

NOT GOVERNMENT POLICY

2016

Property Law Review  
Issues Paper

*Property Law Act 1974 (Qld)* – Sales  
of land and other related provisions

Commercial and Property Law  
Research Centre  
QUT Law

## Preface

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

The members of the Centre who authored this paper are:

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

The Centre gratefully acknowledges the contribution of Stephen Lumb, Barrister, Brisbane in relation to the review of section 70 of the *Property Law Act 1974* (Qld).

# Property Law Act 1974 (Qld) – Sales of Land and other related provisions

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## Attorney-General's foreword

The laws that regulate how we buy, sell and deal with property have a significant impact on the lives of everyday Queenslanders.

Efficient property laws promote confidence in the property sector, and benefit the community at large.

When the *Property Law Act 1974* came into force, it represented a major consolidation and modernisation of Queensland's property laws.

Since then, there have been significant changes in conveyancing and business practice. The laws and social conditions around which some provisions were based have also changed.

It is timely to consider whether there are some provisions of the Act that have now outlived their usefulness and are no longer practical or relevant to modern property transactions.

The Queensland University of Technology (QUT) Commercial and Property Law Research Centre is examining these laws as part of its comprehensive law review of Queensland's property laws.

The review is an important step towards creating a simpler, more accessible and more efficient property law framework for this State.

The Issues Paper - *Property Law Act 1974 (Qld) – Sales of land and other related provisions*, which I release today, is the starting point for this aspect of the review.

This Issues Paper is focussed on certain provisions of the Act that directly involve the sale of land and covenants affecting land which may be redundant or in need of reform.

I anticipate further consultation will follow on other issues concerning the *Property Law Act 1974* identified by QUT as being in need of review.

The Government values the expert knowledge and experience which the QUT brings to the review of this complex area of the law.

The Government is pleased to be joining with QUT in this endeavour and thanks QUT's Commercial and Property Law Research Centre for its ongoing work on the property law review.

I encourage interested members of the public and stakeholders to become involved and provide feedback on the issues and questions raised.

**Hon Yvette D'Ath**

**Attorney-General and Minister for Justice and Minister for Training and Skills**



**Hon Yvette D'Ath**  
**Attorney-General and Minister**  
**for Justice and Minister for**  
**Training and Skills**

## How to make a submission

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

The issues raised are not intended to be exhaustive. If you think there are other opportunities to improve the sections of the *Property Law Act 1974* (Qld) that directly involve the sale of land and covenants affecting land, please include these in your response.

The closing date for submissions is 30 August 2016.

### ***Where to send your submission***

You may lodge your submission by email or post.

The email address for submissions is: [propertylawreview@justice.qld.gov.au](mailto:propertylawreview@justice.qld.gov.au)

Alternatively, you can post your submission to:

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

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

### ***Privacy Statement***

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

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

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

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# 1. Background

## 1.1. Review of Queensland Property Laws

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

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

This Issues Paper is concerned with the provisions of the PLA that directly involve the sale of land and covenants affecting land. The relevant sections considered in this paper are concentrated in Part 6, Divisions 1, 2, 3 and 4 of the PLA as follows:

1. Division 1 – section 53;
2. Division 2 – sections 56, 57A and 58;
3. Division 3 – sections 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70 and 70A;
4. Division 4 – sections 71, 71A, 72, 73, 74, 75 and 76.

As section 59, relating to the requirements for writing derived from the *Statute of Frauds 1677*, is included it is also necessary to incorporate sections 10 and 11 into this Issues Paper. The paper also considers the issues relating to the enforceability of the burden of a positive covenant and the effect of inoperative computers systems in the context of electronic conveyancing.

A primary purpose of this Issues Paper is to obtain feedback from stakeholders and other interested parties to the specific questions set out in the paper. The information obtained as part of this consultation process will be considered and used for the purpose of the final report setting out recommendations in relation to the sections identified above.

## Part A – Instruments required to be in writing

Part A considers the provisions of the PLA which require instruments, contracts and guarantees to be in writing to be effective. These sections are:

- Section 10 – Assurances of land to be in writing;
- Section 11 – Instruments required to be in writing;
- Section 56 – Guarantees to be in writing; and
- Section 59 – Contracts for sale etc. of land to be in writing.

These provisions all originated from the *Statute of Frauds 1677* which was intended, amongst other objectives, to prevent fraud and perjury by ensuring it was not possible to prove the contents of an agreement by oral evidence only.

## 2. Section 10 – Assurances of land to be in writing

### 2.1. Overview and purpose

Section 10 of the PLA provides:

- (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 an 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 Queensland Law Reform Commission (**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.<sup>1</sup>

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

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<sup>1</sup> 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.



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in land to be in writing and signed by the assignor, grantor, etc.<sup>2</sup> 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.<sup>3</sup>

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 made.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup> 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’.<sup>7</sup>

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<sup>2</sup> 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.

<sup>3</sup> 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.

<sup>4</sup> G.H.L. Fridman, ‘The Necessity for Writing in Contracts within the Statute of Fraud’ (1985) 35 *University of Toronto Law Journal* 43, 47.

<sup>5</sup> G.H.L. Fridman, ‘The Necessity for Writing in Contracts within the Statute of Fraud’ (1985) 35 *University of Toronto Law Journal* 43, 47.

<sup>6</sup> 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.

<sup>7</sup> 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.

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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.<sup>8</sup> 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;<sup>9</sup> and
- ‘conveyance’ includes a transfer of an interest in land, and any assignment, appointment, lease, settlement, or other assurance in writing of any property.<sup>10</sup>

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; and
- a vesting order.<sup>11</sup>

## 2.2. Is there a need for reform?

### 2.2.1. Section 10 applies only to ‘old system land’

An assurance taking effect under ‘any Act or Commonwealth Act’ is expressly excluded from the scope of section 10(1) of the PLA.<sup>12</sup> 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. 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*’.<sup>13</sup> 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.<sup>14</sup>

The extent of old system 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.

### 2.2.2. Is requirement for an assurance to be made by deed 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.<sup>15</sup> This is not relevant to registered land which, under the *Land*

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<sup>8</sup> *Property Law Act 1974* (Qld) s 10(1).

<sup>9</sup> *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.

<sup>10</sup> *Property Law Act 1974* (Qld) sch 6.

<sup>11</sup> *Property Law Act 1974* (Qld) s 10(2).

<sup>12</sup> *Property Law Act 1974* (Qld) s 10(2)(e).

<sup>13</sup> *Conveyancing Act 1919* (NSW) s 23B(3).

<sup>14</sup> Stanley Robinson, *The Property Law Act Victoria* (The Law Book Company, 1992) 100 (which referred to the *Transfer of Land Act 1958* (Vic)).

<sup>15</sup> *Conveyancing Service: New South Wales* (eds) PW Young, AF Cahill and GD Newton, Lexisnexis Butterworths (looseleaf) [11-301].

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*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.<sup>16</sup>

### 2.3. Other jurisdictions

All other jurisdictions, apart from the Australian Capital Territory, have a similar provision to section 10 of the PLA.<sup>17</sup>

### 2.4. Options

In light of the fact that there is, to our knowledge, practically no old system land remaining in Queensland, there is some uncertainty regarding the utility of section 10 of the PLA. The provision has not been the subject of judicial consideration in Queensland. There are two potential options for section 10 which are considered further below.

#### 2.4.1. Option 1 – repeal the section

This option would require the repeal of the section. This approach would proceed on the basis that in the absence of any old system land remaining in Queensland, the section no longer has any function. In order to avoid any uncertainty, if there is any old system land remaining in Queensland then this could be dealt with legislatively by requiring any unregistered land to be converted to registered land before any dealing in relation to the land can be registered. Further, any relevant exceptions in section 10(2) can be moved to section 11(2) in the PLA.<sup>18</sup>

#### 2.4.2. Option 2 – retain the section

Retain the section on the basis that it does not cause any harm or mischief.

### Questions

1. Should section 10 of the PLA be retained?
2. Do you think that section 10 of the PLA serves any practical purpose?
3. Are you aware of any issues which might be raised by repealing section 10 of the PLA?
4. Should any of the provisions in section 10(2) be relocated to another formality provision such as section 11 of the PLA?

<sup>16</sup> See *Land Title Act 1994* (Qld) s 181 and *Land Act 1994* (Qld) s 301.

<sup>17</sup> 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).

<sup>18</sup> For example, subsection 10(2)(b) of the *Property Law Act 1974* (Qld) relating to ‘a surrender by operation of law, including a surrender which may, by law, be effective without writing’ may still be relevant.

## 3. Section 11 – Creation or disposal of interest in land to be in writing

### 3.1. Overview and purpose

Section 11 of the PLA provides:

- (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.

This is another provision re-enacted from the Statute of Frauds.<sup>19</sup> 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...’.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup> However, the interest in section 11 was limited primarily to section 11(1)(c) as the QLRC considered

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<sup>19</sup> See *Statute of Frauds 1677* ss 3, 7, 8 and 9.

<sup>20</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 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 disponent’.

<sup>21</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 8.

<sup>22</sup> 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).

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that most of the problems of interpretation 'revolve around s 11(1)(c)'.<sup>23</sup> Some of the problems identified at the time included the scope of its coverage (equitable interests in personalty as well as 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.<sup>24</sup> The recommendation to repeal section 11(1)(c) was not implemented.

An overview of the operation of the section is below.<sup>25</sup>

### 3.1.1. 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)<sup>26</sup> and the disposition of existing interests. The terms '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 Part 3.2.1 below. Disposition or creation of an interest in land at law is also subject to the requirements of the *Land Title Act 1994* relating to registration.<sup>27</sup>

### 3.1.2. 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'<sup>28</sup> and is evidentiary in purpose.<sup>29</sup> In this respect, the subsection is not concerned with the creation or validity of the actual instrument which declared the trust.<sup>30</sup>

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<sup>23</sup> Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1986*, Report No 37 (1987) 18.

<sup>24</sup> 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.

<sup>25</sup> 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, 4<sup>th</sup> ed, 2002).

<sup>26</sup> 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) [2.170]. See also *Adamson v Hayes* (1972) 130 CLR 276.

<sup>27</sup> Refer to *Land Title Act 1994* (Qld) s 181.

<sup>28</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [2.180].

<sup>29</sup> New South Wales Conveyancing Law and Practice (ed) Geoff Lindsay, CCH (looseleaf) CCH [690].

<sup>30</sup> New South Wales Conveyancing Law and Practice (ed) Geoff Lindsay, CCH (looseleaf) CCH [690].

### 3.1.3. Subsection 11(1)(c) - Disposition of trust or equitable interest

This subsection covers the dispositions of equitable interests in land, trusts or personal property<sup>31</sup> which exist at the time of the disposition. It does not apply to the creation of these interests or to dispositions of legal interests.<sup>32</sup>

### 3.1.4. 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).

#### Question

**5. Do you have any comments regarding the operability of, and interaction between, subsections 11(1)(a), (b) and (c)?**

## 3.2. Is there a need for reform?

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.

### 3.2.1. 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'

<sup>31</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [2.190].

<sup>32</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [2.190].

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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;
- 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).<sup>33</sup> 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; and
- 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.<sup>34</sup>

The Law Reform Commission of Victoria (**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.<sup>35</sup> 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;<sup>36</sup>
- 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;<sup>37</sup>
- 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*;<sup>38</sup> and
- 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.<sup>39</sup>

Although the VLRC proposed the repeal of section 126 of the *Instruments Act 1958* (Vic), its final report in 1989<sup>40</sup> 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

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<sup>33</sup> 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.

<sup>34</sup> Nicholas Seddon, 'Contracts for the Sale of Land: Is a Note or Memorandum Sufficient?' (1987) 61 *Australian Law Journal* 406, 413.

<sup>35</sup> 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.

<sup>36</sup> Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No 8 (1988) 5.

<sup>37</sup> Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No 8 (1988) 5.

<sup>38</sup> Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No 8 (1988) 6.

<sup>39</sup> Victorian Law Reform Commission, *Sale of Land*, Discussion Paper No 8 (1988) 6.

<sup>40</sup> Victorian Law Reform Commission, *Sale of Land*, Report No 20 (June 1989).

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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.<sup>41</sup> The recommendation was not implemented.

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.<sup>42</sup> The Commission 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; and
- 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.<sup>43</sup>

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.<sup>44</sup> 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.’<sup>45</sup> A summary of the Courts’ approach to interpreting and distinguishing the two sections includes:

- subsection 11(1)(a) and section 59 of the PLA sets 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 (ss11(1)(a)); and
  - Contracts for the sale or other disposition of land (s59);<sup>46</sup>

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<sup>41</sup> Victorian Law Reform Commission, *Sale of Land*, Report No 20 (1989) 9-10.

<sup>42</sup> 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).

<sup>43</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No 20 (2010) 32.

<sup>44</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No 20 (2010) 33.

<sup>45</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [2.170].

<sup>46</sup> *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.



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- ‘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’;<sup>47</sup>
- 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 agreement in relation to the creation of an interest in land.’<sup>48</sup> It will not apply if there is no more than an agreement to ‘assure property in the future’;<sup>49</sup>
- 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 s 11 of the *Property Law Act*’.<sup>50</sup> Further, it is not possible to dispose of land or an interest in land unless it has been created; and
- there is case law support for the position that the creation of an interest in land is not a disposition.<sup>51</sup>

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.<sup>52</sup> This is consistent with the approach advocated by Seddon that the 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.<sup>53</sup> 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 personality?;
- is the interest in the property being created or disposed of?;<sup>54</sup>
- is the agreement immediately creating an equitable interest in land or evidencing an oral agreement previously created?;

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<sup>47</sup> *Duff v Blinco (No.2)* (2007) 1 Qd.R 407, 415. See also *McLaughlin v Duffill* [2010] Ch 1, 8-9.

<sup>48</sup> 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.

<sup>49</sup> *Conveyancing Service: New South Wales* (eds) PW Young, AF Cahill and GD Newton, Lexisnexis Butterworths (online) [10-451].

<sup>50</sup> *Duff v Blinco (No.2)* (2007) 1 Qd.R 407, 415.

<sup>51</sup> *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 & Ors* (2001) 11 BPR 20,721, 20,750-1.

<sup>52</sup> 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].

<sup>53</sup> 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).

<sup>54</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [2.180].

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- is the agreement disposing of or selling an interest in land already created?; and
- is the agent lawfully authorised in writing or merely lawfully authorised?<sup>55</sup>

### Questions

6. Do you understand how section 11(1)(a) operates and interacts in relation to section 59 of the PLA?
7. Do you think the issues identified in relation to the interaction between section 11(1)(a) and section 59 of the PLA are sufficient to require the amendment of section 11?
8. Should a form of writing be required for the creation and disposition of interests in land?

### 3.2.2. 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 overlaps, ambiguities and lack of consistency in some instances between the subsections.<sup>56</sup> 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;<sup>57</sup>
- 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).<sup>58</sup>

### Questions

9. Do subsections 11(1)(a), (b) and (c) operate in an unsatisfactory manner?
10. Do you think there is any confusion or overlap in relation to the operation of section 11(1)?

<sup>55</sup> W D Duncan, 'An Agreement to Create an Interest or a Disposal of an Interest?' (2007) 21(9) *Australian Property Law Bulletin* (newsletter).

<sup>56</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Consultation Paper (2010) 55.

<sup>57</sup> *Acts Interpretation Act 1954* (Qld) s 36 and Sch 1.

<sup>58</sup> 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).

### 3.3. Other jurisdictions

#### 3.3.1. Australia

All other Australian jurisdictions have an equivalent to section 11 of the PLA in substantially the same terms.<sup>59</sup>

#### 3.3.2. 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.

### 3.4. Options

There are a number of possible approaches to addressing the concerns raised in relation to section 11 of the PLA.

#### 3.4.1. Option 1 - Retain section 11 without any amendment

Despite 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, 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.

#### Questions

11. Do you think section 11 should be retained in its current form? If so, why?
12. Do you think section 11 should be amended? If so, why and do you have any suggestions regarding amendment?

#### 3.4.2. Option 2 – Amend section 11(1) to resolve the potential problems with section 59 of the PLA and address potential interpretation issues between subsections 11(1)(a), (b) and (c).

Section 11 could be amended by clarifying the interaction between the subsections and section 59. Further, based on the discussion in Part 2.4 above in relation to the utility of section 10 of the PLA, there may also need to be an additional exception added to section 11(2), notably the current subsections 10(2)(b) and (c).

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<sup>59</sup> *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.

**Question**

**13. Do you think there are any advantages to amending section 11 to address these issues?**

**3.4.3. Option 3 – Repeal sections 11 and 59 and replace them with an alternative provision which address all the uncertainties associated with the provisions.**

The purpose of repealing and redrafting the provisions is to create sections that:

- are drafted in clear language;
- make sense and are simple to understand;
- clarify the issue of the ‘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 contracts for the sale of land etc. be evidenced by writing); and
- clarify the scope of subsections 11(1)(a), (b) and (c);

New Zealand repealed and replaced its corresponding section 11 and section 59 provisions following a number of reviews by the New Zealand Law Reform Commission.<sup>60</sup> 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 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.<sup>61</sup>

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.<sup>62</sup>

<sup>60</sup> See New Zealand Law Commission, *The Property Law Act 1952*, Preliminary Paper (1991); New Zealand Law Commission, *A New Property Law Act*, Report No 29 (1994); New Zealand Law Commission, *Repeal of the Contracts Enforcement Act 1956*, Preliminary Paper No 30 (2007); Explanatory Note, Property Law Bill 2007 (NZ).

<sup>61</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No 20 (2010) 57.

<sup>62</sup> 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...’.

**Questions**

14. Do you think repealing sections 11 and 59 and replacing them with new provisions is an appropriate response to the current issues raised by the sections?
15. Do you think section 24 and 25 of the *Property Law Act 2007* (NZ) might provide a starting point for a new approach to sections 11 and 59?

## 4. Section 59 contracts for the sale of land etc. to be in writing

### 4.1. Overview and purpose

Section 59 of the PLA provides that:

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.<sup>63</sup> 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.<sup>64</sup> 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.<sup>65</sup> The strict application of the requirement was relaxed by the doctrine of part performance in order to address unfair outcomes.<sup>66</sup> 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.'<sup>67</sup> As the doctrine is equitable any remedy is at the discretion of the court.<sup>68</sup>

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 memorandum or note of the contract should be in writing; and
- the contract etc. should be signed by, or by a 'lawfully authorised agent' of, the party charged upon it.

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. However, as indicated above, the doctrine of part performance developed over time to assist parties to enforce their contracts in certain circumstances, despite non-compliance with the requirements in the section 59. The equitable relief usually provided where adequate acts of part performance are established is specific

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<sup>63</sup> 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*.

<sup>64</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 182.

<sup>65</sup> 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.

<sup>66</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 182.

<sup>67</sup> United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land*, Working Paper No. 92 (1985) 9.

<sup>68</sup> United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land*, Working Paper No. 92 (1985) 10.

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performance of the contract in order to enforce the sale or purchase of the property.<sup>69</sup> Section 6(d) of the PLA expressly preserves the law relating to part performance.

In 1970 the QLRC reviewed and reported on a number of the Imperial statutes in force in Queensland (**QLRC Report No.1**).<sup>70</sup> The QLRC Report No. 1 set out a proposed Bill to repeal, amongst other things, the Statute of Frauds.<sup>71</sup> The QLRC also recommended the retention of the requirement for writing in relation to contracts for the sale or other disposition of land.<sup>72</sup> 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;<sup>73</sup>
- the application of the doctrine of part performance which addressed many of the worst features of the legislation;<sup>74</sup> and
- maintaining consistency with the position adopted in other jurisdictions to retain the provision including the United Kingdom and New South Wales.<sup>75</sup>

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**).<sup>76</sup> 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 in the PLA.

The feedback from the Working Paper Bill was included in the subsequent QLRC Report produced in 1973.<sup>77</sup> The form of the proposed section 59 was not altered and the rationale for the retention of

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<sup>69</sup> Lionel Bentley 'Informal Dealings with Land After Section 2' (1990) 10 *Legal Studies* 325, 327.

<sup>70</sup> 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).

<sup>71</sup> 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*.

<sup>72</sup> 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.

<sup>73</sup> 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.

<sup>74</sup> 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.

<sup>75</sup> 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.

<sup>76</sup> 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).

<sup>77</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973).

section 59 replicated the reasons set out in the QLRC Report No. 1.<sup>78</sup> The PLA was subsequently enacted in 1974 and section 59 has remained in substantially the same form since that time.<sup>79</sup>

## 4.2. Is there a need for reform?

### 4.2.1. Criticisms of section 59

There are a number of criticisms that have been levelled against the requirements in section 4 of the Statute (and as a consequence 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.

#### 4.2.1.1. Principle object of the Statute of Fraud is no longer relevant

As discussed in greater detail in Part 4.1 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.<sup>80</sup> 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'.<sup>81</sup> 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.

#### 4.2.1.2. 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.<sup>82</sup> In those types of cases, section 59 of the PLA would be used as a 'technical defence' to an otherwise potentially 'meritorious claim'.<sup>83</sup> Zelling J in his minority report on the repeal of the South Australian section 59 equivalent provision indicated:

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.<sup>84</sup>

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<sup>78</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 49.

<sup>79</sup> A minor amendment was made by the *Property Law Act Amendment Act 1985* (Qld) s 4.

<sup>80</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) 376 [11.1] and Gerwyn Griffiths, 'A Ten Year Miscellany' (2000) 8 (1) *Australian Property Law Journal* 49, 49.

<sup>81</sup> 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; New Zealand Law Commission, *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 2.

