

2016

Property Law Review  
Issues Paper 6

*Property Law Act 1974 (Qld) – PLA  
Parts 1-4, Part 6 (Deeds) and Part  
20 (Notices)*

Commercial and Property Law

Research Centre

# Table of Contents

|   |    |
|---|----|
| Table of Contents.....  | 2  |
| Preface.....  | 11 |
| How to make a submission.....   | 12 |
| Disclaimer .....  | 13 |
| 1. Background .....   | 14 |
| 1.1. Review of Queensland Property Laws .....   | 14 |
| <b>Part 1 Preliminary (ss 1-6)</b> .....  | 15 |
| 2. Section 4 – Act not to be taken to confer right to register restrictive covenant.....      | 15 |
| 2.1. Overview and purpose.....  | 15 |
| 2.2. Is there a need for reform?.....   | 15 |
| 2.3. Other jurisdictions.....   | 16 |
| 2.3.1. Australia .....  | 16 |
| 2.4. Preliminary recommendation .....   | 16 |
| 3. Section 5 – Application of Act.....  | 17 |
| 3.1. Overview and purpose.....  | 17 |
| 3.2. Is there a need for reform?.....   | 18 |
| 3.2.1. Clarity required in section 5 of the PLA regarding scope of application?.....          | 18 |
| 3.2.2. Inconsistent language within the Act used where provisions are ‘subject to’ other Acts | 19 |
| 3.3. Other jurisdictions.....   | 20 |
| 3.3.1. Australia .....  | 20 |
| 3.3.2. New Zealand .....  | 21 |
| 3.4. Preliminary recommendation .....   | 22 |
| 4. Section 6 – Savings in regard to ss 10-12 and 59.....                                      | 23 |
| 4.1. Overview and purpose.....  | 23 |
| 4.2. Is there a need for reform?.....   | 23 |
| 4.3. Other jurisdictions.....   | 24 |
| 4.3.1. Australia .....  | 24 |
| 4.3.2. New Zealand .....  | 24 |
| 4.4. Preliminary recommendations .....  | 24 |
| <b>Part 2 – General Rules Affecting Property (ss 7-18)</b> .....                              | 26 |
| 5. Section 7 – Effect of repeal of Statute of Uses .....                                      | 26 |
| 5.1. Overview and purpose.....  | 27 |

|        |   |    |
|--------|---|----|
| 5.2.   | Is there a need for reform?.....                                      | 28 |
| 5.2.1. | Sections 7(1) and (2) of the PLA.....                                 | 28 |
| 5.2.2. | Section 7(3) of the PLA – Voluntary conveyances .....                 | 28 |
| 5.3.   | Other jurisdictions.....  | 29 |
| 5.3.1. | Australia .....   | 29 |
| 5.3.2. | New Zealand .....   | 30 |
| 5.4.   | Preliminary recommendation .....                                      | 30 |
| 6.     | Section 8 – Lands lie in grant only.....                              | 31 |
| 6.1.   | Overview and purpose .....  | 31 |
| 6.2.   | Is there a need for reform?.....                                      | 31 |
| 6.3.   | Other jurisdictions.....  | 32 |
| 6.3.1. | Australia .....   | 32 |
| 6.3.2. | New Zealand .....   | 32 |
| 6.4.   | Preliminary recommendation .....                                      | 32 |
| 7.     | Section 9 – Reservation of easements etc in conveyances of land ..... | 33 |
| 7.1.   | Overview and purpose .....  | 33 |
| 7.2.   | Is there a need for reform?.....                                      | 34 |
| 7.3.   | Other jurisdictions.....  | 34 |
| 7.3.1. | Australia .....   | 34 |
| 7.4.   | Preliminary recommendation .....                                      | 34 |
| 8.     | Section 12 – Creation of interests in land by parol.....              | 35 |
| 8.1.   | Overview and purpose .....  | 35 |
| 8.2.   | Is there a need for reform?.....                                      | 35 |
| 8.3.   | Other jurisdictions.....  | 36 |
| 8.3.1. | Australia .....   | 36 |
| 8.3.2. | New Zealand .....   | 36 |
| 8.4.   | Preliminary recommendation .....                                      | 37 |
| 9.     | Section 13 – Persons taking who are not parties.....                  | 39 |
| 9.1.   | Overview and purpose .....  | 39 |
| 9.2.   | Is there a need for reform?.....                                      | 40 |
| 9.3.   | Other jurisdictions.....  | 41 |
| 9.3.1. | Australia .....   | 41 |
| 9.3.2. | New Zealand .....   | 41 |
| 9.4.   | Preliminary recommendation .....                                      | 42 |

|         |  |    |
|---------|--|----|
| 10.     | Section 14 – Conveyances by a person to the person etc ..... | 43 |
| 10.1.   | Overview and purpose .....                                   | 43 |
| 10.1.1. | Sections 14(1) and (2) .....                                 | 44 |
| 10.1.2. | Section 14(3) .....  | 44 |
| 10.1.3. | Section 14(4) .....  | 44 |
| 10.1.4. | Section 14(4A) .....   | 45 |
| 10.2.   | Is there a need for reform? .....                            | 45 |
| 10.3.   | Other jurisdictions.....                                     | 45 |
| 10.3.1. | Australia .....  | 45 |
| 10.3.2. | New Zealand .....  | 46 |
| 10.4.   | Preliminary recommendation .....                             | 47 |
| 11.     | Section 15 – Rights of husband and wife .....                | 48 |
| 11.1.   | Overview and purpose .....                                   | 48 |
| 11.2.   | Is there a need for reform? .....                            | 49 |
| 11.3.   | Other jurisdictions.....                                     | 49 |
| 11.3.1. | Australia .....  | 49 |
| 11.4.   | Preliminary recommendation .....                             | 50 |
| 12.     | Section 15A – Rights of aliens .....                         | 51 |
| 12.1.   | Overview and purpose .....                                   | 51 |
| 12.2.   | Is there a need for reform? .....                            | 51 |
| 12.3.   | Other jurisdictions.....                                     | 53 |
| 12.3.1. | Australia .....  | 53 |
| 12.3.2. | New Zealand .....  | 53 |
| 12.4.   | Preliminary recommendation .....                             | 54 |
| 13.     | Section 16 – Presumption that parties are of full age .....  | 55 |
| 13.1.   | Overview and purpose .....                                   | 55 |
| 13.2.   | Is there a need for reform? .....                            | 56 |
| 13.3.   | Other jurisdictions.....                                     | 56 |
| 13.3.1. | Australia .....  | 56 |
| 13.4.   | Preliminary recommendation .....                             | 58 |
| 14.     | Section 17 – Merger .....                                    | 59 |
| 14.1.   | Overview and purpose .....                                   | 59 |
| 14.2.   | Is there a need for reform? .....                            | 59 |
| 14.3.   | Other jurisdictions.....                                     | 60 |

|   |  |           |
|---|--|-----------|
| 14.3.1.   | Australia .....  | 60        |
| 14.3.2.   | New Zealand .....  | 60        |
| 14.4.   | Preliminary recommendation .....   | 60        |
| 15.   | Section 18 – Restrictions on operation of conditions of forfeiture ..... | 61        |
| 15.1.   | Overview and purpose .....   | 61        |
| 15.2.   | Is there a need for reform? .....  | 63        |
| 15.2.1.   | Australia .....  | 63        |
| 15.3.   | Preliminary recommendation .....   | 63        |
| <b>Part 3 Freehold estates (ss 19-29) .....</b> |  | <b>64</b> |
| 16.   | Section 19 – Freehold estates capable of creation .....                  | 64        |
| 16.1.   | Overview and purpose .....   | 64        |
| 16.2.   | Is there a need for reform? .....  | 64        |
| 16.3.   | Other jurisdictions.....   | 65        |
| 16.3.1.   | Australia .....  | 65        |
| 16.4.   | Preliminary recommendation .....   | 65        |
| 17.   | Section 20 – Incidents of tenure on grant in fee simple .....            | 66        |
| 17.1.   | Overview and purpose .....   | 66        |
| 17.2.   | Is there a need for reform? .....  | 69        |
| 17.3.   | Other jurisdictions.....   | 69        |
| 17.3.1.   | Australia .....  | 69        |
| 17.3.2.   | New Zealand .....  | 70        |
| 17.4.   | Preliminary recommendation .....   | 70        |
| 18.   | Section 21 – Alienation in fee simple.....                               | 71        |
| 18.1.   | Overview and purpose .....   | 71        |
| 18.2.   | Is there a need for reform? .....  | 72        |
| 18.3.   | Other jurisdictions.....   | 72        |
| 18.3.1.   | Australia .....  | 72        |
| 18.3.2.   | New Zealand .....  | 72        |
| 18.4.   | Preliminary recommendations .....  | 73        |
| 19.   | Section 22 – Abolition of estates tail .....                             | 74        |
| 19.1.   | Overview and purpose .....   | 74        |
| 19.2.   | Is there a need for reform? .....  | 75        |
| 19.3.   | Other jurisdictions.....   | 76        |
| 19.3.1.   | Australia .....  | 76        |

|           |   |    |
|-----------|---|----|
| 19.3.2.   | New Zealand .....   | 77 |
| 19.4.     | Preliminary recommendations .....   | 77 |
| 20.       | Section 23 – Abolition of quasi-entails .....   | 79 |
| 20.1.     | Overview and purpose .....  | 79 |
| 20.2.     | Is there a need for reform? .....   | 80 |
| 20.3.     | Other jurisdictions.....  | 80 |
| 20.3.1.   | Australia .....   | 80 |
| 20.4.     | Preliminary recommendations .....   | 80 |
| 21.       | Section 24 – Liability of life tenant for voluntary waste and Section 25 – Equitable Waste .... | 81 |
| 21.1.     | Overview and purpose .....  | 81 |
| 21.1.1.   | Section 24 – Voluntary waste .....  | 81 |
| 21.1.2.   | Section 25 – Equitable Waste .....  | 82 |
| 21.2.     | Is there a need for reform? .....   | 82 |
| 21.3.     | Other jurisdictions.....  | 83 |
| 21.3.1.   | Australia .....   | 83 |
| 21.3.1.1. | Voluntary waste .....   | 83 |
| 21.3.1.2. | Equitable waste.....  | 83 |
| 21.3.2.   | New Zealand .....   | 83 |
| 21.4.     | Preliminary recommendations .....   | 83 |
| 22.       | Section 26 – Recovery of property on determination of a life or lives.....                      | 85 |
| 22.1.     | Overview and purpose .....  | 85 |
| 22.2.     | Is there a need for reform? .....   | 86 |
| 22.3.     | Other jurisdictions.....  | 86 |
| 22.4.     | Preliminary recommendations .....   | 87 |
| 23.       | Section 27 – Penalty for holding over by life tenant.....                                       | 88 |
| 23.1.     | Overview and purpose .....  | 88 |
| 23.2.     | Is there a need for reform? .....   | 89 |
| 23.2.1.   | Establishing that the holding over was ‘wilful’ .....   | 89 |
| 23.2.2.   | Calculation of ‘double the yearly value of the land’ .....                                      | 89 |
| 23.2.3.   | Alternative remedy available .....  | 90 |
| 23.3.     | Other jurisdictions.....  | 90 |
| 23.3.1.   | Australia .....   | 90 |
| 23.4.     | Preliminary recommendations .....   | 90 |
| 24.       | Section 28 – Abolition of the rule in Shelley’s Case.....                                       | 92 |

|         |   |           |
|---------|---|-----------|
| 24.1.   | Overview and purpose .....  | 92        |
| 24.2.   | Is there a need for reform? .....                                       | 93        |
| 24.3.   | Other jurisdictions.....  | 94        |
| 24.3.1. | Australia .....   | 94        |
| 24.3.2. | New Zealand .....   | 94        |
| 24.4.   | Preliminary recommendations .....                                       | 94        |
| 25.     | Section 29 – Words of limitation .....                                  | 96        |
| 25.1.   | Overview and purpose .....  | 96        |
| 25.2.   | Is there a need for reform? .....                                       | 97        |
| 25.3.   | Other jurisdictions.....  | 97        |
| 25.3.1. | Australia .....   | 97        |
| 25.3.2. | New Zealand .....   | 98        |
| 25.4.   | Preliminary recommendations .....                                       | 98        |
|         | <b>Part 4 Future Interests (ss 30-32) .....</b>                         | <b>99</b> |
| 26.     | Section 30 – Creation of future interests in land .....                 | 99        |
| 26.1.   | Overview and purpose .....  | 99        |
| 26.1.1. | General.....  | 99        |
| 26.1.2. | <i>Land Title Act 1994</i> (Qld) and future interests.....              | 101       |
| 26.2.   | Is there a need for reform? .....                                       | 102       |
| 26.3.   | Other jurisdictions.....  | 102       |
| 26.3.1. | Australia .....   | 102       |
| 26.3.2. | New Zealand .....   | 102       |
| 26.4.   | Preliminary recommendations .....                                       | 103       |
| 27.     | Section 31 – Power to dispose of all rights and interests in land ..... | 104       |
| 27.1.   | Overview and purpose .....  | 104       |
| 27.2.   | Is there a need for reform? .....                                       | 105       |
| 27.3.   | Other jurisdictions.....  | 105       |
| 27.3.1. | Australia .....   | 105       |
| 27.3.2. | New Zealand .....   | 106       |
| 27.4.   | Preliminary recommendations .....                                       | 106       |
| 28.     | Section 32 – Restriction on executory limitations .....                 | 107       |
| 28.1.   | Overview and purpose .....  | 107       |
| 28.2.   | Is there a need for reform? .....                                       | 108       |
| 28.3.   | Other jurisdictions.....  | 108       |

|   |  |            |
|---|--|------------|
| 28.3.1.   | Australia .....  | 108        |
| 28.3.2.   | New Zealand .....  | 108        |
| 28.4.   | Preliminary recommendations .....  | 109        |
| <b>Part 6 Division 1 – Deeds, covenants, instruments and contracts (ss 44-52) .....</b> |  | <b>110</b> |
| 29.   | Deeds and electronic commerce .....  | 110        |
| 29.1.   | Deed vs contract .....   | 110        |
| 29.2.   | The history of deeds.....  | 111        |
| 29.3.   | Changing business practices – increasing electronic transactions .....       | 112        |
| 29.4.   | Changing deeds .....   | 112        |
| 29.4.1.   | United Kingdom .....   | 113        |
| 29.4.2.   | New Zealand .....  | 113        |
| 29.4.3.   | Victoria .....   | 114        |
| 29.4.4.   | Scotland.....  | 114        |
| 29.5.   | Electronic deeds? .....  | 115        |
| 29.5.1.   | Deeds under the <i>Electronic Transactions (Queensland) Act (2001)</i> ..... | 116        |
| 29.6.   | Options for reform .....   | 117        |
| 29.6.1.   | Option one – Simplify the requirements for deeds .....                       | 117        |
| 29.6.2.   | Option two – abolish deeds .....   | 118        |
| 30.   | Section 44 – Description and form of deeds.....                              | 120        |
| 30.1.   | Overview and purpose .....   | 120        |
| 30.2.   | Is there a need for reform?.....   | 120        |
| 30.3.   | Other jurisdictions.....   | 121        |
| 30.3.1.   | Australian jurisdictions.....  | 121        |
| 30.3.2.   | New Zealand .....  | 121        |
| 30.4.   | Options.....   | 121        |
| 31.   | Section 45 – Execution of deeds by individuals .....                         | 123        |
| 31.1.   | Overview and purpose .....   | 123        |
| 31.2.   | Is there a need for reform?.....   | 124        |
| 31.2.1.   | Electronic signature and attestation.....                                    | 124        |
| 31.3.   | Other jurisdictions.....   | 125        |
| 31.3.1.   | United Kingdom .....   | 125        |
| 31.3.2.   | New Zealand .....  | 125        |
| 31.3.3.   | Victoria .....   | 125        |
| 31.3.4.   | Western Australia .....  | 125        |



|         |   |     |
|---------|---|-----|
| 31.4.   | Options.....  | 125 |
| 32.     | Section 46 – Execution of deeds by corporations.....                        | 127 |
| 32.1.   | Overview and purpose.....   | 127 |
| 32.2.   | Is there a need for reform?.....  | 128 |
| 32.2.1. | Protection for honest purchasers.....                                       | 128 |
| 32.2.2. | Interaction with the <i>Corporations Act 2001</i> (Cth).....                | 129 |
| 32.2.3. | Attestation of the seal.....  | 130 |
| 32.3.   | Other jurisdictions.....  | 130 |
| 32.3.1. | South Australia and Tasmania.....   | 131 |
| 32.3.2. | New Zealand.....  | 131 |
| 32.4.   | Options.....  | 132 |
| 33.     | Section 47 – Delivery of deeds.....   | 133 |
| 33.1.   | Overview and purpose.....   | 133 |
| 33.2.   | Is there a need for reform?.....  | 133 |
| 33.3.   | Other jurisdictions.....  | 134 |
| 33.3.1. | NSW, ACT and Victoria – delivery under the common law.....                  | 134 |
| 33.3.2. | Western Australia – formal delivery not required.....                       | 134 |
| 33.3.3. | Tasmania and South Australia – delivery not required.....                   | 134 |
| 33.4.   | Options.....  | 135 |
| 34.     | Section 48 – Construction of expressions.....                               | 136 |
| 34.1.   | Overview and purpose.....   | 136 |
| 34.2.   | Is there a need for reform?.....  | 136 |
| 34.3.   | Other jurisdictions.....  | 136 |
| 34.4.   | Options.....  | 136 |
| 35.     | Section 49 – Implied covenants may be negated.....                          | 137 |
| 35.1.   | Introduction and overview.....  | 137 |
| 35.2.   | Is there a need for reform?.....  | 138 |
| 35.3.   | Other jurisdictions.....  | 138 |
| 35.4.   | Options.....  | 138 |
| 36.     | Section 50 – Covenants entered into by a person with self and other(s)..... | 139 |
| 36.1.   | Overview and purpose.....   | 139 |
| 36.2.   | Is there a need for reform?.....  | 140 |
| 36.2.1. | Preliminary recommendation.....   | 140 |
| 37.     | Sections 51 and 52 – Receipt in instrument.....                             | 141 |

|  |   |            |
|--|---|------------|
| 37.1.  | Overview and purpose .....  | 141        |
| 37.2.  | Is there a need for reform? .....   | 142        |
| 37.3.  | Other jurisdictions.....  | 142        |
| 37.4.  | Options.....  | 143        |
| <b>Part 20 Miscellaneous (section 347) .....</b>           |   | <b>144</b> |
| 38.  | Section 347 – Service of Notices .....  | 144        |
| 38.1.  | Overview and purpose .....  | 144        |
| 38.2.  | Is there a need for reform? .....   | 145        |
| 38.2.1.  | The <i>Property Law Act 1974</i> and the <i>Electronic Transactions (Queensland) Act 2001</i> ..... | 145        |
| 38.2.2.  | Electronic signature .....  | 146        |
| 38.2.3.  | Other provisions in the PLA that require signature .....  | 147        |
| 38.2.4.  | Electronic notices under the PLA? .....   | 148        |
| 38.2.5.  | Other provisions in the PLA that require service of notice.....                                     | 149        |
| 38.2.6.  | Time for delivery .....   | 150        |
| 38.3.  | Other Australian jurisdictions .....  | 150        |
| 38.4.  | Options.....  | 151        |
| 38.4.1.  | Repeal section 347 .....  | 151        |
| 38.4.2.  | Electronic service under the PLA .....  | 152        |
| 38.4.3.  | Specifying deemed delivery .....  | 152        |
| 38.4.4.  | Service by making available .....   | 153        |
| <b>Appendix.....</b>                                       |   | <b>155</b> |
| Proposed Preliminary Recommendations .....                 |   | 155        |
| <b>Resources.....</b>                                      |   | <b>156</b> |
| Part 1 - Preliminary (ss 1-6).....                         |   | 156        |
| Part 2 – General rules affecting property .....            |   | 157        |
| Part 3 – Freehold estates .....                            |   | 160        |
| Part 4 – Future interests (ss 30-32).....                  |   | 162        |
| Part 6 – Deeds, covenants, instruments and contracts ..... |   | 164        |
| Part 20 – Miscellaneous (section 347) .....                |   | 166        |

## **Preface**

The Commercial and Property Law Research 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:

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## How to make a submission

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

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

The closing date for submissions is **28 February 2017**.

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

You may lodge your submission by email or post.

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

Alternatively, you can post your submission to:

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

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

### ***Privacy Statement***

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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) 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).

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

- Issues Paper: *Seller Disclosure in Queensland*;
- Interim Report: *Seller Disclosure in Queensland*;
- Issues Paper 1 – *Property Law Act 1974* (Qld) – Sales of Land and Other Provisions;
- Issues Paper 2 – *Property Law Act 1974* (Qld) – Part 8 Leases & Tenancies;
- Issues Paper 3 – *Property Law Act 1974* (Qld) – Incorporeal Hereditaments, Rights of Way, Powers of Appointment & Perpetuities;
- Issues Paper 4 – *Property Law Act 1974* (Qld) – Mortgages, Co-ownership, Encroachment and Mistake; and
- Issues Paper 5 – *Property Law Act 1974* (Qld) - Equitable Interests and Things in Action, Corporations, Voidable Dispositions, Unregistered Land, De Facto Relationships; and Miscellaneous.

This Issues Paper is concerned with the remaining parts of the PLA. These are:

- Part 1 – Preliminary (sections 1-6);
- Part 2 – General Rules Affecting Property (sections 7-18);
- Part 3 – Freehold Estates (sections 19-29);
- Part 4 – Future Interests (sections 30-32);
- Part 6, Division 1 – Deeds, covenants, instruments and contracts (sections 44-52); and
- Part 20 – Miscellaneous – section 347.

In addition, the Appendix contains a small number of sections that have not been discussed in the previous Issues Papers. The Centre is generally of the view that these sections are not controversial, are generally well understood in practice and should be retained with modernised language.

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

## Part 1 Preliminary (ss 1-6)

This Issues Paper considers only sections 4, 5 and 6 of Part 1 of the *Property Law Act 1974* (Qld) (PLA). Sections 1, 2 and 3 are standard provisions which deal with mechanical aspects of the Act including the short title (section 1), confirming that the Act binds the Crown (section 2) and the dictionary (section 3). No changes are proposed in relation to these provisions.<sup>1</sup>

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

### 2.1. Overview and purpose

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

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

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

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

As indicated in Part 1.2 above, restrictive covenants are not registrable in Queensland. However, certain statutory covenants in favour of the State or a local government and covenants in a building management statement may be registered in certain limited circumstances under the *Land Title Act 1994* (Qld).<sup>2</sup> The only other provision in the PLA which refers to restrictive covenants is section 181 which enables the Supreme Court to order the modification or extinguishment (whole or partial) of an easement or restrictive covenant on the application of any person interested in the relevant land. However, there is nothing contained in that provision which would suggest in any way that a restrictive covenant could be registered.

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<sup>1</sup> The dictionary (section 3) is located in Sch 6 of the PLA. Certain terms in the Dictionary may require amendment or repeal depending on the Final Recommendations made in relation to the *Property Law Act 1974* (Qld) provisions.

<sup>2</sup> The limited situations in which restrictive covenants can be registered are set out in sections 54A and 97A of the *Land Title Act 1994* (Qld). All freehold land in Queensland is registered under the *Land Title Act 1994* (Qld). That Act does not provide for the registration of restrictive covenants. See Carmel MacDonald et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 704 [15.370].

The reason for the inclusion of section 4 of the PLA is unclear.<sup>3</sup> However, presumably the intention was to reinforce the accepted position in Queensland that restrictive covenants were not registrable and to avoid any suggestion that the PLA altered that position.

## 2.3. Other jurisdictions

### 2.3.1. Australia

Section 4 of the PLA is unique to Queensland. This may partly be explained on the basis that four jurisdictions expressly authorise the Registrar of Titles to enter notification of restrictive covenants on the certificate of title.<sup>4</sup> The position in South Australia, the Northern Territory and the Australian Capital Territory is the same as Queensland in that there is no provision in the Torrens legislation relating to notification or registration of restrictive covenants.<sup>5</sup>

## 2.4. Preliminary recommendation

Section 4 of the PLA should be repealed subject to any issues raised by stakeholders in response to the questions below.

### Questions

1. Do you think the repeal of section 4 of the PLA would create any uncertainty that the provisions in the PLA do not alter the position that restrictive covenants are not registrable?
2. Do you agree with the preliminary recommendation that section 4 of the PLA should be repealed?

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<sup>3</sup> The Hansard relevant to the passage of the Property Law Bill provides no assistance in clarifying the purpose of section 4. The section was amended by the *Statute Law Revision Act (No. 2) 1995* (Qld).

<sup>4</sup> See *Conveyancing Act 1919* (NSW) s 88(3)(a); *Transfer of Land Act 1958* (Vic) s 88; *Transfer of Land Act 1893* (WA) s 129A; *Land Titles Act 1980* (Tas) s 102-104.

<sup>5</sup> For further information on the position in other Australian jurisdictions see Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 796-798 [19.100].



### 3. Section 5 – Application of Act

#### 3.1. Overview and purpose

##### 5 Application of Act

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

Some of the goals of the PLA are to ‘simplify, as well as to codify and amend, the law of property’<sup>6</sup> in addition to assimilating to the extent possible the ‘rules of law applying to land, whether it be freehold or leasehold and whether registered or unregistered’ in Queensland.<sup>7</sup> However, the QLRC noted in relation to the proposed section 5 that:

In order, however, to preserve the peculiar requirements of particular statutes, the provisions of the proposed Act will, unless otherwise provided, apply subject to the provisions of the statute under which the land is held, e.g. Land Act, or The Miners’ Homestead Leases Act.<sup>8</sup>

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

- unregistered land;
- land under the provisions of the *Land Title Act 1994* (Qld), including any lease of such land;

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<sup>6</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) 2.

<sup>7</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 5.

<sup>8</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 5.

- estates, interests and other rights in or in respect of land, granted, created or taking effect under any Act or any repealed Act which provisions continue to apply with respect to the PLA; and
- land under the Coal Mining Act<sup>9</sup> or the Land Act or leases, and any other rights in or in respect of land, granted, created or taking effect under the Mineral Resources Act.

However, the broad application of the PLA is expressly made subject to the provisions of the various other Acts which apply to the specific tenure in question.<sup>10</sup> For example, the application of the PLA to land under the *Land Act 1994* (Qld) is subject to the provisions of the *Land Act 1994* (Qld).<sup>11</sup> Similarly, the application of the PLA to land under the *Land Title Act 1994* (Qld) is made subject to that Act.<sup>12</sup> The same approach is adopted in relation to the application of the PLA to land under the Coal Mining Act and the various interests under the Mineral Resources Act.

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

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

## 3.2. Is there a need for reform?

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

Section 5 of the PLA makes it clear that the PLA is an Act of general application. However, the section is framed in a way that is arguably complex and convoluted. Re-drafting the section may assist with its clarity. The approach adopted in New Zealand under section 8 of the *Property Law Act 2007* (NZ) is summarised below:

- it clearly identifies at the start of the section the land, other property and instruments the Act applies to;
- the section then indicates what happens in the event of any inconsistency with a provision in the New Zealand Act and another enactment;
- it states that the *Property Law Act 2007* (NZ) applies subject to the *Land Transfer Act 1952* (NZ);
- the section then makes it clear that section 5 applies subject to any other provision in the *Property Law Act 2007* (NZ) or any other enactment providing otherwise.

The New Zealand approach is one possible framework which could be considered when re-drafting section 5.

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<sup>9</sup> The Coal Mining Act is defined in Sch 6 of the *Property Law Act 1974* (Qld) to mean the *Coal Mining Safety and Health Act 1999*.

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

<sup>11</sup> *Property Law Act 1974* (Qld) s 5(1)(d)(ii).

<sup>12</sup> *Property Law Act 1974* (Qld) s 5(5)(1)(b).

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

Section 5 of the PLA makes it clear that the broad application of the PLA is subject to a number of other Acts. However, in addition to section 5 of the PLA, there are a number of other sections in the Act which specifically limit or exclude the operation of the PLA in more precise terms.<sup>13</sup> These sections make specific divisions or parts of the Act subject to other Acts such as the *Land Act 1994* (Qld) and the *Land Title Act 1994* (Qld). The approach adopted in these sections varies. For example:

- other provisions provide that the relevant part or section is 'subject to' the other Act.<sup>14</sup> For example, section 113(4) provides that:

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

This approach is consistent with section 5 of the PLA;

- the phrase, 'shall not apply' is also used in other sections in the PLA.<sup>15</sup> For example, section 86(4) provides that:

*(4) This section shall not apply to a transfer in the exercise of the power of sale conferred on a mortgagee under the Land Act or Mineral Resources Act;*

- a number of provisions provide that the relevant section 'does not affect' how something is done under another Act. For example, section 46(7) of the PLA provides:<sup>16</sup>

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

There are also sections in the PLA which expressly provide that the relevant division applies despite the provisions of any other Act.<sup>17</sup> For example, both Divisions 1 and 2 of Part 11 of the Act which address encroachment and mistake apply despite the provisions of any other Act.<sup>18</sup> This is set out in sections 183 and 195 of the PLA which are in the same terms and provide:

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

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

- the *Land Title Act 1994* (Qld); or
- the *Land Act 1994* (Qld); or
- the *Mineral Resources Act*; or
- the *Housing Act*; or

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<sup>13</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 5.30].

<sup>14</sup> For example, *Property Law Act 1974* (Qld) ss 77A(1)(c), 80(2), 115(2).

<sup>15</sup> For example, *Property Law Act 1974* (Qld) ss 87(2), 123A, 200(2), 84(5).

<sup>16</sup> See also *Property Law Act 1974* (Qld) s 73(3) which provides that 'Nothing in this section affects....(b) the *Land Title Act 1994* s 250(9).

<sup>17</sup> For example, *Property Law Act 1974* (Qld) s 106(2).

<sup>18</sup> For example, see *Property Law Act 1974* (Qld) ss 183 and 195 which are in the same terms and provide: '*This division applies despite the provisions of any other Act.*'

- any other Act, and any repealed Act which continue to apply to such land or mortgage made before that Act was repealed.<sup>19</sup>

Part 7 also applies, subject to any other Act, to any other mortgage whether of land or any other property.<sup>20</sup>

There are instances in the PLA where it is clear that a provision of the PLA will not apply to another Act because of the subject matter of the sections. However, often in these cases the relevant PLA provision does not expressly state that the provision is subject to that other Act. For example, sections 116 to 118 of the PLA clearly would not apply in respect of a lease from the State under the *Land Act 1994* (Qld) as no reversionary estate is retained by the State. A user of the PLA would need to rely on section 5(1)(d) and make an assessment as to whether the PLA provision applied to land or an interest under the *Land Act 1994* (Qld). This approach could be perceived as creating uncertainty in the application of the PLA. However, it would be a complex process to have the PLA specifying each and every section of any other legislation which it is subject to. The Act is one of broad application to a wide range of real and other property interests. It would not be practical to identify with accuracy all the relevant provisions of other legislation which the PLA may be subject to, particularly as those provisions may be fluid and subject to change over time.<sup>21</sup> The primary objective of section 5 is to make it clear that the PLA does not apply in isolation of other legislation. The approach is to highlight that the application of the PLA is subject to those Acts.

### 3.3. Other jurisdictions

#### 3.3.1. Australia

A number of other Australian jurisdictions include an application section.<sup>22</sup> The precise language in the application sections of each jurisdiction varies. However, one common feature is that each jurisdiction makes the relevant property legislation subject to the applicable Torrens legislation in the relevant State or Territory. For example, in New South Wales, section 6(1) of the *Conveyancing Act 1919* (NSW) provides:

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

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

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

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<sup>19</sup> *Property Law Act 1974* (Qld) s 77A(1)(b).

<sup>20</sup> *Property Law Act 1974* (Qld) s 77A(1)(c).

<sup>21</sup> Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 5.

<sup>22</sup> See for example: *Conveyancing Act 1919* s 6(1); *Law of Property Act 1936* (SA) s 6; *Property Law Act 1969* (WA) s 6(1); *Civil Law (Property) Act* (2006) s 5(1).

### 3.3.2. New Zealand

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

- (1) This Act applies to the land, other property, and instruments specified in subsection (2) to the extent that the law of New Zealand applies to the land, other property, and instruments.
- (2) The land, other property, and instruments are –
  - (a) land in New Zealand;
  - (b) other property whether in or outside New Zealand; and
  - (c) instruments whether –
    - (i) executed in our outside New Zealand; and
    - (ii) coming into operation before, on, or after 1 January 2008.
- (3) This Act does not apply to Maori customary land within the meaning of Te Ture Whenua Maori Act 1993.
- (4) If a provision of this Act is inconsistent with a provision in another enactment, the provision in the other enactment prevails.
- (5) Without limiting subsection (4), this Act applies subject to –
  - (a) the Land Transfer Act 1952; and
  - (b) the Land Transfer (Computer Registers and Electronic Lodgement Amendment Act 2002).
- (6) This section applies subject to any other provision of this Act or of another enactment providing otherwise.

The Law Commission (NZ) in its 1994 report acknowledged that it was important that the relationship between the new property Act and other Acts were ‘well understood’.<sup>23</sup> The approach adopted in New Zealand by the Commission is that where there is a conflict between a provision in the new legislation and any other Act, the section in the other Act will prevail except as otherwise provided by the *Property Law Act 2007* (NZ) or any other enactment.<sup>24</sup> The Law Commission (NZ) noted in its report:

So, for example, the rules in the new Act concerning land must be read subject to the provisions of the Land Transfer Act 1952, unless it is otherwise stated in the section where any of those rules are found. When the new Act says that something can be done in a particular way, it has to be remembered that the prescribed method may be sufficient as between the parties to the transaction but may very well have to be formalised by execution and registration of a document in compliance with the Land Transfer Act 1952. Likewise, the Act applies to transactions relating to Maori land but, as an overriding requirement, those transactions must be carried out in compliance with Te Ture Wehua Maori Act 1993 or other applicable statutes.<sup>25</sup>

Further, when discussing the application of the Act to the Crown, the Law Commission (NZ) indicated that it was necessary to have regard to other legislation which may override the proposed new Act in relation to dealings by the Crown.<sup>26</sup> Further, that:

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<sup>23</sup> Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 2 [5].

