any other mode of disposing of property, but applies subject to the provisions of this and of any other Act.

The enactment of a statutory assignment process for choses in action under the *Judicature Act 1876* (UK) did not ‘impair the efficacy of assignments in equity.’³¹⁴⁰ Prior to the introduction of a statutory assignment process, the earlier test in *Milroy v Lord*³¹⁴¹ was that an attempted gift would not be given effect in equity unless ‘the donor has done everything which...was necessary to be done in order to transfer the property’. The QLRC in its 1973 Report indicated that since the introduction of the statutory procedure for assignment, the test in *Milroy v Lord* had given rise to differing judicial opinions.³¹⁴² The QLRC noted that within the High Court decision of *Anning v Anning*³¹⁴³ there were a number of approaches to formulating the relevant test regarding whether there had been an effective assignment in equity. The two main approaches can be described as the ‘Higgins J approach’ and the ‘Griffith CJ approach’ and these are summarised below:

- the Higgins J approach provides that everything should be done by the donor which is within the donor’s power to do in order to transfer the property. This meant that an assignment of a chose in action would be incomplete if the donor had not given the debtor notice of the assignment since this was within the power of the donor to do so, irrespective that the assignee could also provide the notice;
- the Griffith CJ approach provides that the words ‘necessary to be done’ in the Milroy test should be construed to mean ‘necessary to be done by the donor’. This had the effect that, if what remained to be done could equally be done by the assignee, the assignment should be regarded as effective.

³¹⁴⁰ 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) 106.

³¹⁴¹ *Milroy v Lord* (1862) 4 De G.F & J 264.

³¹⁴² 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) 106.

³¹⁴³ *Anning v Anning* (1907) 4 CLR 1049.

Section 200 was introduced to resolve this uncertainty and the QLRC preferred the approach of Griffith CJ and this is reflected in the section.³¹⁴⁴

The QLRC also considered it necessary to confine the operation of the provision to 'effecting a transfer in equity so as not to disturb ordinary rules of priority.'³¹⁴⁵

164.2. Issues with the section

There does not appear to be any impetus for the removal of section 200 of the PLA. It is a provision which clarifies the approach to assignments in equity, has not presented any significant issues in the case law in Queensland and appears consistent with the common law approach.

164.3. Other jurisdictions

164.3.1. Australia

Section 200 is unique to Queensland and is not replicated in any form in any other Australian jurisdiction. In 2010, the VLRC considered whether the *Property Law Act 1958* (Vic) should be amended to include a provision similar to section 200. The VLRC noted that:

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

On this basis, we propose that section 134 be retained in its current form and that no provision be added relating to the completion of a voluntary assignment in equity.³¹⁴⁶

The issue does not appear to have been considered by any other reform body in Australia recently.

164.3.2. New Zealand

Part 2, Sub-part 5 of the *Property Law Act 2007* (NZ) addresses the issue of giving effect to an assignment in equity. The provision is expressed in a different way to section 200 of the PLA but the effect is similar. The relevant provisions are extracted below:

³¹⁴⁴ The approach of Griffith CJ was also supported in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 6.

³¹⁴⁵ 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) 107.

³¹⁴⁶ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010) 60 [8.33]-[8.34]. Following consultation on this issue of whether section 134 of the *Property Law Act 1958* (Vic) should include a provision for voluntary assignments taking effect only in equity, the VLRC confirmed its position that no addition should be made to section 134: see Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 39 [3.52].

50 How thing in action assigned³¹⁴⁷

- (5) A legal or equitable thing in action is to be treated as having been assigned in equity (whether the assignment is oral or in writing) if –
 - (a) the assignee has given valuable consideration for the assignment; or
 - (b) the assignment is complete.
- (6) Subsection (5) –
 - (a) prevails over any rule of equity to the contrary; but
 - (b) applies subject to sections 24 and 25.
- (7) An assignment to which subsection (5) applies is complete when the assignor has done everything that needs to be done by the assignor to transfer to the assignee (whether absolutely, conditionally, or by way of charge) the rights of the assignor in relation to the thing in action.
- (8) Subsection (7) applies even though some other thing may remain to be done, without the intervention or assistance of the assignor, in order to confer title to the rights on the assignee.

Section 51 of the Act then sets out the further consequences of an assignment which apply to both a thing in action assigned in accordance with section 50(1) or a thing assigned in equity.³¹⁴⁸

164.4. Recommendation

The Centre recommends section 200 of the PLA should be retained. This recommendation has the support of the QLS.

RECOMMENDATION 163. Section 200 should be retained.

³¹⁴⁷ The term 'assignment' is defined to mean 'an instrument effecting or relating to an assignment': *Property Law Act 2007* (NZ) s 48.

³¹⁴⁸ *Property Law Act 2007* (NZ) s 51(1).

Part 13 – Powers of appointment

Part 13 of the PLA was taken from the *Law of Property Act 1925* (UK).³¹⁴⁹ The five sections in part 13 all work together. Before turning to a section by section discussion, it is useful to first briefly review the nature of powers of appointment.

The owner of property as a settlor or testator (in each case, the **donor**) may confer on another person (the **donee**) a power to appoint the donor's property to beneficiaries as selected by the donee. A **general power of appointment** allows the donee to appoint the donor's property to anyone (including him or herself). A settlement of property '*to my wife for life, remainder to such person or persons as my wife may appoint*'³¹⁵⁰ is an example of a general power of appointment.

In contrast, a **special power of appointment** allows the donee to appoint the donor's property to a specified person or class of persons. A settlement of property '*to my wife for life, remainder to be divided among my children as my wife may appoint*'³¹⁵¹ is an example of a special power of appointment.

The rule against perpetuities³¹⁵² may apply to a power of appointment either when the power is *created* (i.e. given by the donor to the donee) or when it is *exercised* (i.e. when the donee appoints the property to a person or persons). Whether the power is a special power or a general power is significant for the purposes of the rule against perpetuities. In the case of a general power, the donee may appoint the property to any person in the world. As such, the ownership is equivalent to absolute ownership. Assuming the power is validly created (within the perpetuity period that applies to the disposition of the power by the donor to the donee) this generally means the rule against perpetuities will only again become relevant when the power is exercised.

With a special power, the donee may appoint the property only to specified person or class of persons. As such, the donee's interest in the property is fettered from the beginning. The disposition of the property remains controlled by the donor and the donee has power only to appoint the property to a limited class.³¹⁵³ In these circumstances (again, assuming the special power has been validly created) the perpetuity period will run from the time the instrument creating the special power of appointment comes into effect.

At common law, a special power of appointment will be void for remoteness if there is any possibility that it can be exercised outside the perpetuity period.³¹⁵⁴ This position is modified by section 208 in Part 14 of the PLA, which is discussed at paragraph 174 below.

³¹⁴⁹ *Law of Property Act 1925* (UK) Part VI ss 155-160.

³¹⁵⁰ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010), [1284].

³¹⁵¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010), [1284].

³¹⁵² Discussed below at parts 170 to 187.

³¹⁵³ EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (17th ed, Oxford University Press, 2006), 534, 536.

³¹⁵⁴ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010), [1289].

The powers of appointment provisions in other jurisdictions (as in Queensland) are largely drawn from the relevant UK legislation, the *Law of Property Act 1925*.³¹⁵⁵ New South Wales,³¹⁵⁶ Victoria,³¹⁵⁷ the Northern Territory³¹⁵⁸ and Western Australia³¹⁵⁹ all have provisions that are virtually identical to the powers of appointment provision in part 13 of the PLA. Tasmania,³¹⁶⁰ South Australia³¹⁶¹ and the Australian Capital Territory³¹⁶² each have at least some provisions that are equivalent.

The Centre is of the view that powers of appointment continue to be relevant to the disposition of property and to the exercise of powers under a discretionary trust. As such, the provisions in part 13 of the PLA should continue to apply to powers of appointment (where necessary) regardless of when the power was created or came into effect.

The Centre is of the view that Part 13 should be retained and re-drafted with modernised language. This could be achieved either by redrafting each section or by amalgamating the provisions into a smaller number of sections. Either approach is likely to achieve the desired outcome.

³¹⁵⁵ (UK) Part VI ss 155-160.

³¹⁵⁶ *Conveyancing Act 1919* (NSW) ss 28-29A, 41.

³¹⁵⁷ *Property Law Act 1958* (Vic) Division 6 ss 155-160.

³¹⁵⁸ *Law of Property Act* (NT) Part 12 ss 203-207.

³¹⁵⁹ *Property Law Act 1969* (WA) Part X, ss 93-98.

³¹⁶⁰ *Conveyancing and Law of Property Act 1884* (Tas) ss 76-78. The Tasmanian provisions are equivalent to PLA s 205 and s 202.

³¹⁶¹ *Law of Property Act 1936* (SA) Part 5 ss 57-58. The SA provisions are equivalent to *Property Law Act 1974* (Qld) ss 202-203 and s 205.

³¹⁶² *Civil Law (Property) Act 2006* (ACT) s 222 and Division 2.3.4 ss 228-229. The ACT provisions are equivalent to *Property Law Act 1974* (Qld) ss 202-203.

165. Section 201 – Application of pt 13

165.1. Overview and purpose

201 Application of pt 13

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

Section 201 will apply to all powers created in Queensland, whether arising before and after 30 November 1975.³¹⁶³ For a power of appointment created by a will, the power comes into effect on the death of the testator. For a power created in an instrument, the power comes into effect upon the execution of the instrument.³¹⁶⁴

165.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions to the Property Law Review.

165.3. Recommendation

The Centre is of the view that powers of appointment continue to be relevant to the operation of discretionary trusts. Given this, the Centre is of the view that effect of section 201 should be retained.

RECOMMENDATION 164. Section 201 should be retained with modernised language.

³¹⁶³ The date the *Property Law Act 1974* (Qld) became effective.

³¹⁶⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.201.30]).

166. Section 202 – Mode of exercise of powers

166.1. Overview and purpose

202 Mode of exercise of powers

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

The exercise of a power of appointment occurs when the donee (in this situation, the **appointor**) makes an appointment of property in favour of a person (the **appointee**) or class of persons (the objects of the power). A power of appointment may be exercised in a will or in an *inter vivos* instrument such as a deed or an instrument under the *Land Title Act 1994* (Qld). In an *inter vivos* instrument the power is created upon the settlement of the execution deed.

In a will, the power is created on the death of a testator. Section 202 of the PLA does not apply to powers of appointment exercised by a will.³¹⁶⁵

Consider our earlier example of a special power of appointment ‘*to my wife for life, remainder to be divided among my children as my wife may appoint.*’ The wife’s interest is a life interest and on her death, the remainder goes to the donor’s children as the wife appoints. In this situation the exercise of the power (that is, the appointment of the property to the donor’s children) will occur in the wife’s will. As such, the will exercising the power must be executed in accordance with the provisions of the *Succession Act 1981* (Qld).³¹⁶⁶

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

At common law, the instrument creating the power of appointment could detail the mode of execution of the power so that the donee would have to follow the exact terms in executing the

³¹⁶⁵ These are covered in the *Succession Act 1981* (Qld).

³¹⁶⁶ *Succession Act 1981* (Qld) s 10. Note section 10(12) which provides that if a power of appointment conferred on a person requires an appointment by will be executed with a particular solemnity, the power will still be exercisable if the will is executed in accordance with section 10.

power.³¹⁶⁷ Consider a disposition that provides ‘to my wife for life, remainder to such of my children as my brother X may appoint by deed witnessed by four people.’

In these circumstances section 202 will operate to provide that the exercise of the power of appointment by the brother would be a valid exercise even if the deed was not witnessed by four people, provided the deed was executed and attested under the PLA³¹⁶⁸ or the *Land Titles Act 1994* (Qld).

However, where the consent of a particular person is required, or an act is to be performed, such consent or act must still be obtained or performed.

This section is designed to avoid difficulties that may be caused by documents providing that a power is only exercisable by a deed if additional forms of execution or solemnity are provided.³¹⁶⁹

166.2. Issues with the section

The QLS submitted that the section is not likely to be used as the instrument of appointment will usually provide that the power may be exercised ‘by deed or will’. In less formally drafted instruments of appointment, section 202 may continue to serve a useful purpose. This means there can be little harm in retaining the section.

166.3. Other jurisdictions

A number of Australian jurisdictions³¹⁷⁰ contain a provision equivalent to section 202. In 2007, New Zealand re-drafted an equivalent provision³¹⁷¹ in the following terms:

16 Powers of appointment

- (1) An appointment to be made by deed or writing (but not a will) is valid if it is executed in accordance with the requirements for the execution of a deed.
- (2) Subsection (1) applies even though the instrument conferring the power of appointment requires some additional or other formality.

This approach is notable for the plain language drafting.

166.4. Recommendation

The Centre is of the view that the effect of section 202 should be retained with modernised language. The New Zealand provision provides a useful example of what an updated provision may look like.

³¹⁶⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.202.60].

³¹⁶⁸ See *Property Law Act 1974* (Qld) Part 6.

³¹⁶⁹ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, [30721.1]. The commentary is provided in respect of the *Conveyancing Act 1919* (NSW) s 41 which was the model for PLA s 202. See Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 108.

³¹⁷⁰ *Conveyancing Act 1919* (NSW) s 41; *Property Law Act 1958* (Vic) s 159; *Law of Property Act* (NT) s 204; *Property Law Act 1969* (WA) 97; *Conveyancing and Law of Property Act 1884* (Tas) s 78; *Law of Property Act 1936* (SA) s 58.

³¹⁷¹ *Property Law Act 2007* (NZ) s 16.

RECOMMENDATION 165. Section 202 should be retained with modernised language.

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

167.1. Overview and purpose

203 Validation of appointments where objects are excluded or take illusory shares

- (1) No appointment made in exercise of any power to appoint any property among 2 or more objects shall be invalid on the ground that—
 - (a) an unsubstantial, illusory, or nominal share only is appointed to or left unappointed to devolve upon any 1 or more of the objects of the power; or
 - (b) any object of the power is altogether excluded;

but every such appointment shall be valid even though any 1 or more of the objects is not, or in default of appointment, to take any share in the property.
- (2) This section does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded.
- (3) This section applies to appointments made before or after the commencement of this Act.

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

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

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

At common law, where the power was non-exclusive and the appointment to one or more of the objects of the power was merely nominal, it could be set aside as illusory.³¹⁷² Section 203 of the PLA provides that an exercise of a power of appointment will be valid even if one or more of the objects receives a nominal share of the property or is excluded altogether. This removes the need to distinguish between exclusive and non-exclusive powers.³¹⁷³

³¹⁷² Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, [30480.5], referring to *Conveyancing Act 1919 (NSW) s 29*. See also Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973), 108.

³¹⁷³ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, [30480.1].

167.2. Issues with the section

The QLS submitted that the section is not likely to be used as the instrument of appointment will usually provide that the appointment among objects may be *'to such one or more of the beneficiaries then living or in existence (whether to the exclusion of some of them or not) and in such proportions as the trustee shall in its absolute discretion think fit and appoint.'*

In less formally drafted instruments of appointment, section 203 may continue to serve a useful purpose. The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions. Given this, there can be little harm in retaining the section.

167.3. Recommendation

The Centre is of the view that section 203 should be retained with modernised language.

RECOMMENDATION 166. Section 203 should be retained with modernised language.

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

168.1. Overview and purpose

204 Protection of purchasers claiming under certain void appointments

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

Section 204 provides protection for a purchaser in good faith who purchases property from an appointee where the appointment made by the donee is exercised in a way that creates a fraud on a power. Fraud, in this sense, does not necessarily mean a dishonest dealing but where the appointment is beyond the intent of the power.³¹⁷⁴

A purchaser (or a successor in title to a purchaser) who acquires for valuable consideration the property from the appointee is protected if:

- the appointee is at least 25 years old and a member of a class entitled to the property upon default of appointment; and
- the purchaser has no notice of the fraud.

The protection extends only to the interest in such property to which the appointee was presumptively entitled under the trust in default of appointment³¹⁷⁵ immediately before the execution of the instrument. It has been suggested that this section probably prevents adverse situations from coming to the attention of the court.

³¹⁷⁴ Duncan and Vann, *Property Law and Practice in Queensland* (eds) (looseleaf) WD Duncan and A Wallace, Thomson Reuters, [PLA.204.30] and Young et al, *Annotated Conveyancing & Real Property Legislation (NSW)*, [30485.5].

³¹⁷⁵ Less any advances to the appointee and any reduction due to a hotchpot provision: *Property Law Act 1974* (Qld) s 204(1A).

The purchaser in good faith may also have additional protection if the property in question is real property and after the sale it is registered under the *Land Title Act 1994* (Qld). This is because the land under the PLA is subject to the *Land Title Act 1994* (Qld).³¹⁷⁶

168.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions. The QLS submitted that section 204 is necessary to any sophisticated property legislation.

168.3. Recommendation

The Centre is of the view that section 204 should be retained with modernised language.

RECOMMENDATION 167. Section 204 should be retained with modernised language.

³¹⁷⁶ *Property Law Act 1974* (Qld) s 5(1)(a).

169. Section 205 – Disclaimer etc. of powers

169.1. Overview and purpose

205 Disclaimer etc. of powers

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

Section 205 of the PLA is drawn from the equivalent provisions in both the United Kingdom³¹⁷⁷ and in New South Wales.³¹⁷⁸ The purpose of the section is to allow the donee of a power of appointment to release the power by deed. The section also provides that where necessary, the deed may be registered.

Section 205(4) states that the section does not apply to a power coupled with a duty. This is because it may be a breach of trust to release a duty.³¹⁷⁹

169.2. Issues with the section

The QLS submitted that section 205 should be amended in at least two respects. The first is to clarify the terms of the section. The QLS notes that the phrase a ‘power coupled with an interest’ and a ‘power coupled with a duty’ could be subject to legal debate regarding meaning and application. The second is to remove the exclusion in relation to a power coupled with a duty. In the QLS’s view, this would allow a more uniform outcome to apply in relation to renunciation of a power, irrespective of whether it is a mere power, a trust power or any type of hybrid.

Despite this view, the QLS noted that it would be at odds with the nature of a fiduciary obligation if the appointer with a fiduciary obligation were able to ‘bargain’ for a disclaimer, as the reference to ‘contract’ in section 205(1) and (2) would imply. The QLS suggested that 205(1) could be remodelled to confine the action to a simple renunciation or disclaimer.

³¹⁷⁷ *Law of Property Act 1925* (UK) ss 155-6.

³¹⁷⁸ *Conveyancing Act 1919* (NSW) s 28.

³¹⁷⁹ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, at 30470.10, referring to *Conveyancing Act 1919* (NSW) s 28 and citing *Re Wills Trust Deeds* [1964] CH 219; *Re Mills* [1930] 1 Ch 654, 666.

Allowing a person to disclaim a power coupled with a duty would represent a significant shift in the legislation. As is evident from QLRC Report 16,³¹⁸⁰ the QLRC intended to expressly exclude powers coupled with duties from the operation of the section.

The Centre does not agree with the QLS's suggestion that the powers coupled with duties should be included in section 205.

169.3. Other jurisdictions

The UK equivalent of section 205 does not expressly exclude a power coupled with a duty. Despite this, it has been submitted that such a power cannot be released under the common law.³¹⁸¹

In Victoria,³¹⁸² Tasmania,³¹⁸³ Western Australia³¹⁸⁴ and South Australia,³¹⁸⁵ (as in the UK) the equivalent provision does not specifically exclude powers coupled with a duty. In Victoria, while the section does not expressly exclude powers coupled with duties, there is commentary indicating that the section must be read as containing such an exclusion.³¹⁸⁶

The equivalent provision in New South Wales, which was considered by the QLRC, expressly excludes a power coupled with a duty.³¹⁸⁷

In New Zealand, the previous property legislation³¹⁸⁸ contained a provision very similar to section 205 of the PLA, which had been drawn from the UK legislation.³¹⁸⁹ As in the UK, the earlier New Zealand provision did not expressly exclude disclaimer of a power coupled with a duty. However, when the provision was redrafted in 2007, the exclusion of a power in the nature of a trust was made express.

The *Property Law Act 2007* (NZ) retained the provision but with modernised language. The relevant provision now states:

³¹⁸⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 108.

³¹⁸¹ Peter Young et al, *Annotated Conveyancing & Real Property Legislation: New South Wales*, LexisNexis Butterworths, at 30470.10, referring to *Conveyancing Act 1919* (NSW) s 28, 30470.15.

³¹⁸² *Property Law Act 1958* (Vic) s 155.

³¹⁸³ *Conveyancing and Law of Property Act 1884* (Tas) s 77.

³¹⁸⁴ *Property Law Act 1969* (WA) s 93.

³¹⁸⁵ *Law of Property Act 1936* (SA) s 57.

³¹⁸⁶ Stanley Robinson, *The Property Law Act Victoria*, (1992) Lawbook Co, 389.

³¹⁸⁷ *Conveyancing Act 1919* (NSW) s 28.

³¹⁸⁸ *Property Law Act 1952* (NZ) s 34.

³¹⁸⁹ *Law of Property 1925* (UK) s 155-156, 160.

73 Release and disclaimer of powers

- (1) This section—
 - (a) applies to a power to deal with or dispose of property whether or not the person who can exercise the power has an interest in the property to which the power relates; but
 - (b) does not apply to the power if it is a power in the nature of a trust.
- (2) The person who can exercise a power may—
 - (a) release the power by deed or contract; or
 - (b) disclaim the power by deed.
- (3) The release of a power extinguishes the power.
- (4) If a power is disclaimed—
 - (a) the person who disclaimed the power may not exercise or join in the exercise of the power; but
 - (b) any other person who can exercise the power, and who has not disclaimed it, may continue to exercise the power.
- (5) Subsection (4)(b) applies subject to the terms of the instrument creating the power.

169.4. Recommendation

The QLRC clearly intended section 205 to exclude powers coupled with a duty. As can be seen, when New Zealand re-drafted their equivalent provision in plain language, it was felt necessary to clarify that the disclaimer excluded powers in the nature of a trust, being powers coupled with a duty.

The Centre is of the view that section 205 should continue to include powers coupled with a duty. As such, the Centre recommends that section 205 should be retained with modernised language.

RECOMMENDATION 168. Section 205 should be retained with modernised language.

Part 14 – Perpetuities and accumulations

Part 14 of the PLA modifies the common law doctrine known as the rule against perpetuities (the **rule**).³¹⁹⁰ In Queensland, the common law rule against perpetuities will apply³¹⁹¹ to interests in property that might vest at too late a date. The ‘modern’ rule against perpetuities³¹⁹² may be better described as the rule against remoteness of vesting. The rule can be summed up as follows:

No interest in property is valid unless it must vest (take effect), if at all, earlier than 21 years after the death of a person alive at the time the interest was created.³¹⁹³

The modern rule against perpetuities is ‘as modern as the end of the seventeenth century.’³¹⁹⁴ It has been described as having an ‘inner consistency’ that allows it to be applied with ‘remorseless logic and predictable outcome’.³¹⁹⁵

It has been argued that the rule serves at least two important public policy functions. These functions are: limiting ‘dead hand’ control of property by striking a balance between the freedom of disposition (that is, the ability of a person to deal with their property as they wish);³¹⁹⁶ and protecting the public interest by ensuring that property is not indefinitely tied up in trusts.³¹⁹⁷

Despite this, the rule is not well understood, even among the legal profession.³¹⁹⁸ The rule has been described as ‘complex’,³¹⁹⁹ abstruse, unrealistic, capricious and misapplied.³²⁰⁰

The common law rule has been modified in all Australian states³²⁰¹ and territories except South Australia where it was abolished completely in 1996.³²⁰² A number of jurisdictions overseas have also abolished, or are considering abolition of, the rule.³²⁰³

³¹⁹⁰ For an overview of the rule against perpetuities, see Les McCrimmon, ‘Understanding the Rule Against Perpetuities: Adopting a Five Step Approach to a Perpetuities Problem,’ (1997) 5(2-3) *Australian Property Law Journal*, 130-144.

³¹⁹¹ Subject to the statutory modifications, discussed below at paragraphs 170 to 187.

³¹⁹² The modern rule is so called to contrast it with the ‘old rule’ against perpetuities (also known as the rule in *Whitby v Mitchell* (1890) 44 Ch D 85). The old rule was abolished in Queensland by *Property Law Act 1974* (Qld) s 216. For a discussion of the old rule, see Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1202]-[1205].

³¹⁹³ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No. 40, July 2014, 7.

³¹⁹⁴ JD Merralls, ‘The Application of the Rule Against Perpetuities to Natural Resources Agreements’ (2007) *Australian Mining and Petroleum Yearbook*, 214-227, 220.

³¹⁹⁵ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1207].

³¹⁹⁶ Carl Emery, ‘Do We Need a Rule Against Perpetuities?’ (1994) 57 (4) *Modern Law Review*, 602-610, 602-605.

³¹⁹⁷ Kellee Clark, ‘The Rule Against Perpetuities,’ (2007) 11(3) *Otago Law Review*, 495-512, 500-502.

³¹⁹⁸ See Les McCrimmon, ‘Understanding the Rule Against Perpetuities: Adopting a Five Step Approach to a Perpetuities Problem,’ (1997) 5(2-3) *Australian Property Law Journal*, 130-144, 130.

³¹⁹⁹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1207].

³²⁰⁰ Barton Leach, ‘Perpetuities: Staying the Slaughter of the Innocent,’ (1952) 68 *Law Quarterly Review*, 35-59, 35.

³²⁰¹ *Property Law Act 1974* (Qld) ss 206-222; *Perpetuities Act 1984* (NSW); *Law of Property Act* (NT); *Perpetuities and Accumulations Act 1968* (Vic); *Property Law Act 1969* (WA); *Perpetuities and Accumulations Act 1992* (Tas); *Perpetuities and Accumulations Act 1985* (ACT).

³²⁰² *Property Law Act 1936* (SA) s 61.

³²⁰³ For example, Ireland: *Land and Conveyancing Law Reform Act 2009* (IRE) s 16. See also Law Commission (NZ), *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, ‘Perpetuities and the maximum duration of trusts’, 17.7 and footnote 337.

By way of overview of the rule, it should be noted that in Queensland, the common law rule against perpetuities applies to all dispositions of an interest in property. Where the strict application of the common law rule would result in the interest being invalid, the statutory modifications to the rule contained in part 14 of the PLA may operate to 'save'³²⁰⁴ the interest. The provisions of Part 14 were brought across from the *Perpetuities and Accumulations Act 1972 (Qld) (1972 Act)*, which modified the common law rule in line with similar modifications then in place in Victoria and Western Australia³²⁰⁵ and the United Kingdom.³²⁰⁶ The 1972 Act was repealed and the relevant provisions were re-enacted in the PLA in 1974.³²⁰⁷ The provisions have not been significantly altered in Queensland since.

In its review of the *Trusts Act 1973 (Qld)*, the QLRC commented that there is merit in reviewing the rule against perpetuities.³²⁰⁸ The QLRC observed that the rule is dealt with in the PLA and is thus outside the scope of a review of the *Trusts Act 1973 (Qld)* but specifically mentioned the Centre's review of the PLA.³²⁰⁹

There has been an increasing trend toward modifying and even complete repeal of the rule. An increasing number of jurisdictions are reviewing, or having recently reviewed, the rule. In 2009, the United Kingdom amended the rule to provide a set perpetuity period of 125 years and effectively abolished the rule in respect of commercial arrangements.³²¹⁰ The Law Commission (NZ) has recommended that the common law rule be of no application in New Zealand and that there be a set duration of 150 years for all trusts.³²¹¹ The Northern Territory Law Reform Committee (NTLRC) has similarly recommended a set perpetuity period of 150 years.³²¹²

As set out in greater detail below, the Centre recommends the creation of a single fixed 125 year perpetuity period for all dispositions of an interest in property that take effect after the commencement of the amendments. A fixed perpetuity period will mean that reference to a life or lives in being will no longer be required.

Further, the Centre recommends that existing dispositions of property remain subject to the perpetuity period in place at the time the disposition took effect, subject to the right of the trustee to apply to the court for an order extending the perpetuity period.

³²⁰⁴ See Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.290].

³²⁰⁵ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7, 24 May 1971, 2.

³²⁰⁶ *Perpetuities and Accumulations Act 1964 (UK)*.

³²⁰⁷ With effect from 1 December 1975.

³²⁰⁸ Queensland Law Reform Commission, *A Review of the Trusts Act 1973*, Report No. 71 (December 2013) chapter 3, [33].

³²⁰⁹ The QLRC noted that the *Property Law Act 1974 (Qld)* is under review by the Centre. See Queensland Law Reform Commission, *A Review of the Trusts Act 1973*, Report No. 71 (December 2013) chapter 3, [33].

³²¹⁰ *Perpetuities and Accumulations Act 2009 (UK)* (c 18).

³²¹¹ Law Commission (NZ), *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', R49.

³²¹² Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No. 40, July 2014, 24.

RECOMMENDATION 169. The rule against perpetuities should be replaced with a single perpetuity period of up to 125 years for dispositions of an interest in property that take effect after the commencement of the new provisions. Existing dispositions of property should remain subject to the perpetuity period in place at the time the disposition took effect, subject an ability to ‘opt-in’ to the longer perpetuity period in specified circumstances.

Prior to being incorporated in the PLA, the provisions in Part 14 were located in the 1972 Act, a stand-alone act. When the PLA was drafted, the QLRC thought it preferable that the relevant provisions be incorporated in the PLA.³²¹³

Dispositions of property to unborn people in Queensland, if they are made, usually arise in the case of testamentary trusts. *Inter vivos* settlements where such a disposition would be made in contemporary Queensland are extremely rare if not unknown.

Given this, there is a strong argument that the provisions governing the rule in Queensland belong either in the trusts legislation or in their own Act. While the rule is concerned with property (hence the inclusion in the PLA) it only applies to property that is held by a person for the benefit of another person or persons. The QLS has submitted that the rule against perpetuities should be dealt with in the trusts legislation, not in the PLA.³²¹⁴

The Centre is of the view that the provisions dealing with powers of appointment, perpetuities and accumulations should be removed from the PLA. They could be placed into the *Trusts Act 1973* (Qld) or put into a stand-alone Act.³²¹⁵ Regardless of the approach taken, the provisions dealing with powers of appointment and those dealing with the rule should be kept together.

RECOMMENDATION 170. The provisions dealing with powers of appointment, perpetuities and accumulations should be removed and placed in a stand-alone Act or in the *Trusts Act 1973*.

³²¹³ This was done to accord with the approach in other States and because the PLA was designed to embrace all property rights in general: Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

³²¹⁴ Queensland Law Reform Commission, *A Review of the Trusts Act 1973*, Report No. 71 (December 2013), chapter 3, [30].

³²¹⁵ As has been done in a number of jurisdictions. See for example: *Perpetuities and Accumulations Act 1984* (NSW); *Perpetuities and Accumulations Act 1968* (Vic); *Perpetuities and Accumulations Act 1992* (Tas); *Perpetuities and Accumulations Act 1985* (ACT).

170. Section 206 – Definitions for pt 14

170.1. Overview and purpose

206 Definitions for pt 14

In this part—

disposition includes the conferring or exercise of a power of appointment or any other power or authority to dispose of an interest in or a right over property and any other disposition of an interest in or right over property.

instrument includes a will, and also includes an instrument, testamentary or otherwise, exercising a power of appointment whether general or special but does not include an Act.

power of appointment includes any discretionary power to transfer or grant or create a beneficial interest in property without the furnishing of valuable consideration.

Section 206 sets out several definitions for part 14. The first two terms are also defined in schedule 6 of the PLA³²¹⁶ which means that the definitions in this section modify the more generally applicable definition.

170.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions.

170.3. Recommendation

The definitions in section 206 should be retained with modernised language to be used in line with the Centre’s recommended approach to dealing with perpetuities.

RECOMMENDATION 171. The effect of section 206 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

³²¹⁶ *Property Law Act 1974* (Qld) schedule 6 (definitions of ‘disposition’ and ‘instrument’).

171. Section 206A – When disposition in will made

171.1. Overview and purpose

206A When disposition in will made

For the purposes of this part a disposition contained in a will shall be deemed to be made at the death of the testator.

Section 206A provides that a disposition of property made in a will is deemed to be made at the death of the testator. While not stated in the section, a disposition in an instrument other than a will is made at the time the instrument takes effect.

It is important to determine when a disposition is made as the date will be the start of the perpetuity period. Under the common law rule, the disposition must vest, if at all, within 21 years after the death of a life in being who is alive or in the womb at the death of the testator. Alternatively, the will may specify a perpetuity period of up to 80 years.³²¹⁷

171.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions.

As discussed, the Centre's recommended approach is to replace the rule against perpetuities with a fixed 125 year perpetuity period in which dispositions of property must vest. Given this, it is important that there are statutory mechanisms to determine the effective start of the new perpetuity period.

171.3. Recommendation

The Centre recommends that the effect of section 206A should be retained with modernised language in a way that aligns with the Centre's other recommendations for dealing with the rule against perpetuities.

RECOMMENDATION 172. The effect of section 206A should be retained with modernised language that aligns with the Centre's other recommendations relating to the rule against perpetuities.

³²¹⁷ *Property Law Act 1974 (Qld)* s 209.

172. Section 206B – When person to be treated as member of class

172.1. Overview and purpose

206B When person to be treated as member of class

For the purposes of this part a person shall be treated as a member of a class if in the person's case all the conditions identifying a member of the class are satisfied, and shall be treated as a potential member if in the person's case only 1 or some of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

Section 206B (along with section 206A) was originally included in section 206, which was first enacted in the 1972 Act. The QLRC commented³²¹⁸ that the terms 'member of a class' and 'potential member' were used in relation to the provisions dealing with exclusion of class members³²¹⁹ and an unborn husband or wife.³²²⁰

172.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions.

Under the Centre's recommended approach, there will continue to be a need for class closing rules in order to save dispositions that might not vest in the perpetuity period.