<sup>82</sup> British Columbia Law Reform Commission, *Report on the Statute of Frauds LRC 33* (1977) 56.

<sup>83</sup> New Zealand Law Commission, *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 5.

<sup>84</sup> South Australia Law Reform Committee, *34<sup>th</sup> 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].



#### **4.2.1.3. 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 Part 3.2.1 above.<sup>85</sup>

#### **4.2.1.4. 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.<sup>86</sup>

#### **4.2.2. 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.

##### **4.2.2.1. Established body of case law**

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.

##### **4.2.2.2. Consistency**

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.<sup>87</sup> 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.

##### **4.2.2.3. Reform in the United Kingdom has raised other issues associated with the requirement for writing**

Even though the Law Commission in the United Kingdom undertook an extensive review of 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

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<sup>85</sup> New Zealand Law Commission, *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 8.

<sup>86</sup> New Zealand Law Commission, *Repeal of the Contracts Enforcement Act 1956 A Discussion Paper*, Preliminary Paper 30 (1997) 8.

<sup>87</sup> New South Wales, South Australia and the Australian Capital Territory no longer have any formality requirements in relation to guarantees.

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different set of issues and arguably has not provided improved certainty or workability of the requirement for writing.<sup>88</sup> 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).<sup>89</sup> 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 Lord decisions<sup>90</sup> 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;<sup>91</sup>
- it is potentially easier for individuals to ‘escape’ their contractual obligations by identifying expressly agreed terms that were not included in the final contract.<sup>92</sup> Related to this issue is the extent to which ‘deliberately’ excluded terms actually form part of the land contract;<sup>93</sup> and
- 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.<sup>94</sup>

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.

### 4.2.2.4. 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

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<sup>88</sup> 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.

<sup>89</sup> Mark Pawlowski, ‘Oral Agreements: Estoppels, Constructive Trusts and Restitution’ (2008) *Landlord & Tenant Review* 163, 163.

<sup>90</sup> *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.

<sup>91</sup> 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.

<sup>92</sup> *North Eastern Properties Ltd v Coleman* (CA) [2010] 1 WLR 2715, 2724-2725.

<sup>93</sup> *North Eastern Properties Ltd v Coleman* (CA) [2010] 1 WLR 2715, 2724-2725.

<sup>94</sup> Martin Dixon, ‘To Write or Not to Write?’ (2013) *The Conveyancer and Property Lawyer* 1, 2.

requirement for writing also provides a 'cautionary' function as it provides parties to properly consider the transaction they intend to enter into.<sup>95</sup>

### 4.3. Other jurisdictions

#### 4.3.1. Australia

All States and Territories in Australia require contracts for the sale of land to be in writing in order to be enforceable.<sup>96</sup> 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.<sup>97</sup>

There does not appear to be any move in these jurisdictions to review or alter these provisions.

#### 4.3.2. 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;<sup>98</sup>
- failure to comply with section 2 means that any non-complying contract is void;<sup>99</sup>
- 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).<sup>100</sup> As a consequence the doctrine of part performance is no longer available as no contractual obligation exists to enforce where section 2 has not been complied with;<sup>101</sup> and
- three categories of contract, short leases, sales at public auction and contracts regulated under the United Kingdom *Financial Services Act 1986*, are expressly excluded under section

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<sup>95</sup> M G Bridge, 'The Statute of Frauds and Sale of Land Contracts' *The Canadian Bar Review* 64 (1986) 58, 101.

<sup>96</sup> *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 (Property) Act 2006* (ACT) s 204; *Statute of Frauds 1677* (Imp) (WA) s 2.

<sup>97</sup> *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.

<sup>98</sup> In the case of exchanged contracts, the agreed terms must be in each document.

<sup>99</sup> See Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012) 629.

<sup>100</sup> Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012) 629.

<sup>101</sup> 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, 8<sup>th</sup> ed, 2012) 629.

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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.<sup>102</sup>

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 Reform Commission was asked to look at a proposed amendment to section 40 to assess whether there was a better alternative.<sup>103</sup> 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.<sup>104</sup> The Working Paper was followed by a Final Report by the Law Reform 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 Commission further recommended that failure to comply with the formalities requirements would render the contract void, rather than unenforceable.<sup>105</sup>

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;<sup>106</sup>
- 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

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<sup>102</sup> Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012) 633-634.

<sup>103</sup> 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.

<sup>104</sup> 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.

<sup>105</sup> 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.

<sup>106</sup> 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.

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it inconsistent and unsupported by the enactment itself.<sup>107</sup> 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; and
- 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.<sup>108</sup> 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.'<sup>109</sup>

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:<sup>110</sup>

- 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;<sup>111</sup>

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<sup>107</sup> United Kingdom Law Commission, *Transfer of Land Formalities for Contracts for Sale etc. of Land* Working Paper No. 92 (1985) 22.

<sup>108</sup> *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.

<sup>109</sup> 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.

<sup>110</sup> United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 6.

<sup>111</sup> United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 7.

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- recognition that land transactions are in a more ‘serious’ category of transactions and therefore require formalities to reflect this; and
- 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.<sup>112</sup> The Law Commission considered that the equitable doctrines were already sufficiently strong and developed to enable the court to require that land be transferred.<sup>113</sup>

### Questions

16. Do you think the reasoning for the repeal of section 40 of the *Law of Property Act 1925* (UK) and its replacement with section 2 of the *Law of Property (Miscellaneous Provisions) Act 1989* (UK) is reasonable?
17. Do you have any view as to whether retaining a writing requirement in relation to contracts for sale of land in the United Kingdom has resolved some of the concerns associated with section 40 of the *Law of Property Act 1925* (UK)?

## 4.4. Options

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. Further consideration should be given to the extent to which the provision raises any significant issues in practice.

### Questions

18. Do you think the formality requirements set out in section 59 of the PLA are necessary or relevant anymore?
19. Have you identified any significant issues with section 59 of the PLA which may justify the repeal of the section?
20. Do you think section 59 of the PLA should be retained, revised, replaced or simply repealed with no replacement?
21. Are you aware of any other criticisms of section 59 of the PLA that have not been identified in the discussion above?

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<sup>112</sup> United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 18.

<sup>113</sup> United Kingdom Law Commission, *Transfer of Land Formalities For Contracts for Sale etc. of Land* Final Report No. 164 (1987) 18.

## 5. Part 2 - 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 satisfies the requirement for a contract or note or memorandum of that contract to be:

- in writing; and
- signed by the party.<sup>114</sup>

### 5.1. Will an electronic communication 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)*<sup>115</sup> to include 'any mode of representing or reproducing words in a visible form'. Based on this definition, an email, reproduction on computer screen or other electronic format that can be read will probably satisfy the requirement for writing in section 59 of the PLA.<sup>116</sup>

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'<sup>117</sup> and generally promote commercial certainty in an electronic environment.<sup>118</sup> Section 11 of the *Electronic Transactions (Queensland) Act 2001 (Qld) (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).<sup>119</sup>

In the context of contract formality provisions, the ETA will only be relevant where a writing requirement is given by an electronic communication, for example by email. The relevant ETA provisions have the effect that if a person is required to give information in writing, that requirement 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:

- (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.<sup>120</sup>

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<sup>114</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) 392-393 [11.240].

<sup>115</sup> See Schedule 1 of the Act.

<sup>116</sup> This is consistent with the view expressed in case law. See for example *McGuren v Simpson* [2004] NSWSC 35.

<sup>117</sup> *Electronic Transactions (Queensland) Act 2001 (Qld)* s3(b).

<sup>118</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) [11.250].

<sup>119</sup> 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.

<sup>120</sup> *Electronic Transactions (Queensland) Act 2001 (Qld)* Sch 2.

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The scope of section 11 of the ETA was considered in *Conveyor & General Engineering Pty Ltd v Bastec Services Pty Ltd*.<sup>121</sup> McMurdo J considered whether material within a Dropbox formed part of an electronic communication for the purposes of section 11 of the ETA. In his 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.<sup>122</sup>

This will mean that the application of section 11 is limited to contract formed by electronic communication such as an email and will not extend to the situation where a contract is signed by parties on a website.

There are also other interpretative issues with the interaction between section 11 of the ETA and section 59. Section 59 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).<sup>123</sup> 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).<sup>124</sup> 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.<sup>125</sup> 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.<sup>126</sup>

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 the ETA to section 59 potentially remains uncertain. Victoria has resolved this uncertainty beyond doubt through legislation.<sup>127</sup> 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

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<sup>121</sup> [2014] QSC 30.

<sup>122</sup> *Conveyor & General Engineering Pty Ltd v Bastec Services Pty Ltd* [2014] QSC 30, [28].

<sup>123</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) 395 [11.260].

<sup>124</sup> 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.

<sup>125</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) 395 [11.260].

<sup>126</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> 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 *Electronic Transactions (Queensland) Act 2001* (Qld) and was satisfied that the agreement was ‘signed’. [426 of decision]

<sup>127</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) 396 [11.268].



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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.'<sup>128</sup> 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.<sup>129</sup>

In Queensland currently, there is potential uncertainty regarding the extent to which the ETA will apply to section 59 transactions. It is not clear whether the ETA needs to be amended to clarify this issue. Equivalent clarification has not been enacted in the other states and territories.<sup>130</sup>

### Questions

**22. Do you think there is a need to clarify whether the electronic transaction legislation applies to section 59 of the PLA?**

**23. If so, do you think the amendment of section 59 of the PLA to include a provision similar to section 126(2) of the *Instruments Act 1958* (Vic) would be appropriate – that is:**

*(2) It is declared that the requirements of subsection (1) may be met in accordance with the Electronic Transactions (Queensland) Act 2001.*

**24. Do you think an alternative option might be to amend section 11 of the ETA in a way similar to the amendment made to the signature provisions in section 14(2) of that Act in 2013 – for example:**

*11(3) The reference in subsection (1) to a law that requires a person to give information in writing includes a reference to a law that provides consequences for the absence of writing.*

## **5.2. Will an electronic signature satisfy the 'signing' requirement in section 59 of the PLA?**

The issue in relation to electronic signature is whether this type of signature will satisfy formality requirements. Under section 59 of the PLA, as with the requirement for writing, failure to sign the contract will affect the enforceability of the agreement. Commentators have indicated that the functional requirements of a signature are that it:

<sup>128</sup> Explanatory Memorandum, Transfer of Land (Electronic Transactions) Bill (Vic), cl 1.

<sup>129</sup> 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.

<sup>130</sup> Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) 395 [11.260].

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- authenticates the document as the document of the 'signer'; and
- indicates an intention to be bound while 'guarding against later fraudulent attribution of the transaction to the party'.<sup>131</sup> This relates to the integrity of the document.

The term 'signature' is not defined in legislation but under the *Acts Interpretation Act 1954* (Qld) the word 'sign' includes 'the attaching of a seal and the making of a mark.' The general law in Australia regarding whether an electronic signature satisfies a statutory signature requirement is limited. In *McGuren v Simpson*<sup>132</sup> 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.'<sup>133</sup> However, it is uncertain whether this approach would be followed more generally within Australia in the context of land transaction legislation.<sup>134</sup>

The ETA includes provisions dealing with electronic signatures. Section 14(1) of the ETA provides, inter alia, that if a State law 'requires' a person's signature, the requirement is taken to have been met for an electronic communication if the following conditions are satisfied:

- the signature must identify the person and indicate approval;
- the signature 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.

Any potential uncertainty associated with the applicability of section 14 of the ETA to the formalities requirements in the PLA has been addressed through amendments to section 14 which occurred in 2013 in the following form:

(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.

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<sup>131</sup> 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/>

<sup>132</sup> See also further commentary on this case in Lindy Willmott, Sharon Christensen, Des Butler and Bill Dixon, *Contract Law* (Oxford University Press, 4<sup>th</sup> ed, 2013) 398 [11.723] and S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 201. 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/>.

<sup>133</sup> *McGuren v Simpson* [2004] NSWSC 35, [22].

<sup>134</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 203.

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The amendments to the ETA in 2013 (including section 14) were made to ‘implement model provisions to modernise electronic commerce laws.’<sup>135</sup> The effect of this amendment is to overcome any uncertainty regarding the way ‘require’ is interpreted and makes it clear that section 59 of the PLA would qualify as a State law that ‘requires’ signature.<sup>136</sup> However, the ETA does not resolve all issues associated with electronic signatures and the statutory formality requirements in relation to a signature.

### 5.3. Outstanding issues in relation to electronic signatures and section 59 of the PLA?

There are still a number of issues associated with electronic signatures which are not addressed through the ETA or at general law. These issues relate to uncertainty regarding the attachment or the logical association of the electronic signature with the document it is authenticating and the form of the electronic signature that will meet the functional requirements of a ‘manuscript signature under the common law.’<sup>137</sup>

#### 5.3.1. Signature attached to, or closely associated with, the electronic document

There is no provision which requires the electronic signature to be attached or associated with the electronic document. This is obviously relevant for the purposes of authenticating the electronic communication. Under the PLA, an important aspect of signature is that it is clearly affixed to the document and makes a mark on the document. If the signature is attached or closely associated with the document, it is arguably easier to identify any change to the signature or in the document. This is closely linked to the requirement of integrity and electronic signatures may not be attached in this way. This in turn may impact on the effectiveness of the signature to authenticate a document or maintain its integrity.<sup>138</sup>

Possible ways to address this might include defining the term ‘electronic signature’ in the ETA so that it expressly provides for the signature to be attached or associated with the electronic communication to serve as the method of authentication. Alternatively, section 14 of the ETA could be amended to require it to be attached to or logically associated with the communication.

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<sup>135</sup> Explanatory Notes, Justice and Other Amendment Bill 2013 (Qld) 2.

<sup>136</sup> 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).

<sup>137</sup> 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.

<sup>138</sup> 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/> 94. 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.

### 5.3.2. Functional equivalence

The key issue in relation to functionality relates to the reliability of the relevant signature. The ETA does not prescribe any specific form of technology and this can arguably create uncertainty and impede parties making an assessment of which method is appropriate for use in relation to a particular transaction.<sup>139</sup> This in turn raises an issue that a particular method of signing may not be considered reliable or appropriate in relation to a specific transaction.<sup>140</sup> This is ultimately a matter for a Court to decide where there is a dispute.<sup>141</sup> Some commentators have suggested that more specific criteria for the type of signature which will be effective in the ETA would assist with this issue.<sup>142</sup>

These issues are particularly relevant and critical against the backdrop of electronic contracting, including the process of online land auctions. Land contracts can be entered into electronically if it complies with the ETA. Potential problems arise where negotiations commence in paper writing and then negotiations continue through electronic means. There is no authority yet on issues as to whether the required consent as to method becomes an issue in this situation or the status of variations made.

### 5.4. 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.<sup>143</sup> 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. Another slightly different model for online auctions has been set up by AuctionWorks which is a complete online auction process.<sup>144</sup> 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. Accordingly, in both examples, the contract for sale of land is not signed electronically, although this is likely to be the next logical step.

It is likely that the online auction environment in Australia will continue to evolve. There is potential then for a contract for sale to be entered into electronically, other than by an exchange of email. For example, by signing a contract available in an online system or website. The current interpretation of section 11 of the ETA, as explained above, would preclude this method from falling within the scope of the provision and parties would have to rely upon the common law.<sup>145</sup> The current legislative environment may have difficulty accommodating evolving methods of electronic contract formation.

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<sup>139</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 205 citing A De Zilva. 'Electronic Transactions Legislation: An Australian Perspective' (2003) 37 *The International Lawyer* 1009.

<sup>140</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 205.

<sup>141</sup> *Getup Ltd v Electoral Commissioner* (2010) 268 ALR 797.

<sup>142</sup> 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].

<sup>143</sup> See <https://www.raywhite.com/liveauctions/faq/> accessed 10/12/14.

<sup>144</sup> See <https://www.auctionworksonline.net.au/> accessed 10/12/14.

<sup>145</sup> *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30.

**Questions**

25. Do you think the term 'electronic signature' should be defined in legislation to actually identify acceptable signatures or should the parameters be left to the Courts?
26. Should section 59 be amended to accommodate a situation where a contract is formed and signed electronically other than through email?

## 6. Section 56 – Guarantees to be in writing

### 6.1. Purpose and overview

Section 56 of the PLA provides:

(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 in 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’.<sup>146</sup> At the time the Statute of Frauds was introduced, there was no requirement that a contract be in writing (or any other particular form).<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> 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.<sup>150</sup> Although the QLRC held concerns about the possible jurisdictional differences arising from the recommendation for repeal in New South Wales,<sup>151</sup> it ultimately identified broader policy issues which supported retaining the requirement for writing. These policy issues

<sup>146</sup> *Statute of Frauds 1677* s 4.

<sup>147</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012), 834 [16.1].

<sup>148</sup> 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.

<sup>149</sup> 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.

<sup>150</sup> 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.

<sup>151</sup> 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.

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included the benefit of retaining some degree of 'formality and deliberation' in relation to a transaction that could impose serious obligations and which should not be undertaken or enforced lightly.<sup>152</sup>

The provision must be expressly pleaded if the defendant intends to rely upon it as a defence.<sup>153</sup> When the provision is successfully relied upon as a defence the effect is that the guarantee is valid but unenforceable.<sup>154</sup>

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

There is an extensive history of criticisms that have been levelled against the writing requirements in section 4 of the Statute of Frauds generally.<sup>155</sup> 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 term 'guarantee of another's liabilities of any kind' instead and this is reflected in section 56.<sup>156</sup> An overview of a number of the general criticisms of the writing requirement for guarantees is set out below.

#### 6.2.1. 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.<sup>157</sup> 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.<sup>158</sup>

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<sup>152</sup> 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.

<sup>153</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 838 [16.7], Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1350]. 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* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1340].

<sup>154</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 834 [16.1].

<sup>155</sup> See for example N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> 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.

<sup>156</sup> The Northern Territory is the only other jurisdiction that uses this word instead of the original description in section 4 of the *Statute of Frauds 1677*.

<sup>157</sup> John Phillips 'Guarantees: Protecting the Bankers' (2012) *Journal of Business Law* 248, 250.

<sup>158</sup> John Phillips 'Guarantees: Protecting the Bankers' (2012) *Journal of Business Law* 248, 250-251.

### 6.2.2. 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.<sup>159</sup> 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.<sup>160</sup> 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.<sup>161</sup> 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.<sup>162</sup> 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.<sup>163</sup>

The introduction of the requirement under section 55(1) of the *National Credit Code*<sup>164</sup> (**National Credit Code**) 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).<sup>165</sup> This means that both guarantees and indemnities must satisfy the writing requirement imposed under the National Credit Code.

Section 55 of the National Credit Code will apply to a guarantee if:

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<sup>159</sup> 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).

<sup>160</sup> See N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 834; Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420.

<sup>161</sup> John Phillips, ‘Guarantees: Protecting the Bankers’ (2012) *Journal of Business Law* 248, 249.

<sup>162</sup> 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).

<sup>163</sup> See New South Wales, Australian Capital Territory and South Australia. See N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 840 [16.9] 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.’

<sup>164</sup> 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, 4<sup>th</sup> ed, 2011), vii.

<sup>165</sup> See National Credit Code s 204.



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- it guarantees obligations under a credit contract; and
- the guarantor is a natural person or a strata corporation.<sup>166</sup>

A 'credit contract' is a contract under which credit is or may be provided where:

- the debtor is a natural person<sup>167</sup> 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.<sup>168</sup>

A guarantee which falls within the scope of the National Credit Code is not enforceable unless it complies with section 55.<sup>169</sup> 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.<sup>170</sup> 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.<sup>171</sup> 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).<sup>172</sup> 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.<sup>173</sup>

There are other consumer protections provided to vulnerable guarantors through voluntary industry specific Codes. For example, both the Code of Banking Practice<sup>174</sup> and Customer Owned Banking Code of Practice<sup>175</sup> have provisions which cover guarantors and set out the process adopted by the relevant

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<sup>166</sup> National Credit Code s 8.

<sup>167</sup> A natural person is defined to include an individual or a body corporate: National Credit Code s 211.

<sup>168</sup> 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.

<sup>169</sup> National Credit Code s 55(4).

<sup>170</sup> 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.

<sup>171</sup> See *National Credit Code*, s 55(3) and National Consumer Credit Protection Regulations 2010 (Cth) reg 81.

<sup>172</sup> See section 7A(2) of the *Electronic Transactions Act 1999* (Cth) and reg 4 and sch 1 of the *Electronic Transactions Regulation 1999* (Cth).

<sup>173</sup> *Electronic Transactions Regulations 1999* (Cth), reg 4 and sch 1 and Andrea Beatty and Andrew Smith *Annotated National Credit Code* (Butterworths, 4<sup>th</sup> ed, 2011) 466 [187.10].

<sup>174</sup> This Code applies to banks.

<sup>175</sup> This Code applies to Australian customer-owned banking institutions which include mutual building societies, credit unions and mutual banks).

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.<sup>176</sup>

### Question

**27. Do you think section 55 of the National Credit Code would adequately address concerns associated with 'vulnerable' guarantors if section 56 of the PLA was repealed?**

### 6.2.3. 'Arbitrary' distinction between a guarantee and an indemnity<sup>177</sup>

Another criticism of the provision is that it makes an 'arbitrary' distinction between a guarantee and an indemnity.<sup>178</sup> 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.<sup>179</sup> Generally, an indemnity will impose more onerous obligations than a guarantee but there is no requirement that these kinds of contracts be in writing.<sup>180</sup> Further, distinguishing between a guarantee and an indemnity is not always a simple process and may depend on 'fine points of drafting'.<sup>181</sup> 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.<sup>182</sup>

### 6.2.4. 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 has 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.<sup>183</sup> Some criticisms or problems with section 4 of the Statute of Frauds (which apply equally to section 56 of the PLA) include:

<sup>176</sup> See *Customer Owned Banking Code of Practice* (2014), cl 12 and *Code of Banking Practice* 2013, cl 31.