<sup>24</sup> *Property Law Act 2007* (NZ) ss 8(4) and (6).

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

<sup>26</sup> Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 5 [13].

It is obviously impractical, and could be dangerous to try to list these (ever changing) situations in the new Act. The Law Commission emphasises that where there is a conflict between the provisions of the new Act and any other Act, the other Act prevails except as otherwise expressly provided...<sup>27</sup>

### **3.4. Preliminary recommendation**

Subject to stakeholder feedback, section 5 of the PLA should be retained. The actual form of the section and any subsequent provisions in which the application of a Part or Division of the PLA is restated in more precise terms should be determined by the Office of the Queensland Parliamentary Counsel.

#### **Questions**

- 3. Do you think there is any inconsistency in the approach adopted in section 5 of the PLA and the other sections of the Act which specifically exclude the operation of the PLA (for example section 86(4))?**
- 4. Do you think section 5 of the PLA should be re-drafted to more clearly state that it applies to all land, personal property and instruments executed in Qld with appropriate qualifications to this broad application?**
- 5. What should these qualifications be?**
- 6. Are the current 'qualifications' or limitations in section 5 of the PLA appropriate or do they require revision?**
- 7. Do you think the approach in section 8 of the Property Law Act 2007 (NZ) (see Part 3.3.2 above) is a possible model for section 5 of the PLA?**
- 8. Are you aware of any instances where section 5 of the PLA has caused uncertainty regarding the application of the PLA or the application of another Act such as the Land Act 1994 (Qld) or the Land Title Act 1994 (Qld)?**
- 9. Do you think section 5 could be clearer regarding the interaction between the PLA and other legislation specified in section 5?**

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<sup>27</sup> Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 5 [13].

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

### 4.1. Overview and purpose

#### 6 Savings in regard to ss 10-12 and 59

Nothing in section 10 to 12 or 59 –

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

The inclusion of section 6 in the PLA was justified by the QLRC on the following basis:

This clause simply expresses the existing law in preserving from the “Statute of Frauds” provisions, various interests and powers which have never been regarded as within its scope.<sup>28</sup>

The operation of sections 10, 11 and 59 of the PLA are discussed in detail in Issues Paper 1: *Sales of Land and Other Related Provisions*.<sup>29</sup> Section 12 is reviewed in Part 8 of this paper.

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

The primary issue in relation to section 6 of the PLA is whether it should be retained as a savings provision in Part 1 of the Act or be located either within or near sections 10 to 12 and 59. The approach adopted depends, in part, on what final recommendation is made in relation to these other provisions. One of the options identified in Issues Paper 1: *Sales of Land and Other Related Provisions* is to repeal sections 11 and 59 and replace these sections with an alternative provision which address all the uncertainties associated with those particular sections.<sup>30</sup>

Some of the particular categories set out in section 6 are dealt with under different mechanisms and therefore not affected by sections 10, 11, 12 or 59 in any event. For example, a sale by a court will not be affected by these sections. Similarly, in the case of section 6(c) of the PLA, this relates to the acquisition of an interest in land by adverse possession which is addressed under the *Limitations of*

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<sup>28</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) 5. The form of the provision was originally proposed in the earlier QLRC review of the *Statute of Frauds: Queensland Law Reform Commission, A Review of – The Statute of Frauds 1677; The Statute of Frauds Amendment Act 1828; The Statute of Frauds and Limitations of 1867 (Qld); And The Sale of Goods Act 1896 (Qld)* Report No. 6 (1970) clause 8, 26.

<sup>29</sup> See <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland> to access this Paper.

<sup>30</sup> See Issues Paper 1: *Sales of Land and Other Related Provisions*, 28 Part 3.4.3.

*Actions Act 1974* (Qld) and the *Land Title Act 1994* (Qld).<sup>31</sup> However, for the purpose of clarity, the relevant matters set out in section 6, apart from section 6(e) should be retained in some form.

### 4.3. Other jurisdictions

#### 4.3.1. Australia

New South Wales, Victoria, South Australia, Western Australia, Tasmania and the Northern Territory each have a provision which is equivalent to section 6 of the PLA.<sup>32</sup> In New South Wales, section 23E of the *Conveyancing Act 1919* (NSW) is in similar terms to section 6 of the PLA and is located in the part relevant to the writing requirement provisions (sections 23B, section 23C and 23D). This is consistent with the approach in the other jurisdictions, apart from the Northern Territory which is located in the preliminary part of the Northern Territory legislation.

#### 4.3.2. New Zealand

The approach adopted in the *Property Law Act 2007* (NZ) is to include the relevant 'savings' provision in the body of the substantive provision or as a stand-alone section. These provisions are sections 24, 25 and 26 and provide:

- section 24 sets out the requirements for writing before an action can be brought for the sale or other disposition of land or other interest in land. Section 24(2)(b) of the *Property Law Act 2007* (NZ) expressly provides that a 'disposition' for the purposes of the section does not include a sale of land by order of a court or through the Registrar;
- section 25 of the Act provides that a disposition of three specified categories of interests in land must be in writing and signed by the person making the disposition. However, section 25(4) expressly provides that the section does not affect:
  - the creation or operation of a resulting, implied, or constructive trust; or
  - the making or operation of a will; or
  - the disposition of any interest in land by operation of law;
- section 26 of the Act provides that sections 24 and 25 do not affect the operation of the law relating to part performance.

### 4.4. Preliminary recommendations

In order to avoid any unnecessary consequences, section 6 of the PLA should be retained but incorporated into the relevant provisions to which the section refers. The form this will take will ultimately depend on the final recommendations in relation to sections 10, 11, 12 and 59. The categories in section 6 could be amended slightly by removing section 6(e) as it is unnecessary and simply states the obvious.

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<sup>31</sup> Section 13 of the *Limitation of Actions Act 1974* (Qld) provides that an action to recover land shall not be brought after the expiration of 12 years. Section 24 of the same Act provides that the title of the rightful owner is extinguished after 12 years.

<sup>32</sup> See *Conveyancing Act 1919* (NSW) s 23E, *Property Law Act 1958* (Vic) s 55, *Law of Property Act 1936* (SA) s 31, *Property Law Act 1969* (WA) s36, *Conveyancing and Law of Property Act 1884* (Tas) s 60(5) and *Law of Property Act* (NT) s 5, *Civil Law (Property) Act* (2006) s 203.



## **Questions**

- 10. Do you agree with the preliminary recommendation that section 6 of the PLA should be retained but relocated closer to the sections to which it relates?**
  
- 11. Do you agree with the preliminary recommendation that section 6(e) of the PLA should be repealed?**

## Part 2 – General Rules Affecting Property (ss 7-18)

Part 2 of the PLA comprises sections 7 to 18. Sections 10 and 11 were previously considered in Issues Paper 1: *Sale of Land and Other Related Provisions*<sup>33</sup> and are not reviewed in this Issues Paper.

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

The *Statute of Uses 1535 (Statute of Uses)* was introduced to address the doctrine of use which had evolved to overcome some of the limitations of existing laws in relation to land tenure.<sup>34</sup> A use operated by the freeholder conveying the subject land to another person on the basis that the land is held by that person for the use and enjoyment of the grantor, rather than the grantee.<sup>35</sup> A practical example of a use provided in commentary is:

Thus, for example if B, the holder of a fee simple estate conveyed his interest “to A and his heirs to the use of B and his heirs”, A was the feoffee to uses and B was the cestui que use.<sup>36</sup>

A ‘feoffee’ as the recipient, was essentially the trustee of the land and the ‘cestui que use’ as the grantor of the land was the beneficiary. There were many benefits of this type of arrangement including that the payment of feudal taxes upon the death of B was avoided.<sup>37</sup> The introduction of the Statute of Uses in 1535 had the effect of vesting legal estate and seisin in the grantor with the effect that on the death of the grantor, feudal taxes would be payable again.<sup>38</sup> In the context of the example above, this meant that B took the legal fee simple and A obtained nothing.<sup>39</sup> This has been described as the ‘execution of the use’ by the Statute of Uses.<sup>40</sup> Although the aim of the legislation was to completely abolish uses, this outcome was not fully achieved.<sup>41</sup>

The Statute of Uses has been repealed in Queensland by the PLA.<sup>42</sup> The Statute was only applicable to old system land.<sup>43</sup>

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<sup>33</sup> See <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland> to access this Paper.

<sup>34</sup> For a detailed discussion of these issues and the development of the use and the trust more generally see Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 66-74 [2.255]-[2.355].

<sup>35</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 68 [2.280].

<sup>36</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 68 [2.280].

<sup>37</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 68 [2.285]. For a detailed discussion of the advantages and disadvantages of uses see [2.285] – [2.290].

<sup>38</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 70 [2.305].

<sup>39</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 70 [2.305].

<sup>40</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 70 [2.305].

<sup>41</sup> This is discussed in detail in Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 70 [2.305] – [2.325].

<sup>42</sup> See *Property Law Act 1974* (Qld) as enacted, s 3, Sch 6. The Statute of Uses was repealed in New South Wales in 1969 by the *Imperial Acts Application Act 1969* (NSW) s 8 and in Victoria by the *Imperial Acts Application Act 1980* (Vic) s 5.

<sup>43</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA 7.30].

## 5.1. Overview and purpose

### 7 Effect of repeal of Statute of Uses

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

The QLRC described the effect of the proposed sections 7(1) and (2) as ‘enabling conveyances of old system land to proceed by direct grant’, rendering ‘it unnecessary to resort to the conveyancing devices evolved out of the Statute of Uses.’<sup>44</sup> The provisions are also directed at clarifying that future interests should not be capable of being created at law.<sup>45</sup>

Section 7(3) of the PLA is directed at voluntary conveyances and provides that a resulting trust for the grantor is not implied merely because the property is not expressed to be conveyed for the use or benefit of the grantee. An example of a voluntary transfer of property (or gift) arises where ‘A makes a gift of property to B, a presumption of resulting trust may arise that B holds the property on trust for A.’<sup>46</sup>

Prior to the Statute of Uses the position was that ‘on a voluntary conveyance in fee simple by A to B in which no use was expressed, there was a presumption of a resulting use to the grantor of the whole estate granted.’<sup>47</sup> The introduction of the Statute of Uses removed this resulting use as a presumption. However, a separate issue arose regarding whether a voluntary grant using the words ‘unto and to the use of B’ created a resulting trust in equity in favour of the grantor.<sup>48</sup> The concern of the QLRC was that:

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<sup>44</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) 6.

<sup>45</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) 6.

<sup>46</sup> Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (Butterworths, 2010) 419 [19.73].

<sup>47</sup> Charles Harpum, et al, *The Law of Real Property* (Thomson, 2008) 413 [11.012] and Peter Radan and Cameron Stewart, *Principles of Australian Equity & Trusts* (Butterworths, 2010) 419-420 [19.74].

<sup>48</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [7.60].

Since the repeal of the Statute of Uses would restore the pre-1535 doctrine of resulting uses or trusts on a voluntary conveyance, s 60(3) of the Law of Property Act expressly precludes the implication of resulting trusts merely from the fact that a conveyance fails to express a use or benefit in favour of the grantee.<sup>49</sup>

Section 7(3) of the PLA was introduced to prevent such a presumption arising in the circumstances specified.<sup>50</sup>

## 5.2. Is there a need for reform?

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

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

By enabling conveyances of old system land to proceed by direct grant clause 7 will render it unnecessary to resort to the conveyancing devices evolved out of the Statute of Uses.<sup>51</sup>

Subject to the odd sliver of land, it is generally accepted that there is no longer any old system land in Queensland of any significance. The relevance of sections 7(1) and (2) in a modern PLA is doubtful.

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

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

A transfer of an interest in land, and any assignment, lease, settlement, or other assurance in writing of any property.<sup>52</sup>

It is not clear whether the section is intended to cover both realty and personalty. However, the VLRC when considering the equivalent provision in Victoria recommended that it be retained but for old system land only.<sup>53</sup> Section 19A(3) of the *Property Law Act 1958* (Vic) is identical in form to section 7(3) of the PLA. The rationale for the recommendation is unclear, however, the intent may be to clarify the uncertainty regarding the scope of the application of section 19A(3).<sup>54</sup>

However, a key difference in Queensland is the absence of old system land. The ongoing utility of section 7(3) of the PLA is questionable.

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<sup>49</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) 7.

<sup>50</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) 7.

<sup>51</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) 7.

<sup>52</sup> *Property Law Act 1974* (Qld) s 3, Sch 6.

<sup>53</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 126.

<sup>54</sup> ‘Conveyance’ is broadly defined in section 18 of the *Property Law Act 1958* (Vic).

## 5.3. Other jurisdictions

### 5.3.1. Australia

Victoria and the Northern Territory have similar provisions to section 7 of the PLA. These are found in section 19A of the *Property Law Act 1958* (Vic) and section 6 of the *Law of Property Act* (NT). The Victorian provision was reviewed in 2010 by the VLRC. The Commission made a number of recommendations including repealing sections 19A(1) and (2) but with a savings provision. The rationale for the recommendation is set out below:

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

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

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

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

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

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

<sup>56</sup> For further discussion on the interpretation to be given to section 44(2) of the *Conveyancing Act 1919* (NSW) since the repeal of the Statute of Frauds in New South Wales see Peter Butt, *Land Law* (LawBook Co., 5<sup>th</sup> ed, 2006) and Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) including the Commissioners Report extracted at [35102].

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

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

### 5.3.2. New Zealand

In New Zealand, the *Statute of Uses 1535* was repealed in 1905.<sup>59</sup> There is no provision in New Zealand equivalent to section 7 of the PLA.

### 5.4. Preliminary recommendation

The approach adopted in relation to section 7 of the PLA is dependent on stakeholder feedback in relation to the questions below.

#### Questions

12. Do you agree that sections 7(1) and (2) of the PLA have no utility?
13. Do you think section 7(3) of the PLA has any ongoing purpose or function in Queensland?
14. Do you think the repeal of section 7 of the PLA would create any problems?

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

## 6. Section 8 – Lands lie in grant only

### 6.1. Overview and purpose

#### 8 Lands lie in grant only

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

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

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

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

In Queensland, it is generally accepted that there is no remaining unregistered land of significance. In those circumstances, the section no longer has any application or relevance. There is a separate issue regarding whether the section was drafted in a way which achieved the purpose of actually abolishing the common law rule. If it does not, then there is risk that its repeal may have the unintended consequence of reinstating the common law rule, irrespective of the section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld). This issue is discussed in more detail in relation to sections 22 (Abolition of estates tail) and 28 (Abolition of the rule in Shelly's Case) in Parts 19.2 and 24.2 below. However, section 8 of the PLA can be distinguished from these other provisions on the basis that the subject matter to which the section is directed no longer exists in Queensland. In those circumstances, the very low risk that the common law position could be reinstated is irrelevant if there is no unregistered land to which it could apply.

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

<sup>61</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) 7-8.

## 6.3. Other jurisdictions

### 6.3.1. Australia

Other Australian jurisdictions have equivalent or similar provisions.<sup>62</sup> The VLRC recommended the retention of the equivalent provision in the *Property Law Act 1958* (Vic) but with redrafting for clarity. However, the Commission provides no details regarding the rationale for the retention of the section.<sup>63</sup>

### 6.3.2. New Zealand

In New Zealand, section 58 of the *Property Law Act 2007* (NZ) abolishes a number of obsolete estates and rules. Section 58(1)(c) provides that the passing of the legal estate in any land by a covenant to stand seised, livery of seisin or a contract for the sale and purchase of land may not be created or done. This section was drafted in a way which expressly abolished the common law rule as the New Zealand Law Commission held the view that section 15 of the now repealed *Property Law Act 1952* (NZ) was not couched as a direct abolition despite the section headings.<sup>64</sup> Section 15 of the 1952 Act provided:

#### **15 Certain forms of assurance abolished**

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

The Commission indicated that sections such as section 15 were ‘best dealt with by restating the abolition in direct language.’<sup>65</sup>

## 6.4. Preliminary recommendation

Subject to any issues raised by stakeholders, section 8 of the PLA should be repealed. If there are ongoing concerns regarding possible unintended consequences of repealing section 8, an alternative option is to replace the section with one that clearly and expressly abolishes the common law rule. In this respect, see the discussion in Part 19.4 below regarding the approach adopted in New Zealand.

### Questions

**15. Do you agree with the preliminary recommendation that section 8 should be repealed?**

**16. Do you think section 8 of the PLA should be replaced with a section which clearly and expressly abolishes the common law rule?**

<sup>62</sup> See *Conveyancing Act 1919* (NSW) s 14; *Property Law Act 1958* (Vic) s 51; *Law of Property Act 1936* (SA) ss 8 and 9; *Property Law Act 1969* (WA) s 32; *Conveyancing and Law of Property Act 1884* (Tas) s 59; *Law of Property Act* (NT) s 7.

<sup>63</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 129. There is no analysis of this section in the Report and as a result, the rationale for the recommendation is not clear. However, Victoria does still have some remaining unregistered land.

<sup>64</sup> Law Commission (New Zealand), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 43 [134].

<sup>65</sup> Law Commission (New Zealand), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 43 [134].



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

### 7.1. Overview and purpose

#### 9 Reservation of easements etc in conveyances of land

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

At common law, an easement and other incorporeal hereditaments lay in grant only.<sup>66</sup> An easement could be created ‘by reservation of rights in a conveyance of land’ but would only take effect if the conveyance was also executed by the grantee for the reservation.<sup>67</sup> It would then operate as a regrant by the grantee.<sup>68</sup> Butt notes that:

In reality, the grantor does not grant a fee simple from which an easement has been subtracted. Rather, two steps are involved, though in practice fused into one. First, the grantor (A) conveys or transfers the (unencumbered) fee simple to B; and secondly, B grants (or “regrants”) an easement to A.<sup>69</sup>

In the case of old system land, the purchaser would not normally execute the deed for conveyance and without this, the re-grant or reservation of the easement was not ‘effective’ at common law.<sup>70</sup> Section 9 of the PLA has the effect of overcoming the common law rule so that it is possible to enable the reservation of an easement (or other incorporeal hereditament) without the need to re-grant by execution.<sup>71</sup> The provision only applies to reservations made after the commencement of the PLA on 1 December 1975.<sup>72</sup>

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<sup>66</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>67</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA9.30].

<sup>68</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA9.30].

<sup>69</sup> Note section 45A of the *Conveyancing Act 1919* (NSW).

<sup>70</sup> Peter Butt, *Land Law* (LawBook Co, 5<sup>th</sup> ed, 2006) [1634] 434. See also Peter Young, et al, *Annotated Conveyance & Real Property Legislation* (Butterworths, 2012) 83 [30747].

<sup>71</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA9.30].

<sup>72</sup> *Property Law Act 1974* (Qld) s 9(2).

## 7.2. Is there a need for reform?

In Queensland, the section appears to only have relevance to old system land. As indicated in part 5.2.1 above, there is no remaining old system land of significance in Queensland. In relation to registered land in Queensland, the *Land Title Act 1994* (Qld) specifies the requirements for the creation of easements.<sup>73</sup>

## 7.3. Other jurisdictions

### 7.3.1. Australia

New South Wales, Victoria, Northern Territory and Tasmania all have sections which have a similar effect to section 9 of the PLA.<sup>74</sup> Section 45A of the *Conveyancing Act 1919* (NSW) explicitly refers to profits a prendre which is not included in the PLA but is otherwise in identical form to section 9 of the PLA. The Victorian provision uses the term ‘legal estate’. The VLRC, when reviewing the *Property Law Act 1958* (Vic), recommended the retention of section 65 and redrafting the provision for clarity.<sup>75</sup> The Commission also suggested that the provision be expanded to include ‘interest’ in addition to ‘legal estate’ to accommodate the proposed repeal of section 194 which allowed express reservation of an easement by way of use.<sup>76</sup> Further, the Commission recommended that the section should apply to registered and unregistered land.<sup>77</sup> The rationale for this recommendation is unclear.

South Australia and Western Australia do not have equivalent legislative provisions and commentary indicates that the common law rule applies which means that the ‘reservation still has to be included in the conveyance and signed by the purchaser.’<sup>78</sup>

## 7.4. Preliminary recommendation

On the basis that section 9 of the PLA does not appear to have any current purpose in Queensland and in the circumstances, it should be repealed. As with section 8 above, if there are ongoing concerns regarding possible unintended consequences of repealing section 9, an alternative option is to replace the section with one that clearly and expressly abolishes the common law rule. In this respect, see the discussion in Part 19.4 below regarding the approach adopted in New Zealand.

### Question

**17. Do you agree with the preliminary recommendation that section 9 should be repealed?**

<sup>73</sup> *Land Title Act 1994* (Qld) see ss 82-83. The *Land Act 1994* (Qld) has in place separate processes for reservations: see, for example, Chapter 2, Part 2.

<sup>74</sup> See *Conveyancing Act 1919* (NSW) s 45A; *Property Law Act 1958* (Vic) s 65; *Law of Property Act* (NT) s 8; *Civil Law (Property) Act 2007* (ACT) s 224; *Conveyancing and Law of Property Act 1884* (Tas) s 34C.

<sup>75</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 131.

<sup>76</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 131.

<sup>77</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 131.

<sup>78</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 756 [18.190].

## 8. Section 12 – Creation of interests in land by parol

### 8.1. Overview and purpose

#### 12 Creation of interests in land by parol

- (1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by the person's agent lawfully authorised in writing, shall have, despite any consideration having been given for the same, the force and effect of interests at will only.
- (2) Nothing in this Act shall affect the creation by parol of a lease taking effect in possession for a term not exceeding 3 years, with or without a right for the lessee to extend the term for any period which with the term would not exceed 3 years.

Section 12 of the PLA has its origins in sections 1 and 2 of the *Statute of Frauds 1677*<sup>79</sup> and the substance of these Imperial legislative provisions has been preserved in section 12. The effect of section 12(1) of the PLA is that the creation of an interest in land by parol which is not in writing or signed, only creates an interest at will. This means that the interests can be determined at the will of either party. However, the exception to this general rule is set out in section 12(2) of the PLA which enables a legal leasehold interest to be created by parol. In order to fall within the scope of section 12(2):

- the lease must take effect in possession. The term 'possession' is defined in the PLA to include, when used with reference to land, the receipt of income from land;<sup>80</sup>
- there must be clear evidence of intention to create a lease for an actual term;
- the term of the lease and any option periods must not exceed three years in duration.<sup>81</sup>

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

Section 12 of the PLA is a well understood provision. There has been some academic discussion regarding the meaning of the phrase 'taking effect in possession' in section 12(2) of the PLA and the equivalent section in New South Wales.<sup>82</sup> A lease which commences at a future date and gives no immediate right to possession is not a lease which takes effect in possession and will not fall within the scope of section 12(2) of the PLA.<sup>83</sup> However, one area of uncertainty is whether the phrase means a lease that requires the lessee to take possession as soon as the term commences or a lease that gives the lessee a right to take immediate possession which may or may not be exercised.<sup>84</sup> The

<sup>79</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.

<sup>80</sup> *Property Law Act 1974* (Qld) s 3, Sch 6.

<sup>81</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 12.90].

<sup>82</sup> *Conveyancing Act 1919* (NSW) s 23D(2).

<sup>83</sup> Peter Butt, *Land Law* (LawBook Co, 5<sup>th</sup> ed, 2006) [1550] 297.

<sup>84</sup> Peter Butt, *Land Law* (LawBook Co, 5<sup>th</sup> ed, 2006) 297 [1550] prefers this view. Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [12.90]. For a detailed analysis regarding this issue see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [12.90].

rationale for this latter approach proceeds on the basis that ‘an interest “in possession”, strictly speaking, is an interest that *entitles* its holder to the immediate benefits of the interest, but does not *compel* the holder to take actual possession.’<sup>85</sup> Further support for this interpretation is found in the definition of ‘possession’ in Schedule 6 of the *Property Law Act 1974* (Qld) which includes the ‘receipt of income from the land’.<sup>86</sup> Receiving income does not require the lessee to have actual possession of the property. Further, there is case law in the United Kingdom considering the equivalent provision to section 12(2) of the PLA which confirms an interpretation that an ‘immediate right to take possession’ is sufficient to satisfy the ‘taking effect in possession’ requirement.<sup>87</sup>

In Queensland, there is an additional issue with the language in section 12(2) of the PLA and the terminology used in the *Land Title Act 1994* (Qld). A ‘short-term’ lease under the *Land Title Act 1994* (Qld) means a lease for a term of 3 years or less.<sup>88</sup> The Act then defines the word ‘term’ to mean:

... period beginning when the lessee is first entitled to possession of a lot or part of a lot under the lease and ending when the lessee is last entitled to possession, even if the lease consists of 2 or more discontinuous periods.<sup>89</sup>

The effect of this is that for the purposes of the *Land Title Act 1994* (Qld), a short-term lease ‘takes effect’ when the lessee is first entitled to possession under the lease. It is undesirable to have significant differences in language in provisions in different Acts addressing similar subject matter.

## 8.3. Other jurisdictions

### 8.3.1. Australia

Each Australian jurisdiction has a provision similar to section 12 of the PLA.<sup>90</sup> In South Australia, New South Wales and Victoria, the term ‘at the best rent which can be reasonably obtained’ is included in the equivalent provision to section 12(2) of the PLA.<sup>91</sup>

In Victoria, the Victorian Law Reform Commission appears to view the equivalent provision in section 54 of the *Property Law Act 1958* (Vic) to mean that ‘the lease must commence immediately upon the making of the agreement.’<sup>92</sup> This is suggestive of a requirement that the ‘creation of the lease and the taking of possession must be synchronous, that is, occur at the same time.’

### 8.3.2. New Zealand

In New Zealand, section 10 of the now repealed *Property Law Act 1952* (NZ) provided:

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<sup>85</sup> Peter Butt, *Land Law* (LawBook Co., 5<sup>th</sup> ed, 2006) 297 [1550].

<sup>86</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 12.90].

<sup>87</sup> See *Long v Tower Hamlets London Borough Council* [1996] 2 All ER 683, 699-701.

<sup>88</sup> The term also means a lease from year to year or a shorter period: *Land Title Act 1994* (Qld) Sch 2.

<sup>89</sup> *Land Title Act 1994* (Qld) Sch 2.

<sup>90</sup> See *Conveyancing Act 1919* (NSW) s 23D; *Property Law Act 1958* (Vic) s 54; *Law of Property Act 1936* (SA) s 30; *Property Law Act 1969* (WA) s 35; *Conveyancing and Law of Property Act 1884* (Tas) ss 60(3) and (4); *Law of Property Act* (NT) s 11.

<sup>91</sup> See *Law of Property Act 1936* (SA) s 30(2); *Conveyancing Act 1919* (NSW) s 23D(2); *Property Law Act 1958* (Vic) s 54(2).

<sup>92</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 129.

## 10 Partitions, exchanges, etc

No partitions, exchange, lease, assignment, or surrender (other-wise than by operation of law) of any land shall be valid at law unless the same is made by deed, except a lease for a term not exceeding a tenancy of one year, which lease may be made either by writing or by parol.

The New Zealand Law Commission acknowledged in 1991 that deed land had ‘all but disappeared’ in New Zealand and any parcels that remained were ‘small and unlikely to be of much importance.’ The Commission noted:

It is almost inconceivable that anyone will knowingly try to convey or mortgage them without first bringing them within the Land Transfer Act. It is therefore tempting to suggest that the sections simply be repealed. However, to guard against the (theoretical) possibility that they may be needed in some unexpected situation we suggest retaining the sections, despite the repeal of the 1952 Act, but without repeating them in the new statute. The new Act could provide simply that in the case of deeds system land the section in question in the 1952 Act should continue to apply.<sup>93</sup>

The relevant provisions, including section 10, were ultimately included in Schedule 6 of the *Property Law Act 2007* (NZ). Section 351 of that Act specifies that Schedule 6 only applies to land (and instruments relating to land) that is not owned by the Crown and is not under the *Land Transfer Act 1952*. Section 1 of Schedule 6 is in a similar form to section 10 of the 1952 Act but uses the term ‘short-term leases’ when excluding these from the requirement that to be valid, a lease must be made by deed.

Leases of land, including short-term leases, are now governed by Part 4 of the *Property Law Act 2007* (NZ). A ‘short-term lease’ is defined to mean:

an unregistered lease –

- (a) that has a term that commences not later than 20 working days after the date of the contract to lease; and
- (b) that is –
  - (i) a lease for a term of 1 year or less; or
  - (ii) a periodic tenancy for periods of 1 year or less; or
  - (iii) a statutory tenancy.<sup>94</sup>

Further, section 208 specifies that a short-term lease can be made orally or in writing and that a lessee that occupies land under a short-term lease has a legal interest in the land, subject to the *Land Transfer Act 1952* (NZ).

## 8.4. Preliminary recommendation

Section 12 is still relevant in Queensland and should be retained with some amendments and updating for clarity. One of the key amendments proposed is to clarify that the phrase ‘taking effect in possession’ includes an entitlement to possession as soon as the lease commences. This provides certainty in relation to the intended scope of section 12(2) of the PLA and also ensures that the language in section 12(2) of the PLA is consistent with the *Land Title Act 1994* (Qld).

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<sup>93</sup> Law Commission (New Zealand), *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 6-7 [15].

<sup>94</sup> *Property Law Act 2007* (NZ) s 207.

### **Questions**

- 18. Do you agree with the preliminary recommendation that section 12 of the PLA be retained and re-drafted for clarity?**
  
- 19. Do you agree with the preliminary recommendation that the phrase 'taking effect in possession' should be clarified by indicating that it includes an entitlement to possession as soon as the lease commences?**

## 9. Section 13 – Persons taking who are not parties

### 9.1. Overview and purpose

#### 13 Persons taking who are not parties

- (1) In respect of an assurance or other instrument executed after the commencement of this Act, a person may take –
  - (a) an immediate or other interest in land; or
  - (b) the benefit of any condition, right of entry, covenant or agreement over or respecting land; even though the person may not have executed the assurance or other instrument, or may not be named as a party to the assurance or other instrument, or may not have been identified or in existence at the date of execution of the assurance or other instrument.
- (2) Such person may sue, and shall be entitled to all rights and remedies in respect of the assurance or other instrument, as if the person had been named as a party to and had executed the assurance or other instrument.

At common law, only a person named as a party to a deed could sue to enforce a covenant contained in a deed or take an immediate interest in land under a deed.<sup>95</sup> Section 13 of the PLA was introduced to overcome this common law rule.<sup>96</sup> The section covers a broad range of transactions as the word ‘assurance’ is defined to include a conveyance and a disposition made otherwise than by will.<sup>97</sup> ‘Conveyance’ and ‘disposition’ are in turn broadly defined as follows:

**conveyance** includes a transfer of an interest in land, and any assignment, appointment, lease, settlement, or other assurance in writing of any property.

**disposition** includes a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will.

The QLRC when considering the introduction of this provision noted:

Clearly, the old rule should be abrogated that an executing party to an indenture inter partes is not entitled to enforce a benefit thereby conferred on him simply because he is not expressed to be or named as a party thereto. Likewise it is plainly desirable that in Queensland the law should go at least as far as it does in England and Victoria in enabling a person to whom a benefit purports to be given by a covenant or condition relating to real property, to enforce the same even though he is not an executing party to the instrument in question, although it will be necessary to ensure by express provision that the principle of paramountcy of title under The Real Property Acts is not disturbed.<sup>98</sup>

<sup>95</sup> Carmel MacDonald, *Real Property Law in Queensland* (Lawbook Co., 3<sup>rd</sup>, 2010) 773 [17.100].

<sup>96</sup> Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) 70 [30569.1].

<sup>97</sup> *Property Law Act 1974* (Qld) s 3, Sch 6.

<sup>98</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 QLRC discussed whether the reform should extend beyond real property. The QLRC indicated that if the Commission's recommendations in relation to the proposed section 55 of the PLA were adopted then it would not be necessary to extend section 13 in this way and it would be 'appropriate to restrict the operation of cl 13 to land, leaving it to cl 55 to regulate the general enforcement of contracts for the benefit of third parties.'<sup>99</sup>

Section 13 of the PLA was adapted from a similar provision in the United Kingdom, section 56(1) of the *Property Law Act 1925* (UK), with some variations and as a consequence is broader.<sup>100</sup> Section 13 operates in the following way:

- it covers an 'assurance or other instrument' executed on or after 1 December 1975. An 'assurance' is defined in the PLA to include 'a conveyance and a disposition made otherwise than by will';<sup>101</sup>
- it enables a person to take:
  - an immediate or other interest in land; or
  - the benefit of any condition, right of entry, covenant or agreement over or respecting land;even though the person may not have:
  - executed the assurance or other instrument; or
  - may not be named as a party to the assurance or other instrument; or
  - may not have been identified or in existence at the date of execution of the assurance or other instrument;
- the person who takes the relevant interest or benefit is treated as though he or she had been named as a party to and had executed the assurance or other instrument. This means that the person is entitled to all rights and remedies in respect of the assurance or other instrument.

The section is limited to assurances or other instruments concerning land.

## 9.2. Is there a need for reform?

There has been some debate regarding the possible limits of section 13 of the PLA and its equivalent in other jurisdictions. Some of the possible limits include the section only applying to deeds or deeds inter partes and only to covenants that run with land.<sup>102</sup> However, in Queensland the reference to 'assurance', 'instrument' and 'agreement' are not consistent with the limits.<sup>103</sup>

Section 13(1)(a) of the PLA may require some amendment as a person is not able to take an immediate or other interest in registered land. Section 62(1) of the *Land Title Act 1994* (Qld) clearly provides that

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<sup>99</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.