172.3. Recommendation

The Centre recommends that the effect of section 206B should be retained with modernised language in a way that aligns with the Centre's other recommendations for dealing with the rule against perpetuities.

RECOMMENDATION 173. The effect of section 206B should be retained with modernised language that aligns with the Centre's other recommendations relating to the rule against perpetuities.

³²¹⁸ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7, 24 May 1971, 4.

³²¹⁹ *Property Law Act 1974* (Qld) s 213.

³²²⁰ *Property Law Act 1974* (Qld) s 214.

173. Section 207 – Application of pt 14

173.1. Overview and purpose

207 Application of pt 14

- (1) Save as otherwise provided in this part, this part shall apply only in relation to instruments taking effect after the commencement of this Act, and in the case of an instrument under which a special power of appointment is exercised shall apply only where the instrument creating the power takes effect after that commencement.
- (1A) However, section 208 shall apply in all cases for construing the reference in this subsection to a special power of appointment.
- (2) This part applies in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.

The 1972 Act applied to instruments taking effect after the commencement of that Act. This position was continued when the 1972 Act was re-enacted in the PLA. This means that the rule against perpetuities, as modified by statute applies to in relation to instruments taking effect after the commencement of the Act. In relation to a special power of appointment, the rule against perpetuities as modified by statute will apply to the exercise of that special power only where the instrument creating the power takes effect after the commencement of the Act. This is because, as explained earlier, the perpetuity period for a special power of appointment runs from the time the power is given by the donor to the donee.³²²¹

Part 14, then, generally does not apply to a special power of appointment granted before the commencement of the PLA, but exercised after. Where the instrument creating a special power of appointment takes effect prior to the commencement of the 1972 Act or the PLA, the perpetuity period will be subject to the rules in place at that time, regardless of whether the appointment is made after the commencement of the 1972 Act or the PLA.

One exception to this is in relation to section 208 of the PLA³²²² which provides that a power of appointment will be deemed to be a special power unless specific requirements are met. Section 207 expressly makes the meaning of a special power of appointment subject to section 208.

173.2. Issues with the section

As discussed, the Centre has recommended a significant change to the approach for dealing with remoteness of vesting, replacing the rule against perpetuities with a fixed perpetuity period within which property held on trust must vest.

The Centre's recommended approach will apply to all dispositions of property made after the commencement of the new provisions. Dispositions made prior to the commencement will continue to be subject to the rule against perpetuities, as modified by statute, at the time the disposition was made.

³²²¹ Discussed further at 174.1 below.

³²²² Discussed further at 174.1 below.

Existing trusts would continue to be subject to the rule against perpetuities at the time the disposition took place. This means that existing trusts with the common law perpetuity period (a life in being plus 21 years, or just 21 years), the statutory maximum 80 year period, or some other fixed date shorter than 80 years, would continue to be subject to those perpetuity periods.

However, the Centre is of the view that existing trusts should have the ability to effectively ‘opt-in’ to the new 125 year maximum perpetuity period. An extension to the perpetuity period for existing trusts could be achieved in one of three ways:

- within the terms of the instrument of trust itself;
- by agreement of all the beneficiaries; or
- on application to the court.

The court should be given a list of criteria to consider when making a decision. This criteria should include a number of relevant factors such as the reason for extending the perpetuity period, the likely impact on beneficiaries and the intentions of the testator or person making the disposition.

173.3. Recommendation

In the Centre’s view, the 125 year perpetuity period should apply to trusts and dispositions of property made after the commencement of the new provisions— so that property held on trust must vest, if it vests at all, within 125 years from the date the disposition of the interest takes effect. There should be default rules for vesting if the interest fails to vest within the perpetuity period.

In the Centre’s view, trusts in existence at the time of the commencement of the new provisions should have the ability to opt-in to the new perpetuity period.

Special powers of appointment should continue to be subject to a perpetuity period that commences from the date the power of appointment is created or given, rather than when the special power of appointment is exercised.

The Centre recommends that the effect of section 207 should be retained with modernised language in a way that aligns with the Centre’s other recommendations for dealing with the rule against perpetuities. This means that the fixed 125 year perpetuity period will apply to all dispositions of property made after the commencement of the new provisions. Trusts already in existence at the time of the commencement of the new provisions should have an opportunity to opt-in to the new perpetuity period by agreement of all beneficiaries, under the terms of the trust instrument or by order of a court.

RECOMMENDATION 174. The effect of section 207 should be retained with modernised language so that the new perpetuity period applies to all dispositions of property made after the commencement of the new provisions. Further, trusts that are already in existence should have the ability to opt-in to the new perpetuity period.

174. Section 208 – Powers of appointment

174.1. Overview and purpose

208 Powers of appointment

- (1) For the purposes of the rule against perpetuities a power of appointment shall be treated as a special power unless—
- (a) in the instrument creating the power it is expressed to be exercisable by 1 person only; and
 - (b) it could at all times during its currency when that person is of full age and capacity be exercised by the person so as immediately to transfer to or otherwise vest in the person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.
- (2) However, for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

Under the current legislation, the rule against perpetuities is applicable to the creation and the exercise of a power of appointment.³²²³ In regards to the creation of the power (when the power is given by the donor to the donee) at common law, both a general power and a special power will be validly created if the power must become exercisable, if at all, within the perpetuity period.³²²⁴

Assuming the power has been validly created, the rule applies differently depending on whether the power is a general power or a special power. For a general power, the perpetuity period will apply from the exercise (i.e. when the property is appointed by the donee to the appointee or the object or objects) of the power. It is irrelevant if the power is or may be exercised outside of the perpetuity period from when the power was created. For a special power, however, the perpetuity period will apply from the date the power is created.

This means that characterising the power as general or special is crucial to determine when the property must vest in order to avoid infringing the rule. It has been noted that a power may be special for some purposes and general for others.³²²⁵ This has led to a debate over whether there is in fact a third type of power that is a hybrid power.³²²⁶ However, the PLA has provisions that eliminate the need to characterise the power.

Section 208 of the PLA provides that a power of appointment will be treated as a special power unless the power is exercisable by one person only and at all times could be exercised by that person to appoint the property to him or herself without the approval of any other person or compliance with any other condition.

³²²³ The rule is also relevant when considering the validity of gifts over in default of appointment. See Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1285] to [1294].

³²²⁴ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1286] and [1290].

³²²⁵ See, for example, JHC Morris and W Barton Leach, *The Rule Against Perpetuities*, Steven & Sons, (2nd ed, 1962) at 136; Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1284].

³²²⁶ See JHC Morris and W Barton Leach, *The Rule Against Perpetuities*, Steven & Sons, (2nd ed, 1962) 135-138.

Section 208(2) provides that, if a power of appointment is only exercisable in a will, the power is to be treated as a general power if it would have been a general power had it been able to be exercised in a deed.

174.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions.

For special powers of appointment, it is appropriate that the perpetuity period runs from the time the power is created because this limits the 'dead hand' control of the property. The appointor's discretion is fettered by the donor of the power because the property may only be appointed to a limited class of objects. As such, the interest in property must vest, if it vests at all, during the perpetuity period commencing from the time the power is created, or given to the donor.

For general powers of appointment, the appointor's discretion is not so fettered and the appointor may appoint the property to anybody, including him or herself. As such, the general power of appointment is akin to absolute ownership of the property. It is appropriate that the perpetuity period run from the time the property is appointed by the donee because there is no dead hand control.

It is also appropriate that the legislation provide a method to determine whether a power of appointment is general or special in order to determine when the perpetuity period commences.

174.3. Recommendation

The Centre has recommended that the rules relating to powers of appointment should be retained with modernised language. Further, the Centre is also recommending the retention of a perpetuity period to limit remote vesting of property. Given this, it will be necessary to ensure that the new perpetuity period continues to apply to powers of appointment.

RECOMMENDATION 175. The effect of section 208 should be retained with modernised language that aligns with the Centre's other recommendations relating to the rule against perpetuities.

175. Section 209 – Power to specify perpetuity period

175.1. Overview and purpose

209 Power to specify perpetuity period

- (1) Except as otherwise provided in this part where the instrument by which any disposition is made so provides the perpetuity period applicable to the disposition under the rule against perpetuities instead of being of any other duration shall be such number of years not exceeding 80 as is specified in the instrument as the perpetuity period applicable to the disposition.
- (2) Subsection (1) shall not have effect where the disposition is made in exercise of a special power of appointment but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself.
- (3) If no period of years is specified in an instrument by which a disposition is made as the perpetuity period applicable to the disposition but a date certain is specified in the instrument as the date on which the disposition shall vest the instrument shall, for the purposes of this section, be deemed to specify as the perpetuity period applicable to the disposition a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date.

At common law, the perpetuity period is the life of a person or a group of people alive or in the womb at the time the interest is created plus 21 years. If no person or group is specified (or implied) as the life (or lives) in being, the perpetuity period is 21 years after the interest is created.

Section 209 of the PLA allows the instrument creating the interest to specify a period of up to 80 years or to specify a date of vesting (provided it is no more than 80 years from the date the interest is created). If no period or date is stated, the common law period will apply, which means that the perpetuity period will be either the life of an express or implied life in being plus 21 years, or just 21 years after the creation of the interest.

The end result is that in Queensland, the perpetuity period for a disposition of property may be any of the following:

- 21 year period under common law; or
- if a life or lives in being is express or implied, the length of that life (or the oldest survivor of the group) plus 21 years; or
- for dispositions after the commencement of the 1972 Act, a set date up to 80 years from the time the instrument containing the disposition takes effect; or
- exactly 80 years from the date the instrument containing the disposition takes effect.

175.2. Issues with the section

Section 209 modifies one of the most difficult aspects of the rule against perpetuities— determining the perpetuity period by reference to a live in being. Attempts to maximise the perpetuity period – or the period within which a disposition of property must vest, if it is to vest at all – have resulted in the use of ‘royal lives’ clauses and babies in the womb as lives in being.

Tracing the life or lives in being may be difficult. The Centre understands that it is not unknown for some trusts to exceed the perpetuity period because nobody noticed that the life in being had ended. Simplification of the perpetuity period is one area ripe for reform.

In considering changes to the perpetuity period, it is useful to consider the legislation and law reform papers that have been produced in a number of other jurisdictions.

175.3. Other jurisdictions

Many jurisdictions both overseas and in Australia have recently reviewed, or are currently reviewing, the operation of the rule against perpetuities. Both the Northern Territory³²²⁷ and New Zealand³²²⁸ have released discussion papers considering the operation of the rule against perpetuities and recommending a fixed perpetuity period. In the UK, the law in relation to perpetuities was significantly amended in 2009.³²²⁹

In 1976, the NSWLRC said of the rule that ‘we know of no considerable body of opinion calling for its abolition.’³²³⁰ In the 40 years since that report, however, this has changed significantly. South Australia abolished the rule completely in 1994³²³¹ and an increasing number of law reform bodies have called for the abolition of the rule,³²³² including the Irish Law Reform Commission.³²³³

175.3.1. New South Wales

New South Wales enacted the *Perpetuities Act 1984 (NSW) (NSW Act)* to modify the application of the rule. The NSW Act contains many of the same statutory modifications as are contained in the PLA, including a ‘wait and see’ period,³²³⁴ age reduction and class closing provisions.³²³⁵

Unlike Queensland, where the settlor can choose either an 80 year fixed period or use a life in being plus 21 years, in New South Wales the perpetuity period is for a fixed period of 80 years.³²³⁶ This means that the concept of a life or lives in being is irrelevant for determining the perpetuity period.³²³⁷ This approach was adopted for several reasons,³²³⁸ including that it approximates the common law period and that it avoids the need for provisions directed at the ‘unborn spouse’ or presumptions as to parenthood.³²³⁹

³²²⁷ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No. 40 (July 2014).

³²²⁸ Law Commission (NZ), *Review of the Law of Trusts*, Report 130, Chapter 17, ‘Perpetuities and the Maximum Duration of Trusts’ (2013).

³²²⁹ *Perpetuities and Accumulations Act 2009* (UK) (c. 18).

³²³⁰ New South Wales Law Reform Commission, *Report on Perpetuities and Accumulations*, LRC 26 (1976) 11, 2.4.

³²³¹ *Law of Property Act 1936* (SA) s 61.

³²³² See Kellee Clark, ‘The Rule Against Perpetuities,’ (2007) 11(3) *Otago Law Review*, 495-512, 507.

³²³³ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000.

³²³⁴ *Perpetuities Act 1984* (NSW) s 8.

³²³⁵ *Perpetuities Act 1984* (NSW) s 9.

³²³⁶ *Perpetuities Act 1984* (NSW) s 7.

³²³⁷ The Commission initially recommended allowing the settlor to choose the common law period or a fixed 80 year period: New South Wales Law Reform Commission, *Report on Perpetuities and Accumulations*, LRC 26, (1976) 27.

³²³⁸ See, Mr Gordon, Legislative Assembly NSW, 21 September 1983, 1050-1051.

³²³⁹ As contained in the *Property Law Act 1974* (Qld) ss 212 and 214.

175.3.2. South Australia

Following the recommendation of the Law Reform Committee of South Australia (**LRC SA**),³²⁴⁰ the South Australian government abolished the rule in 1994.³²⁴¹ It was felt that other legislation made it unlikely that a trust would endure for over one hundred years and that the rationale of limiting dead hand control of property was not sufficient to justify retaining the rule.³²⁴²

In addition, to compensate for the abolition of the rule, South Australia enacted increased powers for the court, on application by specified parties, to:

- vary the terms of a disposition if, after 80 or more years, there remain interests that have not vested, so that those interests vest immediately; or
- if the interests cannot, or are unlikely to, vest within 80 years after being created, to vary the disposition so that the interests will vest within that period.³²⁴³

175.3.3. Northern Territory

The rule against perpetuities in the Northern Territory is largely in line with Queensland and other Australian States and Territories in terms of containing a wait and see period, class closing provisions and a choice between the common law (life in being plus 21 years) or an 80 year perpetuity period.³²⁴⁴

In July 2014, the NTLRC released its *Report on Perpetuities*³²⁴⁵ (**NTLRC Report No 40**) which considered the options of reform or abolition of the rule. The NTLRC Report No 40 surveys a number of reviews which have taken place in international jurisdictions before recommending that it is time to abolish reference to the common law and to provide for a fixed perpetuity period of 150 years.³²⁴⁶

The Northern Territory LRC recommended that ‘one simple system’³²⁴⁷ apply to all trusts created before or after the change. Existing settlements that had a perpetuity period by reference to a life in being plus 21 years, or with no stated term, would now have the longer 150 year period. Any party aggrieved by the change would have the right to apply to the court to adjust the settlement or its duration. Existing trusts with a stated term would continue with the stated term but for those with a stated maximum term of 80 years, an interested party could apply to increase the perpetuity period to 150 years.³²⁴⁸

³²⁴⁰ Law Reform Committee of South Australia, *Seventy-Third Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Perpetuities* (1984).

³²⁴¹ *Law of Property Act 1936* (SA) s 61.

³²⁴² Law Reform Committee of South Australia, *Seventy-Third Report of the Law Reform Committee of South Australia Relating to the Reform of the Law of Perpetuities* (1984) 12.

³²⁴³ *Law of Property Act 1936* (SA) s 62.

³²⁴⁴ *Law of Property Act* (NT) part 11 (ss 183-202).

³²⁴⁵ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No. 40 (July 2014).

³²⁴⁶ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No. 40 (July 2014) 17.

³²⁴⁷ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No. 40 (July 2014) 21.

³²⁴⁸ Northern Territory Law Reform Committee, *Report on Perpetuities*, Report No. 40 (July 2014) 27, Recommendation 3.

175.3.4. United Kingdom

Prior to 2010, the legislation relating to perpetuities in the UK was very similar to that which is currently in place in Queensland.³²⁴⁹ The relevant legislation provided a choice between the common law (life in being plus 21 years) or an 80 year perpetuity period, wait and see provisions and included class closing and age-reduction provisions.³²⁵⁰

In 1998, the UK Law Commission released *Report No 251: The rules against perpetuities and excessive accumulations*³²⁵¹ which considered the rule against perpetuities. The UK Law Commission considered a number of submissions from interested parties in making recommendations for reform (rather than a complete abolition)³²⁵² of the rule.

Following the UK Law Commission's recommendations, the *Perpetuities and Accumulations Act 2009* (UK) has significantly amended the relevant legislation to exclude most commercial transactions, and most significantly, to provide for a set perpetuity period of 125 years.³²⁵³

Generally, the previous legislation and the common law continue to apply to trusts executed prior to the commencement of the *Perpetuities and Accumulations Act 2009* (UK) although there is an 'opt-in' provision which allows a trustee of an existing trust to choose a 100 year perpetuity period if it is not reasonably practicable to ascertain whether the lives in being have ended.³²⁵⁴

175.3.5. New Zealand

In New Zealand, the statutory modifications relating to the rule are similar to those in place in Queensland and the other jurisdictions discussed above.³²⁵⁵

In 2013, the Law Commission (NZ) released *Review of the Law of Trusts: A Trusts Act for New Zealand*.³²⁵⁶ The Law Commission (NZ) noted a number of problems with the existing law but declined to recommend abolition of the rule as it was felt that the tax system in New Zealand does not discourage trusts of long duration.³²⁵⁷

Despite this, the Law Commission (NZ) felt that an appropriate way to address some of the current issues with the rule is to modify the rule and provide for an extended perpetuity period of 150 years.³²⁵⁸ While it was recommended that this new period apply to new and existing trusts, the Law Commission (NZ) recommended that existing trusts not automatically be able to extend the duration

³²⁴⁹ Note that one significant difference relates to the rules against accumulations (*Property Law Act 1974* (Qld) s 222). In the UK income could not accumulate for the whole of the perpetuity period.

³²⁵⁰ Anna Heywood, 'Perpetuities and Accumulations' (2010) 42 *Bracton Law Journal* 68-76, 70-71.

³²⁵¹ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations*, 1998.

³²⁵² Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations*, 1998, 8, para [1.18].

³²⁵³ *Perpetuities and Accumulations Act 2009* (UK) (c. 18) s 5.

³²⁵⁴ *Perpetuities and Accumulations Act 2009* (UK) (c. 18) s 12.

³²⁵⁵ *Perpetuities Act 1964* (NZ) ss 6-8.

³²⁵⁶ Law Commission (NZ), *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts'.

³²⁵⁷ Law Commission (NZ), *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', 220, [17.7]

³²⁵⁸ Law Commission (NZ), *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', Recommendation R49.

of the trust unless this is done according to the terms of the trust deed, by agreement of the beneficiaries or by applying to the court for an approval of the variation.³²⁵⁹

The recommendations of the Law Commission (NZ) have not been implemented in legislation to date.

175.3.6. Ireland

Ireland abolished the rule against perpetuities in 2009³²⁶⁰ following a report of the Irish Law Reform Commission (ILRC).³²⁶¹ The ILRC's recommendations in relation to the rule against perpetuities were supported by further recommendations for greater powers allowing the variation of trust deeds.³²⁶² It was felt that the purposes served by the rule in the modern world are at best slight.³²⁶³ The ILRC felt that the introduction of a 'wait and see' period would create as many problems as it solved.³²⁶⁴

The ILRC considered and dismissed the key rationales generally used to support the rule's existence and further identified a number of arguments against the rule.³²⁶⁵ It was noted that operation of the rule generally catches ordinary, reasonable plans from people whose will breaches the rules due to the ignorance or oversight of the solicitor preparing the will. The result is that perfectly reasonable objectives are held invalid.³²⁶⁶

The ILRC noted several further reasons in support of abolishing the rule. First, the socio-economic background in Ireland is different to that in England. Ireland does not have the same 'long established landed gentry'.³²⁶⁷ It was further noted that the taxation of discretionary trusts acts as a deterrent against the establishment of lengthy trusts.³²⁶⁸ According to the ILRC, discretionary trusts are taxed at a 6% one-off charge on the value of the assets with a 1% annual charge thereafter.³²⁶⁹

175.3.7. Scotland

Scotland has never had a rule against perpetuities. The UK Law Commission commented on this in its 2000 review of the rule where it was noted that just because settlors may create perpetual trusts does not mean that they will.³²⁷⁰ Although perpetual trusts can be created in Scotland, the UK Law Commission noted that these were generally for some public purpose. Reference was made to a

³²⁵⁹ Unlike the UK position, the Law Commission (NZ) did not feel that trustees should be able to unilaterally adopt a new vesting date. See Law Commission (NZ), *Review of the Law of Trusts*, 2013, Report 130, Chapter 17, 'Perpetuities and the Maximum Duration of Trusts', [17.26-17.30].

³²⁶⁰ *Land and Conveyancing Law Reform Act 2009* (IRE) s 16.

³²⁶¹ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000.

³²⁶² Irish Law Reform Commission, *Report on the Variation of Trusts*, LRC 63-2000.

³²⁶³ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 50.

³²⁶⁴ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 21, [2.23].

³²⁶⁵ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 50-61.

³²⁶⁶ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 55-56.

³²⁶⁷ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 57, 4.20.

³²⁶⁸ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 57.

³²⁶⁹ Irish Law Reform Commission, *Report on the Rule Against Perpetuities and Cognate Rules*, LRC 62-2000, 57, 4.21.

³²⁷⁰ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 20-23.

private perpetual trust created in the 18th century that eventually became impossible to administer as the identity of the beneficiaries became uncertain.³²⁷¹

According to the UK Law Commission, Scotland has other limits on the duration of trust property.³²⁷² This includes rules restricting the accumulation of income³²⁷³ and legislation that prohibits ‘successive liferents’. A liferent is broadly equivalent to a life interest.³²⁷⁴ In Scotland, if the life interest is created in favour of a person who is not yet alive or in utero at the time the interest is created, then the life interest will be treated as absolute once the first person comes into possession and is of full age.³²⁷⁵

The Scottish Law Commission has recently considered the operations of provisions relating to the duration of trusts and has recommended repealing the rules restricting successive liferents. However, they have also recommended against adopting a rule against perpetuities.³²⁷⁶

175.4. Recommendation

The rule against remoteness of vesting, also known as the modern rule against perpetuities should be replaced with a new, simplified system to prevent remote vesting of property for dispositions that take effect after the commencement of the new provisions. The Centre recommends an approach to perpetuities that replaces the common law rule against perpetuities with a fixed perpetuity period of up to 125 years.

RECOMMENDATION 176. Section 209 should be repealed and replaced as part of the larger change to the operation of the perpetuity period in Queensland. The replacement provision should provide for a perpetuity period of up to 125 years.

³²⁷¹ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 22, 2.36.

³²⁷² Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 21, 2.34.

³²⁷³ These rules play a greater role in limiting perpetual trusts than is the case in the UK: Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 21, [2.35].

³²⁷⁴ Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No. 142 (January 2010), 2.

³²⁷⁵ For a discussion of the Scottish approach to life interests, see Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No. 142 (January 2010), 23-32.

³²⁷⁶ Scottish Law Commission, *Discussion Paper on Accumulation of Income and Lifetime of Private Trusts*, Discussion Paper No. 142 (January 2010), 99.

176. Section 210 – Wait and see rule

176.1. Overview and purpose

210 *Wait and see* rule

- (1) Where apart from the provisions of this section and of section 213 a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period as if the disposition were not subject to the rule against perpetuities, and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.
- (2) Where apart from the provisions of this section and of section 213 a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period as if the disposition were not subject to the rule against perpetuities.
- (3) Where apart from the provisions of this section and of section 213 a disposition consisting of the conferring of any power, option or other right would be void on the ground that the right might be exercised at too remote a time the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and subject to the provisions shall be treated as void for remoteness only if and so far as the right is not fully exercised within that period.
- (4) Nothing in this section makes any person a life in being for the purposes of ascertaining the perpetuity period unless the life of that person is one expressed or implied as relevant for this purpose by the terms of the disposition and would have been reckoned a life in being for such purpose if this section had not been enacted.
- (5) However, in the case of a disposition to a class of persons or to 1 or more members of a class, any person living at the date of the disposition whose life is so expressed or implied as relevant for any member of the class may be reckoned a life in being in ascertaining the perpetuity period.

At common law, if there is any possibility that the interest will vest outside of the perpetuity period, the disposition is void. This is referred to as the ‘initial certainty rule’³²⁷⁷ and it will apply even if subsequent facts prove that the interest will vest during the perpetuity period.

In the case of *Re Wood, Tullet v Colville*³²⁷⁸ a testator provided in his will for gravel pits to be worked until exhausted, then sold with the proceeds divided between the testator’s living children. At the death of the testator, the pits were expected to be exhausted in four years (on the facts of the case, they were actually exhausted in six years). However, under the common law, only the facts in existence at the time of the disposition are relevant. At that time, there was a possibility, however unlikely, that the gravel pits would not be exhausted within the perpetuity period. Under the strict application of the initial certainty rule, this meant there was no initial certainty and the gift was void.³²⁷⁹

Section 210 of the PLA modifies this aspect of the common law rule to allow a court to ‘wait and see’ whether the disposition will vest within the perpetuity period. An interest in property will only be

³²⁷⁷ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1232]-[1235].

³²⁷⁸ [1894] 3 Ch 381, as discussed in Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.120].

³²⁷⁹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1235] for further discussion of *Re Wood*.

void if it becomes certain that the interest will not vest within the perpetuity period. Section 211 allows a person to apply to the court for a declaration of the validity of the disposition of the property.

176.2. Issues with the section

There were no issues raised by the submissions. However, the ‘wait and see’ rule is designed to mitigate one of the harsher aspect of the common law rule against perpetuities. If the perpetuity period is amended in line with the Centre’s recommendation then the wait and see will not be need for dispositions that take effect after the commencement of the new provisions.

176.3. Other jurisdictions

In South Australia, where the rule against perpetuities was abolished rule in 1994³²⁸⁰ the *Law of Property Act 1936 (SA)* was amended to provide that a disposition of property is not invalid because it will, or may, vest at a date remote from the date of the disposition.³²⁸¹

176.4. Recommendation

Section 210 is designed to mitigate the harsh application of the common law rule against perpetuities. The Centre is of the view that the effect of section 210 – which provides that a disposition of property is not invalid because it may vest at a date that is remote from the date of the disposition – should be retained. However, this should be subject to the fact that the interest must vest within the perpetuity period, failing which vesting will occur in accordance with default rules.

RECOMMENDATION 177. Section 210 should be repealed and replaced with a provision which states that a disposition of property is not invalid because it may vest at a date that is remote from the date of the disposition provided it may vest within the perpetuity period.

Should the interest fail to vest in the perpetuity period, default vesting rules will be applied.

³²⁸⁰ *Law of Property Act 1936 (SA)* s 61.

³²⁸¹ *Law of Property Act 1936 (SA)* s 61(1)(a).

177. Section 211 – Power to apply to court for declaration as to validity

177.1. Overview and purpose

211 Power to apply to court for declaration as to validity

- (1) A trustee of any property, or any person interested under, or on the invalidity of, a disposition of property, may at any time apply to the court for a declaration as to the validity, in respect to the rule against perpetuities, of a disposition of that property.
- (2) The court may, on an application under subsection (1), make a declaration, on the basis of facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the disposition in respect of which the application is made, but the court shall not make a declaration in respect of any disposition the validity of which cannot be determined at the time at which the court is asked to make the declaration.

Section 211 enables trustees, or a person interested under or on the invalidity of a disposition, to apply to apply to the Supreme Court³²⁸² for orders as to the validity of a disposition with respect to the rule against perpetuities.

177.2. Issues with the section

The Centre did not identify any significant issues in practice with this section. No issues were raised in the submissions.

Under the Centre’s recommended approach for dealing with perpetuities it will be necessary that trustees and beneficiaries retain the ability to apply to court for declarations in relation to the vesting of property. Additionally, as part of the opt-in provisions for existing trusts as at the date of commencement of the new provisions, it will be necessary to allow trustees to apply to the court for an order extending the perpetuity period.

177.3. Recommendation

The Centre is of the view that trustees and persons interested in the disposition of property under a trust should retain the right to apply to the court for declarations in relation to the vesting of property.

However, in line with the Centre’s approach to dealing with perpetuities, a disposition should be valid if it may vest within the perpetuity period. If the interest fails to vest, default vesting rules should apply.

The power of the court should also be expanded to deal with applications by existing trusts as at the date of the commencement of new proceedings so that the court has the ability, on the consideration of specified factors, to allow an existing trust to extend the perpetuity period to the new maximum 125 year period and to order vesting in line with default rules if an interest will not, or does not vest within the 125 year period.

³²⁸² *Property Law Act 1974* (Qld) schedule 6 (definition of ‘court’).

NOT GOVERNMENT POLICY

Given this, the Centre is of the view that the effect of section 211 should be retained with modernised language and that the powers of the court should be expanded so that the court may:

- make orders allowing existing trusts to opt-in to the new 125 year period; and
- order the vesting of property that has not or will not vest within 125 years.

RECOMMENDATION 178. The effect of section 211 should be retained with modernised language so that the power of the court is expanded to allow the court to make orders:

- extending the perpetuity period for trusts that pre-date the commencement of the new provisions; and
- for the vesting of property that has not or will not vest within the 125 year period.

178. Section 212 – Presumptions and evidence as to future parenthood

178.1. Overview and purpose

212 Presumptions and evidence as to future parenthood

- (1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the capacity of a person to have a child at some future time, then—
 - (a) it shall be presumed, subject to paragraph (b), that a male can have a child at the age of 12 years or over but not under that age and that a female can have a child at the age of 12 years or over but not under that age or over the age of 55 years; but
 - (b) in the case of a living person evidence may be given to show that he or she will or will not be capable of having a child at the time in question.
- (2) Where any such question is decided by treating a person as incapable of having a child at a particular time and he or she does so, the court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition so far as may be just in the position they would have held if the question had not been so decided.
- (3) Subject to subsection (2), where any such question is decided in relation to a disposition by treating a person as capable or incapable of having a child at a particular time then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.
- (4) In this section, references to having a child are references to begetting or giving birth to a child, but this section (other than subsection (1)(b)) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to the person's capacity at that time to beget or give birth to a child.

A further aspect of the initial certainty rule³²⁸³ requires that a group of people (or class) that is capable of increasing after the creation of the interest cannot be lives in being for the disposition. Lives in being are the people alive or in the womb at the time the interest in property is created whose lives are used to measure the perpetuity period.³²⁸⁴ The perpetuity period will be the length of the life of the last member of the class plus 21 years. If the members of the class could increase after the disposition of the interest then it is possible that the interest could vest outside the perpetuity period. As such, there is no initial certainty and the gift will infringe the rule against perpetuities.

This has affected the validity of dispositions that use a person's children as the lives in being. Under the common law, there is a conclusive presumption of fertility which presumes that a person of any age can have a child. This has led to examples of the 'fertile octogenarian' and 'precocious toddler.'³²⁸⁵ It is at least theoretically possible that a person can beget a child at any age. If the children of a person who is living at the time of the disposition are used as the lives in being, this creates a possibility

³²⁸³ Discussed at part 176 above.

³²⁸⁴ See Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015), [7.50] to [7.110] and Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1222] – [1228] for further discussion of the concept of life or lives in being.

³²⁸⁵ See Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1236]; Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.110].

(however improbable) that the person will have more children and the class of lives in being may increase which would mean that the interest could vest outside of the perpetuity period.³²⁸⁶

Section 212 of the PLA modifies this aspect of the common law rule by providing a rebuttable presumption that a male is able to father a child only if over the age of 12 and that a female is able to have a child between the ages of 12 and 55.

178.2. Issues with the section

The Centre's recommended approach to perpetuities is to replace the common law perpetuity period with a set perpetuity period. As such, reference a life or lives in being will not be necessary for dispositions that take effect after the commencement of new provisions.

178.3. Recommendation

An advantage of the single, set perpetuity period is that determining the perpetuity period by reference to a life or lives in being will no longer be required. Given this, section 212 can be repealed for dispositions of an interest in property that take effect after the commencement of the new provisions.

RECOMMENDATION 179. Section 212 should be repealed.

³²⁸⁶ No such problem arises if the children of a person who has pre-deceased the appointor or testator are used as the class of lives in being.

179. Section 213 – Reduction of age and exclusion of class members to avoid remoteness

179.1. Overview and purpose

213 Reduction of age and exclusion of class members to avoid remoteness

- (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding 18 years and it is apparent at the time the disposition is made or becomes apparent at a subsequent time—
 - (a) that the disposition would apart from this section be void for remoteness; but
 - (b) that it would not be so void if the specified age had been 18 years;
 the disposition shall be treated for all purposes as if instead of being limited by reference to the age in fact specified it had been limited by reference to the age nearest to that age which would if specified instead, have prevented the disposition from being so void.
- (2) Where in the case of any disposition different ages exceeding 18 years are specified in relation to different persons—
 - (a) the reference in subsection (1)(b) to the specified age shall be construed as a reference to all the specified ages; and
 - (b) that subsection shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.
- (3) Where the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class prevents subsections (1) and (2) from operating to save a disposition from being void for remoteness, those persons shall be deemed for all the purposes of the disposition to be excluded from the class and subsections (1) and (2) shall have effect accordingly.
- (4) Where in the case of a disposition to which subsection (3) does not apply it is apparent at the time the disposition is made or becomes apparent at a subsequent time that apart from this subsection the inclusion of any persons, being potential members of a class or unborn persons who at birth could become members or potential members of the class would cause the disposition to be treated as void for remoteness, those persons shall unless their exclusion would exhaust the class be deemed for all the purposes of the disposition to be excluded from the class.
- (5) Where this section has effect in relation to a disposition to which section 210 applies the operation of this section shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

The gift of an interest in property to a beneficiary upon that person obtaining a specified age may offend the rule against perpetuities if the age is greater than 21 years. Consider the following example:

To such of A's children as shall reach 25 years of age.

In this example A is the life in being. It is possible that A may have a child and then die when that child is less than 4. This would mean the gift to A's children would vest 25 years after A's death which is longer than the 21 years allowable under the common law rule. At common law, this disposition would be void. Section 213(1) of the PLA allows the specified age to be reduced as low as 18 in order to save the disposition from being void for remoteness.