<sup>177</sup> For a detailed discussion of this issue see Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6<sup>th</sup> ed, 2011) 56-59.

<sup>178</sup> Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420.

<sup>179</sup> Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420.

<sup>180</sup> Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420.

<sup>181</sup> 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, 6<sup>th</sup> ed, 2011) 56.

<sup>182</sup> John Phillips, 'Guarantees: Protecting the Bankers' (2012) *Journal of Business Law* 248, 251 - 252.

<sup>183</sup> 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, 10<sup>th</sup> ed, 2012) 846 [16.18].

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- that the judicial interpretation of it has required ‘sophistry’ in order to exclude and limit its application.<sup>184</sup> For example, the guarantee must be the ‘main object of the transaction’ rather than incidental to it in order for the provision to apply.<sup>185</sup> If it is only incidental, the section will not apply and an oral guarantee may be enforceable;<sup>186</sup>
- the difficulty associated with distinguishing guarantees and indemnities;
- the distinction between a promise which comprises an original promise<sup>187</sup> and one which is collateral<sup>188</sup> – that is, supporting the primary liability of a third party.<sup>189</sup> The formality requirements will not apply to an ‘original promise’;<sup>190</sup>
- the liability guaranteed must be to the creditor – that is, the guarantee is to the creditor against the default of some third party;<sup>191</sup> and
- the uncertainty regarding the availability of part performance in the case of guarantees.<sup>192</sup>

### Question

**28. Are you able to identify any other criticisms or problems in relation to the requirement for writing in section 56 of the PLA?**

## 6.3. Other jurisdictions

### 6.3.1. Australia

The Australian jurisdictions do 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

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<sup>184</sup> Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420.

<sup>185</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 844 [16.16].

<sup>186</sup> Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420, 433.

<sup>187</sup> 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 his or 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* (Law Book Co, 3<sup>rd</sup> ed, 1996) 70-71.

<sup>188</sup> Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420.

<sup>189</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 843 [16.15].

<sup>190</sup> Graham McBain, ‘Abolishing the Statute of Frauds 1677 section 4’ (2010) 5 *Journal of Business and Law* 420, 435.

<sup>191</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 841 [16.11].

<sup>192</sup> 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...’.

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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'.<sup>193</sup> Western Australia has retained section 4 of the Statute of Frauds in relation to guarantees and Tasmania and Victoria have re-enacted the provision.<sup>194</sup> 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.<sup>195</sup> 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';<sup>196</sup> and
- the writing requirement and the Statute had led to 'innumerable abuses'.<sup>197</sup>

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.<sup>198</sup>

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.<sup>199</sup> 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.<sup>200</sup>

In 1975 the Law Reform Committee of South Australia looked at the provision and recommended its repeal.<sup>201</sup> The Committee identified a number of issues in relation to the writing requirement for guarantees including:

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<sup>193</sup> *Law of Property Act (NT)* s 58.

<sup>194</sup> See *Law Reform (Statute of Frauds) Act 1962 (WA)* s 2; *Mercantile Law Act 1935 (Tas)* s 6; *Instruments Act 1958 (Vic)* s126(1).

<sup>195</sup> New South Wales Law Reform Commission *Application of Imperial Acts* Report (1967) 99.

<sup>196</sup> New South Wales Law Reform Commission *Application of Imperial Acts* Report (1967) 98.

<sup>197</sup> New South Wales Law Reform Commission *Application of Imperial Acts* Report (1967) 98.

<sup>198</sup> 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.

<sup>199</sup> 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).

<sup>200</sup> ACT Law Reform Commission, *Report on the Imperial Acts in Force in the Australian Capital Territory and Supplementary Report* Report (1973) 35.

<sup>201</sup> South Australian Law Reform Committee, *34<sup>th</sup> Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

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- 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’;<sup>202</sup>
- 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;<sup>203</sup>
- the extensive list of exceptions that had been developed to avoid the effect of the Statute;<sup>204</sup> and
- 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’.<sup>205</sup>

The effect of the removal of the writing requirement for guarantees is that a guarantor can be sued on an oral guarantee.<sup>206</sup> However, in practice, the majority of guarantees (at least in the commercial context) are in writing.<sup>207</sup> 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.<sup>208</sup>

### 6.3.2. 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:<sup>209</sup>

- 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;

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<sup>202</sup> South Australian Law Reform Committee, *34<sup>th</sup> 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.

<sup>203</sup> South Australian Law Reform Committee, *34<sup>th</sup> Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

<sup>204</sup> South Australian Law Reform Committee, *34<sup>th</sup> Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

<sup>205</sup> South Australian Law Reform Committee, *34<sup>th</sup> Report Relating to the Repeal of the Statute of Frauds and Congate Enactments in South Australia*, Report (1975) 6.

<sup>206</sup> New South Wales Law Reform Commission, *Representations as to Credit* Report No. 57 (1988) (Community Law Reform Program (14<sup>th</sup> report)) [3.1].

<sup>207</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> 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].

<sup>208</sup> N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot Law of Contract* (Butterworths, 10<sup>th</sup> ed, 2012) 840 [16.9].

<sup>209</sup> 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.

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- 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; and
- 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.<sup>210</sup> 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.<sup>211</sup> 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;<sup>212</sup>
- requiring a guarantee to be in writing would give the 'proposed surety an opportunity for thought';<sup>213</sup> and
- 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.'<sup>214</sup>

### Question

**29. Are you aware of any problems arising from the repeal of the *Statute of Frauds 1677* requirement that guarantees must be in writing in order to be enforceable in New South Wales, South Australia and the Australian Capital Territory?**

## 6.4. Options

### 6.4.1. Option 1 – Repeal section 56

One option in relation to section 56 of the PLA is to repeal the provision for the reasons set out above.

### 6.4.2. Option 2 – Retain section 56 without any amendment

Despite the criticisms above, there are still a number of factors which may support the retention of section 56 of the PLA in its current form. 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

<sup>210</sup> Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6<sup>th</sup> ed, 2011) 50 [3-002].

<sup>211</sup> Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6<sup>th</sup> ed, 2011) 50 [3-002].

<sup>212</sup> Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6<sup>th</sup> ed, 2011) 50 [3-002].

<sup>213</sup> Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6<sup>th</sup> ed, 2011) 51 [3-002].

<sup>214</sup> Geraldine Andrews and Richard Millett, *Law of Guarantees* (Sweet & Maxwell, 6<sup>th</sup> ed, 2011) 51 [3-002].

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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.

### Question

**30. Can you list any other benefits in retaining the requirement that guarantees must be in writing in order to be enforceable?**

### **6.4.3. Option 3 – Amend section 56**

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). Section 56 of the PLA could be amended so that indemnities fall within the scope of the section. Amending section 56 in this way has a number of benefits. Firstly, it promotes consistency with other consumer protection codes currently in operation. 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.<sup>215</sup> Thirdly, it would eliminate issues associated with distinguishing between a guarantee and an indemnity.

### Question

**31. Rather than repealing section 56 of the PLA, do you think section 56 should be amended to be consistent with the National Credit Code by defining guarantee to include an indemnity?**

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<sup>215</sup> Graham McBain, 'Abolishing the Statute of Frauds 1677 section 4' (2010) 5 *Journal of Business and Law* 420, 420.

## Part B – Covenants

Part B of this Issues Paper examines the effect of section 53 of the PLA and the interpretation of this section as a ‘word saving’ provision. It then considers the legal position of unregistered covenants in Queensland and whether reform is required to enable positive covenants, particularly those contained within easements, to pass with the land.

### 7. Section 53 – Benefit and burden of covenants relating to land

#### 7.1. Overview and Purpose

Section 53 of the PLA provides:

(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 is 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



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necessary to provide expressly that this clause of the Bill should be subject to the provisions of The Real Property Acts 1861 to 1963.<sup>216</sup>

The section has not been reviewed since it came into effect on 1 December 1975.<sup>217</sup>

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.<sup>218</sup> A freehold covenant refers to those covenants that affect the use and enjoyment of land.<sup>219</sup> 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.<sup>220</sup> Both Parts 1 and 2 of this paper are concerned only with freehold covenants. Leasehold covenants dealt with in Part 8 of the PLA will be considered separately as part of this review.

Section 53 of the PLA does not alter the substantive common law rules relevant to covenants affecting freehold land which are summarised in Part 8.1.1 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.<sup>221</sup> 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).<sup>222</sup>

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.

### 7.1.1. 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.<sup>223</sup> Whether or not a covenant touches and concerns the land depends on whether it

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<sup>216</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 35-36.

<sup>217</sup> 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.

<sup>218</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 765; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 259.

<sup>219</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 765.

<sup>220</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 765–766.

<sup>221</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 771.

<sup>222</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 771.

<sup>223</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1020].

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affects the 'nature, quality, mode of use or value of the land of the covenantee.'<sup>224</sup> A covenant that is only for the personal benefit of the covenantee does not touch and concern the land.

### 7.1.2. 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.<sup>225</sup> The section is directed at the benefit of the covenant as it is concerned with the covenantee's land.<sup>226</sup> There has been limited case law in Queensland that has directly considered section 53(1) of the PLA. The Queensland Court of Appeal did consider the section in *Simmons v Lee*<sup>227</sup> and confirmed the position 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.<sup>228</sup>

The term 'successors in title' (which is used in both sections 53(1) and (2)), in the case of covenants restrictive of the user of land, extends to owners and occupiers of the relevant land.<sup>229</sup> Prior to the introduction of section 53(1) of the PLA, there was some suggestion that only an assignee having the same legal estate as the original covenantee could enforce the benefit of the covenant.<sup>230</sup> 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.'<sup>231</sup>

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<sup>224</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1020].

<sup>225</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1020] referring to *Simmons v Lee* [1998] 2 QdR 671 per McPherson J.

<sup>226</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 311 [13.19]; Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) 509 – 510; Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012) 1380 [32-014].

<sup>227</sup> (1998) 2 Qd.R 671.

<sup>228</sup> *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).

<sup>229</sup> *Property Law Act 1974* (Qld) s 53(3).

<sup>230</sup> Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) 509 – 510 [1736]; Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> 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 Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012) 1380 [32-014] – [32-015]. See also Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> 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.'

<sup>231</sup> Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012) 1380 [32-014].

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There is some commentary which questions the correctness of this rule<sup>232</sup> and it has been described as an 'old technical rule which no longer has any practical value.'<sup>233</sup> The effect of section 53(3)<sup>234</sup> 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.<sup>235</sup>

### 7.1.3. 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.<sup>236</sup> 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 position that a successor in title is not subject to the burden of a positive covenant.<sup>237</sup> Section 53(2) of the PLA was considered in the Queensland Supreme Court case of *Rural View Developments Pty Limited v Fastfort Pty Limited*.<sup>238</sup> McMurdo J in that case followed the reasoning in *Rhone v Stephens*<sup>239</sup> 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.<sup>240</sup> Section 53(1) does not include a similar reference, although it is likely to be an implicit qualification to the section.<sup>241</sup>

The comments made above in relation to the operation of section 53(3) in the context of s 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.

### 7.1.4. Section 53(4)

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<sup>232</sup> Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> ed, 2012) 1380 [32-014]; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 312 [13.21].

<sup>233</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 312 [13.21].

<sup>234</sup> The other Australian jurisdictions that have an equivalent to section 53 also define 'successors in title' broadly in this way.

<sup>235</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 312 [13.21] and Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) 509-510. 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.

<sup>236</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 779, [17.90], [17.130].

<sup>237</sup> See *Rhone v Stephens* [1994] 2 AC 310, 318 and *Rural View Developments Pty Limited v Fastfort Pty Limited* (2011) 1 QdR 35, 40, referring to *Rhone v Stephens* [1994] 2 AC 310.

<sup>238</sup> (2009) 1 QdR 35.

<sup>239</sup> *Rhone v Stephens* [1994] 2 AC 310 at 322

<sup>240</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1070].

<sup>241</sup> 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.

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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.<sup>242</sup> 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.

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

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 Part 8.1.3 of this paper.

### 7.3. Other jurisdictions

#### 7.3.1. 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.<sup>243</sup> The Australian Capital Territory provision has been drafted differently but has a similar effect.<sup>244</sup> 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.<sup>245</sup>

#### 7.3.2. United Kingdom

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<sup>242</sup> The section does not impact on the indefeasibility of title: Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 790 [17.270].

<sup>243</sup> *Conveyancing Act 1919* (NSW) ss70 & 70A; *Property Law Act 1958* (Vic) ss78 & 79; *Property Law Act 1969* (WA) ss47 & 48; *Conveyancing and Law of Property Act 1884* (Tas) ss71 & 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)).

<sup>244</sup> *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, 3<sup>rd</sup> ed, 2011) 381 [14.26].

<sup>245</sup> 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.

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.<sup>246</sup>

### 7.3.3. 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.'<sup>247</sup> 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 the covenant will run with the land and is enforceable against successors in title, subject to some qualification.<sup>248</sup>

### 7.3.4. Reviews and reform in other Australian jurisdictions relevant to section 53 of the PLA

A number of reviews have considered issues associated with covenants.<sup>249</sup> 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 unregistered 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.'<sup>250</sup> There is no detailed explanation provided for the recommendation to retain both sections of the *Property Law Act 1958* (Vic).

## 7.4. Options

### 7.4.1. Option 1 - Make no changes to section 53 of the PLA

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<sup>246</sup> *Rhone v Stephens* [1994] 2 AC 310 and Charles Harpum, Stuart Bridge and Martin Dixon, *Megarry & Wade The Law of Real Property* (Thomson Reuters, 8<sup>th</sup> 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.

<sup>247</sup> For further commentary on the New Zealand position see Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2<sup>nd</sup> ed, 2009) 903-906.

<sup>248</sup> 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, 2<sup>nd</sup> ed, 2009) 905.

<sup>249</sup> 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).

<sup>250</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958*, Final Report No 20 (2010) 133.

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Adopting this approach means that section 53 will remain in its current form and continue operating as a 'deeming' or word saving provision only. Preserving this provision in its existing form potentially 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.

### **7.4.2. Option 2 - Repeal section 53 of the PLA**

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 is concerned, which appears to have been the requirement prior to the introduction of the provision.

### **7.4.3. Option 3 – Retain sections 53(1) and (2) but repeal section 53(3) of the PLA**

This option would mean that section 53 would operate 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.

#### **Questions**

- 32. Do you think leaving section 53 of the PLA in its current form is appropriate?**
- 33. Do you think that section 53 of the PLA should be repealed or reformed to reflect that it has no significant function in the absence of old system title in Queensland.**
- 34. Do you think a partial repeal of section 53 by removing section 53(3) only is appropriate?**

## 8. Reform of rules relating to enforcement of burden of positive covenants in Queensland

### 8.1. 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 part of the Issues Paper 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.

#### 8.1.1. 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.<sup>251</sup> A freehold covenant refers to those covenants that affect the use and enjoyment of land.<sup>252</sup> 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.<sup>253</sup> 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:<sup>254</sup>
  - 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; and
  - the person who bears the 'burden' of the covenant is obliged to perform the promise and is known as the covenantor.<sup>255</sup>
- Covenants can be positive or negative and the distinction is one of substance, rather than form.<sup>256</sup>
- 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;<sup>257</sup>

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<sup>251</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 765; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 259.

<sup>252</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 765; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 259.

<sup>253</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 765-766.

<sup>254</sup> *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.

<sup>255</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 766.

<sup>256</sup> Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.87].

<sup>257</sup> Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.87].

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- 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".<sup>258</sup> For example, the covenant may restrict the height of a building or the number of dwellings on the land.<sup>259</sup>
- 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.<sup>260</sup>
- 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.<sup>261</sup>
- Generally, the burden of a positive covenant does not run with land at law and is not enforceable against successors in title.<sup>262</sup> It is only enforceable against the original covenantor.<sup>263</sup> This is known as the rule in *Austerberry v Corporation of Oldham* (the *Austerberry* rule).<sup>264</sup> The legal basis for the rule was explained in *Rhone v Stephens*<sup>265</sup> 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.'<sup>266</sup>
- 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

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<sup>258</sup> Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.87].

<sup>259</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 766; Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants in Australia* (Butterworths, 3<sup>rd</sup> ed, 2011) 377 [14.21].

<sup>260</sup> 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.

<sup>261</sup> *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.

<sup>262</sup> 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 Titles Act 1997* (Qld), positive and negative covenants in a building management statement registered under s 54A of the *Land Title Act 1994* (Qld); Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 780 [17.140].

<sup>263</sup> See *Rhone v Stephens* [1994] 2 AC 310, 318; Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 779 [17.90] and [17.130].

<sup>264</sup> *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750; Victorian Law Reform Commission, *Easements and Covenants* Final Report 22 (2010) 84 [6.88].

<sup>265</sup> *Rhone v Stephens* [1994] 2 AC 310, 318.

<sup>266</sup> *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 QdR 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.'



covenant must touch and concern the land and there must be an intention that the benefit should run with the land.<sup>267</sup>

### 8.1.2. 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.<sup>268</sup> The covenants can be positive or negative and once registered are binding on the covenantor and any successor of the land.<sup>269</sup> For statutory covenants under Part 6, Division 4A of the *Land Title Act 1994* (Qld) (**LTA**), only the State, another entity representing the State, or a local government can be the covenantee.<sup>270</sup>

### 8.1.3. 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.<sup>271</sup> The reason for this is discussed in detail in Part 8.1.1 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 Part 8.2.1 below.

Queensland differs from other Australian jurisdictions in relation to the enforceability of restrictive covenants. There is no general provision in the LTA 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 LTA include:<sup>272</sup>

- building management statements - both positive and negative covenants contained in a registered building management statement;<sup>273</sup> and
- 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.<sup>274</sup>

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<sup>267</sup> Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) 502 [1720].

<sup>268</sup> 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.

<sup>269</sup> *Land Title Act 1994* (Qld) s 97A(4).

<sup>270</sup> *Land Title Act 1994* (Qld) s 97A(2). This Issues Paper is not reviewing or considering statutory covenants under the *Land Title Act 1994* (Qld).

<sup>271</sup> 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.

<sup>272</sup> This paper is not concerned with restrictive covenants. 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 Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) [17.340] – [17.430].

<sup>273</sup> *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. This issue will be discussed in further detail when this Review considers easements in the next *Property Law Act 1974* (Qld) Issue Paper.

<sup>274</sup> *Land Title Act 1994* (Qld) s 97A.

### 8.1.4. 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.

#### 8.1.4.1. 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.<sup>275</sup> 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;<sup>276</sup>
- 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;<sup>277</sup> and
- 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.<sup>278</sup>

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.<sup>279</sup> 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.<sup>280</sup> The utility and value inherent in an easement may be diminished where the subsidiary obligations are unenforceable and not observed by subsequent covenants.<sup>281</sup> For example, an unmaintained easement may render the easement land unfit to serve the original purpose for which it was created.<sup>282</sup>

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:

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<sup>275</sup> Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) [17.19].

<sup>276</sup> *Rural View Developments Pty Limited v Fastfort Pty Limited* (2009) 1 QdR 35, 39.

<sup>277</sup> *Fanigun Pty Ltd v Woolworths Limited* [2006] 2 Qd R 366 [2].

<sup>278</sup> *Rufa Pty Ltd v Cross* (1981) QdR 365.

<sup>279</sup> See, for example, *Rural View Developments Pty Ltd v Fastfort Pty Ltd* [2011] 1 Qd R 35; *Kocagil v Chen* [2012] NSWSC 1354.

<sup>280</sup> For example, *Clifford v Dove* [2003] NSWSC 938.

<sup>281</sup> 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.

<sup>282</sup> See, for example, *Mount Cathay Pty Ltd v Lend Lease Funds Management Ltd* [2012] QCA 274.

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The law relating to the enforcement of covenants in easements between successors in title to the original parties is difficult and uncertain.<sup>283</sup>

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.'<sup>284</sup> The different judicial approaches which have been applied are discussed in more detail under the judicial exceptions section below.

### 8.1.4.2. 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.<sup>285</sup> 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.<sup>286</sup> These provisions will be considered in further detail as part of the next stage of the review of the PLA.

## 8.2. Is there a need for reform?

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 Part 8.1.4 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 subsequent covenants. Some mechanisms have been developed to enforce the burden of a positive covenant, however, these are not ideal solutions and have limited applicability.

### 8.2.1. 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

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<sup>283</sup> (1981) QdR 365, 369.

<sup>284</sup> *Rufa Pty Ltd v Cross* (1981) QdR 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.

<sup>285</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 607 [14.890].

<sup>286</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 609 [14.890].

complicated contractual arrangements entered into in order to enable the burden of positive 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.

### 8.2.1.1. 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).<sup>287</sup> For example:

- personal covenants can be used to bind successive covenants. 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.<sup>288</sup> 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; and
- 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.<sup>289</sup> 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.<sup>290</sup>

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.<sup>291</sup> This is mainly due to the technical requirements that arise in the creation of a series of individually enforceable contracts.

### 8.2.1.2. 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.<sup>292</sup> A brief overview of the relevant exceptions is set out below:

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<sup>287</sup> Teresa Sutton 'On the Brink of Land Obligations Again' (2013) *The Conveyancer and Property Lawyer* 17, 19.

<sup>288</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 779; Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) [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.

<sup>289</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3<sup>rd</sup> ed, 2011) 368.

<sup>290</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3<sup>rd</sup> ed, 2011) 368.

<sup>291</sup> '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, 3<sup>rd</sup> ed, 2011) 368-369.