<sup>100</sup> The provision in the United Kingdom legislation does not extend to a beneficiary who may not have been identified or in existence at the date that the instrument is executed. The Queensland provision covers this category.

<sup>101</sup> *Property Law Act 1974* (Qld) s 3, Sch 6.

<sup>102</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 13.60].

<sup>103</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 13.60].



the effect of registration of an instrument of transfer in a lot is that all the ‘rights, powers, privileges and liabilities of the transferor’ in relation to the lot vest in the transferee.’ The amendment may simply indicate that its operation is subject to the provisions of the *Land Title Act 1994* (Qld).

## 9.3. Other jurisdictions

### 9.3.1. Australia

Victoria, South Australia, New South Wales, Tasmania and Western Australia have very similar provisions which adopt the drafting approach in section 56 of the *Law of Property Act 1925* (UK).<sup>104</sup> Unlike in Queensland, these provisions do not extend to individuals who are not in existence and identifiable at the time the covenant is entered into. Further, the provisions in these other jurisdictions also refer to taking an interest ‘in land or other property’ whereas in Queensland, section 13 is clearly limited to land only. The QLRC indicated that it was ‘appropriate’ to restrict section 13 to land and leave it to section 55 to ‘regulate the general enforcement of contracts for the benefit of third parties.’<sup>105</sup>

Section 12 of the *Law of Property Act* (NT) is in a similar form to section 13 of the PLA and also extends to individuals who are not in existence and identifiable at the time the covenant is entered into.<sup>106</sup>

In Victoria, the Victorian Law Reform Commission recommended that section 56(1) of the *Property Law Act 1958* (Vic) be amended to confirm ‘its meaning as interpreted by the courts’ as follows:

- clarifying that an interest in personal property does not fall within the scope of the section; and
- providing that a covenant ‘under an instrument made *inter partes* may be enforced by a person who, although not named, is a person to whom the conveyance or other instrument purports to grant something, provided that the person was in existence and identifiable at the time the covenant was made.’<sup>107</sup>

### 9.3.2. New Zealand

Section 7 of the *Property Law Act 1952* (NZ) provided that:

Any person may take an immediate benefit under a deed, although not named as a party thereto.

This provision was repealed by the *Contracts (Privity) Act 1982* (NZ) with the effect that it did not apply to any deeds made on or after 1 April 1983.<sup>108</sup> In relation to deeds made after this date the position has been described in the following way:

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<sup>104</sup> *Property Law Act 1958* (Vic) s 56(1), *Law of Property Act 1936* (SA) s 34(1), *Conveyancing Act 1919* (NSW) s 36C, *Conveyancing and Law of Property Act 1884* (Tas) s 61(1)(c) and the *Property Law Act 1969* (WA) s 11(1).

<sup>105</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.

<sup>106</sup> *Law of Property Act* (NT) s 12.

<sup>107</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 43 Recommendation 10.

<sup>108</sup> *Contracts (Privity) Act 1982* (NZ) s 13.

Section 4 Contracts (Privity) Act 1982, which applies to deeds made on or after 1 April 1983, provides that, where a promise contained in a deed or contract confers or purports to confer a benefit on a person designated in the deed or contract by name, description, or reference to a class (but who is not a party to a deed or contract), that promise is enforceable at the suit of that person against the promisor. Deeds made before 1 April 1983 are subject to s 7 Property Law Act 1952, which provides that any person may take an immediate benefit under a deed although not named as a party thereto. In effect, the position in respect of deeds is the same under both provisions.<sup>109</sup>

#### 9.4. Preliminary recommendation

The preliminary recommendation in relation to section 13 of the PLA is that it be retained. The section should be amended to make it clear that it is subject to the provisions of the *Land Title Act 1994* (Qld).

##### Question

**20. Do you agree with the preliminary recommendation to retain section 13 of the PLA, with clarification that it is subject to the provisions of the Land Title Act 1994 (Qld)?**

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<sup>109</sup> Tom Bennion et al, *New Zealand Land Law* (Bookers Ltd, 2<sup>nd</sup> ed, 2009) [10.18.02] 893-894.

## 10. Section 14 – Conveyances by a person to the person etc

### 10.1. Overview and purpose

#### 14 Conveyances by a person to the person etc.

- (1) In conveyances and leases made after 28 December 1867, personal property, including chattels real, may be conveyed or leased by a person to the person jointly with another person by the like means by which it might be conveyed or leased by the person to another person.
- (2) In conveyances or leases made after the commencement of this Act freehold land, or a thing in action, may be conveyed or leased by a person to the person jointly with another person, by the like means by which it might be conveyed or leased by the person to another person, and may, in like manner, be conveyed or leased by a husband to his wife, and by a wife to her husband, alone or jointly with another person.
- (3) After the commencement of this Act a person may convey or lease land to or vest land in the person but may not convey to or vest in the person an estate in fee simple absolute in such land.
- (4) Two or more persons (whether or not being trustees or personal representatives) may convey or lease, and shall be deemed always to have been capable of conveying or leasing, any property vested in them to any 1 or more of themselves in like manner as they could have conveyed or leased such property to a third party.
- (4A) However, if the persons in whose favour the conveyance or lease is made are, because of any fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance or lease shall be liable to be set aside.
- (5) In subsection (4) –  
**or more of themselves** includes all the persons by whom the conveyance or lease is or has been made.

At common law, a person was not permitted to convey any interest in property to him or herself.<sup>110</sup> This rule impacted on relationships such as a husband and wife or joint tenants where the common law only regarded the joint arrangements as one person or as a single owner in the case of the joint tenancy. In the case of a husband and wife, this meant that a wife was unable to convey any interest to her husband and vice versa. Similarly, a joint tenant was unable to convey 'directly to him or herself and another or others jointly.'<sup>111</sup> Different methods were used to overcome this restriction including the use of the *Statute of Uses 1535* (UK). In the case of personal property which did not fall within the scope of the 1535 legislation, 'two conveyances were necessary'.<sup>112</sup> Despite these alternative mechanisms to avoid the rule, some legislative changes were made to address the problems which the rule created.<sup>113</sup> In Queensland, section 1 of *The Mercantile Acts 1867-1896* abrogated the rule to some extent by allowing any person to have power to assign personal property directly to 'himself and

<sup>110</sup> Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012) [30445.1].

<sup>111</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 14.30].

<sup>112</sup> See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 14.30] for further detail about these types of conveyances.

<sup>113</sup> For an overview of the relevant legislative changes see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA14.30] –[PLA14.60].

another person or other persons or corporation by the like means he might assign the same to another.’<sup>114</sup>

The QLRC recommended the adoption of section 72 of the *Law of Property Act 1925* (UK) with some amendments to clarify that in Queensland, individuals and co-owners can lease to themselves.<sup>115</sup> This variation to section 72 of the English legislation was to address the House of Lords decision of *Rye v Rye*<sup>116</sup> which held that a lease by a person to himself and another (including a lease by two co-owners to themselves) was not permitted.<sup>117</sup>

A summary of the effect of section 14 of the PLA is below.

### **10.1.1. Sections 14(1) and (2)**

Section 14(1) applies to personal property, including ‘chattels real’. The provision allows for the conveyance or lease of personal property by a person to him or herself jointly with another person. The provision applies to conveyances and leases made after 28 December 1867.

Section 14(2) applies to freehold land or a thing in action. The provision permits the conveyance or lease of freehold land or a thing in action by:

- a person to him or herself jointly with another person;
- by a husband to his wife and by a wife to her husband, alone or jointly with another person.

### **10.1.2. Section 14(3)**

Section 14(3) applies to land and enables a person to convey or vest land in him or herself. However, the provision expressly prevents the person from conveying or vesting in him or herself an estate in fee simple absolute in the land. This means that the person is only able to convey to himself or herself ‘lesser interests than a fee simple absolute.’<sup>118</sup> The qualification in the subsection has been explained in the following way:

The prohibition in the section applies only to the conveyance or vesting of an estate in fee simple absolute in land and therefore, if the joint tenancy is of a lease, a life estate, or other lesser interest, then that joint tenancy could be severed by one joint tenant transferring her or his interest to her or himself.<sup>119</sup>

### **10.1.3. Section 14(4)**

Section 14(4) of the PLA is directed at any property vested in two or more persons, whether or not they are trustees or personal representatives. The provision enables two or more persons to convey

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<sup>114</sup> *The Mercantile Acts 1867-1896* s 1.

<sup>115</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) Final Report 11.

<sup>116</sup> *Rye v Rye* [1962] AC 492.

<sup>117</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) Final Report 10.

<sup>118</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) [12.250] 465.

<sup>119</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010) 244 [8.370]. For a discussion of the *Land Title Act 1994* (Qld) statutory regime allowing severance by a joint tenant see pp 244-245 [8.370].

or lease any property vested in them to one or more of themselves. The phrase 'or more of themselves' is clarified in section 14(5) of the PLA to include 'all the persons by whom the conveyance or lease is or has been made.'

#### **10.1.4. Section 14(4A)**

Section 14(4A) of the PLA is a limitation imposed on the operation of the section. Commentary on the section indicates that:

The limitation contained in subs (4A) makes clear that the subsection has no effect on the equitable principles as to setting aside dealings by a fiduciary with trust property in his own favour.<sup>120</sup>

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

Section 14 was drafted to overcome the common law rule which prevented a person conveying an interest in property to him or herself. The form of the section is complicated and lacking in clarity. Some of the issues raised by the current drafting of section 14 include:

- section 14(1) is directed at conveyances and leases made after 28 December 1867, the date on which The Mercantile Acts commenced in Queensland. The reference to that date is arguably no longer relevant;
- the specific reference in section 14(2) which recognises a husband and wife as separate entities is arguably unnecessary since section 18 of the *Queensland Law Reform Act 1995* (Qld) which expressly provides that a married person has a legal personality that is independent, separate and distinct from the legal personality of the person's husband or wife. Further, under section 18(2) of that Act, a married person has the same legal capacity that the person would have if the person were unmarried;
- the separation of the different categories of property in sections 14(1) and (2) is unnecessary if the date in section 14(1) is removed;
- section 14(3) is the only Australian jurisdiction apart from the Northern Territory which expressly states that the fee simple cannot be conveyed. This is arguably implicit and does not need to be expressly included.

The section could benefit from significant redrafting to simplify the provisions. This is discussed in Part 10.4 below.

### **10.3. Other jurisdictions**

#### **10.3.1. Australia**

Section 24 of the *Conveyancing Act 1919* (NSW) is a short provision which provides:

**24.** A person may assure property to himself or herself, or to himself or herself and others.

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<sup>120</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA14.90].

This provision consolidated section 34 of the *Conveyancing and Law of Property Act 1898* (NSW) and widened the scope of the provision to include real estate as it previously only applied to personal property.<sup>121</sup> The current provision is very broad as the term ‘property’ includes ‘real and personal property, and any estate or interest in any property real or personal, and any debt, and anything in action, and any other right or interest.’<sup>122</sup> The terms ‘conveyance’ and ‘assurance’ are defined broadly as well and a conveyance will include a lease.<sup>123</sup>

In both Western Australian and the Australian Capital Territory, the relevant sections are in a similarly short form to the New South Wales provision.<sup>124</sup> The provisions in the other Australian jurisdictions, Tasmania, Victoria, South Australia and the Northern Territory are in a similar form to section 14 of the PLA.<sup>125</sup> However, the key difference is that in section 14(3) of the PLA and the equivalent provision in the Northern Territory, the ability to convey or lease land to oneself is qualified by only being able to do so in relation to lesser interests than fee simple absolute. The rationale for the inclusion of this qualification is not clear in the Queensland context.

In Victoria, the Victorian Law Reform Commission recommended that section 72 of the *Property Law Act 1958* (Vic) be retained and re-drafted for clarity.<sup>126</sup> The other recommendations include:

In order to clarify the meaning and overcome the restrictive interpretation in *Rye v Rye*, the section should be amended by adding the words shown in italics;

- section 72(3) should provide that a person may ‘convey *or lease* land’.
- The words ‘or all’ should be added to s 72(4) so that it relevantly reads ‘Two or more persons....may convey....any property vested in them to any one or more *or all* of themselves.’<sup>127</sup>

There is no rationale provided in the VLRC report for the recommendation.

### 10.3.2. New Zealand

Section 56 of the *Property Law Act 2007* (NZ) provides:<sup>128</sup>

#### **56 Person may dispose of property to himself, herself, or itself**

- (1) A person may dispose of an estate or interest in property to himself, herself, or itself, alone or jointly with some other person.
- (2) A disposition to which subsection (1) applies is enforceable in the same manner as a disposition to another person.

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<sup>121</sup> Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths) 2012) (looseleaf online) ‘Commissioner’s Report into Conveyancing Act’ [35102] clause 24. The original provision in the *Conveyancing and Law of Property Act 1898* (NSW) provided: ‘Any person may assign personal property now by law assignment, including chattels real, directly to himself and another person by the like means as he might assign same to another.’

<sup>122</sup> *Conveyancing Act 1919* (NSW) s 7.

<sup>123</sup> See *Conveyancing Act 1919* (NSW) s 7.

<sup>124</sup> See *Property Law Act 1969* (WA) s 44 and *Civil Law (Property) Act 2006* (ACT) s 208.

<sup>125</sup> See *Property Law Act 1958* (Vic) s 72; *Law of Property Act 1936* (SA) s 40; *Conveyancing and Law of Property Act 1884* (Tas) s 62; *Law of Property Act* (NT) s 13.

<sup>126</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 132.

<sup>127</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 132.

<sup>128</sup> The previous provision set out in section 49 of the *Property Law Act 1952* (NZ) provided that ‘A person may convey or mortgage property for any estate or interest to himself or to himself jointly with another or others.’

A similar provision was included in the earlier property law legislation in New Zealand.<sup>129</sup>

## 10.4. Preliminary recommendation

Section 14 should be retained but amended to improve its clarity. This might be achieved by adopting a drafting approach similar to either New South Wales or New Zealand (see 10.3.1 and 10.3.2 above).

### Question

**57 Do you agree with the proposal that section 14 of the PLA be retained but re-drafted to improve its clarity?**

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<sup>129</sup> See *Property Law Act 1905* (NZ).

## 11. Section 15 – Rights of husband and wife

### 11.1. Overview and purpose

#### 15 Rights of husband and wife

A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of the Act, be treated as 2 persons.

Section 15 of the PLA has the effect of reversing the common law position applying where real or personal property was owned, or held in trust, by a husband and wife and a third party. The position at common law in that scenario was that the husband and wife counted as one person so that the third party received a half share in the property and the husband and wife received the other half share. This position reflected the common law doctrine of unity which meant that a husband and wife became one person when entering into a marriage.<sup>130</sup> In practice, this meant that a married woman did not have contractual capacity as she had no legal identity separate from her husband.<sup>131</sup> Section 15 of the PLA alters this distribution so the husband and wife are treated as 2 persons. This means that the husband, wife and third party will all receive one third share each.

Part of the QLRC's justification for the inclusion of this provision was that the abolition of tenancies by entireties<sup>132</sup> in Queensland by the *Married Women's Property Act 1884*:

did not affect the independent rule of construction, based upon the legal entity of husband and wife, that a conveyance to a husband and wife and third parties, whether as joint tenants or tenants in common, vested in the husband and wife only one actual or potential share between them, the other share or shares being taken by third party or parties.<sup>133</sup>

The QLRC noted that the rule was abrogated in New South Wales in 1901 but the common law remained in Queensland.<sup>134</sup>

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<sup>130</sup> Western Australia Hansard, *Acts Amendment (Equality of Status) Bill 2002* Introduction and First Reading Speech [1].

<sup>131</sup> Western Australia Hansard, *Acts Amendment (Equality of Status) Bill 2002* Introduction and First Reading Speech [1].

<sup>132</sup> The common law position that a husband and wife were regarded as one person and a tenancy by entireties was a 'species of joint tenancy which could exist only between a husband and wife but which neither spouse could sever': see Adrian Bradbrook, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 432 [12.75].

<sup>133</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) Final Report (1973) 11

<sup>134</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) Final Report (1973) 11. The common law rule was abrogated in New South Wales in *The Married Women's Property Act of 1884* (NSW) s 26. It was retained in *Married Persons (Equality of Status) Act 1996* (NSW) s 9.



## 11.2. Is there a need for reform?

Section 15 of the PLA alters the common law position in relation to the status of a husband and wife from one person to two for the purposes of the distribution of property between a husband, wife and third party. However, the ongoing necessity for, and the contemporary relevance of, such a provision is doubtful. The *Law Reform Act 1995* (Qld) clarified the legal capacity of persons whose relationship is husband and wife. Section 18 of that Act provides:

### Capacity

- (1) A married person has a legal personality that is independent, separate and distinct from the legal personality of the person's husband or wife.
- (2) A married person has the same legal capacity that the person would have if the person were unmarried.

The inclusion of this provision arguably removes the need for the clarification of the position in section 15 of the PLA.

There are other presumptions regarding co-ownership which apply in Queensland also in relation to registered land which implicitly recognise that the legal capacity of a husband and wife is no different to an unmarried individual. For example, section 56 of the *Land Title Act 1994* (Qld) provides that in registering an instrument transferring an interest to co-owners, the registrar must also register the co-owners as holding their interests as tenants in common or joint tenants. Where this is not specified on the instrument, the registrar is required to register the interest as tenants in common.

There appears to be no current rationale for the retention of section 15 of the PLA.

## 11.3. Other jurisdictions

### 11.3.1. Australia

Victoria, South Australia and the Northern Territory have similar provisions.<sup>135</sup> In New South Wales, a similar provision is located in the *Married Persons (Equality of Status) Act 1996* (NSW). Section 9 of that Act provides:

A husband and wife are to be treated as two separate persons for the purposes of the construction of a will, trust, or other instrument in relation to a gift or other disposition of real or personal property to the husband and wife, unless a contrary intention appears.<sup>136</sup>

The section in Western Australia is in similar terms to the provision in section 18 of the *Law Reform Act 1995* (Qld).<sup>137</sup> However, the Western Australian legislation in section 2 also expressly abolishes the doctrine of unity in the following way:

The common law doctrine of unity of spouses is abolished.<sup>138</sup>

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<sup>135</sup> *Property Law Act 1958* (Vic) s 21, *Law of Property Act 1936* (SA) s 95A, *Law of Property Act* (NT) s 14

<sup>136</sup> This section follows the previous provision in New South Wales set out in section 26 of the *Married Persons (Property and Torts) Act 1901* (NSW). See: Explanatory Note, *Married Persons (Equality of Status) Bill 1996*.

<sup>137</sup> See *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 3.

<sup>138</sup> *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 2.

In 2010, the Victorian Law Reform Commission recommended the retention of the equivalent provision in section 21 of the *Property Law Act 1958* (Vic). The rationale for the retention of the provision appears to be based on concerns that the repeal of the provision could ‘create unnecessary uncertainty as to the share of a husband and wife in co-ownership with a third person.’<sup>139</sup> The Commission held concerns about the effect of section 14(2)(c) of the *Acts Interpretation Act* (Vic) which provides that unless the contrary intention expressly appears, the repeal of an Act or provision does not revive ‘anything not in force or existing at the time that the repeal becomes operative.’ The main concern was whether the section applied to a ‘rule for the construction of instruments.’<sup>140</sup> The Victorian Law Reform Commission argued that retaining the provision made the law clear.<sup>141</sup>

## 11.4. Preliminary recommendation

Section 15 has no contemporary relevance and should be repealed. If there are ongoing concerns that section 18 of the *Law Reform Act 1995* (Qld) is not explicit enough in terms of abolishing the common law doctrine of unity, then a clear provision similar to the one in Western Australia in section 2 of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA) could be enacted in Queensland.

### Questions

- 58 Do you disagree with the preliminary recommendation that section 15 of the PLA be repealed?**
- 59 Do you think there needs to be a provision which clearly abolishes the common law doctrine of unity?**

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<sup>139</sup> Victorian Law Reform Commission Report, *Review of the Property Law Act 1958* Final Report (2010) 95 [6.109].

<sup>140</sup> Victorian Law Reform Commission Report, *Review of the Property Law Act 1958* Final Report (2010) 95 [6.110]

<sup>141</sup> Victorian Law Reform Commission Report, *Review of the Property Law Act 1958* Final Report (2010) 95 [6.111].

## 12. Section 15A – Rights of aliens

### 12.1. Overview and purpose

#### 15A Rights of aliens

- (1) An alien may take, give, buy or sell property as if the alien were an Australian citizen.
- (2) The application of succession laws to a person is not different merely because the person is an alien.
- (3) This section does not entitle an alien to any right as an Australian citizen other than a right given by this section.
- (4) In this section –  
**property** means any interest in real, personal, movable or immovable property.

Section 15A of the PLA was inserted into the Act in 1994 under the same legislation which repealed the *Aliens Act 1965* (Qld).<sup>142</sup> Section 2 of the *Aliens Act 1965* (Qld) provided:

2. Notwithstanding any provision of any Act or law an alien shall and may take, acquire, hold and dispose of any property in all respects as if he were an Australian citizen; and a title to property may be derived through, from or in succession to an alien in the same manner in all respects as through, from or in succession to an Australian citizen.

Section 15A of the PLA effectively replicates the earlier Act and provides that:

- an ‘alien’ may take, give, buy or sell property as if the person was an Australian citizen;<sup>143</sup> and
- succession laws do not apply any differently to an ‘alien’.<sup>144</sup>

The section expressly provides that it does not give an alien any right as an Australian citizen other than what is provided for in the section.<sup>145</sup> The provision is intended to override the common law rule that an alien cannot acquire, hold or transfer land.<sup>146</sup>

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

Section 15A of the PLA has existed in one form or another in Queensland for an extended period of time.<sup>147</sup> Clearly there is now greater clarity at the Commonwealth level in relation to citizenship under the *Australian Citizenship Act 2007* (Cth). However, that Act does not address the issue of property acquisition or holdings by non-citizens. Another Commonwealth Act, the *Foreign Acquisitions and Takeovers Act 1975* (Cth) (**FATA**),<sup>148</sup> regulates actions involving the acquisition of land interests and

<sup>142</sup> See Sch 5 of the *Land Act 1994* (Qld) (Act No. 81 s 527) which inserted section 15A of the PLA and section 524 which repealed the *Aliens Act 1965* (Qld).

<sup>143</sup> *Property Law Act 1974* (Qld) s 15A(1).

<sup>144</sup> *Property Law Act 1974* (Qld) s 15A(2).

<sup>145</sup> *Property Law Act 1974* (Qld) s 15A(2).

<sup>146</sup> See Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 91 [6.81].

<sup>147</sup> In Queensland, prior to the enactment of the *Aliens Act 1965* (Qld) the relevant Imperial legislation in place was the *Aliens Act of 1867* (31 Vic No. 28); See *Aliens Act 1965* (Qld) s 3.

<sup>148</sup> Substantial amendments were made to the Act by the *Foreign Acquisitions and Takeovers Legislation Amendment Act 2015* (Cth) which commenced on 1 December 2015. For a detailed discussion of the changes

foreign acquisition and control of certain businesses, enterprises and mineral rights by foreign persons<sup>149</sup> in Australia. In the case of residential real estate, all foreign persons must get approval to acquire an interest irrespective of the value of the property.<sup>150</sup> The FATA expressly indicates that it is not intended to exclude or limit the operation of a State or Territory law which can operate concurrently with it.<sup>151</sup>

The Victorian Law Reform Commission indicated that the FATA does not cover the field and that it does not apply to foreign nationals who are permitted to stay indefinitely in Australia such as New Zealand citizens.<sup>152</sup> The FATA now expressly provides that in relation to the acquisition of residential real estate, New Zealand citizens and holders of a permanent visa are exempt from the requirement to seek approval for an acquisition.<sup>153</sup> On this basis it is arguable that section 15A of the PLA may be of ongoing relevance.

Section 15A(2) of the PLA provides that the operation of succession laws is not different merely because an individual is an 'alien'. The original section in the 1965 Act, extracted in Part 12.1 above, is directed at clarifying that an alien's title to property can be obtained through succession laws in the same way it can in the case of an Australian citizen. It is not clear from the wording of the current section 15(2) whether this is still the purpose of the provision or whether it is intended to be broader and cover both acquisition of property under a will and also the right of the 'alien' to make a will in Queensland (or elsewhere) in relation to property. Irrespective of the intended effect of section 15A(2) of the PLA, the terms of the *Succession Act 1981* (Qld) governs the succession process in Queensland and would apply if there was any inconsistency with the PLA. The *Succession Act 1981* (Qld) is broad in its application and recognises the validity of wills executed internationally in the circumstances specified in the relevant Division.<sup>154</sup>

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made to the foreign investment regime see: Bill Dixon, 'Land Transactions and the New Foreign Investment Regime' (2016) 25(1) *Australian Property Law Journal* 55.

<sup>149</sup> A 'foreign person' will cover an individual who is not ordinarily a resident in Australia, a foreign government or foreign government investor or a corporation where an individual not ordinarily a resident in Australia, foreign corporation or foreign government holds a substantial interest of at least 20 percent: see Treasurer, *Australian's Foreign Investment Policy* (1 July 2016) 3 (<https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>)

<sup>150</sup> For further information on this legislation and the Commonwealth Government's approach to foreign investment see Treasurer, *Australian's Foreign Investment Policy* (1 July 2016) (<https://firb.gov.au/files/2015/09/Australias-Foreign-Investment-Policy-2016-2017.pdf>) and other explanatory material on the Foreign Investment Review Board website: [www.firb.gov.au](http://www.firb.gov.au).

<sup>151</sup> *Foreign Investment and Acquisition Act 1975* (Cth) s 34. There are separate obligations imposed on a 'foreign person' in Queensland under the *Foreign Ownership of Land Register Act 1988* (Qld). The definition of 'foreign person' is slightly different in Queensland to the Commonwealth definition in the *Foreign Investment and Acquisition Act 1975* (Cth). The Act establishes the Foreign Ownership of Land Register (see Part 2). Part 3 of the Act imposes notification obligations on foreign persons to lodge the required forms to notify the registrar of any legal estate of an interest in land which exists or is acquired by the foreign person (ss 17 and 18). A disposal of a registered interest in land is also required to be notified on the register (s 18A).

<sup>152</sup> See Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 92 [6.93] referring to section 5A(1) of the *Foreign Investment and Acquisition Act 1975* (Cth).

<sup>153</sup> The relevant section in FATA was repealed in 2015 but replaced with section 5 which is similar in effect.

<sup>154</sup> *Succession Act 1981* (Qld) s 33YE and see Div 6A. There is a separate issue of which law applies where a person dies with properties located in different jurisdictions or dies in Queensland but is usually resident in another jurisdiction where he or she may have a valid will in place under the laws of that other jurisdiction: AA

## 12.3. Other jurisdictions

### 12.3.1. Australia

All other Australian jurisdictions, apart from the Northern Territory and Western Australia have similar provisions to section 15A of the PLA. Tasmania has retained its 1913 legislation, the *Aliens Act 1913* (Tas). The relevant section in South Australia is set out in section 24 of the *Law of Property Act 1936* (SA). In New South Wales, section 146A was inserted into the *Conveyancing Act 1919* (NSW) in 1985. The section originated from section 4 of the *Naturalization and Denization Act 1898* (NSW) which was repealed at the same time.<sup>155</sup>

In Victoria, section 27 of the *Property Law Act 1958* (Vic) expressly allows for an ‘alien’ to acquire, hold or dispose’ of property.<sup>156</sup> This provision was reviewed by the Victorian Law Reform Commission in 2010 and the Commission noted that:

The provision has appeared in Victorian legislation substantially unchanged for 120 years. In the meantime, the Commonwealth of Australia was formed, the concept of Australian citizenship evolved, and foreign investment in property has become increasingly regulated by the Commonwealth Government.<sup>157</sup>

The Victorian Law Reform Commission concluded that the provision is ‘arcane’ and requires updating.<sup>158</sup> The final recommendation in relation to this provision is:

#### RECOMMENDATION

45. Section 27, concerning the property rights of alien friends, should be replaced by a provision in the New Property Law Act which:

- (a) provides that a person is not prevented from acquiring, holding or disposing of real or personal property in Victoria by reason only that the person is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth);
- (b) includes a note stating that investment by foreign persons is regulated by the Commonwealth under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

### 12.3.2. New Zealand

In New Zealand, the equivalent provision is set out in section 23 of the *Citizenship Act 1977* (NZ) and provides:

Subject to subsection (2) and to any other enactment, every person who is not a New Zealand citizen shall be entitled to take, acquire, hold, and dispose of real or personal property in the same manner in all respects as if he were a New Zealand citizen.

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Preece, *Lee’s Manual of Queensland Succession Law* (LawBook Co., 7th ed, 2013) [1.130] 14. This issue is not considered for the purpose of this Issues Paper.

<sup>155</sup> *Statute Law (Miscellaneous Provisions) Act 1985* (NSW) Sch 3; Explanatory Note, *Statute Law (Miscellaneous Provisions) Bill 1985* 2.

<sup>156</sup> *Property Law Act 1958* (Vic) s 27.

<sup>157</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 91 [6.82].

<sup>158</sup> See Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 91 [6.83].

New Zealand also has an Overseas Investment Office which regulates a narrow category of foreign acquisitions categorised as 'sensitive' New Zealand assets such as high value businesses (more than \$100 million), fishing quotas and 'sensitive' land.<sup>159</sup>

## **12.4. Preliminary recommendation**

The preliminary view in relation to section 15A of the PLA is that it should be retained but updated. However, stakeholder feedback is invited in relation to the ongoing relevance of section 15A and possible approaches to updating the section if it is retained. For example, should a note be included in the provision to highlight the existence of FATA?

### **Questions**

**60 Do you think section 15A of the PLA should be retained?**

**61 If section 15A of the PLA is retained do you think it requires updating and if so, in what way?**

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<sup>159</sup> See *Overseas Investment Act 2005* (NZ).

## 13. Section 16 – Presumption that parties are of full age

### 13.1. Overview and purpose

#### 16 Presumption that parties are of full age

The persons expressed to be parties to any conveyance shall, until the contrary is proved, be presumed at the date of such conveyance to be of full age or of such other lesser age as to have capacity to give effect to the conveyance.

The effect of section 16 of the PLA is to provide a rebuttable presumption that the parties to a conveyance are of full age or of ‘such lesser age’ as to have capacity to give effect to the conveyance. The position at common law in relation to the capacity of minors to contract depends on the particular transaction involved. In terms of contracts involving something of a permanent nature such as purchasing an interest in land, the common law position is that it is binding on the minor unless the contract is repudiated within a reasonable time of reaching the age of 18.<sup>160</sup> Section 16 does not alter that common law position. It is essentially a declaratory provision which enables a contracting party to assume that the other party to a conveyance is not a minor and is able to enter into an agreement, subject to the contrary position being established.

A ‘conveyance’ under the PLA is defined broadly to include:

A transfer of an interest in land, and any assignment, appointment, appointment, lease, settlement or other assurance in writing of property.<sup>161</sup>

The QLRC noted that the utility of a section such as section 16 is greater in the case of unregistered rather than registered land.<sup>162</sup> In the case of registered land, the QLRC indicated that ‘the fact and effect of registration is virtually if not completely conclusive.’<sup>163</sup> However, the Commission stated:

Nevertheless, questions as to the validity of a conveyance by or to a person whose age is not readily discoverable may arise in relation to land which is not under The Real Property Acts, e.g. a transfer of a Crown lease under the Land Act, where a provision in the form of s 15 might provide useful.<sup>164</sup>

The QLRC indicated that because of section 111A of the *Real Property Act* and section 15(2) of the *Land Act 1962* (Qld) in place in Queensland at the time, the presumption proposed in clause 16 needed

<sup>160</sup> S. A Christensen, W M Dixon, W D Duncan and S E Jones, *Land Contracts in Queensland* (The Federation Press, 4<sup>th</sup> ed, 2016) 148 [3.4.1.4].

<sup>161</sup> *Property Law Act 1974* (Qld) s 3, Sch 6. The term ‘assurance’ is also defined in Sch 6.

<sup>162</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) 11.

<sup>163</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) 11.

<sup>164</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 11.

to be extended 'to such other lesser age as to have capacity to give effect to conveyance.'<sup>165</sup> Section 15(2) of the *Land Act 1962* (Qld) for example, appeared to lower the age of majority from 21 to 18 in relation to the property dealings set out in that section. Further, section 111A of the *Real Property Acts* provided that any person of the age of 18 years but under the age of 21 years may acquire, transfer, mortgage or otherwise deal with any estate or interest in land under the Real Property Acts as if the person were 21 years of age.<sup>166</sup> At the time of the introduction of the PLA, the age of majority was 21 and the inclusion of 'other lesser age' in the section appears to have been to ensure that the section reflected other exceptions to the age of majority rule in other Acts. That inclusion was probably unnecessary as the *Age of Majority Act 1974* (Qld) reduced the age of majority from 21 to 18 years of age. The age of majority is now expressly set out in section 17 of the *Law Reform Act 1995* (Qld) and is 18 years.<sup>167</sup>

## 13.2. Is there a need for reform?

The section arguably only applies to old system land which is virtually non-existent in Queensland. This is made clear in the QLRC comments and is consistent with the approach under the *Land Title Act 1994* (Qld) which has specific provisions dealing with the issue of minors or individuals lacking capacity. For example, where the Act requires or permits an act to be done by a person and that person is a minor and there is no person with authority under an Act to act for that minor, section 136(2) enables a person 'suitably authorised by a court of competent jurisdiction' to act for the relevant person.<sup>168</sup> Section 137 of the Act also allows a qualified person to act for another person lacking capacity, subject to the operation of the *Guardianship and Administration Act 2000* (Qld). The Registrar is required to record on the register that a person with an interest is a minor.<sup>169</sup>

In the case of land under the *Land Act 1994* (Qld), section 142 of the Act expressly provides that only an adult is eligible to apply for, buy or hold land under the Act.