At common law, the class of beneficiaries must be certain at the time the interest is created. This is known as the ‘all or nothing rule.’³²⁸⁷ Section 213(3) of the PLA modifies this aspect of the common law rule by excluding potential members of the class of beneficiaries or unborn persons who may become members of the class of beneficiaries if their inclusions would cause the disposition to fail for remoteness. The interest of any excluded members will accrue to the benefit of the members of the class whose interests do vest.³²⁸⁸

179.2. Issues with the section

The Centre’s recommended approach calls for the rule to be replaced with a single, set perpetuity period. Such a change, if implemented, will reduce the need for age reduction and class closing rules. However, given the varying nature of dispositions, there may be times where it is necessary to:

- reduce the age at which a disposition of property is to vest; or
- to close off a class of beneficiaries so that no new members can be added,

in order to ensure that the property vests within the perpetuity period, rather than subject to default rules on a failure to vest.

179.3. Recommendation

The Centre is of the view that the effect of section 213 should be retained for dispositions of an interest in property that take effect after the commencement of the new provisions.

RECOMMENDATION 180. The effect of section 213 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

³²⁸⁷ See Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1244]; Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.170]. Note that there are some exceptions to this at common law, referred to as ‘class-closing rules’. See Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1246]-[1254]; Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.180]-[7.220].

³²⁸⁸ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.213.90].

180. Section 214 – Unborn husband or wife

180.1. Overview and purpose

214 Unborn husband or wife

The widow or widower of a person who is a life in being for the purposes of the rule against perpetuities shall be deemed to be a life in being for the purpose of—

- (a) a disposition in favour of that widow or widower; and
- (b) a disposition in favour of a charity which attains or of a person who attains or of a class the members of which attain under the terms of the disposition a vested interest on or after the death of the survivor of the person who is a life in being and that widow or widower, or on or after the death of that widow or widower or on or after the happening of any contingency during her or his lifetime.

The initial certainty rule requires that the life or lives in being must be ascertainable at the time the disposition creating the interest in property comes into effect. This means that at common law, any disposition of a contingent remainder to the children of the widow or widower of a person who is a life in being will be void for offending the rule against perpetuities.³²⁸⁹ Consider the following example:

*To A for life, remainder for life to any wife who survives A, remainder to any children of A living at the death of the survivor of A and that wife.*³²⁹⁰

In what has been described as the ‘unborn widow’ issue,³²⁹¹ there is a possibility that the widow (or widower) of the person who is the life in being (A) for the disposition may not have been born at the time of the disposition. This means that any contingent remainder to the children of that widow or widower could vest outside of the perpetuity period.

Section 214 of the PLA modifies this aspect of the common law rule by providing that the widow or widower of a person who is a life in being is deemed to be a life in being for any remainder to a charity, class or person who attains their interest on or after the death of the widow or widower or on the occurrence of a contingency during that person’s lifetime.

180.2. Issues with the section

The Centre’s recommended approach to perpetuities is to replace the common law perpetuity period with a set perpetuity period. As such, reference a life or lives in being will no longer be necessary.

180.3. Recommendation

An advantage of the single, set perpetuity period is that determining the perpetuity period by reference to a life or lives in being will no longer be required. Given this, section 214 can be repealed for dispositions of an interest in property that take effect after the commencement of the new provisions.

³²⁸⁹ See Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.350].

³²⁹⁰ This example taken from Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1234].

³²⁹¹ See Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1234].

RECOMMENDATION 181. Section 214 should be repealed.

181. Section 215 – Dependent dispositions

181.1. Overview and purpose

215 Dependent dispositions

A disposition shall not be treated as void for remoteness merely because the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest merely because the failure arises because of remoteness.

At common law, a subsequent interest, in itself valid, that is dependent on and ulterior to an earlier disposition that is invalid will also be invalid. Consider the following example:

To such of A's children as shall reach the age of 25, but if there is no such child then remainder to B.

As discussed above, the disposition to A's children is invalid at common law which means the subsequent interest to B is also invalid at common law. Section 215 of the PLA modifies this position and provides that an ulterior dependent interest will not be treated as invalid solely on the basis that the earlier interest is void.

181.2. Issues with the section

The Centre did not identify any significant issues with the section in practice. No issues were raised by the submissions.

181.3. Recommendation

The Centre recommends that the effect of section 215 should be retained with modernised language in line with the Centre's recommended approach to dealing with perpetuities.

RECOMMENDATION 182. The effect of section 215 should be retained with modernised language that aligns with the Centre's other recommendations relating to the rule against perpetuities.

182. Section 216 – Abolition of the rule against double possibilities

182.1. Overview and purpose

216 Abolition of the rule against double possibilities

- (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is abolished.
- (2) This section applies only to limitations or trusts created by an instrument coming into operation after the commencement of this Act.

Section 216 of the PLA has the effect of abolishing the ‘old rule’ against perpetuities.³²⁹² The effect of the provision is that a gift of an interest in property can be given to the unborn child of an unborn person, provided the gift will vest within the perpetuity period.

182.2. Issues with the section

The Centre did not identify any significant issues with the section in practice. No issues were raised by the submissions.

182.3. Recommendation

As the ‘old’ rule against perpetuities has been repealed, it is not necessary to repeat the abolition in any new provisions. The effect of the abolition will continue. Further, repealing section 216 will not have the effect of reviving the old rule against perpetuities. Given this, the Centre is of the view that there is no reason to retain section 216 in a re-drafted provisions dealing with perpetuities.

RECOMMENDATION 183. Section 216 should be repealed.

³²⁹² Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.30]. For further discussion of the ‘old rule’ against perpetuities, Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1202]-[1205].

183. Section 217 – Restriction on the perpetuity rule

183.1. Overview and purpose

217 Restrictions on the perpetuity rule

- (1) For removing doubts, it is declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied—
- (a) to any power to distrain on or to take possession of land or the income of the land given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or
 - (b) to any rent charge created only as an indemnity against another rent charge, although the indemnity rent charge may arise or become payable only on breach of a condition or stipulation; or
 - (c) to any power, whether exercisable on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rent charge as an indemnity against another rent charge; or
 - (d) to any grant, exception or reservation of and right of entry on, or user of, the surface of land or of any easements, rights or privileges over or under land for the purpose of—
 - (i) winning, working, inspecting, measuring, converting, manufacturing, carrying away and disposing of mines and minerals; and
 - (ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops of them; and
 - (iii) executing repairs, alterations or additions to any adjoining land, or the buildings and erections on the land; and
 - (iv) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers, watercourses, cesspools, gutters, drains, water pipes, gas pipes, electric wires or cables or other like works.
- (2) This section applies to instruments coming into operation before or after the commencement of this Act.
- (3) In this section—
instrument includes a statute creating a settlement.

Section 217 of the PLA provides that certain estates and interests in land are excluded from the operation of the rule against perpetuities.³²⁹³ It has been noted that it is essential that certain estates and interests in land last for an indefinite or perpetual period.³²⁹⁴

183.2. Issues with the section

The Centre did not identify any significant issues with the section in practice. No issues were raised by the submissions.

The Centre has recommended retaining a perpetuity period. Given this, it will be crucial to clarify the types of powers, rights and interests that will not be subject to a perpetuity period. Further, as discussed below³²⁹⁵ options and rights of pre-emption should also be excluded from the rule.

³²⁹³ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.217.30].

³²⁹⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.217.30].

³²⁹⁵ See paragraph 184 below.

183.3. Recommendation

The Centre recommends that the effect of section 217 should be retained so that specified interests are excluded from the perpetuity period. Further, as discussed below, options and rights of pre-emptions should also be excluded from the perpetuity period.

RECOMMENDATION 184. The effect of section 217 should be retained so that specified powers, rights and interests are excluded from the perpetuity period.

184. Section 218 – Options

184.1. Overview and purpose

218 Options

- (1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if—
- (a) the option is exercisable only by the lessee or the lessee’s successors in title; and
 - (b) it ceases to be exercisable at or before the expiration of 1 year following the determination of the lease.
- (1A) Subsection (1) applies in relation to an agreement for a lease as it applies in relation to a lease, and lessee shall be construed accordingly.
- (2) An option to acquire an interest in land (not being an option to which subsection (1) applies) or a right of pre-emption in respect of land, which according to its terms is or may be exercisable at a date more than 21 years from the date of its grant shall after the expiration of 21 years from the date of its grant be void and not exercisable by any person and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect, but—
- (a) this subsection shall not apply to an option or right of pre-emption conferred by will; and
 - (b) nothing in this subsection shall affect an option for renewal or right of pre-emption contained in a lease or an agreement for a lease.

At common law, the exercise of an option to acquire the reversionary interest on the term of the lease is void if the option could be exercised more than 21 years after the option was granted.³²⁹⁶ Section 218(1) of the PLA modifies this position and provides that the rule against perpetuities will not apply to such an option if the option is exercisable only by the lessee or the lessee’s successors in title and the option ceases to be exercisable at or before one year following the determination of the lease.

Section 218(2) deals with options in gross,³²⁹⁷ which are options other than those covered in section 218(1), and rights of pre-emption (sometimes described as a right of first refusal).³²⁹⁸ The effect of section 218(2) is to restrict the exercise of an option in gross or a right of pre-emption to a period of 21 years after that option or right is granted. After 21 years, the option or right is void and no remedy is available in contract or otherwise.

At common law, the rule against perpetuities does not apply to an option to renew a lease.³²⁹⁹ This position has been preserved in the PLA.³³⁰⁰ An option in gross or a right of pre-emption conferred by a will, or contained in a lease or an agreement for a lease is excluded from the rule under section 218.³³⁰¹

³²⁹⁶ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7 (24 May 1971) at 8; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.218.30].

³²⁹⁷ See Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.410]; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.218.60].

³²⁹⁸ See Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.410].

³²⁹⁹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1276].

³³⁰⁰ *Property Law Act 1994* (Qld) s 218(2)(b).

³³⁰¹ *Property Law Act 1974* (Qld) s 218(2)(a)-(b).

184.2. Issues with the section

It has been suggested that section 218(2) affirms the common law principle that an option to purchase and a right of pre-emption³³⁰² are subject to the rule at common law.³³⁰³ However, there are conflicting views as to whether this is correct.³³⁰³

The rule against perpetuities evolved in the context of family settlements. Over time it was extended to rights over property unconnected to family settlements. This has been described as a principal shortcoming of the rule because a sustainable rationale for the application is absent.³³⁰⁴ It is unclear why the PLA limits the duration of options in gross and rights of pre-emption to a term of 21 years after the creation of the right.³³⁰⁵

At the time section 218 was drafted, the QLRC stated that it merely affirmed the common law principle that such options and rights are within the rule if they are not exercised within 21 years from being granted.³³⁰⁶ The PLA further provides that after the 21 year period, no remedy is available in contract or otherwise for giving effect to the option or pre-emption or making restitution for its lack of effect.³³⁰⁷ The QLRC noted that this was a reversal of the common law position which allowed a remedy in the form of damages or specific performance against the giver of the option.³³⁰⁸

The 21 year duration is of particular concern in the context of joint venture agreements.³³⁰⁹ Generally, a joint venture agreement will contain a right of pre-emption that requires any party to the joint venture to offer to sell their interest to the other joint venture participants prior to taking the sale to the open market. If the other parties in the joint venture decide not to accept the offer, the selling party is free to sell the interest elsewhere (hence the reason this right is sometimes referred to as a right of first refusal). This 21 year restriction serves no commercial purpose in the context of the operation of large resource joint ventures, which may be conducted over a period well in excess of 21 years.

³³⁰² See Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7 (24 May 1971) at 8.

³³⁰³ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 3.44-3.45.

³³⁰⁴ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 1.1, 1.11.

³³⁰⁵ *Property Law Act 1974* (Qld) s 218(2).

³³⁰⁶ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7 (24 May 1971) at 8. However, see Peter Allen and Richard Cottee, 'The Effect of the Rule Against Perpetuities on Pre-emptive Rights in Joint Ventures' (1982) 4(1) *Australian Mining and Petroleum Law Journal*, 190-200 at 194 where it is argued that rights of pre-emption do not give rise to a proprietary interest and are merely contractual. It is also noted by the UK Law Commission in Report No. 251 that it is unclear whether the rule against perpetuities applies to pre-emptive rights at common law: Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 3.45

³³⁰⁷ *Property Law Act 1974* (Qld) s 281(2).

³³⁰⁸ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7, 24 May 1971, at 8.

³³⁰⁹ JD Merralls, 'The Application of the Rule Against Perpetuities to Natural Resources Agreements' (2007) *Australian Mining and Petroleum Yearbook*, 214-227; Peter Allen and Richard Cottee, 'The Effect of the Rule Against Perpetuities on Pre-emptive Rights in Joint Ventures' (1982) 4(1) *Australian Mining and Petroleum Law Journal*, (1982) 4(1) 190-200.

It has been argued that there is a distinction between an option in gross and a right of pre-emption. For an option in gross, the grantee of the option has the right to exercise the option and call for the conveyance of the property. Options in gross are part personal contract³³¹⁰ and part property interest. A right of pre-emption, on the other hand, is different because the grantee of the right has no ability to call for the conveyance of the property.³³¹¹ It has been argued that a right of pre-emption is a contractual right that could be an interest in land only from the time it is exercisable³³¹² and thus should not be subject to the rule against perpetuities or limited to a time period.

184.3. Other jurisdictions

184.3.1. New South Wales

New South Wales does not apply the rule against perpetuities to options or rights of pre-emption. The *Perpetuities Act 1984* (NSW) takes an exclusionary approach and provides that the rule against perpetuities does not apply to:

- any option to renew a lease of property;
- any option to acquire the reversionary interest in the property the subject of the lease;
- any right of pre-emption given for valuable consideration or in a will in respect of property; or
- any other option given for valuable consideration or by will to acquire an interest in property.³³¹³

The section was included in the New South Wales legislation specifically to ensure that the rule against perpetuities would not apply to arrangements of a commercial nature.³³¹⁴

184.3.2. United Kingdom

Prior to 2010, the UK legislation was similar to Queensland.³³¹⁵ The UK Law Commission recommended that the rule should not apply to commercial arrangements such as options, rights of pre-emption and similar rights in respect of land of a commercial nature.³³¹⁶

Rather than define ‘commercial arrangements’, the UK Law Commission recommended an inclusionary approach to the application of the rule that would operate by defining ‘those interests to which the rule should apply rather than those to which it should not.’³³¹⁷ This recommendation was

³³¹⁰ To which the rule against perpetuities will not apply. See Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1277].

³³¹¹ Peter Allen and Richard Cottee, ‘The Effect of the Rule Against Perpetuities on Pre-emptive Rights in Joint Ventures’ (1982) 4(1) *Australian Mining and Petroleum Law Journal*, 190-200 192-193.

³³¹² JD Merralls, ‘The Application of the Rule Against Perpetuities to Natural Resources Agreements’ (2007) *Australian Mining and Petroleum Yearbook* 214-227, 215.

³³¹³ *Perpetuities Act 1984* (NSW) s 15.

³³¹⁴ New South Wales Law Reform Commission, *Report on Perpetuities and Accumulations*, LRC 26 (1976) 60-61.

³³¹⁵ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 3.34 to 3.46.

³³¹⁶ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 7.35.

³³¹⁷ Law Commission (United Kingdom), *Report No. 251: The Rules Against Perpetuities and Excessive Accumulations* (1998) 7.21.

accepted in the UK and as a result, most commercial interests are not caught by the application of the rule in the *Perpetuities and Accumulations Act 2009* (UK).³³¹⁸

184.4. Recommendation

The Centre is of the view that the perpetuity period should not apply to commercial transactions generally and that rights of pre-emption and options in gross should be specifically excluded. This position is supported by the QLS and by the Society of Trust and Estate Planners Queensland.

Given this, the Centre recommends redrafting section 218 using an exclusive approach modelled on the New South Wales provision, to exclude options and rights of pre-emption from the perpetuity period.

RECOMMENDATION 185. Section 218 should be amended so that options and rights of pre-emption are not caught by the perpetuity period.

For example, section 218 could be re-drafted along the lines of the New South Wales provision in the following manner:

Section [218] Options

The rule against perpetuities does not apply to:

- (a) any option to renew a lease of property;
- (b) any option to acquire a reversionary interest in property comprised in a lease;
- (c) any right of pre-emption given for valuable consideration or by will in respect of property; or
- (d) any other option given for valuable consideration or by will to acquire an interest in property.

³³¹⁸ The UK approach is to list the interests to which the rule against perpetuities will apply. There are some exceptions and a power to specify exemptions in the future: *Perpetuities and Accumulations Act 2009* (UK) (c 18) ss 1-3.

185. Section 219 – Determinable interests

185.1. Overview and purpose

219 Determinable interests

- (1) The rule against perpetuities shall apply—
- (a) to a possibility of reverter in land on the determination of a determinable fee simple, in which case if the fee simple does not determine within the perpetuity period it shall afterwards continue as a fee simple absolute; and
 - (b) to a possibility of a resulting trust on the determination of any other determinable interest in property, in which case if the first interest created by the trust does not determine within the perpetuity period the interest it creates shall afterwards continue as an absolute interest; and
 - (c) to a right of entry for condition broken the exercise of which may determine a fee simple subject to a condition subsequent and to an equivalent right in the case of property other than land, in which case if the right of entry or other right is not exercised within the perpetuity period the fee simple shall afterwards continue as an absolute interest and any such other interest in property shall afterwards continue free from the condition.
- (2) This section shall apply whether or not the determinable or conditional disposition is charitable except that the rule against perpetuities shall not apply to a gift over from 1 charity to another.
- (3) Where a disposition is subject to any provision that causes an interest to which subsection (1)(a) or (b) applies to be determinable, or to any condition subsequent giving rise on breach of it to a right of re-entry or an equivalent right in the case of property other than land, or to any exception or reservation the disposition shall be treated for the purposes of this Act as including a separate disposition of any rights arising because of the provision condition subsequent exception or reservation.

The disposition of an interest in property may be given in such a manner that the interest created is limited from the outset so that on the occurrence of some specified event (which may never occur) the interest will automatically revert back to the disposer. This is known as a determinable fee simple and the possibility that it may revert back to the disposer is known as a possibility of reverter.³³¹⁹

At common law, the rule against perpetuities did not apply to a possibility of reverter.³³²⁰ Section 219(1)(a) amends this aspect of the common law rule to provide that a determinable fee simple that does not revert during the perpetuity period becomes a fee simple absolute.

The disposition of an interest in property may be given in such a manner that it is subject to a condition subsequent to the grant. The condition subsequent may be either:

³³¹⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.219.30].

³³²⁰ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7 (24 May 1971) 8; Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [4.400] and [7.420].

- a condition on which the interest has been disposed of (in which case it may include a right of entry over the land to determine the disposition if the condition has been breached); or
- created by a resulting trust (a trust arising by operation of law where a grantor has not completely disposed of an interest in land and there is not a clear intention to give the beneficial interest to the person who has been given legal title).³³²¹

In either case, the condition subsequent may be void at public policy as a restraint on the alienation of land.³³²² If the determinable interest in the property is valid, section 219(1)(b) and 219(1)(c) provide that the determinable interest will become an absolute interest if the resulting trust does not determine or the right of entry (or other right) is not exercised in the perpetuity period.

Section 219(2) provides that the rule against perpetuities does not apply to a gift over from one charity to another.³³²³

185.2. Issues with the section

The Centre did not identify any significant issues with the section in practice. No issues were raised by the submissions.

185.3. Recommendation

The Centre is of the view that the effect of section 219 should be retained so that determinable interests continue to be subject to vesting within the 125 year perpetuity period as recommended by the Centre. The effect of section 219(2) and (3) should also be retained.

RECOMMENDATION 186. The effect of section 219 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

³³²¹ Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.420] citing *Butterworths Australian Property Law Dictionary* (Sydney, Butterworths, 1997) 214.

³³²² See Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [3.990].

³³²³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.219.120].

186. Section 220 – Trustee powers and superannuation funds

186.1. Overview and purpose

220 Trustee powers and superannuation funds

- (1) The rule of law known as the rule against perpetuities does not apply and shall be deemed never to have applied so as to render void—
- (a) a trust or power to sell property, where a trust of the proceeds of sale is valid; or
 - (b) a trust or power to lease or exchange property, where the lease or exchange directed or authorised by the trust or power is ancillary to the carrying out of a valid trust; or
 - (c) any other power which is ancillary to the carrying out of a valid trust or the giving effect to a valid disposition of property; or
 - (d) a trust or fund established for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for persons who are or have been—
 - (i) employees; or
 - (ii) self-employed persons; or
 - (iii) employees and self-employed persons; or
 - (iv) the spouses, children, grandchildren, parents, dependants or legal personal representatives of employees or self-employed persons; or
 - (v) persons selected or nominated by an employee or a self-employed person under the provisions of such trust or fund; or
 - (e) any provision for the remuneration of trustees.
- (2) This section does not—
- (a) render any trustee liable for any acts done prior to the commencement of this Act for which that trustee would not have been liable had this section not been enacted; or
 - (b) enable any person to recover any money distributed or paid under any trust prior to the commencement of this Act, if the person could not have recovered that money had this section not been enacted.
- (3) In this section—
- employee** includes directors, servants, officers or employees of any employer or employers.
- self-employed persons** includes persons engaged in any lawful profession, trade, occupation or calling.

Section 220 ameliorates the rule against perpetuities in respect of particular types of trusts or powers. The section was designed to overcome a difficulty in that the exercise of a trust power may be outside of the perpetuity period (even though interests of the beneficiaries must vest during the perpetuity period).³³²⁴ At common law, such exercise of a power would be invalid.

The QLRC noted that under the *Trusts Act 1973* (Qld) it was intended that certain statutory powers given to trustees could be exercisable by them at any time, even outside of the perpetuity period. Section 220 was enacted because the QLRC felt that this principle should also apply to powers given under the trust instrument.³³²⁵

186.2. Issues with the section

The Centre did not identify any significant issues with the section in practice. No issues were raised by the submissions.

³³²⁴ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7, 24 May 1971, 9.

³³²⁵ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7, 24 May 1971, 9-10.

186.3. Recommendation

The Centre is of the view that the effect of section 220 should be retained with modernised language.

RECOMMENDATION 187. The effect of section 220 should be retained with modernised language that aligns with the Centre's other recommendations relating to the rule against perpetuities.

187. Section 221 – Non-charitable purpose trusts

187.1. Overview and purpose

221 Non-charitable purpose trusts

- (1) Except as provided in subsection (2) nothing in this Act shall affect the operation of the rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness in cases where the trust property may be applied for the purposes of the trusts after the end of the perpetuity period.
- (2) If any such trust is not otherwise void sections 209 and 210 shall apply to it and the property subject to the trust may be applied for the purposes of the trust during the perpetuity period but not afterwards.

At common law, the general rule is that a non-charitable ‘purpose’ trust (so-called because it is a trust for a purpose, not for people) is void. However, some purpose trusts, such as those for maintenance of a grave or tomb or of animals have been allowed.³³²⁶

Section 221 provides that purposes trusts that are otherwise valid may be subject to a specified perpetuity period and the ‘wait and see’ provisions.

187.2. Issues with the section

The Centre did not identify any significant issues with the section in practice. No issues were raised by the submissions.

187.3. Recommendation

The Centre is of the view that purpose trusts should continue to be subject to the perpetuity period, provided they are otherwise valid. Given this, the Centre recommends that section 221 be retained with modernised language.

RECOMMENDATION 188. The effect of section 221 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

³³²⁶ Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7, 24 May 1971, 10; Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.221.30].

188. Section 222 – Accumulation of income

188.1. Overview and purpose

222 Accumulation of income

- (1) Where property is settled or disposed of in such manner that the income of the property may be or is directed to be accumulated wholly or in part the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is or may be valid but not otherwise.
- (2) Nothing in this section shall affect the power of any person or persons to terminate an accumulation that is for his or her benefit or any jurisdiction or power of the court to maintain or advance out of accumulations or any power of a trustee under the *Trusts Act 1973* or under any other Act or law or under any instrument creating a trust or making a disposition.

At common law, a settlor was free to provide that the income from property the subject of a disposition is to accumulate and, provided the rule against perpetuities was not infringed, the accumulation of income would be valid. This changed with the introduction of the *Accumulations Act 1800*³³²⁷ in the United Kingdom. The 1800 UK Act applied in Queensland until 1973³³²⁸ when the relevant provisions were replaced with the *Perpetuities and Accumulations Act 1972* (Qld). The 1972 Act was repealed and re-enacted in the PLA.

Section 222 of the PLA provides that the income earned from the property that has been settled or disposed of in a disposition may accumulate for the duration of the perpetuity period provided the gift of the accumulated income would itself be valid. This is a return to the common law as applied prior to the 1800 Act.

Section 222(2) of the PLA allows the beneficiary who is presently entitled, or group of people who collectively are entitled to 100% of the beneficial interest of the income being accumulated to apply to a court to stop the accumulation (and take possession) provided the person is 18 years of age (or the group of beneficiaries has closed) and can give a valid discharge.³³²⁹

188.2. Issues with the section

The Centre did not identify any significant issues with the section in practice. No issues were raised by the submissions.

188.3. Recommendation

The Centre is of the view that the effect of section 222 should be retained with modernised language.

³³²⁷ (UK) 39 & 40 Geo III c 98. For a discussion of the history behind the *Accumulations Act 1800* (also known as the Thelluson Act) see Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.440] to [7.470].

³³²⁸ See Queensland Law Reform Commission, *The Law Relating to Perpetuities and Accumulations*, Report No. 7 (24 May 1971) 10-11.

³³²⁹ This is known as the rule in *Saunders v Vautier*. See Anne Wallace et al, *Real Property Law in Queensland*, (Lawbook Co, 4th ed, 2015) [7.480]. For a discussion on the rule in *Saunders v Vautier*, see Paul Matthews, 'The Comparative Importance of the Rule in *Saunders v Vautier*' (2006) 122 *Law Quarterly Review* 266-294.

RECOMMENDATION 189. The effect of section 222 should be retained with modernised language that aligns with the Centre’s other recommendations relating to the rule against perpetuities.

Part 15 – Corporations

Part 15 comprises sections 223 to 227 and these provisions are directed at corporations sole or corporations aggregate.

189. Section 223 – Devolution of property of corporation sole

189.1. Overview and purpose

223 Devolution of property of corporation sole

Where either before or after the commencement of this Act any property or interest in the property is or has been vested in a corporation sole (including the Crown), the same shall, unless and until disposed of by the corporation, pass and devolve to and vest in and be deemed always to have passed and devolved to and vested in the successors from time to time of such corporation.

This section only applies to a corporation sole. The existence of corporations sole date back to the middle ages in England. These entities were created and used for the purpose of enabling office-holders of the Church of England to hold title to church property.³³³⁰ A corporation sole is characterised by only one person occupying a specified office and ‘each and several of the persons in perpetuity who succeed’ that person in the office.³³³¹ Commentary on the history of corporations sole notes that:

The common lawyers treated the occupant of the office and his successors as an artificial person in which title to church property could be vested. Each occupant of the office for the time being represented the corporation which however still subsisted during a vacancy in the office. Problems arising from transfers of property to the corporation during a vacancy were met by legislation providing for the property to vest in the successor upon his appointment....³³³²

At the time of considering the inclusion of provisions relating to corporations sole in 1973, the QLRC acknowledged that corporations sole were not commonly encountered in Queensland, although it noted these corporations could be created expressly in a number of ways, including by statute.³³³³ It is a consistent theme in commentary that very few corporations sole now exist.³³³⁴

One of the rules at common law regarding a corporation sole is ‘that a leasehold interest may not be granted to a corporation sole in his corporate capacity but only in his natural capacity.’³³³⁵ This meant that a lease granted to a corporation sole passed to his personal representatives and not to his

³³³⁰ R P Austin and M Ramsay, *Ford’s Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.030].

³³³¹ EH Burn and J Cartwright, *Cheshire and Burn’s Modern Law of Real Property* (Oxford University Press, 17th ed, 2006) 923.

³³³² R P Austin and M Ramsay, *Ford’s Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.030].

³³³³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

³³³⁴ See for example, Charles Harpum, et al, *The Law of Real Property* (Sweet & Maxwell Limited, 6th ed, 2000) 48 [3–27].

³³³⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

successors. Further, at common law personal property cannot be vested in a corporation sole.³³³⁶ Section 223 of the PLA was introduced to overcome these rules so that ‘proprietary interests such as leaseholds pass to the successors of a corporation sole and not to his personal representatives.’³³³⁷ The section is based on the equivalent provisions in the *Property Law Act 1958* (Vic)³³³⁸ and the *Law of Property Act 1925* (UK).³³³⁹

189.2. Issues with the section

The section has not been considered judicially in Queensland. There are a number of corporations sole in existence in Queensland that have been established under legislation. These include the Public Trustee of Queensland,³³⁴⁰ the Treasurer of Queensland,³³⁴¹ the Coordinator-General,³³⁴² the Queensland Treasury Corporation³³⁴³ and the Minister for Economic Development Queensland.³³⁴⁴ The Acts that establish these corporations sole generally provide, in one form or another, that the corporation:

- is a body corporate with perpetual succession;
- has a seal; and
- may sue and be sued in its corporate name.

Further, in some cases, the relevant provisions also provide that corporations sole have all the powers of an individual and may, for example:

- enter into contracts;
- acquire, hold, dispose of, and deal with, property; and
- appoint agents and attorneys etc.

However, despite the existence of these Acts that create corporations sole, there may still be gaps in these provisions, which potentially require the retention of section 223.

³³³⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.223.60].

³³³⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

³³³⁸ *Property Law Act 1958* (Vic) s 176.

³³³⁹ *Law of Property Act 1925* (UK) s 180(1).

³³⁴⁰ *Public Trustee Act 1978* (Qld) s 8.

³³⁴¹ *Financial Accountability Act 2009* (Qld) s 53.

³³⁴² *State Development and Public Works Organisation Act 1971* (Qld) s 8.

³³⁴³ *Statutory Bodies Financial Arrangements Act 1982* (Qld) s 4 and *Queensland Treasury Corporation Act 1988* (Qld) s 5. The Under Treasurer is the constituted corporation sole under the name Queensland Treasury Corporation.

³³⁴⁴ *Economic Development Act 2012* (Qld) s 12.

189.3. Other jurisdictions

Section 223 of the PLA was modelled on section 176 of the Victorian legislation.³³⁴⁵ The VLRC recommended the retention of section 176 with the incorporation of section 60(5) of that Act into section 176. Section 60(5) provides that:³³⁴⁶

A disposition of freehold land to a corporation sole by his corporate designation without the word 'successors' shall pass to the corporation the fee-simple or other the whole interest which the disposer had power to dispose of in such land unless a contrary intention appears in the disposition.

The VLRC did not provide any detail regarding why the section should be retained, although it noted that corporations sole still exist in Victoria. This recommendation has not been implemented to date in Victoria.

The arrangement in the *Law of Property Act 1936 (SA)* is quite different from Queensland and Victoria, although it has a similar effect. Section 24D (1) of the South Australian Act provides that:

- (1) A corporation sole established under an Act has, and will be taken always to have had –
 - (a) perpetual succession and a common seal; and
 - (b) the capacity to sue and be sued in the corporation's name; and
 - (c) subject to any limitations imposed under an Act, all the powers of a natural person.

189.4. Recommendation

Given the continued existence of corporations sole in Queensland, the Centre recommends that section 223 should be retained with modernised language. This position is supported by the QLS.

RECOMMENDATION 190. Section 223 should be retained with modernised language.

³³⁴⁵ *Property Law Act 1958 (Vic)* s 176.

³³⁴⁶ The equivalent provision in Queensland is located in section 29(2) of the *Property Law Act 1974 (Qld)*.

190. Section 224 – Vacancy in corporation and section 225 – Transactions with corporations sole

190.1. Overview and purpose

224 Vacancy in corporation

Where either before or after the commencement of this Act there is or has been a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate (in any case in which the vacancy affects the status or powers of the corporation) at the time when, if there had been no vacancy, any interest in or charge on property would have been acquired by the corporation, such interest shall despite such vacancy vest and be deemed to have vested in the successor to such office on the successor's appointment as a corporation sole, or in the corporation aggregate (as the case may be), but without prejudice to the right of such successor, or of the corporation aggregate after the appointment of its head officer, to disclaim that interest or charge.

225 Transactions with corporation sole

Any contract or other transaction expressed or purporting to be made with a corporation sole, or any appointment of a corporation sole as trustee, at a time when there was a vacancy in the office and no administrator acting, shall on the vacancy being filled take effect and be deemed to have taken effect as if the vacancy had been filled before the contract, transaction or appointment was expressed to be made or was capable of taking effect, and on the appointment of a successor shall be capable of being enforced, accepted, disclaimed or renounced by the successor.

The QLRC indicated that the proposed section 224 (referred to as section 223 in the QLRC Report No 16) was included to displace the common law rule that applied to both corporations sole and aggregate that during a vacancy in office 'the corporation is capable of no corporate act.'³³⁴⁷ This means that a 'grant or devise' of land to a corporation during a vacancy is void. The same reasoning was provided in relation to the introduction of section 225 of the PLA.³³⁴⁸ Both sections 224 and 225 are based on the equivalent provisions in the *Property Law Act 1958* (Vic).³³⁴⁹

Section 224 of the PLA applies to both a corporation sole and a corporation aggregate. The characteristics of a corporation sole are described in paragraph 189.1 above. A corporation aggregate is:

a legal entity constituted by two or more members (corporate or individual) associated for some common venture or by a single member with whom others could associate for some common venture.³³⁵⁰

³³⁴⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

³³⁴⁸ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

³³⁴⁹ *Property Law Act 1958* (Vic) ss 177 and 178. The Victorian provisions in turn are based on the English legislation, *Law of Property Act 1925* (UK) s 180(2)-(3).

³³⁵⁰ EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (Oxford University Press, 17th ed, 2006) 923.