<sup>292</sup> See for example, *Konstas v Southern Cross Pumps and Irrigation Pty Ltd* (1996) 217 ALR 310.

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- 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.<sup>293</sup> 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.<sup>294</sup> 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.<sup>295</sup>

The principle has been considered in a number of Australian cases,<sup>296</sup> although its status is uncertain and has been criticised.<sup>297</sup> It is generally accepted that the 'pure' benefit and burden principle is not applicable in Queensland.<sup>298</sup>

- 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.<sup>299</sup> 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.<sup>300</sup>

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<sup>293</sup> *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, Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 784 [17.200] and Peter Butt, 'Making Positive Covenants Run' (2013) 87 *Australian Law Journal* 812, 812.

<sup>294</sup> *Tito v Waddell (No 2)* [1977] Ch 106, 289 – 290; Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) 499 [1712].

<sup>295</sup> Peter Butt, 'Making Positive Covenants Run' (2013) 87 *Australian Law Journal* 812, 812 referring to *Halsall v Brizell* [1957] Ch 169.

<sup>296</sup> *Gallagher v Rainbow* (1994) 179 CLR 624; *Konstas v Southern Cross Pumps and Irrigation Pty Ltd* (1996) 217 ALR 310.

<sup>297</sup> 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.

<sup>298</sup> 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, Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 785 [17.2000] and Peter Butt, 'Making Positive Covenants Run' (2013) 87 *Australian Law Journal* 812, 812.

<sup>299</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave's Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3<sup>rd</sup> ed, 2011) 371 [14.10].

<sup>300</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 780 [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.

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The principle has been treated more favourably in Queensland than the broader pure benefit and burden principle.<sup>301</sup> The precise scope of the conditional benefits principle is not completely clear or settled.<sup>302</sup>

### 8.2.1.3. Statutory exceptions

The common law rule against the running of the burden of 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;<sup>303</sup>
- building management statements - both positive and negative covenants contained in a registered building management statement are enforceable against successors in title;<sup>304</sup>
- statutory covenants - both positive and negative statutory covenants will be enforceable against successors in title to a lot, as long as they are registered.<sup>305</sup> 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; and
- 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.<sup>306</sup>

### 8.3. 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 has undertaken a relatively recent review of easements and covenants generally, including

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<sup>301</sup> 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).

<sup>302</sup> Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 782 [17.180]. See also the limits to this approach discussed at [17.810].

<sup>303</sup> *Body Corporate and Community Management Act 1997* (Qld).

<sup>304</sup> *Land Title Act 1994* (Qld) s 54A.

<sup>305</sup> *Land Title Act 1994* (Qld) s 97A.

<sup>306</sup> *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.

considering the issue of enforceability of the burden of a positive covenant. The position in these jurisdictions is discussed below.

### 8.3.1. 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.<sup>307</sup> 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.'<sup>308</sup> 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;<sup>309</sup>
- in the case of old system title land, the relevant instrument must be registered in the deeds register;<sup>310</sup>
- the burden of the registered covenant will then run with the land and bind successors to title;<sup>311</sup>
- 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;<sup>312</sup>
- the instrument must be executed by each person to be bound by the covenant;<sup>313</sup> and
- the covenant can be released or varied.<sup>314</sup>

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

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<sup>307</sup> 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.

<sup>308</sup> Land and Property Information, 'Property Legislation Amendment (Easements) Act 1995 – Partial Commencement' 54 *Information Bulletin* 1. See also Peter Butt, *Land Law*, (LawBook Co., 5<sup>th</sup> ed. 2006) 502 [1719].

<sup>309</sup> *Conveyancing Act 1919* (NSW) s 88BA(2).

<sup>310</sup> *Conveyancing Act 1919* (NSW) s 88BA(2)(c).

<sup>311</sup> *Conveyancing Act 1919* (NSW) s 88BA(1).

<sup>312</sup> *Conveyancing Act 1919* (NSW) s 88BA(3).

<sup>313</sup> *Conveyancing Act 1919* (NSW) s 88BA(4).

<sup>314</sup> *Conveyancing Act 1919* (NSW) s 88BA(5).

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.

### 8.3.2. Northern Territory

The Northern Territory has adopted the broadest legislative provisions relating to covenants under the *Law of Property Act* (NT).<sup>315</sup> The regime provides for the registration of restrictive and positive covenants on the title of the benefited and burdened land.<sup>316</sup> 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;<sup>317</sup>
- 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;<sup>318</sup>
- 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*;<sup>319</sup>
- 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;<sup>320</sup>
- 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.<sup>321</sup> 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;<sup>322</sup>
- 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;<sup>323</sup>
- 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;<sup>324</sup> and

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<sup>315</sup> *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].

<sup>316</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3<sup>rd</sup> ed, 2011) 449 [17.4].

<sup>317</sup> *Law of Property Act* (NT) s 167.

<sup>318</sup> *Law of Property Act* (NT) s 168.

<sup>319</sup> *Law of Property Act* (NT) s 169.

<sup>320</sup> *Law of Property Act* (NT) ss 170, 171 and 173.

<sup>321</sup> *Law of Property Act* (NT) s 171(1).

<sup>322</sup> *Law of Property Act* (NT) s 171(2).

<sup>323</sup> *Law of Property Act* (NT) s 173(1).

<sup>324</sup> *Law of Property Act* (NT) s 174.



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- 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.<sup>325</sup>

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.<sup>326</sup>

### 8.3.3. Victoria

In 2010, the VLRC completed a review of easements and covenants.<sup>327</sup> The VLRC recommended that the burden of a positive covenant should not run with the covenantor's land except under specific legislation.<sup>328</sup> As a general rule, the VLRC indicated that positive covenants should operate only in contract and not bind the covenantor's successors in title.<sup>329</sup> This recommendation was made following consideration of submissions in relation to this issue. The reasons for this recommendation included:<sup>330</sup>

- 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.

### 8.3.4. United Kingdom<sup>331</sup>

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*.<sup>332</sup> However, the United Kingdom Law Reform Commission recently reviewed easements, covenants and profits a prendre, producing a Report in 2011 with a number of recommendations.<sup>333</sup> In the context of covenants (both restrictive and positive), the Law Commission recommended that:

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<sup>325</sup> *Law of Property Act* (NT) ss 176 – 181.

<sup>326</sup> See for example *Registrar General's Stated Case* [2011] NTSC 69; *Phelps v Development Consent Authority* [2012] NTCA 2.

<sup>327</sup> 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.

<sup>328</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No 20 (2010) 88 (Recommendation 35).

<sup>329</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No 20 (2010) 87 (Recommendation 35).

<sup>330</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report No 20 (2010) 87-88 (Recommendation 35).

<sup>331</sup> In addition to the countries discussed in Part 8.3 above, 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.

<sup>332</sup> *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750.

<sup>333</sup> United Kingdom Law Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* Report No. 327 (2011).

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- 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*;<sup>334</sup>
- 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;<sup>335</sup> and
- existing freehold covenants should continue to work as they do now but a new approach would be used for future promises.<sup>336</sup>

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); and
- reform of the Lands Chamber of the Upper Tribunal (Part 3).<sup>337</sup>

The recommendations made by the Law Commission were generally consistent with the position adopted in previous reviews of covenants in the United Kingdom.<sup>338</sup> 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.<sup>339</sup> 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.

### 8.3.5. 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.<sup>340</sup> Where a covenant:

- 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.<sup>341</sup> 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

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<sup>334</sup> (1885) LR 29 Ch D 750.

<sup>335</sup> Teresa Sutton, 'On the Brink of Land Obligations Again' (2013) *The Conveyancer and Property Lawyer* 17, 17.

<sup>336</sup> United Kingdom Law Reform Commission, *Making Land Work: Easements, Covenants and Profits a Prendre* Report No. 327 (2011).

<sup>337</sup> Part 4 of the Bill deals with general issues.

<sup>338</sup> 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).

<sup>339</sup> Ministry of Justice, *Report on the Implementation of Law Commission Proposals* (2013) 12.

<sup>340</sup> *Property Law Act 2007* (NZ) ss 301 and 302.

<sup>341</sup> *Property Law Act 2007* (NZ) s 303.

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equity.<sup>342</sup> 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.<sup>343</sup> The covenant is to be treated as an equitable interest.<sup>344</sup> The Court may make determinations with respect to covenants,<sup>345</sup> and may also modify or extinguish a covenant in certain specified circumstances.<sup>346</sup> 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.<sup>347</sup>

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.<sup>348</sup> 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.<sup>349</sup>

### 8.4. Options for reform in Queensland

As indicated in Part 8.1 above, this Issues Paper 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 options presented below. The options identified below are only intended to canvass possible approaches to address the issue of the enforceability of the burden of positive covenants in Queensland.

#### 8.4.1. Option 1 – Make no change to the current position in Queensland

This approach would preserve the status quo 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. It would also acknowledge that any issues associated with the enforcement of a burden of a positive covenant can be adequately dealt with through the alternative mechanisms discussed in Part 8.2.1 above.

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<sup>342</sup> 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 Part 7.3.3 and 8.3.5 above for more details about this issue.

<sup>343</sup> *Property Law Act 2007* (NZ) ss 305(2), 307.

<sup>344</sup> *Property Law Act 2007* (NZ) s 305(1).

<sup>345</sup> *Property Law Act 2007* (NZ) s 313.

<sup>346</sup> *Property Law Act 2007* (NZ) s 317.

<sup>347</sup> Victorian Law Reform Commission, *Easements and Covenants* Final Report No 22 (2010) 114.

<sup>348</sup> *Property Law Act 2007* (NZ) s 294(3).

<sup>349</sup> Explanatory Note, Property Law Bill (NZ) 52.

**Questions**

35. Do you think there is a need to alter the position in Queensland to allow the burden of a covenant to be enforced against subsequent owners of the relevant land?
36. Do you think there is a case for not making any change to the current position in Queensland so that the burden of a positive covenant remains generally unenforceable against successors in title?

**8.4.2. Option 2 – A new statutory approach to enforcing the burden of a positive covenant**

This option would require the creation of a new legislative approach to enforcing the burden of a positive covenant which could be modelled on, or adapted from, either the Northern Territory or New Zealand legislative approaches which are discussed in more detail in Parts 8.3.2 and 8.3.5 above.<sup>350</sup> The ultimate outcome from any proposed legislative regime under this option would be to facilitate the formal recognition of the relevant covenant through either registration or notification on the title of the affected property to enable the burden of a positive covenant to be enforced against successors in title.<sup>351</sup>

This option would be a significant departure from the existing regime in Queensland.

**Questions**

37. Is there sufficient justification to introduce a new statutory approach to enforcing the burden of a positive covenant against successors in title?
38. Do you think a minimalist approach is preferable in Queensland whereby the burden of a positive covenant is effectively deemed to be an equitable interest and enforceable in the same way?

**8.4.3. Option 3 – Allow for the enforcement of the burden of positive covenants contained in easements**

Maintenance and repair covenants attached to easements have presented some difficulties in Queensland, as illustrated by the discussion above under Part 8.1.4.1. This option would allow

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<sup>350</sup> 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 under s 301. Commentary indicates that the use of the words ‘enforceable by’ leaves no room for argument that this section (unlike its predecessor) is only a word-saving device deeming successors and occupiers to be brought within the scope of the parties to the original covenant.’ See Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2<sup>nd</sup> ed, 2009) 905.

<sup>351</sup> Adrian Bradbrook and Susan MacCallum, *Bradbrook and Neave’s Easements and Restrictive Covenants* (LexisNexis Butterworths, Australia, 3<sup>rd</sup> ed, 2011) 449 [17.4].

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covenants in easements to run with the land. There are a number of different approaches which could be adopted under this option including:

- allowing maintenance and repair covenants relevant to easements to 'run with the land'. Reform in this area could follow the model adopted by New South Wales in section 88BA of the *Conveyancing Act 1919* (NSW) which enables covenants that require repair or maintenance of the site of an easement to continue to apply after ownership of the relevant land (that has the benefit or burden of the covenant) changes;
- a broader approach than the New South Wales model so that all positive covenants, beyond maintenance and repair, contained in an easement are covered; and
- adapting the model used for the purposes of transport easements for support under Part 4, Division 4 of the *Transport Planning and Coordination Act 1994* (Qld) (see section 28AH) where the burden and benefit of a registered transport easement for support runs with the land.

### Questions

- 39. Do you think a better approach in Queensland is to address the specific issue which has arisen in the Courts regarding the enforceability of positive covenants included in easements?**
- 40. Do you think an approach of expressly enabling the burden of obligations under an easement to be enforced against successors in title is viable in Queensland?**
- 41. If so, do you think any amendment should be restricted to repair and maintenance covenants or should the scope be broader and cover other covenants that are generally associated with easements?**

## Part C – Provisions affecting sales of land

Part C considers the provisions of the PLA that impact on the conveyancing process, terms of the contract of sale and certain remedies for the buyer and seller.

### 9. Section 57A – Effect of Act or Statutory instrument

#### 9.1. Overview and Purpose

Section 57A was introduced into the PLA in 1985.<sup>352</sup> An amendment to the section was proposed and introduced into the Queensland Parliament in 2014. However, that proposed amendment lapsed.<sup>353</sup>

The current section provides:

- (1) A statutory instrument shall not have the effect of rendering void or unenforceable any contract or dealing concerning property that is made, entered into or effected contrary to the legislation unless, in the case of an instrument duly made by the Governor in Council, it expressly provides that such a contract or dealing shall be void or, as the case may be, unenforceable.
- (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) This section applies in relation to an Act or statutory instrument whether enacted or made before or after the commencement of the Property Law Amendment Act 1985.

#### 9.1.1. Section 57A(1) – addressing assumptions of illegality

Section 57A purports 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.<sup>354</sup> An example of the type of provision intended to be captured by section 57A is found in *Chitts v Allaine*.<sup>355</sup> 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

<sup>352</sup> *Property Law Act Amendment Act 1985* (Qld) (No. 3) s 4. Assented to 18 March 1985.

<sup>353</sup> Further details of the amendments which were proposed are set out in Part 9.2 below.

<sup>354</sup> Second Reading Speech, *Property Law Act Amendment Bill* (Qld), 25 October 1984, 1852-1853.

<sup>355</sup> [1982] 1 Qd R 319.

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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.<sup>356</sup> 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.<sup>357</sup>

### 9.1.2. 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 tendered before or at the time of the contract.<sup>358</sup> 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 Part 9.1.1 above. However, difficulties in interpreting the section have arisen as a result of ‘drafting infelicities’.<sup>359</sup>

The Queensland Full Court considered the provision in *Garms v Birnzweig*.<sup>360</sup> 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 repealed<sup>361</sup> 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

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<sup>356</sup> 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 Act; or power conferred by Act; or statutory instrument also under a power conferred otherwise by law (s7(2)).

<sup>357</sup> Second Reading Speech, *Property Law Act Amendment Bill* (Qld), 25 October 1984, 1853.

<sup>358</sup> 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.

<sup>359</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1460].

<sup>360</sup> [1990] 2 Qd.R 336.

<sup>361</sup> *Builders’ Registration and Home-owners’ Protection Act 1979-1987* (Qld) s 53(3).

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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,<sup>362</sup>
- 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,<sup>363</sup>
- 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.<sup>364</sup>

Section 57A(2) was considered and applied in 2010 in the Supreme Court case of *St George Bank Ltd v Perpetual Nominees Ltd*.<sup>365</sup> 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.<sup>366</sup> 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.

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<sup>362</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1460].

<sup>363</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1460].

<sup>364</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1460].

<sup>365</sup> [2011] QdR 389, 393-394.

<sup>366</sup> [2011] QdR 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.'



## 9.2. Is there a need for reform?

An amendment in relation to section 57A(1) was before the Queensland Parliament in 2014 but has now lapsed.<sup>367</sup> The proposed amendment would have replaced section 57A(1) with a new subsection which:

- provided 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’;<sup>368</sup> and
- made 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.<sup>369</sup>

Some of the reasons which supported the lapsed proposed amendment are discussed in paragraphs 9.2.1, 9.2.2 and 9.2.3 below.

### 9.2.1. Is the policy underlying section 57A still valid?

As indicated in Part 9.1.1 above, the policy impetus for the enactment of section 57A was to minimise the circumstances in which a contract could be found to be impliedly illegal for failing to comply with a statutory instrument as opposed to an Act. The relevant cases which gave rise to the provision related to local authority ordinances which stipulated that entry into a contract of sale was prohibited prior to the seller tendering a certificate of fitness.<sup>370</sup> It is not clear whether the original rationale for the inclusion of the section still exists – that is, are there statutory instruments in existence which may still trigger the need to rely upon section 57A.

### 9.2.2. Is the policy objective achieved in all cases?

A further issue arising in relation to section 57A(1) is the extent to which the policy objective underlying the provision is achieved in all cases. This point is illustrated by the operation of the *Gold Coast City Council Local Law No. 17 (Maintenance of Works in Waterway Areas) 2013 (Local Law No 17)* and its interaction with section 57A. The purpose of Local Law No 17 is twofold. First, an obligation is placed upon the owners of land adjacent to or connected to a waterway to be responsible for structures in the waterway benefitting their land. The second aspect of Local Law No 17 is the imposition of an obligation on the seller of property affected by Local Law No 17 to include a special condition in a contract of sale specifying certain matters about the operation of the Local Law. If the seller does not comply with this requirement the buyer has a right to terminate the contract. There are arguably significant challenges in applying section 57A(1) to Local Law No 17. Prima facie, section 57A applies to local laws, which are included in the definition of statutory instrument in the *Statutory Instruments Act 1992* (Qld).<sup>371</sup> However, the language of section 57A refers to statutory instruments that may have the ‘effect of rendering void or unenforceable any contract’.

As explained above, the impetus for the enactment of section 57A was to minimise the circumstances in which a contract could be found to be impliedly illegal for failing to comply with a statutory

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<sup>367</sup> See *Justice and Other Legislation Amendment Bill 2014* (Qld) cl 102 (lapsed).

<sup>368</sup> Explanatory Notes, *Justice and Other Legislation Amendment Bill* (Qld) 2014, 33.

<sup>369</sup> Explanatory Notes, *Justice and Other Legislation Amendment Bill* (Qld) 2014, 33.

<sup>370</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 270.

<sup>371</sup> See *Statutory Instruments Act 1992* (Qld) s 7.

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instrument as opposed to an Act. The words ‘void’ or ‘unenforceable’ have clear parallels with the case law that examines whether a contract is either void or unenforceable by reason of illegality under a statute.<sup>372</sup> The existence of a right to terminate a contract either at law or under a statute is not generally regarded as making a contract void or unenforceable. While in a limited sense a seller will have difficulty enforcing a contract where the buyer has a right to terminate at law or under statute, this is not the same as a contract being rendered ‘unenforceable’ due to a failure to comply with a statutory requirement. A contract is usually referred to as being unenforceable where, although there is a contract on foot, non-compliance with a statutory requirement, such as the Statute of Frauds, means that one or both parties are unable to enforce the contract or sue upon it to obtain a remedy. The meaning was explained in *Pavey & Matthew Pty Ltd v Pau*<sup>373</sup> by Mason CJ and Wilson JJ as:

As a matter of ordinary legal usage the words “enforceable” and “unenforceable” may refer either to the judicial and curial remedies available for the enforcement of a contract or to all the remedies available for the enforcement of a contract, including such remedies as the contract itself may provide.

The effect of Local Law No 17 is not to prevent one or both parties from relying upon the contract to obtain a remedy, but specifically gives the buyer a right to terminate the agreement and recover any money paid. The most probable conclusion is that Local Law No 17 is not a statutory instrument that has the effect of rendering void or unenforceable any contract entered into contrary to the Local Law and therefore, section 57A, in its current form, has no application.

### 9.2.3. Appropriateness of statutory instruments declaring contracts void or unenforceable?

A separate policy issue arising in relation to section 57A(1) is the appropriateness of statutory instruments declaring a contract void or unenforceable. Statutory instruments that include such a provision can potentially impede business practices and in the case of property sales, interfere with conveyancing practices. These instruments when drafted may not necessarily have been subject to notification, tabling and disallowance provisions of the *Statutory Instruments Act 1992* (Qld) and the scrutiny by the appropriate portfolio committee. A more appropriate forum for these kinds of provisions is, arguably, an Act where they will be subject to a drafting process and the usual Parliamentary scrutiny.

### 9.2.4. Drafting and other issues with 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’ associated with the provision. These are outlined in further detail in Part 9.1.2 above but in general 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 Speech 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

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<sup>372</sup> See for example, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498.

<sup>373</sup> (1987) 69 ALR 577, 582.

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Queensland Act and statutory instrument is reviewed, there is no guarantee that the provision is not required.

If section 57A is retained, further consideration will need to be given to addressing the drafting problems in section 57A(2).

### 9.3. Options

It is clear from the preceding discussion that there are a number of issues with section 57A in its current form. One option would be to amend section 57A(1) in accordance with the proposed amendment that was before the Queensland Parliament in 2014 but which has now lapsed. Part 9.2 of this paper sets out the details of that proposed amendment.

Reform of section 57A(2) is recommended, although the actual form of any changes will need to be considered in more detail. Section 57A(2) could be redrafted to address the drafting problems previously identified and provide greater clarity. A possible drafting approach is to simplify 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.

#### Questions

42. Is the rationale for the introduction of section 57A(1) still valid or relevant?
43. Is the rationale for the introduction of section 57A(2) clear?
44. What is the role of section 57A(2)?
45. Have you recently come across any examples of where you have relied upon sections 57A of the PLA?
46. Are you aware of any other issues associated with sections 57A(1) and (2)?
47. Do you think amending sections 57A(1) and (2) in the way proposed in Part 9.3 has merit?