## 13.3. Other jurisdictions

### 13.3.1. Australia

The Northern Territory has an equivalent provision to section 16 of the PLA, although the term 'adult' is used instead of 'full age' in the Northern Territory legislation.<sup>170</sup> Victoria is the only other Australian

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<sup>165</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) 11.

<sup>166</sup> Extracted from Law Reform Commission (NSW) *Infancy in Relation to Contracts and Property* No. 6 (1969) 21 [22].

<sup>167</sup> The *Age of Majority Act 1974* (Qld) was repealed by the *Statute Law Revision Act (No. 2) 1995* (Qld).

<sup>168</sup> The Land Title Practice Manual expressly provides in the commentary on transfers of fee simple that 'There is no authority for a minor (a person who has not yet reached 18 years of age) to execute a transfer. Accordingly, a transfer by a minor, either as a sole transferor or as one of several transferors is not acceptable unless a Court Order authorises a person to execute the transfer on behalf of the minor (s 136 of the *Land Title Act 1994*): see Department of Natural Resources and Mines, *Land Title Practice Manual (Queensland)* [1-2060] [https://www.dnrm.qld.gov.au/data/assets/pdf\\_file/0006/97134/land-title-practice-manual.pdf](https://www.dnrm.qld.gov.au/data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf) (accessed 16/8/16).

<sup>169</sup> *Land Title Act 1994* (Qld) s 28.

<sup>170</sup> *Law of Property Act* (NT) s 15.



jurisdiction with a similar section located in a property law specific Act.<sup>171</sup> The Victorian Law Reform Commission, when reviewing the *Property Law Act 1958* (Vic) in 2010, recommended that the section be retained.<sup>172</sup> However, the Commission did not provide a rationale for its recommendation.

New South Wales has effectively codified the laws relating to minors and contracts in the *Minors (Property and Contracts) Act 1970* (NSW). The Act provides that a person aged 18 years or above is of full age and an adult.<sup>173</sup> Section 20 of the Act provides that a disposition of property made for consideration by a minor or a disposition made to a minor for consideration is 'presumptively' binding on the minor in the circumstances specified in the section.<sup>174</sup> The Act provides for court approval of a disposition of property made by or to the minor<sup>175</sup> and certification of dispositions prior to the actual disposition.<sup>176</sup> However, a minor is still entitled to repudiate the relevant dispositions at any time while he or she remains a minority and after turning 18 can still repudiate up until before turning 19.<sup>177</sup>

In South Australia the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) also specifically addresses issues relating to minors and contracts. The starting point in South Australia is that contracts should not be enforceable against infants. This is different to the New South Wales position where there is a presumption that it is binding. Section 4 of the *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) provides that:

Where a person has entered into contract that is, by reason of his minority at the time of entering into the contract, unenforceable against him, the contract shall remain unenforceable against him unless it is ratified by him, in writing, on or after the day on which he attains his majority.

However, a contract with a minor can have effect in South Australia, if before entering into the contract, its terms were approved by a court.<sup>178</sup> A minor in South Australia can also apply for restitution if the minor has avoided the contract on the ground of minority and before the avoidance, the property passed to some other contracting party.<sup>179</sup>

The legislation in both New South Wales and South Australia followed recommendations made in reports completed by the relevant Law Reform Commissions in those jurisdictions.<sup>180</sup> The Law Reform Committee in South Australia noted that the issue of minors and contracts had been considered by a number of international law reform bodies and had been considered in New South Wales also.<sup>181</sup> In this respect, the Committee acknowledged that there had been a lack of consistency in terms of the

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<sup>171</sup> However, section 26 of the *Property Law Act 1958* (Vic) does not include the second part of section 16 of the PLA which states 'or of such lesser age as to have capacity to give effect to the conveyance'.

<sup>172</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 20 (2010) Appendix A 127.

<sup>173</sup> *Minors (Property and Contracts) Act 1970* (NSW) s 9.

<sup>174</sup> The same presumption is made in relation to the disposition of property as a gift which is reasonable at the time when it is made: *Minors (Property and Contracts) Act 1970* (NSW) s 21.

<sup>175</sup> *Minors (Property and Contracts) Act 1970* (NSW) s 27.

<sup>176</sup> *Minors (Property and Contracts) Act 1970* (NSW) ss 28 and 29.

<sup>177</sup> *Minors (Property and Contracts) Act 1970* (NSW) s 31. There is a process which must be followed before a repudiation is effective, including providing a written and signed notice (s 33).

<sup>178</sup> *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) s 6.

<sup>179</sup> *Minors Contracts (Miscellaneous Provisions) Act 1979* (SA) s 6.

<sup>180</sup> New South Wales Law Reform Commission, *Infancy in Relation to Contracts and Property* Report No. 6 (1969) and Law Reform Committee (SA) *Report Relating to the Contractual Capacity of Infants* No. 41 (1977).

<sup>181</sup> Law Reform Committee (SA) *Report Relating to the Contractual Capacity of Infants* No. 41 (1977) 4-6.

legislative reform ultimately adopted in these jurisdictions. The Committee noted that the law was generally complex in this area but despite this, it had caused ‘little difficulty in practice for many years.’<sup>182</sup>

The Law Commission of Western Australia considered minors’ contracts in 1988 and made a number of recommendations including that a statutory regime should be implemented in Western Australia.<sup>183</sup> However, these recommendations were not adopted and the position in relation to contracts and minors in Western Australian, as with some other Australian jurisdictions, is primarily governed by common law.

### **13.4. Preliminary recommendation**

Queensland has not implemented any significant reforms in relation to minors and contracts in the same way that New South Wales and South Australia have. Section 16 of the PLA sets out a rebuttable presumption that a person entering into a conveyance is of full age and is therefore able to enter into the transaction. The provision was primarily intended to address old system conveyances where the age of the parties may not have always been obvious. The section was not intended to make any significant alterations to the common law and does not appear to alter the common law rules in relation to minors entering into agreements. The current utility of the provision in circumstances where there is effectively no old system land in existence in Queensland is questionable. In the circumstances, section 16 should be repealed.

#### **Questions**

- 62 Do you agree with the preliminary recommendation that section 16 of the PLA be repealed?**
- 63 Do you have any concerns if section 16 of the PLA is repealed?**

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<sup>182</sup> Law Reform Committee (SA) *Report Relating to the Contractual Capacity of Infants* No. 41 (1977) 6.

<sup>183</sup> Law Reform Commission of Western Australia, *Minor’s Contracts* Project No. 25 – Part II Report (1988) 101.

## 14. Section 17 – Merger

### 14.1. Overview and purpose

#### 17 Merger

An estate does not merge by operation of law only if the beneficial interest in the estate would not be merged or extinguished in equity.

At common law, merger occurred automatically where a lesser and a greater estate vested in the same person in the ‘same right’.<sup>184</sup> Merger occurred irrespective of the person’s intention. An example of the operation of merger at common law includes:

if the reversion and the leasehold vest in the one person, the lesser interest (the leasehold) “merges” in the greater (the reversion) and is destroyed.<sup>185</sup>

The position was different at equity where there was no merger unless this was intended by the party acquiring both the lease and the reversion.<sup>186</sup> Section 5(4) of the *Judicature Act 1876* altered the common law rule by specifying that the equitable rule regarding merger prevailed. The QLRC when considering the inclusion of section 17 of the PLA noted that the provision should be included in property legislation which was the practice in Victoria and the United Kingdom.<sup>187</sup> Further, the form of the Queensland provision adopted reflected recommendations made in Northern Ireland in relation to the equivalent provision which was aimed at providing greater clarity to the provision.<sup>188</sup>

The effect of section 17 of the PLA is to abrogate the common law rule that merger occurred irrespective of the intention of the person acquiring both estates. The section now reflects the position in equity in relation to merger.

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

Section 17 of the PLA is a necessary provision which is applicable in current legal practice. The provision is well understood and the cases which have applied the provision have not highlighted any significant issues of interpretation.

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<sup>184</sup> Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths) 2012) (looseleaf) [30310.5]

<sup>185</sup> Peter Butt, *Land Law* (LawBook Co.,5<sup>th</sup> ed, 2006) [15237]. For further examples of mergers see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 17.90].

<sup>186</sup> Carmel MacDonald, et al, *Real Property Law In Queensland* (LawBook Co. 2010) 620 [14.1050].

<sup>187</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) 12.

<sup>188</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) 12.

## 14.3. Other jurisdictions

### 14.3.1. Australia

Each Australian jurisdiction has a provision equivalent to section 17 of the PLA.<sup>189</sup> The Victorian Law Reform Commission considered section 185 of the *Property Law Act 1958* (Vic) as part of its broader review of the Act in 2010. The Commission recommended that the section be retained and that:

provision should be made in the *Transfer of Land Act 1958* for the Registrar, upon the application of the proprietor of interests or estate in the land, to record the merger of the interests or estates.<sup>190</sup>

The rationale for the inclusion of this latter part of the recommendation is explained by the Victorian Law Reform Commission as follows:

Since the application can be made after the greater interest has been registered, the provision will avoid any need to delay registration of dealings to determine whether merger is intended.<sup>191</sup>

The proposal was modelled on section 12(1)(i) of the *Real Property Act 1900* (NSW).

### 14.3.2. New Zealand

In New Zealand, the merger provision was set out in section 30 of the *Property Law Act 1952* (NZ). The New Zealand Law Commission in its preliminary report indicated that the provision may be superfluous as it was sufficiently covered by section 99 of the *Judicature Act 1908*. Section 30 of the now repealed 1952 Act no longer has an equivalent provision in the *Property Law Act 2007* (NZ).

## 14.4. Preliminary recommendation

Section 17 of the PLA should be retained.

### Question

**64 Do you agree with the preliminary recommendation that section 17 of the PLA should be retained?**

<sup>189</sup> *Conveyancing Act 1919* (NSW) s 10; *Property Law Act 1958* (Vic) s 185; *Law of Property Act 1936* (SA) s 13; *Property Law Act 1969* (WA) s 18; *Law of Property Act* (NT) s 16; *Civil Law (Property) Act 2006* (ACT) s 206; *Supreme Court Civil Procedure Act 1932* (Tas) s 11(4).

<sup>190</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report, 89 Recommendation 43.

<sup>191</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report, 89.

## 15. Section 18 – Restrictions on operation of conditions of forfeiture

### 15.1. Overview and purpose

#### 18 Restrictions on operation of conditions of forfeiture

- (1) Where there is a person entitled to income (including an annuity or other periodical income) or any other property, subject to a condition of forfeiture on alienation, whether voluntary or involuntary, and whether with or without words of futurity, then –
  - (a) unless the instrument containing the condition expressly provides to the contrary, no alienation, whether by way of charge or otherwise, of the income or other property, made or occurring before the person becomes entitled to receive payment of the income, or to call for a conveyance or delivery of the other property, shall operate to create forfeiture under the condition unless the alienation is in operation at the time the person becomes so entitled; and
  - (b) despite any stipulation to the contrary in the instrument containing the condition no voluntary alienation made by the person, with the sanction of the court, shall operate to create forfeiture under the condition.
- (2) This section applies where the condition of forfeiture is contained in an instrument executed, made, or coming into operation before or after the commencement of this Act, but only in cases where such person becomes entitled to receive payment of the income, or to call for an assurance or delivery of the other property, or where the alienation with the sanction of the court is made, after such commencement.

Section 18 of the PLA was enacted to resolve a conflict between an English Court of Appeal decision, *In re Forder*<sup>192</sup> and a decision of the Australian High Court in *McQuade v Morgan*.<sup>193</sup> The factual scenario from the High Court decision is summarised below:

- a daughter had a power of appointment under the will of her father. The daughter executed a deed poll in which she directed trustees to hold her property on trust for her four children for their maintenance while they were still minors. Once they turned 21, the trustees were required to pay them the whole of the income in equal shares;<sup>194</sup>
- however, the deed poll included a provision for the determination of the share of any child who becomes ‘bankrupt or do, or suffer any act or thing whereby the said income or his or her interest therein or any part thereof shall be charged or encumbered or become vested in or payable to any other person’;
- a number of years before the death of the appointor, one of the adult children charged his interest as collateral security for a loan but this charge was released well before the death of the appointor.

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<sup>192</sup> *In re Forder* [1927] 2 Ch 291.

<sup>193</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) 12. The High Court decision was *McQuade v Morgan* (1927) 39 CLR 222.

<sup>194</sup> H Ford and WA Lee, *Principles of the Law of Trusts* (The Law Book Company Limited, 2<sup>nd</sup> ed, 1990) 271 [719].

The issue in the High Court case was whether the appellant had incurred a forfeiture of the interest appointed to him by virtue of charging his interest, despite the fact that no charge existed at the time of the death of the appointor. The majority of the High Court agreed that the appellant had forfeited his interest and relied on the construction of the provision in the instrument. The Court disagreed with the generally accepted rule that 'no forfeiture is incurred if the charge is got rid of before the interest falls into possession as to widely stated and did not think the rule was applicable 'where no ambiguity can be found in the forfeiture clause.' Isaacs J dissented and while he accepted the general proposition that the instrument must be interpreted by its own words he also made it clear that the rules of law and construction must have their force also.<sup>195</sup> A slightly earlier English Court of Appeal decision, *In re Forder*,<sup>196</sup> in the same year reached the contrary position to the High Court decision and Isaac J's dissenting views were consistent with the Court of Appeal approach that no forfeiture occurs if the charge is removed before the interest falls into possession.

Section 18 of the PLA is taken directly from section 29C of the *Conveyancing Act 1919* (NSW) which was inserted into that Act in 1930 in response to the uncertainty regarding the appropriate approach in these situations. The section clarifies the position following the High Court case and essentially adopts the English Court of Appeal approach and the minority approach of Isaacs J in *McQuade v Morgan*. Commentary on section 29C of the *Conveyancing Act 1919* (NSW) explains the principle in the following way:

The principle applicable to clauses of forfeiture on alienation in wills and settlements is that although an interest subject to forfeiture is actually alienated, that is, by an act purporting to alienate it, yet if the alienation be got rid of before the interest falls into possession, no forfeiture takes place. Consequently if a charge, or a bankruptcy, or any other impediment to the personal reception of the income or enjoyment of the property has been created or has occurred, but has been validly extinguished before the period of distribution or the period at which the right to receive any portion of the money or to enjoy the property has accrued, there is no forfeiture.<sup>197</sup>

Section 18 of the PLA operates in the same way so that an alienation which has taken place and been reversed before the interest falls into possession is disregarded.<sup>198</sup> This means that if a scenario similar to the one in *McQuade v Morgan* was raised again, the outcome is likely to be different, unless there is a contrary intention expressly provided for in the relevant instrument.

The term 'instrument' is defined broadly in the Act to include 'deed, will, and Act.'<sup>199</sup>

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<sup>195</sup> *McQuade v Morgan* (1927) 39 CLR 222, 231.

<sup>196</sup> *In re Forder* [1927] 2 Ch 324.

<sup>197</sup> G P Stuckey, *The Conveyancing Act 1919-1969 and Regulations* (The Law Book Company Limited, 2<sup>nd</sup> ed, 1970) 61 [192].

<sup>198</sup> Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths) 2012) (looseleaf online) [30497.1].

<sup>199</sup> *Property Law Act 1974* (Qld) Sch 6.

## 15.2. Is there a need for reform?

It is not clear whether section 18 of the PLA has any current relevance and whether it is relied upon to any extent. The High Court decision of *McQuade v Morgan*<sup>200</sup> does not appear to have been overturned or altered in any way. In this respect, section 18 of the PLA sets out the preferred approach in Queensland which is not the approach adopted in the High Court decision of *McQuade*. In the absence of any clear policy reason for its removal the section should remain.

### 15.2.1. Australia

As indicated in Part 15.1 above, the Queensland provision is based on section 29C of the *Conveyancing Act 1919* (NSW). The Northern Territory is the only other jurisdiction that has an equivalent provision and this is set out in section 17 of the *Law of Property Act* (NT). The other Australian jurisdictions do not appear to have enacted similar provisions.

## 15.3. Preliminary recommendation

Subject to stakeholder feedback, section 18 of the PLA should be retained.

### Questions

**65 Do you agree with the preliminary recommendation that section 18 of the PLA should be retained?**

**66 Do you think section 18 of the PLA still serves a purpose?**

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<sup>200</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) 12. The High Court decision was *McQuade v Morgan* (1927) 39 CLR 222.

## Part 3 Freehold estates (ss 19-29)

### 16. Section 19 – Freehold estates capable of creation

#### 16.1. Overview and purpose

##### **19 Freehold estates capable of creation**

After the commencement of this Act the following estates of freehold shall be capable of being created and, subject to this Act, of subsisting in land –

- (a) estate in fee simple;
- (b) estate for life or lives.

Prior to the introduction of the PLA the three principal forms of freehold estates in existence were:

- estates in fee simple;
- estates tail; and
- life estates.

Estates in fee simple and life estates were originally recognised at common law, while estates tail were created under a thirteenth century statute.<sup>201</sup> The QLRC recommended the abolition of estates tail (and quasi-entails) as those estates had ‘long since ceased to be of any legal or social significance’.<sup>202</sup> The effect of section 19 of the PLA is to limit the freehold estates that may be created to estates in fee simple and life estates in Queensland from 1 December 1974.<sup>203</sup>

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

Although it is probably implicit as a result of the abolition of the other estates in sections 22 and 23 that the only remaining estates in Queensland are estates in fee simple or life estates, the retention of section 19 of the PLA puts the position beyond doubt.

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<sup>201</sup> The relevant statute was De Donis Conditionalibus 1285. The QLRC also recommended the repeal of this Statute in its report. See Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) 12.

<sup>202</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) 12.

<sup>203</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) 13.



## 16.3. Other jurisdictions

### 16.3.1. Australia

The Northern Territory is the only other jurisdiction that has a provision equivalent to section 19 of the PLA.<sup>204</sup>

## 16.4. Preliminary recommendation

Section 19 of the PLA should be retained.

### Question

67 Do you agree that section 19 of the PLA should be retained?

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<sup>204</sup> See *Law of Property Act* (NT) s 18 which is in identical terms to section 19 of the *Property Law Act 1974* (Qld).

## 17. Section 20 – Incidents of tenure on grant in fee simple

### 17.1. Overview and purpose

#### 20 Incidents of tenure on grant in fee simple

- (1) All tenures created by the Crown upon any grant of an estate in fee simple made after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown.
- (2) Where any quit rent issues to the Crown out of any land, or the residue of any quit rent issues to the Crown out of any land in respect of which quit rent has been apportioned or redeemed, such land or residue is released from quit rent.
- (3) In respect of property of any person dying intestate on or after 16 April 1968—
  - (a) escheat is abolished; and
  - (b) all such property, whether real or personal, shall, subject to this section, be distributed in the manner and to the person or persons provided by the *Succession Act 1981*, but subject to the provisions (including part 4) of that Act.
- (4) Subject to any other Act, property of any corporation dissolved after the commencement of this Act shall not escheat, but the Crown shall be entitled to and take as *bona vacantia* all such property, whether real or personal, as would apart from this Act be liable to escheat or pass to the Crown as *bona vacantia*.
- (5) Despite this section, where the Crown, or it is made to appear to the Minister that the Crown, has a right to any property, by escheat or devolution or as *bona vacantia*, on the death intestate of any person, whether the death occurred before or after the passing of this Act, the Minister, upon application being made for the waiver of that right, may by gazette notice waive such right on such terms (if any), whether for the payment of money or otherwise, in favour of any 1 or more of the following persons, whether belonging to the same or to different classes—
  - (a) any dependants, whether kindred or not, of the intestate;
  - (b) any other persons for whom the intestate might reasonably have been expected to make provision;
  - (c) any persons to whom the State would, if the State's title had been duly proved by inquisition, have the power to grant such property;
  - (d) any other persons having in the opinion of the Minister a just claim to the grant of the property;
  - (e) the trustees of any person as mentioned in paragraphs (a) to (d);as to the Minister seems reasonable.
- (6) Upon a waiver made under subsection (5), the right of the State so waived, subject to subsection (10), shall vest in the person or persons in favour of whom the waiver is made.
- (7) For the purpose of giving effect to any waiver under subsection (5) the Minister, by gazette notice or a further gazette notice, may do all or any of the following things—
  - (a) appoint such person as the Minister considers suitable to be administrator of the property of the person who has died intestate (*the deceased*);
  - (b) appoint a person to execute any conveyance or transfer or other document for the purpose of conveying or transferring under the terms of the waiver to the person or persons in whose favour the waiver is made the right of the State so waived;
  - (c) give directions that the Minister considers necessary or desirable to give effect to the waiver (including the terms of the waiver) and the directions are to be given effect.
- (8) The person appointed under subsection (7)(a) to be administrator may apply to the Supreme Court for a grant of letters of administration of the property of the deceased and such letters of administration may be granted accordingly.

- (8A) For the purposes of the grant of the letters of administration and the administration under the grant, the property in respect of which the right of the State has been waived shall be deemed to form part of the estate of the deceased to be administered under the terms of the waiver for the benefit of the person or persons in favour of whom the waiver is made.
- (9) A waiver under subsection (5) shall have the effect of a grant of the land or other property of whatever kind the subject of the waiver or any part of the waiver, and in the case of land in fee simple or for any less estate, to the administrator appointed under this section or to any person or persons in favour of whom the waiver is made.
- (10) This section shall be subject to schedule 1 and all proceedings by way of writ of inquisition or otherwise may be had under that schedule.
- (11) Despite this section and that because of the death intestate of any person the State has a right to any property of that person by escheat or devolution or as bona vacantia the public trustee shall have and shall be deemed always to have had the same power—
- (a) to obtain from the court or otherwise under *the Public Curator Act 1915* or the *Public Trustee Act 1978* authority to administer the estate of such person; and
  - (b) to deal in due course of administration with the estate of such person; as the public trustee has in a case where the State has no such right.
- (12) In this section—
- intestate** has the meaning given by the *Succession Act 1981*, section 5.

The historical basis of English land law is the doctrine of tenure which provides that ultimate ownership of all land vests in the Crown.<sup>205</sup> In turn the Crown granted land upon certain conditions such as the payment of rent or the performance of service to the Crown.<sup>206</sup> The *Tenures Abolition Act 1660*<sup>207</sup> abolished these incidents of tenure so that payments and services were not required in relation to grants of freehold land. However, two incidents of tenure, escheat and quit rent, remained.<sup>208</sup> The 1660 Act also converted all free tenures into free and common socage and prohibited the creation of other types of tenure in the future.<sup>209</sup>

The position in Queensland prior to the introduction of the PLA was that:

... all alienated Crown land in Queensland was by virtue of the *Tenures Abolition Act 1660*, held in free and common socage, attended by the incidents of quit rent and escheat.<sup>210</sup>

<sup>205</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA PT 3.30] and

<sup>206</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 20.30].

<sup>207</sup> *Tenures Abolition Act 1660* (12 Car 2, c 24).

<sup>208</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 20.30]. Escheat is a feudal rule where real property would revert to the Crown if the owner of the property dies intestate or if the holder 'grossly breached his or her feudal bond.': see New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy* Report 116 (2007) 176 FN 1; Peter Butt, *Land Law* (LawBook Co., 6<sup>th</sup> ed, 2010) 84 [4.46].

<sup>209</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 20.30].

<sup>210</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 20.30].

Section 20 of the PLA operates in the following way:

- section 20(1) preserves the substance of the *Tenures Abolition Act 1660* by providing that all tenures created by the Crown upon any grant of estate in fee simple shall be taken to be in free and common socage. The section applies to any grants on or after 1 December 1975. The provision also removes any remaining incidents of tenure for the benefit of the Crown – that is, quit rent or escheat;
- section 20(2) is intended to abolish any quit rent out of any land in Queensland and releases any land from further payment;<sup>211</sup>
- section 20(3) was included to address a ‘somewhat confused position’ which existed in Queensland in relation to persons dying intestate after 16 April 1968. The position under this section now is that in respect of property of any person dying after 16 April 1968 escheat is abolished<sup>212</sup> and all affected property (real or personal) is to be distributed to the person or persons provided by the *Succession Act 1981* (Qld). The section has a retrospective effect;<sup>213</sup>
- section 20(4) effectively abolishes escheat upon the dissolution of any corporation on or after 1 December 1975. The section also provides that the Crown shall be entitled to take as *bona vacantia*<sup>214</sup> all real or personal property which, but for the PLA, be liable to escheat or pass to the Crown as *bona vacantia*. The *Corporations Act 2001* (Cth) deals with the distribution of property where a registered company is deregistered.<sup>215</sup> Section 20(4) of the PLA clearly states that it is ‘subject to any other Act’ and the subsection will not apply to corporations registered under the *Corporations Act 2001* (Cth) provisions.  
The QLRC indicated that corporations not registered under *The Companies Acts* in force in 1973 remained subject to escheat on dissolution and their personalty passed to the Crown as *bona vacantia*.<sup>216</sup>
- sections 20(5) has the effect that despite section 20, where the Crown has (or appears to have) a right to any property by escheat, devolution or as *bona vacantia* on the death of a person intestate, before or after 1 December 1975, it can waive that right in favour of certain specified categories of persons;
- section 20(6) provides that where the Crown waives the right specified in section 20(5), the right shall vest in the person or persons in whom favour the waiver is made. This section is subject to section 20(10) which provides that section 20 is subject to schedule 1 of the PLA which sets out the procedure for cases falling under section 20 including the writ of inquisition process;
- section 20(7) sets out the process for giving effect to any waiver by the Crown under section 20(5) including the requirement for a gazettal notice which may appoint an administrator of the property;

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<sup>211</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA20.30].

<sup>212</sup> *Property Law Act 1974* (Qld) s 20(3)(a).

<sup>213</sup> *Property Law Act 1974* (Qld) s 20(3)(b). This subsection is subject to the provisions of the *Succession Act 1981* (Qld).

<sup>214</sup> *Bona vacantia* means ‘ownerless goods’.

<sup>215</sup> See *Corporations Act 2001* (Cth) Part 5A.1.

<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) 15-16.

- the appointed administrator may apply to the Supreme Court for a grant of letters of administration of the property of the deceased and to have these granted;<sup>217</sup>
- section 20(11) retains the power of the Public Trustee to administer the estate of an intestate person. The section enables the property of the intestate person to vest in the Public Trustee for the purpose of administering it.<sup>218</sup>

## 17.2. Is there a need for reform?

Section 20 of the PLA still serves a current purpose and should be retained. However, the provision is complex and difficult to understand. The section can be divided into those provisions that deal with free and common socage and the abolition of quit rent or escheat in Queensland and those provisions that address the issue of persons dying intestate and *bona vacantia*. While the latter part also abolishes escheat, it is restricted to property of any person dying intestate on or after 16 April 1968. In order to assist with clarity in relation to section 20, there may be some advantage to dividing the section into two separate provisions dealing with the separate subject matter. This approach was adopted in the Northern Territory.<sup>219</sup> The section should also be re-drafted to simplify its language. This re-drafting should also extend to Schedule 1 of the PLA.

Section 20(4) of the PLA should be amended to expressly make it subject to the *Corporations Act 2001* (Cth). This will assist to avoid any possible confusion regarding the applicability of the PLA provision.

## 17.3. Other jurisdictions

### 17.3.1. Australia

The Northern Territory is the only other Australian jurisdiction which has provisions in the same form as section 20 of the PLA. Section 19 of the *Law of Property Act (NT)* is equivalent to sections 20(1) and (2) of the PLA. Section 20 of the Northern Territory Act includes equivalent provisions to section 20(3) to (11) of the PLA.

The Centre has not been able to locate any equivalent provisions to section 20 of the PLA in the property law legislation of other jurisdictions. In New South Wales, section 37 of the *Imperial Acts Application Act 1969* (NSW) is in similar form to section 20(1) of the PLA. Quit rents ceased to exist in New South Wales some time ago.<sup>220</sup>

All jurisdictions, apart from the Australian Capital Territory, have provisions which specify that where there is an estate with no one entitled to take possession, it passes to the Crown.<sup>221</sup> These are primarily located in succession related legislation. In Victoria, *bona vacantia* is treated as 'unclaimed

<sup>217</sup> *Property Law Act 1974* (Qld) s 20(8).

<sup>218</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 20.150].

<sup>219</sup> See Part 17.3.1 below.

<sup>220</sup> See Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) [4 46] 84 and *Wills, Probate and Administration Act 1898* (NSW).

<sup>221</sup> See for example *Administration and Probate Act 1958* (Vic) s 55; *Succession Act 2009* (NSW) s 136;

property' under the *Financial Management Act 1994* (Vic).<sup>222</sup> A number of jurisdictions have in place procedures for the Crown's waiver of its rights of *bona vacantia*.<sup>223</sup>

### **17.3.2. New Zealand**

In New Zealand, section 57(1) of the *Property Law Act 2007* (NZ) provides:

A Crown grant of land, or a certificate of title or computer register having the force and effect of a Crown grant of land, whether issued before, on, or after 1 January 2008, for an estate in fee simple confers on the person named in the Crown grant or certificate of title or computer register a right of freehold tenure (free and common socage) without any incident of tenure for the benefit of the Crown.

## **17.4. Preliminary recommendation**

Section 20 of the PLA should be retained with some amendment to modernise and simplify the provision. Section 20(4) of the PLA should be amended to expressly make it subject to the *Corporations Act 2001* (Cth).

### **Questions**

- 68 Do you agree with the recommendation that section 20 of the PLA be retained with some amendments to modernise and simplify the provision?**
- 69 Do you agree that section 20(4) of the PLA should expressly provide that it is subject to the Corporations Act 2001 (Cth)?**

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<sup>222</sup> See Victorian Law Reform Commission, *Succession Laws Consultation Paper* (2013).

<sup>223</sup> See for example, *Financial Management Act 1994* (Vic) s 58(3); *Law of Property Act 1936* (SA) s 115; *Succession Act 2009* (NSW) s 137.

## 18. Section 21 – Alienation in fee simple

### 18.1. Overview and purpose

#### 21 Alienation in fee simple

Land held of the Crown in fee simple may be assured in fee simple without licence and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect.

Section 21 of the PLA is essentially a re-enactment of a part of the Statute of *Quia Emptores 1290* (18 Edw 1, c 1, 2, 3). This statute was introduced in an attempt to address some of the complexities associated with the feudal tenure system, including the inability of a landholder to alienate land by transfer to a third party.<sup>224</sup> The only form of alienation permitted was by a process called subinfeudation which enabled a landholder ‘to carve a smaller estate out of her or his holding and to grant it to another.’<sup>225</sup> In that situation, the grantee became the tenant of the grantor not the lord that may have originally granted the tenure. These kinds of grants could occur many times over. Property could not be disposed of by will which meant that if the landholder died, his or her interest would pass by law to his or her heirs.<sup>226</sup>

The Statute of *Quia Emptores 1290* applied only to grants in fee simple and altered the legal position in a number of ways including:

- enabling a person to alienate the whole or part of land without obtaining the consent of the relevant lord; and
- prohibiting subinfeudation with the effect that:

If A held the land from a lord X and alienated part or all of the land to B, B stood in A’s shoes: no new subtenancy between A and B could be created. A substitution only was permitted.<sup>227</sup>

The Statute was still in force in Queensland until the enactment of the PLA. Commentary on the Statute of *Quia Emptores 1290* suggests that:

This statute more than any other, including the *Tenures Abolition Act 1660*, was instrumental in dismantling the feudal landowning system and was directly responsible for the development of the situation existing today, that all land is held mediately or immediately from the Crown, which is the source of all title.<sup>228</sup>

<sup>224</sup> Adrian J Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 36-37 [2.15].

<sup>225</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010) 10 [1.110]. That person then held the land by way of tenure from the “grantor”: [1.110].

<sup>226</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010) 10 [1.110].

<sup>227</sup> Adrian J Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 36-37 [2.15].

<sup>228</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 21.30].

The term ‘assurance’ in section 21 is defined to include a conveyance and a disposition made otherwise than by will.<sup>229</sup>

## 18.2. Is there a need for reform?

Section 21 of the PLA is essentially declaratory in nature and its ongoing utility is uncertain. The *Land Act 1994* (Qld) deals with the grant in fee simple of unallocated State land which is subject only to Crown reservations set out in that Act.<sup>230</sup> Once granted, it is registered without any conditions under the *Land Title Act 1994* (Qld).

## 18.3. Other jurisdictions

### 18.3.1. Australia

The Statute of *Quia Emptores 1290* was part of the law in Australia at settlement<sup>231</sup> and remains the law.<sup>232</sup> However, New South Wales,<sup>233</sup> Victoria<sup>234</sup> and the Northern Territory<sup>235</sup> have repealed the statute but re-enacted the key aspects of the enactment.<sup>236</sup>

The Victorian Law Reform Commission recommended in 2010 that section 18A of the *Property Law Act 1958* (Vic), the equivalent provision to section 21 of the PLA, be retained but that it be redrafted for clarity.<sup>237</sup> In this respect, the Commission referred to the equivalent provision in New Zealand as a possible example.

### 18.3.2. New Zealand

Section 57 of the *Property Law Act 2007* (NZ) deals with the Statute of *Quia Emptores 1290* in the following way:

#### 57. Feudal incidents of estate in fee simple abolished

(1) A Crown grant of land, or a certificate of title or computer register having the force and effect of a Crown grant of land, whether issued before, on or after 1 January 2008, for an estate in fee simple confers on the person named in the Crown grant or the certificate of title or computer register a right of freehold tenure (free and common socage) without any incident of tenure for the benefit of the Crown.

(2) An estate in fee simple is transferable, and has always been transferable, without the permission of the Crown or the need to make any payment to the Crown.

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<sup>229</sup> *Property Law Act 1974* (Qld) s 3, Sch 6.