NOT GOVERNMENT POLICY

Incorporation as a corporation aggregate facilitated the holding of property by a fluctuating group of persons, such as local government organisations and university colleges, and the dealings of the group with other persons in order to advance the group's collective aim.³³⁵¹

A corporation aggregate was originally a creation of common law and it was eventually settled by the courts that the creation of this type of entity required the consent of the monarch in the form of a grant of a royal charter.³³⁵² Both the Chartered Accountants Australia and New Zealand³³⁵³ and The Institution of Engineers Australia are examples of corporations aggregate created by charter.³³⁵⁴ A modern example of a corporation aggregate is a registered company (one member or multiple members).

Section 224 of the PLA is directed at interests in, or charges on, property and applies if:

- there is, or has been, a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate; and
- at the time of the vacancy, an interest in or charge on property would have been acquired by the corporation had the vacancy not existed.

If these circumstances exist then the relevant interest is deemed to have been vested in the successor to the office of the corporation sole or aggregate. However, the deeming effect of the section is not absolute as any successor is able to 'disclaim that interest or charge.'

Section 225 of the PLA only applies to a corporation sole and is directed at contracts or other transactions with these entities. The section applies:

- where any contract or other transaction is expressed or purporting to be made with a corporation sole; or
- to any appointment of a corporation sole as trustee; and
- there was a vacancy in the office and no administrator acting.

When the vacancy is filled, any contract, other transaction or appointment of a corporation sole as trustee takes effect and is deemed to have taken effect as if the vacancy had been filled before the contract, transaction or appointment was expressed to be made or was capable of taking effect. On the appointment of a successor, these contracts or other transactions are capable of being enforced, accepted, disclaimed or renounced.

The reference to the words 'and no administrator acting' in section 225 of the PLA is a reference to the appointment of an administrator under section 226 of the PLA. If an administrator is appointed under section 226, the corporation's powers devolve to the administrator and acts of the

³³⁵¹ R P Austin and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.050].

³³⁵² R P Austin and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.020].

³³⁵³ The Chartered Accountants and New Zealand was previously known as the Institute of Chartered Accountants.

³³⁵⁴ Some aspects of the *Corporations Act 2001* (Cth) may apply to chartered corporations because of the effect of expressions defined in the Act such as 'body' or 'body corporate'. See R P Austin and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.060] for further commentary on this issue.

administrator bind the corporation, rather than any acts of the successor under section 225 of the PLA.³³⁵⁵

190.2. Issues with the section

190.2.1. Section 224 of the PLA

Corporations sole created by legislation still exist in Queensland. It is not clear whether the relevant legislation creating these entities specifically address the effect of a vacancy in the office on interests or charges acquired during a vacancy. In the case of corporations aggregate there is suggestion in commentary that ‘corporations created by or under statutes will rarely have a “head” in the sense used here and will be invested with powers in such a manner as to exclude the operation of the rule.’³³⁵⁶ The absence of certainty regarding possible gaps in enacting Acts supports a position that the section should probably be retained but with some amendments.

190.2.2. Section 225 of the PLA

As indicated above, this section only applies to corporations sole. It is not clear why corporations aggregate were also not included in the section and this exclusion has been described as leaving ‘curious gaps’.³³⁵⁷ In particular, the question has been raised in commentary as to why it was not extended to corporations aggregate ‘which experience similar difficulties during a vacancy in the headship’.³³⁵⁸

The reference in section 225 to the appointment of a corporation sole as trustee originated from section 180(3) of the *Law of Property Act 1925* (UK) where it was included to avoid any uncertainty regarding the Public Trustee acting as a trustee.³³⁵⁹ In Queensland, there is a strong argument that there is no uncertainty in relation to the Public Trustee of Queensland acting as trustee as the *Public Trustee Act 1978* (Qld) confers broad powers on the Public Trustee.³³⁶⁰

Other comments made in relation to section 225 of the PLA include that it is unlikely that a contract would be made by a corporation sole at a time when there is a vacancy in the office.³³⁶¹ Further, it has been suggested that the only transactions likely to be ‘covered would be of a passive kind not requiring any action by the corporation sole (e.g. appointment by power of attorney).’³³⁶²

³³⁵⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.225.30].

³³⁵⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.224.60].

³³⁵⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.225.60].

³³⁵⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.225.60].

³³⁵⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.225.30].

³³⁶⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.225.30].

³³⁶¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.225.30].

³³⁶² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.225.30].

190.3. Other jurisdictions

Sections 177 and 178 of the *Property Law Act 1958* (Vic) are equivalent provisions to sections 224 and 225 of the PLA. South Australia has a different drafting approach to the issue of a temporary vacancy. Section 24D(2) of the *Law of Property Act 1936* (SA) uses the term 'right or liability' and provides:

(2) A right or liability that a corporation sole or corporation aggregate would have acquired or incurred but for the occurrence (before or after the commencement of this section) of a temporary vacancy in the office or offices of the corporation will be treated as having taken effect on the filling of the vacant office or offices as if the vacancy or vacancies had been filled before the right or liability was acquired or incurred.

190.4. Recommendation

The Centre recommends retaining the effect of sections 224 and 225 but with modernised language and by combining the two sections into a single provision, along the lines of the South Australian approach.

The advantage of this approach is that the 'right or liability' would capture the transactions covered by both sections 224 and 225 of the PLA. Further, retaining the reference to the appointment of a corporation sole as a trustee will continue to allow other corporations sole to act as trustees.

RECOMMENDATION 191. Sections 224 and 225 should be retained with modernised language and combined into a single section.

191. Section 226 – Corporation incapable of acting

191.1. Overview and purpose

226 Corporation incapable of acting

- (1) Where, because of the death or incapacity (whether before or after the commencement of this Act) of any 1 or more of the officers or members of a corporation or for any other reason, the corporation ceases to be capable of acting –
 - (a) either generally or in respect of a particular transaction or transactions; and
 - (b) either temporarily or for an indefinite or any lesser period;
 the court may, on the application of any officer or member of the corporation or the personal representative of such member or of any creditor or person having or appearing to have any claim against the corporation, appoint an administrator.
- (2) The court may in its discretion appoint any administrator for an indefinite period or for a fixed period or until the happening of any specified event and on such terms and conditions as to remuneration out of the assets of the corporation and otherwise as it thinks fit.
- (3) Unless the court otherwise directs, the administrator shall, to the exclusion of the corporation and any officer or member of the corporation, have authority to and may exercise all the powers of the corporation subject to such terms and conditions (if any) as the court sees fit to impose.
- (4) Unless the court otherwise directs, the administrator may delegate any of the powers exercisable by the administrator.
- (5) The court may in its discretion on the application of the administrator or of any person referred to in subsection (1) –
 - (a) give to the administrator directions –
 - (i) as to the exercise of any of the powers exercisable by the administrator; and
 - (ii) as to any question or matter arising in or with respect to the affairs of the corporation;
 or
 - (b) remove or replace the administrator.
- (6) On any application under this section the court may make such order for the payment of costs as it thinks fit.
- (7) This section applies to any corporation, whether a corporation aggregate or corporation sole –
 - (a) incorporated under the *Associations Incorporation Act 1981*; or
 - (b) incorporated or registered under the Corporations Act; or
 - (c) constituted under any other Act.
- (8) Where an order is made under this section for the appointment, removal or replacement of an administrator in relation to a company incorporated or registered under the Corporations Act the order shall not take effect until the lodgment within 7 days of the making of the order, or such longer period as the court may allow, of an office copy of the order with the Australian Securities and Investments Commission.

Section 226 of the PLA appears to have been included to address a concern of the QLRC regarding the effect of the death, incapacity or otherwise of all members and officers of a body corporate and the inability of the corporation to actually act in those circumstances.³³⁶³ At the time the QLRC undertook its review in 1973, it indicated that this scenario was:

³³⁶³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

happening with recurring frequency, particularly in the case of small proprietary companies of which the only directors and shareholders are husband and wife who are killed in the same motor accident.³³⁶⁴

The QLRC's concern appeared to be in relation to those situations where none of the deceased had left a will, which it described as 'virtually insoluble'. Further, the QLRC noted that there was no means by which the corporation's affairs could be conducted while waiting for the appointment of an administrator which could take 'many months'.³³⁶⁵ The QLRC indicated that:

What is needed is some procedure by which the court can, during such a period, appoint a person who can administer the affairs of the corporation. Such procedure exists under s 23 of The Building Units Titles Act of 1965, or the R.E.I.C Acts. We therefore propose a clause, modelled principally on s 23, which will enable an administrator to be appointed to the affairs of a corporation during any period when it is incapable of acting. This will ensure that it will be possible to preserve the assets of the corporation and to carry on and complete transactions entered into by it until the conduct of its affairs can be returned to normal.³³⁶⁶

Section 226 operates in the following way:

- where, because of death or incapacity, the corporation is not capable of acting generally or in respect of a particular transaction an application can be made to the court to appoint an administrator;
- an application can be made by:
 - any officer or member of the corporation; or
 - the personal representative of a member; or
 - any creditor or person having or appearing to have any claim against the corporation;³³⁶⁷
- the court has discretion whether or not it will appoint any administrator, for what time period and on such terms and conditions as it thinks fit;³³⁶⁸
- the administrator has the authority and may exercise all the powers of the corporation subject to other directions of the court;³³⁶⁹
- where an order is made under the section for the appointment, removal or replacement of an administrator in relation to a company registered or incorporated under the *Corporations Act 2001* (Cth), the order does not take effect until the lodgement of a copy of the order with ASIC.³³⁷⁰

³³⁶⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109-110.

³³⁶⁵ 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) 110.

³³⁶⁶ 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) 110.

³³⁶⁷ *Property Law Act 1974* (Qld) s 226(1).

³³⁶⁸ *Property Law Act 1974* (Qld) s 226(2).

³³⁶⁹ *Property Law Act 1974* (Qld) ss 226(3)-(5).

³³⁷⁰ *Property Law Act 1974* (Qld) s 226(8).

Commentary suggests that the scope of section 226 of the PLA extends to a wide variety of situations where a company may be incapable of acting including:

- disagreements and deadlocks among directors or members;
- legal disabilities in exercise of directors' and members' powers; and
- death, disappearance and physical incapacity.³³⁷¹

However, the section will not cover situations where a company is acting ultra vires.³³⁷² The section potentially covers a broad range of entities and expressly provides that it applies to any corporation whether a corporation aggregate or corporation sole –

- incorporated under the *Associations Incorporation Act 1981* (Qld); or
- incorporated or registered under the *Corporations Act 2001* (Cth) or
- constituted under any other Act.

However, in practice, a court would only exercise its discretion under section 226 to appoint an administrator where:

[T]he incapacity has arisen from a difficulty not brought about by the directors or members deliberate act to create it and **where other available remedies are inconvenient or impracticable** in the circumstances of the case. Indeed although the section does not expressly say so, its purpose appears to be to provide a machinery for corporate action where all concerned are agreed on the action, but there is a practical difficulty in carrying it out; hence the fact that an application under the section is opposed by an interested party may be grounds for refusing an order under it.³³⁷³
[emphasis added]

191.2. Issues with the section

It is unclear how regularly section 226 of the PLA has been relied upon in practice. Prima facie, the section appears to have a potentially wide application. However, as suggested above, it is likely to operate as a last resort provision where other remedies are not suitable and there is agreement regarding the action to be taken.

The QLS submitted that it is not aware of how often the process in section 226 is used but stated that the section should be retained as it provides a useful mechanism.

191.3. Recommendation

The Centre recommends that section 226 should be retained with modernised language. This recommendation is supported by the QLS.

³³⁷¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.226.270]. See [PLA.226.30] – [PLA.226.240] for further commentary on situations that may give rise to incapacity.

³³⁷² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.226.270].

³³⁷³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [226.270].

RECOMMENDATION 192. Section 226 should be retained with modernised language.

192. Section 227 – Corporate contracts and transactions not under seal

192.1. Overview and purpose

227 Corporate contracts and transactions not under seal

- (1) Contracts and other transactions may be made or effected by any body corporate, wherever incorporated, as follows –
 - (a) a contract or other transaction which if made or effected by or between individuals would by law be required to be in writing, signed by the party to be charged with it or effecting the same, may be made by the corporation in writing signed by any person under its authority, express or implied; and
 - (b) a contract or other transaction, which if made or effected by or between individuals would by law be valid although made by parol only, and not reduced to writing, may be made by parol by the corporation by any person acting under its authority, express or implied.
- (2) A contract or other transaction made or effected under this section shall be effective in law, and shall bind the corporation and the corporation’s successors and all other parties to the contract or other transaction.
- (3) A contract or other transaction made or effected under this section may be varied or discharged in the same manner in which it is by this section authorised to be made or effected.
- (4) Nothing in this section shall be taken to prevent a contract or other transaction from being made or effected under the seal of the corporation.
- (5) This section –
 - (a) applies to the making, effecting, variation or discharge of a contract or transaction after the commencement of this Act, whether the corporation gave its authority before or after the commencement of this Act; and
 - (b) does not apply to contracts made by any company within the meaning of the Corporations Act, or by any corporation incorporated under any other Act which expressly prescribes the manner and form in which contracts may be made or transactions effected by or on behalf of such corporation.

At common law, contracts and transactions of a corporation were required to be effected under the corporate seal, except in respect of basic day-to-day transactions.³³⁷⁴ The QLRC acknowledged that a number of statutes modified the common law rule and placed a company in the same category as an individual for the purpose of the required formalities associated with contracts and other transactions.³³⁷⁵ However, the QLRC was concerned that some legislation in place in 1973 did not have provisions which addressed the common law rule in all cases, including corporations created by letters patent under the *Religious Educational and Charitable Institutions Act 1861* (Qld).³³⁷⁶

³³⁷⁴ 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) 110. For a historical overview of the development of the rule see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.227.30], [PLA.227.60] and [PLA.27.90].

³³⁷⁵ 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) 110.

³³⁷⁶ 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) 110. Under section 106H of the *Associations Incorporation Act 1981* (Qld) an application can be made to the Minister for authority to transfer the corporation’s incorporation from the *Religious Educational and*

Section 227 of the PLA is directed at the making or effecting of contracts and other transactions by a body corporate (wherever incorporated) and has the effect of displacing the common law rule requiring corporate acts to be effected under corporate seal. It applies to 'any body corporate, wherever incorporated.' The term body corporate is not defined in the PLA nor is it defined in the *Acts Interpretation Act 1954* (Qld). The section also refers to a 'corporation'. This term is defined in schedule 1 of the *Acts Interpretation Act 1954* (Qld) to include a body politic or corporate.

Section 227 operates in the following way:

- if a contract or other transaction made between individuals is legally required to be in writing and signed, then a corporation may make a contract or transaction in writing signed by any person under the corporation's authority (express or implied);³³⁷⁷ and
- if a contract or other transaction made by parol only would be legally valid if made between individuals, it may also be made by the corporation by any person acting under its authority (express or implied).³³⁷⁸

The section has been interpreted as an enabling provision which is permissive in nature, rather than mandatory.³³⁷⁹ The section 'does not dictate the means by which a company may make a contract.'³³⁸⁰ Section 227(5) of the PLA expressly states that:

- the section applies to the making, effecting, variation or discharge of a contract or transaction after the commencement of the Act, whether or not the corporation gave its authority before or after the commencement of the PLA,³³⁸¹ and
- it does not apply to contracts made by any company within the meaning of the *Corporations Act 2001* (Cth); or
- it also does not apply to any corporation incorporated under any other Act which expressly prescribes the manner and form in which contracts may be made or transactions effected by or on behalf of such corporation.³³⁸²

A 'company' under the *Corporations Act 2001* (Cth) means a company registered under that Act.³³⁸³

Charitable Institutions Act 1861 (Qld) to a company limited by guarantee under the *Corporations Act 2001* (Cth) or the *Corporations (Aboriginal and Torres Strait Island) Act 2006* (Cth).

³³⁷⁷ *Property Law Act 1974* (Qld) s 227(1)(a).

³³⁷⁸ *Property Law Act 1974* (Qld) s 227(1)(b).

³³⁷⁹ *LK Bros Pty Ltd v Collins and Anor* [2004] QSC 026 [21]. For further commentary on this issue see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.227-120] – [PLA.227.150].

³³⁸⁰ *LK Bros Pty Ltd v Collins and Anor* [2004] QSC 026 [21]. For further commentary on this issue see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.227-120] – [PLA.227.150].

³³⁸¹ *Property Law Act 1974* (Qld) s 227(5)(a).

³³⁸² *Property Law Act 1974* (Qld) s 227(5)(b).

³³⁸³ *Corporations Act 2001* (Cth) s 9. The meaning of the section is also enlarged for the purpose of specific provisions of the Act specified in the section 9 definition. See Ford, Austin & Ramsay's *Principles of Corporations Law*, LexisNexis (online)[1.051].

192.2. Issues with the section

In practical terms the exclusions set out in section 227(5)(b) require an assessment to be undertaken of the relevant entity to determine if it is a:

- company within the meaning of the *Corporations Act 2001* (Cth); or
- corporation which has been incorporated under any other legislation which sets out a process for the making of contracts or effecting transactions.

In this respect, it is not clear which bodies corporate the section will cover, if any, and whether or not section 227 of the PLA is still relevant.

192.3. Other jurisdictions

Victoria is the only jurisdiction that has a provision similar to section 226 of the PLA. However, the relevant section is located in section 31A of the *Instruments Act 1958* (Vic).

192.4. Recommendation

The QLS commented that it is unaware of how often section 227 is relied on for execution by corporations but argued that it would have frequent application to the execution of contracts by incorporated associations. Given this, the QLS submitted that the section should be retained to ensure there is a process that applies to entities that fall outside of other legislation.

The Centre recommends that section 227 should be retained with modernised language.

RECOMMENDATION 193. Section 227 should be retained with modernised language.

Part 16 – Voidable dispositions

Part 16 of the PLA deals with voidable dispositions or alienation of property made with intent to defraud. The Part contains three sections, each of which are discussed in turn below.

193. Section 228 – Voluntary conveyances to defraud creditors voidable

193.1. Overview and purpose

228 Voluntary conveyances to defraud creditors voidable

- (1) Subject to this section, every alienation of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person prejudiced by the alienation of property.
- (2) This section does not affect the law of bankruptcy for the time being in force.
- (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

Section 228 is directed at addressing a situation where voluntary conveyances are made with the intent to defraud creditors. Its origins are derived from 16th century English legislation³³⁸⁴ which spoke of dispositions made to ‘delay, hinder or defraud creditors.’³³⁸⁵ The section is essentially a restatement of the relevant English provision in the *Law of Property Act 1925*³³⁸⁶ with the main difference that the word ‘alienation’ is used rather than ‘disposition’ to make it clear that the section covered dispositions of all kinds of property whether real or personal.³³⁸⁷

Section 228 operates in the following way:

- it has the general effect of making voidable every alienation of property, with intent to defraud creditors. The alienation of the property is voidable at the instance of the person prejudiced by the alienation;³³⁸⁸
- ‘alienation’ is not defined in the PLA but it has been interpreted broadly to mean ‘parting with property or some interest in property’;³³⁸⁹

³³⁸⁴ 13 Eliz 1 c 5 (Fraudulent Conveyances) (1571).

³³⁸⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.228.30]).

³³⁸⁶ 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) 111. See *Law of Property Act 1925* (UK) s 172 (the section has now been repealed).

³³⁸⁷ 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) 111. The QLRC noted that the Victorian equivalent used the term ‘conveyance’ in the place of ‘disposition’ and the corresponding provision in section 37A of the *Conveyancing Act 1919* (NSW) use the word ‘alienation’.

³³⁸⁸ *Property Law Act 1974* (Qld) s 228(1).

³³⁸⁹ For a full discussion on the meaning of this term see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.228.60]).

- it does not extend to any estate or interest in property conveyed for valuable consideration and in good faith to a person who does not have notice of the intent to defraud creditors at the time of the conveyance;³³⁹⁰ and
- it does not affect the law of bankruptcy.³³⁹¹

The section (and its interstate equivalents) has been considered in different contexts in a variety of decisions.³³⁹² Whether there is an intention to defraud is determined on the facts of each case.³³⁹³

193.2. Issues with the section

One of the key considerations in relation to reform of section 228 of the PLA is the extent to which a similar provision in the *Bankruptcy Act 1966* (Cth) covers some or all of the situations in which section 228 may apply. In this respect, when considering the introduction of section 228 of the PLA, the QLRC noted that:

To a large extent the field of fraudulent dispositions is now occupied by s 121 of the Commonwealth Bankruptcy Act, which, however, is confined to dispositions by bankrupts as such. The foregoing sections of the property legislation are not, however, confined to insolvents so affect dispositions which are not within the scope of the Commonwealth legislation.³³⁹⁴

Section 121 of the *Bankruptcy Act 1966* (Cth) has been amended since 1973.³³⁹⁵ Commentary on section 121 of the *Bankruptcy Act 1966* (Cth) indicates that in the context of bankruptcy, the section ‘supersedes’ the State and Territory ‘voluntary conveyance’ provisions, including section 228 of the PLA.³³⁹⁶ However, it appears from case law that any suggestion that section 121 of that Act covers the same subject matter as section 228 of the PLA has been rejected.³³⁹⁷ In the New South Wales Court of Appeal decision of *Zaravinos v Houvardas* Sheller JA expressly stated in relation to section 37A of the *Conveyancing Act 1919* (NSW) that:

Section 121 is not an exhaustive enactment of the topic of the avoidability of fraudulent transfers and was not intended to operate to the exclusion of state laws on that subject, even if the transferor was or became bankrupt.³³⁹⁸...

³³⁹⁰ *Property Law Act 1974* (Qld) s 228(3).

³³⁹¹ *Property Law Act 1974* (Qld) s 228(2).

³³⁹² For further detailed commentary on the operation of the section and related decisions see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.228.30] – [PLA.228.210].

³³⁹³ Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 73 [30597.10].

³³⁹⁴ 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) 111.

³³⁹⁵ The amendments strengthened the ability of the trustee to recover under section 121 prior to a person becoming bankrupt. For more information about the amendments see PP McQuade and MGR Gronow, *Australian Bankruptcy Law and Practice* (Thomson Reuters) (online) [121.0.10].

³³⁹⁶ PP McQuade and MGR Gronow, *Australian Bankruptcy Law and Practice* (Thomson Reuters) (online) [121.0.20].

³³⁹⁷ See *Zaravinos v Houvardas* (2004) 32 Fam LR 490. See also *Ashton v Prentice* [1998] FCA 1464 where Hill J indicated that the amended section 121 of the Act ‘covers more or less the same area as the section it replaced, although, if anything, it is now framed in such a way as to make it rather easier for a Trustee to succeed than was earlier the case.’

³³⁹⁸ (2004) 32 Fam LR 490 [40].

Clearly s 121 does not cover the field covered by s 37A. It is concerned only with enabling a trustee in bankruptcy in certain circumstances to avoid certain transfers.³³⁹⁹

Section 228 of the PLA is still available even after the debtor becomes bankrupt, although in such a situation the official trustee is the appropriate person to commence proceedings under section 228. However, it is more likely the official trustee would make the application under section 121 of the *Bankruptcy Act 1966* (Cth) and any other creditor will be unable to commence proceedings under section 228 of the PLA.³⁴⁰⁰

193.2.1. Submissions by the QLS

The QLS submitted that there is potential for the section to operate inequitably in some circumstances. It was suggested that the section could be amended to include a number of factors that the court could take into account when exercising its discretion.³⁴⁰¹ The QLS suggested the factors may include:

- whether the creditor could have reasonably taken steps to protect their interest (e.g. by registration of a security interest on a statutory register);
- whether there has been delay by the creditor in bringing the proceedings; or
- whether the current owner has invested in the land or would otherwise be unjustly prejudiced.

The QLS also suggested that section 228 could be amended to provide the court with a range of orders that may be made, other than just making the alienation of the property void. This could include compensation to the innocent owner and a general power to make orders that the court considers fit for the relief sought.

193.3. Other jurisdictions

193.3.1. Australia

Each Australian jurisdiction has a provision that is generally in the same form as section 228 of the PLA.³⁴⁰² There are some slight variations in terms of the language used. For example:

- in Victoria, section 172(2) of the *Property Law Act 1958* (Vic) refers to ‘insolvency, bankruptcy and disentailing assurance’ instead of simply ‘bankruptcy’ which is the position in section 228(2) of the PLA;
- section 172(3) of the *Property Law Act 1958* (Vic) covers alienation ‘for valuable consideration and in good faith’ or ‘upon good consideration and in good faith’ whereas the equivalent provision in section 228(3) of the PLA only refers to ‘valuable consideration and good faith’;³⁴⁰³

³³⁹⁹ *Zaravinos v Houvardas* (2004) 32 Fam LR 490 [41].

³⁴⁰⁰ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.228.30] for discussion on this issue.

³⁴⁰¹ The QLS noted that other provisions in the PLA do this, e.g. *Property Law Act 1974* (Qld) s 128(7).

³⁴⁰² See *Property Law Act 1958* (Vic) s 172; *Conveyancing Act 1919* (NSW) s 37A; *Law of Property Act 1936* (SA) s 87; *Law of Property Act* (NT) s 208; *Property Law Act 1969* (WA) s 89.

³⁴⁰³ The South Australian and Western Australian provisions in this respect are in the same form as the Victorian section.

- the South Australian provision does not include a subsection which refers to the law of bankruptcy not being affected by the relevant section;³⁴⁰⁴
- section 40 of the *Conveyancing and Law of Property Act 1884* (Tas) only refers to 'disentailing assurance'.

The VLRC considered the voidable disposition provisions in Division 9 of the *Property Law Act 1958* (Vic) in 2010 when that Act was reviewed. The VLRC recommended that section 172 of the Act be retained for the following reasons:

This provision ensures that a person cannot put property in the name of a third party in order to place it beyond the reach of creditors with the intention of defrauding them. Any person prejudiced by a conveyance with the intention to defraud may set the conveyance aside, even if the person is not a creditor. The person transferring the property need not be insolvent.

Section 121 of the *Bankruptcy Act 1966* (Cth), which regulates the validity of transfers to defeat creditors by a person who later becomes bankrupt, overlaps this provision but does not completely displace it.³⁴⁰⁵

193.3.2. New Zealand

The *Property Law Act 1952* (NZ) included section 60 which was in essentially the same terms as section 228 of the PLA. The new property law regime in the *Property Law Act 2007* (NZ) reformulated and extended the approach in section 60. The Explanatory Note to the Property Law Bill 2006 summarises the changes in the following way:

Subpart 6 of Part 6 is a reformulation and extension of section 60 of the 1952 Act, which itself derives from the Statute of Elizabeth (13 Eliz 1, c 5). The concept of recovering, for general creditors, property transferred by a debtor to put it beyond the reach of general creditors is thus a very old one indeed. The subpart puts into statutory form much of the common law gloss which section 60 has attracted. It also clarifies procedures, especially when application is made by an individual creditor and the debtor has not yet been bankrupted or, if a company, put into liquidation.

The relevant provisions are set out in sections 344 to 350 of the *Property Law Act 2007* (NZ). The provisions apply to dispositions of property made after 31 December 2007 to a debtor who:

- was insolvent at the time, or became insolvent as a result of making the disposition; or
- was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or
- intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.³⁴⁰⁶

In addition, the disposition by the debtor must have been done with intent to prejudice a creditor, or by way of gift, or without receiving reasonably equivalent value in exchange.³⁴⁰⁷

Part 6, subpart 6 of the *Property Law Act 2007* (NZ):

³⁴⁰⁴ See *Law of Property Act 1936* (SA) s 82.

³⁴⁰⁵ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 138.

³⁴⁰⁶ *Property Law Act 2007* (NZ) ss 346(1) and (2).

³⁴⁰⁷ *Property Law Act 2007* (NZ) s 346(1).

- clarifies what it means for a disposition to prejudice a creditor, explains what a disposition by way of gift includes and indicates when a debtor must be treated as insolvent.³⁴⁰⁸ The term ‘disposition’ is also defined broadly in section 345(2) and means, amongst other things:
 - a conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity;
 - the creation of a trust;
 - the grant or creation, at law or in equity, of a lease, mortgage, charge, servitude, licence, power, or other right, estate, or interest in or over property;
- sets out the process for making an application for a court order setting aside certain dispositions of property. Only a creditor who claims to be prejudiced by a disposition of property or the liquidator (if the company is a company in liquidation) may apply for an order;³⁴⁰⁹
- where a valid application has been made under section 347 of the Act, the court can make an order if satisfied that the applicant has been prejudiced by a disposition of property.³⁴¹⁰ The order can either:
 - vest the property in one of the persons specified in section 350 of the Act; or
 - require a person who acquired or received property through the disposition to pay reasonable compensation to the person specified in section 350 of the Act;³⁴¹¹
- section 350 overrides the *Land Transfer Act 1952* (NZ);³⁴¹²
- the court must not make an order to set aside a disposition of property:
 - against a person who acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a disposition to which subpart 6 applies; or
 - the person acquired the property through a person who acquired it in the above circumstances.³⁴¹³

193.3.3. United Kingdom

The *Law of Property Act 1925* (UK) included section 172 which was in the same form as section 228 of the PLA. This provision was removed from the UK legislation in 1985. The position now is that conveyances made with the intent to defraud creditors are dealt with under the *Insolvency Act 1986* (UK).³⁴¹⁴

193.3.4. Singapore

In Singapore, section 73B of the *Conveyancing and Law of Property Act* (CAP 61) sets out the position in relation to voluntary conveyances to defraud creditors. The section is essentially in the same form

³⁴⁰⁸ *Property Law Act 2007* (NZ) s 345(1).

³⁴⁰⁹ *Property Law Act 2007* (NZ) s 347. The word ‘creditor’ is defined in section 4 of the Act to include a person who is a creditor within the meaning of section 240 of the Companies Act 1993 and a person who can provide a debt under the Insolvency Act 2006.

³⁴¹⁰ *Property Law Act 2007* (NZ) s 348(1).

³⁴¹¹ *Property Law Act 2007* (NZ) s 348(2). The persons specified in section 350 of the Act include the Official Assignee, if the debtor is bankrupt, or the debtor if the debtor is a company in liquidation etc. or in every other case, the person directed by the court under subsection (2).

³⁴¹² *Property Law Act 2007* (NZ) s 350(2).

³⁴¹³ *Property Law Act 2007* (NZ) s 349.

³⁴¹⁴ *Insolvency Act 1986* (UK) ss 423-425. For further information on this process see Charles Harpum, et al, *The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000) 172 [5.080].

as section 228 of the PLA. In 2013, the Insolvency Law Review Committee produced a final report regarding insolvency law in Singapore with the aim of streamlining and consolidating the two sources of law located in the *Companies Act (Cap. 50)* and the *Bankruptcy Act (Cap 20)*.³⁴¹⁵ Part of that review considered the avoidance provision in section 73B and the removal of the equivalent provision in the United Kingdom into the insolvency legislation. The recommendation of the Committee is to move the section into the 'New Insolvency Act and amend the provision to mirror the section in the United Kingdom'.³⁴¹⁶ The relevant reforms proposed in relation to the insolvency law in Singapore do not appear to have been implemented to date.

The Insolvency Law Review Committee made a number of observations in relation to the differences between section 73B (equivalent provision to section 228 of the PLA) and section 423 of the *Insolvency Act 1985 (UK)* including:³⁴¹⁷

- the UK section covers only undervalue transactions compared to the broader category of 'every' conveyance of property set out in the Singaporean provision (mirrored in Australia);
- the UK section considers the 'purpose' of the transaction rather than whether there was 'intention to defraud creditors'; and
- the availability of different remedies in place of simply making the transaction 'voidable'.

193.4. Recommendation

The Centre is of the view that section 228 continues to serve a function in Queensland and should be retained. The QLS agreed with this view. However, the Centre does not support the QLS's view that the section should be amended to provide discretionary factors or remedies for the court to consider when declaring an alienation of property to be void.

In the Centre's view, the section should be retained with modernised language but amended to refer to 'disposition' of property rather than alienation. This will align with the expanded definition of 'disposition' described in paragraph 12.4.

RECOMMENDATION 194. Section 228 should be retained with modernised language but amended to replace the reference to alienation of property with disposition of property.

³⁴¹⁵ Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee*, Final Report (2013) 184-185 [52]-[54].

³⁴¹⁶ Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee*, Final Report (2013) 185 [54].

³⁴¹⁷ Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee*, Final Report (2013) 184 [53].

194. Section 229 – Voluntary disposition of land how far voidable as against purchasers

194.1. Overview and purpose

229 Voluntary disposition of land how far voidable as against purchasers

- (1) Every voluntary alienation of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.
- (2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud merely because a subsequent conveyance for valuable consideration was made, if such subsequent conveyance is made after the commencement of this Act.

Section 229 of the PLA has similar historical origins to sections 228 and 230. The statute 27 Eliz I, c 4 of 1584 was construed by the courts so that ‘an intent to defraud was conclusively inferred (except as against a charity) from the mere fact that a voluntary conveyance was followed by a conveyance of the same land for value.’³⁴¹⁸ This created problems as the initial recipient of the land – that is, the voluntary grantee did not have certainty of tenure.³⁴¹⁹

The effect of this harsh interpretation of 27 Eliz I, c 4, was, in effect, to enable anyone who made a voluntary conveyance of land to change his or her mind by subsequently selling the land for value; for the voluntary conveyance was voidable at the instance of the subsequent purchaser even though the subsequent purchaser took the land with notice of the prior voluntary conveyance.³⁴²⁰

In England, the presumption of the courts when interpreting the imperial legislation was altered by legislation.³⁴²¹ In Queensland this was eventually set out in provisions of The Mercantile Acts.³⁴²² Part of the QLRC’s justification for the inclusion of section 229 of the PLA was to simplify and modernise the ‘archaic and somewhat unclear language’ in these earlier provisions.³⁴²³

The effect of section 229 of the PLA is that a voluntary alienation is not voidable at the instance of a subsequent purchaser unless the alienation was made with the intention to defraud the purchaser. Further, the section expressly provides that a voluntary disposition is not deemed to have been made with intent to defraud merely because a subsequent conveyance was made for valuable consideration.³⁴²⁴ The word ‘disposition’ is defined broadly to include:

³⁴¹⁸ GW Hinde, et al, *Land Law in New Zealand* (Butterworths, 1997).