## 10. Section 58 – Insurance money from burnt building

### 10.1. 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.<sup>374</sup>

Section 58 provides:

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.<sup>375</sup> 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,<sup>376</sup>
- 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'. As indicated above, 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

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<sup>374</sup> 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* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1490]-[6.1560].

<sup>375</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 322.

<sup>376</sup> A lessor can also be a person interested

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the policy.<sup>377</sup> This means 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.<sup>378</sup>

The limitations in relation to the reliance on the section by these categories of interested persons are discussed further below in Part 10.2. The section only applies to buildings damaged by fire and does not make the 'person interested' an insured.<sup>379</sup>

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.<sup>380</sup>

## 10.2. Is there a need for reform?

### 10.2.1. Rationale underpinning the original imperial enactment outdated

The original Imperial enactment was drafted in the context of quite specific social conditions<sup>381</sup> 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.

### 10.2.2. 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.

### 10.2.3. 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.<sup>382</sup>

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<sup>377</sup> Position restated in *Kern Corporation Limited v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 178.

<sup>378</sup> WD Duncan and W M Dixon *The Law of Real Property Mortgages* (The Federation Press, 2<sup>nd</sup> ed, 2013) 208.

<sup>379</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 323.

<sup>380</sup> WD Duncan and W M Dixon *The Law of Real Property Mortgages* (Federation Press, 2<sup>nd</sup> ed, 2013) 208.

<sup>381</sup> These conditions included the prevention of arson affecting neighbouring properties.

<sup>382</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 324.

### 10.2.4. 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.<sup>383</sup> 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.'<sup>384</sup> 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.<sup>385</sup> 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.<sup>386</sup> 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.<sup>387</sup> 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.*<sup>388</sup>

### 10.2.5. Lessee and mortgagee alternative mechanisms to section 58

#### 10.2.5.1. 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.<sup>389</sup> Further, there is often a provision which enables the lessor and lessee to give notice to determine the lease if the premises are unsuitable for occupation as a result of damage or destruction.<sup>390</sup>

In commercial leases, it is usually the lessor that maintains the insurance of the property, irrespective of any covenant in the lease agreement.<sup>391</sup> 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.<sup>392</sup> Similarly, if the lessee makes a

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<sup>383</sup> *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.

<sup>384</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.1540].

<sup>385</sup> *Kern Corporation Limited v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164, 178–179 (Mason J).

<sup>386</sup> 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

<sup>387</sup> *Kern Corporation Limited v Walter Reid Trading Pty Ltd* (1987) 163 CLR 164 at 191 (Brennan J).

<sup>388</sup> (1987) 163 CLR 164 at 191.

<sup>389</sup> WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Thomson Reuters, 2014) 347.

<sup>390</sup> WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Thomson Reuters, 2014) 347.

<sup>391</sup> 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.

<sup>392</sup> WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Thomson Reuters, 2014) 347, 348-349.

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.<sup>393</sup>

### 10.2.5.2. 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.<sup>394</sup> 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.<sup>395</sup>

### 10.2.6. 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*<sup>396</sup> 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*.’<sup>397</sup>

### 10.2.7. Insurance Contracts Act 1984 (Cth) potentially covers the field

#### 10.2.7.1. 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.<sup>398</sup> 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.<sup>399</sup> 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 the adequacy and appropriateness of insurance landscape in Australia.<sup>400</sup> 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.<sup>401</sup> 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;

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<sup>393</sup> *Mumford Hotels Ltd v Wheeler* [1964] Ch 117.

<sup>394</sup> WD Duncan and W M Dixon *The Law of Real Property Mortgages* (The Federation Press, 2<sup>nd</sup> ed, 2013) 199.

<sup>395</sup> WD Duncan and W M Dixon *The Law of Real Property Mortgages* (The Federation Press, 2<sup>nd</sup> ed, 2013) 206.

<sup>396</sup> [1997] 1 Qd.R 136, 141.

<sup>397</sup> *Bit Badger Pty Ltd v Cunich* [1997] 1 Qd.R 136, 141.

<sup>398</sup> *Insurance Contracts Act 1984* (Cth) s 3; WD Duncan and Sharon Christensen, *Commercial Leases in Australia* (Law Book Co, 7<sup>th</sup> ed, 2014) [110.2600].

<sup>399</sup> 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.

<sup>400</sup> 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.

<sup>401</sup> 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].

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- 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.<sup>402</sup>

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.<sup>403</sup> 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.<sup>404</sup>

### 10.2.8. 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.<sup>405</sup> 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:<sup>406</sup>

.. 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.<sup>407</sup>

The objective of section 48 was to overcome the effects of the indemnity principle.<sup>408</sup> Some key differences between the operation of this section and section 58 of the PLA are set out below:

- 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;

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<sup>402</sup> Australian Law Reform Commission, *Insurance Contracts*, Final Report No. 20 (1982) 78 [129].

<sup>403</sup> Australian Law Reform Commission, *Insurance Contracts*, Final Report No. 20 (1982) 78 [129].

<sup>404</sup> Australian Law Reform Commission, *Insurance Contracts*, Final Report No. 20 (1982) 78 [129].

<sup>405</sup> Peter Mann and L Candace, *Mann's Annotated Insurance Contracts Act* (Thomson Reuters, 5<sup>th</sup> ed, 2012) 298-299 [48.10].

<sup>406</sup> *Commercial and Retail Leases in Australia* (eds), WD Duncan, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (Looseleaf) (Thomson Reuters) [110.3600]

<sup>407</sup> *Insurance Contracts Act 1984* (Cth) s 11.

<sup>408</sup> Peter Mann and L Candace, *Mann's Annotated Insurance Contracts Act* (Thomson Reuters, 5<sup>th</sup> ed, 2012) 298-299 [48.10].



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- the insurer has the same defences to an action as the insurer would have in an action by the insured.<sup>409</sup>

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.<sup>410</sup> 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.<sup>411</sup> 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; and
- 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.

### 10.3. 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,<sup>412</sup> Victoria,<sup>413</sup> Western Australia and South Australia.<sup>414</sup> Derivatives of the Imperial Act are retained in the Northern Territory<sup>415</sup> and Tasmania<sup>416</sup> and these provisions are similar to section 58 of the PLA. The Australian Law Reform Commission in its *Insurance Contracts Discussion Paper No 7* indicated that in New South

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<sup>409</sup> 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.

<sup>410</sup> Peter Mann and L Candace, *Mann's Annotated Insurance Contracts Act* (Thomson Reuters, 5<sup>th</sup> ed, 2012) 322 [48.10].

<sup>411</sup> Peter Mann and L Candace, *Mann's Annotated Insurance Contracts Act* (Thomson Reuters, 5<sup>th</sup> ed, 2012) 323 [48.10].

<sup>412</sup> *Hazelwood v Webber* (1934) 62 CLR 268.

<sup>413</sup> The provision was repealed by the *Sale of Land Amendment Act 1982* (Vic).

<sup>414</sup> *Insurance Contracts Act 1984* (Cth) 3(1) repealed the operation of the Imperial Act in Western Australia and South Australia.

<sup>415</sup> *Law of Property Act* (NT) s 61.

<sup>416</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 90E.

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Wales, 'insurance law has lacked regulation of this type since 1879. Its absence has certainly led to no discernible mischief.'<sup>417</sup>

### 10.4. Options

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.

#### Question

**48. Do you think section 58 of the PLA serves any practical purpose?**

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<sup>417</sup> Australian Law Reform Commission *Insurance Contracts* Discussion Paper No. 7 (1978). NSW 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.

## 11. Section 60 – Sales of land by auction

### 11.1. Overview and purpose

Section 60 of the PLA regulates the right of a seller to make a bid at an auction of their property and provides:

- (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.<sup>418</sup>

Section 60 has not been amended since its enactment and is based upon provisions of the *Sale of Land by Auction Act 1867* (UK).

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

#### 11.2.1. 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*, 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.

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<sup>418</sup> *Parfitt v Jepson* (1877) 46 LQB 529.

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(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.

### 11.2.2. Should notification of a seller's right to bid be retained 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 but one question may be whether this requirement is appropriately located in the PLA or should move to the *Property Occupations Act 2014* (Qld) or regulations.

### 11.3. 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 Wales<sup>419</sup> and the Northern Territory.<sup>420</sup> 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.

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<sup>419</sup> *Conveyancing Act 1919* (NSW) s 65.

<sup>420</sup> *Law of Property Act* (NT) s 63.

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**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 <sup>421</sup>		✓		✓ (unlimited bids)	✓	
NSW <sup>422</sup>	✓	✓ <sup>423</sup>	✓	✓ (only bid once)		
VIC <sup>424</sup>	✓	✓	✓	✓ (no limit)		✓
WA <sup>425</sup>	✓	✓ (number of bids specified)				
SA <sup>426</sup>		✓	✓	✓(max 3 bids)	✓	✓
NT <sup>427</sup>	✓	✓				
ACT <sup>428</sup>	✓	✓	✓	✓		✓
TAS <sup>429</sup>	✓	✓	✓	✓		✓

<sup>421</sup> *Property Law Act 1974* (Qld) s 60 and *Property Occupations Regulation 2014* (Qld) s 24.

<sup>422</sup> *Conveyancing Act 1919* (NSW) s 65 and *Property Stock and Business Agents Act 2002* (Qld) s 66 and s 66A.

<sup>423</sup> If notified in conditions then *Property Stock and Business Agents Act 2002* (NSW) s 66 limits it to one bid by the auctioneer.

<sup>424</sup> *Sale of Land Act 1962* (Vic) ss 28, 41, 43.

<sup>425</sup> *Auction Sales Act 1973* (WA) s 29.

<sup>426</sup> *Land and Business (Sale and Conveyancing) Act 1994* (SA) ss24O, 24P.

<sup>427</sup> *Law of Property Act* (NT) s 63 and *Auctioneers Act* (NT) s 15.

<sup>428</sup> *Civil Law (Sale of Residential Property) Act 2003* (ACT) ss 29, 30 & 33.

<sup>429</sup> *Property Agents and Land Transactions Act 2005* (Tas) s 40-42 & 47.

## 11.4. Options

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 issue is whether the obligation should be retained in the PLA or moved to the *Property Occupations Act 2014* (Qld).

### Questions

49. Is there a need to disclose a seller's right to bid?

50. If so, should it stay in the PLA or be re-located into the *Property Occupations Act 2014* (Qld)?

## 12. Section 61 – Conditions of sale of land

### 12.1. Overview and purpose

Section 61 of the PLA provides:

- (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.<sup>430</sup> An explanation of the operation of each of the subsections, where relevant, is discussed in below.

## 12.2. Is there a need for reform?

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.

### 12.2.1. 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.<sup>431</sup> 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 additions to the powers of the purchaser.<sup>432</sup>

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.

### 12.2.2. 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.’<sup>433</sup> 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.’<sup>434</sup> The language in the section is not entirely appropriate, particularly the use of the qualifying words ‘which form part of the vendor’s title’. This is because a claim under an instrument supported by a caveat

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<sup>430</sup> *Property Law Act 1974* (Qld) s 61(4).

<sup>431</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 50.

<sup>432</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 50.

<sup>433</sup> 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.’

<sup>434</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 50.



would not at that stage 'form part of' the seller's title. This part of the section could be removed or amended to better reflect practice.

### **12.2.3. 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.'<sup>435</sup> The section also refers to 'or other documents 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 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.<sup>436</sup> 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.<sup>437</sup> The section arguably has no utility.

#### **Question**

**51. In the light of the discussion above, is there any utility in retaining this subsection?**

### **12.2.4. 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

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<sup>435</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973).

<sup>436</sup> Clause 10.7 of the REIQ Standard Contract for Houses and Residential Land (11<sup>th</sup> 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.'

<sup>437</sup> This obligation is found in section 14 of the *Land Sales Act 1984* (Qld). Amendments to the *Land Sales Act 1984* commenced on 1 December 2014 and were made under the *Land Sales and Other Legislation Amendment Act 2014* (Qld), Pt 7.

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.

### **12.2.5. 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 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. Although the subsection does not raise any concerns, improvements in its drafting to clarify its relationship with subsection 61(1)(d) would be beneficial. For example, combining subsections 61(1A) and subsection 61(1)(d).

### **12.2.6. 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.<sup>438</sup> 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.

### **12.2.7. Section 61(2)(b) – ‘free from encumbrance’**

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.<sup>439</sup> Prior to the introduction of this provision 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.<sup>440</sup> For example, a registered mortgage on the title at settlement constituted an encumbrance, despite the buyer being handed the release of

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<sup>438</sup> See REIQ Contract for Houses and Residential Land (11<sup>th</sup> ed) clause 2.5. The terms ‘bank’ and ‘financial institution’ are defined in clause 1.1 of the Contract.

<sup>439</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 50.

<sup>440</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973).

mortgage at settlement. However, handing over a release of mortgage at settlement is now accepted conveyancing practice.

### **12.2.8. 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.’<sup>441</sup> 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.<sup>442</sup> 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.

### **12.2.9. 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.<sup>443</sup> 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.

### **12.2.10. Section 61(3A) – alternative place/time of settlement**

Subsection 61(3A) was added to the PLA in 2005.<sup>444</sup> 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 holiday in the locality of the land registry. In those circumstances, the subsection enables settlement to occur:

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<sup>441</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 50.

<sup>442</sup> REIQ Contract for Houses and Residential Land (11<sup>th</sup> ed) clause 5.2.

<sup>443</sup> REIQ Contract for Houses and Residential Land (11<sup>th</sup> ed) clause 10.5

<sup>444</sup> The section was inserted by the *Natural Resources and Other Legislation Amendment Act 2005* (Qld) s 126.

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- 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.

### **12.2.11. 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.

## **12.3. Options**

It is clear from the discussion above that there are some changes required in relation to section 61 of the PLA. The suggested amendments to the section include:

- section 61(1)(a) – repeal. The section serves no purpose in the light of current conveyancing practice;
- section 61(1)(b) – amend by removing the words ‘which form part of the vendor’s title’ and replacing it with words to the effect of ‘which are within the vendor’s possession’;
- section 61(1)(c) – repeal. The section serves no current purpose;
- section 61(1)(d) – retain with possible amendment to link it more clearly with subsection 61(1A);
- section 61(1A) – retain with possible amendment to link it more clearly with subsection 61(1)(d);
- section 61(2)(a) – retain but amend slightly to make it clear that the subsection does not apply to electronic conveyancing.
- section 61(2)(b) – retain.
- section 61(2)(c) – retain but amend slightly to make it clear that the subsection does not apply to electronic conveyancing;
- section 61(3) – retain with possible amendment to express the provision more clearly;
- section 61(3A) – retain with possible amendment to express the provision more clearly; and
- section 61(4) – retain.

### **Questions**

**52. Should any other implied terms be added to section 61 of the PLA?**

**53. Should a ‘no exclusion’ provision be added to the section? If so, should the parties be able to contract out of this?**

## 13. Section 62 – Stipulations not of the essence of the contract

### 13.1. Overview and purpose

Section 62 of the PLA provides:

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.’<sup>445</sup> 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.<sup>446</sup> However, in equity, a stipulation as to time was not dealt with as strictly and was not regarded as essential.<sup>447</sup> 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.’<sup>448</sup> 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.<sup>449</sup>

The effect of section 62 is to make the rule in equity applicable to proceedings at law as well.<sup>450</sup> 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.’<sup>451</sup>

<sup>445</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51.

<sup>446</sup> G.P Stuckey, *The Conveyancing Act, 1919-1969* (Law Book Company Limited, 2<sup>nd</sup> 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].

<sup>447</sup> G.P Stuckey, *The Conveyancing Act, 1919-1969* (Law Book Company Limited, 2<sup>nd</sup> ed, 1970) [118].

<sup>448</sup> G P Stuckey, *The Conveyancing Act, 1919-1969* (Law Book Company Limited, 2<sup>nd</sup> ed, 1970) [118].

<sup>449</sup> G P Stuckey, *The Conveyancing Act, 1919-1969* (Law Book Company Limited, 2<sup>nd</sup> 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.

<sup>450</sup> G P Stuckey, *The Conveyancing Act, 1919-1969* (Law Book Company Limited, 2<sup>nd</sup> 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].

<sup>451</sup> G.P Stuckey, *The Conveyancing Act, 1919-1969* (Law Book Company Limited, 2<sup>nd</sup> 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.’

The section applies to both registered and unregistered land.

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

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.

### 13.3. Other jurisdictions

The other Australian jurisdictions, apart from Tasmania, have a provision equivalent to section 62 of the PLA.<sup>452</sup>

### 13.4. Options

The provision raises no significant problems. It is recommended that section 62 of the PLA be retained.

#### Question

54. Do you think retaining section 62 of the PLA raises any significant issues?

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<sup>452</sup> *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.

## 14. Section 63 – Application of insurance money on completion of a sale or exchange

### 14.1. Overview and purpose

Section 63 of the PLA provides:

(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 only 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.<sup>453</sup> 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.<sup>454</sup>

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<sup>453</sup> New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984).

<sup>454</sup> See *Rayner v Preston* (1881) 18 ChD 1.

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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.<sup>455</sup>

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 person entitled to the money because of an encumbrance, and any balance remaining to the buyer;<sup>456</sup>
- 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;<sup>457</sup> and
- 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.<sup>458</sup>

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 buyer<sup>459</sup> and the section does not require the consent of the seller's insurer.<sup>460</sup>

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.

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<sup>455</sup> 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.

<sup>456</sup> *Property Law Act 1974* (Qld), s 63(1).

<sup>457</sup> *Property Law Act 1974* (Qld) s 63(2).

<sup>458</sup> *Property Law Act 1974* (Qld) s 63(3).

<sup>459</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973); 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].

<sup>460</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973); 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.



## 14.2. Is there a need for reform?

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.

### 14.2.1. 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 section 63(1) will be confined to damage or destruction by causes which are insured against under the seller's insurance policy.<sup>461</sup>

### 14.2.2. 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.<sup>462</sup>

### 14.2.3. 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?; and
- 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?<sup>463</sup>

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<sup>461</sup> Queensland Conveyancing Law Commentary, (eds) H Weld, John Peter Thomas and Allan James Chay, CCH Australia Ltd [6.865].

<sup>462</sup> See *State Government Insurance Office (Queensland)* [1984] 2 QdR 441 and *Kern Corporation v Walter Reid Trading Pty Ltd (No 1)* (1986) 4 ANZ Ins Cas 60-690.

<sup>463</sup> Queensland Conveyancing Law Commentary, (eds) H Weld, John Peter Thomas and Allan James Chay, CCH Australia Ltd [6.865].

#### **14.2.4. 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.<sup>464</sup>

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:

- 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; and
- 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).<sup>465</sup>

The section will provide assistance to some purchasers but may not cover the field completely because of the limitations set out above.

#### **14.2.5. 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.<sup>466</sup> Further, the rights under the section which benefit the purchaser relate only to money paid to the buyer under the insurance policy before completion.<sup>467</sup> This is an event which is very unlikely to occur in practice.

#### **14.2.6. 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.

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<sup>464</sup> 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.

<sup>465</sup> Queensland Conveyancing Law Commentary, (eds) H Weld, John Peter Thomas and Allan James Chay, CCH Australia Ltd [6.845].

<sup>466</sup> 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 QdR 441, 444.

<sup>467</sup> 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 QdR 441, 445.

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In that situation, any contract of insurance held by the seller will lapse.<sup>468</sup> This in turn means that the section is obsolete. In the High Court decision of *Ziel Nominees Pty Ltd v V.A.C.C Insurance Co Ltd*,<sup>469</sup> 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.<sup>470</sup>

Commentary suggests that the wording in section 63(2) of the PLA is not 'strong' enough to overcome this problem.<sup>471</sup> Both the Queensland and New South Wales Law Reform Commissions have identified this problem as a possible limitation to the utility of section 63.<sup>472</sup> 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.<sup>473</sup>

### 14.3. 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.<sup>474</sup> 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;<sup>475</sup>
- 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.<sup>476</sup> 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;<sup>477</sup> and

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<sup>468</sup> 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.

<sup>469</sup> (1975) 7 ALR 667.

<sup>470</sup> New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.4].

<sup>471</sup> 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.

<sup>472</sup> 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].

<sup>473</sup> A minor amendment was made to section 63(4) pursuant to the *Statute Law (Miscellaneous Provisions) Act 1989* (Qld), Sch 1.

<sup>474</sup> *Sale of Land Act 1962* (Vic) s 35(1).

<sup>475</sup> *Sale of Land Act 1962* (Vic) s 35(3).

<sup>476</sup> *Sale of Land Act 1962* (Vic) s 35(4).

<sup>477</sup> 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.

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- 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.<sup>478</sup> There are different views among commentators regarding whether or not this provision overcomes the issue arising from *Ziel Nominees v VACC Insurance Ltd.*<sup>479</sup>. 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.*<sup>480</sup> 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.<sup>481</sup> An alternative view regarding the effect of section 35(2) of the *Sale of Land Act 1962* (Vic) is that it is still 'conjectural' whether it has the effect of circumventing the indemnity principle in insurance law.<sup>482</sup>

### 14.4. Options

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. The preliminary recommendation in relation to section 63 of the PLA, based on the discussion above is that it should be repealed.

#### Question

**55. Do you think that section 63 of the PLA serves any practical purpose?**

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<sup>478</sup> *Sale of Land Act 1962* (Vic) s 35(2).

<sup>479</sup> (1991) 180 CLR 173.

<sup>480</sup> New South Wales Law Reform Commission, *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.19].