<sup>230</sup> *Land Act 1994* (Qld) s 14 and Ch 2, Pt 2.

<sup>231</sup> *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9<sup>th</sup> ed, 2013) 176 [3.3].

<sup>232</sup> *Brendan Edgeworth, et al, Sackville & Neave Australian Property Law* (Butterworths, 9<sup>th</sup> ed, 2013) 176 [3.3].

<sup>233</sup> *Imperial Acts Application Act 1969* (NSW) s 36.

<sup>234</sup> *Property Law Act 1958* (Vic) s 18A.

<sup>235</sup> *Law of Property Act* (NT) s 21.

<sup>236</sup> The Statute is no longer in force in the Australian Capital Territory: see *Imperial Acts (Substituted Provisions) Act 1986* (rep) Sch 2 Pt 1 which re-enacted the Statute, which was then repealed by the *Law Reform (Abolitions and Repeals) Act 1996* (rep). There is now only leasehold land in the Australian Capital Territory and as a result there was no requirement for the key provisions under the Statute of *Quia Emptores*.

<sup>237</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Vic) Final Report (2010) 125.



(3) An instrument purporting to create, transfer, or assign an estate in fee simple in any land subject to the reservation to the person executing the instrument of an estate in fee simple (subinfeudation) continues to create, transfer, or assign an estate in fee simple without any such reservation.

Section 57 replaced the Statute of *Quia Emptores 1290* in New Zealand.<sup>238</sup> The New Zealand Law Commission indicated that section 57 contained a number of declarations which had the following effect:

- all such estates granted by the Crown at any time confer freehold tenure without obligations in the form of services to the Crown;
- fee simple estates are freely transferable; and
- subinfeudation of an estate in fee simple is prohibited: therefore, any attempt to create a fee simple out of a fee simple operates as a conveyance of the fee simple without any reservation.<sup>239</sup>

## 18.4. Preliminary recommendations

The ongoing utility of section 21 of the PLA is unclear, particularly given the effect of section 14 of the *Land Act 1994* (Qld) and the *Land Title Act 1994* (Qld). Stakeholder feedback is required in relation to section 21.

### Questions

**70 Do you think section 21 of the PLA serves any current purpose?**

**71 Could section 21 of the PLA be repealed?**

**72 If the section is retained, do you think it requires amendment to provide greater clarity regarding the actual effect of the section? If so, do you think section 57 of the *Property Law Act 2007* (NZ) is a possible example of a clearer approach?**

<sup>238</sup> New Zealand Law Commission, *A New Property Law Act Report 29* (1994) 270 [190].

<sup>239</sup> New Zealand Law Commission, *A New Property Law Act Report 29* (1994) 270 [190].

## 19. Section 22 – Abolition of estates tail

### 19.1. Overview and purpose

#### 22 Abolition of estates tail

- (1) In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been enacted, would have created an estate tail (legal or equitable) in any land in favour of any person shall be deemed to create an estate in fee simple (legal or equitable as the case may be) in that land in favour of that person to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail and to the exclusion of all estates or interests in reversion on any such estate tail.
- (2) Where at or after the commencement of this Act any person is entitled, or would, but for subsection (1), be entitled, to an estate tail (legal or equitable) and whether in possession, reversion, or remainder, in any land, that person, subject to subsection (2A), shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in that land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of the estate tail and to the exclusion of all estates or interests in reversion on the estate tail.
- (2A) Where any such person is an infant and such land for any estate or interest would pass to any other person in the event of the death of the infant before attaining full age and without issue, then in such case, the infant shall be deemed to take an estate in fee simple with an executory limitation over of such estate or interest on the happening of such event in favour of such other person.
- (3) In this section —  
**estate tail** includes that estate in fee into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred, also an estate in fee voidable or determinable by the entry of the issue in tail, but does not include the estate of a tenant in tail after possibility of issue extinct.
- (4) The registrar is authorised, on a request in the approved form, to make the recordings in the register necessary to give effect to this section.

Estates tail were estates of inheritance limited to lineal descendants.<sup>240</sup> The estates have a long history but the statute *De Donis Conditionalibus 1285* and its interpretation by the courts established some of the key features of estates tail. These features included:

- any succession to an estate tail was restricted to the original donee’s lineal descendants; and
- the holder of an estate tail could not alienate for a period longer than his or her life.<sup>241</sup>

The estate tail essentially inhibited the alienation of land.<sup>242</sup>

<sup>240</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 51 [2.100].

<sup>241</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 153-154 [6.130]. For a detailed discussion of the history of estates tail see Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 50-52 [2.90]-[2.115]; Carmel MacDonald, et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 152-154 [6.110]-6.140] and Peter Butt, *Land Law* (Lawbook Co., 6<sup>th</sup> ed, 2010) 137-143 [9 01]-[9 14].

<sup>242</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 51 [2.100].

The *Statute De Donis Conditionalibus 1285* was part of the law of New South Wales and, as a result, became part of the law of Queensland.<sup>243</sup> The PLA enacted section 22 of the PLA in addition to abolishing the *Statute De Donis Conditionalibus 1285*.<sup>244</sup>

Section 22 of the PLA has the following effect:

- any instrument coming into operation on or after 1 December 1975 that would have granted a fee tail estate is deemed to grant an estate in fee simple. This section covers both legal and equitable estates in land;<sup>245</sup>
- existing legal or equitable estates tail are converted into fee simple estates (legal or equitable).<sup>246</sup>

In the case of a minor, the remainder interest is preserved.<sup>247</sup>

## 19.2. Is there a need for reform?

The QLRC when considering the issue of estates tail indicated that:

Estates tail have always been rare in Queensland, and, although a legal institution of long standing ought not to be too readily abolished, such estates have ceased to have any real social or legal utility.<sup>248</sup>

It is likely that the intent of section 22 of the PLA is to abolish estates tail in Queensland.<sup>249</sup> The practical effect of the section is that since 1 December 1975 no new estates tail can be created in Queensland and any existing at that time should have automatically been converted under section 22(2) of the PLA to an estate in fee simple (equitable or legal). However, the section is framed in a way which deems an intended fee tail (coming into operation after 1 December 1975) to be a fee simple estate, rather than expressly providing that fee tails are abolished or that they cannot be created. Although it is highly unlikely that any person would want to create an estate in fee tail, the repeal of section 22 of the PLA, in the absence of a savings provision, may have an unintended consequence of allowing such estates to be created once the section was repealed.

In Queensland, section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) expressly provides that the repeal or amendment of an Act does not revive anything not in force or existing at the time the repeal or amendment takes effect.<sup>250</sup> Further, it also does not affect the previous operation of the Act or anything suffered, done or begun under the Act<sup>251</sup> or affect a right, privilege or liability acquired,

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<sup>243</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 22.90].

<sup>244</sup> *Property Law Act 1974* (Qld) No. 76 (as enacted) s 3 Sch 6.

<sup>245</sup> *Property Law Act 1974* (Qld) s 22(1); Carmel MacDonald, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 155 [6.160].

<sup>246</sup> *Property Law Act 1974* (Qld) s 22(2).

<sup>247</sup> *Property Law 1974* (Qld) s 22(2A).

<sup>248</sup> Queensland Law Reform Commission Report, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) 17.

<sup>249</sup> This is reflected in the heading 'Abolition of estates tail': *Acts Interpretation Act 1954* (Qld) s 35C(1).

<sup>250</sup> *Property Law Act 1974* (Qld) s 20(2)(a). The word 'Act' under section 20 includes a provision of an Act: see *Acts Interpretation Act 1954* (Qld) s 20(1).

<sup>251</sup> *Property Law Act 1974* (Qld) s 20(2)(b).

accrued or incurred under the Act.<sup>252</sup> The application of the *Acts Interpretation Act 1954* (Qld) may be displaced, wholly or partly, by a contrary intention appearing in any Act.<sup>253</sup> If there is uncertainty regarding whether section 22 of the PLA is a provision of abolition, then repealing it may have an unintended consequence of facilitating the creation of estates tail in Queensland. This is because section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) may not be relevant if estates tail still existed in Queensland but were simply deemed to be estates in fee simple.

The New Zealand Law Reform Commission expressed concern that section 16 of the *Property Law Act 1952* (NZ), which was in similar terms to section 22 of the PLA, was not a clear abolition of the rule. This is discussed in more detail in Part 19.3.2. The approach adopted in New Zealand to address this concern was to include a provision in the new legislation which expressly abolishes the rule and clearly states that any estates which would have created an estate tail after the enactment of the new Act are deemed to create an estate in fee simple.<sup>254</sup>

## 19.3. Other jurisdictions

### 19.3.1. Australia

Estates tail cannot be created in New South Wales, Victoria, Western Australia and the Northern Territory.<sup>255</sup> New South Wales, Northern Territory and Western Australia all have provisions which convert any estates tail to fee simple estates. Victoria does not have a provision which does this. In South Australia, estates tail remain and there is some suggestion that these estates may still be created over Torrens land and any remaining old system land.<sup>256</sup>

The Victorian Law Reform Commission considered estates tail in its 2010 review of the *Property Law Act 1958* (Vic). It has not been possible to create an estate tail in Victoria since 1886 but, unlike New South Wales, Queensland, the Northern Territory and Western Australia, Victoria had not taken the additional step of converting existing fee tails to fee simple estates.<sup>257</sup> The Commission noted that:

[T]he legislation in these jurisdictions operates to automatically convert the 'base fee' to a fee simple estate as there is still a possibility of issue to stop the reversion or remainder interests from vesting. However, the legislation protects the position of the vested future interests by excluding from the conversion provisions the estate of a tenant in tail where there is no possibility of a succeeding heir (or 'after possibility of issue extinct').<sup>258</sup>

The Victorian Law Reform Commission recommended the adoption of a model similar to Western Australia or Queensland. This recommendation has not been implemented in Victoria to date.<sup>259</sup>

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<sup>252</sup> *Property Law Act 1974* (Qld) s 20(2)(c).

<sup>253</sup> *Acts Interpretation Act 1954* (Qld) s 4.

<sup>254</sup> *Property Law Act 2007* (NZ) s 58(1)(a) and s 22(2).

<sup>255</sup> *Conveyancing Act 1919* (NSW) ss 19 and 19A; *Property Law Act 1958* (Vic) s 249; *Transfer of Land Statute Amendment Act 1885* (Vic); *Property Law Act 1969* (WA) s 23; *Law of Property Act* (NT) s 22.

<sup>256</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 52 [2.110]. However, the *Estates Tail Act 1881* (SA) provides a mechanism 'by which the holder of an estate tail can bar the entail': [2.110]. Details on the position in Tasmania are set out in Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 52 [2.110].

<sup>257</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 80 [6.3]-[6.4].

<sup>258</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 82 [6.16].

<sup>259</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 82 [6.18].

### 19.3.2. New Zealand

Section 58(1)(a) of the *Property Law Act 2007* (NZ) abolishes estates tail in New Zealand and section 58(2) provides that any instrument which comes into operation on or after 1 January 1953 which would have created an estate tail are to be treated as creating an estate in fee simple. Under the previous property law legislation, section 16 was in a similar form to section 22 of the PLA.<sup>260</sup> However, the New Zealand Law Commission was concerned that although section 16 abolished estates tail, it went on to ‘make provision for what should happen if anyone thereafter tries to rely upon the abolished rule.’<sup>261</sup> An express statement regarding the abolition of estates tail was included in section 58 to address this concern.

Section 58 of the *Property Law Act 2007* (NSW), as it is relevant to estates tail, provides:

#### **58 Abolition of obsolete estates and rules**

- (1) The following may not be created or done:
  - (a) Estates tail and estates wrong;
  - .....
- (2) In an instrument coming into operation on or after 1 January 1953, words which, before that date, would have created an estate tail are to be treated as creating an estate in fee simple.
- (3) .....

### 19.4. Preliminary recommendations

There is uncertainty whether the effect of section 22 of the PLA is to abolish estates tail in Queensland. The provision has prevented the creation of these by deeming any intended estates tail to be estates in fee simple. In the circumstances, there may be benefit in adopting an approach similar to New Zealand which clearly abolishes estates tail to avoid any uncertainty regarding the position in Queensland. This approach could also be adopted in relation to sections 23 (abolition of quasi-entails) and 28 (abolition of the rule in *Shelly’s case*) to ensure consistency in relation to the removal of common law rules relating to freehold land.<sup>262</sup>

Stakeholder feedback is required before a final position is reached in relation to how section 22 should be dealt with. Any revised section which expressly abolishes section 22 may also need to ensure section 22(1) of the PLA is retained in some form. In the Centre’s view, the work of section 22(2) of the PLA in converting estates in fee tail which existed at the time section 22 of the PLA commenced into estates in fee simple is complete. Section 20(2)(b) of the *Acts Interpretation Act 1954* (Qld) arguably preserves the effect of that section in any event.

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<sup>260</sup> *Property Law Act 1952* (NZ) s 16.

<sup>261</sup> Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 43 [134].

<sup>262</sup> These provisions are discussed in Parts 20 (s 23) and 24 (s 28) below.

## Questions

- 58 Do you think section 22 of the PLA clearly abolishes estates tail in Queensland?
- 59 Do you think the position in relation to the intended abolition should be clarified and expressly stated?
- 60 Do you think an approach similar to that adopted in section 58 of the *Property Law Act 2007* (NZ) is appropriate in Queensland?

## 20. Section 23 – Abolition of quasi-entails

### 20.1. Overview and purpose

#### 23 Abolition of quasi-entails

In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been passed, would have created in favour of any person a quasi-entail (legal or equitable) in respect of any estate for life or lives of another or others shall be deemed to create in favour of that person an estate (legal or equitable as the case may be) for the life or lives of that other.

Life estates are another category of freehold estates. Two types of life estate exist - estates for the life of the tenant and an estate *pur autre vie*.<sup>263</sup> The latter estate was one which was granted for the life of someone other than the actual tenant. A quasi-entail existed when an estate *pur autre vie* was limited to a person and the heirs of his body. The *Statute of De Donis Conditionalibus 1285* was not applicable to these as an estate *pur autre vie* was not a hereditament.<sup>264</sup> The QLRC justified the inclusion of section 23 in the PLA on the following ground:

The prospect of a quasi-entail being created in Queensland is so remote as to be virtually capable of being ignored, but, as a measure of simplification of real property law, it is desirable that interests in this form cease to be capable of being created.<sup>265</sup>

The QLRC noted the 'extreme rarity' of the estate *pur autre vie* which in its view, made it 'virtually certain' that no quasi-entails existed in Queensland.<sup>266</sup> Pursuant to section 23 of the PLA, if an instrument came into operation after 1 December 1975 and would have created a legal or equitable quasi-entail in respect of any estate for life, that instrument will be deemed to create a legal or equitable estate for the life of that other person.<sup>267</sup> The QLRC did not see any need for a section which abolished any existing quasi-entails in Queensland because of their rarity and, to the extent some may exist, they would 'expire in the natural course of events at most within the period of a life or lives after the passing of the Act.'<sup>268</sup>

<sup>263</sup> Charles Harpum, et al, *Megarry & Wade The Law of Real Property* (Thomson, 7<sup>th</sup> ed, 2008) 77 [3-085].

<sup>264</sup> Queensland Law Reform Commission Report, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) 17.

<sup>265</sup> Queensland Law Reform Commission Report, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) 18.

<sup>266</sup> Queensland Law Reform Commission Report, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) 18.

<sup>267</sup> The Queensland Law Reform Commission also identified two Imperial enactments directed at preventing the barring of quasi-entails: 32 Hen. 8, c. 31 (1540) and 14 Eliz. 1 c.8 (1572). These were also repealed by the *Property Law Act 1974* (Qld) as enacted, s 3(1) Sch 6.

<sup>268</sup> Queensland Law Reform Commission Report, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) 18.

## 20.2. Is there a need for reform?

The QLRC recognised in 1973 the unlikelihood of quasi-entails existing or being created in Queensland and included section 23 of the PLA as a precaution only.<sup>269</sup> It is highly doubtful that the position in Queensland has altered in the 43 years since the QLRC proposed section 23. The provision is drafted as a deeming provision in a similar way to section 22 of the PLA. The same uncertainty and issues identified in Part 19.2 in relation to estates tail applies in the case of section 23. However, one point of difference is the nature of quasi tails and the unlikelihood that they are still able to be created in Queensland if section 23 is repealed.<sup>270</sup>

## 20.3. Other jurisdictions

### 20.3.1. Australia

The Northern Territory appears to be the only other Australian jurisdiction which has an equivalent provision to section 23 of the PLA.

## 20.4. Preliminary recommendations

Section 23 of the PLA should be repealed. However, if there are concerns regarding any possible unintended consequences arising from such repeal because of the way the section is drafted, quasi tails may also be included in the same proposed abolition provision as section 22 of the PLA in order to put the matter beyond doubt. As with section 22, the abolition provision would also need to include a clause which makes it clear that any quasi tails intended to be created by instrument on or after 1 December 1975 are deemed to be a life estate (legal or equitable).

### Questions

- 61 Do you disagree with the preliminary recommendation that section 23 of the PLA be repealed?
- 62 Do you think that there is sufficient uncertainty regarding whether there may be unintended consequences if section 23 of the PLA is repealed that it should also be incorporated into the same proposed abolition provision as section 22 of the PLA?

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<sup>269</sup> Queensland Law Reform Commission Report, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No 16 (1973) 18.

<sup>270</sup> See Part 19.2 above.



## 21. Section 24 – Liability of life tenant for voluntary waste and Section 25 – Equitable Waste

### 21.1. Overview and purpose

#### 24 Liability of life tenant for voluntary waste

- (1) A tenant for life or lives shall not commit voluntary waste.
- (2) Nothing in subsection (1) applies to any estate or tenancy without impeachment of waste, or affects any licence or other right to commit waste.
- (3) A tenant who infringes subsection (1) is liable in damages to the tenant's person in remainder or reversioner, but this section imposes no criminal liability.

#### 25 Equitable waste

An estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate.

#### 21.1.1. Section 24 – Voluntary waste

Historically, a number of restrictions were imposed on a life tenant in terms of how he or she could treat the land. The doctrine of waste developed to prevent a person with a limited interest from damaging the land in order to protect the interests of any individuals with a reversionary interest or an interest in the remainder.<sup>271</sup> The term ‘voluntary waste’ is intended to cover the commission of positive acts which harm or damage the land or ‘spoil’ it in some way.<sup>272</sup> Examples of voluntary waste include demolishing internal walls and fittings and, as a result, altering the ‘character’ of the property, cutting timber and opening and working on a mine on the relevant land.<sup>273</sup> There was no common law rule in relation to waste and the *Statute of Marlborough 1267* 52 Henry III c 23 was introduced in order to impose liability on tenants for waste. Under this Statute tenants were liable for waste, subject to the contrary intention in the relevant instrument conferring the interest.<sup>274</sup>

The *Statute of Marlborough 1267* was received as part of the law in New South Wales and was re-enacted in an amended form in section 32 of the *Imperial Acts Application Act 1969* (NSW).<sup>275</sup> Section 24 of the PLA was modelled on the New South Wales provision. The effect of section 24 of the PLA is that a life tenant is not permitted to commit voluntary waste.<sup>276</sup> However, this prohibition does not apply where an estate or tenancy has a licence or other right to commit waste.<sup>277</sup> A life tenant is liable

<sup>271</sup>Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 24.30]; Peter Butt, *Land Law* (LawBook Co., 6<sup>th</sup> ed, 2010) 154 [10.28].

<sup>272</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 24.30].

<sup>273</sup> See Charles Harpum, et al, *Megarry & Wade: The Law of Real Property* (Thomson, 7<sup>th</sup> ed, 2008) 79-80 [3-094] and Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 154-155 [10 31].

<sup>274</sup> Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 154-155 [10 29].

<sup>275</sup> Peter Butt, *Land Law* (LawBook Co, 6<sup>th</sup> ed, 2010) 154-155 [10 29]. See also the New South Wales Law Reform Commission, *Report on the Application of Imperial Acts* (LRC 4) (1967) 48-49.

<sup>276</sup> *Property Law Act 1974* (Qld) s 24(1).

<sup>277</sup> *Property Law Act 1974* (Qld) s 24(2).

in damages to his or her reversioner or remainderman.<sup>278</sup> There is no criminal liability if a tenant contravenes section 24(1) of the PLA.<sup>279</sup>

### 21.1.2. Section 25 – Equitable Waste

Equitable waste is a serious category of waste which comprises acts of ‘flagrant or wanton destruction’ to the property.<sup>280</sup> It arises only where a life tenant has permission to commit voluntary waste but the tenant causes flagrant destruction or damage to the property. In that situation, the tenant may be restrained in equity from committing acts which constitute equitable waste.<sup>281</sup> Examples of acts of equitable waste include pulling down a house or destroying timber.<sup>282</sup> An instrument conferring the relevant interest on the tenant can permit the tenant to commit equitable waste only if such permission is unequivocal.<sup>283</sup>

The QLRC indicated that the proposed section 25 was a ‘rescript’ of section 5(3) of the *Judicature Act 1876*.<sup>284</sup> The inclusion of the section in the PLA was justified on the basis of completeness with the aim that all relevant statutory provisions relevant to life tenancies were included in a single Act.<sup>285</sup>

Under section 25 of the PLA a life tenant is not exempt from liability for equitable waste even if the instrument has granted the estate for life permitting the voluntary waste. This rule is subject to the relevant instrument expressly conferring such a right.

## 21.2. Is there a need for reform?

As life tenancies can still be created in Queensland, section 24 of the PLA still has a purpose and should remain. There is an equally valid case for the retention of section 25. However, section 25 of the PLA requires re-drafting for clarity. In New Zealand, the *Property Law Act 2007* (NZ) has adopted an approach of combining voluntary waste and equitable waste into a single provision. The advantage of this approach is that:

- waste for life tenants is addressed in a single section; and
- the interrelatedness of voluntary waste and equitable waste is clearly identified in the provision.

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<sup>278</sup> *Property Law Act 1974* (Qld) s 24(3).

<sup>279</sup> *Property Law Act 1974* (Qld) s 24(3).

<sup>280</sup> Peter Butt, *Land Law* (LawBook Co., 6<sup>th</sup> ed, 2010) 155 [10 32]; Duncan & Vann [PLA 25.30].

<sup>281</sup> Peter Butt, *Land Law* (LawBook Co., 6<sup>th</sup> ed, 2010) 155 [10 32].

<sup>282</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 25.30].

<sup>283</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 25.30]; Peter Butt, *Land Law* (LawBook Co., 6<sup>th</sup> ed, 2010) 155 [10 32].

<sup>284</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) 18.

<sup>285</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) 18.

## 21.3. Other jurisdictions

### 21.3.1. Australia

#### 21.3.1.1. Voluntary waste

As indicated above, the voluntary waste provision is re-enacted in New South Wales in section 32 of the *Imperial Acts Application Act 1969* (NSW). The Northern Territory has included a provision in the same terms as section 24 of the PLA in the *Law of Property Act* (NT).<sup>286</sup>

#### 21.3.1.2. Equitable waste

The majority of Australian jurisdictions each have a statutory provision in similar form to section 25 of the PLA.<sup>287</sup> Tasmania does not appear to have any legislation in place addressing equitable waste.

### 21.3.2. New Zealand

Section 68 of the *Property Law Act 2007* (NZ) provides:

**68 Voluntary waste or equitable waste by life tenant or lessee**

- (1) A life tenant or a lessee of land is liable in damages for the tort of voluntary waste and the tort of equitable waste to the person entitled to the reversion or remainder expectant on the estate for life or the lease.
- (2) Subsection (1) applies unless the liability is excluded by an express or implied term of the grant of the estate for life or the lease.
- (3) However, liability for equitable waste –
  - (a) is not excluded by the exclusion of waste or voluntary waste; but
  - (b) is excluded only if expressly excluded.

The *Property Law Act 1952* (NZ) (repealed) did not have a voluntary waste provision although it did have an equitable waste provision which was in similar form to section 25 of the PLA.<sup>288</sup> The New Zealand Law Commission described the effect of the new section in the following way:

This new section renders a life tenant or a lessee of land liable to pay damages to the person entitled to the reversion or remainder for the torts of voluntary waste and equitable waste unless the grant of the life estate or lease provides otherwise.<sup>289</sup>

## 21.4. Preliminary recommendations

Sections 24 and 25 of the PLA should be retained with amendment to clarify the effect of section 25. Combining the sections into a single provision in a way similar to the approach in section 68 of the *Property Law Act 2007* (NZ) is one option to assist with clarity.

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<sup>286</sup> *Law of Property Act* (NT) s 24.

<sup>287</sup> *Conveyancing Act 1919* (NSW) s 9; *Property Law Act 1958* (Vic) s 133; *Law of Property Act 1936* (SA) s 12; *Property Law Act 1969* (WA) s 17; *Civil Law (Property) Act 2006* (ACT) s 207; *Law of Property Act* (NT) s 25.

<sup>288</sup> *Property Law Act 1952* (NZ) s 29.

<sup>289</sup> New Zealand Law Commission, *A New Property Law Act Report No. 29* (1994) 274 [211].

## **Questions**

- 68 Do you agree with the preliminary recommendation that sections 24 and 25 should be retained?**
- 69 Do you think adopting the approach set out in section 68 of the Property Law Act 2007 (NZ) of combining the sections into a single provision is a viable option to assist with simplifying and clarifying section 25 of the PLA?**

## 22. Section 26 – Recovery of property on determination of a life or lives

### 22.1. Overview and purpose

#### 26 Recovery of property on determination of a life or lives

- (1) Every person having any estate or interest in any property determinable upon a life or lives who, after the determination of such life or lives without the express consent of the person next immediately entitled upon or after such determination, holds over or continues in possession of such property estate or interest, or of the rents, profits or income of the property, shall be liable in damages or to an account for such rents and profits, or both, to the person entitled to such property, estate, interest, rents, profits or income after the determination of such life or lives.
- (2) Where a reversion, remainder, or other estate or interest in any property is expectant upon the determination of a life or lives, the reversioner, person in remainder, or other person entitled to such reversion, remainder, or estate or interest may in any proceeding claiming relief on the basis that such life or lives has or have determined, adduce evidence of belief that such life or lives has or have been determined and of the grounds of such belief, and the court may in its discretion order that, unless the person or persons on whose life or lives such reversion, remainder, or other estate or interest is expectant is or are produced in court or is or are otherwise shown to be living, such person or persons shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.
- (3) If in such proceedings a person in respect of whom it is material that the person be shown to be living or not is shown to have remained beyond Australia, or otherwise absented himself or herself from the place in which if in Australia the person might be expected to be found, for the space of 7 years or upwards, such person, if not proved to be living, shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.
- (4) If in any such proceedings judgment has been given against the plaintiff, and afterwards such plaintiff brings subsequent proceedings upon the basis that such life has determined, the court may make an order staying such proceedings permanently or until further order or for such time as may be thought fit.
- (5) If in consequence of the judgment given in any such proceedings, any person having any estate or interest in any property determinable on such life or lives has been evicted from or deprived of any property or any estate or interest in the property, and afterwards it appears that such person or persons on whose life or lives such estate or interest depends is or are living or was or were living at the time of such eviction or deprivation, the court may give such relief as is appropriate in the circumstances.

As discussed in Part 20.1 above, life estates are another category of freehold estates. Two types of life estate exist - estates for the life of the tenant and an estate *pur autre vie*.<sup>290</sup> The latter estate was one which was granted for the life of someone other than the actual tenant. The *cestui que vie* is the person whose life is used to measure when an estate *pur autre vie* ends. However, as a result of circumstances of the time, there were difficulties in determining whether the *cestui que vie* was alive or dead. Imperial Statutes were introduced to address this issue.<sup>291</sup>

<sup>290</sup> Charles Harpum, et al, *Megarry & Wade The Law of Real Property* (Thomson, 7<sup>th</sup> ed, 2008) 77 [3-085].

<sup>291</sup> See *Cestui que Vie Acts* (18 & 19 Car. 2, c 11 of 1666 and 6 Anne c 72 (or c 18) of 1707).

The object of section 26 of the PLA has been described as allowing remaindermen to ‘prove the death of the cestui que vie in order that they may show that the life estate has determined and that they are entitled to possession.’<sup>292</sup> The section operates as follows:

- if a person who has an estate *pur autre vie* holds over when the other dies, the remainderman immediately entitled to the property is provided with a cause of action in damages for an account of rent and profits or both;<sup>293</sup>
- the person entitled to the estate upon the determination of the estate may adduce evidence to the court of the death of the cestui que vie. The Court has the discretion to order that the relevant person is dead, unless the person is produced in court or otherwise shown to be living;<sup>294</sup>
- the court is entitled to draw a presumption of death if the cestui que vie is absent for a period of seven years;<sup>295</sup>
- a court is able to stay a subsequent action because a life estate has determined;<sup>296</sup>
- the court can give relief as appropriate in the circumstances if a person presumed dead proves to be alive.<sup>297</sup>

## 22.2. Is there a need for reform?

The QLRC in its discussion of the proposed section 26 noted that estates *pur autre vie* were very rare in Queensland.<sup>298</sup> Despite this, the QLRC still thought it was ‘advisable’ to adopt the clause. The position now has not altered significantly. Life estates, including estates *pur autre vie*, are capable of being created in Queensland. Although it is highly unlikely that an estate *pur autre vie* would be created, it is still an available form of life estate. In the circumstances, section 26 of the PLA should be retained. However, the section in its current form is quite complex. The section should be re-drafted in order to simplify and modernise its language.

## 22.3. Other jurisdictions

Section 26 of the PLA was adopted from section 38 of the *Imperial Acts Application Act 1969* (NSW) which remains in force in New South Wales.

In Victoria, section 274 of the *Property Law Act 1958* (Vic) addresses the issue of holding over by a life tenant and provides that the relevant person shall be liable in damages or to an account of rents and

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<sup>292</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 26.30].

<sup>293</sup> *Property Law Act 1974* (Qld) s 26(1).

<sup>294</sup> *Property Law Act 1974* (Qld) s 26(2).

<sup>295</sup> *Property Law Act 1974* (Qld) s 26(3).

<sup>296</sup> *Property Law Act 1974* (Qld) s 26(4) and S Robinson, *The Property Law Act Victoria* (The Law Book Company Limited, 1992) 506.

<sup>297</sup> *Property Law Act 1974* (Qld) s 26(5).

<sup>298</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) 18.

profits. The Victorian Law Reform Commission, as part of the review into the *Property Law Act 1958* (Vic), recommended that the section be retained but simplified.<sup>299</sup>

## 22.4. Preliminary recommendations

Section 26 of the PLA should be retained but simplified.

### Question

**70 Do you agree with the recommendation that section 26 of the PLA should be retained but simplified? If not, why?**

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<sup>299</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 146. The Commission also noted in its recommendation that the: 'provision applies in the rare case of an overholding by a legal life tenant of a life estate *pur autre vie*. If, as we propose, all life estates will in future exist in equity only, (recommendation 32) the provision will have transitional application only, to legal life estates already existing.':[at 146].

## 23. Section 27 – Penalty for holding over by life tenant

### 23.1. Overview and purpose

#### **27 Penalty for holding over by life tenant**

Where any tenant for life or lives or person who is in or comes into possession of any land by, from or under or by collusion with such tenant, wilfully holds over any land after—

- (a) termination of the tenancy; and
- (b) after demand has been made and notice in writing given for the delivery of possession of the land by the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;

then, the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of the land, be liable to the person kept out of possession at the rate of double the yearly value of the land so detained for as long as the land shall have been so detained, to be recovered by action in a court of competent jurisdiction.

Section 27 of the PLA originated from section 1 of the *Landlord and Tenant Act 1730* which was held to apply in Queensland.<sup>300</sup> Section 1 of that Act applied also to yearly tenants which is now covered in section 138 of the PLA.<sup>301</sup> The QLRC decided to separate the holding over provisions relevant to life tenancies and yearly tenancies on the basis that a life tenancy is a freehold estate and more appropriately addressed in the freehold land part of the PLA.<sup>302</sup> The purpose of section 1 of the *Landlord and Tenant Act 1730* was to 'discourage tenants from holding over after determination of their lease or tenancy by penalising them at the rate double the yearly value of the premises.'<sup>303</sup>

Section 27 of the PLA applies where there is a life tenancy and the life tenant wilfully holds over any land after:

- the termination of the tenancy; and<sup>304</sup>
- after demand has been made and notice in writing given for delivery of possession by the remainderman or reversioner or his or her lawfully authorised agent.<sup>305</sup>

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<sup>300</sup> See *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28 and *Trivett v Hurst* [1937] St.R.Qd 265 referred to in Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 90-91.

<sup>301</sup> See Issues Paper 2: *Leases and Tenancies* available at <http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/current-activities/review-of-property-law-in-queensland>.

<sup>302</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) 19.

<sup>303</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) 90.

<sup>304</sup> *Property Law Act 1974* (Qld) s 27(a).

<sup>305</sup> *Property Law Act 1974* (Qld) s 27(b).



The effect of the section is that where the threshold matters above are satisfied, the life tenant is liable during the period of holding over to the remainderman or reversioner or lawfully authorised agent at double the yearly value of the land.

## 23.2. Is there a need for reform?

A number of the issues with section 27 of the PLA overlap with the matters raised in the discussion of section 138 of the PLA. The provisions are framed in similar terms but apply to different types of tenancies. These issues are discussed in further detail below.