³⁴¹⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.229.30]).

³⁴²⁰ GW Hinde, et al, *Land Law in New Zealand* (Butterworths, 1997) 217 [2.107].

³⁴²¹ The relevant English Act was the *Voluntary Conveyances Act* 1893. 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) 111.

³⁴²² See sections 48 and 49 of The Mercantile Acts.

³⁴²³ 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) 111.

³⁴²⁴ *Property Law Act 1974* (Qld) s 229(2).

a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will.³⁴²⁵

The term 'conveyance' includes a transfer within the meaning of the *Land Title Act 1994* (Qld). This means that section 229 of the PLA will apply to registered land. The effect of this is that a registered owner of the property who obtained the title to the property as a volunteer would have the same right of indefeasibility as a person who obtained the title through a purchase for valuable consideration.³⁴²⁶

194.2. Issues with the section

It is not clear whether section 229 of the PLA serves any current purpose and whether it is relied upon in practice. Judicial consideration of this section appears to have been limited in Queensland and in the other Australian jurisdictions. In a Preliminary Paper reviewing the *Property Law Act 1952* (NZ), the Law Commission (NZ) asked whether there was any purpose in re-enacting a version of section 61 of that Act into the new property law legislation in New Zealand. The section was not re-enacted in the *Property Law Act 2007* (NZ).

The QLS Banking and Finance Committee submitted that the section should be retained for the following reasons:

- the other States and various countries have not removed the equivalent provision in their jurisdictions, and the need for consistency in the law of credit in the modern world of commerce and location of property to satisfy debtors' obligations;
- the 'gaps' in suitable remedies for insolvency appointees and/ or creditors which are likely to arise if section 229 of the PLA was removed;
- section 229 of the PLA may have application in circumstances where remedies under the *Corporations Act 2001* (Cth) and the *Bankruptcy Act 1966* (Cth) may not be available;
- there is no apparent 'mischief' or duplication with the insolvency laws which its removal would seek to achieve, and
- whilst it might not be used as often by insolvency appointees as the voidable transaction provisions of the insolvency laws, it still maintains a high relevance to creditors and insolvency appointees of local and foreign debtors.

However, the QLS Property Law Committee submitted that the section should be repealed for the following reasons:

- section 229 concerns alienation of land to defraud a purchaser. The commentary by the Law Commission (NZ) (see paragraph 194.3.2) identifies the limited use (if any) of retaining this section. The equivalent section has been abolished by New Zealand; and
- retaining the section is inconsistent with the general concepts of indefeasibility of title.

³⁴²⁵ *Property Law Act 1974* (Qld) s 3, sch 6 (definition of 'disposition').

³⁴²⁶ See *Land Title Act 1994* (Qld) ss 180, 184.

194.3. Other jurisdictions

194.3.1. Australia

Each Australian jurisdiction has a section that has a similar effect to section 229 of the PLA, although not always identical in form. An overview of the provisions in the other States and Territories is set out below:

- the Northern Territory, Tasmanian and Western Australian provisions are essentially identical, although section 41(1) of the *Conveyancing and Law of Property Act 1884* (Tas) uses the word ‘disposition’ instead of ‘alienation’;³⁴²⁷
- the sections in South Australia and Victoria are also very similar to the Queensland provision. However, both jurisdictions use the word ‘disposition’ and define it to include every mode of disposition referred to or mentioned in the *Real Property Act 1886* (in the case of South Australia) and the *Transfer of Land Act 1958* (Vic) (in the case of Victoria);³⁴²⁸
- in New South Wales, section 37B of the *Conveyancing Act 1919* (NSW) is similar but uses the phrase ‘every instrument (other than a will) which operates, or on registration would operate as a voluntary alienation of land’.³⁴²⁹

The VLRC recommended that the equivalent provisions, sections 173 and 174, of the *Property Law Act 1958* (Vic) be retained.³⁴³⁰ However, there is no detail provided in the VLRC’s report which explains the reasoning for the recommendation.

194.3.2. New Zealand

Prior to 2007, section 61 of the *Property Law Act 1952* (NZ) was in a similar form to section 229 of the PLA. The Law Commission (NZ) reviewed section 61 and commented that:

It is a little difficult to see the purpose of perpetuating this watered-down version of the original rule. Under modern New Zealand conveyancing conditions it is hard to conceive of a situation in which a voluntary alienation could be used as a means of defrauding a subsequent purchaser and, even if that did occur, would it really be necessary to rely upon the statute before a court could deprive the volunteer of the benefit of the transferor’s fraud? A party to a fraud cannot take advantage of it; nor, it is thought, can a volunteer. On the other hand, an innocent volunteer would get an indefeasible title under the Land Transfer Act if *Bogdanovic v Koteff* (1988) 12 NSWLR 472 is followed in New Zealand. If the section is re-enacted it will therefore need to include a clause overriding that Act.³⁴³¹

³⁴²⁷ See *Law of Property Act* (NT) s 209; *Property Law Act 1969* (WA) ss 90-91; *Conveyancing and Law of Property Act 1884* (Tas) s 41.

³⁴²⁸ *Law of Property Act 1936* (SA) s 87; *Property Law Act 1958* (Vic) ss 173-174. See also *Civil Law (Property) Act 2006* (ACT) s 240. Section 240(2) of that Act is similar to the exception in section 229(2) of the PLA, although it is expressed in terms of the document by which the voluntary disposition is made is registered before a subsequent purchase of the land the voluntary disposition is not taken to have been made with intent to defraud a subsequent purchaser only because of the absence of valuable consideration or only because of the subsequent purchase.

³⁴²⁹ *Conveyancing Act 1919* (NSW) s 37B(1).

³⁴³⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 138.

³⁴³¹ Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 76 [258].

Section 61 is not re-enacted in the *Property Law Act 2007* (NZ). An overview of the way in which the new subpart dealing with dispositions that prejudice creditors is set out in paragraph 193.3.2 above.

194.3.3. United Kingdom

In the United Kingdom, section 173 of the *Law of Property Act 1925* (UK) is in the same form as section 229 of the PLA.

194.4. Recommendation

Notwithstanding the view of the QLS Banking and Finance Committee, the Centre remains of the view that section 229 should be repealed.

RECOMMENDATION 195. Section 229 should be repealed.

195. Section 230 – Acquisitions of reversions at an under value

195.1. Overview and purpose

230 Acquisitions of reversions at an under value

- (1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of under value.
- (1A) In subsection (1) –
reversionary interest includes an expectancy or possibility.
- (2) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

Historically, equity protected the interests of the 'expectant heir'.³⁴³² There was an assumption that the heir was in a vulnerable position and often 'inclined' to enter into 'unconscionable bargains'. Relief would be granted in equity relying on constructive fraud.³⁴³³ Eventually in the mid-19th century transactions were set aside in equity simply because the price paid appeared inadequate.³⁴³⁴ In order to establish that the transaction was fair, the onus of proof was imposed upon the person entering into the transaction with the expectant heir. Commentary on this situation indicates that:

This approach came to be regarded not only as a hindrance to unconscionable bargains but to fair and reasonable ones too.³⁴³⁵

Legislation has since been introduced in Australia (and the United Kingdom) to alter the effect of the equitable doctrine.

The practical effect of section 230 is to make it clear that under value alone is not sufficient to set aside an acquisition of a reversionary interest for money or money's worth. The onus of proof is not altered by the section. The object of the section has been described as follows:

[T]o protect those expectant heirs who may be under some duress or coercion to sell their reversionary interests without knowledge or full appreciation of the value of those interests.³⁴³⁶

³⁴³² Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

³⁴³³ Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

³⁴³⁴ Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

³⁴³⁵ Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

³⁴³⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.230.30].

The QLRC in its discussion of the proposed section 230 recognised that ‘improvident bargains by expectant heirs now recall a social milieu which is largely past.’³⁴³⁷ However, the QLRC’s view was that there is ‘no harm, and may well be some good’ in adopting the provision.³⁴³⁸

195.2. Issues with the section

Section 230 of the PLA does not appear to have been the subject of judicial consideration. Further, there are arguably alternative options to address any issues raised in relation to under value, including through equitable principles.

The QLS view, similarly to the view on section 229 (discussed at paragraph 194 above) is split. The QLS Property Law Committee supported the VLRC position (discussed at paragraph 195.3.1 below) and submitted that the section could be repealed. The QLS Banking and Finance Committee, citing concerns similar to those raised in relation to section 229, indicated that the provision should be retained.

195.3. Other jurisdictions

Each Australian State and Territory has a provision that is in a similar form to section 230 of the PLA.³⁴³⁹

195.3.1. Victoria

The VLRC recommended that section 175 of the *Property Law Act 1958* (Vic), the equivalent provision to section 230 of the PLA, be repealed. The VLRC indicated that:

It is sufficient to rely on the equitable jurisdiction to set aside on grounds such as, fraud, undue influence and other unconscionable conduct.³⁴⁴⁰

The VLRC appeared to place some weight on the views of the Law Reform Commissions in Northern Ireland and Ireland. The earlier review undertaken by the Irish Law Reform Commission in 2004 recommended the repeal of the provision equivalent to section 230 of the PLA. The ILRC noted that:

It is difficult to justify singling out such transactions nowadays and this matter should be left to be dealt with under the wide equitable jurisdiction to strike down ‘improvident’ bargains and transactions vitiated by improper conduct such as fraud, duress, undue influence or other unconscionable behaviour.³⁴⁴¹

³⁴³⁷ 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) 111-112.

³⁴³⁸ 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) 111-112.

³⁴³⁹ See *Property Law Act 1958* (Vic) s 175; *Conveyancing Act 1919* (NSW) s 37C; *Law of Property Act 1936* (SA) s 88; *Law of Property Act* (NT) s 210; *Conveyancing and Law of Property Act 1884* (Tas) s 42; *Property Law Act 1969* (WA) s 92; *Civil Law (Property) Act 2006* (ACT) s 241.

³⁴⁴⁰ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 138.

³⁴⁴¹ Law Reform Commission (Ireland), *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* LRC CP 34 (2004) 126 [8.40].

The later review undertaken by the Northern Ireland Law Commission in 2009 endorsed the recommendation that the section be repealed and that it was sufficient to rely on the equitable jurisdiction to address these types of situations.³⁴⁴²

The VLRC recommendation has not been implemented to date in Victoria.

195.3.2. United Kingdom and New Zealand

The *Law of Property Act 1925* (UK) has retained section 174 which is in identical terms to section 230 of the PLA.

Section 62 of the *Property Law Act 1952* (NZ) was effectively in the same terms as the Queensland provision. However, that provision was not re-enacted in the *Property Law Act 2007* (NZ).

195.4. Recommendation

The Centre recognises that the view of the QLS is divided between retain and repeal. However, on balance, the Centre is in agreement with the views of the law reform commissions in Victoria, Ireland and New Zealand in that existing equitable jurisdiction will give the court powers to make orders in this area. For this reason, the Centre recommends that section 230 of the PLA should be repealed.

RECOMMENDATION 196. Section 230 should be repealed.

³⁴⁴² See Northern Ireland Law Commission, *Consultation Paper Land Law* NILC 2 (2009) 178 [10.23].

Part 17 – Apportionment

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

196.1. Overview and purpose

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

231 Definitions for pt 17

In this part –

annuities include salaries and pensions.

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

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

232 Rents etc. apportionable in respect of time

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

233 Exceptions and application

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

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

... if rent was payable quarterly in arrears, and a landlord ended a tenancy (whether by forfeiture or otherwise) between rent days, or terminated a tenancy at will between rent days, the landlord lost the right to claim any rent for that quarter.³⁴⁴³

This position was viewed as an injustice and was remedied in the United Kingdom by a number of Acts, culminating in the *Apportionment Act 1870* (UK) which is still in force.³⁴⁴⁴ The first apportionment provision was included in the *Distress for Rent Act 1737* and was reasonably narrow in scope.³⁴⁴⁵ The scope of the provision was extended in the *Apportionment Act 1834* beyond 'rent' to cover 'Rents, Annuities, Pensions, Dividends ... and all other payments of every Description ... made payable or coming due at fixed periods under any instrument...'.³⁴⁴⁶ Commentary has indicated that the 1870 Act was passed 'to try to recast the provisions in more acceptable form.'³⁴⁴⁷ The object of the Act has been described in the following way:

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

The idea is clearly to cover cases where a periodical payment is made on one occasion to A and on the next to B, A's successor, A having died or otherwise ceased to be entitled. The paradigm case is where a landlord dies between rent days, and the tenant on the next rent day pays to his landlord's successor rent, part of which is attributable to the ownership of the deceased landlord. The tenant holds the land throughout, and must at the next rent day pay someone: the apportionment of that payment is by statute made between the two parties involved, the deceased landlord's estate and his successor.³⁴⁴⁸

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

Part 17 operates in the following way:

- the Part applies to annuities, rents, dividends and other periodical payments but not to rent where it is expressly payable in advance,³⁴⁴⁹
- rent, annuities, dividends and other periodical payments are considered as accruing from day to day and are apportionable in respect of time accordingly.³⁴⁵⁰ This means, for example, that if a lease determines on a date in between the days specified for payment of the relevant rent, rent is recoverable for that portion up to the point the lease is determined,³⁴⁵¹

³⁴⁴³ Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (Lawbook Exchange 2011) 109.

³⁴⁴⁴ V G Wellings and G N Huskinson, *Woodfall's Law of Landlord and Tenant* (Lawbook Co, 28th ed, 1978) 307 [1-0765].

³⁴⁴⁵ Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302. Section 15 of the *Distress for Rent Act 1737* provided that where leases determined on the death of the lessor, the lessor's estate could claim a proportion of the rent that would have been due on the next rent day.': 303.

³⁴⁴⁶ Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302, 303.

³⁴⁴⁷ Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302, 303.

³⁴⁴⁸ Paul Matthews, "'Salaries'" in the Apportionment Act 1870' (1982) 2 *Legal Studies* 302, 303.

³⁴⁴⁹ *Property Law Act 1974* (Qld) s 232(1). These terms are defined in section 231 of the Act.

³⁴⁵⁰ *Property Law Act 1974* (Qld) s 232(1).

³⁴⁵¹ Queensland Law Reform Commission, *Report of the Law Reform Commission on the Law Relating to Relief From Forfeiture of Leases and to Relief From Forfeiture of an Option to Renew and Certain Aspects of the Law*

- the apportioned part of the rent or annuity etc. is payable or recoverable when the entire portion becomes due and payable and not before. In the case of a rent, annuity or other payment determined by re-entry, death or otherwise, it becomes payable when the next entire portion of the same would have been payable as if it had not been determined;³⁴⁵²
- ‘all persons’ will have the same remedies for recovering such apportioned parts as those persons did for recovering entire portions.³⁴⁵³ Common actions for recovery might include recovery of rent on the express or implied covenants in the lease and an action to recover damages for mesne profits for the loss caused by being out of possession;³⁴⁵⁴
- annual sums payable under policies of assurance are excluded from the scope of Part 17.³⁴⁵⁵

196.2. Issues with the sections

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

As indicated in paragraph 196.1 above, Part 17 of the PLA does not apply where rent is expressly payable in advance. This position raises some issues as rents are usually now payable in advance.³⁴⁵⁶ The effect of rent being payable in advance is that it is already due before the event necessitating the apportionment.³⁴⁵⁷ In practical terms, it means that in relation to leases the Part would apply in very few cases.

Most land contracts in Queensland are in writing and provide expressly for the adjustment of rent on a daily basis where a property is sold subject to lease. This means that Part 17 only applies where there is no express provision for adjustment upon settlement, provided that the lease only requires payment in arrears and not in advance. A recent Court of Appeal decision in the United Kingdom has reaffirmed this position. The Court of Appeal in *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* held that the equivalent provisions in the *Apportionment Act 1870* (UK) did not apply to enable a lessee to obtain a refund of rent paid in advance.³⁴⁵⁸ The lease in that case was

Relating to Landlord and Tenant, Report No. 1 (1970) 21. The QLRC also discussed other complications arising from the common law rule in relation to rents due from tenants for life and the death of a tenant for life during the currency of a lease granted by the tenant. See [21].

³⁴⁵² *Property Law Act 1974* (Qld) s 232(2).

³⁴⁵³ *Property Law Act 1974* (Qld) s 232(3). This section is qualified by *Property Law Act 1974* (Qld) s 232(4).

³⁴⁵⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.232.180]. In relation to rents payable in advance see *Ocelota Ltd & Ors v Water Administration Ministerial Corporation & Anor* [2000] NSWSC 370 and *Marks & Spencer Plc v BNP Paribus Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603.

³⁴⁵⁵ *Property Law Act 1974* (Qld) s 233(1).

³⁴⁵⁶ *Ellis v Rowbotham* [1900] 1 QB 740. This principle was followed more recently in New South Wales in *Ocelota Pty Ltd v Water Administration Ministerial Corp* [2000] NSWSC 370.

³⁴⁵⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.232.30].

³⁴⁵⁸ *Marks & Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2014] EWCA Civ 603. This decision was an appeal from a High Court decision which indicated that a tenant was entitled to recover sums pre-paid for the period following a break date once the lease had ended ‘because there was an implied term to that effect in the parties’ lease.’: See Allyson Colby, ‘The Court of Appeal Has Refused to Imply a Term in a Lease That Would Enable the Tenant to Recover Pre-Payments for a Period After a Break Date’ *The Estates Gazette* (24 May 2014) 92.

terminated under a break clause and the lease did not include an adjustment clause applicable to that situation.³⁴⁵⁹

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

Rent payable in advance is apportionable between an assignor and assignee of the reversion and the same is the case where there is an assignment of the lease. A proceeding to recover the rent can only be brought by the person who, if the rent had not been apportioned, would have been entitled to the entire rent, but that person is liable to account for it to the person entitled under the apportionment.³⁴⁶⁰

There is no similar provision in the PLA.

196.2.2. Practical utility of Part 17 of the PLA

There is limited case law in Queensland in relation to Part 17 of the PLA. The position is similar in the other Australian jurisdictions. This may suggest that the Part is not relied upon very often and other mechanisms may be used. In this respect, Part 17 of the PLA will only apply if:

- the rent or other period payment captured by the Part is payable in arrears; and
- the lease does not expressly provide that apportionment will not take place.³⁴⁶¹

It is common in the leasing context for the lease terms to expressly direct what happens with rent if the lease is determined. Similar provisions may be included in wills dealing with dividends. It is also generally the case under a lease that rent is required to be paid in advance. Taken together, this means that Part 17 will only apply in very few cases.

196.2.3. Application to dividends and annuities

The QLRC, when initially considering the issue of apportionments in the context of leases, recommended the adoption of the United Kingdom and New South Wales legislation which includes, as apportionable sums, 'dividends payable by companies'.³⁴⁶² However, the QLRC noted that:

³⁴⁵⁹ The Queensland provisions were considered in *Huntley Management Limited v Australian Olives Limited* [2009] FCA 1549 in the context of a managed investment and management fees which were paid in advance for a full year. One part of the case related to the application of section 232 of the *Property Law Act 1974* (Qld). The court found that the section did not apply where the payment is made in advance. The relevant management fees payable under the managed investment schemes were not apportionable. This decision was upheld on appeal in *Huntley Management Limited v Australian Olives Limited* [2010] FCAFC 98.

³⁴⁶⁰ Tom Bennion et al, *New Zealand Law* (Brookers Ltd, 2nd ed, 2009) 567 [8.11.04(13)].

³⁴⁶¹ *Property Law Act 1974* (Qld) s 233(2). For a discussion on what this requires in practice see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.233.60].

³⁴⁶² Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 112.

However, the principal trustee companies operating in Queensland have made strong representations to the Commission against the adoption of a provision which renders such dividends apportionable. In particular, it said that, with the very considerable variety of dividends declared by different companies, it is often extremely difficult to determine in respect of what period a dividend is declared, whether it is in character final or interim only, and, if interim, what is the proper method of dealing with it as between life tenant and remainderman. Such sums are almost invariably small and the time and cost expended upon making the necessary inquiries and calculations is seldom justified in financial terms and simply results in substantial delays and expense in administering estates.³⁴⁶³

Although the QLRC accepted these arguments and agreed that dividends from companies should be excluded from the statutory provision of apportionment, dividends were still included in the final version of Part 17 of the PLA when it commenced in 1975.³⁴⁶⁴

Annuities are also included in the Part. These are defined to include salaries and pensions. This is consistent with the approach in all other Australian jurisdictions discussed in paragraph 196.3. However, the legal landscape in relation to employment matters and corporations law is vastly different since 1870 (and even since 1975). The rationale for the ongoing inclusion of dividends and annuities under Part 17 is unclear.

196.3. Other jurisdictions

196.3.1. Australia

Each State and Territory in Australia has legislation that includes apportionment provisions.³⁴⁶⁵ The form and effect of these provisions is similar to Part 17 of the PLA. Generally, the legislation in each jurisdiction covers rents, annuities and dividends, provides for the apportionment of these categories, identifies when the relevant portion is payable and sets out the remedies for recovering the apportioned parts. Further, each statute expressly enables the parties to exclude the apportionment provisions.

196.3.2. New Zealand

The relevant apportionment provisions in New Zealand are set out in sections 45 to 47 of the *Property Law Act 2007* (NZ). The provisions operate in a similar way to Part 17 of the PLA, although the language and layout is simplified in comparison to the Queensland provisions. The New Zealand provisions refer to 'periodical payments' which covers rent, rent charge, salary, pension, bonus, dividend, interest or outgoing.³⁴⁶⁶ Section 47 of the Act is a new provision which provides for apportionment between a

³⁴⁶³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 112.

³⁴⁶⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 112-113.

³⁴⁶⁵ See *Conveyancing Act 1919* (NSW) ss 142 and 144; *Supreme Court Act 1986* (Vic) ss 53-56; *Law of Property Act 1936* (SA) ss 64-68; *Civil Law (Property) Act 2006* (ACT) ss 248-253; *Law of Property Act* (NT) ss 211-213; *Property Law Act 1969* (WA) ss 130-134; *Apportionment Act 1871* (Tas) ss 211-213.

³⁴⁶⁶ *Property Law Act 2007* (NZ) s 4.

vendor and purchaser of rent payable in advance. The rent is not apportionable as between the lessor and lessee but 'only as between the parties to the transfer of the interest.'³⁴⁶⁷

196.4. Recommendation

The language used in Part 17 is cumbersome and generally unclear.³⁴⁶⁸ The sections in Part 17 require amendment to assist with the clarity and interpretation of the provisions. The QLS agreed that the New Zealand provisions provide a useful, simplified model that could be adapted for Queensland. Given the comments by the QLS, the Centre recommends that Part 17 should be replaced with simpler provisions based on the relevant provision in New Zealand

The QLS did not directly comment on whether dividends and annuities should be retained within the Part or whether the Part should be limited to rent. However, the QLS submitted that there is no rationale for Part 17 of the PLA to apply to dividends of companies that are caught under the *Corporation Act 2001* (Cth) (but expressed no view as to whether dividends of companies that are not caught by the *Corporations Act 2001* (Cth) should be included). The Centre is of the view that the Part should be limited to apply to payments of rent, thereby excluding application to dividends and annuities.

Further, the Centre is of the view that the definition of 'rent' in the Part should be removed. As discussed at paragraph 215.4.8 the Centre is of the view that the definition of rent in the dictionary to the PLA should define rent as including rent payable in advance. If this general definition of rent is applied to the re-drafted Part (as set out below) it will mean that the Part will have greater application than it currently does.

If there is any practical utility in retaining the effect of Part 17 for situations where apportionment of rent is required, it is difficult to justify denying the benefit of the provisions to situations where the rent is paid in advance. A wider practical application of the apportionment provisions actually strengthens the argument for retaining the effect of the Part.

Currently, the Part only applies in a very limited number of cases where the rent is paid in arrears and there is no agreement about apportionment. Changing the definition of rent to include rents payable in advance means that the Part will apply to leases where there is no agreement about apportionment.

While this will increase the number of cases where the Part may apply, the Centre understands that it is unusual that a lease would not contain a provision about apportionment. This means the Part will have wider application but will still be unlikely to apply.

Given this, the Centre recommends that Part 17 be redrafted along the lines of the equivalent provisions in New Zealand. The re-drafted provision should apply only to payments of rent, including rent paid in advance.

³⁴⁶⁷ Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994), 405 [752]. The issue regarding rent payable in advance was discussed by the Commission which indicated that 'it could be made clear that, where interests in land, either freehold or leasehold, are changing hands, rent receivable or payable by the owners of those interests is apportionable between the vendor and purchaser regardless of whether it is payable in advance. This now has to be dealt with by specific provision in the agreement for sale and purchase': see Law Commission (NZ), *The Property Law Act 1952 – A Discussion Paper*, Preliminary Paper No. 16 (1991) 51 [165].

³⁴⁶⁸ See for example *Property Law Act 1974* (Qld) s 232(4).

RECOMMENDATION 197. Part 17 should be retained with modernised language and amended to exclude dividends and annuities.

For example, the provisions in Part 17 could be re-drafted along the lines of the New Zealand legislation in the following manner:

Section [] Apportionments in respect of time

- (1) This section applies to a payment of rent in respect of a fixed or ascertainable period (whether the payment is reserved or made payable under an instrument or not).
- (2) The payment must be regarded as accruing from day to day, and is apportionable in respect of time accordingly, as to both—
 - (a) the liability to make the payment; and
 - (b) the right to receive it.
- (3) Subsection (2) does not apply if a contrary intention is expressed in an instrument.

Section [] Payment and recovery of apportioned part of payment of rent

- (1) An apportioned part of a payment of rent is payable and recoverable—
 - (a) for a continuing right to a payment, only when the entire payment becomes payable and recoverable;
 - (b) for a payment the continuing right to which has ceased because of death, re-entry, or another cause, only when the entire payment would have become payable and recoverable if the continuing right to the payment had not ceased.
- (2) A person entitled to an apportioned part of a payment of rent—
 - (a) has, when the entire payment becomes payable and recoverable, the same remedies for recovering the apportioned part as would have been available in respect of the entire payment; but
 - (b) must bear a proportionate part of any allowance which should properly be made in respect of the entire payment.

Part 18 – Unregistered Land

Part 18 consists of sections 234 to 254A. Other than section 241 (which is discussed in detail at paragraph 199 below) Part 18 of the PLA applies only to unregistered, or old system land. The term ‘unregistered land’ is defined in the PLA to mean:

land that has been granted in fee simple and is not registered land or land granted in trust under the Land Act.³⁴⁶⁹

Unregistered land was granted under the old system of land tenure, which pre-dated the Torrens system and is generally referred to as ‘old system land’. Part 18 is divided into the following four divisions:

- Division 1 (sections 234-234A) which defines the term ‘instrument’ for the purposes of the Part and clarifies the application of the Part to old system land;³⁴⁷⁰
- Division 2 (sections 235-240) includes provisions which deal with the conveyance of old system land including qualifying common law rules;³⁴⁷¹
- Division 3 (sections 241-249) comprises provisions which set out the requirements for the registration, recording of deeds, other instruments and wills and the process surrounding this; and³⁴⁷²
- Division 4 (sections 250-254A) sets out the process for the compulsory conversion of old system land to registered land in Queensland.³⁴⁷³

In 1973 when Part 18 of the PLA was introduced the QLRC indicated that almost ‘all freehold land in Queensland’ had been brought under the provisions of the *Real Property Acts*.³⁴⁷⁴ At that time, the QLRC noted that there still existed ‘some few hundreds, possibly thousands, of acres of “old system” land elsewhere in the State’, particularly in regional areas.³⁴⁷⁵

Part 18 contains a significant number of sections, and as the Centre has recommended the Part be repealed and replaced, a section-by-section consideration of the Part is of limited utility. Given this, the discussion below considers Part 18 by divisions, rather than on a section-by-section basis.

³⁴⁶⁹ *Property Law Act 1974* (Qld) Sch 6. Note: This definition may require amendment as land granted under trust under the *Land Act 1994* (Qld) is registered land and can be found within the freehold land register.

³⁴⁷⁰ *Property Law Act 1974* (Qld) ss 234 and 234A.

³⁴⁷¹ *Property Law Act 1974* (Qld) ss 235-240.

³⁴⁷² *Property Law Act 1974* (Qld) ss 241-249.

³⁴⁷³ *Property Law Act 1974* (Qld) ss 250-254A.

³⁴⁷⁴ 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) 3.

³⁴⁷⁵ 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) 3.

197. Part 18 Division 1 – Application of part – interpretation

197.1. Overview and purpose

Division 1 of Part 18 consists of sections 234 and 234A. The sections modify the definition of instrument and provide that, except for section 241, Part 18 of the PLA applies only to old system land.

197.2. Issues with the section

As discussed in relation to section 7 at paragraph 5.2.1 the extent of any remaining old system land in Queensland is limited. The current position is that all identifiable old system land has been converted to registered land. Essentially, this means that there is no more old system land remaining in Queensland.

However, it is possible that limited, small amounts of unidentified old system land will become known in the future through a dealing of some type. To the extent that any old system land remains unidentified, the likely scenario is that the land will be remainders from earlier subdivisions of larger tracts of old system land which have since been brought under the *Land Title Act 1994* (Qld). For example, small remainders may have been left over from two (spatially) separate subdivisions. The Titles Registry has indicated that if any remaining slivers of old system land are identified they will likely be located in or near regional centres such as Toowoomba and Warwick.

The last time old system land was identified in Queensland occurred in 2013 when a small portion (eight square meters) of old system land came to the attention of the Titles Registry following an attempt to deal with that land.

197.3. Recommendation

As there is no remaining identified old system land, the Centre recommends that the whole of Part 18 of the PLA be repealed. To deal with the possibility that small slivers of old system land may remain unidentified, the Centre recommends the development of a simplified process for registering any old system land that may be identified in the future. This view is supported by the QLS.

The repeal and replacement of Part 18 is justified due to the fact that any remaining old system land:

- is not able to be identified by the Titles Registry until someone attempts to deal with it;
- is likely to be small slivers of land only, probably of limited value and located in regional areas;
- may not have a clearly identifiable owner or may have an identifiable owner who is now deceased or in the case of a corporate owner, no longer exists; and
- must be converted to registered land before any dealing can occur.

RECOMMENDATION 198. Division 1 of Part 18 (sections 234-234A) should be repealed.

198. Part 18 Division 2 – Sales and conveyances

198.1. Overview and purpose

Division 2 of Part 18 consists of sections 235 to 240. The sections are only applicable to sales and conveyances of old system land.

198.2. Issues with the section

As indicated at paragraph 5.2.1 above, all old system land in Queensland identifiable by the Titles Registry has now been converted to registered land and brought under the *Land Title Act 1994* (Qld). If any remaining tracts are identified through a dealing in the future, the land must be converted to registered land before it could be dealt with in any event.

198.3. Recommendation

As there is no way to deal with old system land without it being registered, Division 2 is now obsolete and should be repealed.

RECOMMENDATION 199. Division 2 of Part 18 (sections 235-240) should be repealed.

199. Part 18 Division 3 – Registration of Deeds

199.1. Overview and purpose

Division 3 of Part 18 consists of sections 241 to 249 and deals with the registration of deeds. Other than section 241, none of the section in Division 3 of Part 18 apply to registered land. Given this, the Centre recommends that the sections be repealed, in line with the general approach to old system land set out at paragraph 5.2.1. However, section 241 applies to registered land and is given further consideration below.

241 Registration of instruments and wills*

- (1) After the commencement of this Act -
- (a) any agreement in writing, deed, conveyance or other instrument (except a lease for less than 3 years) affecting any estate in land may; and
 - (b) any will or devise affecting any estate in land may; and
 - (c) any other instrument, record or document which, prior to the passing of this Act, might have been registered under the *Registration of Deeds Act 1843* may; and
 - (d) every Act shall;
- under this division, be registered, enrolled or, as the case may be, recorded in the land registry.
- (2) A reference in any Act or instrument to, or to registration of an instrument under, the *Registration of Deeds Act 1843* or the *Titles to Land Act 1858* shall be construed as a reference to this division.

***Note: Division 3 of the PLA also includes sections 242-245 which are not reproduced here.**

The registration of deeds affecting old system land was governed by the *Registration of Deeds Act 1843* which still applied in 1973 when the QLRC was considering the inclusion of Division 3 in the PLA.³⁴⁷⁶ The 1843 Act applied to other categories of instruments beyond old system land deeds. During its review the QLRC noted that:

The Act of 1843 originally contained provision for the registration or enrolment of a variety of deeds and documents, such as Acts of Parliament, charters of incorporation of public companies... And certificates of births, marriages and deaths, all of which were to be registered or enrolled by the Registrar-General.In Queensland the duties and powers of the Registrar-General in relation to deeds were, by The Registrar of Titles Act of 1884 (48 Vic No.4), transferred to the Registrar of Titles, whose office was created by that Act. Finally, by The Registration of Deeds Act of 1899 (63 Vic No. 6) any necessity for registering under the Act of 1843 instruments, other than deeds relating to unregistered land, was dispensed with and **that Act of 1843 has since continued to be utilised only in relation to old system land.**³⁴⁷⁷ [emphasis added]

As mentioned above, section 241 is the only section in Part 18 that is not limited to old system land. The qualification appears to have been included to accommodate the requirement in section 241(1)(d) that Acts must be registered, enrolled or recorded in the Titles Registry.

Section 241 of the PLA enables a variety of instruments to be registered or recorded in the Titles Registry. These include any agreement in writing, deed or other instrument or any will. In each of

³⁴⁷⁶ 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) 114.