<sup>481</sup> *Passing of Risk between Vendor and Purchaser of Land* Report No. 40 (1984) [3.19].

<sup>482</sup> Sharon Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 216.

## 15. Section 64 – Right to rescind on destruction of or damage to dwelling house

### 15.1. Overview and purpose

Section 64 of the PLA provides:

(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 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.<sup>483</sup> The section has effect regardless of any contractual stipulation to the contrary.<sup>484</sup>

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 Queensland Law Reform Commission<sup>485</sup> 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*

<sup>483</sup> 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.

<sup>484</sup> *Property Law Act 1974* (Qld) s 64(4).

<sup>485</sup> Queensland Law Reform Commission, *Amendments to the Property Law Act 1974-1985* Working Paper No. 30 (1986) 24, 26-27.

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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*<sup>486</sup> 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 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.<sup>487</sup>

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.

### 15.1.1. 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.<sup>488</sup>

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'.<sup>489</sup> 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.<sup>490</sup> However, if the house is no longer used as a residence then it no longer qualifies as a dwelling house.<sup>491</sup>

### 15.1.2. '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

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<sup>486</sup> [2012] 1 QdR 207.

<sup>487</sup> *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 QdR 207, 223.

<sup>488</sup> *Property Law Act 1974* (Qld) s 64(3).

<sup>489</sup> 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.

<sup>490</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2090].

<sup>491</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters [6.2090] referring to *Re Nordenfelt*[1895] 1 QB 151.

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.<sup>492</sup> 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 or replacement).<sup>493</sup> In the case of strata title dwellings, the damage must be to the actual lot, not the common areas or common property. This Paper does not consider that the expression 'damaged or destroyed' needs to be defined in the section and there is no proposal in this paper to define either 'damaged' or 'destroyed'.

### 15.1.3. 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.<sup>494</sup> 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;<sup>495</sup>
- 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;<sup>496</sup>
- 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;<sup>497</sup> and
- 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.<sup>498</sup> However, some

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<sup>492</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 326-327.

<sup>493</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 326-327.

<sup>494</sup> 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* (eds) WD Duncan and A Wallace, Thomson Reuters [6.2100].

<sup>495</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, [6.2110] referring to *Cruse v Mount* [1933] Ch 278, 282.

<sup>496</sup> See *Georgeson v Palmos* (1962) 106 CLR 578, 587 (per Menzies J).

<sup>497</sup> 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.

<sup>498</sup> See *Georgeson v Palmos* (1962) 106 CLR 578, 587 per Windeyer J.

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time to allow for restoration or cleaning up should be allowed immediately after an event such as a flood.<sup>499</sup>

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.<sup>500</sup> 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.

### 15.1.4. 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.<sup>501</sup> 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; and
- 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.<sup>502</sup>

## 15.2. Is there a need for reform?

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.

### 15.2.1. 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.<sup>503</sup> 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*<sup>504</sup> 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

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<sup>499</sup>See *Georgeson v Pamos* (1962) 106 CLR 578, 587 per Windeyer J.

<sup>500</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2110].

<sup>501</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2100].

<sup>502</sup> *Property Law Act 1974* (Qld) s 64(2).

<sup>503</sup> See for example G Walker, 'Insurance and the Sale of Land' (1981) 9 *Australian Business Law Review* 148, 165.

<sup>504</sup> 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.



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.<sup>505</sup> A further issue is ensuring that the test regarding fitness for occupation is appropriate in the commercial context. Examples of some alternative approaches to this assessment include whether the commercial property is destroyed or damaged so as not to be:

- in a condition suitable for its approved use at the time of contract; or
- substantially in the same condition as at the date of contract.

### 15.2.2. 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 discussed and clarified in the Queensland Court of Appeal decision of *Dunworth v Mirvac Qld Pty Ltd*.<sup>506</sup> 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.'<sup>507</sup> 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.<sup>508</sup>

### 15.2.3. 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 decision<sup>509</sup> 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

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<sup>505</sup> 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.

<sup>506</sup> [2011] QCA 207.

<sup>507</sup> *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 QdR 207, 221 (per Chief Justice).

<sup>508</sup> *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 QdR 207, 221 (per Chief Justice).

<sup>509</sup> See *Dunworth v Mirvac Queensland Pty Ltd* [2012] 1 QdR 207, 221.

timing in relation to when the dwelling house must be unfit for occupation.<sup>510</sup> 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*.<sup>511</sup> 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?;
- Does the property need to be unfit for occupation at the time of settlement?<sup>512</sup> Commentary in relation to this interpretation indicates that it is only valid if it is accepted that the 'exercise of rights under s 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.'<sup>513</sup> 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.<sup>514</sup>

#### 15.2.4. 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.<sup>515</sup> 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.'<sup>516</sup>

### 15.3. 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

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<sup>510</sup> 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.

<sup>511</sup> (1962) 106 CLR 578 and see Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2110].

<sup>512</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 328.

<sup>513</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 328.

<sup>514</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 328.

<sup>515</sup> *Dunworth v Mirvac Queensland Pty Ltd* [2011] QCA 207, 221 (per Chief Justice).

<sup>516</sup> *Sale of Land Act 1962* (Vic) s 36.

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.

## 15.4. Options

There is no proposal in this Paper (or as part of this review) 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 could be resolved with some amendment to the section. Suggested areas for amendment include:

- Extending the application of the section to contracts for the sale of ‘commercial property’ where the same rules exist in relation to the passing of risk at common law. The inclusion of commercial property could be qualified so that the parties to the contract can nominate to contract out of the section. The inclusion of commercial property within the scope of the section would also require consideration of the appropriateness of the test of fitness for occupation in the commercial context;
- The expression ‘date of completion’ should be clarified in the light of the Queensland Court of Appeal decision of *Dunworth v Mirvac Queensland Pty Ltd*<sup>517</sup> 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;
- Clarifying the time at which the assessment of fitness for occupation is undertaken; and
- Allowing the seller an opportunity to reinstate and therefore avoiding rescission in certain circumstances. A provision of this type could model 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 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.

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<sup>517</sup> [2012] 1 Qd R 207.

**Questions**

56. Do you think the scope of section 64 should extend to all property, including commercial property?
57. On what basis could you justify the extension to other property beyond 'dwelling houses'?
58. If the scope of section 64 is extended to cover other property, what test should be used to assess whether the property is 'fit for occupation'? For example:
- (a) Should the current test of 'unfit for occupation' be retained?; or
  - (b) Should the assessment be made on the basis of whether the property is in a condition suitable for its approved use at the time of contract?; or
  - (c) Is a test based on whether the property is in substantially the same condition as at the date of the contract a good approach?
59. Are any of the possible tests in Q56 (b) or (c) suitable for dwelling houses?
60. At what stage should assessment of 'fitness for occupation' (or any alternative test) take place? Should it occur immediately after the damage occurs?
61. If the scope of section 64 is extended to cover non-residential property, should the parties to those contracts be able to nominate to contract out the section with appropriate notice and a term in the contract for sale?
62. Should parties to a contract for the sale of a dwelling house be permitted to contract out of section 64 of the PLA?
63. Should sellers be given an opportunity to reinstate or restore the damaged dwelling house? If so:
- (a) Do you think section 36 of the *Sale of Land Act 1962* (Vic) provides an appropriate model?;
  - (b) Should the seller be required to notify the intention to rectify and be required to do so within a specified time period?

## 16. Section 65 – Rights of purchasers as to execution of conveyance

### 16.1. Overview and purpose

Section 65 of the PLA provides:

- (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*<sup>518</sup> 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'<sup>519</sup> 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.<sup>520</sup>

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

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.<sup>521</sup>

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. 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 310 of the *Land Act 1994*

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<sup>518</sup> (1858) 2 De G & J 468.

<sup>519</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51.

<sup>520</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2120].

<sup>521</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51.

(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.<sup>522</sup> 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.

### 16.3. Options

It is clear from the discussion above that section 65 of the PLA serves no (or limited) purpose. It is recommended that the provision be repealed.

#### **Recommendation**

**64. Section 65 of the PLA should be repealed.**

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<sup>522</sup> 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.

## 17. Section 66 – Receipt in instrument or endorsed authority for payment

### 17.1. Overview and purpose

Section 66 of the PLA provides:

(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.

**solicitor** includes the agent of the solicitor.

This section has its origins in the nineteenth century case of *Viney v Chaplin*<sup>523</sup> 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.<sup>524</sup> 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.<sup>525</sup> 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.<sup>526</sup> 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

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<sup>523</sup> (1858) 2 De G&J 468.

<sup>524</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51-52.

<sup>525</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51-52.

<sup>526</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51-52.

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receipt for the payment, to give a receipt without any separate direction or authority.<sup>527</sup> The relevant instrument must be produced and be relevant to the particular transaction.<sup>528</sup>

The QLRC when looking at the effect of *Viney v Chaplin* noted that the principle was abrogated in England and Victoria<sup>529</sup> 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.<sup>530</sup> 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.<sup>531</sup> 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.<sup>532</sup> The provision was adjusted slightly by substituting the term 'deed', which was in the Victorian section, with the word 'instrument' in the Queensland section.

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

There appears to have been no litigation where section 66 has been relied upon in Queensland.<sup>533</sup> 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. If the section is retained, redrafting to simplify and clarify the provision should be considered.

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

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<sup>527</sup> 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.

<sup>528</sup> 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.

<sup>529</sup> 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.

<sup>530</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51, 52.

<sup>531</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 51, 52.

<sup>532</sup> 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.

<sup>533</sup> Searches undertaken have not identified any cases specifically dealing with section 66 of the *Property Law Act 1974* (Qld).



and lodged directly into the electronic land register.<sup>534</sup> The payment of purchase money (or other consideration) will occur electronically.

### 17.3. 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'.<sup>535</sup> 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.<sup>536</sup>

### 17.4. Options

The extent to which section 66 of the PLA serves any current purpose is not clear and further consideration needs to be given to whether it should be repealed or amended. If the section is amended to provide greater clarity, the model in the Australian Capital Territory or the Northern Territory could be adopted.

The relevant provision in the Northern Territory provides as follows:

(1) A receipt for consideration money or other consideration in the body of a deed or other instrument is sufficient discharge for the payment or giving of the consideration without any further receipt being endorsed on the deed or instrument.<sup>537</sup>

The wording of the provision in the Australian Capital Territory is similar.

#### Questions

65. Does section 66 of the PLA serve any purpose in modern conveyancing practice?
66. Have you relied on section 66 of the PLA in practice?
67. Do you think section 66 should be repealed?
68. Do you think section 66 should be amended? If so, do you think amending in a way that is consistent with the approach in the Northern Territory (see above) is a workable option?

<sup>534</sup> 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.

<sup>535</sup> *Property Law Act 1958* (Vic) s 69 and *Conveyancing and Law of Property Act 1884* (Tas) s 69.

<sup>536</sup> *Law of Property Act* (NT) s 53, *Conveyancing Act 1919* (NSW) s 40, *Civil Law (Property) Act 2006* (ACT) s 220. and *Property Law Act 1969* (WA) s 14.

<sup>537</sup> *Law of Property Act* (NT) s 53(1).

## 18. Section 67 – Restrictions on vendor’s right to rescind on purchaser’s objection

### 18.1. Overview and purpose

Section 67 of the PLA provides:

- (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.’<sup>538</sup> 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.<sup>539</sup>

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.<sup>540</sup> 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.’<sup>541</sup> Further, that it seemed safe to conclude that ‘no change in common practice will result from the enactment of the proposed clause in Queensland.’<sup>542</sup>

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<sup>538</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 52.

<sup>539</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 52.

<sup>540</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 52.

<sup>541</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 52.

<sup>542</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 52.

## 18.2. Is there a need for reform?

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 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. 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.

## 18.3. Options

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. It is recommended that the provision be repealed.

### **Recommendation**

**69. Section 67 of the PLA should be repealed.**

## 19. Section 68 – Damages for breach of contract to sell land

### 19.1. Overview and purpose

Section 68 of the PLA provides:

- (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 liability 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*<sup>543</sup> 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.<sup>544</sup> The damages could include the buyer's loss of bargain.<sup>545</sup> The exception to this rule which was articulated in the House of Lords in *Bain v Fothergill*<sup>546</sup> 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.'<sup>547</sup> 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.<sup>548</sup>

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<sup>543</sup> (1874) LR 7 HL 158.

<sup>544</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 53.

<sup>545</sup> 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.'

<sup>546</sup> (1874) LR 7 HL 158.

<sup>547</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 53.

<sup>548</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2210]. The rule in *Bain v Fothergill* has been described as one 'laid down for defects in

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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 relation to the seller's title.<sup>549</sup> This recommendation was made despite early Queensland case law to the contrary.<sup>550</sup> 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.<sup>551</sup>

Section 68 of the PLA abrogates the rule in *Bain v Fothergill* in relation to land, other than unregistered land.<sup>552</sup> 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.<sup>553</sup>

## 19.2. Is there a need for reform?

### 19.2.1. 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

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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* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2210].

<sup>549</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 53.

<sup>550</sup> See *Merry v Australian Mutual Provident Society* (1872) 2 QSCR 40 and *Boardman v Mc Grath* [1925] QWN 8.

<sup>551</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 53.

<sup>552</sup> See *Property Law Act 1974* (Qld) s 68(3) which expressly excludes unregistered land from the scope of the section.

<sup>553</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 53.

noted in its 1990 Report that conveyances in Queensland of ‘unregistered titles, and therefore the likelihood of the Rule being applied, are almost insignificant.’<sup>554</sup>

### 19.2.2. 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.<sup>555</sup> The position in relation to unregistered 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 unregistered land, the rule in *Bain v Fothergill* remains applicable irrespective of whether section 68 is repealed. However, the stock of remaining unregistered land in Queensland is limited and the risk of the rule being invoked is unlikely. In any event, a large number of exceptions to the rule have developed over the years, potentially limiting its application further.<sup>556</sup> 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.

### 19.3. 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.<sup>557</sup> 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*.<sup>558</sup> The Northern Territory has also abolished the rule but not in relation to contracts for the sale of unregistered land.<sup>559</sup> In 1989, the Victorian Law Reform Commission recommended the abolition of *Bain v Fothergill*, however the recommendation has not been implemented.<sup>560</sup> Western Australia has no statutory provision abolishing the rule.<sup>561</sup> The rule also appears to have been retained in South Australia and Tasmania.

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<sup>554</sup> 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].

<sup>555</sup> See subsection 20(2)(a) of the *Acts Interpretation Act 1954* (Qld).

<sup>556</sup> Although a return to the rule in *Bain v Fothergill* is not suggested in this paper, 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*.

<sup>557</sup> *Conveyancing Act 1919* (NSW) s 54B.

<sup>558</sup> 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].

<sup>559</sup> *Law of Property Act* (NT) s 70(2).

<sup>560</sup> Victorian Law Reform Commission, *Sale of Land*, Report No 20 (June 1989) 19 (Recommendation 14).

<sup>561</sup> 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.

## 19.4. Options

It is recommended that section 68 be retained but that its form is simplified to assist with its interpretation. One way of achieving this is to adopt the drafting approach in New South Wales, with some minor variation, which is set out in section 54B of the *Conveyancing Act 1919* (NSW). An illustration of how a revised section 68 may look is set out below:

- (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 purchaser in respect of the failure of a buyer to show or make good title or otherwise perform a contract for the sale of land.

### Questions

**70. Do you think amending section 68 in the way described above is appropriate?**

**71. Do you think section 68 should be repealed?**

## 20. Section 69 – Rights of purchaser where vendor’s title defective

### 20.1. Overview and purpose

Section 69 of the PLA provides:

- (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...<sup>562</sup>

This result was described as ‘unreasonable’ when the Queensland Law Reform Commission (QLRC) was considering the inclusion of section 69 into the PLA in 1973.<sup>563</sup>

The QLRC noted that section 55(1) of the *Conveyancing Act 1919* (NSW) avoided the result as it:

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<sup>562</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 53. Derrington J in *Delbridge v Low* [1990] 2 QdR 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.’

<sup>563</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 53.



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- 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.<sup>564</sup>

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.<sup>565</sup>

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'.<sup>566</sup> Commentators note that the section reverses the ordinary principles of contract law;<sup>567</sup> and
- 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.<sup>568</sup> Section 69 does not provide a general discretion to return deposits to buyers in all cases.<sup>569</sup> The section is unavailable where the

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<sup>564</sup> 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.

<sup>565</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 54 referring to the decision in *Bennett v Stuart* (1927) 27 S.R(NSW) 317, 327-8.

<sup>566</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2320].

<sup>567</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf)[6.2320].

<sup>568</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2290].

<sup>569</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2290]. See for example *Delbridge v Low* [1990] 2 QdR 317, 329 where the criterion

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.<sup>570</sup> Where the contract discloses the defect, the buyer would take subject to it if that is what has been agreed.

## 20.2. Is there a need for reform?

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.

### 20.2.1. 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.<sup>571</sup> 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.<sup>572</sup> This makes a ‘doubt’ in title in section 69(1) difficult to establish in order to rely on the section.<sup>573</sup>

### 20.2.2. 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 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

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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.

<sup>570</sup> *Faruqi v English Real Estate Ltd* [1979] 1 WLR 963.

<sup>571</sup> In the example of a will and beneficiaries, any disappointed beneficiaries would have to consider alternative remedies.

<sup>572</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2350].

<sup>573</sup> 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.

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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.'<sup>574</sup>

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.<sup>575</sup> 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'.<sup>576</sup> 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.<sup>577</sup> 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).<sup>578</sup>

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.<sup>579</sup> 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.'<sup>580</sup>

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:

(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.

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<sup>574</sup> See Derrington J in *Delbridge v Low* [1990] 2 QdR 317, 328.

<sup>575</sup> 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.

<sup>576</sup> *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].

<sup>577</sup> *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].

<sup>578</sup> 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.

<sup>579</sup> Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [31040.20].

<sup>580</sup> Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [31040.20].

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The section was recently reviewed as part of the VLRC's general review of the *Property Law Act 1958* (Vic) during 2010.<sup>581</sup> 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.<sup>582</sup> 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.<sup>583</sup> 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.<sup>584</sup>

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).

### 20.3. 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.

### 20.4. Options

There are some issues associated with section 69 and the scope of its application which is discussed in detail in Part 20.2 above. The concept of 'doubt' in title may be obsolete and unlikely to arise in the registered land context. The application of section 69 is also limited to situations where specific

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<sup>581</sup> 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 NSW 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.

<sup>582</sup> Victorian Law Reform Commission *Review of the Property Law Act 1958* Consultation Paper (2010) 62.

<sup>583</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 54.

<sup>584</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 48.

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performance would not be granted to a seller because of a defect or doubt in the title held. This is different from 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. The issues in relation to section 69 of the PLA relates to whether or not the section should be retained and if so, should it be broadened to extend beyond the situation where specific performance might be refused because of a defect or doubt in title.

### Questions

**72. Should section 69 be retained?**

**73. If so, should the application of section 69 be broadened beyond recovery of deposit for the refusal of specific performance because of a doubt or defect in the seller's title?**

**74. If section 69 is extended beyond its current scope, is section 55(2A) of the *Conveyancing Act 1919* (NSW) a good model? Section 55(2A) provides:**

**(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.**

**75. If section 69 is retained and amended to include a provision similar to section 55(2A) of the *Conveyancing Act 1919* (NSW), should section 69(1) be amended to delete the reference to 'doubt' in title?**

## 21. Section 70 – Applications to court by vendor and purchaser

### 21.1. Overview and purpose

Section 70 of the PLA provides:

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.<sup>585</sup>

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.<sup>586</sup> In the Supreme Court decision of *Re MacDonald*,<sup>587</sup> 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.’<sup>588</sup> Section 70 is not an appropriate process where there are significant disputed facts.<sup>589</sup>

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 Condition of sale in Queensland. It has been

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<sup>585</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 54.

<sup>586</sup> Where oral evidence is required, the matter would be adjourned to the civil list for trial as an action.

<sup>587</sup> [1989] 2 Qd.R 29.

<sup>588</sup> [1989] 2 Qd.R 29, 34.

<sup>589</sup> See *Re MacDonald* [1989] 2 Qd.R 29, 34.

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held in Queensland that compensation is available even after settlement.<sup>590</sup> From a procedural perspective, a question determined under a section 70 summons is deemed to be *res judicata* (as 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.<sup>591</sup>

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.<sup>592</sup>

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);<sup>593</sup>
- whether the parties have abandoned the contract;<sup>594</sup>
- whether to enforce a term of the contract (for example, a restrictive covenant by injunction);<sup>595</sup>
- subject to comments in Part 21.2.1 below, specific performance of the contract.<sup>596</sup>

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<sup>590</sup> See *Re Forward Development Associates and Martin's Contract* [1982] Qd R 569 and *Re Custom Credit Corporation Ltd* [1985] 1 Qd R 35.

<sup>591</sup> See for example *Re Glenning* [1987] 2 Qd R 523.

<sup>592</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2430].

<sup>593</sup> *Re Mujaj* [1998] 2 Qd R 152.

<sup>594</sup> *Re Macdonald* [1989] 2 Qd R 29.

<sup>595</sup> *Re Forward Development Associates and Martin's Contract* [1982] Qd R 569.

<sup>596</sup> 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* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2430].