### 23.2.1. Establishing that the holding over was ‘wilful’

Determining whether there has been a ‘wilful’ holding over can be difficult as it is difficult to obtain evidence that establishes ‘wilfulness’ on the part of the tenant. For example, it is arguably simple to raise a bona fide right to possession through other mechanisms such as obtaining legal advice to that effect. This occurred in the case of *Grainger v Williams*<sup>306</sup> where the Supreme Court considered the equivalent provision to section 138 of the PLA found in the Imperial Statute, 4 Geo 2, c 28 (1731), section 1 in force in Western Australian. In that case the tenant allegedly ‘holding over’ had received legal advice which led them to believe that they had a right to do so.<sup>307</sup> Simmonds J concluded on that basis that there could not be wilfulness in those circumstances and that the claim under the Imperial Statute could not be justified.<sup>308</sup>

The phrase ‘a ‘contumacious act of the lessee’ has been used by the Courts to describe what is meant by ‘wilful’.<sup>309</sup> However, Paull J in *French v Elliott*<sup>310</sup> considered the full term ‘wilfully holds over’ and noted:

It has been held that ‘wilfully’ means ‘contumaceously’, but I can see no reason why the old English word ‘wilfully’ does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumacious tenant. It deals only with the moment of time when the tenancy comes to end. At that moment of time a tenant may say ‘I shall stay on. I think I have the right to do so.’ His staying on is not wilful. On the other hand, a tenant may say: ‘I will stay on, although I know I have no right to do so.’ That is will, and well illustrates the now sometimes forgotten distinction between ‘I shall’ and the insistent ‘I will’. In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place.<sup>311</sup>

Ultimately, whether or not the holding over of a life tenant is ‘wilful’ will depend on the relevant factual circumstances of each individual case.

### 23.2.2. Calculation of ‘double the yearly value of the land’

There have also been difficulties associated with determining how ‘double the yearly value of the land’ is calculated. The phrase has been interpreted in a number of different ways. The first approach is that it means double the value of the premium on the lease – that is, what the lease is worth.<sup>312</sup> The

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<sup>306</sup> [2005] WASC 286

<sup>307</sup> *Grainger v Williams* [2005] WASC 286, [22].

<sup>308</sup> *Grainger v Williams* [2005] WASC 286, [23].

<sup>309</sup> *Trivett v Hurst* [1937] St.R.Qd 265, 271.

<sup>310</sup> *French v Elliott* [1959] 3 All ER 886, 874. This case considered section 1 of the *Landlord and Tenant Act 1730* (the equivalent provision to section 138 of the PLA).

<sup>311</sup> *French v Elliott* [1959] 3 All ER 886, 874.

<sup>312</sup> *Trivett v Hurst* [1937] St R Qd 265 at 275.

alternative approach is to calculate it as double the yearly rent.<sup>313</sup> A more recent approach is set out in the decision of Simmonds J in *Grainger v Williams*.<sup>314</sup> Although the relevant provision of the Imperial statute was held not to apply, Simmonds J still considered the issue of the ‘yearly value’ on the basis that some of the issues that arose were also relevant to the alternative claims made for damages for trespass and for mesne profits.<sup>315</sup> Simmond J’s approach is described below:

That ‘double yearly value’ was in the nature of damages which might have been received for ‘the use of the freehold and everything connected with it during the time possession was withheld’ (at [25]) equating the damages concept with mesne profits being damages for trespass payable by a lessee in possession after forfeiture of a lease (at [52]).<sup>316</sup>

### 23.2.3. Alternative remedy available

A person in possession of land not paying rent or remaining upon land without a legal right would be a trespasser and liable to damages for trespass which is generally calculated at the rate of the rental.<sup>317</sup> Those damages can only be claimed from the time when the ‘defendant ceased to hold as tenant and became a trespasser.’<sup>318</sup> The Centre has not located any cases dealing with section 27 of the PLA.

## 23.3. Other jurisdictions

### 23.3.1. Australia

Tasmania and the Northern Territory have provisions which address the issue of life tenants holding over. Section 9 of the *Landlord Tenant Act 1935* (Tas) is framed in a similar way to the existing section 27 of the PLA, although it extends to tenancies of years also. Under the Northern Territory provision in section 27(1) of the *Law of Property Act* (NT) the penalty for holding over is calculated at double the market rent for the land detained.

## 23.4. Preliminary recommendations

Section 27 of the PLA still has ongoing relevance as life estates can still be created and still exist in Queensland. There some issues in relation to section 27 which include:

- the lack of clarity regarding how the calculation of ‘double the yearly value’ should be undertaken; and
- evidentiary difficulties establishing that a holding over is wilful.

These concerns are the same as the ones raised in relation to section 138 of the PLA, which is discussed in Issues Paper 2: *Leases and Tenancies*. Section 27 of the PLA should be retained. However, any amendment to the section would need to be consistent with any proposed changes made to section 138 of the PLA to ensure a consistent approach to penalties for holding over within the Act.

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<sup>313</sup> *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28.

<sup>314</sup> *Grainger v Williams* [2005] WASC 286

<sup>315</sup> *Grainger v Williams* [2005] WASC 286 at [24].

<sup>316</sup> Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [3.400].

<sup>317</sup> Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2009) [2.6], [17.17]. Damages for trespass are known as ‘mesne profits’.

<sup>318</sup> Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2009) [17.17]. See also *Grainger v Williams* [2005] WASC 286, [57].

### Question

**71 Do you agree with the recommendation that section 27 of the PLA should be retained, and any amendments should be consistent with any changes made to section 138 of the PLA?**

## 24. Section 28 – Abolition of the rule in Shelley’s Case

### 24.1. Overview and purpose

#### 28 Abolition of the rule in Shelley’s<sup>319</sup> Case

Where by any instrument coming into operation after the commencement of this Act an interest in any property is expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the rule in Shelley's Case, and independently of section 22, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate as words of purchase and not of limitation, and shall be construed and have effect accordingly.

The rule in *Shelley’s Case*<sup>320</sup> is a common law rule which applied to dispositions by deed and will.<sup>321</sup> The rule arose where there was a disposition of freehold estate followed by a limitation, mediately or immediately in the following terms:

**Situation 1:** To A for life, remainder to his heirs.

**Situation 2:** To A for life, remainder to the heirs of his body.<sup>322</sup>

The effect of the rule in Situation 1 was that the transaction created a fee simple in A and in Situation 2 a fee tail in A was created. This occurred despite the intention of the person making the grant that A in both situations was only obtaining a life estate and that the remainder in fee simple or fee tail was to be vested in A’s heirs.<sup>323</sup> As a result of the rule, the heirs did not acquire any interest and the words giving them an interest were treated as ‘words of limitation and not of purchase.’<sup>324</sup>

The QLRC acknowledged there had been no decisions in Queensland considering the rule in *Shelley’s Case*, as at 1973 and suggested the absence of decisions was partly due to the prevalence of registered titles in Queensland.<sup>325</sup> However, the QLRC held concerns about the correctness of the view that the rule in *Shelley’s Case* did not apply to a system of registered titles. The QLRC identified the following three situations in which the rule may apply to registered land:

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<sup>319</sup> The *Property Law Act 1974* (Qld) cites the case as ‘Shelly’. However, commentary refers to it as ‘Shelley’. The Centre has adopted the latter spelling.

<sup>320</sup> *Shelley’s Case* (1581) 1 Co. Rep. 88b.

<sup>321</sup> Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 59-60 [2.200].

<sup>322</sup> Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 59-60 [2.200].

<sup>323</sup> Adrian Bradbrook, Susan MacCallum and Anthony Moore, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 59-60 [2.200].

<sup>324</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) 19.

<sup>325</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) 19.

- (1) to a grant or transfer inter vivos if technical words of limitation, even though unnecessary, were in fact used in the instrument of transfer;
- (2) to a like disposition by will of land under the Acts, since transmission has to be entered in the register in accordance with the legal effect of the testamentary disposition;
- (3) to a disposition of the equitable estate in land effected prior to 1952 by means of a schedule of trusts declared by the schedule or by separate deed and deposited with a nomination of trustees, since the latter is not an “instrument” within the meaning of The Real Property Acts, with the consequence that, prior to 1952, amendment of the Acts introducing s 15A, technical words of limitation were necessary for the creation of equitable estates in land even if under the Act.<sup>326</sup>

The QLRC noted the alternative view that the rule in *Shelley’s Case* could be abrogated by the Real Property Acts but considered that the abolition of the rule in the PLA was preferable to resolve any possible issues.

Section 28 of the PLA applies to any instrument which comes into operation on or after 1 December 1975. An ‘instrument’ is defined in the PLA to include a will or a deed.<sup>327</sup> The effect of the section is to treat words of limitation, such as ‘remainder to his heir’ or ‘remainder to the heirs of his body’, as words of purchase. This means that in both Situations 1 and 2 above, A will take a life interest only and the remainder to the heir or heir of his body who on the death of A intestate would be beneficially entitled to the interest. Section 28 of the PLA is modelled on the equivalent Victorian provision.<sup>328</sup>

## 24.2. Is there a need for reform?

The QLRC proposed section 28 of the PLA for the purpose of abolishing the rule in *Shelley’s case*.<sup>329</sup> The effect of the section is that from 1 December 1975, any instrument containing words of limitation will be treated as words of purchase which means that the effect of *Shelley’s Case* is abrogated. However, if the section is repealed, it is not clear whether the current drafting of section 28 potentially leaves open the possibility that the rule in *Shelley’s case* continues after the repeal. In Queensland, section 20(2)(a) of the *Acts Interpretation Act 1954* (Qld) expressly provides that the repeal or amendment of an Act does not revive anything not in force or existing at the time the repeal or amendment takes effect.<sup>330</sup> The issue is whether section 28 is a provision of abolition or simply modifies the common law. If it is the latter, there is an argument that the rule in *Shelley’s Case* remained in force in Queensland and section 20(2)(a) of the PLA may not be applicable. The repeal would not, of course, affect the previous operation of the Act or anything suffered, done or begun under the Act.<sup>331</sup> However, there is a remote possibility that it could produce an unintended

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<sup>326</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) 19-20.

<sup>327</sup> *Property Law Act 1974* (Qld) s 4, Sch 6.

<sup>328</sup> *Property Law Act 1958* (Vic) s 130.

<sup>329</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) 20.

<sup>330</sup> *Property Law Act 1974* (Qld) s 20(2)(a). The word ‘Act’ under section 20 includes a provision of an Act: see *Acts Interpretation Act 1954* (Qld) s 20(1).

<sup>331</sup> *Acts Interpretation Act 1954* (Qld) s 20(2)(b).

consequence in relation to the continued application of the rule in Shelley's Case if any instruments created after the repeal of section 28 included words of limitation.

## 24.3. Other jurisdictions

### 24.3.1. Australia

New South Wales, Victoria, Western Australia and the Northern Territory have legislative provisions in place which effectively reverse the rule in *Shelley's Case*.<sup>332</sup> Tasmania, South Australia and the Australian Capital Territory do not have any legislative provisions addressing the rule in *Shelley's Case*.

The Victorian Law Reform Commission in its review of the *Property Law Act 1958* (Vic) in 2010 recommended the retention (with some amendments) of section 130, which deals with the rule in *Shelley's Case*.<sup>333</sup> The Commission indicated that the retention of the section should only be for old system land only and indicated that the rule never applied to registered land.<sup>334</sup> The Victorian Law Reform Commission does not provide any rationale for the retention of the section.

### 24.3.2. New Zealand

Section 58(3) of the *Property Law Act 2007* (NZ) is the New Zealand equivalent of section 28 of the PLA and provides:

(3) Words in an instrument which, but for the abolition of the rule of law known as the rule in Shelley's case (by section 5(1)(a) of the Property Law Amendment Act 1951 and section 22 of the Property Law Act 1952), would have operated to give a person an interest in fee simple are to be treated as words of purchase and not of limitation.

Prior to the enactment of the 2007 property legislation, section 22 of the *Property Law Act 1952* (NZ) addressed the issue of the rule in *Shelley's Case*. However, the New Zealand Law Commission in its review of the 1952 Act was concerned that section 22 was not framed as a direct abolition, despite the section heading.<sup>335</sup> In the case of section 22 the Commission noted that although the section may have abolished the rule, it went on to make provision for 'what would happen if anyone thereafter tries to rely upon the abolished rule.' In order to address this, the Law Commission suggested restating the abolition in direct language followed by a 'restatement of the consequential provisions.'<sup>336</sup> Section 58(3) of the *Property Law Act 2007* (NZ) reflects the Law Commission's suggested approach.

## 24.4. Preliminary recommendations

There is uncertainty whether the effect of section 28 of the PLA is to abolish the rule in Shelley's Case. In the circumstances, there may be benefit in adopting an approach similar to New Zealand which clearly abolishes the rule to avoid any uncertainty regarding the position in Queensland.

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<sup>332</sup> *Conveyancing Act 1919* (NSW) s 17; *Property Law Act 1958* (Vic) s 130; *Property Law Act 1969* (WA) s 27; *Law of Property Act* (NT) s 28.

<sup>333</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 135.

<sup>334</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 135.

<sup>335</sup> New Zealand Law Commission, *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 43 [134].

<sup>336</sup> New Zealand Law Commission, *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 43 [134].

Any revised section which expressly abolishes section 28 may also need to ensure that the 'consequential' provision is retained in some form to ensure the effect of the abolition is clear.

### **Questions**

- 72 Do you think section 28 of the PLA clearly abolishes the rule in Shelley's Case in Queensland?**
- 73 Do you think the position in relation to the intended abolition should be clarified and expressly stated?**
- 74 Do you think an approach similar to that adopted in section 58 of the *Property Law Act 2007* (NZ) is appropriate in Queensland?**

## 25. Section 29 – Words of limitation

### 25.1. Overview and purpose

#### 29 Words of limitation

- (1) A disposition of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the donee the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.
- (2) A disposition of freehold land to a corporation sole by the donor's corporate designation without the word 'successors' shall pass to the corporation the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.
- (3) This section applies to dispositions effected after the commencement of this Act.

At common law, specific words were required to be used in order to create a fee simple estate. The word required was 'heirs' after the grantee's name – that is, 'to A and his heirs'. These were known as words of limitation and if the word 'and his heirs' were not added, A only received a life estate, rather than an estate in fee simple.<sup>337</sup>

In Queensland, prior to 1 December 1975 these precise words were required to transfer the fee simple in old system land.<sup>338</sup> An issue arose in Queensland in relation to nominations of trustees and following a decision of the Supreme Court in 1951, the *Real Property Acts* were amended to insert section 15A which was partly based on section 60 of the English *Law of Property Act 1925*.<sup>339</sup> That provision applied to conveyances of unregistered land and registered or unregistered declarations of trust or dispositions of equitable interests in land. The QLRC noted that the inclusion of unregistered land made the *Real Property Acts* 'a somewhat inappropriate place in which to include the provision' and recommended that it be repealed and transferred to the proposed new property law legislation.<sup>340</sup> The QLRC preferred the approach in section 60 of the *Property Law Act 1958* (Vic) over the English provision.

Section 29 of the PLA now enables the transfer of the whole interest of the grantor, irrespective of whether the words of limitation are used, subject to a contrary intention appearing in the disposition.<sup>341</sup> The section only applies to dispositions effected after 1 December 1975.<sup>342</sup> In the case of a disposition of freehold land to a corporation sole, prior to the enactment of section 29(2), the

<sup>337</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 55-56 [2.165].

<sup>338</sup> Carmel MacDonald, et al, *Real Property Law In Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 151 [6.90].

<sup>339</sup> See Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 20-21 for further details regarding the issue and the case which led to the amendment of the Real Property Acts.

<sup>340</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) 21.

<sup>341</sup> The term 'disposition' is defined in the PLA to include a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will: *Property Law Act 1974* (Qld) s 3, Sch 6.

<sup>342</sup> *Property Law Act 1974* (Qld) s 29(3).



words ‘and his successors’ were required, otherwise only a life estate was passed.<sup>343</sup> Section 29(2) of the PLA has the effect that such words are not necessary in order to pass the whole interest in the relevant land, unless a contrary intention appears in the disposition.<sup>344</sup>

Words of limitation were not necessary to pass the fee simple in the case of a corporation aggregate because:

...in contemplation of law, such a corporation never dies, and such words as “successors or assigns” are meaningless as words of limitation in a conveyance to it.<sup>345</sup>

## 25.2. Is there a need for reform?

The QLRC when considering the application of the proposed section 29 of the PLA to registered land indicated that it would apply to dispositions of registered land because of the proposed clause 28(3) (now section 28(3)) but in essence it would not have any effect because:

- the proposed clause 5(1)(a)<sup>346</sup> (now section 5(1)(b)) makes the PLA apply to land under the *Real Property Acts* but subject to the provisions of those Acts;
- section 48 of the *Real Property Acts* does not require prescribed words of transfer.<sup>347</sup>

The position remains the same under the *Land Title Act 1994* (Qld) where no prescribed words of transfer are required in the instrument of transfer.<sup>348</sup>

In the circumstances, there is a strong argument that section 29 of the PLA only applies to old system land.

## 25.3. Other jurisdictions

### 25.3.1. Australia

South Australia is the only State in Australia which has not modified the common law position by statute. All the other States and Territories have a provision equivalent to section 29(1) of the PLA.<sup>349</sup>

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<sup>343</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 29.60] and GP Stuckey, *The Conveyancing Act, 1919-1969 and Regulations* (The LawBook Company Limited, 2<sup>nd</sup> ed, 1970) 97 [282].

<sup>344</sup> There was no similar requirement that specific words are required for a conveyance to a corporate aggregate or an incorporated company: see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (online) Thomson Reuters [PLA 29.60].

<sup>345</sup> GP Stuckey, *The Conveyancing Act, 1919-1969 and Regulations* (The LawBook Company Limited, 2<sup>nd</sup> ed, 1970) 97 [282].

<sup>346</sup> The Queensland Law Reform Commission referred to clause 5(1)(a) which provides that the PLA applies to unregistered land, but it is clear from the context that the relevant clause should have been clause 5(1)(b) which proposed that the PLA apply to land under the provisions of the *Real Property Acts* but subject to the provisions of that Act.

<sup>347</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) 21.

<sup>348</sup> See *Land Title Act 1994* (Qld) s 61. Section 61(1)(d) only requires the instrument of transfer to include a description sufficient to identify the interest to be transferred.

<sup>349</sup> *Conveyancing Act 1919* (NSW) s 47; *Property Law Act 1958* (Vic) s 60; *Property Law Act 1969* (WA) s 37; *Law of Property Act* (NT) s 29; *Conveyancing and Property Law Act* (Tas) s 61(2).

New South Wales, Victoria and the Northern Territory also have a section equivalent to section 29(2) of the PLA.

### 25.3.2. New Zealand

Section 43 of the, now repealed, *Property Law Act 1952* (NZ) had the same effect as section 29(1) of the PLA. The section has now been moved to Schedule 6 of the *Property Law Act 2007* (NZ) which applies only to land that is not owned by the Crown and not under the *Land Transfer Act 1952* (NZ).<sup>350</sup> It also applies to instruments relating to these categories of land. Schedule 6, clause 2 now provides:

#### **2 Fee to pass without words of limitation**

A conveyance of land without words of limitation passes the fee simple or other whole estate that the party conveying has power to dispose of.

The rationale for this change was that the section only applied to the ‘rarely found parcels of land which are in private ownership but still under the deeds system.’ The New Zealand Law Commission did not provide any commentary on the provisions in the Schedule on the basis that where such a parcel of land is identified, it is normally brought under the *Land Transfer Act 1952* (NZ) prior to dealing with it.<sup>351</sup> As a result, it is unlikely the provisions in the Schedule (including clause 2) would be relied upon.<sup>352</sup>

## 25.4. Preliminary recommendations

If the view is formed that section 29 of the PLA only applies to old system land, the section should be repealed.

### Questions

- 75 Do you agree that section 29 of the PLA has no application to registered land in Queensland?
- 76 Do you agree that section 29 of the PLA could be repealed given that it is unlikely there is any remaining old system land in Queensland?

<sup>350</sup> *Property Law Act 2007* (NZ) s 351.

<sup>351</sup> New Zealand Law Commission, *A New Property Law Act* Report No. 29 (1994) [803].

<sup>352</sup> New Zealand Law Commission, *A New Property Law Act* Report No. 29 (1994) [803].

## Part 4 Future Interests (ss 30-32)

### 26. Section 30 – Creation of future interests in land

#### 26.1. Overview and purpose

##### 30 Creation of future interests in land

- (1) A future interest in land validly created after the commencement of this Act shall take effect as an equitable and not a legal interest.
- (2) An interest in remainder created after the commencement of this Act must not be registered in the freehold land register.
- (2A) Subsection (2) has effect despite anything in the *Land Title Act 1994*.
- (3) This section shall not apply to any future interest –
  - (a) created before the commencement of this Act whether that interest arose or arises before or after the commencement of this Act; or
  - (b) created or arising because of section 22.
- (4) In this section –

**future interest** means –

  - (a) a legal contingent remainder; or
  - (b) a legal executory interest.

#### 26.1.1. General

A future interest in land at common law is an interest which grants rights in the land to be enjoyed at a future time.<sup>353</sup> Future interests are generally categorised as reversions, remainders (vested or contingent) and executory interests.<sup>354</sup> These categories are described in more detail below:

- a reversion generally refers to the 'rights to future possession remaining in a grantor of a fee simple estate who has not disposed of all his interest in the land.'<sup>355</sup> For example, A grants to B for life. In that case B has a 'life estate vested in possession and A has a fee simple reversion vested in interest but not vested in possession until B dies',<sup>356</sup>
- a remainder is an interest which a grantor confers on another but which does not give any rights of possession of the land until the determination of rights to possession held by another. For example, A grants to B for life and to C. In that case, 'B has a life estate vested in possession and C a fee simple remainder that is vested in interest but not in possession.'<sup>357</sup> A remainder can either be vested in interest or contingent. It is vested when:

<sup>353</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 370 [10.05].

<sup>354</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 370 [10.05].

<sup>355</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA30.30].

<sup>356</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters Duncan and Vann [PLA 30.30].

<sup>357</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA30.30].

- (i) the person or persons entitled to it are ascertained; and
  - (ii) it is ready to take effect in possession forthwith and is prevented from doing so only by the existence of some prior interest or interests. Otherwise a remainder is referred to as contingent.<sup>358</sup>
- An executory interest has been described as ‘future interests which are not reversions or remainders, that is, which are not intended to wait for the natural termination of a particular estate.’<sup>359</sup> There are equitable and legal executory interests.<sup>360</sup>

Future interests at common law were regulated by a large number of rules, particularly in relation to the validity and enforceability of these interests.<sup>361</sup> These developed in the context of old system land and only applied to legal interests.<sup>362</sup> Contingent remainders were particularly affected by these rules.<sup>363</sup> Examples of some of the rules include, a ‘remainder or reversion after a fee simple is void’ and a ‘remainder is void if it is not supported by prior particular estate of freehold created by the same instrument.’<sup>364</sup> Some legal executory interests were caught by the contingent remainder rules as a result of the decision in *Purefoy v Rogers*<sup>365</sup> in the seventeenth century. The rule following that decision was that:

a legal executory interest capable of subsisting as a contingent remainder must be given effect as such. As such, legal executory interests which satisfied this description became subject to the contingent remainder rules, and so were susceptible to all the disabilities of contingent remainders.<sup>366</sup>

The QLRC considered the approach adopted in other jurisdictions including the earlier English approach under the Real Property Act 1845 which was adopted in some other Australian States including New South Wales and South Australia.<sup>367</sup> The QLRC noted that the position in England after the introduction of the *Law of Property Act 1925* (UK) was that contingent remainders and legal executory interests were not able to be created at law and took effect as equitable interests.<sup>368</sup> The QLRC preferred this approach and provided the following rationale for the recommendation:

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<sup>358</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA30.30]).

<sup>359</sup> Carmel MacDonald, et al, *Real Property Law In Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 172 [6.350].

<sup>360</sup> Carmel MacDonald, et al, *Real Property Law In Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 172 [6.350]. For a detailed discussion on executory interests see also 172-174 [6.350]-[6.400].

<sup>361</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 370 [10.05].

<sup>362</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (Law Book Co., 3<sup>rd</sup> ed, 2010) 175 [6.420].

<sup>363</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) 21.

<sup>364</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 166 -168 [6.290]-[6.300]. For detail of the various rules applicable see also 166-170 [6.290] -[6.320].

<sup>365</sup> (1671) 2 Wms Saund 380; 85 ER 1181 as discussed in Carmel MacDonald, *Real Property Law in Queensland* (LawBook Co., 3<sup>rd</sup> ed, 2010) 174 [6.400].

<sup>366</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) 21.

<sup>367</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) 21.

<sup>368</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) 22.

In these circumstances we see no merit in preserving in this State the power to create at law contingent remainders and legal executory interests. To do so would involve the adoption and improvement of a number of statutory provisions of not inconsiderable complexity in order to maintain a legal institution which is no longer of any real social utility and which has ceased to be employed in practice. Hence, while preserving the validity of any existing contingent remainders or executory interests already created in this state: see sub-cl (3), we recommend the adoption of the substance of s. 4(1) of the English Act of 1925, so that any such interest created in the future will take effect in equity only. This will accord with existing conveyancing practice prevailing in Queensland by which such interests are now created as trusts, and will also dispose of the difficulties and disabilities associated with legal contingent remainders, which, as we have said, have no application to such interests if created by trust.<sup>369</sup>

Section 30 of the PLA abrogates the effect of the contingent remainder rules and the impact of *Purefoy v Rogers* on legal executory interests. The section:

- applies to future interests that are either a legal contingent remainder or a legal executory interest.<sup>370</sup> These interests are not defined in the PLA;
- has the effect that any future interest created after 30 November 1975 will take effect as an equitable, rather than a legal interest;
- expressly provides that an interest in remainder created after the commencement of the PLA must not be registered in the freehold land register;
- does not apply to any future interest created before the commencement of the PLA.<sup>371</sup>

Any contingent remainders created prior to 1 December 1975 are subject to the common law rules and legal executory interests also created prior to the commencement of the PLA will be subject to the rule in *Purefoy v Rogers*.<sup>372</sup> Further, future interests that do not fall within the scope of the section 30 (reversions and vested remainders) will be governed by the common law rules also.<sup>373</sup>

### **26.1.2. Land Title Act 1994 (Qld) and future interests**

Part of the QLRC's recommendation in relation to section 30 of the PLA also included changes to prevent the registration of future contingent remainders.<sup>374</sup> This is set out in section 30(2) of the PLA and prohibits the registration of an interest in remainder created after 30 November 1975 in the freehold land register. Section 55 of the *Land Title Act 1994* (Qld) provides that:

The registrar may record in the freehold land register an interest in a lot for life and an interest in remainder in the way the registrar considers appropriate.

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<sup>369</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) 22.

<sup>370</sup> *Property Law Act 1974* (Qld) ss 30(1) and 30(4).

<sup>371</sup> *Property Law Act 1974* (Qld) s 30(3).

<sup>372</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co., 4<sup>th</sup> ed, 2007) 388 [10.65].

<sup>373</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (LawBook Co, 3<sup>rd</sup> ed, 2010) 175 [6.420].

<sup>374</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) 22.

However, this section is subject to section 30(2) of the PLA<sup>375</sup> which means that a remainder cannot be registered in the register but can be recorded.

## 26.2. Is there a need for reform?

The QLRC's approach to reform in relation to this section and the rationale relied upon remains valid. The section is well understood and does not appear to have raised any significant issues in practice.

## 26.3. Other jurisdictions

### 26.3.1. Australia

There are two main approaches which have been implemented in Australia to address some of the issues arising from the common law contingent remainder rules. The approach in Queensland and the Northern Territory<sup>376</sup> is to effectively abolish legal contingent remainders and legal executory interests.<sup>377</sup> The second approach is based on the earlier English legislation, *Contingent Remainders Act 1877*, which was adopted in New South Wales,<sup>378</sup> South Australia<sup>379</sup> Victoria, Western Australia and Tasmania.<sup>380</sup> This approach was aimed at 'mitigating the harshness of the common law contingent remainder rules' and to modify the effect of the common law contingent remainder rules.<sup>381</sup> There is some variation within the legislation implementing this approach with New South Wales and the South Australian provisions drafted quite differently to the other jurisdictions. Commentary suggests that both these jurisdictions 'appear to have prevented both the natural and artificial destruction of contingent remainders.'<sup>382</sup>

The Victorian Law Reform Commission reviewed the contingent remainder provisions in 2010 and ultimately recommended that:

32. From the commencement of the new Property Law Act, legal life estates and legal future interests should be capable of creation only in equity as beneficial interests under a trust.<sup>383</sup>

The recommendation made by the Victorian Law Reform Commission has not been implemented in Victoria, to date.

### 26.3.2. New Zealand

Section 20 of the *Property Law Act 1952* (NZ) provided:

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<sup>375</sup> Section 30(2A) of the *Property Law Act 1974* (Qld) expressly provides that subsection 30(2) of the PLA has effect despite anything in the *Land Title Act 1994*.

<sup>376</sup> *Law of Property Act* (NT) s 30.

<sup>377</sup> Brendan Edgeworth, et al, *Sackville & Neave Australian Property Law* (Butterworths, 9<sup>th</sup> ed, 2013)204 [3.69].

<sup>378</sup> *Conveyancing Act 1919* (NSW) s 16.

<sup>379</sup> *Law of Property Act 1936* (SA) s 25.

<sup>380</sup> *Law of Property Act 1952* (Vic) ss191 and 192; *Property Law Act 1969* (WA) s 26; *Conveyancing and Law of Property Act 1884* (Tas) ss 80(2) and 81.

<sup>381</sup> Brendan Edgeworth, et al, *Sackville & Neave Australian Property Law* (Butterworths, 9<sup>th</sup> ed, 2013)204 [3.69].

<sup>382</sup> Brendan Edgeworth, et al, *Sackville & Neave Australian Property Law* (Butterworths, 9<sup>th</sup> ed, 2013)204 [3.69].

<sup>383</sup> Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report 73: Recommendation 32.

## 20 When contingent remainders capable of taking effect

- (1) A contingent remainder shall be capable of taking effect notwithstanding the destruction or determination by any means of the particular estate immediately preceding, and notwithstanding that it may have been created expectant on the termination of years.
- (2) A contingent remainder or a contingent interest lying between 2 estates vested in the same person shall prevent the merger of those 2 estates.

The New Zealand Law Commission indicated that section 20(1) reversed the effect of two common laws applicable to contingent remainders.<sup>384</sup> The Commission recommended retaining section 20(1) but that the section be restated. Sections 20(1) and (2) of the repealed 1952 Act now appear in section 63 in the *Property Law Act 2007* (NZ) which provides:

### 63 Contingent remainders and interests

- (1) A contingent remainder or contingent interest in land may follow a leasehold estate in the land.
- (2) A contingent remainder or contingent interest in land, expressed to take effect on the ending of a preceding estate in the land, does not become void because the preceding estate ends before the occurrence of the event or the fulfilment of the condition on which the contingent remainder or contingent interest depends.
- (3) Different estates in land vested in the same person do not merge if the estates are separated by the contingent remainder or contingent interest in the land of some other person.
- (4) In this section, **contingent remainder** or **contingent interest** means a remainder or interest that depends on -
  - (a) a future event that may or may not occur; or
  - (b) a condition that may or may not be fulfilled.

The current approach in New Zealand is to still reverse some of the common law rules associated with contingent remainders and interests.<sup>385</sup>

## 26.4. Preliminary recommendations

Section 30 of the PLA should be retained.

### Question

**77 Do you agree with the preliminary recommendation that section 30 of the PLA should be retained?**

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<sup>384</sup> These rules are discussed in detail in the Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper Preliminary Paper No. 16* (1991) 44 [140].

<sup>385</sup> See Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper Preliminary Paper No. 16* (1991) 44-45 for further discussion on the approach of the Law Commission.

## 27. Section 31 – Power to dispose of all rights and interests in land

### 27.1. Overview and purpose

#### 31 Power to dispose of all rights and interests in land

- (1) All rights and interests in land may be disposed of including -
  - (a) a contingent, executory or future interest in any land or a possibility coupled with an interest in any land, whether or not the object of the gift or limitation of such interest or possibility be ascertained; and
  - (b) a right of entry, into or upon land whether immediate or future, and whether vested or contingent.
- (2) All rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, after the commencement of this Act, be made exercisable by any person and the persons deriving title under that person, but, in regard to an estate in fee simple (not being a rent charge held for a legal estate) only within the period authorised by the rule relating to perpetuities.

Although at common law property was generally considered to be freely alienable, there were some rights relating to land which were not or which were subject to restrictions in relation to alienation. For example, historically contingent remainders were unable to be alienated but vested future interests could be. The rule in relation to the inalienability of contingent remainders evolved in the 18<sup>th</sup> century so that equity permitted the alienation of these.<sup>386</sup> The effect of section 31(1) of the PLA is to render interests in land such as contingent remainders freely available at law and in equity.<sup>387</sup> The section also covers a right of entry into or upon land whether immediate or future, and whether vested or contingent.<sup>388</sup> The term ‘disposed’ is not defined in the PLA but ‘disposition’ is defined to include:

A conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will.

The alienation of vested and contingent future interests can occur in all situations ‘whether the interests are created by deed or by will.’<sup>389</sup> In Queensland, section 8(1) of the *Succession Act 1981* (Qld) expressly provides that a person may dispose by will of any property to which the person is entitled at the time of the person’s death, irrespective of whether or not the entitlement existed at the date of the making of the will.<sup>390</sup> Other States and Territories have similar provisions in succession legislation.<sup>391</sup> Duncan & Vann suggest that section 31(1) of the PLA overlaps with other provisions

<sup>386</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA31.30].

<sup>387</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 31.60].

<sup>388</sup> *Property Law Act 1974* (Qld) s 31(1)(b).

<sup>389</sup> Adrian Bradbrook, et al, *Australian Real Property Law* (LawBook Co, 4<sup>th</sup> ed, 2007) 391 [10.90].

<sup>390</sup> *Succession Act 1981* (Qld) s 8(2).