³⁴⁷⁷ 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) 114.

these instances the relevant instrument must affect any estate in land. Additionally, the section provides that any instrument, record or document which, prior to the passing of the PLA, may have been registered under the *Registration of Deeds Act 1843* may also be registered or recorded in the Titles Registry.

An 'instrument' is defined broadly in section 234 of the PLA to include:

not only a conveyance and other deeds but also all instruments in writing of any kind, under which real or leasehold estate is affected or is intended so to be including –

- (a) a certificate under section 101; and
- (b) a power of attorney registered under an Act.

An instrument which does not affect an estate in land will not fall within the scope of section 241 of the PLA. The only exception to the requirement that the relevant agreement, deed or instrument affects any estate in land arises from subsection 241(1)(d) which relates to the registration or recording of every Act in the Register. The registration or recording of 'every Act' is mandatory, however, this is not the position in relation to the other instruments set out in sections 241(1)(a) and (b) where registration is discretionary.³⁴⁷⁸

In order to register an instrument under section 241 of the PLA, one or more of the parties to the relevant instrument needs to initiate the process by lodging the document in the Titles Registry.³⁴⁷⁹ The other sections of Division 3, Part 18 operate in the following way:

- section 243 sets out the process for the signature requirements in relation to dead or absent parties to any instrument;
- section 244 governs the receipt and endorsement process undertaken by the Registrar once the certified copy of the instrument is lodged;
- section 245 addresses the issue of mistakes in registration by providing that the registration of deeds is not ineffectual because of any omission, misdescription or error occurring in the circumstances set out in that section.

199.2. Issues with the section

As most of the provisions in Division 3 apply only to old system land, the provisions are no longer necessary and may be repealed. Section 241, however, requires further consideration as it is not limited to old system land.

199.2.1. Section 241(1)(a)-(c) – registering, recording deed, conveyance, other instrument, will or devise etc

The rationale for the enactment of legislation such as the *Registration of Deeds Act 1843* was to avoid secrecy in conveyancing which made it easier for property owners to prove their title when selling their land or providing security over their land.³⁴⁸⁰ Further, having a place to register deeds also

³⁴⁷⁸ The registration or recording of an instrument, record or document which, prior to the passing of the PLA, may have been registered under the *Registration of Deeds Act 1843* is also discretionary. See *Property Law Act 1974* (Qld) s 241(1)(c).

³⁴⁷⁹ *Property Law Act 1974* (Qld) s 242.

³⁴⁸⁰ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1988].

promoted ‘the use of more formal and properly-drawn instruments.’³⁴⁸¹ The register was not intended to be a system of registration of title of old system land, although not registering a relevant instrument potentially impacted on the priority of deeds.

In the case of section 241(1)(c) of the PLA, it is highly unlikely that there are any remaining instruments, documents or records which prior to the passing of the PLA might have been registered under the 1843 Act. Further, the Department of Natural Resources and Mines indicates that:

All land in Queensland identified as previously being under the *Registration of Deeds Act 1843* has now been brought under the *Land Title Act 1994*.³⁴⁸²

In Queensland, there have been no new lodgements of instruments in the register of deeds since 2011.³⁴⁸³ Between 2000 and 2011 there have only been 34 entries.³⁴⁸⁴ The types of instruments which have been lodged for registration include a power of attorney unrelated to any estate or interest in land, a pre-emptive rights deed relating to registered land and a release of mortgage sub-demise.³⁴⁸⁵

As discussed above, in the absence of any remaining old system land in Queensland section 241(1) is obsolete.

199.2.2. Section 241(1)(d) – requirement to register or record ‘every Act’

The Titles Registry currently receives signed copies of all Queensland Acts passed and records them in the Registry. There is limited commentary explaining the historic rationale for the requirement to record Acts of Parliament in this way. However, the practice was probably aimed at having a central repository of Acts passed in the 19th and early 20th centuries. Recording in this way commenced in an era where the volume of legislation being passed was much lower and therefore it was arguably logical and reasonably easy for it to be recorded under the *Registration of Deeds Act 1843*.

However, the practice is now archaic and arguably obsolete, particularly given the responsibilities of the Office of the Queensland Parliamentary Counsel (**OQPC**). The *Legislative Standards Act 1992* (Qld) establishes the position of Queensland Parliamentary Counsel and sets up the OQPC.³⁴⁸⁶ One of the purposes of this Act includes ensuring that Queensland legislation, and information relating to Queensland legislation, is readily available to access publicly.³⁴⁸⁷ Consistent with this objective, some of the key functions of the OQPC are to:

- ensure the Queensland statute book is of the highest standard; and
- make arrangements for the printing and publication of Bills, Queensland legislation; and
- make arrangements for access, in electronic form, to Bills presented to the Legislative Assembly and Queensland legislation.

³⁴⁸¹ Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1988].

³⁴⁸² Department of Natural Resources and Mines, *Land Title Practice Manual (Queensland)* https://www.dnrm.qld.gov.au/__data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf [0-0000].

³⁴⁸³ Information provided by the Titles Registry.

³⁴⁸⁴ Information provided by the Titles Registry.

³⁴⁸⁵ Information provided by the Titles Registry.

³⁴⁸⁶ *Legislative Standards Act 1992* (Qld) s 5(1) and (2).

³⁴⁸⁷ *Legislative Standards Act 1992* (Qld) s 3(1)(c).

The OQPC maintains a website which sets out, among other things, the Queensland legislation collection created and maintained since 1991 and also legislation passed from 1963.³⁴⁸⁸ This material is publicly available and easily searchable on this website.

The mandatory obligation imposed under section 241(1)(d) serves no current purpose. The Titles Registry is not utilised to search for past and current Queensland enactments.

199.3. Recommendation

For the reasons set out above, Division 3 of the PLA, including section 241, should be repealed.

RECOMMENDATION 200. Division 3 of Part 18 (sections 241-249) should be repealed.

³⁴⁸⁸ See OQPC website at: <https://www.legislation.qld.gov.au/about>.

200. Part 18 Division 4 – Compulsory Registration of Title

200.1. Overview and purpose

Division 4 of Part 18 of the PLA comprises sections 250 to 254A. The Division is directed at bringing any remaining old system land under the provisions of the *Land Title Act 1994* (Qld).³⁴⁸⁹

After the commencement of the *Real Property Act 1861* (Qld) in Queensland, all grants by the Crown of fee simple estates were required to be made under that Act. However, the *Real Property Act 1861* (Qld) only provided a voluntary process for the conversion of existing grants of fee simple made prior to the commencement of that Act. Owners of old system land were reluctant to apply to convert their title to one registered under the 1861 Act partly because of the process involved and the associated costs.³⁴⁹⁰ Division 4, Part 18 of the PLA was introduced to facilitate the compulsory conversion of remaining old system land to registered land under the *Real Property Acts* and subsequently the *Land Title Act 1994* (Qld).

In considering the options regarding when and how compulsory conversion should occur, the QLRC noted that:

The critical moment in relation to old system land is the occasion on which such land is dealt with, usually by sale, mortgage, lease or some other such disposition inter vivos. It is at this point of time that old system land should be made obligatory at such time to bring land under The Real Property Acts, since it is on the occasion of a disposition of this kind that investigation of title to the land is undertaken, usually by the purchaser or mortgagee.....

We recommend that an application to bring land under The Real Property Acts should be compulsory on any occasion on which it is sought to register an instrument in accordance with the provisions of Division 3 of this Part.³⁴⁹¹

The process under the Division is set out below:

- section 250 provides for the progressive registration of old system land in Queensland. Under this provision the Registrar is able to serve a prescribed notice on the owner of the old system land directing that it be brought under the *Real Property Acts*. The owner has a specified period of time within which to make an application to do so. If an application is not made or the application is rejected the land will be brought under the *Real Property Acts* and a certificate of title issued for it in the name of the Public Trustee;
- even where land has been vested in the Public Trustee, an applicant still has an opportunity to make an application to have the land converted to registered land under the applicant's name, rather than the Public Trustee. This process is set out in section 251 of the PLA and is available for a period of 12 years from the date the land is vested in the Public Trustee;

³⁴⁸⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.18.DIV.4.30].

³⁴⁹⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.18.DIV.4.30].

³⁴⁹¹ 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) 116.

- if the applicant does not make use of the process in section 251 of the PLA within the time period, the relevant land which has already vested in the Public Trustee under section 250, then vests in the Crown, absolutely.³⁴⁹² However, section 252(2) of the PLA still provides a further opportunity for a person who would have been entitled to make an application under section 251 of the PLA to make an application to the court within 5 years after the land is vested in the Crown for an order that the Registrar take such action as the Registrar might have taken on an application under section 251 of the PLA;
- the powers and duties of the Registrar in relation to the process under Division 4 are set out in section 253 of the PLA;
- an investigator of old system title is established under section 254 of the PLA;
- section 254A of the PLA confirms that Division 4 continues to operate after the commencement of the *Land Title Act 1994* (Qld).

200.2. Issues with the section

The current process under Division 4 of the PLA is directed at the compulsory conversion of identifiable old system land to registered land. If an applicant cannot be identified for the purpose of section 250 of the PLA, the land will be converted and then vested in the Public Trustee for a period of 12 years until it is eventually vested in the Crown absolutely.³⁴⁹³

Any remaining old system land is unlikely to be identifiable by the Titles Registry until an attempt is made to deal with it. Although it may be possible to search through old records to identify the original owner, that owner will likely be deceased and identifying heirs and successors may be difficult. If the owner was a corporation, the corporation is unlikely to still exist. Further, assuming any land actually still exists, it is likely to be only small tracts of limited value.

As discussed, the position in Queensland is that the conversion of all identifiable old system land to registered land is complete. However, it is possible that a limited amount of unidentified old system land exists. In this respect, the current conversion process in Part 4 is too cumbersome and lengthy. Further, before the land vests in the Crown absolutely under Division 4, it will vest in the Public Trustee for an extended period of time. The ongoing involvement of the Public Trustee is not appropriate given the likely characteristics of any remaining old system land.

200.3. Recommendation

As discussed above, the Centre recommends that Part 18 be repealed and replaced with a simple process. The Centre recommends that the process of converting old system land to registered land should be a simple process that allows interested parties to claim a legitimate interest in the land. Where a claim is meritorious, the party can be registered as the owner of the land under the *Land Title Act 1994* (Qld). Where there is no claimant, or the Registrar is not satisfied of the merit of the claim, the land should be declared to be unallocated state land.

A broad framework for a simple process to deal with any identified old system land might include:

³⁴⁹² *Property Law Act 1974* (Qld) s 252.

³⁴⁹³ *Property Law Act 1974* (Qld) s 252.

NOT GOVERNMENT POLICY

- the Registrar undertaking a process of public notification, seeking anyone who claims a legitimate interest in the land to come forward within a specified time period;
- if no person with an interest in the land comes forward, the Registrar should be able to declare that the land is unallocated state land;
- if a person with an interest through legal title, succession laws or a claim to possessory title comes forward either in response to the public notification or otherwise and the Registrar is satisfied the claim is meritorious then the Registrar should be able to bring the land under the *Land Title Act 1994* (Qld) and onto the Register with the claimant as the registered owner;
- where an interest is based on a claim to possessory title, a meritorious claim may be established in a similar way to an adverse possession claim which generally requires evidence of continuous occupation for 30 years;
- in the case of either a legal title or possessory title claim, a time limited review or appeal mechanism should also be available under the new process prior to the registration of the interest under the *Land Title Act 1994* (Qld); and
- the Public Trustee should remain outside the process.

The process should remain in the PLA, rather than the *Land Title Act 1994* (Qld).

RECOMMENDATION 201. Division 4 of Part 18 (sections 250-254A) should be repealed and replaced with a simplified process to provide for the registration of old system land (to the extent any may be identified in the future).

To the extent that any old system land is identified in Queensland, the process to convert that land to registered land under the *Land Title Act 1994* should involve public notification of the land with a specified period for interested parties to claim a legitimate interest in the land.

To the extent no meritorious claims are received, the land should be declared unallocated state land. To the extent a claimant makes a successful claim, the claimant should be registered as the owner of the land under the *Land Title Act 1994*.

Part 19 – Property (de facto relationships)

Part 19 of the PLA comprises sections 255 to 344. The Part was inserted into the PLA by the *Property Law Amendment Act 1999* (Qld)³⁴⁹⁴ which was assented to and commenced operation on 21 December 1999.³⁴⁹⁵ The PLA was amended following a review by the QLRC into the law governing de facto relationships. The review commenced in 1990 and a final report was completed in 1993.³⁴⁹⁶ The review was initiated as a result of concerns regarding the adequacy of the laws governing property distribution between de facto couples in Queensland.³⁴⁹⁷

Part 19 contains a large number of sections which, from a practical view, have limited application. The Centre is of the view that given the declining practical application of Part 19, a section by section consideration of each section in Part 19 is not necessary here. The discussion below considers Part 19 as a whole, rather than on a section by section basis.

201. De facto relationships – Part 19 (255 to 344)

201.1. Overview

The provisions in Part 19 are designed to facilitate the resolution of financial matters and a just and equitable property distribution at the end of a de facto relationship.³⁴⁹⁸

Prior to amendments to federal legislation in 2008, following the breakdown of a de facto relationship, parties were required to access two jurisdictions to resolve disputes: Queensland courts under Part 19 of the PLA to deal with financial matters; and federal family law courts under the *Family Law Act 1975* (Cth) to deal with disputes involving children.³⁴⁹⁹

As a consequence of the amendments to the Commonwealth legislation,³⁵⁰⁰ Part 19 of the PLA now applies to limited, and arguably shrinking, categories of de facto relationships. Broadly, Part 19 will apply:

- where the relationship was in existence at, or commenced on or after, 21 December 1999 and the breakdown in the relationship occurred before 1 March 2009. However, parties can agree to opt-into the *Family Law Act 1975* (Cth) regime, rather than Part 19 of the PLA if certain specific matters are satisfied³⁵⁰¹; or
- where the breakdown occurred on or after 1 March 2009 and an application cannot be brought under the *Family Law Act 1975* (Cth). This may arise where jurisdictional or

³⁴⁹⁴ *Property Law Amendment Act 1999* (Qld) (Act No. 89 of 1999).

³⁴⁹⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.PT.19.30]).

³⁴⁹⁶ Queensland Law Reform Commission, *De Facto Relationships* Final Report No. 44 (1993).

³⁴⁹⁷ Queensland Law Reform Commission, *De Facto Relationships* Working Paper No. 40 (1992) 3.

³⁴⁹⁸ *Property Law Act 1974* (Qld) s 255.

³⁴⁹⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.257.60]).

³⁵⁰⁰ Discussed further below.

³⁵⁰¹ See *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) Sch 1, Part 2 s 86A.

geographical requirements under the Commonwealth Act cannot be met by the parties.³⁵⁰²

201.1.1. Federal legislation and Part 19 of the PLA

The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) made a number of amendments to the *Family Law Act 1975* (Cth) in relation to de facto matters. The amendments provide for de facto couples in Australia at the end of a relationship to have property and maintenance matters dealt with under the *Family Law Act 1975* (Cth).³⁵⁰³ The key provisions commenced on 1 March 2009.³⁵⁰⁴ Following the commencement of the amendments to the *Family Law Act 1975* (Cth) in 2009, Part 19 is now used infrequently.

201.2. Issues with the section

The Centre consulted directly with the Queensland Law Society's Family Law Committee in relation to the current utility of Part 19 of the PLA. In response to specific questions, the Committee confirmed that:³⁵⁰⁵

- Part 19 is used rarely following the introduction of the de facto provisions in the *Family Law Act 1975* (Cth);
- however, Part 19 of the PLA could still have application in relation to matters where the parties do not elect to proceed under the *Family Law Act 1975* (Cth);
- there is utility in retaining Part 19 of the PLA for a further period of at least 5 years, with a review at the end of that timeframe to determine its ongoing relevance;
- there is no reason why the Part could not be included as a stand-alone Act. However, the Committee suggested that Part 19 remain in the PLA in order to avoid any unnecessary amendments.

201.3. Recommendation

The Centre agrees with the QLS's view in relation to retaining the provisions in Part 19 of the PLA for a period of time, subject to the comprehensive review of the Part's continuing utility before the end of a sunset period. Whether the Part should be removed from the PLA and placed in a stand-alone act upon the complete re-enactment of the PLA may be considered at that time.

³⁵⁰² Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.257.60].

³⁵⁰³ Justice Garry Watts, *De Facto Property Under the Family Law Act* (19 December 2008) 2.

³⁵⁰⁴ The new provisions relating to de facto couple property settlements were able to be enacted under the *Family Law Act 1975* (Cth) as a result of most of the States, including Queensland, referring their powers pursuant to s 51(xxxviii) of the Constitution.

³⁵⁰⁵ Email from Queensland Law Society 8 February 2016.

Incorporating the de facto property law legislation in a stand-alone act is consistent with the QLRC's recommendations from 1993.³⁵⁰⁶ The proposed Bill attached to the QLRC's final report from 1993 reflected this preference.³⁵⁰⁷ Further, this would be consistent with the approach in all other Australian jurisdictions.³⁵⁰⁸ Finally, such a separation of Part 19 could facilitate the future review, and eventual repeal of the provisions.

RECOMMENDATION 202. The necessity for retaining Part 19 should be reviewed with a view to repeal if it is found to no longer be of utility.

³⁵⁰⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.PT.19.30]).

³⁵⁰⁷ Queensland Law Reform Commission, *De Facto Relationships* Report No. 44 (1993) Appendix B.

³⁵⁰⁸ See *Property (Relationships) Act 1984* (NSW); *De Facto Relationships Act 1996* (SA) *De Facto Relationships Act 1991* (NT); *Domestic Relationships Act 1994* (ACT); *De Facto Relationship Act 1999* (Tas).

Part 20 – Miscellaneous

202. Section 345 – Protection of solicitors and others adopting this Act

202.1. Overview and purpose

345 Protection of solicitors and others adopting this Act

- (1) The powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed to be included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction, and a solicitor, counsel or conveyancer shall not be deemed guilty of neglect or breach of duty, or become in any way liable, because of the person omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place of them, in any case where this Act would allow of the person doing so.
- (2) Nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.
- (3) Where the solicitor, counsel or conveyancer is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.
- (4) Where such persons are acting without a solicitor, counsel or conveyancer, they shall also be protected in like manner.

Section 345 of the PLA is copied from both the *Law of Property Act 1925* (UK) and section 176 of the *Conveyancing Act 1919* (NSW).³⁵⁰⁹ The section is declaratory and provides that:

- the powers given under the Act and the covenants, provisions and stipulations which are deemed to be included or implied are deemed to be proper powers, covenants and provisions to be given by or contained in instruments or applied to contracts; and
- a solicitor, counsel or conveyancer is not liable in negligence for failing to negative any power or covenant implied by the Act.³⁵¹⁰

The protection provided by the section extends to trustees, executors and others for whom the solicitor is acting³⁵¹¹ and persons acting on their own behalf.³⁵¹²

³⁵⁰⁹ 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) 117.

³⁵¹⁰ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013* (LexisNexis, 2012) 259 [3373.1].

³⁵¹¹ *Property Law Act 1974* (Qld) s 345(3).

³⁵¹² *Property Law Act 1974* (Qld) s 345(4).

There is very little commentary which identifies the rationale for this provision. The QLRC notes that the provision was ‘self-explanatory’ and provided no further detail regarding its operation.³⁵¹³

202.2. Issues with the section

There are no cases in Queensland which consider this section. As discussed in paragraph 202.3 below, a number of other Australian jurisdictions also have equivalent sections. The VLRC when it reviewed the *Property Law Act 1958* (Vic) recommended that the equivalent provisions, sections 180 to 182, should be retained and redrafted for clarity.³⁵¹⁴ The VLRC also recommended that the three sections be unified into a single section in the same way as section 345 of the PLA.³⁵¹⁵ However, there is no explanation provided in relation to the rationale for the retention of the section.

In New Zealand, the *Property Law Act 1952* (NZ) included an identical provision to section 345 of the PLA.³⁵¹⁶ The section was omitted from the new Act on the basis that:

...protections of this kind are inappropriate and that solicitors and other persons should, whether or not they have relied upon or used powers in the new Act or implied covenants, have their decisions scrutinised in the same way as would be done in relation to the express provisions of documents.³⁵¹⁷

202.3. Other jurisdictions

New South Wales,³⁵¹⁸ Victoria³⁵¹⁹ and Tasmania³⁵²⁰ have equivalent provisions to section 345 of the PLA.

202.4. Recommendation

The Centre recommends section 345 of the PLA be repealed. The current utility of section 345 of the PLA is not clear and the Law Commission (NZ) comments raise a significant point in terms of why special protection is provided to solicitors and others under section 345 of the PLA. A basic duty owed by a legal practitioner to a client is that they will perform the role of legal adviser competently.³⁵²¹ This duty extends to knowing the law in the relevant area that he or she is advising on. Further, where the actions of the legal practitioner fall short of sustaining a claim in negligence, the actions may still be scrutinised in a disciplinary process under the *Legal Profession Act 2007* (Qld) to determine if the conduct constitutes professional misconduct or unsatisfactory professional conduct.³⁵²² There is no policy reason which would support excluding the actions of the solicitor or counsel from scrutiny.

³⁵¹³ 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) 117.

³⁵¹⁴ Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Vic), Final Report (2010) 139.

³⁵¹⁵ Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Vic), Final Report (2010) 139.

³⁵¹⁶ See *Property Law Act 1952* (NZ) s 154.

³⁵¹⁷ Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) 416 [802].

³⁵¹⁸ *Conveyancing Act 1919* (NSW) s 176.

³⁵¹⁹ *Property Law Act 1958* (Vic) ss 180-182.

³⁵²⁰ *Conveyancing and Law of Property Act 1884* (Tas) s 84.

³⁵²¹ Stephen Corones, et al, *Professional Responsibility and Legal Ethics in Queensland* (Lawbook Co, 2nd ed, 2014) 314 [9.05].

³⁵²² Stephen Corones, et al, *Professional Responsibility and Legal Ethics in Queensland* (Lawbook Co, 2nd ed, 2014) 314 [9.05]. See *Legal Profession Act 2007* (Qld) Ch 4.

NOT GOVERNMENT POLICY

No submissions were received in respect of section 345.

RECOMMENDATION 203. Section 345 should be repealed.

203. Section 346 – Restriction on constructive notice

203.1. Overview and purpose

346 Restriction on constructive notice

- (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless –
 - (a) it is within the purchaser’s own knowledge, or would have come to the purchaser’s knowledge, if such searches as to instruments registered or deposited under any Act, inquiries, and inspections had been made as ought reasonably to have been made by the purchaser; or
 - (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser’s counsel as such, or of the purchaser’s solicitor or other agent as such, or would have come to the knowledge of the purchaser’s solicitor or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
- (2) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, condition, provision, or restriction contained in any instrument under which the purchaser’s title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.
- (3) A purchaser shall not because of anything in this section be affected by notice in any case where the purchaser would not have been so affected if this section had not been enacted.
- (4) This section applies to purchases made either before or after the commencement of this Act, save that where an action is pending at the commencement of this Act the rights of the parties shall not be affected by this section.

Under the general law, all equitable interests bound every transferee of land except a bona fide purchaser for value of a legal estate in the land who did not have notice of the interest.³⁵²³ If the purchaser had notice of the equitable interest prior to acquiring the legal estate, the purchaser would take title subject to that interest.³⁵²⁴ Notice of such an interest encompasses actual, constructive and imputed knowledge.

Section 346 of the PLA replicates the common law so that a purchaser acquiring an interest in property is only prejudicially affected by notice of any instrument, fact or thing if the purchaser has:

- actual knowledge of the interest.³⁵²⁵ It is irrelevant how the knowledge was acquired,³⁵²⁶
- constructive knowledge of the interest. This is notice which would have come to the purchaser’s knowledge had the purchaser undertaken searches, inquiries and inspections as he or she ought reasonably have made.³⁵²⁷ For example, caveats lodged under the *Land Title Act 1994* (Qld) and settlement notices are searchable on the register and will give notice of pre-existing unregistered interests to a prospective purchaser of a legal estate.
- imputed knowledge. This is the actual or constructive knowledge of the purchaser’s solicitor, counsel or other agent obtained in relation to the ‘current’ transaction only.³⁵²⁸ The knowledge of this third party representative is ‘imputed’ to the purchaser.³⁵²⁹ This is a

³⁵²³ Michael Harwood, *Modern English Land Law* (Sweet & Maxwell, 2nd ed, 1982) 517.

³⁵²⁴ Michael Harwood, *Modern English Land Law* (Sweet & Maxwell, 2nd ed, 1982) 517.

³⁵²⁵ *Property Law Act 1974* (Qld) s 346(1)(a).

³⁵²⁶ Michael Harwood, *Modern English Land Law* (Sweet & Maxwell, 2nd ed, 1982) 517.

³⁵²⁷ *Property Law Act 1974* (Qld) s 346(1)(a).

³⁵²⁸ *Property Law Act 1974* (Qld) s 346(1)(b).

³⁵²⁹ *Property Law Act 1974* (Qld) s 346(1)(b).

variation to the position at general law where knowledge of a solicitor obtained in a different transaction unconnected to the current one could be imputed to the current transaction.

The term ‘purchaser’ is defined in the PLA to mean:

a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property.³⁵³⁰

The section is not applicable to registered property as section 184(2)(a) of the *Land Title Act 1994* (Qld) expressly provides that the registered proprietor is not affected by actual or constructive notice of an unregistered interest affecting the lot.³⁵³¹ The section applies to old system land only. The Centre’s view towards old system land is discussed at paragraph 5.2.1.

203.2. Issues with the section

There has been no instance in Queensland since the PLA commenced where section 346 has been applied to determine priorities in equitable interests. The courts, when considering cases involving priorities, apply settled rules. All identifiable old system land has now been brought under the *Land Title Act 1994* (Qld) and its predecessors, the Real Property Acts. Further, a registered proprietor of a lot is not affected by actual or constructive notice of an unregistered interest affecting the lot. In the absence of any remaining old system land and the exclusion of registered land from section 346, the ongoing utility of the section is doubtful.

203.3. Other jurisdictions

South Australia and Victoria have similar legislative provisions to section 346 of the PLA.³⁵³² The provisions in Tasmania and New South Wales are also the same, subject to one additional sub-section. Section 164(1A) of the *Conveyancing Act 1919* (NSW) provides:

(1A) Omission to search in any register or list kept by, or filed with, the Australian Securities and Investments Commission, whether within New South Wales or elsewhere, shall not of itself affect a purchaser of land with notice of any mortgage or charge.³⁵³³

However, this section does not impact on the position where the purchaser has actual or constructive knowledge of a company security.³⁵³⁴ In that case, the purchaser will be affected by such notice.

Victoria is the only jurisdiction which has recently reviewed its notice provision as part of the broader review of the *Property Law Act 1958* (Vic). The VLRC recommended the retention of the section and made the following comments:

Section 199 applies to unregistered interests in registered land as well as old system land. Equitable priority rules, which include the concept of notice, are used to resolve conflicts between unregistered dealings. The question of whether equitable priority rules should continue to be used

³⁵³⁰ *Property Law Act 1974* (Qld) s 3, Sch 6. The term ‘valuable consideration’ is defined to include marriage but does not include a nominal consideration in money: s 3, Sch 6.

³⁵³¹ This is subject to section 184(3)(b) which excludes the effect of section 184(1)(a) if there has been fraud by the registered proprietor. The predecessor provision was section 109 of the *Real Property Act 1861*.

³⁵³² *Law of Property Act 1936* (SA) s 117; *Property Law Act 1958* (Vic) s 199.

³⁵³³ The Tasmanian provision is in *Conveyancing and Law of Property Act 1884* (Tas) s 5(1A).

³⁵³⁴ Peter Young, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013* (LexisNexis, 2012) 249 [33500.25].

to determine the priority of unregistered interests should be examined as part of the review of the *Transfer of Land Act 1958*.

203.4. Recommendation

Section 346 of the PLA should be repealed as it does not have any ongoing utility. The QLS agrees that the provision can be repealed as it is 'no longer consistent with the legal framework for purchase of property in Queensland.'

RECOMMENDATION 204. Section 346 should be repealed.

204. Section 347 – Service of Notices

347 Service of notices

- (1) A notice required or authorised by this Act to be served on any person or any notice served on any person under any instrument or agreement that relates to property may be served on that person—
 - (a) by delivering the notice to the person personally; or
 - (b) by leaving it for the person at the person’s usual or last known place of abode, or, if the person is in business as a principal, at the person’s usual or last known place of business; or
 - (c) by posting it to the person by registered mail as a letter addressed to the person at the person’s usual or last known place of abode, or, if the person is in business as a principal, at the person’s usual or last known place of business; or
 - (d) in the case of a corporation by leaving it or by posting it as a letter addressed in either case to the corporation at its registered office or principal place of business in the State.
- (1A) A notice so posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post the notice would be delivered.
- (2) If the person is absent from the State, the notice may be delivered as provided in subsection (1) to the person’s agent in the State.
- (2A) If the person is deceased, the notice may be so delivered to the person’s personal representative.
- (3) If the person is not known, or is absent from the State and has no known agent in the State or is deceased and has no personal representative, the notice shall be delivered in such manner as may be directed by an order of the court.
- (4) Despite anything in subsections (1) to (3), the court may in any case make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery of any notice.
- (5) This section does not apply to notices served in proceedings in the court, nor where the person serving the notice prevents its receipt by the person on whom the notice is intended to be served
- (6) This section applies unless a contrary method of service of a notice is provided in the instrument or agreement or by this Act.

204.1. Overview and purpose

Section 347 of the PLA facilitates the service of notices required or authorised by the PLA and acts as a default provision for the service of notices under contracts related to property in the event the contract does not contain a notice clause. The section applies, unless modified by another part of the PLA, or the instrument or agreement in question, to any notice that is:

- ‘required or authorised’ by the PLA to be served on a person; or
- served on a person under an instrument or agreement that relates to property.

In each case the notice may be served:

- personally;
- by leaving the notice at, or posting it by registered mail to, the person’s usual or last known residence or business; or
- for a corporation, by leaving the notice at, or posting it to, the registered address of the corporation or the corporation’s principal place of business.

Section 347 is not a mandatory provision. A notice may be validly served using another type of method, for example, facsimile.

Section 347 also makes provision for the service of notices if the person who is required to be served is absent from Queensland, deceased or unknown.

In the context of statutory notices required by other sections of the PLA, section 347 should be read together with *Acts Interpretation Act 1954* (Qld), sections 39 and 39A. The combined effect of these sections is that a notice may be served: personally; by leaving it at the last known residence, place of business or registered office; by using post or registered post; or by facsimile or any other similar facility. The obvious omission from both the PLA and *Acts Interpretation Act 1954* (Qld) is electronic communication. As the PLA and *Acts Interpretation Act 1954* (Qld) are not mandatory, statutory notices may be served by email in reliance upon the *Electronic Transactions (Queensland) Act 2001* (Qld) (ETA).

Notices required or authorised by a contract or other instrument may be served under section 347: personally; by leaving the notice at the last known residence or place of business; by using registered post; or in the case of a corporation by posting or leaving the notice at the registered office. Notably this list does not include facsimile or email. The terms of the contract may exclude or modify section 347. Most contracts for the disposition of land or interests in land will contain a notice clause prescribing the methods that may be used for the service of notices. Facsimile is a common method and email is the preferred form of communication for business.

The PLA governs many aspects of property transactions in Queensland, including both residential and commercial transactions. Section 347 (previously section 257) has remained in the same terms since its enactment, which explains the absence of any reference to facsimile or other forms of electronic communication, commonly used in property transactions. There are also unexplained differences between section 347 and section 39 of the *Acts Interpretation Act 1954* (Qld) which may cause confusion when serving notices required by the PLA.

204.2. Issues with the section

Section 347 needs amendment to align the section with current commercial practice. For example, the section refers to registered post for service on a person, whereas, in most cases a contract will allow service by ordinary post on a person or business. In some cases, the contract will also include a deemed service provision either a certain number of days after posting³⁵³⁵ or within the ordinary course of post. Although registered post may be tracked and the recipient must sign at the time of delivery, service by registered post is easily avoided by a potential recipient. The service provisions applicable to a person may be contrasted with the provisions for service on a corporation. If the notice is sent via regular post to the address of a corporation, it will be deemed to have been served (unless shown otherwise) at the time when in the ordinary course of post the notice would be delivered.³⁵³⁶ Consistency and simplification of approach is required.

The ETA aims to facilitate electronic commerce by validating the use of electronic documents and communication if certain requirements are met.³⁵³⁷ In this context, the ETA makes provision for

³⁵³⁵ See for example REIQ Contract for Houses and Residential Land (13th ed), clause 10.4(3).

³⁵³⁶ *Property Law Act 1974* (Qld) s 347(1A). Deemed delivery will not be necessary for registered post as there is evidence of actual delivery.

³⁵³⁷ S Christensen, W Duncan and R Low, *Moving Queensland Property Transactions to the Digital Age: Can Writing and Signature Requirements be Fulfilled Electronically: A case for reform based upon Electronic Transactions (Queensland) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/15> [2.3].

documents to be signed electronically,³⁵³⁸ information to be given in electronic form³⁵³⁹ and provides rules for the time of sending and receipt of electronic communications.

204.2.1. Does section 347 prevent service of notices using electronic communication?

Section 347 of the PLA does not expressly provide for service of statutory or contractual notices by email or other electronic means, but it does not prevent the sender from using any method of service which results in the notice coming to the attention of the recipient.

204.2.1.1. Statutory Notices

As discussed above, the combined effect of section 347 and section 39 of the *Acts Interpretation Act 1954* (Qld) is that a statutory notice under the PLA may be served personally, by leaving at the last known residence, place of business or registered office, by using post or registered post, facsimile or any other similar facility. As the provisions are not mandatory, statutory notices may also be served by any other means,³⁵⁴⁰ including email.