## 21.2. Is there a need for reform

### 21.2.1. 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.<sup>597</sup> 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.<sup>598</sup> An application is governed by a different rule in the UCPR and the originating document is referred to as an Originating Application.<sup>599</sup> 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.<sup>600</sup> 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.<sup>601</sup>

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.<sup>602</sup> In terms of cases involving disputed questions of fact, as indicated in Part 20.1 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.<sup>603</sup> 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 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 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 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 deposit. Alternatively,

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<sup>597</sup> See UCPR 8(2). A claim is governed by UCPR 22 and a statement of claim must be attached to the claim. An application is governed by UCPR 26 and the originating document is referred to as an Originating Application (see Form 5).

<sup>598</sup> UCPR 292 (in the case of the plaintiff) and UCPR 293 (in the case of the defendant).

<sup>599</sup> UCPR 26.

<sup>600</sup> UCPR 11(a).

<sup>601</sup> UCPR 27(1) and UCPR 28(1).

<sup>602</sup> 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 11(a).

<sup>603</sup> See *Re Ringrose Pty Ltd* [1994] 1 Qd.R 382 and *Re MacDonald* [1989] 2 QdR 29, 34.



orders could potentially be framed by way of mandatory injunctive relief requiring one party to effect certain acts.<sup>604</sup>

### 21.2.2. 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*<sup>605</sup> 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.<sup>606</sup>

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.<sup>607</sup> The decision also referred to an earlier case of *Lindaning Pty Ltd v Goodlock*<sup>608</sup> 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.<sup>609</sup>

Commentary in relation to *Evans v Robcorp*<sup>610</sup> 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.’<sup>611</sup> This may include specific performance if ‘applied in conjunction with the *Uniform Civil Procedure Rules 1999*.’<sup>612</sup>

The position in relation to specific performance and section 70 of the PLA remains uncertain.

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<sup>604</sup> As to the application of UCPR 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).

<sup>605</sup> [2014] QSC 26.

<sup>606</sup> *Evans v Robcorp* [2014] QSC 26, [2].

<sup>607</sup> *Evans v Robcorp* [2014] QSC 26, [16] – [17].

<sup>608</sup> [2011] QSC 266.

<sup>609</sup> [2011] QSC 266, [1]. Proceedings under section 70 of the PLA are commenced by originating application using Form 5 of the UCPR.

<sup>610</sup> [2014] QSC 26.

<sup>611</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2430].

<sup>612</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2430].

### 21.3. Other Australian jurisdictions

Victoria, Northern Territory and Tasmania have an equivalent provision to section 70 of the PLA.<sup>613</sup> The form of the relevant sections in each jurisdiction is similar to the Queensland provision. The Victorian provision was reviewed by the Victorian Law Reform Commission in 2010 and it was noted by the Commission that the relevant sub-section (section 49(1)) was 'uncontentious'.<sup>614</sup> 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 sections 49(1), (2) and (3) should be revised and consolidated into a single provision, although the recommendation to date has not been adopted.<sup>615</sup>

### 21.4. Options

It does appear that existing civil procedure rules in Queensland, particularly Originating Applications made under UCPR 11(a), provide a similarly expeditious process for dealing with issues that would ordinarily fall within the scope of section 70. The discussion in Part 21.2.1 potentially 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. Uncertainty regarding the scope of the section has also recently been highlighted in two Supreme Court decisions.

In these circumstances, repeal of section 70 is recommended.

#### Questions

**76. Do you think the summons process provided in section 70 of the PLA has any current utility in the light of the *Uniform Civil Procedure Rules 1999* (Qld), particularly UCPR 11(a)?**

**77. If the *Uniform Civil Procedure Rules 1999* (Qld) provide a similarly expeditious process as section 70, is there any purpose in retaining section 70 of the PLA?**

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<sup>613</sup> See *Property Law Act 1958* (Vic) s 49, *Law of Property Act* (NT) s 72 and *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).

<sup>614</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010).

<sup>615</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) (Recommendation 11).

## 22. Section 70A – Computers inoperative on day for completion

### 22.1. Overview and purpose

Section 70A of the PLA provides:

- (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 2000<sup>616</sup> 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*<sup>617</sup> 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.<sup>618</sup> 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

<sup>616</sup> The section was introduced in the *Justice and Other Legislation (Miscellaneous Provisions) Act 2000* (Qld).

<sup>617</sup> [1999] Qd R 172.

<sup>618</sup> 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.’

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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.<sup>619</sup>

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.<sup>620</sup> This provided the buyer with a reason not to complete.<sup>621</sup> 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 check 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.<sup>622</sup>

Section 70A of the PLA effectively restates the Court of Appeal's implied term in *Imperial Bros Pty Ltd v Ronim Pty Ltd*<sup>623</sup> 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:<sup>624</sup>
  - 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;<sup>625</sup>
- time ceases to be of the essence of the contract;<sup>626</sup>
- 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;<sup>627</sup> and
- time is again of the essence from receipt of the notice by the relevant party.<sup>628</sup>

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<sup>619</sup> W D Duncan and SA Christensen, 'Overcoming the Problems of Showing and Making Cyber Title' (2000) 8 *Australian Property Law Journal* 1, 2.

<sup>620</sup> *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].

<sup>621</sup> W D Duncan and SA Christensen, 'Overcoming the Problems of Showing and Making Cyber Title' (2000) 8 *Australian Property Law Journal* 1, 2.

<sup>622</sup> 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'.

<sup>623</sup> [1999] Qd R 172.

<sup>624</sup> 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.

<sup>625</sup> *Property Law Act 1974* (Qld) s 70A(1) and (3).

<sup>626</sup> *Property Law Act 1974* (Qld) s 70A(2).

<sup>627</sup> *Property Law Act 1974* (Qld) s 70A(4) and (5).

<sup>628</sup> *Property Law Act 1974* (Qld) s 70A(7).

## 22.2. Is there a need for reform

The section was introduced to address and clarify the specific issue identified in *Imperial Bros Pty Ltd v Ronim Pty Ltd*.<sup>629</sup> 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 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.<sup>630</sup> The section continues to have this role.

## 22.3. Options

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 Part 23 below.

### Questions

**78. Are you are of any issues which might be raised by retaining section 70A of the PLA?**

**79. Are there additional clarifications which may need to be added to section 70A of the PLA?  
If so, what are these?**

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<sup>629</sup> [1999] Qd R 172.

<sup>630</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 300.

## 23. Inoperative computer systems and electronic conveyancing

### 23.1. Overview Electronic Conveyancing

The *Electronic Conveyancing National Law (Queensland) Act 2013* 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 Land Registry.<sup>631</sup> 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's 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.<sup>632</sup> 'Settlement' in that context occurs when the electronic workspace for the electronic conveyance records that:

- financial settlement<sup>633</sup> occurs; or
- if there is no financial settlement, the documents necessary to transfer title have been accepted for electronic lodgement by the registrar.<sup>634</sup>

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.'<sup>635</sup>

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 (Land Title, 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

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<sup>631</sup> 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.

<sup>632</sup> Explanatory Notes, Land Sales and Other Legislation Amendment Bill 2014 (Qld) 9.

<sup>633</sup> *Property Law Act 1974* (Qld) s 58A.

<sup>634</sup> *Property Law Act 1974* (Qld) s 58B(2).

<sup>635</sup> *Property Law Act 1974* (Qld) s58BA.

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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.<sup>636</sup> 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.<sup>637</sup>

### 23.2. 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'.<sup>638</sup> 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**)<sup>639</sup> 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;

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<sup>636</sup> *Property Law Act 1974 (Qld)* s67A(3)

<sup>637</sup> REIQ Contract for Houses and Residential Land (11<sup>th</sup> ed).

<sup>638</sup> Source accounts include a solicitor's trust account and the accounts of a financial institution.

<sup>639</sup> This request is made through the Reserve Bank Information and Transfer System (**RITS**) which is operated by the RBA.

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- after confirmation of reservation from the RBA, PEXA lodges documents with the Land Registry;
- assuming lodgement occurs, the Land 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, 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 which 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 Land 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.

### 23.3. Options

#### **Option 1 – Rely on the current provisions in the REIQ standard form contracts to address the issue of computer inoperability.**

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.

#### **Option 2 – Address the issue through a statutory provision**

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.<sup>640</sup> 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.

Any statutory provision proposed could be formulated in a number of different ways. Two possible approaches are discussed below.

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<sup>640</sup> Sharon Christensen and Amanda Stickley, ‘Electronic Title in the New Millennium’ 4(2) 2000 *Flinders Journal of Law Reform* 209.

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### ***Approach A: The provision could mirror clause 14 of the REIQ standard form contracts.***

The statutory provision would 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.

### ***Approach B: Adopt an approach similar to section 70A of the PLA but which reflects the electronic conveyancing environment.***

An overview of the matters which may be included in an adapted statutory provision is below:

- the application of the section, as with section 70A of the PLA, should be subject to a contrary provision in the contract for sale and will only apply where time is of the essence in the contract;
- 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 Land Registry, Office of State Revenue, PEXA or a financial institution in the transaction being unavailable for settlement by 4pm;;
- in those circumstances, time ceases to be 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;<sup>641</sup> and
- the resetting of the time is 'notification' of settlement and time is again of the essence of the contract.

Some matters which will require further consideration in relation to this Approach B is 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 than Approach A and is inconsistent with the contractual approach which does not suspend time of the essence.

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<sup>641</sup> If the other non-nominating party does not resign as required for the purposes of e-conveyancing, the usual contractual rights would apply.

**Questions**

- 80. Do you think the failure to settle a contract for sale as a result of computer inoperability (and without fault on the part of the parties to the contract) and the consequential breach of time of the essence, should be addressed?**
- 81. If so, do you think a statutory solution to address the issue of computer inoperability during settlement is an appropriate approach?**
- 82. Do you think an alternative approach is for the parties to simply rely on contractual measures to address the issue?**
- 83. Do you think either Approach A or Approach B set out above are viable? If so, which Approach do you prefer?**
- 84. Are you aware of any other issues arising as a result of delays in settlement caused by technical problems within the locked electronic workspace?**
- 85. Should the provision also apply if a TAC cannot be obtained prior to settlement, or should this be added to s 70A PLA?**
- 86. Should the period of time for a 'fresh' attempt at settlement be prescribed in the statute? If so, how long should it be?**
- 87. Should parties be allowed to notify a 'fresh' attempt at settlement and set a time?**

## Part D – Instalment sales

Part D examines the provisions of the PLA regulating instalment contracts.

### 24. Part 6 Division 4 – Instalment sales of land

#### 24.1. Overview and purpose

Part 6 Division 4 (the **Division**) of the *Property Law Act 1974* (Qld) (**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 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**).<sup>642</sup> The Queensland Law Reform Commission (**QLRC**)<sup>643</sup> commented upon the 1933 Act when re-enacting the essence of the legislation. The Report commented:

This procedure, which is commonly referred to as 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.<sup>644</sup>

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.<sup>645</sup> 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.<sup>646</sup>

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

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<sup>642</sup> 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.

<sup>643</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973).

<sup>644</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973), 54.

<sup>645</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 55.

<sup>646</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 54. See also Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2510].

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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 provisions of the 1933 Act were subject to significant criticism,<sup>647</sup> including by the Queensland Law Reform Commission in its 1973 report.<sup>648</sup> 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.

In recommending that the enactment of the Division proceed in the PLA, the QLRC commented:

A purchaser who buys subject to a terms contract is subject to a real risk and may suffer substantial loss if the vendor effects a transfer or mortgage before completion.<sup>649</sup>

The 1933 Act forms the conceptual basis of the Division. The Division is made up of seven sections, which are discussed in turn below.

### 24.1.1. Section 71 - Definitions

Section 71 provides a number of definitions for the Division. Relevant definitions are as follows:

**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.

**prescribed percentage** means—

- (a) for a contract for the sale of a proposed lot—20%; or
- (b) otherwise—10%.”

**sale** includes an agreement for sale and an enforceable option for sale.

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.<sup>650</sup> The Parliamentary Debates indicate that this change is intended to assist

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<sup>647</sup> See Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2510] and *Petrie v Dwyer* (1954) 912 CLR 99, 106.

<sup>648</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 57.

<sup>649</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 56.

<sup>650</sup> *Land Sales and Other Legislation Amendment Act 2014* (Qld) s 62, amending *Property Law Act 1974* (Qld) s 71.

developers when financing major projects.<sup>651</sup> For sales of existing lots, the prescribed percentage has remained at 10%.

### **24.1.2. Section 71A – Application**

Section 71A 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.

### **24.1.3. Section 72 – Restriction on vendor’s right to rescind**

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.<sup>652</sup> 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.<sup>653</sup>

### **24.1.4. Section 73 – Land not to be mortgaged by vendor**

Section 73 provides that the seller may not, without the consent of the buyer, mortgage or sell the land.<sup>654</sup> If the seller mortgages or sells 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.<sup>655</sup>

### **24.1.5. Section 74 – Purchaser’s right to lodge a caveat**

Section 74 gives the buyer the right to lodge a non-lapsing caveat<sup>656</sup> 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.

### **24.1.6. Section 75 – Right to require a conveyance**

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 the land to the buyer, subject to a mortgage by the buyer in favour of the seller (or another party as the seller specifies).<sup>657</sup> The seller who is not in default under the instalment contract has an equivalent right to require the buyer to accept conveyance of the land subject to a mortgage by the buyer in favour of the seller (or another party as the seller specifies).<sup>658</sup>

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<sup>651</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 3 June 2014, 1941.

<sup>652</sup> *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).

<sup>653</sup> *Property Law Act 1974* (Qld), s 72(3).

<sup>654</sup> *Property Law Act 1974* (Qld) s 73(1).

<sup>655</sup> *Property Law Act 1974* (Qld) s 73(2).

<sup>656</sup> *Property Law Act 1974* (Qld) s 74(1).

<sup>657</sup> *Property Law Act 1974* (Qld) s 75(1).

<sup>658</sup> *Property Law Act 1974* (Qld) s 75(2).

### 24.1.7. Section 76 – Deposit of title deed

Section 76 allows a buyer, who is not in default under the instalment contract, to require the seller to deposit the title deed and a duly executed conveyance or instrument of transfer with a prescribed authority to be held in trust.<sup>659</sup> A prescribed authority includes a financial institution, a trustee corporation, a solicitor or conveyancer or another authorised person.<sup>660</sup>

## 24.2. Is there a need for reform?

The instalment contract provisions contain important protections for buyers of land under a genuine instalment contract, where a deposit of up to the prescribed amount is paid and the balance of the purchase price is paid in equal 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 property<sup>661</sup> or by lodging a consent caveat with the agreement of the seller.

However, genuine instalment contracts are virtually unknown in Queensland and are generally limited to informal family contracts. The reason for this is because today 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 true instalment contracts by the parties, but which were only instalment contracts due to the operation of the definitions in the legislation. In many of these cases, the buyer was unable to settle on the agreed date and the seller attempted to rescind the contract and seek damages.

Unmeritorious buyers have been able to avoid liability for failing to complete the contract by arguing 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, most without even realising that they had entered into an instalment contract in the first place.

Under the Division, a contract may be deemed an instalment contract in situations where the deposit exceeds the prescribed percentage of the purchase price or where a payment of a sum is made by the buyer to the seller (or the seller's agent) under the sale contract. A contract may also be deemed to be an instalment contract if the buyer is bound to make any payments at all (purchase instalment or not) to the seller under the contract. This may include payments to maintain the land, interest payments or payment for an extension of time to complete the contract.

Paragraphs 24.2.1 and 24.2.2 below consider examples where instalment contracts have been deemed to exist where no instalment contract was intended by the parties. These "deemed"

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<sup>659</sup> *Property Law Act 1974* (Qld) s 76(3).

<sup>660</sup> *Property Law Act 1974* (Qld) s 76(4).

<sup>661</sup> *Property Law Act 1974* (Qld) s 74.

instalment contracts were not intended to be caught by the legislation and have given rise to almost all the litigation under the Division.

Aside from the issue of an instalment contract being created where no instalment contract was intended by the parties, there are several issues with the Division that may require legislative amendment. Paragraph 24.2.3 considers a number of these issues.

### **24.2.1. Deemed instalment contracts – deposit amount**

The major issue with the Division relates to sales contracts that are not intended to be instalment contracts but that may, due to the operation of the definitions in the Division, be deemed to be instalment contracts. If the buyer is unable to complete the contract on the day agreed for settlement and the seller terminates the contract for the buyer's breach, the buyer may avoid liability if the contract is deemed to be an instalment contract and the seller has terminated without giving the required notice.

This may occur if the purported deposit does not satisfy the definition of deposit in section 71 of the PLA. If the amount of the deposit exceeds 10% (or 20% in the case of proposed lots) (each, the **prescribed percentage**) of the purchase price, an instalment contract will be created.<sup>662</sup> This is because the amount paid as a deposit will not be a 'deposit' within the meaning of the PLA and is then a payment that the buyer is bound to make without becoming entitled to receive a 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.

#### **24.2.1.1. Deposit greater than the prescribed percentage of the purchase price**

In *Emlen Pty Ltd v Cabbala Pty Ltd*<sup>663</sup> a total deposit of \$421,000 was paid on a purchase price of \$4,100,450. The buyer failed to settle on the date for completion and the seller attempted to terminate the contract. The buyer argued, and the court accepted, that because the amount of the deposit exceeded 10% of the purchase price, the contract was an instalment contract. As a result, the seller could not rescind the contract until the expiration of a 30 day notice period following a notice of default.

This result occurred because of the definition of deposit. For the purposes of the Division, to be a deposit, the amount must be no more than the prescribed amount, payable in one or more payments and liable to be forfeited and retained by the seller if the buyer breaches the contract. A purported deposit that does not satisfy all three of these requirements is not a deposit for the purposes of the Division. It then becomes a payment that the buyer is bound to make without becoming entitled to a conveyance in exchange for the payment and creates an instalment contract.

#### **24.2.1.2. Discount on the purchase price**

A discount or rebate on the purchase price may also result in an instalment contract if, as a result of the discount or rebate, the deposit exceeds the prescribed percentage. In *Moor v BHW Project Pty*

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<sup>662</sup> *Emlen Pty Ltd v Cabbala Pty Ltd* [1989] 1 Qd R 620.

<sup>663</sup> [1989] 1 Qd R 620.



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*Ltd*<sup>664</sup> the contract provided for a \$5,000 reduction in the purchase price of \$247,500 upon paying a deposit of \$24,750. The Supreme Court (following *Emlen*) held that because the reduction in purchase price was triggered upon payment of the deposit, the purchase price was immediately reduced and the deposit then exceeded 10%. This made the contract into an instalment contract.<sup>665</sup>

*Moor* can be contrasted with *Re Divoca's Caveat*<sup>666</sup> which involved a similar situation. In *Re Divoca* a rebate was applied to the purchase price but (unlike *Moor*) the rebate was payable to the buyer on settlement, not on paying the deposit. This meant that the rebate was only given to the buyer after the full purchase price had been paid (in effect, if not in practice). The trigger for the rebate was the payment in full of the purchase price, meaning the deposit did not exceed 10% of the purchase price and an instalment contract was not created.

Both *Emlen* and *Moor* involved contracts where the deposit was paid with the balance of the purchase price to be paid in one payment at settlement. In each case, the sales contracts were not intended to be instalment contracts but were deemed to be instalment contracts by operation of the Division. In both cases, the buyer was unable to settle at the agreed time but the seller was unable to terminate the contract (as the proper notice had not been given).

### 24.2.1.3. Non-refundable amount

To satisfy the definition of a deposit, the amount must be liable to be forfeited and retained by the seller in the event of a breach by the buyer. It has been argued that if the deposit is paid immediately to the seller without the seller waiting to see if the buyer breaches the contract, then the buyer loses any right to recover the amount and no longer has an interest in the amount that can be forfeited in the event of a breach of contract by the buyer.

*Phillips v Scotdale Pty Ltd*<sup>667</sup> considered this issue. The case involved a situation where the buyer (who was unable to complete the sale on the agreed date of settlement) argued that the contract was in fact an instalment contract because a special condition in the contract entitled the seller to retain the deposit immediately, without waiting to see if the buyer breached the contract. The argument was advanced that as the deposit had already been paid to the seller, the buyer no longer had an interest in the amount which could be forfeited in the event the buyer breached the contract. If accepted, this would mean that the purported deposit did not satisfy the definition under the Division. This argument was rejected by the court which held that the buyer was entitled, albeit contingently, to recover the deposit in the event of a breach of contract by the seller.<sup>668</sup>

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<sup>664</sup> [2004] QSC 60.

<sup>665</sup> See discussion in S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 257-258 [4.4.1.1].

<sup>666</sup> [1991] 2 Qd R 121.

<sup>667</sup> [2008] QCA 127.

<sup>668</sup> *Phillips v Scotdale Pty Ltd* [2008] QCA 127, [22]. *Phillips* was followed in *Watpac Developments Pty Ltd v Latrobe King Commercial Pty Ltd* [2011] QSC 392.

Despite the decision, 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 71.<sup>669</sup>

#### 24.2.1.4. Option fee

A further situation where a deposit may be greater than the prescribed percentage of the purchase price relates to the payment of an option fee. The definition of instalment contract includes an enforceable option for the sale of the land. In *AMP Property 3 Pty Ltd v Blondeau*<sup>670</sup> an option fee of \$100 was payable upon exercising the option to purchase a proposed lot on terms contained in the option agreement and an annexed contract for the price of \$2,140,000. The annexed contract contained a schedule which specified that the deposit was not to exceed 10% of the purchase price.