<sup>391</sup> See for example *Wills Act 1968* (ACT) s 7; *Wills Act 1997* (Vic) s 4 and *Wills Act 1936* (SA) s 4.



such as the *Succession Act 1981* (Qld) but ‘without producing any apparent difficulties in application.’<sup>392</sup>

The purpose of section 31(2) of the PLA is less clear. Commentary on this subsection notes that:

The section has additional effects on rights of entry by reason of subs (2). These need no longer be attached, in the case of a lease, to the reversion; rights of entry may now be originally conferred upon or subsequently alienated to persons who do not hold the reversion. Rights of entry over fee simple estate, subs (2) makes clear that the right is subject to the rule against perpetuities, except where the right of entry forms part of a rent charge held for a legal estate.<sup>393</sup>

Victoria<sup>394</sup> and the Northern Territory<sup>395</sup> are the only other Australian jurisdictions which each have a subsection equivalent to section 31(2) of the PLA.

## 27.2. Is there a need for reform?

Section 31(1) of the PLA has current relevance and should be retained. Clarification around the relevance of section 31(2) is required in order to ensure that the section remains current. Subject to the position in relation to section 31(2), section 31 should be retained with some modifications discussed in Part 27.4 below.

## 27.3. Other jurisdictions

### 27.3.1. Australia

Apart from Western Australia, each Australian State and Territory has a provision which deals with the conveyance or disposition of future interests. The equivalent provisions in Victoria<sup>396</sup> and the Northern Territory<sup>397</sup> are in essentially identical terms to section 31 of the PLA. The only difference occurs in section 19(1) of the *Property Law Act 1952* (Vic) which adds the words ‘but no such disposition shall defeat or enlarge an estate tail’ at the end of the section. These additional words are also included in the Tasmanian<sup>398</sup> provision which is in similar form to the Victorian section. The sections in New South Wales,<sup>399</sup> South Australia<sup>400</sup> and the Australian Capital Territory<sup>401</sup> are in similar form to section 31(1) of the PLA and do not include an equivalent provision to section 31(2) of the PLA.

In the case of Tasmania, the Australian Capital Territory and New South Wales, the conveyance or disposition of the interest is by ‘deed’.

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<sup>392</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 31.60].

<sup>393</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA 31.60].

<sup>394</sup> *Property Law Act 1958* (Vic) s 19(2).

<sup>395</sup> *Law of Property Act* (NT) s 31(2).

<sup>396</sup> *Property Law Act 1958* (Vic) s 19.

<sup>397</sup> *Law of Property Act* (NT) s 31.

<sup>398</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 80(1).

<sup>399</sup> *Conveyancing Act 1919* (NSW) s 50(1).

<sup>400</sup> *Law of Property Act 1936* (SA) s 10.

<sup>401</sup> *Civil Law (Property) Act 2006* (ACT) s 255.

### 27.3.2. New Zealand

Section 21 of the, now repealed, *Property Law Act 1952* (NZ) expressly enabled the conveyance, by deed, of a number of interests in property including, contingent remainders, every contingent or executory or future estate, right or interest in property.<sup>402</sup> The New Zealand Law Commission in its Preliminary Paper reviewing the 1952 Act noted that provisions such as section 21 cannot be understood 'by themselves without looking to the principles which they alter.'<sup>403</sup> In this respect, the Commission preferred 'direct statements of those rules in their modified form so that some of the obscurity of the present sanctions can be removed, but it is not intended to make further changes to the rules themselves.'<sup>404</sup> This approach was endorsed and adopted in the final report of the Law Commission in 1994.<sup>405</sup> The Commission also indicated that as part of the reforms, the opportunity was taken to 'confirm that future estates and interests can be created within the limits of the rule against perpetuities, as modified by the Perpetuities Act 1964.'<sup>406</sup>

Section 21 of the 1952 Act has now been replaced by section 62 in the *Property Law Act 2007* (NZ) which provides:

#### **62 Creation and disposition of estates and interests in property**

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

### 27.4. Preliminary recommendations

Subject to stakeholder feedback in relation to section 31(2) of the PLA, the provision should be retained.

#### **Questions**

**78 Are you aware of a current situation in which section 31(2) of the PLA may be relevant or applicable?**

**79 Do you agree with the preliminary recommendation that section 31 of the PLA be retained?**

<sup>402</sup> The section qualifies this ability to convey with the addition of the words 'Provided that no person shall be empowered by this Act to dispose of any expectancy he may have as next of kin, or under the Administration Act 1969.' *Property Law Act 1952* (NZ) s 21.

<sup>403</sup> Law Commission (NZ), *The Property Law Act: A Discussion Paper* Preliminary Paper No. 16 (1991) 43.

<sup>404</sup> Law Commission (NZ), *The Property Law Act: A Discussion Paper* Preliminary Paper No. 16 (1991) 43-44.

<sup>405</sup> Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 13 [38].

<sup>406</sup> Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) 13 [39].

## 28. Section 32 – Restriction on executory limitations

### 28.1. Overview and purpose

#### 32 Restriction on executory limitations

- (1) Where there is a person entitled to -
  - (a) land, or an equitable interest in land, for an estate in fee simple or for any less estate or interest;  
or
  - (b) any other property, or an interest in any other property;with an executory limitation over on default or failure of all or any of the person's issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect if, and as soon as, there is living any issue who has attained full age and capacity of the class on default or failure of which the limitation over was to take effect.
- (2) This section applies where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

Section 32 of the PLA is modelled on section 29B of the *Conveyancing Act 1919* (NSW) with some modifications required as a result of section 30 of the PLA which has the effect that legal executory interests created after the PLA commenced take effect as equitable interests only.<sup>407</sup> The problem which the section is intended to address is best explained by Example 1 below:

#### Example 1

G grants Blackacre to A in fee simple, but if A dies without living issue, then to B in fee simple.<sup>408</sup>

The QLRC noted that since the passing of the Succession Acts 1867 to 1968, a devise to A by G is 'construed as a gift to A, subject to an executory limitation in favour of B if at the death of A he has no issue living.'<sup>409</sup> This interpretation meant that A would never know during his or her lifetime whether the gift over in favour of B has taken effect.<sup>410</sup> Commentary at the time noted that '[E]ven if A had many children and grandchildren alive, they might all perish in some calamity before his death and so leave him to 'die without issue'.<sup>411</sup>

<sup>407</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) 23-24.

<sup>408</sup> This example has been extracted in full from Carmel MacDonald, et al, *Real Property Law in Queensland* (Law Book Co, 3<sup>rd</sup> ed, 2010) 176 [6.440].

<sup>409</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) 23.

<sup>410</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) 23 and Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (Law Book Co, 3<sup>rd</sup> ed, 2010) 176 [6.440].

<sup>411</sup> Extracted from Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 23.

The effect of section 32(1) of the PLA is to avoid this uncertainty so that a gift in the form in Example 1 will become absolute:

- if any of A's issues reach the age of 18, irrespective of whether all of these individuals die before A or any issue;<sup>412</sup> or
- A dies leaving any issue, irrespective of whether any of these individuals have reached 18.<sup>413</sup>

This means that the executory limitation in favour of B can never take effect and is void if one of these criteria is satisfied. The section only applies to instruments executed after 30 November 1975, 'or wills of testators dying after that date.'<sup>414</sup>

## 28.2. Is there a need for reform?

Section 32(1) of the PLA clarifies the position in relation to executory limitations imposed on gifts over. The provision still has a current purpose. The provision is restricted to instruments executed after 30 November 1975, however it is still possible that there remain some entitlements which have yet to operate or fail. Accordingly, section 32(2) of the PLA should be retained. This can be compared to the situation in New Zealand, where the relevant date was 1906 and the Law Commission thought it was doubtful that any entitlements remained which were yet to take effect or fail. For further discussion on this aspect of the New Zealand reform of the equivalent provision to section 32(2) of the PLA, see Part 28.3.2 below.

## 28.3. Other jurisdictions

### 28.3.1. Australia

Apart from South Australia, each State and Territory has an equivalent provision to section 32 of the PLA.<sup>415</sup> Queensland and the Northern Territory include 'equitable interest in land' in the category of interests falling within scope of the section to account for the effect of section 30 of the PLA (and section 30 of the Northern Territory Act).

### 28.3.2. New Zealand

The relevant provision in New Zealand is set out in section 64 of the *Property Law Act 2007* (NZ) which provides:

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<sup>412</sup> Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 24.

<sup>413</sup> Duncan & Vann indicated that 'this follows from the previous law which is added to but not replaced by the current section.': Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA32.60].

<sup>414</sup> Carmel MacDonald, et al, *Real Property Law in Queensland* (Law Book Co, 3<sup>rd</sup> ed, 2010) 176 [6.440].]

<sup>415</sup> *Conveyancing Act 1919* (NSW) s 29B; *Law of Property Act 1952* (Vic) s 132; *Property Law Act 1969* (WA) s 28; *Conveyancing and Law of Property Act 1884* (Tas) s 79; *Law of Property Act* (NT) s 32.

#### 64 When gifts over cease to be capable of taking effect

- (1) This section applies if –
  - (a) a person (**person A**) is entitled to an estate or interest in land; and
  - (b) the estate or interest is subject to a gift over to another person (**person B**) if person A has no issue or no issue of a specified class (whether at any specified time or within any specified period).
- (2) The gift over ceases to be capable of taking effect as soon as there is issue, or a member of the specified class of issue, who attains the age of 20 years.
- (3) Subsection (2) applies even if the issue may subsequently fail.
- (4) In this section, **gift over** includes a gift over expressed to take effect on the ending of an estate or interest preceding that of the person whose estate or interest is the subject of the gift over.

The previous provision in the *Property Law Act 1952* (NZ) (section 23) was framed in a similar way to the Queensland (and other Australian jurisdictions) but was limited in application to land only. The New Zealand Law Commission formed the view that section 23 of the 1952 Act should be 're-enacted in a more approachable modern form and should ... relate to all types of property, not just, as at present, to land.'<sup>416</sup> The Commission did not consider it necessary to retain section 23(2) which provided that section 23 only applied where the gift over is contained in an instrument coming into operation after 1 January 1906.<sup>417</sup> In the Commission's view, any pre-1906 gifts over would have, in all reasonable probability, either operated or failed.<sup>418</sup>

### 28.4. Preliminary recommendations

Section 32 of the PLA should be retained with some revision to assist with clarity. In order to properly understand the purpose of the section an approach similar to section 64 of the *Property Law Act 2007* (NZ) where a practical example is incorporated into the section may be one model to consider.

#### Question

**80 Do you agree with the preliminary recommendation that section 32 of the PLA be retained with some amendment for clarity?**

<sup>416</sup> Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 46 [145].

<sup>417</sup> Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 46 [146].

<sup>418</sup> Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 46 [146].

## Part 6 Division 1 – Deeds, covenants, instruments and contracts (ss 44-52)

### 29. Deeds and electronic commerce

A deed has been described as ‘the most solemn act that a person can perform with respect to a particular piece of property or other right’.<sup>419</sup> For a deed to be valid, it must be: written on paper;<sup>420</sup> signed;<sup>421</sup> sealed (or deemed to be sealed);<sup>422</sup> and delivered.<sup>423</sup>

Lawyers, it has been argued,<sup>424</sup> love deeds and may use a deed to minimise the risk to the transaction at hand. However, the incorrect use of a deed may actually increase the risk.<sup>425</sup> A deed that has been signed, sealed and delivered is immediately binding on the maker (subject to any conditions).<sup>426</sup> If the deed is not properly executed, then it will not be valid even if the parties intend it to be binding.

Division 1 of Part 6 of the PLA deals with deeds. A deed may be used for a large number of purposes, including as a record of an agreement reached between two or more parties. In this sense, a deed is very similar to a contract and in fact, in the mind of many people, a deed is a synonym for contract. However there are significant differences between a deed and a contract. A deed is a physical object, a document recording a solemn binding promise that is legally enforceable if the deed has been properly executed (i.e. it is signed, sealed and delivered). A contract, on the other hand, may not require writing if there is an agreement between the parties, offer and acceptance, an intention to be legally bound and consideration.

#### 29.1. Deed vs contract

There are significant ramifications that can flow from whether an agreement is a contract or executed as a deed.<sup>427</sup> At law a deed is distinct from a contract in a number of ways.

Unlike a contract, a deed is immediately binding on the party executing the deed if it is validly executed and delivered even if the other side has not executed the deed.<sup>428</sup> This means that a deed can be

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<sup>419</sup> *Manton v Parabolic Pty Ltd* (1985) 2 NSWLR 361 at 369 cited in Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 30.

<sup>420</sup> See RJA Morrison and HJ Goolden (eds), *Norton A Treatise on Deeds* (2<sup>nd</sup> ed 1928), Sweet & Maxwell, 3 cited in Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 6.

<sup>421</sup> *Property Law Act 1974* (Qld) s 45(1).

<sup>422</sup> *Property Law Act 1974* (Qld) s 45(2) provides that an instrument executed by an individual will be deemed to be sealed if the instrument is expressed to be sealed and it is signed and attested by at least 1 witness who is not a party to the instrument. See discussion at paragraph 31 below. Execution by a corporation is dealt with in section 47 discussed at paragraph 32 below.

<sup>423</sup> *Property Law Act 1974* (Qld) s 47.

<sup>424</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 1.

<sup>425</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 30-35.

<sup>426</sup> For a discussion escrow, the delayed effect of a deed, see Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 130. Note that a deed will become effective when the condition in the escrow is satisfied.

<sup>427</sup> See for example, *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245.

<sup>428</sup> *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245 at [9], referring to a statement of Lord Denning MR in *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 QB 609 at 612.

enforced by a third party<sup>429</sup> who has not provided consideration.<sup>430</sup> In fact, one of the main advantages of using a deed is that it can create a binding promise without the need for consideration.<sup>431</sup>

A second main difference is that a deed is a 'specialty'<sup>432</sup> at law and the usual limitation period<sup>433</sup> is doubled to 12 years.<sup>434</sup> It has been argued that this longer limitation period is an anachronistic remnant from the time when unregistered land was transferred by deed of conveyance under a deeds system and is no longer necessary.<sup>435</sup> The UK Law Commission in 2001 recommended that the longer limitation period for specialties should be removed<sup>436</sup> although this recommendation was not actually accepted by the UK Parliament.<sup>437</sup> In 2010, New Zealand changed the limitation period for deeds to 6 years.<sup>438</sup>

## 29.2. The history of deeds

Deeds have a long history under the common law, dating to the back to the 7<sup>th</sup> century. A full overview of this history is beyond the scope of this paper.<sup>439</sup> However, for present purposes it is important to note that deeds developed as a formal way recording an agreement. The law developed specific formal requirements (writing on paper, sealing, signing, attestation and delivery) as a way to mark the formality of the occasion of entering into a deed. These formal requirements are intended to prevent fraud, provide evidence of the transaction and to make parties think carefully before entering into a deed.<sup>440</sup> A deed that does not satisfy the formal requirements will not be valid and will not take effect as a deed.

In his recent text, *Seddon on Deeds*,<sup>441</sup> author Nicholas Seddon argues that the current law on deeds is 'very unsatisfactory in many ways.'<sup>442</sup> While the concept of deeds and the formal requirements

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<sup>429</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 22. See also Graham McBain, 'Abolishing deeds, specialties and seals: Part 2', June-August 2006 *Commercial Law Quarterly*, 3.

<sup>430</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 20-24 at 1.11.

<sup>431</sup> Seddon argues that a deed should always include at least nominal consideration in case it is defective and an equitable remedy is required to enforce the deed: Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [1.10].

<sup>432</sup> 'Specialty' is not defined in statute but is taken to mean an agreement under seal, as opposed to an ordinary agreement 'under hand'. See 'Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 13-14 and 19.

<sup>433</sup> *Limitations of Actions Act 1974* (Qld) s 10(1).

<sup>434</sup> *Limitations of Actions Act 1974* (Qld) s 10(3) which allows 12 years for a *specialty*. Note that under the *Land Title Act 1994* (Qld) s 176, a registered instrument operates as a deed. This may be to take advantage of the longer limitation period.

<sup>435</sup> New Zealand Law Commission, *Limitation Defences in Civil Cases: Update Report for the Law Commission*, Miscellaneous Paper prepared by Chris Corry, Barrister, MP 16 (2007) 29 at [78].

<sup>436</sup> Law Commission (UK), *Limitation of Actions*, Report No 270, (July 2001), 100, [4.7] – [4.9].

<sup>437</sup> See: <http://www.lawcom.gov.uk/project/limitation-of-actions/> accessed 29.09.16.

<sup>438</sup> The *Limitation Act 2010* (NZ) does not provide an extra limitation period for deeds or specialties. This previous legislation, the now repealed *Limitation Act 1950* (NZ) s 4(3) allowed a 12 year limitation period for deeds.

<sup>439</sup> But see Graham McBain, 'Abolishing Deeds, Specialties and Seals: Part 1' *Commercial Law Quarterly*, (March – May 2006) 15, at 19-25.

<sup>440</sup> Graham McBain, 'Abolishing Deeds, Specialties and Seals: Part 1' *Commercial Law Quarterly*, (March – May 2006) 15.

<sup>441</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015).

<sup>442</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 38.



have changed and developed over time, the question of whether, and to what extent, such formalities are of relevance today becomes increasingly important to consider.<sup>443</sup>

A commercial transaction may fall over because one or more of the formalities required for valid execution of a deed have not been satisfied or are in some way deficient. This may result in a transaction being held to be invalid despite the intention of the parties. This is of particular importance if a deed has been used where a contract would suffice. A defective deed may take effect as a contract but it is not advisable for practitioners to rely on 'back-up' rules.<sup>444</sup>

### **29.3. Changing business practices – increasing electronic transactions**

Electronic transactions are increasingly common in commercial practice. Where once commerce was conducted face to face with pen and paper today electronic commerce is the norm. Contracts are often negotiated by email and may be signed electronically.<sup>445</sup> Electronic (paperless) contracting, for example through auction sites like E Bay or online grocery shopping, is ubiquitous. In such cases the contract is usually formed when the person ticks a check box or clicks 'I agree'.

While electronic contracting is commonplace, electronic deeds are impossible to create in the current legal framework. There is an argument to be made that the inability to create deeds electronically is already, and will continue to be, a hindrance to commercial transactions. As such, it is prudent to consider whether the formal requirements for executing a deed should be modernised to accommodate current electronic practices or whether deeds are a relic of the past that should be abolished.

### **29.4. Changing deeds**

The formal requirements for deeds have changed through the ages. Initially, deeds only required sealing and delivery.<sup>446</sup> Signature and witnessing were not required but gradually these became almost universal.<sup>447</sup> The common law requirements for effective execution of deeds have been modified by legislation at both the federal and state / territory level in Australia. In most cases, sealing has been supplanted with signature and attestation.<sup>448</sup>

Legislation in Australia and overseas has been used to modernise or update the formal requirements for deeds. Before considering how the relevant provisions operate in Queensland it is useful to consider reforms that have been made in other jurisdictions.

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<sup>443</sup> Graham McBain, 'Abolishing Deeds, Specialties and Seals: Part 1' *Commercial Law Quarterly*, (March – May 2006) 15.

<sup>444</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 20.

<sup>445</sup> *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 at [62] – [67].

<sup>446</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015), 41 citing *Goddard's Case* (1584) 2 Co Rep 4b at 5a.

<sup>447</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015), 41.

<sup>448</sup> For example, *Property Law Act 1974* (Qld) s 45(2) will deem an instrument to be sealed if it is expressed to be sealed and has been signed and attested by one witness who is not a party to the deed.



### 29.4.1. United Kingdom

In 1989, the UK abolished any rule of law that required a deed to be written on parchment or vellum<sup>449</sup> or that required a deed to be sealed by an individual.<sup>450</sup> The legislation also provides that a validly executed deed must:

- make clear on its face that it is intended to be a deed (by describing itself as a deed or expressing itself to be executed as a deed);<sup>451</sup> and
- be signed by the individual executing the deed in the presence of a witness who attests the signature.<sup>452</sup>

These changes removed the somewhat archaic requirement for sealing but added two new requirements (the so-called ‘face value requirement’<sup>453</sup> and attestation of the signature) for valid execution of a deed. Removing the requirement for writing on paper does not, Seddon argues, open the way for electronic deeds generally. Deeds must still be signed and the signature attested.

Seddon notes that the UK legislation allows for an electronic document to be treated as a deed in specified circumstances.<sup>454</sup> A similar provision operates in Queensland under the Electronic Conveyancing National Law (Queensland). The provision provides that if a registry instrument is digitally signed in accordance with the participation rules applicable to that instrument, the requirements of any Queensland law relating to execution, signing, witnessing, attestation or sealing of documents must be regarded as having been fully satisfied.<sup>455</sup> This provision gives electronically executed documents a functional equivalence with documents executed on paper in particular circumstances. As in the UK, this approach does not open the way for electronic deeds generally.

### 29.4.2. New Zealand

The Law Commission New Zealand initially considered two alternate approaches to the reform of the law of deeds.<sup>456</sup> The first was a moderate approach designed to make only minor modifications to the existing requirements. The second was a radical reform, doing away with the concept of deeds altogether.

The Law Commission argued that it is important to retain a formal way of executing documents so that the promises within such documents can be enforced without consideration (one of the key advantages of a deed). The Law Commission worried that making contractual promises binding without consideration could make unintended inroads to the doctrine of consideration and the law of

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<sup>449</sup> The legislation removed any rule of law that restricted the substances a deed could be written on: *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 1(a).

<sup>450</sup> *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 1(b).

<sup>451</sup> *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 2(a).

<sup>452</sup> *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 3(a).

<sup>453</sup> Graham McBain, ‘Abolishing Deeds, Specialties and Seals: Part 1’ *Commercial Law Quarterly*, (March – May 2006) 30 at [12].

<sup>454</sup> Under the *Land Registration Act 2002* (UK c 9) s 91(5), a document that complies with the required formalities (for electronic disposition) will be regarded as a deed. See Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 97.

<sup>455</sup> Electronic Conveyancing National Law (Queensland) s 9(3)(b) (which is in force in Queensland under the *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld) s 4).

<sup>456</sup> Law Commission New Zealand, *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16, (1991) 19, [56] – [64].

contract.<sup>457</sup> The Law Commission noted that the concept of a 'deed' is used in legislation in many ways and that abolishing deeds would require locating and amending relevant provisions. Further, it was argued, abolishing deeds would require a new way of executing documents in a formal manner. If such execution just creates a deed by another name, then there is little point in abolishing deeds.

Ultimately, the Law Commission New Zealand favoured the moderate approach. Under the *Property Law Act 2007* (NZ) deeds are no longer required to be written on paper. However, the New Zealand provision requires that to execute a deed, an individual must sign the deed and have his or her signature witnessed by a person who is not a party to the deed who signs as a witness.<sup>458</sup> In this respect, the New Zealand reforms have followed very much in the footsteps of the UK.

### 29.4.3. Victoria

In the 1970s, Victoria amended its property legislation<sup>459</sup> to provide that an instrument executed by an individual that is expressed to be sealed, but is not so sealed, will operate as if it had been sealed.<sup>460</sup> This amendment was a response to the common law rule that the absence of a seal will render a deed void.<sup>461</sup> A strict application to the common law rule could render deeds invalid if a wax seal had been applied but over time, the seal had been damaged or lost and no trace remained or if the parties simply forgot to apply the seal.<sup>462</sup> The Victorian Chief Justice's Law Reform Committee recommended removing the requirement for a seal to be applied to make a deed executed by an individual valid.<sup>463</sup>

The Victorian provision has abolished the common law requirement for an individual to physically seal a deed if the deed itself is expressed to be sealed.<sup>464</sup> The Chief Justice's Law Reform Committee also recommended that an individual executing a deed should have their signature attested by a witness<sup>465</sup> but this was not adopted in the amended legislation.<sup>466</sup> The result is that in Victoria, a deed may be validly executed if it is signed by the maker and expressed to be sealed. The other requirements (writing on paper and delivery) must still be satisfied for the deed to be valid. As elsewhere, this does not open the door to electronic deeds.

### 29.4.4. Scotland

In 1988, the Scottish Law Commission recommended that, subject to express exceptions, any rule of the common law that requires writing to create or vary any agreement or obligation should cease to have effect.<sup>467</sup> It was noted that the formal requirements of sealing and attestation make it more likely that genuine agreements may be held to be invalid due to a purely technical defect.<sup>468</sup>

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<sup>457</sup> Law Commission New Zealand, *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16, (1991) [62].

<sup>458</sup> *Property Law Act 2007* (NZ) ss 9(2) and 9(7).

<sup>459</sup> By enacting the *Property Law (Deeds) Act 1977* (Vic).

<sup>460</sup> *Property Law Act 1958* (Vic) s 73A.

<sup>461</sup> Stanley Robinson, *The Property Law Act Victoria*, (Law Book Co, 1992) 153.

<sup>462</sup> Chief Justice's Law Reform Committee, *Sealing of Documents*, Victorian Government, 1975, 1, [2].

<sup>463</sup> Chief Justice's Law Reform Committee, *Sealing of Documents*, Victorian Government, 1975, 3.

<sup>464</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 50-51 at [2.6].

<sup>465</sup> Chief Justice's Law Reform Committee, *Sealing of Documents*, Victorian Government, 1975, 1, [2].

<sup>466</sup> Victoria, *Parliamentary Debates*, Legislative Council, 14 September 1977, (Mr Story, Attorney-General) at 9511.

<sup>467</sup> Scottish Law Commission, *Report on the Requirements of Writing*, Report No 112 (1988) 102.

<sup>468</sup> Scottish Law Commission, *Report on the Requirements of Writing*, Report No 112 (1988), 33-35.

Attestation, it was argued, serves an evidentiary function only. The Scottish Law Commission noted that '[a]nyone who can be duped into signing something can be duped into doing so before witnesses'.<sup>469</sup> The Scottish Law Commission further noted that if the requirements of who can act as a witness are heavily regulated then an authentic agreement is more likely to be held invalid due to a purely technical problem with the attestation process. On the other hand, if there are no requirements as to who can act as a witness then attestation becomes an empty and meaningless formality.<sup>470</sup>

In 1995, Scotland enacted the *Requirements of Writing (Scotland) Act 1995* implementing the Scottish Law Commission's recommendations and dramatically reshaping the requirements for the creation of contracts, obligations, trusts and the execution of deeds. Under the new law, a contract, a unilateral obligation or a trust need not be in writing except in specified circumstances.<sup>471</sup> Where writing is required, for example the creation of an interest in land, the only formal requirement is the subscription of the grantor.<sup>472</sup>

The Scottish Law Commission argued that simple subscription is a sufficient formal requirement for cheques, promissory notes, share transfers and other contracts involving moveable property, sometimes involving very large sums of money.<sup>473</sup> The Scottish Law Commission reasoned that subscription should also be sufficient for formal validity of written transactions.

In a strict sense, deeds no longer exist in Scotland. Of course, the execution of documents may continue to be witnessed but such attestation does not alter the validity of the document. Rather, it serves merely as evidence that the document was executed.

## 29.5. Electronic deeds?

The common law requires a deed to be in writing. In Queensland, 'writing' is defined as any mode of representing or reproducing words in a visible form.<sup>474</sup> A deed, however, is about writing *on paper*. This means that without modification to the common law through legislative provisions,<sup>475</sup> it is impossible to create a deed electronically.<sup>476</sup>

Under the current legislative requirements it is impossible to have an electronic deed in Queensland because a deed must be written on paper. The electronic transactions legislation provides that a transaction will not be invalid merely because it took place by electronic communications<sup>477</sup> but a deed is a physical object, not a transaction. Further, it is awkward to say that a deed 'took place' by electronic means.<sup>478</sup>

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<sup>469</sup> Scottish Law Commission, *Report on the Requirements of Writing*, Report No 112 (1988) 33 [4.15].

<sup>470</sup> Scottish Law Commission, *Report on the Requirements of Writing*, Report No 112 (1988) 33 [4.15].

<sup>471</sup> *Requirements of Writing (Scotland) Act 1995* (c 7) ss 1(1) – 1(2).

<sup>472</sup> *Requirements of Writing (Scotland) Act 1995* (c 7) s 2(a).

<sup>473</sup> Scottish Law Commission, *Report on the Requirements of Writing*, Report No 112, 34-35, [4.19].

<sup>474</sup> *Acts Interpretation Act 1954* (Qld) schedule 1 (definition of 'writing').

<sup>475</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 98.

<sup>476</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 34.

<sup>477</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 8(1).

<sup>478</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 100.

Seddon argues that there is no legislation that provides for electronic deeds.<sup>479</sup> Even a printed copy of an electronic document is at best a copy of the original and, in the case of a deed, merely evidence of the deed. This is because a deed is a physical object.

As discussed there has been a broad movement towards electronic commerce and the use of electronically negotiated agreements, promises and exchanges. Deeds, however, continue to require the formalities under the common law as modified by the PLA. Even the electronic transactions legislation in Queensland is not likely to be sufficient to allow deeds to be executed electronically.

### **29.5.1. Deeds under the *Electronic Transactions (Queensland) Act (2001)***

The *Electronic Transactions (Queensland) Act 2001* (Qld) (ETA) section 8(1) provides:

A transaction is not invalid under a State law merely because it took place wholly or partly by 1 or more electronic communications.

‘State law’ is defined to include written and unwritten law<sup>480</sup> and ‘transaction’ is defined broadly to include ‘any transaction in the nature of a contract, agreement or other arrangement’.<sup>481</sup> Seddon argues that the focus here is on the *arrangement* not on the document. A deed is a physical object and it is awkward to say a deed ‘took place’ by electronic means.<sup>482</sup> This, Seddon argues, means that it is not safe to rely on the ETA to support the validity of an electronic deed.<sup>483</sup> Of course, an electronic copy of a validly executed deed could be treated as best evidence<sup>484</sup> of the existence of a deed, but that is a different issue.

The ETA is effective for the use of electronic signatures.<sup>485</sup> However, it is unlikely that an instrument executed electronically under the ETA could satisfy the formalities to take effect as a deed at law.

If a legislature intends to allow for electronic deeds, then express words will be required to modify the common law definition of deed. It will be necessary to remove the requirement for writing on paper and to modify such other aspects of the required formalities (i.e. sealing, attestation etc.) as necessary to facilitate the valid execution of a deed by electronic means.

This leads to a question as to what approach should be used to reform the law of deeds. A moderate approach could make incremental reform. If a moderate approach is taken, it becomes necessary to consider whether the legislation should facilitate electronic deeds for all situations or just allow for the valid execution of a deed in an electronic format in specified circumstances. A radical approach could consider abolishing deeds altogether.

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<sup>479</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 97 at [2.28].

<sup>480</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) schedule 2 (definition of ‘state law’).

<sup>481</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) schedule 2 (definition of ‘transaction’).

<sup>482</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 100.

<sup>483</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 100.

<sup>484</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 16(1).

<sup>485</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 14.

## 29.6. Options for reform

The Centre is of the view that there are two options to deal with deeds in the context of electronic commerce. The first is to simplify the formal requirements for valid execution of a deed by either removing requirements that are a barrier to creating deeds electronically or by creating a *sui generis* category of electronic deeds that may be used in particular transactions subject to specific formal requirements. The second option is to abolish the deeds – that is to remove all of the formal requirements for deeds and any benefits (such as the longer limitation period). This approach may involve implementing some other legislative method to allow parties to achieve the benefits associated with a deed without actually using a deed.

### 29.6.1. Option one – Simplify the requirements for deeds

In Queensland, the requirements for the valid creation of a deed are based on the common law as modified by the PLA. The common law requires that a deed is written on paper, parchment or vellum<sup>486</sup> and that a deed must be sealed and delivered. Under the PLA, to be valid, a deed executed by an individual must be signed.<sup>487</sup> The PLA will deem an instrument to be sealed if it is:

- expressed to be a deed; or
- expressed to be sealed; and
- signed and attested by at least one witness not a party to the instrument.<sup>488</sup>

The PLA also modifies the common law concept of delivery, which refers not to physical delivery of the document but to an intention of the person making the deed to be bound by it.<sup>489</sup> It has been said that under the common law there was a presumption that sealing imported delivery. The PLA expressly removes this common law presumption.<sup>490</sup>

As discussed above, the UK and New Zealand have both removed the common law rule that requires deeds to be written on paper. However, both jurisdictions also require that the signature of the person making the deed must be attested by a witness. While the electronic signature of an individual is relatively straightforward under the ETA<sup>491</sup> attesting such an electronic signature raises some difficulty.<sup>492</sup> The ETA does not apply to particular transactions or requirements<sup>493</sup> including a requirement or permission for a document to be attested by a person other than the maker of the document.<sup>494</sup>

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<sup>486</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.6.DIV.1.30].

<sup>487</sup> *Property Law Act 1974* (Qld) s 45(1).

<sup>488</sup> *Property Law Act 1974* (Qld) s 46(2).

<sup>489</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [47.30]. This has been codified in *Property Law Act 1974* (Qld) s 47(3) (definition of ‘delivery’).

<sup>490</sup> *Property Law Act 1974* (Qld) s 47(1); Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [47.30].

<sup>491</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 14.

<sup>492</sup> Adrian McCullah, Peter Little & William Caelli, ‘Electronic Signatures: Understand the Past to Develop the Future’, (1998) 21(2) UNSWLJ 452 at 464.

<sup>493</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 7A.

<sup>494</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 7A and schedule 1 s 6.

Special software would be required to accommodate electronic attestation. This means that electronic deeds will require either a form of deemed sealing that does not involve attestation or removal of the requirement for sealing altogether.

Victoria has removed the requirement for an individual to seal a deed (provided the deed is expressed to be sealed)<sup>495</sup> and does not require a signature to be attested for a deed to be validly executed.<sup>496</sup> However, the Victorian legislation does not modify the common law with respect to writing on paper.

Each of the modifications discussed above, taken together, could pave a way for electronic deeds. However, aside from Scotland that has abolished the requirement for writing in most situations, there is no jurisdiction that has brought these various elements together in a way that allows deeds to be valid if drafted and executed electronically.