McMurdo J (as he then was) in *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd*³⁵⁴¹ (**Conveyor**) held that although the *Acts Interpretation Act 1954* (Qld) did not authorise the service of a notice using electronic communication the ETA may apply to facilitate service of notices by electronic means when applied to particular statutory provisions.³⁵⁴² Alternatively, if the ETA did not apply, which was the case in *Conveyor*, email was still a valid method of service. The notice is effectively delivered when it comes to the attention of the recipient.

Therefore, while section 347 does not prevent the service of a statutory notice using electronic communication there is a degree of uncertainty about the interaction of the PLA with the ETA which should be resolved.

204.2.1.2. Contractual Notices

The position is similar for contractual notices. Section 347 is facultative only and may be overridden by the terms of the contract. If the contract does not impose a mandatory service requirement, the parties may use any method of service that brings the notice to the attention of the recipient.³⁵⁴³ The server of the notice is not bound to use a method stated in section 347 or the contract and may rely upon the common law. If a contractual notice is served by email, the server may rely upon the deeming provisions in the ETA, section 24 to prove receipt by the recipient.³⁵⁴⁴

³⁵³⁸ *Electronic Transactions (Queensland) Act 2001* (Qld) s 14.

³⁵³⁹ *Electronic Transactions (Queensland) Act 2001* (Qld) ss 11-12.

³⁵⁴⁰ *Capper v Thorpe* (1998) 194 CLR 342, 352.

³⁵⁴¹ [2015] 1 Qd R 265.

³⁵⁴² In that case His Honour was considering the service of notices under the *Building and Construction Industry Payments Act 2004* (Qld).

³⁵⁴³ *Capper v Thorpe* (1998) 194 CLR 342; *Brannigan v Smith* [2017] NSWSC 1201.

³⁵⁴⁴ According to section 26E of the *Electronic Transaction (Queensland) Act 2001* (Qld) sections 23-24 apply where an electronic communication is used to form or perform a contract.

204.2.1.3. Is section 347 a 'State law' to which section 11 ETA applies?

The ETA provides that, if a State law³⁵⁴⁵ requires or permits a person to give information³⁵⁴⁶ in writing, the requirement or permission is satisfied if the person gives the information in such a way that:

- the information is readily available for subsequent reference; and
- the person given the information consents to the information being given electronically.³⁵⁴⁷

Is section 347 a 'State law' to which section 11 of the ETA will apply? The first question is whether section 347 is a State law that requires or permits a person to give information in writing? The phrase 'give information' is widely defined and includes the giving of a notice. Section 347 permits notices to be served personally or by post. Considered broadly this may be a provision that requires or permits notices to be giving in writing, as it is not possible to either leave a notice or post a notice unless it is in writing.

The application of the ETA is, however, subject to particular exclusions, including that the ETA does not apply to a 'transaction, requirement, permission, electronic communication or other matter of a kind' in Schedule 1.³⁵⁴⁸ Exclusion 5 in Schedule 1 is 'a requirement or permission for document to be served personally or by post'.³⁵⁴⁹

Section 347 of the PLA essentially permits notices to be served either personally (including by leaving at an address) or by post, which means there is a strong argument that section 347 falls within this exclusion. The impact of this conclusion is that the ETA may not be used to extend the operation of section 347 to electronic service of notices.

As such, it is likely that the ETA does not apply to section 347 so that the permission to give a notice personally or by post in section 347 may be satisfied by giving the notice electronically. However, as section 347 is facultative only, section 11 of the ETA may arguably apply to the other sections of the PLA requiring the giving of a notice, bypassing the need to even consider section 347. For example, under section 124 of the PLA a notice to remedy breach must be given in writing (in the approved form) to a lessee. Section 124 may be described as a requirement under State law to give information in writing to another person. On this basis the ETA facilitates the giving of a notice under section 124 PLA by email.

204.2.2. Deemed time of receipt

204.2.2.1. By post

Section 347 provides that a notice sent by post is taken to have been served at the time when, by the ordinary course of post, the notice would be delivered, unless the contrary is shown.³⁵⁵⁰ In the event

³⁵⁴⁵ Defined to include a written or unwritten law of Queensland or any instrument made or having effect under such law: *Electronic Transactions (Queensland) Act 2001* (Qld) Sch 2 (definition of 'State law').

³⁵⁴⁶ 'Give information' is defined to include a number of actions, including 'give, send or serve a notification': *Electronic Transactions (Queensland) Act 2001* (Qld) s 10(c).

³⁵⁴⁷ *Electronic Transactions (Queensland) Act 2001* (Qld) ss 11-12.

³⁵⁴⁸ *Electronic Transactions (Queensland) Act 2001* (Qld) s 7A.

³⁵⁴⁹ *Electronic Transactions (Queensland) Act 2001* (Qld) s 7A and Sch 1 s 5.

³⁵⁵⁰ *Property Law Act 1974* (Qld) s 347(1A). This is also provided by the *Acts Interpretation Acts 1954* (Qld) s 39A(1)(b).

of a dispute about delivery, evidence of 'ordinary course of post' for the particular destination may be produced to a court.

The 'deemed delivery' provision appears to only apply where service is effected by ordinary post to the registered offices of a corporation. Service on a person requires registered post where the letter is tracked and signed for. This means that the actual time of delivery is known and a party will not need to resort to the 'deemed' delivery provision. A statutory notice may however be served by post under the *Acts Interpretation Act 1954* (Qld).

Prior to 2016, the ordinary course of post with Australia Post was about 2 to 3 days from the time the letter was sent. In early 2016, Australia Post restructured its delivery times and fees, with a result that the ordinary course of postal delivery is now longer than previously. Australia Post now has four levels of delivery³⁵⁵¹ ranging from express delivery next business day to regular delivery in 2-6 business days.

It has been suggested that the deemed delivery provisions should be altered to refer to a stated number of days,³⁵⁵² similar to the approach in NSW, where the relevant legislation provides that service is deemed to occur on the fourth working day after sending unless the contrary is shown.³⁵⁵³

204.2.2.2. Service 'by electronic communication'

If the PLA is amended to allow service of notices by electronic communication, the question arises as to whether a deemed time for service of notices by electronic communication should be specified.

If no deeming provision is inserted into the PLA, the ETA will apply. The ETA deems the time of receipt of an electronic communication to be:

- when the email is capable of being retrieved by the addressee at an email address designated by the addressee; or
- if an email address is not designated, when the email is capable of being retrieved by the addressee at an email address of the addressee and the addressee has become aware that the electronic communication was sent to that address.³⁵⁵⁴

The time of deemed receipt is therefore dependent on whether the recipient has designated an email address for the service of notices. Designation of an email address requires more than merely consenting to the use of electronic communication.³⁵⁵⁵

In contrast, under the *Corporations Act 2001* (Cth), notices given by electronic methods in specific circumstances will be taken to have been given or sent on the business day after being sent.³⁵⁵⁶

³⁵⁵¹ Regular (2-6 business days); priority (1-4 business days); registered (2-6 business days) and express (next business day): <https://auspost.com.au/sending/send-within-australia/compare-letter-services>.

³⁵⁵² SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts*, (2014) Federation Press, 330.

³⁵⁵³ *Interpretation Act 1987* (NSW) s 76. Interestingly the *Conveyancing Act 1919* (NSW) s 170 (which is similar to the Qld provision in section 347) provides that documents delivered by a document exchange are deemed served on the second business day after delivery.

³⁵⁵⁴ *Electronic Transactions (Queensland) Act 2001* (Qld) s 24(1). For a discussion of when an email is capable of being received and when an email address has been designated, see SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts*, (2014) Federation Press, 348-351.

³⁵⁵⁵ *Piha Pty Ltd v Spiral Tube Makers Pty Ltd* (2010) 88 IPR 439.

³⁵⁵⁶ *Corporations Act 2001* (Cth) s 600G(5).

Similarly, a document given to a person by the Migration Tribunal via electronic means is taken to be received at the end of the day on which the document was transmitted.³⁵⁵⁷

204.2.3. Making documents available online

A further issue for consideration is whether a person should be able to serve a notice by making the notice available on a website or electronic repository. The recipient is given access to the notice through a link in an email sent by the server.

In *Conveyor*³⁵⁵⁸ it was held that sending an email, which included a link to a document on Dropbox, did not amount to giving the document ‘by an electronic communication’ according to section 11 of the ETA. This was because the ‘data, text or images within the document in the Dropbox was [not] itself electronically communicated’ to the recipient.³⁵⁵⁹ Instead, the recipient was given the means to obtain the information. As a consequence the server of the document was unable to rely upon the deemed receipt provisions in section 24 of the ETA, which also refer to giving a document ‘by electronic communication’. Although the service method was valid, the document was not served until it came to the attention of the recipient, according to common law principles.

It is becoming increasingly common for commercial parties to provide documents through cloud based services such as Dropbox, usually due to the size of the documentation. This minimises the circumstances in which an email may be rejected by a mail server and not delivered to the recipient. Recognition of the need to expand available methods of electronic service to accommodate changes in commercial practice has occurred in the area of product disclosure statements. Provision has been made for financial services disclosures and product disclosure statements to either be given or made available electronically.³⁵⁶⁰

204.2.4. Other provisions in the PLA that specify a method of service

Section 347 applies subject to a contrary method of service – either agreed by the parties in the instrument or agreement in question or as provided in the PLA itself. Generally, where the PLA imposes an obligation to serve or give notice in writing, the method of service is not specified.³⁵⁶¹

There are some places however where the PLA is more prescriptive regarding the method of service. For example, a notice of termination of tenancy given under Division 4 of Part 8 of the PLA provides that the notice will be sufficiently given if:

³⁵⁵⁷ *Migrations Act 1958* (Cth) s 379C(5).

³⁵⁵⁸ *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265.

³⁵⁵⁹ *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265, [28].

³⁵⁶⁰ ASIC has provided detailed guidance for corporations using digital disclosure: Australian Securities & Investments Commission, *Regulatory Guide 221: Facilitating Digital Financial Services Disclosures* (March 2016).

³⁵⁶¹ For example, see, among other provisions, *Property Law Act 1974* (Qld) s 38(5); s 64(1); s 84(1)(a)-(b); s 85(2).

- delivered personally;
- delivered by registered post;
- left with an adult residing at the premises;
- delivered to the person who usually pays the rent; or
- posted up in a conspicuous place on the premises.³⁵⁶²

The parties are, of course, able to agree on a different method of giving such notice.³⁵⁶³

The other provisions of the PLA that specify a method of service do not specifically authorise service of notice by electronic communications. If section 347 is amended to allow electronic delivery of notices, consideration should be given to whether these other sections of the PLA should also be amended to accommodate electronic delivery or removed on the basis section 347 should apply, subject to the terms of the contract.

204.3. Other jurisdictions

Several jurisdictions in Australia³⁵⁶⁴ have provisions similar provisions to section 347, which have been based on the UK legislation.³⁵⁶⁵ The Queensland provision was drawn from the equivalent Western Australia property legislation.³⁵⁶⁶

The notice provisions across jurisdictions are generally similar in that they facilitate service of notices personally or by post and exclude service of notices for court proceedings. Generally, the sections provide that notices served by post are deemed to be served at the time when, by the ordinary course of post, the notice would be delivered.

204.3.1. NSW

NSW takes a different approach to deeming by prescribing a set number of days for service in particular circumstances. Under the *Conveyancing Act 1919* (NSW) service by delivery of the notice to a document exchange facility of which the person to be served is a member will be taken to have been served two business days after delivery to the facility.³⁵⁶⁷ Further, under the *Interpretation Act 1987* (NSW) service of a document sent by post in Australia or in an external territory is taken to have been effected on the fourth working day (the equivalent of a business day) after the letter was posted.³⁵⁶⁸

³⁵⁶² *Property Law Act 1974* (Qld) s 132.

³⁵⁶³ *Property Law Act 1974* (Qld) s 130(1).

³⁵⁶⁴ For example, *Property Law Act 1958* (Vic) s 198; *Conveyancing and Law of Property Act 1884* (Tas) s 85; *Law of Property Act 1936* (SA) s 112.

³⁵⁶⁵ *Law of Property Act 1925* (UK).

³⁵⁶⁶ 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) 117; *Property Law Act 1969* (WA) s 135.

³⁵⁶⁷ *Conveyancing Act 1919* (NSW) ss 170(1)(c) and 170(1A). See also the *Evidence Act 1995* (NSW) s 160 which presumes that an article sent by post in Australia was received on the 4th working day after posting.

³⁵⁶⁸ *Interpretation Act 1987* (NSW) s 76(1)(b).

204.3.2. The Corporations Act 2001 (Cth)

The *Corporations Act 2001* (Cth) provides that particular types of notice (e.g. notice given to creditors of a company)³⁵⁶⁹ may be given by giving or sending the notice or document to the recipient at the fax number, electronic address or other electronic means nominated by the recipient.³⁵⁷⁰

The *Corporations Act 2001* (Cth) also allows the person sending the notice to give or send the notice by making the notice or document publically available and notifying the recipient that:

- the notice is available electronically; and
- how the notice can be accessed.³⁵⁷¹

204.4. Recommendation

As the interaction of the ETA and section 347 of the PLA is unclear, the Centre is of the view that the PLA should be amended to facilitate electronic delivery of notices. The QLS supports the amendment of section 347 to facilitate electronic notices.

204.4.1. The QLS's view

The QLS raised some concerns about the application of the deemed receipt provisions in the ETA.³⁵⁷² In particular, the QLS noted the difficulty of determining the time of receipt if the recipient has not designated an email address for notices. In that case, the notice is not taken to be received until the person is aware of the communication. This may be when the recipient notices the email in their mailbox or at the time the recipient reads the email or downloads the attachment.

The QLS submitted that email delivery should be taken to be instantaneous for emails up to a specified size, but submitted that the legislation could limit such deemed receipt to situations where the email is below a particular size (as the main risk of non-delivery arises when the email is too large for a typical email server to handle).

The QLS also submitted that, if a party includes its email address in a document as part of its contact details, that this should be deemed consent to receive notices electronically, without the need for a separate consent to the use of email.

The QLS broadly supports service of documents by making the document available electronically such as on a website or via a third party service such as Drop Box. However, the QLS noted that several issues need to be resolved before this could be achieved. The issues include:

- how to prove what document was made available when clicking on the link;
- version control of the relevant document;
- how to prove that the link was made available to the relevant person.

³⁵⁶⁹ See *Corporations Act 2001* (Cth) s 600G(1)(a)-(y) for a full list.

³⁵⁷⁰ *Corporations Act 2001* (Cth) s 600G(2)-(3).

³⁵⁷¹ *Corporations Act 2001* (Cth) s 600G(4).

³⁵⁷² *Electronic Transactions (Queensland) Act 2001* (Qld) s 24.

The QLS noted that it does not support a deeming provision when the delivery is done via Australia Post. It was noted that there is now a wide variation of postal delivery times. It was submitted that it is not prudent to send time sensitive notices by post.

204.4.2. The Centre's view

The Centre recommends that section 347 be amended to allow notices required or authorised by the PLA or under an instrument or agreement relating to property (subject to the terms of that instrument or agreement itself) to be served:

- personally;
- by pre-paid post; or
- by electronic communication (including facsimile and by making notices available in an electronic repository).

In relation to service of notices by post, the Centre further recommends that

- (a) the requirement for registered post be omitted;
- (b) a deeming provision for the receipt of notices sent by post be introduced. After considering current time frames advertised by Australia Post the Centre recommends a period 5 business days after the notice is posted.

In relation to the service of notices by electronic communication, the Centre further recommends:

- (a) electronic communication should be a permitted method of serving a notice under the PLA or under an instrument or agreement related to property unless the section, instrument or agreement contains a provision to the contrary;
- (b) service of a notice by electronic communication in accordance with section 347 should be to a person or corporation at the electronic address nominated by the person or corporation in writing for the purpose of giving notices. As the Centre recommends the introduction of a deemed receipt provision which places the risk of non-delivery on the recipient, it is appropriate that the recipient should only bear this risk if an address is nominated;
- (c) a requirement for a person to give a notice containing prescribed information or by an approved form may be met by:
 - (i) including the prescribed information in the electronic communication;
 - (ii) attaching the prescribed information or approved form to the electronic communication, or
 - (iii) including a link to the prescribed information or approved form in an electronic repository with instructions for accessing the information or form. The repository should meet the requirement of being accessible by the recipient for a reasonable time after the electronic communication is given depending on the context;

- (d) a new deeming provision for receipt of electronic communication sent in accordance with the PLA. The Centre recommends that if an electronic communication is sent before 4pm on a business day it should be deemed to be received on the same day, unless the contrary is proved. If the electronic communication is sent after 4pm or on a day that is not a business day it should be deemed to be received on the next business day.

RECOMMENDATION 205. Section 347 should amended to:

- remove the requirement to use registered post;
- allow for notices to be sent using electronic communication (e.g. via fax, email or by making the notice available electronically); and
- provide a deemed time of receipt for notices sent via post or electronic communication.

For example, using section 600G of the *Corporations Act 2001* (Cth) as a guide, section 347 could be drafted in the following manner:

Section [347] Service of notices

- (1) Where this Act, or any instrument or agreement that relates to property requires or authorises a notice to be served on a person, the notice may be served:
 - (a) on a person, by:
 - (i) delivering the notice to the person personally; or
 - (ii) leaving it for the person at the person's usual or last known place of residence; or
 - (iii) posting it to the person as a letter addressed to the person at the person's usual or last known place of residence; or
 - (b) if the person is in business as a principal, by:
 - (i) delivering the notice to the person at the person's usual or last known place of business; or
 - (ii) posting it to the person as a letter addressed to the person at the person's usual or last known place of business; or
 - (c) if the person is a corporation, by:
 - (i) leaving the notice; or
 - (ii) posting it as a letter addressed to the corporation; at its registered office or principal place of business in the State; or
 - (d) by electronic communication to the electronic address nominated by the person or corporation for the purpose of receiving notices under the Act, instrument or agreement.
- (2) If the person is:
 - (a) absent from the State; or
 - (b) deceased;
 the notice may be delivered as provided in subsection (1) to the person's agent in the State or to the person's personal representative.
- (3) If the person is:
 - (a) not known, or is absent from the State and has no known agent in the State; or
 - (b) deceased and has no personal representative;
 the notice must be delivered in such manner as may be directed by an order of the court.

- (4) Despite anything in subsections (1) to (3), the court may make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery of any notice.
- (5) This section does not apply to notices served in proceedings in the court, nor where the person serving the notice prevents its receipt by the person on whom the notice is intended to be served.
- (6) A notice is validly served by electronic communication if:
 - (a) the notice in the form required by the Act, instrument or contract is attached to the electronic communication; or
 - (b) the content of the notice as required by the Act, instrument or agreement is included in the electronic communication; or
 - (c) a link to the content or form required by the Act, instrument or agreement is included in the electronic communication and the content or form is accessible by the recipient for a reasonable time; and
 - (d) the electronic communication is sent to the electronic address nominated by the recipient for the purpose of notices under the Act, instrument or contract.
- (7) A notice given by post is taken to be received, unless the contrary is shown, 5 business days after being sent.
- (8) A notice given by an electronic communication in accordance with subsection (6) is taken to be received, unless the contrary is shown:
 - (a) if sent before 4pm on a business day – on the same business day it is sent; or
 - (b) if sent after 4pm on a business day – on the next business day; or
 - (c) if sent on a day that is not a business day – on the next business day.
- (9) This section applies unless a contrary method of service of notices is provided in the instrument or agreement or by this Act.

205. Section 348 – Payments into and applications to court

205.1. Overview and purpose

348 Payments into and applications to court

- (1) Payment of money into court under this or any other Act shall effectually exonerate the person making the payment.
- (2) Every application to the court shall be by summons at chambers, except where it is otherwise provided in this Act (expressly or by implication) or in a regulation made under this Act.
- (3) On an application by a purchaser, notice shall be served in the first instance on the vendor unless the court dispenses with such service.
- (4) On an application by a vendor, notice shall be served in the first instance on the purchaser unless the court dispenses with such service.
- (5) On any application, notice shall be served on such persons (if any) as the court thinks fit.
- (6) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

The QLRC indicated in its 1973 Report that section 348 of the PLA was included in the Act to regulate payments into court and applications which are made to court under a section of the PLA.³⁵⁷³ The section is not intended to allow payment into court instead of paying the creditor.³⁵⁷⁴ Where there is uncertainty regarding to whom the payment should be made, proceedings should be instituted to clarify this issue.³⁵⁷⁵

The process around the actual payment of the money into court is governed by the UCPR rule 560. This provision provides that, where a person is required or permitted by an Act, the UCPR, an order of the court or another law or practice to pay into or deposit money into court, any payment made must be accompanied by an affidavit which is served on all other parties.³⁵⁷⁶ The disposal of money paid into court is then governed by UCPR rule 561.

205.2. Issues with the section

205.2.1. Section 348(1): Payments into court

There have been no decisions in Queensland which have considered section 348(1) of the PLA. The equivalent provision in New South Wales was considered in the Federal Court decision of *Digiplus Pty Ltd v RSL Com Partners Pty Ltd*.³⁵⁷⁷ Gyles J accepted the respondent's argument and approach to interpreting section 171 of the New South Wales Act which was:

³⁵⁷³ 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) 118.

³⁵⁷⁴ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013*, (Butterworths, 2012) 255 [33650] and Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.348.30].

³⁵⁷⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.348.30].

³⁵⁷⁶ UCPR, rule 560(2) and (3).

³⁵⁷⁷ *Digiplus v RSL Com* (2003) 202 ALR 117.

It is submitted that the text of s 171 requires a two-stage process – first a particular provision must be found in a statute such as ss 12, 66 and 98 of the Conveyancing Act and s 95 of the Trustee Act 1925 (NSW) which authorises payment into court and then the second stage is the exoneration effected by s 171 upon that payment in being made.³⁵⁷⁸

There are a number of provisions in the PLA which enable the payment of money into court including:

- section 95 which is directed at overcoming the injustice that may be done to mortgagors by acceleration clauses by providing relief against acceleration in the stated circumstances. Payment into court of an instalment amount is a precondition to the mortgagor applying to the court for relief from the consequences of default specified in section 95(1);
- section 101 facilitates redemption in the case of unknown or absent mortgagees. The application to the court may be made by a person entitled to redeem the mortgaged premises. The court may order the amount of debt which is ascertained to be paid into court. A certificate from the registrar that it has been paid operates to discharge the mortgage debt, although any amount which is shown by a person entitled to the mortgage debt to still be outstanding is still a debt due under the mortgage;
- section 199(2) enables the payment into court of the debt by the debtor where there is notice that the assignment is disputed. The payment must be made ‘under and in conformity with the provisions of the Acts relating to relief of trustees’.

The application of section 348(1) of the PLA to payments made under these provisions is unlikely as the payments into court are linked to proceedings or processes provided for in the sections. In the case of other Acts, the *Trusts Act 1973* (Qld) also authorises the payment into court of trust money or securities.³⁵⁷⁹ However, this Act explicitly addresses the issue of the effect of the payment into court by providing that the receipt or certificate of the proper officer is a sufficient discharge to the trustee or trustees for the funds paid into court.³⁵⁸⁰

The concept of ‘exoneration’ is broad, open to interpretation and unqualified. The VLRC recommended that the equivalent provision in the *Property Law Act 1952* (Vic) be amended to make it clear that a person is not exonerated if the payment made does not meet the liability incurred.

It is difficult to identify a situation where section 348 of the PLA would be utilised in practice. If section 348 of the PLA is retained, the section may require amendment to clarify what is meant by ‘exonerate’. This may simply require using a term such as ‘discharge’ and explicitly stating discharge only occurs if the full liability is met by the payment.

205.2.2. Section 348(2)-(6): Application to court

These provisions set out the general procedure for making applications to court, service requirements and costs. Under the UCPR, proceedings are either initiated by an application or a claim.³⁵⁸¹ However, in the case of section 348(2) of the PLA, the effect of UCPR rule 10(b) is that the matter would proceed by application under the UCPR rather than by ‘summons at chambers’. The provisions in section

³⁵⁷⁸ *Digiplus v RSL Com* (2003) 202 ALR 117, 124 [20].

³⁵⁷⁹ *Trusts Act 1973* (Qld) s 102(1).

³⁵⁸⁰ *Trusts Act 1973* (Qld) s 102(2).

³⁵⁸¹ UCPR rule 8(2).

348(2)-(6) are provided for in the UCPR and there does not appear to be any utility in retaining provisions which may potentially be inconsistent with the process under the UCPR.

205.3. Other jurisdictions

The legislative provisions in New South Wales, South Australia and Victoria only include a section equivalent in form to section 348(1) of the PLA.³⁵⁸² New South Wales previously had an identical provision to section 348(2) which was amended following recommendations made by the New South Wales Law Reform Commission when reviewing Supreme Court procedure in New South Wales.³⁵⁸³ The Commission noted in its Report that it had identified four thousand instances of provisions in legislation which affected procedure in the Supreme Court and that there was likely to be more provisions that had not been identified.³⁵⁸⁴ In order to avoid inconsistency between the proposed Supreme Court Act and some of this other legislation, it recommended the repeal of a number of provisions from a variety of Acts, including section 171 of the *Conveyancing Act 1919 (NSW)*.³⁵⁸⁵

Tasmania has retained a provision which is similar in approach and form to section 348 of the PLA.³⁵⁸⁶ The VLRC recommended that section 202 be amended and that it apply to registered land.³⁵⁸⁷ The VLRC noted:

Payment into court exonerates the person from making the payment. Amend the provision to state that the payment does not exonerate the person when the person's liability exceeds the amount paid into court.³⁵⁸⁸

205.4. Recommendation

The Centre recommends repealing section 348 of the PLA on the basis that the UCPR provides a process for payment of money into court and the section is therefore of no utility. The QLS agrees that the process of payment of money into court should be regulated by the UCPR.

RECOMMENDATION 206. Section 348 should be repealed.

³⁵⁸² See *Conveyancing Act 1919 (NSW)* s 171; *Law of Property Act 1936 (SA)* s 119; *Property Law Act 1958 (Vic)* s 202.

³⁵⁸³ New South Wales Law Reform Commission, *Second Report of the Law Reform Commission on Supreme Court Procedure* Report No. 14 (1971).

³⁵⁸⁴ New South Wales Law Reform Commission, *Second Report of the Law Reform Commission on Supreme Court Procedure* Report No. 14 (1971) 13-14.

³⁵⁸⁵ New South Wales Law Reform Commission, *Second Report of the Law Reform Commission on Supreme Court Procedure* Report No. 14 (1971) Sch 2, 136.

³⁵⁸⁶ *Conveyancing and Law of Property Act 1884 (Tas)* s 92.

³⁵⁸⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) Appendix A, 142.

³⁵⁸⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) Appendix A, 142.

206. Section 349 – Forms

206.1. Overview and purpose

349 Forms

- (1) Where by this Act any application, instrument or document is authorised or required to be made in the approved form, such form, if the application, instrument or document is to be registered in respect of land under the Real Property Acts, shall in addition to any of the requirements of this Act –
 - (a) be attested under the requirements of the Real Property Acts; and
 - (b) unless in any case the registrar otherwise directs, bear the endorsement referred to in the *Real Property Act 1861*, section 139.
- (2) The registrar may, before registering any such application, instrument or document, require proof by statutory declaration or otherwise of any matter because of which the applicant or person seeking registration claims to be entitled to registration of the application, instrument or document.
- (3) This section applies despite any other section of this Act.

Section 349 was not originally proposed in the 1973 draft Property Law Bill set out in the QLRC's Report. It was subsequently added to the Bill prior to it being passed in 1974. The section operates in the following way:

- where any application, instrument or document is authorised or required to be made in the approved form;
- if the application, instrument or document is to be registered in respect of land under the Real Property Acts, the form of the application, instrument or document should:
 - comply with the requirements under the PLA; and
 - be attested under the requirements of the Real Property Acts; and
 - bear the endorsement referred to in section 139 of the *Real Property Act 1861*.³⁵⁸⁹

The registrar is also entitled to request proof of certain matters prior to registering any application, instrument or document.³⁵⁹⁰

206.2. Issues with the section

206.2.1. Section 139 of the Real Property Act has been omitted

The rationale for the inclusion of section 349 is not clear and there is no commentary which assists in this respect. Section 139 of the *Real Property Act 1861* was omitted from the *Land Title Act 1994* (Qld). That section enabled the Registrar-General to refuse to receive and register any application for bringing land under the Act unless there was an endorsement on a certificate regarding the correctness of the instruments signed by the applicant or by his solicitor. As a result, section 349(1)(b) is obsolete.

206.2.2. Attestation requirements (PLA s 349(1)(a))

The only other provisions in the PLA which appear to provide for an instrument to be in an approved form and anticipate the possible registration of the instrument are:

³⁵⁸⁹ *Property Law Act 1974* (Qld) s 349(1).

³⁵⁹⁰ *Property Law Act 1974* (Qld) s 349(2). Section 349 applies despite any other section of the PLA: see s 349(3).

- memorandum of variation of mortgage;³⁵⁹¹
- a request by a tenant in tail for entry of title in fee simple;³⁵⁹²
- the release or disclaimer of a power of appointment.³⁵⁹³

The approved forms for each of these provisions were originally included in schedule 2³⁵⁹⁴ of the PLA but this schedule was removed in 1995.³⁵⁹⁵ The provisions dealing with forms are now set out in the *Acts Interpretation Act 1954* (Qld) and require any approval or availability under authorising law of a form or a new version of a form to be notified in the gazette.³⁵⁹⁶ There do not appear to be any approved forms gazetted dealing with a request by a tenant in tail for entry of title in fee simple and the release or disclaimer of a power of appointment.

In terms of amending a registered mortgage, section 76 of the *Land Title Act 1994* (Qld) deals with that process and any amendment is required to be registered with the Titles Registry on Form 13. Section 79 of the PLA was introduced to address a gap under the Real Property Acts which did not provide for the variation of a mortgage.³⁵⁹⁷ This created significant practical inconvenience as any variation required the discharge of the existing mortgage and the execution of a new mortgage.³⁵⁹⁸ However, section 76 was subsequently included in the *Land Title Act 1994* (Qld) as it was considered ‘appropriate to insert the power to vary mortgages over registered land in the Bill.’³⁵⁹⁹ The Land Title Practice Manual notes that:

If the purpose of the amendment is a variation in accordance with s 79 of the *Property Law Act 1974*, usually prepared prior to the commencement of the *Land Title Act 1994*, the terms of the variation in the appropriate form under the *Property Law Act 1974* should be deposited with a Form 13.

In the case of a release or disclaimer of a power of appointment and a request by a tenant for entry of title in fee simple, assuming these provisions have any currency, a ‘General Request’ to register these instruments could be made on Form 14.

Section 349(1)(a) of the PLA makes it clear that it is the form, if the relevant instrument is to be registered, which must be attested under the requirements of the Real Property Acts. Under the *Land Title Act 1994* (Qld), an instrument may only be registered by the registrar if it complies with the Act. The only specific requirement under the *Land Title Act 1994* (Qld) in relation to ‘attestation’ or valid execution is set out in section 161 of the Act. That section specifies what constitutes valid execution by a corporation and an individual. In the case of an individual, an instrument is validly executed if it

³⁵⁹¹ *Property Law Act 1974* (Qld) s 79(2).

³⁵⁹² *Property Law Act 1974* (Qld) s 22.

³⁵⁹³ *Property Law Act 1974* (Qld) s 205(3).

³⁵⁹⁴ Form 22 (Request by Tenant in Tail for Entry of Title in Fee Simple); Forms 3-6 (Variation of Mortgage); Form 17 (Release or Disclaimer of Power).

³⁵⁹⁵ The amending legislation was the *Statute Law Revision Act (No. 2) 1995* (Qld).

³⁵⁹⁶ *Acts Interpretation Act 1954* (Qld) s 48(5).

³⁵⁹⁷ 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) 60.

³⁵⁹⁸ 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) 60.

³⁵⁹⁹ Queensland Law Reform Commission, *Consolidation of Real Property Acts* Report No. 40 (1991) cl 51, 25.

is executed in a way permitted by law and the execution is witnessed by a person specified in schedule 1 of the Act.³⁶⁰⁰

Section 349 is arguably no longer necessary as an instrument may only be registered under the *Land Title Act 1994* (Qld) if it complies with that Act and it appears capable of registration. In this respect, the method of attestation of an instrument in any form needs to comply with section 161 of the *Land Title Act 1994* (Qld).

206.3. Other jurisdictions

No other Australian jurisdiction has a provision equivalent to section 349.

206.4. Recommendation

Section 349 of the PLA should be repealed on the basis that it does not have any current utility. The QLS agrees that the section is superfluous now that the processes are regulated by the *Land Title Act 1994* (Qld) and the *Land Act 1994* (Qld).

RECOMMENDATION 207. Section 349 should be repealed.

³⁶⁰⁰ *Property Law Act 1974* (Qld) ss 161(2)(a) and (b).

207. Section 350 – Approval of forms

207.1. Overview and purpose

350 Approval of forms

The chief executive may approve forms for use under this Act.

No change is recommended in relation to sections 350 as this is a standard machinery provision included in most legislation. The section provides that the chief executive may approve forms for use under the PLA.³⁶⁰¹

207.2. Recommendation

The Centre recommends retaining section 350 of the PLA. This is an important machinery provision and needs to remain to give the chief executive the power to approve forms to be used under the Act. New forms, or amendments to existing forms are required from time to time.

RECOMMENDATION 208. Section 350 should be retained.

³⁶⁰¹ *Property Law Act 1974 (Qld) s 350.*

208. Section 351 – Regulation-making power

351 Regulation-making power

- (1) The Governor in Council may make regulations under this Act.
- (2) The regulations may be about fees including—
 - (a) the persons who are liable to pay fees; and
 - (b) when fees are payable; and
 - (c) the waiver of fees; and
 - (d) the recovery of unpaid amounts of fees.