The respondent Blondeau paid the option fee and a deposit of \$214,000. Blondeau argued that this created an instalment contract and purported to terminate the contract because the seller had mortgaged the lot. However, the court held that the proper interpretation of the sales contract required the option fee to form part of the deposit of \$214,000.<sup>671</sup>

It has been suggested that 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,<sup>672</sup> particularly given that a 'sale' within the meaning of section 71 includes an 'enforceable option for a sale.'<sup>673</sup>

#### 24.2.2. Deemed instalment contracts – Payments to the vendor

An instalment contract is one in which the buyer is bound to make payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments.<sup>674</sup> The definition does not restrict or limit the type of payments to those payments of an instalment of the purchase price.<sup>675</sup> 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 amount of the purchase price may make the contract an instalment contract.<sup>676</sup>

If the buyer is late making a payment of any instalment or sum of money (other than a deposit) under an instalment contract, the seller cannot terminate the contract without giving 30 days notice.<sup>677</sup>

This means that any payments, not just payments of the purchase price (other than a deposit) paid by the buyer to the seller under the contract prior to settlement may create an instalment contract.

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<sup>669</sup> See *Phillips v Scotdale Pty Ltd* [2008] QCA 127. See also Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2540] and S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 258 [4.4.1.1].

<sup>670</sup> [2009] QSC 326.

<sup>671</sup> *AMP Property 3 Pty Ltd v Blondeau* [2009] QSC 326 at para [61].

<sup>672</sup> S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 259 [4.4.1.2].

<sup>673</sup> *Property Law Act 1974* (Qld) s 71 (definition of 'sale').

<sup>674</sup> *Property Law Act 1974* (Qld) s 71 (definition of 'instalment contract').

<sup>675</sup> *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, 507.

<sup>676</sup> Duncan and Vann, *Property Law and Practice in Queensland* (eds) WD Duncan and A Wallace, Thomson Reuters, (looseleaf) [6.2550].

<sup>677</sup> *Property Law Act 1974* (Qld) s 72(1).

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Payments to third parties or payments at the time of settlement are unlikely to create an instalment contract.<sup>678</sup> The types of payments that may cause a sales contract to be deemed to be an instalment contract include payments to maintain the land, interest payments and payments for an extension of time.

### 24.2.2.1. Payments to maintain the land

In *Bradiotti v Queensland City Properties Ltd*<sup>679</sup> the sales contract required the buyer to make payments to the seller to maintain the land in a condition for farming. The buyer was unable to complete the contract on the specified day for settlement so the seller issued a notice of rescission. The buyer argued that the payments to maintain the land were a sum required to be paid under the contract without giving the buyer a right to a conveyance thus creating an instalment contract. This argument was accepted by the High Court.

As a result, the seller's attempt to rescind the contract without giving the appropriate notice was a wrongful termination and the buyer was able to terminate the contract. This position is different if the buyer is required to pay rent to the seller under a tenancy agreement or lease. In such circumstances, the requirement to pay rent is under the tenancy agreement or lease and not under the sales contract.

### 24.2.2.2. Payments of interest

In *Wacal Developments Pty Ltd v Realty Investments Pty Ltd*<sup>680</sup> the sales contract provided for a deposit of \$31,900 on a purchase price of \$319,200. The contract also provided for the buyer to pay the seller interest on the outstanding balance of the purchase price until completion. The buyer defaulted on the payment of interest and the seller issued a notice of rescission of the contract and forfeiture of deposit 14 days after giving the buyer a notice to remedy its default. The buyer argued that the contract was actually an instalment contract and the seller's rescission of the contract was a repudiation which gave the buyer a right to rescind the contract and recover the deposit.

The matter ultimately was determined by the High Court. In considering the matter, the High Court noted that equivalent provisions in the 1933 Act referred to default in 'payment of any instalment' or 'such instalment or instalments as would have been due and payable'.<sup>681</sup> However, the Division did not have this limitation and the ordinary meaning of the words 'or sum of money' clearly indicated that the intention of the legislature was to include any payment from the buyer to the seller made after the payment of the deposit and before settlement, whether part of the purchase price or not. As the interest payments were payments under the contract that the purchaser was bound to make without becoming entitled to a conveyance an instalment contract was created.<sup>682</sup>

### 24.2.2.3. Payments for extension of time

In some situations where the buyer is unable to complete a contract at the agreed time for settlement, the seller may agree to an extension of time, sometimes in exchange for a payment, such as interest

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<sup>678</sup> *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503, 507. S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 260 [4.4.1.5].

<sup>679</sup> (1991) 172 CLR 293.

<sup>680</sup> (1978) 140 CLR 503.

<sup>681</sup> *Wacal Developments Pty Ltd v Realty Investments Pty Ltd* (1978) 140 CLR 503, 510.

<sup>682</sup> *Wacal Developments Pty Ltd v Realty Investments Pty Ltd* (1978) 140 CLR 503, 507.

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on the unpaid balance. However, a variation of a sales contract that requires the buyer to make a payment prior to settlement may create an instalment contract especially if there is a variation to the terms of the contract. Payments made to a seller to extend time are not uncommon.

In *Kaneko v Crawford*<sup>683</sup> the seller agreed to extend the time for settlement in exchange for a payment from the buyer of interest on the unpaid purchase price. The buyer paid \$677.97 and an extension was given. The buyer failed to settle on the ultimate settlement date and the seller terminated the contract. At first instance, the payment of interest was held to create an instalment contract. However, on appeal, the Court carefully considered the correspondence between the parties when negotiating the extension of time. The Court of Appeal held that the payment for the extension was actually made under a collateral or separate agreement, not under the sales contract itself. The payment was consideration for the seller granting an extension and as it was paid under a separate contract and not under the sales contract, it did not create an instalment contract.<sup>684</sup>

However, the nature and terms of the agreement to extend the time for settlement are crucial. *Starco Developments Pty Ltd v Ladd*<sup>685</sup> also involved a situation where an extension of time was granted by the seller when the purchaser paid interest on the unpaid purchase price. However, the extension was documented by an addendum to the existing contract amounting to a variation of the contract by which the buyer became 'bound to make a payment'. The variation also provided that the deposit money was to be immediately payable to the seller. The Court held that this was a variation of the sales contract that converted it to an instalment contract.

### 24.2.3. Other issues with the Division

The cases considered to this point generally deal with situations where a sales contract is deemed to be an instalment contract through the operation of definitions within the Division. There has been very little judicial consideration of some of the other aspects of the instalment contract provisions. However, there are areas where these provisions may require amendment to clarify the position at law or to conform to modern practices.

#### 24.2.3.1. Act does not bind the crown – should it?

Section 71A provides that the Division does not bind the Crown. In this sense, the Crown generally refers to the executive branch of government.<sup>686</sup> 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.<sup>687</sup>

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<sup>683</sup> [1999] 2 Qd R 514.

<sup>684</sup> See S Christensen, WM Dixon and WD Duncan and SE Jones, *Land Contracts in Queensland* (Federation Press, 2011) 261 [4.4.1.6].

<sup>685</sup> [1999] 2 Qd R 542.

<sup>686</sup> See Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5<sup>th</sup> ed, 2013) 154 [4.4].

<sup>687</sup> Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5<sup>th</sup> ed, 2013) 162 [4.6].

If the question were to arise in practice, it may require recourse to the legislation that created the statutory body and the intention of the legislature.<sup>688</sup> For this reason, it may be desirable to address whether the Division should in fact be binding on the Crown. There seems no reason to exclude the Crown which is bound generally by the PLA.

#### **24.2.3.2. Presumption of an instalment contract**

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. However instalment contracts are rarely used, and given the extra burden an instalment contract creates for the seller, it may be appropriate to reverse the presumption so that the contract is presumed not to be an instalment contract until the buyer elects to perform it as an instalment contract.

#### **24.2.3.3. Consent to sell the land with a novation to the new party**

Under an instalment contract the seller cannot mortgage or sell the land without the consent of the buyer. However, there may be situations where the seller wants to sell the land to a third party under conditions that include a novation of the original instalment contract, replacing the seller with the third party purchaser under a new contract.

The only effect of such a novation would be that original seller is replaced with the third party purchaser 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.

This may be necessary for example if the seller under an instalment contract is in immediate need of funds and the contract still has some time to run, or the payments have not yet reached the one-third threshold. The buyer under the instalment contract may not be in a position to complete the purchase and the seller may have to seek a sale of the land to a third party.

Under the existing rules, the buyer would be able to withhold consent to such a sale to a third party. However, 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 to be 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.

#### **24.2.3.4. Consent to mortgage the land**

Generally, the seller cannot mortgage the land without the consent of the buyer. However, in some sales, particularly sales of proposed lots or 'off-the-plan' sales, the seller may require further finance in order to complete the project. Where this is a possibility, the seller may include terms in the sales contract so that the buyer gives consent to any mortgage of the land in advance. This means that if the seller requires further finance, the seller may mortgage the land relying on the prior consent given in the sales contract.

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<sup>688</sup> Nicholas Seddon, *Government Contracts: Federal, State and Local* (The Federation Press, 5<sup>th</sup> ed, 2013) 169 [4.8].

While this may occur in practice, it is unclear if such prior consent will be effective if the buyer were to challenge the issue in a court of law. It has been suggested that the PLA should clarify the position regarding whether prior consent to a mortgage of the land in an instalment contract is effective for the purposes of section 73 of the PLA.

#### **24.2.3.5. Right to require a conveyance**

Section 75 provides that under an instalment contract a seller or a purchaser who is not in default has the right to require the other party to convey (or accept conveyance as the case may be) of the property subject to a mortgage. This right can be exercised after one-third of the purchase price has been paid.

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.<sup>689</sup> Initially, this right only applied to the buyer but when the provisions were placed in the PLA, the equivalent right was given to the seller.

It has been suggested that it may be appropriate to remove or change the one-third threshold to a lower amount. The effect would be to allow the buyer or the seller to exercise this right sooner in the transaction without the need to wait until one-third of the purchase price has been paid.

#### **24.2.3.6. Deposit of title in escrow**

Section 76 allows a buyer under an instalment contract to direct the seller to deposit the title deed and a duly executed conveyance or instrument of transfer with a prescribed authority. This was a feature of the 1933 Act designed to protect the buyer under long term instalment contracts where the seller and the title may be difficult to locate.<sup>690</sup>

However, the majority of titles in Queensland are now held electronically and no paper certificate has been issued for the property. Paper titles may be available from the Titles Registry for a fee but 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.

It has been suggested that the section could be amended to provide that a certificate of title is only required to be held in escrow with the signed transfer if a certificate of title has been issued. This would mean that the vendor cannot be required to acquire a certificate of title where none has been issued just to satisfy the requirement in the section.

#### **24.2.3.7. Application to off-the-plan sales**

It has been suggested that sales of proposed lots or 'off-the-plan' sales could be specifically excluded from the instalment contract provisions. As discussed above, the prescribed percentage for deposits

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<sup>689</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 58.

<sup>690</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 58.

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on sales contracts for proposed lots has been increased to 20%,<sup>691</sup> which makes it less likely that off-the-plan sales contract will be deemed to be instalment contracts.

It has been argued that 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, a conveyance cannot be required after one-third of the purchase price has been paid (as there is nothing to convey) and there is no title that can be held in escrow by a prescribed authority. However, the High Court has held that despite this, the Division applies to sales of proposed lots.<sup>692</sup>

It may be argued that there are sufficient protections in the *Body Corporate and Community Management Act 1997 (Qld)*<sup>693</sup> for 'off-the-plan' buyers without complicating the transaction further by continuing to impose the Division which may be unsuitable for the type of contracting process involved in off-the-plan sales.

### 24.3. Other Australian jurisdictions

Other Australian jurisdictions generally have similar provisions relating to instalment contracts. However, in some states there are minor differences worth noting. The provisions in New South Wales however, are completely different.

In the Northern Territory, the equivalent provisions are effectively identical to the Queensland provisions.<sup>694</sup> Similarly to Queensland, the Northern Territory legislation allows either the buyer or the seller to require the other to convey or accept conveyance (as the case may be) of the land the subject of an instalment contract. However, unlike Queensland, there is no threshold of the purchase price that must be paid before the conveyance can be required.<sup>695</sup>

In Western Australia, the instalment contract provisions provide that if the buyer breaches the instalment contract by failing to pay a sum of money, the seller must give at least 28 days notice before the seller can rescind.<sup>696</sup> However, if the breach is for any other reason, the seller is only required to give a reasonable time from the date of service of a notice. The Queensland legislation is silent as to when a seller can rescind an instalment contract for a breach by the buyer that is not a failure to pay a sum of money.

Like Queensland, the Western Australian legislation provides that the seller cannot mortgage the land without the consent of the buyer. However, unlike Queensland, Western Australia gives the seller the option to seek leave of a court to encumber the land with a mortgage.<sup>697</sup> The court may make an order accordingly subject to such conditions as are necessary to protect the interest of the buyer.<sup>698</sup>

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<sup>691</sup> *Property Law Act 1974 (Qld)* s 71 (definition of 'prescribed percentage' and 'proposed lot').

<sup>692</sup> *Chan v Dainford Limited* (1985) 155 CLR 533, 538-539.

<sup>693</sup> See *Body Corporate and Community Management Act 1997 (Qld)* Ch 5 pt 2.

<sup>694</sup> *Law of Property Act (NT)* Part 6 division 4 ss 73-78.

<sup>695</sup> *Law of Property Act (NT)* s 77.

<sup>696</sup> *Sale of Land Act 1970 (WA)* s 6(2)(a).

<sup>697</sup> *Sale of Land Act 1970 (WA)* s 8.

<sup>698</sup> *Sale of Land Act 1970 (WA)* s 9.

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In addition to contracts for the sale of land under which a buyer is bound to make a payment, Western Australia and Victoria include contracts under which the buyer is entitled to possession or occupation of the land before becoming entitled to a conveyance of the land.<sup>699</sup>

New South Wales takes an approach to instalment contracts which is different from the other states and territories. In New South Wales, an instalment contract means:

- a contract for the sale of a lot in a subdivision comprising five or more lots where the purchase price is paid by four or more part payments; and
- any option to purchase such a lot where the consideration for granting the option is paid by four or more part payments,<sup>700</sup>

but excludes particular types of contracts, including contracts under both the *Strata Schemes (Freehold Development) Act 1973* (NSW) and the *Strata Schemes (Leasehold Development) Act 1986* (NSW).<sup>701</sup> A lot cannot be sold under an instalment contract unless the subdivision in which the lot is comprised complies with the relevant provisions.<sup>702</sup>

### 24.4. Options

As discussed above, the instalment contract provisions protect important rights for buyers under genuine instalment contracts. However problems arise with sales contracts that were never intended to be instalment contracts but are deemed to be instalment contracts by operation of the law. In many of the cases, such a deeming has the effect of protecting buyers who are otherwise unable to settle the contract as agreed.

There are effectively three options to address the concerns raised in relation to this topic. The first option is to keep the Division and make no changes. The second option is to completely repeal the Division. A final option is to modify the provisions of the Division to avoid the types of adverse outcomes described above.

#### 24.4.1. Option 1 – Retain the Division in its current form

Despite the number of cases dealing with instalment contracts and the problems that may arise in practice if sales contracts are deemed to be instalment contracts, there is an argument that the existing provisions are well known and understood. Sellers are generally advised by legal practitioners and other professionals to structure land sales transactions in ways that minimise the risk the contract will be deemed to be an instalment contract.

Additionally the Division has recently been modified to allow a deposit of up to 20% of the purchase price for sales of proposed lots. This will help to ensure that major projects can get access to financing so that projects can get off the ground. The risk that off-the-plan contracts will be deemed to be instalment contracts is now reduced.

Taken together, this may mean that there is no need for amendment of the Division at this time.

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<sup>699</sup> *Sales of Land Act 1970* (WA) s 5 (definition of ‘terms contract’); *Sale of Land Act 1962* (Vic) s 29A(1).

<sup>700</sup> *Land Sales Act 1964* (NSW) s 2 (definition of ‘instalment contract’).

<sup>701</sup> *Land Sales Act 1964* (NSW) s 2 (definition of ‘instalment contract’).

<sup>702</sup> *Land Sales Act 1964* (NSW) s 3.



**Question**

**88. Should the existing provisions relating to instalment contracts be retained in their current form?**

**24.4.2. Option 2 – Repeal the Division**

A second option to address the issue of instalment contracts is to completely repeal the Division. There is an argument that buyers are no longer in need of the protections created by the Division as instalment contracts are much less frequently used and financing is increasingly available. This argument is supported by the fact that many of the cases relating to the instalment contract provisions actually deal with situations where a regular sales contract is deemed to be an instalment contract, even though the parties never intended to create an instalment contract.

If the Division were repealed, a buyer knowingly entering into an instalment contract would be able to lodge a caveat with the consent of the seller, which would be adequate protection. Additionally, instalment buyers would have some protection as holders of an equitable interest in the land. This means that relief against forfeiture of part payments would be given by a court of equity.

**Question**

**89. Should the existing provisions relating to instalment contracts be completely repealed? What problems may arise in practice if this were to occur?**

**24.4.3. Option 3 – Modify the Division**

A third option to address the issue of instalment contracts is to modify the existing provisions to reduce the number of sales contracts that will be deemed to be instalment contracts and to address issues with the operation of the provisions. The options discussed at 24.4.3.1 and 24.4.3.2 below are intended to limit the types of contracts that are deemed to be instalment contracts.

There may also be a need to amend the provisions of the Division that apply to instalment contracts. The options discussed in 24.4.3.3 are intended to modify the rights and obligations of parties under instalment contracts.

**24.4.3.1. Amend the definition of ‘deposit’**

There are a number of options to address the situation where a purported deposit fails to satisfy the definition in the Division and leads to a sales contract being deemed to be an instalment contract. The first is to change the definitions in the Division to exclude particular types of contracts from falling into the definition of an instalment contract. In relation to situations where the deposit exceeds the prescribed percentage, this could be done by:

- increasing the prescribed percentage of the deposit above 10% for sales of existing lots (as has been done for the sales of proposed lots);<sup>703</sup> or

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<sup>703</sup> See *Property Law Act 1974* (Qld) ss 68A and 71.

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- providing that the fact that the deposit exceeds 10% of the purchase price is not sufficient by itself to create an instalment contract (particularly in situations where a discount or rebate on the purchase price upon paying the deposit or at settlement reduces the purchase price).

### **Questions**

- 90. Should the prescribed percentage (currently 10% for contracts that do not relate to proposed lots) for a payment to be a 'deposit' within the meaning of the Division continue to apply or should it be changed?**
- 91. Should a discount on the purchase price that makes the deposit greater than the prescribed percentage of the purchase price mean that the contract is deemed to be an instalment contract for the purposes of the Division? Should other factors be taken into consideration when deeming a sales contract to be an instalment contract? What should these factors be?**
- 92. Should a purported deposit that is not refundable in any situation (including a breach of contract by the seller) mean that the contract is deemed to be an instalment contract for the purposes of the Division?**
- 93. If an option fee and a deposit together are more than the prescribed percentage of the purchase price, should the contract be deemed to be an instalment contract for the purposes of the Division?**

#### **24.4.3.2. Clarify the meaning of 'payments'**

To reduce the chances that a sales contract may be deemed to be an instalment contract because of payments made by the buyer under the contract, it may be necessary to define payments or exclude particular types of payments. For example, a definition of payments could:

- define payments to include only instalments of the purchase price; or
- exclude particular types of payments from the definition of 'payment', such as:
  - rent payable by a buyer in possession to a seller;
  - any payment to the seller for the maintenance or upkeep of the land (including reimbursement of any expenses such as rates and land taxes) made by the buyer to the seller pending completion of the contract;
  - interest on the balance of the purchase price payable by a buyer to a seller between contract and completion; and
  - payments by the buyer to the seller in consideration of an extension of the completion date.

**Questions**

**94. Should any payment under the sales contract payable from the buyer to the seller between the contract date and settlement mean that the contract is deemed to be an instalment contract for the purposes of the Division?**

**95. If not, what type of payments should be included or excluded?**

**24.4.3.3. Other changes to the Division**

As discussed above, there are several areas of the Division that may require amendment. Options to address these areas include:

- making the Division binding on the Crown;
- providing that when a buyer has a choice between performing a sales contract as an instalment contract or in some other manner, the contract will not be deemed to be an instalment contract until the buyer elects to perform the contract as an instalment contract;
- allowing the seller to sell the land the subject of an instalment contract to a third party provided the instalment contract is novated to the new third party purchaser;
- allowing the seller to mortgage the land subject to an instalment contract without the consent of the buyer if the buyer has given consent in advance as a term of the instalment contract;
- reducing or removing the one-third threshold requirement before either party can require the other to convey or accept conveyance of the land subject to a mortgage;
- providing that a certificate of title is only required to be held in escrow by a prescribed authority with a signed conveyance or instrument of transfer if a certificate of title has been issued for the lot; and
- excluding sales of proposed lots from the instalment contract provisions.

**Questions**

96. Should the instalment contract provisions bind the Crown?
97. When the buyer has a choice to perform a contract as an instalment contract or in some other manner, should the contract be presumed not to be an instalment contract until the buyer chooses otherwise? Should the parties to a sales contract be able to 'contract out' of this provision?
98. Should the seller under a binding instalment contract be able to sell the land to a third party without obtaining the buyer's consent?
99. If the terms of an instalment contract provide that the buyer gives consent in advance (and not in response to a specific request) for the seller to mortgage the land, should the seller be able to mortgage the land in reliance on this consent?
100. Under an instalment contract, should there be any restriction on when the buyer or seller can direct the other party to convey or accept conveyance (as the case may be) of the land subject to a mortgage? Should the one-third purchase price threshold continue to apply or should a different threshold apply?
101. Should the escrow provisions be modified to provide that a certificate of title must be held in escrow only if a paper certificate has been issued?
102. Should contracts for the sale of proposed lots (off-the-plan sales) be completely excluded from the instalment contract provisions?

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