No change is recommended in relation to section 351 as this is a standard machinery provision included in most legislation. The section provides that the Governor in Council may make regulations under the PLA and also specifies that the regulations may be about fees.³⁶⁰²

208.1. Recommendation

The Centre recommends retaining section 351 of the PLA. This is an important machinery provision and needs to remain to give the Governor in Council the power to make regulations relating to the Act. Regulations are required from time to time.

RECOMMENDATION 209. Section 351 should be retained.

³⁶⁰² *Property Law Act 1974 (Qld)* s 351.

209. Part 21 to Part 24 (Sections 353 – 358) Transitional Provisions

209.1. Recommendation

The Centre recommends reviewing the transitional provisions and notes the possible inclusion of further transitional provisions that may result from any reform to the PLA, however this is a matter of policy and the Centre makes no other comments in that regard.

Schedules 1 – 6

210. Schedule 1 – Procedure in cases of *bona vacantia*

210.1. Overview and purpose

Schedule 1 of the PLA is relevant to the operation of section 20 of the PLA. A full discussion on the operation of section 20 is set out at paragraph 22.

210.2. Recommendation

Section 20 still serves a current purpose and the recommendation at paragraph 22.4 is that the section, and therefore schedule 6, should be retained. However, section 20, and schedule 6 are complex and difficult to understand.

The recommendation is that section 20 be divided into those provisions that deal with free and common socage and the abolition of quit rent or escheat in Queensland and those provisions that address the issue of persons dying intestate and *bona vacantia*.

There is a further recommendation that the language of section 20 be modernised language and this recommendation also extends to schedule 1 of the PLA.

RECOMMENDATION 210. Schedule 1 should be retained with modernised language.

211. Schedule 2

Schedule 2 of the PLA was repealed by the *Statute Law Revision (No. 2) Act 1995* (Qld).

212. Schedule 3 – Short forms of covenants in leases

212.1. Purpose and overview

Where a lease contains covenants by express reference to schedule 3 and the words used are the same as those in column 1 of schedule 3, then the full covenant set out in the corresponding column 2 is imported by reference into the lease. This is a ‘short form’ process for expressing common covenants in leases.

212.2. Recommendation

The Centre recommends repealing the current provisions that contain implied lease covenants. The Centre further recommends repealing the short-form lease provision and schedule. A new approach, based on the New Zealand model should be adopted. This recommendation is discussed fully at paragraph 122 and Recommendation 119.

As part of the recommendations for a new approach to implied covenants in leases, schedule 3 should be amended to contain a number of relevant, standardised lease covenants that parties can rely on in circumstances where there is no agreement otherwise. The proposed drafting for the amended schedule 3 is set out at paragraph 122 and Recommendation 119.

RECOMMENDATION 211. Schedule 3 should be amended in accordance with recommendation 119.

213. Schedule 4 – Improvements by tenant

213.1. Overview and purpose

Schedule 4 is relevant to Part 8 Division 6 – Agricultural holdings, and specifically section 156 – Tenant’s right to compensation. The recommendation with respect to Part 8 Division 6 is to repeal the Division in full. In such circumstances, schedule 4 should also be repealed.

213.2. Recommendation

If the recommendation for repealing Part 8 Division 6 is adopted (discussed at paragraph 154 and Recommendation 151), then schedule 4 should also be repealed as it will have no purpose.

RECOMMENDATION 212. Schedule 4 should be repealed.

214. Schedule 5 – Rules as to arbitration

214.1. Overview and purpose

Schedule 5 is relevant to Part 8 Division 6 – Agricultural holdings, and specifically section 159 – Arbitration. The recommendation with respect to Part 8 Division 6 is to repeal all of the sections in full. In those circumstances, schedule 5 should also be repealed.

214.2. Recommendation

If the recommendation for repealing Part 8 Division 6 is adopted (discussed at paragraph 154 and Recommendation 151), then schedule 5 should also be repealed as it will have no purpose.

RECOMMENDATION 213. Schedule 5 should be repealed.

215. Schedule 6 – Dictionary

The Centre makes various recommendations with respect to the dictionary in schedule 6, as set out in turn below.

215.1. Placement of definitions

The Centre notes that in several cases, the definitions are replicated in the Division or Part as well as in schedule 6.³⁶⁰³ The entry in the schedule then sends the reader back to the definitions for the Division or Part. This is discussed at paragraph 215.2.

Further, certain definitions are contained in a section that provides the definitions for the Division or Part only. Such definitions do not have general application to the rest of the PLA.³⁶⁰⁴

As a general approach to the placement of the definitions in the PLA, the Centre recommends consideration be given to the drafting practices mentioned above. The Centre is of the view that, ideally, all definitions should be located in a separate dictionary schedule and not repeated throughout the Act. Further, it is preferable that all definitions have general application to all of the Act, and unless there is a Part, Division or section that requires a modified or specialised definition of a term. The Centre has also identified some areas where the definitions are used exclusively for a particular Part or Division³⁶⁰⁵ and in that case, for ease of reference, the definitions should be located within the Part or Division.

Finally, where the *Acts Interpretation Act 1954* (Qld) provides a definition that is the same, or that is similar enough to a definition in the PLA to be appropriate for application then it is preferable to rely on the *Acts Interpretation Act 1954* (Qld) and omit the definition from the PLA.

215.2. Duplication of definitions

215.2.1. Definitions relating to Part 6 Division 3 Sales of land

Section 58A currently contains the definitions that relate to Part 6 Division 3. Schedule 6 contains the same defined words, but refers the reader back to section 58A. This is an example of the circular drafting mentioned above at paragraph 215.1. The Centre sees no reason why the definitions in section 58A should be referred to in the schedule. It is the view of the Centre that those definitions that refer back to section 58A can be removed from the dictionary on the basis that the repetition is unnecessary.

215.3. Definitions to be added to Schedule 6

215.3.1. Definition of ‘short lease’

The recommendations with respect to section 59 include, *inter alia*, amending schedule 6 to provide a definition of **short lease**. The full recommendations for section 59 are set out at paragraph 12.4 and Recommendation 12.

³⁶⁰³ See for example *Property Law Act 1974* (Qld) ss 58A, 259, 260, 261, 264, 268.

³⁶⁰⁴ See for example *Property Law Act 1974* (Qld) ss 37, 123 and 140.

³⁶⁰⁵ See for example, new proposed drafting for replacement section 179, or proposed redrafting of section 123.

215.3.2. Definition of ‘intestate’

The word **intestate** is relevant the proposed drafting of section 20 of the PLA (discussed at paragraph 22) however there is no reason why the definition should not have general application to the entire PLA. The Centre is of the view that it can be relocated to schedule 6.

215.4. Definitions to be amended

215.4.1. Definition of ‘disposition’

The recommendations with respect to section 59 include, *inter alia*, amending the definition of **disposition** in schedule 6. The full recommendations for section 59 are set out at paragraph 12.4 and Recommendation 12.

215.4.2. Definition of ‘valuable consideration’

The definition of **valuable consideration** in schedule 6 of the PLA references ‘marriage’ as being valuable consideration. This is out of step with current community standards. Section 111A of the *Marriage Act 1961* (Cth) abolishes an action for breach of promise to marry. The Centre is of the view that characterisation of a promise to marry as ‘valuable consideration’ should not continue. The Centre therefore recommends the definition be amended in the following terms:

valuable consideration does not include a nominal consideration in money.

‘Valuable consideration’ is relevant in the context of:

- section 55 – Contracts for the benefit of third parties (discussed at paragraph 58);
- section 204 – Protection of purchasers claiming under certain void appointments (discussed at paragraph 168);
- section 206 – Definitions for pt 14 (Perpetuities and accumulations) (discussed at paragraph 170);
- section 218 – Options (discussed at paragraph 184);
- section 228 – Voluntary conveyances to defraud creditors voidable (discussed at paragraph 193);
- section 229 – Voluntary disposition of land how far voidable as against purchasers (Note that the Centre recommends the repeal of this section as discussed at paragraph 194);
- section 246 – Deeds to take effect according to priority of registration (note that the Centre recommends the repeal of this section as discussed at paragraph 199); and
- section 247 – Fraud of conveying party (note that the Centre recommends the repeal of this section as discussed at paragraph 199).

215.4.3. Definition of ‘court’

If the recommendations in respect of Part 19 are adopted, the definition of **court** in schedule 6 should be amended to remove the reference to that Part. This will result in the definition of ‘court’ having general application to the whole PLA, and will mean ‘the Supreme Court.’

215.4.4. Definition of ‘commencement of this Act’

The Centre notes that the definition of **commencement of this Act** will require amendment depending upon the approach taken by Parliament as to whether a completely new Act will replace the current

PLA. The redrafted definition will depend on the drafting practices and is a matter for the Office of Queensland Parliamentary Counsel at the appropriate time. The Centre makes no further comment in this regard.

215.4.5. Definition of ‘mortgage-money’

Schedule 6 contains a definition of *mortgage-money* which remains relevant to the operation of the PLA, however the definition is hyphenated, and the term within the body of the PLA is not. The Centre is of the view that the hyphen from the definition in schedule 6 should be removed for consistency.

215.4.6. Definition of ‘president of the Law Society’

The current definition of the *president of the Law Society* relies on legislation that is now repealed. The Centre notes that the definition should be amended to refer to the current legislation, that is, the *Legal Profession Act 2007* (Qld).

215.4.7. Definition of ‘sale’

The definition of *sale* currently provided in schedule 6 uses outdated language and is not particularly helpful. The Centre is of the view that the definition of ‘sale’ should be amended to modernise the language and provide a more helpful description that gives a plain English definition of the word.

215.4.8. Definition of ‘rent’

The definition of *rent* in schedule 6 is antiquated and not in step with current commercial leasing practice and terminology. The current definition in schedule 6 is:

rent includes yearly or other rent, toll, duty, royalty, or other reservation by the acre, hectare, the ton, tonne, or otherwise.

The Centre is of the view that this definition is outdated and should be amended to provide a more relevant and appropriate definition.

There is extensive case law on what is rent. Commentators describe rent as ‘merely compensation for the lessee’s use and possession of the demised premises.’³⁶⁰⁶ In *Junghenn v Wood*³⁶⁰⁷ the court said that reference to ‘rent’ in a lease is to be given its ordinary meaning ‘as being a sum issuing out of the land demised, payable by the lessee to the lessor for the right to occupy the land (and all that goes with it) and use it for the purpose for which it is demised.’³⁶⁰⁸

There is a distinction between rent that is required to be paid under a covenant in a lease and rent at common law. The covenant to pay rent is described by commentators as the ‘principal covenant in every lease’.³⁶⁰⁹ A lease will almost certainly require rent to be paid in advance. Where there is no agreement as to the payment of rent in advance, then the common law applies. Common law rent is paid in arrears.

³⁶⁰⁶ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [50.10].

³⁶⁰⁷ (1958) 58 SR (NSW) 327.

³⁶⁰⁸ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [50.10].

³⁶⁰⁹ *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [50.10].

This distinction between contractual rent and common law rent is significant in the context of Part 17 of the PLA. Part 17 deals with apportionment and applies only to common law rent; that is, rent that is paid in arrears (because there is no covenant requiring rent to be paid in advance). This means that, in a modern commercial leasing context, Part 17 has little no application as the payment of rent in advance is almost invariably a term of a lease.

Part 17 is discussed fully at paragraph 196. As part of the recommendations for reform of those provisions, the Centre also recommends the definition of **rent** in chapter 6 be drafted as follows:

rent includes rent payable in advance.

The effect of this is twofold. Firstly, this will broaden the operation of Part 17 to apply to leases that require payment of rent in advance. The operation of the section will continue to be subject to agreement between the parties, so where there are covenants that deal with apportionment in the lease itself, Part 17 will not apply. However, if the lease is silent as to apportionment, then Part 17 is the default mechanism that is to be applied. The Centre acknowledges that most commercial leases deal with apportionment, however changing the definition in this manner will broaden the scope of the provisions and potentially give the Part some utility.

The second effect of the proposed definition is to place reliance on the common law and principles of statutory interpretation. By using the word ‘includes’ the definition is not limited. The Centre is of the view that the word **rent** will be given its ordinary meaning, in line with the current case law relating to contractual rent in lease documents.

215.5. Definitions to be repealed

215.5.1. Definition of ‘assurance’

The definition of **assurance** should be repealed on the basis that the word will no longer be used, if the recommendations with respect to the following sections are adopted:

- section 10 – Assurances of land to be in writing: Recommendation 9 is to repeal this section;
- section 13 – Persons taking who are not parties: Recommendation 15 is to repeal this section;
- section 18 – Restrictions on operation of conditions of forfeiture: Recommendation 21 is to repeal this section;
- section 21 – Alienation in fee simple: Recommendation 24 is to repeal this section; and
- section 128 – Relief against loss of lessee’s option: Recommendation 138 is to repeal the section on the basis that a replacement Division is adopted, and this replacement provision does not use the word ‘assurance’.

215.5.2. Definition of ‘conveyance’

The definition of **conveyance** should be repealed on the basis that the term is outdated and has generally been replaced with the term ‘transfer’ in the context of the PLA. The term **e-conveyance** however remains relevant and should not be removed from the PLA. ‘Conveyance’ appears 35 times in the PLA. In each instance, the section has either been recommended for redrafting or repeal. On that basis the Centre is of the view that the definition in schedule 6 should be repealed.

215.5.3. Definition of ‘encumbrance’ and ‘encumbrancee’

The word **encumbrance** is used in several places throughout the PLA and commentators note that the precise meaning of the word will depend on the particular context in which it appears in the PLA.³⁶¹⁰ In *Wallace v Love*³⁶¹¹ the context was a will that left property ‘free from all encumbrances’ to the beneficiary. In that case, the court held:

The word ‘encumbrances’, in its ordinary connotation, means that a person or estate is burdened with debts, obligations or responsibilities. True, the word is in law especially used to indicate a burden on property, a claim, lien or liability attached to property.³⁶¹²

Therefore, while it is true that the meaning of ‘encumbrance’ can extend to any liability attached to the property, each use of this word in the PLA must be taken in context. After careful consideration of the use of the term in the PLA, the Centre is of the view that, in most cases, the word ‘encumbrance’ is actually referring to a mortgage. Each section where the word ‘encumbrance’ is used is addressed below.

215.5.3.1. Section 38

The definition of ‘encumbrance’ and ‘encumbrancee’ operate currently in respect of section 38 – ‘Statutory trusts for sale or partition of property held in co-ownership’ (discussed at paragraph 40). Substantial changes have been recommended to the entire division and the word ‘encumbrance’ and ‘encumbrancee’ would no longer appear in the division if Recommendation 39 is adopted.

215.5.3.2. Section 61

Section 61– ‘Conditions of sale of land’ – subsection (2)(b) (discussed at paragraph 67) refers to an ‘encumbrance’. No changes are proposed in respect of this subsection. The Centre is of the view that, in the context of the section, the use of the word ‘encumbrance’ is in reference to the contract of sale. The standard REIQ Contract for House and Residential Land has its own definition of encumbrance:

Clause 1(m) – ‘**Encumbrance**’ includes:
 (i) unregistered encumbrances;
 (ii) statutory encumbrances; and
 (iii) Security Interests.

Note: ‘Security Interests’ is also defined and means: ‘all security interests registered on the PPSR over Included Chattels and Improvements.’

The Centre is of the view that if the definition of ‘encumbrance’ is removed from the PLA, section 61 would not be effected because, in this context, the parties would rely on the definition provided in the REIQ standard contract. Where a different contract is used and the term is not defined, then parties could rely on the common law interpretation of the term.

³⁶¹⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.SCH.6.240]; *Bradney Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 33 ATR 1087.

³⁶¹¹ (1922) 31 CLR 156.

³⁶¹² *Wallace v Love* (1922) 31 CLR 156, 172.

215.5.3.3. Section 63

Section 63 – ‘Application of insurance money on completion of a sale or exchange’ – subsection (1)(a) (discussed at paragraph 69) also currently relies on a definition of ‘encumbrance’. However Recommendation 68 is that this section be repealed on the basis that it has no utility.

215.5.3.4. Section 64

Section 64 – ‘Right to rescind on destruction of or damage to dwelling house’ – subsection (2) (discussed at paragraph 70 refers to an ‘encumbrance.’ The Centre has recommended that section 64 be amended and those recommended amendments include replacing ‘encumbrance’ with the word ‘mortgage’. The Centre is of the view that, in the context of the section, this is a more precise and appropriate term.

215.5.3.5. Section 71

Section 71 – Definitions for div 4 – the definition of ‘mortgage’ includes an encumbrance (discussed at paragraph 81) and the recommendation in that regard is to repeal the definition in that section. The operation of the section would rely on the standard definition of ‘mortgage’ in the schedule. The Centre is of the view that this is the appropriate approach because the definition of mortgage is broad, and, as discussed at paragraph 215.5.3.13, would also capture registered bills of encumbrance.

215.5.3.6. Section 82

Section 82 – ‘Tacking and further advances’ – subsection (4A) (discussed at paragraph 94) talks about ‘subsequent encumbrance.’ As discussed above at paragraph 215.5.1, each use of the word ‘encumbrance’ in the PLA must be taken in context. After careful consideration of the use of the term in section 82 of the PLA, the Centre is of the view that the word ‘encumbrance’ is actually referring to a mortgage.

215.5.3.7. Section 86

Section 86 – ‘Effect of conveyance on sale’ – subsection (2) (discussed at paragraph 98) refers to a ‘registered encumbrance’, however, the Centre has made a recommendation that this section be repealed on the basis that it has no utility.

215.5.3.8. Section 88

Section 88 – ‘Application of proceeds of sale’ – (discussed at paragraph 100) specifies that the application of the proceeds of a sale be paid in a particular order, including the payment of ‘any subsequent mortgages or encumbrances’. The Centre is of the view that the word ‘encumbrances’ can be removed from this section as it is superfluous in circumstances where the preceding word is ‘mortgage’.

215.5.3.9. Section 94

Section 94 – ‘Obligation to transfer instead of discharging mortgage’ – subsection (2) (discussed at paragraph 106) refers to an intermediate encumbrance and the priority of an encumbrancee. The Centre is of the view that the word ‘encumbrance’ is actually referring to a mortgage. The Centre is therefore also of the view that section 94 should be amended to replace the word ‘encumbrance’ with ‘mortgage’.

215.5.3.10. Section 99

Section 99 – ‘Sale of mortgaged property in action for redemption or foreclosure’ – subsection (7) (discussed at paragraph 111) provides that a vesting order can be made, or a person appointed to convey a property, subject or not to an encumbrance, as the court sees fit. The Centre is of the view that the word ‘encumbrance’ is actually referring to a mortgage and amending section 94 to replace the word ‘encumbrance’ with ‘mortgage’ is appropriate.

215.5.3.11. Section 100

Section 100 – ‘Realisation of equitable charges by the court’ – subsection (1) (discussed at paragraph 112) notes that there will be no prejudice to an encumbrance having priority over an equitable interest if the court makes an order for the sale of the property. The Centre is of the view that the word ‘encumbrance’ is actually referring to a mortgage and that section 94 should be amended to replace the word ‘encumbrance’ with ‘mortgage’.

215.5.3.12. Section 197

Section 197 – ‘Nature of relief’ – subsection (2)(b) (discussed at paragraph 161) reads in part: ‘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’ (emphasis added). The Centre is of the view that the more appropriate term in this context is ‘other **registered interest**’. This is because the section can only apply to those interests that are registered on the title and therefore this term has more precision than the potentially wide definition of ‘encumbrance’ given in *Wallace v Love*³⁶¹³ as discussed above at paragraph 215.4.5.

215.5.3.13. Bills of encumbrance

The term ‘encumbrance’ as it is defined refers to ‘a mortgage in fee’ which is an encumbrance under old system land. The mortgage of a lesser estate refers to a mortgage of a leasehold interest. Under the new system of registered land, the only types of encumbrances that remain relevant are registered mortgages, or bills of encumbrance. These encumbrances were created under old system land in accordance with the *Real Property Act 1861-1985* (Qld). Section 203(b) of the *Land Title Act 1994* (Qld) limits the repeal of the *Real Property Acts and Other Acts Amendment Act 1986* (Qld) so that section 5 of that Act continues to apply to a bill of encumbrance:

Section 5 Savings and transitional

- (1) Notwithstanding the amendment of the *Real Property Act 1861-1985* by this Act, the provisions of the *Real Property Act 1861-1985* in respect of encumbrances, bills of encumbrance, encumbrancers and encumbrancees and in respect of memoranda of transfer and charge and the transferors and transferees thereunder shall continue to apply or, as the case may be, memorandum of transfer and charge registered or executed before the commencement of the Act as if this Act (other than this section) had not been enacted.

While it is no longer possible to register a bill of encumbrance on the freehold land register since 1994, there would still be some of these remaining that were registered before the commencement of the *Land Title Act 1994* (Qld).

³⁶¹³ (1922) 31 CLR 156.

The Centre is of the view that the current definition of mortgage is very broad and includes any existing bill of encumbrance. Under registered land, the only relevant encumbrance is a registered mortgage or bill of encumbrance.

215.5.3.14. Conclusion of definition of ‘encumbrance’

Taking into consideration the above discussion and the recommendation with respect to the sections that contain the word ‘encumbrance’, the Centre concludes that, if all of the recommendations are adopted, the definition of ‘encumbrance’ can be repealed. On that basis, the corresponding definition of ‘encumbrancee’ can also be repealed.

215.5.4. Definition of ‘fine’

The word *fine* is currently used in limited parts of the PLA and the recommendations for each are dealt with as follows:

- section 21 – Alienation in fee simple: Recommendation 24 is to repeal this section;
- section 102 – Abolition of interesse termini as to reversionary leases and leases for lives: Recommendation 113 is to repeal subsection (3) where the term ‘fine’ is used;
- section 121 – Provisions as to covenants not to assign etc. without licence or consent: Recommendation 129 calls for extensive amendment and the proposed drafting does not use the word ‘fine’;
- section 238 – Other statutory conditions of sale: Recommendation 199 is to repeal Part 18, Division 2 which contains section 238; and
- schedule 3 – the implied lease covenants have been subject to extensive redrafting as part of Recommendation 119 to reflect a new approach to implied lease covenants. The word ‘fine’ is not used in those draft covenants.

If the recommendations for these sections are adopted, the definition of ‘fine’ can be repealed.

215.5.5. Definition of ‘Imperial Act’

Schedule 6 provides a definition of *Imperial Act*, however the term is no longer used anywhere in the PLA. On that basis, the Centre recommends the definition be removed from the schedule. Further, the *Acts interpretation Act 1954* (Qld) schedule 1 already defines ‘Imperial Act’ as ‘means a British Act’.

215.5.6. Definition of ‘warden’

The definition of *warden* was removed from the *Mineral Resources Act 1989* (Qld) in 1999. The term appears in section 80 and 101 of the PLA. The recommendation for both of those sections is to remove the word ‘warden’. In those circumstances the Centre recommends the definition also be removed from the schedule.

215.6. Definitions relating to Part 19

The definitions in schedule 6 that operate in respect of Part 19 – Property (de facto relationships) are replicated in section 259 of the PLA. The recommendation for Part 19 is to retain the provisions in Part 19 of the PLA for a period of time, subject to the comprehensive review of the Part’s continuing utility before the end of a sunset period. Whether the Part should be removed from the PLA and placed in a stand-alone act upon the complete re-enactment of the PLA may be considered at that

time. In any event, the replication of the definitions means that the repeal of schedule 6 as part of the repeal of the entire PLA (with a view to enacting a replacement property law act), except Part 19, will not impact the operation of that Part. The full recommendation in respect of Part 19 is set out at paragraph 201.3.

The definition of **de facto relationship** is provided for the purposes of Part 19 at section 261 of the PLA. The term is defined as ‘the relationship between de facto partners.’ It should be noted that the *Acts Interpretation Act 1954* (Qld) also provides a definition which is slightly different: ‘... the relationship existing between 2 persons as a couple because each is the de facto partner of the other.’³⁶¹⁴ The Centre recommends that, for consistency and the avoidance of unnecessary duplication, the definition in the PLA be removed and the definition provided in the *Acts Interpretation Act 1954* (Qld) be relied upon.

215.7. Definitions already provided by *Acts Interpretation Act 1954* (Qld)

As stated above at paragraph 215.1, where the *Acts Interpretation Act 1954* (Qld) provides a definition that is the same, or that is similar enough to a definition in the PLA to be appropriate for application then it is preferable to rely on the *Acts Interpretation Act 1954* (Qld) and omit the definition from the PLA.

The *Acts Interpretation Act 1954* (Qld) provides definitions for the following terms which are also defined in schedule 6 of the PLA:

Term	PLA	<i>Acts Interpretation Act 1954</i> (Qld)
instrument	includes deed, will, and Act.	means any document.
mortgage	includes a charge on any property for securing money or money’s worth.	includes a charge on a property for securing money or money’s worth.
mortgagee in possession	means a mortgagee who in right of the mortgage has entered into and is in possession of the mortgaged property.	means a mortgagee who in right of a mortgage has entered into and is in possession of the mortgaged property.
possession	when used with reference to land, includes the receipt of income from land.	of land includes the receipt of income from the land.

The definition of **instrument** in the *Acts Interpretation Act 1954* (Qld) is much broader than the definition provided in the PLA. However, the Centre has analysed the use of the term throughout the PLA and has concluded that the *Acts Interpretation Act 1954* (Qld) is appropriate and should be used in favour of the PLA definition.

With respect to the definition of **mortgage** in the *Acts Interpretation Act 1954* (Qld), the reference to ‘a property’ includes property, both real or personal. This conclusion is drawn based on the definition of ‘property which is:

³⁶¹⁴ *Acts Interpretation Act 1954* (Qld) Sch 1.

... 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.

The Centre is therefore of the view that, while the definitions in the two Acts are slightly different, the effect is identical.

Referring to the proposed addition to sections dealing with:

- inoperative computer systems and electronic conveyancing, discussed at paragraph 80; and
- adverse events preventing attendance at settlement, discussed at paragraph 67.3 with Recommendation 66,

it is noted that there is a definition of **business day** that is different from the definition of ‘business day’ provided in the *Acts Interpretation Act 1954* (Qld). The Centre maintains that a special definition, to be applied only to the specific sections to be added, different to the *Acts Interpretation Act 1954* (Qld), is required in these circumstances. The reason for this is the proposed definition replicates the definition in the REIQ Standard Contract for House and Residential Land. By operation of the sections, the settlement date could inadvertently fall on the days between Christmas and New Year. It is standard conveyancing practice in Queensland to exclude the business days between Christmas and New Year and this should be reflected in the PLA in the context of these sections.

Term	PLA (proposed definition)	<i>Acts Interpretation Act 1954</i> (Qld)
business day	(1) In this section – business day means a day other than: (a) a Saturday or Sunday; (b) a public holiday; or (c) a day in the period 27 to 31 December.	business day means a day that is not— (a) a Saturday or Sunday; or (b) a public holiday, special holiday or bank holiday in the place in which any relevant act is to be or may be done.

215.8. Recommendations

The Centre makes the following recommendations based on a synthesis of the discussions and recommendations set out above from paragraph 215.1 to paragraph 215.7.

RECOMMENDATION 214. The new PLA should contain a schedule that provides a dictionary of terms to be defined for application to the whole Act. The overarching drafting principles that should be applied are:

- where possible, put definitions together in the schedule and do not duplicate them within the Act;
- locate definitions in the schedule where those definitions have general application;
- only embed definitions within the sections, Parts or Divisions when the definition is specific to that section, Part or Division and does not have general application to the entire Act; and
- where the *Acts Interpretation Act 1954* provides a suitable definition, do not define that term in the new PLA, and instead rely on the definition provided in that Act.

RECOMMENDATION 215. The definitions in schedule 6 that direct the reader back to section 58A should be repealed.

RECOMMENDATION 216. The definition of ‘disposition’ in schedule 6 should be amended in the following terms:

disposition includes:

- (a) a sale;
- (b) a mortgage;
- (c) a transfer;
- (d) a grant;
- (e) a partition;
- (f) an exchange;
- (g) a lease;
- (h) an assignment;
- (i) a vesting instrument;
- (j) a declaration of trust;
- (k) a surrender, disclaimer, or release;
- (l) the creation of an easement, profit à prendre, or any other interest in property; and
- (m) every other assurance of property by an instrument,

but does not include:

- (a) a will;
- (b) a devise;
- (c) a bequest; or
- (d) an appointment of property contained in a will.

RECOMMENDATION 217. A definition of ‘intestate’ should be added to schedule 6 in the following terms:

intestate has the same meaning as in section 5 of the *Succession Act 1981*.

RECOMMENDATION 218. A definition of ‘short lease’ should be added to schedule 6 in the following terms:

short lease is a lease:

- (a) for a term of 3 years or less;
- (b) from year to year or a shorter period; or
- (c) created by parol taking effect in possession, for a term not exceeding 3 years, including any option to renew.

Note: ‘taking effect in possession’ includes an immediate entitlement to possession.

NOT GOVERNMENT POLICY

Note: a short lease creates a legal interest in land.

RECOMMENDATION 219. The definition of ‘rent’ in schedule 6 should be amended in the following terms:

rent includes rent payable in advance.

RECOMMENDATION 220. The definition of ‘valuable consideration’ in schedule 6 should be amended in the following terms:

valuable consideration does not include a nominal consideration in money.

RECOMMENDATION 221. The definition of ‘court’ in schedule 6 should be amended in the following terms:

court means the Supreme Court.

RECOMMENDATION 222. The definition of ‘commencement of this Act’ in schedule 6 should be amended as appropriate.

RECOMMENDATION 223. The definition of ‘mortgage-money’ in schedule 6 should be amended to remove the hyphen.

RECOMMENDATION 224. The definition of ‘president of the Law Society’ in schedule 6 should be amended in the following terms:

president of the Law Society means the president for the time being of the Queensland Law Society Incorporated constituted under the *Legal Profession Act 2007*.

RECOMMENDATION 225. The definition of ‘sale’ in schedule 6 should be amended in the following terms:

sale means a transfer for valuable consideration.

RECOMMENDATION 226. The definition of ‘assurance’ in schedule 6 should be repealed.

RECOMMENDATION 227. The definition of ‘conveyance’ in schedule 6 should be repealed.

RECOMMENDATION 228. The definition of ‘encumbrance’ and ‘encumbrancee’ in schedule 6 should be repealed.

RECOMMENDATION 229. The definition of ‘fine’ in schedule 6 should be repealed.

RECOMMENDATION 230. The definition of ‘Imperial Act’ in schedule 6 should be repealed.

RECOMMENDATION 231. The definition of ‘warden’ in schedule 6 should be repealed.

RECOMMENDATION 232. The definitions of ‘instrument’, ‘mortgagee in possession’ and ‘possession’ in schedule 6 should be repealed on the basis that the *Acts Interpretation Act 1954* already provides a definition that is suitable for the purposes of the PLA.

For example, based on the recommendations made by the Centre, the dictionary could be drafted in the following way:

bankruptcy includes any act or proceeding in law having under any Act or Commonwealth Act effects or results similar to those of bankruptcy, and includes the winding-up of an insolvent company.

Coal Mining Act means the *Coal Mining Safety and Health Act 1999*.

commencement of this Act [amend as appropriate].

court means the Supreme Court.

deed includes an instrument having under this or any other Act the effect of a deed.

disposition includes:

- (a) a sale;
- (b) a mortgage;
- (c) a transfer;
- (d) a grant;
- (e) a partition;
- (f) an exchange;
- (g) a lease;
- (h) an assignment;
- (i) a vesting instrument;
- (j) a declaration of trust;
- (k) a surrender, disclaimer, or release;
- (l) the creation of an easement, profit á prendre, or any other interest in property; and
- (m) every other assurance of property by an instrument,

but does not include:

- (a) a will;
- (b) a devise;
- (c) a bequest; or
- (d) an appointment of property contained in a will.

District Court means the District Court or a District Court judge.

Housing Act means the *Housing Act 2003* [subject to this Act remaining current].

income when used with reference to land, includes rents and profits.

intestate has the same meaning as in section 5 of the *Succession Act 1981*.

Land Act means the *Land Act 1994*.

land under the provisions of the Land Act or any equivalent expression, means estates, interests, or any other rights in or in respect of land, granted, leased, or granted in trust or reserved and set aside under that Act but does not include registered land or unregistered land.

Mineral Resources Act means the *Mineral Resources Act 1989*.

mortgage includes a charge on any property for securing money or money's worth.

mortgagee includes any person from time to time deriving title to the mortgage under the original mortgagee.

mortgage money means money or money's worth secured by a mortgage.

mortgagor includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to the mortgagor's estate, interest, or right in the mortgaged property.

notice includes constructive notice.

order includes judgment and decree of a court

president of the Law Society means the president for the time being of the Queensland Law Society Incorporated constituted under *Legal Profession Act 2007*.

purchaser means a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property.

registered means the making or recording by proper authority in the appropriate register (if any) or other book, instrument or document of such entries, endorsements, particulars or other information as may be requisite for recording a dealing or other transaction with respect to land.

registered land means land under the provisions of the *Land Title Act 1994*.

registrar means the registrar of titles.

rent includes rent payable in advance.

sale means a transfer for valuable consideration.

securities include stocks, funds and shares.

short lease is a lease:

- (a) for a term of 3 years or less;
- (b) from year to year or a shorter period; or
- (c) a lease created by parol taking effect in possession, for a term not exceeding 3 years, including any option to renew.

Note: 'taking effect in possession' includes an immediate entitlement to possession.

Note: a short lease creates a legal interest in land.

title deed includes a certificate of title to, or deed of grant in respect of, registered land.

trustee corporation means the public trustee and any corporation authorised by the *Trustee Companies Act 1968* to administer the estates of deceased persons and other trust estates.

valuable consideration does not include a nominal consideration in money.

unregistered land means land that has been granted in fee simple and is not registered land or land granted in trust under the Land Act.