A moderate approach to reforming the law of deeds could merely simplify the existing formalities for valid creation of deeds. In Queensland, this would require a number of legislative changes including:

- express words in the legislation removing the common law requirement for deeds to be in writing on paper; and
- simplification of the deemed sealing provisions by removing the need for a signature to be attested or removing the need for sealing altogether; and
- expressly allowing for the electronic execution of an electronic deed.

Within this approach, there are really two variations. The first is to modify the formal requirements for all new deeds. This would mean that deeds would no longer require writing on paper, a seal (or deemed sealing by attestation) and would allow for deeds to be executed electronically.

The second variation is a more modest reform that would leave the existing rules in place for deeds but provide for the creation of a new type of deed. Effectively, this new type of deed would be *sui generis*. An electronic deed would require express words and the clear intention of the parties to create a deed electronically.

### **29.6.2. Option two – abolish deeds**

A more radical approach to reform the law of deeds is to abolish deeds altogether. This could be done in a way similarly to the Scottish approach by:

- abolishing the need for contracts, obligations and trusts to be created in writing except in limited circumstances; and
- providing that where writing is required, the only formality required for the writing to be valid is the subscription of the grantor.

Alternatively, this approach could be achieved by removing the required formalities for deeds and removing the special benefits associated with deeds, effectively making deeds the equivalent of a contract. As mentioned, such an approach would likely require alternative methods of implementing some of the more beneficial aspects of deeds (i.e. as a way of making a promise binding without consideration). While this approach is radical, it has been noted that the differences between deed

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<sup>495</sup> *Property Law Act 1958 (Vic)* ss 73-73A.

<sup>496</sup> *Property Law Act 1958 (Vic)* s 73.

and contract have become a trap for the unwary.<sup>497</sup> It has been argued that deeds no longer fulfil their initial purposes – which were: to prevent fraud (precautionary); evidence the transaction (evidentiary); and make parties consider the terms of the instrument carefully before executing (cautionary).<sup>498</sup>

There is an argument that the perceived benefits of using a deed need not be lost if deeds are abolished.<sup>499</sup> The consequences of such abolition, argues one commentator, are likely to be ‘relatively slight’ provided there is some legislative amendment.<sup>500</sup>

### Questions

**81 Should deeds be abolished?**

**82 If not, should the formal requirements for deeds be modified to allow the creation of electronic deeds?**

**83 If yes, should the legislation modify the formal requirements for all deeds or create a sui generis category of electronic deeds?**

**84 Should deeds continue to have the longer limitation period of 12 years?**

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<sup>497</sup> For example, *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245.

<sup>498</sup> Graham McBain, ‘Abolishing Deeds, Specialties and Seals: Part 1’ *Commercial Law Quarterly*, (March – May 2006) 15.

<sup>499</sup> Graham McBain, ‘Abolishing Deeds, Specialties and Seals: Part 2’ *Commercial Law Quarterly*, (June – Aug 2006) 3, 7-8.

<sup>500</sup> Graham McBain, ‘Abolishing Deeds, Specialties and Seals: Part 2’ *Commercial Law Quarterly*, (Jun – Aug 2006) 9 at [19].



## 30. Section 44 – Description and form of deeds

### 30.1. Overview and purpose

#### 44 Description and form of deeds

- (1) A deed between parties, to effect its objects, has the effect of an indenture although not indented or expressed to be indented.
- (2) Any deed, whether or not being an indenture, may be described (at the commencement of the deed or otherwise) as a deed simply, or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected.

From a historical perspective, there are two kinds of deeds – a deed poll and an indenture.<sup>501</sup> Generally, a deed poll would be unilateral and historically had edges that were straight or polled.<sup>502</sup> An indenture is a deed *inter partes*. Historically, a copy of the deed was prepared for each party and was then cut with a wavy line<sup>503</sup> or indented (as a fraud protection mechanism).

The practice of physically indenting deeds has not been followed for some time. In 1973, the QLRC noted that the requirement to indent a deed, though dispensed with in 1845 in the United Kingdom, remained at least technically necessary in Queensland, even if rarely performed.<sup>504</sup>

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

A deed was indented when there were several parties to a deed. A copy of the deed would be made for each party from the same piece of parchment, which was then cut in a way to make it difficult to substitute a forged deed for a real deed.<sup>505</sup>

Referring to the NSW equivalent<sup>506</sup> of section 44(1) of the PLA, Seddon argues that the word ‘deed’ has replaced the word ‘indenture.’ The practice of indenting would be almost unknown today but a modern equivalent is a deed executed in counterparts.<sup>507</sup>

It has been stated that section 44(2) of the PLA was included ‘out of an abundance of caution.’<sup>508</sup> The QLRC noted that a deed should be recognised for what it purports to do rather than its physical form

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<sup>501</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 14.

<sup>502</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) 30.

<sup>503</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

<sup>504</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) 30-31.

<sup>505</sup> Graham McBain, ‘Abolishing Deeds, Specialties and Seals: Part 1’ *Commercial Law Quarterly*, (March – May 2006), 15 at 18.

<sup>506</sup> *Conveyancing Act 1919* (NSW) s 38(2)-(3).

<sup>507</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

<sup>508</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [44.60]).



or technical description.<sup>509</sup> Such sentiment is still relevant today given the reforms discussed above at paragraphs 29.5 to 29.6.

### 30.3. Other jurisdictions

#### 30.3.1. Australian jurisdictions

Most other jurisdictions in Australia have a provision that deems a deed to be an indenture even if it is not indented or expressed to be indented.<sup>510</sup> The equivalent provision in Victoria,<sup>511</sup> Western Australia<sup>512</sup> and the Northern Territory<sup>513</sup> is virtually identical to section 44(2).

#### 30.3.2. New Zealand

In 2007, New Zealand substantially reformed their property law with the adoption of the *Property Law Act 2007* (NZ). The previous property act<sup>514</sup> had contained a provision stating that indenting is not necessary but the provision was not retained in the 2007 Act. The New Zealand Law Commission noted that indenting had already been abolished and argued that it is not necessary to repeat the abolition.<sup>515</sup>

### 30.4. Options

The first option is to repeal section 44(1). The need to physically indent a deed was abolished in the UK in 1845.<sup>516</sup> The QLRC submitted<sup>517</sup> that although indenting was still technically required in Queensland until 1974 it was not widely practised. Seddon argues that removing the term ‘indenture’ from the legislation would have no effect other than to remove a source of puzzlement.<sup>518</sup>

A second option is to replace section 44(1) with a statement that a document may be treated as a deed regardless of its form or what it is called by the parties to it. In Queensland, the amendment of an Act (e.g. repealing a section) does not revive anything not in force or existing at the time of the repeal.<sup>519</sup> This means that repealing section 44(1) will not revive a requirement for deeds to be indented.

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<sup>509</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) 31.

<sup>510</sup> *Conveyancing Act 1919* (NSW) s 38(2); *Property Law Act 1958* (Vic) s 56(2); *Law of Property Act 1936* (SA) s 34(2); *Law of Property Act 1969* (WA) s 12; *Conveyancing and Law of Property Act 1884* (Tas) s 61(1)(d); *Law of Property Act* (NT) s 46.

<sup>511</sup> *Property Law Act 1958* (Vic) s 57.

<sup>512</sup> *Law of Property Act 1969* (WA) s 12.

<sup>513</sup> *Law of Property Act* (NT) s 46(2).

<sup>514</sup> *Property Law Act 1952* (NZ) s 4(3).

<sup>515</sup> Law Commission New Zealand, *A New Property Law Act*, Report No 29 (1994) 266 [170].

<sup>516</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) 30-31.

<sup>517</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) 30-31.

<sup>518</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

<sup>519</sup> *Acts Interpretation Act 1954* (Qld) s 20(2)(a).

In regard to section 44(2), Duncan & Vann<sup>520</sup> note that the section does not require a deed to be expressed as a deed or as any of the other types of instruments listed in the subsection, provided the instrument complies with the other requirements for a deed. It has been argued that the intention to create a deed is essentially a fourth requirement (after: writing on paper; appropriate execution; and delivery). The Courts will use an objective approach to determining the existence of the requisite intention to create a deed. The words used by the parties are not determinative.<sup>521</sup>

### **Questions**

**85 Are there any reasons to retain section 44(1) of the PLA?**

**86 Are there any reasons to retain section 44(2) of the PLA?**

**87 If section 44 of the PLA is removed, is there a need to include a provision about the form or description of a deed?**

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<sup>520</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [44.60], citing *Associated Broadcasting Services Ltd v Comptroller of Stamps* (1986) ATC 4188 at 4192.

<sup>521</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.6.DIV.1.30] to [PLA.PT. DIV. 1. 150].

## 31. Section 45 – Execution of deeds by individuals

### 31.1. Overview and purpose

#### 45 Formalities of deeds executed by individuals

- (1) Where an individual executes a deed, the individual shall either sign or place the individual's mark upon the same and sealing alone shall not be sufficient.
- (2) An instrument expressed—
  - (a) to be an indenture or a deed; or
  - (b) to be sealed;shall, if it is signed and attested by at least 1 witness not being a party to the instrument, be deemed to be sealed and, subject to section 47, to have been duly executed.
- (3) No particular form of words shall be requisite for the attestation.
- (4) A deed executed and attested under this section may in any proceedings be proved in the manner in which it might be proved if no attesting witness were alive.
- (5) Nothing in this section shall affect—
  - (a) the execution of deeds by corporations; or
  - (b) how instruments are validly executed under the *Land Title Act 1994*; or
  - (c) any deed executed before the commencement of this Act.

Section 45 of the PLA modifies the common law with respect to the execution of deeds by an individual. At common law, a deed was required to be sealed and delivered.<sup>522</sup> Section 45(1) modifies this by requiring a signature or a mark on the deed. In addition, section 45(2) will deem an instrument to be sealed if the instrument is expressed to be a deed or expressed to be sealed and the signature has been attested by at least one witness who is not a party to the deed.

The QLRC noted that the requirement for sealing had 'sunk to a level at which any indication of a seal on a document signed with the intention of executing it as a deed is sufficient'<sup>523</sup> to satisfy the requirement of sealing. Section 45(2) addresses this issue by providing an alternative to physical sealing that has the same legal effect but without the artificial contrivance.

The QLRC proposed that sealing would continue to be required for a deed to be valid but intended the deeming effect of section 45(2) to address the fact personal seals are no longer used.<sup>524</sup> A signature witnessed and attested by a third party is easy to achieve and less artificial than placing a meaningless seal (or some mark meant to represent a seal) on a document.

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<sup>522</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) 31.

<sup>523</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) 31.

<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) 31-32.

The QLRC did not intend to make attestation a formal requirement for a deed to be validly executed (as is the case in NSW.)<sup>525</sup> Despite the QLRC's intention, attestation of the signature on a deed has become a de-facto requirement for execution of a deed by an individual.

## 31.2. Is there a need for reform?

The effect of the common law and the PLA is that in Queensland, to be valid, a deed executed by an individual must be:

- written on paper;
- signed;
- sealed or deemed to be sealed (if expressed to be a deed or to be sealed and the signature is attested by at least one witness who is not a party to the deed); and
- delivered (as required under section 47).

These formalities make it impossible for a deed to be created electronically and executed by an individual electronically. Assuming that facilitating electronic deeds is a worthwhile object, the formal requirements for an individual to validly execute a deed will require modification. As discussed above, this may be done by either amending the formal requirements for all deeds or by creating a specific category of electronic deeds that is subject to special requirements.

### 31.2.1. Electronic signature and attestation

Assuming that the legislation is modified to allow a deed to be created electronically and digitally signed, the question of sealing remains relevant. As discussed above, the ETA allows for electronic signatures<sup>526</sup> and will not invalidate a transaction merely because it took place by electronic communications.<sup>527</sup>

The ETA excludes particular types of transactions, requirements or permissions, including a requirement or permission for a document to be attested, authenticated, verified or witnessed by a person.<sup>528</sup> As mentioned, attesting a digital signature may be difficult without appropriate software.<sup>529</sup> Taken together, this means that deemed sealing cannot take place electronically under the ETA if the deeming provision requires a signature to be attested.

This means that the either the requirement for sealing must be removed completely or a different method of deemed sealing must be created. The Victorian approach that allows a document which is expressed to be sealed to operate and take effect as if it had been so sealed<sup>530</sup> is a possible approach for option to achieve this outcome.

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<sup>525</sup> *Conveyancing Act 1919* (NSW) s 38(1) provides that every deed shall be signed as well as sealed and attested by at least 1 witness not being a party to the deed. A deed will be deemed sealed if it is expressed to be an indenture, a deed or to be sealed and it is signed and attested: *Conveyancing Act 1919* (NSW) s 38(3).

<sup>526</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 14.

<sup>527</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 8(1).

<sup>528</sup> *Electronic Transactions (Queensland) Act 2001* s 7A(1) and schedule 1 item 6.

<sup>529</sup> Adrian McCullah, Peter Little & William Caelli, 'Electronic Signatures: Understand the Past to Develop the Future', (1998) 21(2) UNSWLJ 452, 464.

<sup>530</sup> *Property Law Act 1958* (Vic) s 73A.

## 31.3. Other jurisdictions

### 31.3.1. United Kingdom

In 1989, the UK amended the formalities for the valid execution of deeds by individuals. The legislation abolished any rule of law that either limited the substances on which a deed could be written<sup>531</sup> or required a deed to be sealed.<sup>532</sup> However, as discussed above, the UK legislation added a requirement that the signature of the person executing the deed must be witnessed and attested by a person who is not a party to the deed.

### 31.3.2. New Zealand

The *Property Law Act 2007* (NZ) provides that to execute a deed, an individual must sign the deed and have his or her signature witnessed by a person who is not a party to the deed who signs as a witness.<sup>533</sup> The deed is not required to be written on paper but must be in writing.<sup>534</sup>

### 31.3.3. Victoria

In Victoria, the *Property Law Act 1958* (Vic) provides that a deed executed by an individual must be signed<sup>535</sup> but does not require the deed to be sealed (if it is expressed to be sealed) or for the signature to be attested.<sup>536</sup>

To the extent it has not been modified by the *Property Law Act 1958* (Vic) the common law of deeds still applies in Victoria. This means that a deed must be in writing on paper.

### 31.3.4. Western Australia

In WA, sealing is not required<sup>537</sup> when an individual executes a deed. However, a deed is not validly executed unless it is signed and attested by at least one witness who is not a party to the deed.<sup>538</sup>

## 31.4. Options

Queensland could adopt an approach that expressly removes the requirement for deeds to be written on paper and that removes the need for a seal or deemed sealing when a deed is executed by an individual. If this approach is taken, it may be necessary that the instrument include express words that the parties intend the instrument to be legally binding.

Such an approach could be applied to all deeds or used as a way to give electronically drafted and executed documents a functional equivalence with paper deeds.

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<sup>531</sup> *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 1(a).

<sup>532</sup> *Law of Property (Miscellaneous Provisions) Act 1989* (UK c. 34) s 1(b).

<sup>533</sup> *Property Law Act 2007* (NZ) ss 9(2) and 9(7).

<sup>534</sup> *Property Law Act 2007* (NZ) s 9(1)(a).

<sup>535</sup> *Property Law Act 1958* (Vic) s 73.

<sup>536</sup> *Property Law Act 1958* (Vic) s 73A. The instrument must be executed on or after 1 September 1989, which is the date of commencement of section 4 of the *Property Law (Deeds) Act 1977* (Vic). See Stanley Robinson, *The Property Law Act Victoria*, (1992) Law Book Co, 153.

<sup>537</sup> Except in the case of a deed executed by a corporation: *Property Law Act 1969* (WA) s 9(2).

<sup>538</sup> *Property Law Act 1969* (WA) s 9(1).

## Questions

- 88** Should the PLA be amended to remove the requirement for deeds to be written on paper?
- 89** Should the PLA be amended so that a document expressed to be sealed or expressed to be legally binding on the parties is sufficient for valid creation of a deed, without the need for actual or deemed sealing? If so, what form of words should be used in the deed?
- 90** If a modified approach is adopted to the execution of deeds by individuals, should the approach apply to all deeds or just to deeds where the parties specifically desire or intend to create an electronic deed?

## 32. Section 46 – Execution of deeds by corporations

### 32.1. Overview and purpose

#### 46 Execution of instruments by or on behalf of corporations

- (1) In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed to the deed in the presence of and attested by its clerk, secretary or other permanent officer or his or her deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices, the deed shall, subject to section 47, be deemed to have been executed under the requirements of this section, and to have taken effect accordingly.
- (2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation.
- (3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, the person may as attorney execute the conveyance by signing the person's name in such a way as to show that the person does so as attorney of the corporation in the presence of at least 1 witness, and in the case of a deed by executing the same under section 45, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.
- (4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose, either generally or in the particular instance, by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person, and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.
- (5) Subsections (1) to (4) apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.
- (6) Despite anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs of the corporation, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.
- (7) This section does not affect how instruments are validly executed under the *Land Title Act 1994*.
- (8) In this section—  
**purchaser** shall include the registrar and any other person who because of any Act has the power, duty, or function of registering or recording instruments including instruments executed by corporations.

Section 46 of the PLA deals with the way a deed may be executed by a corporation. Under section 46(1), a purchaser can rely on a deed as duly executed by a corporation if a seal purporting to be the corporation's seal has been affixed to the deed in the presence of and attested by persons purporting to be the company clerk, secretary or other officer and a director or member of the governing body

of the corporation. This provision will apply even if the corporation's constitution provides other requirements for affixing the corporate seal.<sup>539</sup>

The QLRC intended this provision to function as a consumer protection clause to 'protect a purchaser from the corporation irrespective of the particular provisions of [the corporation's] constitution' in regard to the execution of deeds.<sup>540</sup> The provision has the effect of relieving 'a purchaser of the need to scrutinise the provisions of the articles [of the corporation] for unorthodox requirements as to sealing'<sup>541</sup> and allows the purchaser to rely on an instrument sealed in accordance with section 46.

Section 46(2) provides that a corporation may appoint an agent to execute documents not under seal. Section 46(3) provides that where a person is authorised under a power of attorney or some other power to convey an interest in property on behalf of a corporation, that person may execute the conveyance by signing as an attorney in front of an attesting witness. The sub-section further provides that in the case of a deed, the person may execute the deed under section 45.

Section 46(4) provides that where a corporation is authorised under a power of attorney or some other power to convey an interest in property on behalf of a person (including another corporation (the **first person**)) the corporation may authorise a person (the **second person**) to execute the deed or other instrument in the name of the first person. A deed that appears to be so executed will be deemed to have been executed by a duly authorised person.

Section 46(5) provides that paragraphs (1) to (4) apply to all instruments executed after the commencement of the PLA and to all powers or authorisations of a person, whether given before or after the commencement of the Act.

Section 46(6) preserves other methods of execution and attestation of instruments authorised by law or the governing documents of the corporation itself. Section 46(7) provides that nothing in section 46 affects the way instruments are validly executed under the *Land Title Act 1994* (Qld).<sup>542</sup>

## 32.2. Is there a need for reform?

### 32.2.1. Protection for honest purchasers

Section 46(1) does not actually stipulate how a deed must be executed by a corporation. Instead, it says that a purchaser for valuable consideration may assume a deed executed or purported to be executed by a corporation is 'duly executed' if the deed has been executed in accordance with the provision. Seddon notes that the section (and its equivalent in other jurisdictions) may arguably be

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<sup>539</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.46.30].

<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) 32.

<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) 32.

<sup>542</sup> The *Land Title Act 1994* (Qld) provides that an instrument is validly executed by a corporation if it is executed in a way permitted by law or sealed with the corporation's seal in accordance with section 46 of the *Property Law Act 1974* (Qld): *Land Title Act 1994* (Qld) s 161(1).



construed as applying only to deeds dealing with property.<sup>543</sup> Under this view, rather than stating how a corporation should execute deeds generally, section 46(1) has a narrow and limited purpose of protecting purchasers. This is consistent with the intentions of the QLRC.<sup>544</sup>

Generally, deeds are used in transactions where there is no consideration or where consideration is likely to be an issue. Duncan and Vann note that a purchaser in the sense of section 46(1) is likely to have provided valuable consideration. This means such a purchaser is unlikely to need to resort to the protection in section 46(1) because even if the document fails as a deed, it is likely to bind the corporation contractually.<sup>545</sup>

Given this, it is necessary to consider whether the section actually serves a useful purpose. It may be more useful if the section prescribed the methods by which a corporation may execute a deed and expressly set out the assumptions that a person entering into an agreement with a corporation could rely on. Such an approach is in place under the *Corporations Act 2001* (Cth).<sup>546</sup> Section 46 is largely drawn from the equivalent UK provisions contained in the 1925 UK Act<sup>547</sup> and significantly predates the introduction of the *Corporations Act 2001* (Cth).

### **32.2.2. Interaction with the *Corporations Act 2001* (Cth)**

Under the *Corporations Act 2001* (Cth), a company<sup>548</sup> is not required to have a common seal.<sup>549</sup> A company under the *Corporations Act 2001* (Cth) may use section 127 of that Act to execute a document as a deed (with or without the use of a seal)<sup>550</sup> and does not need to rely on section 46 of the PLA.<sup>551</sup> The *Corporations Act 2001* (Cth) also provides that section 127 does not limit the ways in which a company may execute a deed. Combined with section 46(6) of the PLA, this means that the provisions in the *Corporations Act 2001* (Cth) and in the PLA with regard to the execution of deeds are able to operate concurrently.

The *Corporations Act 2001* (Cth) allows a person to assume that a document has been duly executed by a company if it appears to have been signed under section 127(1) (without a seal) or section 127(2)

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<sup>543</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015), 81-82, [2.20].

<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) 32.

<sup>545</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.46.210].

<sup>546</sup> *Corporations Act 2001* (Cth) ss 127-129.

<sup>547</sup> *Law of Property Act 1925* (UK) (c 20 Geo 5) s 74.

<sup>548</sup> As defined in the *Corporations Act 2001* (Cth) s 9 (definition of 'company').

<sup>549</sup> *Corporations Act 2001* (Cth) s 123.

<sup>550</sup> Execution of a document without a common seal requires the signature of two directors, a director and a secretary or if there is only a sole director, that director: *Corporations Act 2001* (Cth) s 127(1); Execution with a seal (if a company has a seal) requires affixing the seal as witnessed by two directors, a director and a secretary or if there is only a sole director, that director: *Corporations Act 2001* (Cth) s 127(2). A company may execute a deed in accordance with either s 127(1) or s 127(2) if the document is expressed to be a deed.

<sup>551</sup> *Property Law Act 1974* (Qld) s 46(6).

(with a seal) of that Act.<sup>552</sup> If a document is executed electronically by a company under the Commonwealth equivalent of the ETA,<sup>553</sup> the person is not able to make such assumptions.<sup>554</sup>

It has been noted that the protections under the *Corporations Act 2001* (Cth), which apply to a 'person' are wider than those under the PLA, which only apply to a purchaser.<sup>555</sup>

Seddon, in *Seddon on Deeds*<sup>556</sup> provides a detailed explanation of the method of execution of deeds by companies under the *Corporations Act 2001* (Cth) and other types of corporations.

### 32.2.3. Attestation of the seal

Duncan and Vann note that the attestation of the clerk, secretary or other officer of a corporation required by section 46(1) of the PLA is part and parcel of the sealing itself. The attestation referred to is not attestation of the execution of the deed but of the affixing of the seal. If the execution of the deed must also be attested (perhaps due to a statutory requirement) a second attesting signature will also be required.<sup>557</sup>

While this may not present a significant problem, it is one further formal requirement that may lead to a failure of a document to take effect as a deed even when there is a clear intention of the parties to create a deed.

## 32.3. Other jurisdictions

Victoria,<sup>558</sup> NSW<sup>559</sup> and Western Australia<sup>560</sup> all have provisions that are virtually identical to the Queensland legislation (all having been drawn from the equivalent UK legislation).<sup>561</sup> As in Queensland, these provisions function as a protection for purchasers if a deed is executed in a particular way. Thus it is only by inference that the provisions set out the way that a body corporate should execute a deed.<sup>562</sup>

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<sup>552</sup> *Corporations Act 2001* (Cth) s 129(5)-(6).

<sup>553</sup> *Electronic Transactions Act 1999* (Cth) s 8 (A transaction is not invalid because it took place by one or more electronic means) and s 10 (Signature requirement can be satisfied electronically if a method is used to identify a person and their intention).

<sup>554</sup> This is because a person is only entitled to assume a document has been duly executed if the document appears to have been signed in accordance with section 127(1) or (2) of the *Corporations Act 2001* (Cth).

<sup>555</sup> Section 46(1) of the *Property Law Act 1974* (Qld) only protects a purchaser from the company who acquires their interest in good faith for valuable consideration: *Property Law Act 1974* (Qld) s 46(1) and Schedule 6 (definition of 'purchaser'). See also Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.46.30].

<sup>556</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [2.10] – [2.23].

<sup>557</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.46.90].

<sup>558</sup> *Property Law Act 1958* (Vic) s 74.

<sup>559</sup> *Conveyancing Act 1919* (NSW) s 51A.

<sup>560</sup> *Property Law Act 1969* (WA) s 10.

<sup>561</sup> *Law of Property Act 1925* (UK) (c 20 Geo 5) s 74.

<sup>562</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [2.19].

### 32.3.1. South Australia and Tasmania

South Australia and Tasmania take a different approach to the execution of deeds by corporations. In South Australia, a body corporate executes a deed by affixing the common seal of the body corporate to the deed in accordance with the rules governing the use of the common seal.<sup>563</sup>

Prior to 2000, the Tasmanian property legislation contained a provision very similar to section 46 of the PLA.<sup>564</sup> Tasmania amended the legislation in 2000, borrowing from the South Australian approach.<sup>565</sup> The current provision states that a body corporate is not required to execute a deed by affixing its common seal unless it is required to do so under the enactment by which the body corporate is created or by another law relating to the execution of deeds.<sup>566</sup>

Both Tasmania and South Australia provide that a deed may be executed on behalf of a party to the deed by an attorney acting under an authority granted by deed.<sup>567</sup>

### 32.3.2. New Zealand

Prior to the commencement of the *Property Law Act 2007* (NZ), New Zealand had a provision that operated similarly to the Queensland provision in that a deed executed by a corporation in accordance with that Act would be deemed duly executed.<sup>568</sup> When the law was reformed in 2007, the new provision changed the way bodies corporate execute deeds. The *Property Law Act 2007* (NZ) provides that a body corporate executes a deed if the deed is signed in the name of the body corporate by at least two directors.<sup>569</sup> Alternatively, the deed may be executed by a sole director (if only one)<sup>570</sup> or a director and another person authorised under the body corporate's constitution<sup>571</sup> if the signature is witnessed in accordance with the relevant provision.<sup>572</sup>

Similarly to Queensland, the New Zealand provision preserves any other mode of execution of a deed provided in another enactment relating to the execution of deeds by the body corporate.<sup>573</sup> Unlike Queensland, however, the New Zealand legislation also makes specific provision for deeds executed by foreign corporations or the Crown.<sup>574</sup>

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<sup>563</sup> *Law of Property Act 1936* (SA) s 41.

<sup>564</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 63A.

<sup>565</sup> The Tasmanian provisions of *Conveyancing and Law of Property Act 1884* (Tas) s 63 were modelled on the South Australia provisions. See South Australia, *Parliamentary Debates*, House of Assembly, 30 March 2000, (Mr Llewellyn) on the second reading of the *Strata Titles (Miscellaneous Amendments) Bill 1999*.

<sup>566</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 63.

<sup>567</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 63(1)(c)(i); *Law of Property Act 1936* (SA) s 41(1)(c)(i).

<sup>568</sup> *Law of Property Act 1952* (NZ) s 5(1). The methods were affixing of the common seal or execution by a duly appointed attorney. See also Law Commission New Zealand, *The Property Law Act 1953 – A Discussion Paper*, Preliminary Paper No 16 (1991) [65].

<sup>569</sup> *Property Law Act 2007* (NZ) s 9(3)(a)(ii).

<sup>570</sup> *Property Law Act 2007* (NZ) s 9(3)(a)(i).

<sup>571</sup> *Property Law Act 2007* (NZ) s 9(3)(a)(iii).

<sup>572</sup> *Property Law Act 2007* (NZ) s 9(7).

<sup>573</sup> *Property Law Act 2007* (NZ) s 9(4).

<sup>574</sup> *Property Law Act 2007* (NZ) ss 9(5)-(6).

## 32.4. Options

It is understood that most corporations in Australia will execute documents in accordance with section 127 of the *Corporations Act 2001* (Cth). The approach is relatively simple and provides important safeguards for a person relying on the document as duly executed.

There may be some merit in simplifying the approach to the execution of deeds for corporations in Queensland by adopting an approach that mimics the method and protections offered by the *Corporations Act 2001* (Cth).

A revised approach may also require consideration of the way that foreign corporations or corporations that are not 'companies' within the meaning of the *Corporations Act 2001* (Cth) should execute deeds in Queensland. Currently the PLA preserves other methods of execution of deeds by a corporation as authorised by law, practice or the instrument constituting the corporation.<sup>575</sup>

Any approach adopted for execution of deeds by a corporation should be considered in line with the approach for execution of a deed by an individual.

### Questions

- 91 Should the PLA be amended to simplify the requirements for valid execution of a deed by a corporation? If yes, what should the requirements be?**
- 92 Is section 46(6) of the PLA sufficient to allow the execution of instruments by corporations not 'companies' under the Corporations Act 2001 (Cth) and foreign corporations?**
- 93 Should the PLA expressly provide for execution of deeds by foreign corporations and by corporations that are not companies under the Corporations Act 2001 (Cth)? If yes, what should the approach be?**

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<sup>575</sup> *Property Law Act 1974* (Qld) s 46(6).

## 33. Section 47 – Delivery of deeds

### 33.1. Overview and purpose

#### 47 Delivery of deeds

- (1) After the commencement of this Act, execution of an instrument—
- (a) in the form of a deed; or
  - (b) in the form provided in section 45 or 46;
- shall not of itself import delivery, nor shall delivery be presumed from the fact of such execution only, unless it appears that execution of the document was intended to constitute delivery of the document.
- (2) Subject to subsection (1), delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery.
- (3) In this section—
- delivery** means the intention to be legally bound either immediately or subject to fulfilment of a condition.

Section 47 of the PLA codifies common law principles in relation to delivery but also modifies the common law in some respects. At common law there is a presumption that the execution of an instrument as a deed imports delivery.<sup>576</sup> This is because delivery refers to an intention to be bound and a person executing a deed is demonstrating an intention to create a deed. However, the PLA expressly modifies this aspect of the common law.

Delivery has been retained as a requirement for valid execution of a deed. At common law, delivery refers to an intention to be bound. It is a state of mind, not the physical handing over of the document.<sup>577</sup> This position is retained by section 47 with the definition of ‘delivery’ included in section 47(3).

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

Seddon notes that the intention to create a deed is different from the intention to be immediately bound, which is the definition of delivery.<sup>578</sup> This is one reason that the PLA has removed the common law presumption that execution imports delivery.

Delivery of a deed is inferred from the circumstances. *400 George St*<sup>579</sup> revolved around a dispute over whether an instrument expressed to be a deed was in fact a deed. The issue in that case involved a lease and an agreement for a lease which had been executed by one side. If the instrument in question was in fact validly executed and delivered as a deed, the party that had executed it would be unable to withdraw from the lease. In the initial case, the trial judge found that the instrument was not a deed. On appeal, Muir JA stated that in determining whether an instrument is a deed or a

<sup>576</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [47.30].

<sup>577</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [3.2].

<sup>578</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) [3.2].

<sup>579</sup> *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245.

contract, the task at hand is to decide what is meant by the words in the instrument when viewed in the context in which the instrument was entered into.<sup>580</sup> Muir went on to hold that the words ‘executed as a deed,’ ‘signed sealed and delivered’ and ‘by executing this deed’ demonstrated that the parties intended to create a deed. However, Muir found the deed did not take effect because it was never delivered.<sup>581</sup> The evidence in the case pointed to a clear intention that both parties were to become bound at the same time. The side that executed the deed did not intend to be bound until the other side was also bound. As the other side did not execute the deed, the requisite intention to be legally bound was not present.

### 33.3. Other jurisdictions

#### 33.3.1. NSW, ACT and Victoria – delivery under the common law

The property legislation in New South Wales and the Australian Capital Territory is silent on the issues of delivery of deeds.<sup>582</sup> However, this does not mean that delivery is not required but rather that delivery is determined under the common law. It has been noted that in NSW, delivery continues to be essential to the validity of a deed.<sup>583</sup>

The Victorian legislation does not specify that delivery is required. As in NSW, this means that delivery continues to be governed by the common law. The Victorian legislation only addresses delivery to abolish the common law rule that said an agent cannot deliver a deed on behalf of a principal unless authorised to do so by an instrument sealed by the principal.<sup>584</sup>

#### 33.3.2. Western Australia – formal delivery not required

The WA legislation provides that ‘formal delivery’ is not necessary for a deed to be validly executed.<sup>585</sup> However, Seddon notes<sup>586</sup> that this has not been interpreted as an abolition of delivery but rather a relaxation of the need for delivery to be formal in the sense of physical delivery. An intention to be bound is still required for a deed to be valid in Western Australia.

#### 33.3.3. Tasmania and South Australia – delivery not required

In Tasmania and South Australia, delivery is not qualified by the word ‘formal’. The legislation says that ‘Delivery and indenting are not necessary in any case.’<sup>587</sup> While this may do away with the common law concept of delivery, the intention of the parties still remains an important factor.

The legislation provides that despite a technical defect in the execution, a deed will be taken to be valid if there is evidence external to the deed that the party intended to be bound to it.<sup>588</sup> The

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<sup>580</sup> *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245, [36].

<sup>581</sup> *400 George St (Qld) Pty Limited v BG International Limited* [2010] QCA 245, [57].

<sup>582</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 119, [3.3].

<sup>583</sup> Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales*, (Lexis Nexis Butterworths, 2012-2013) at [30700.15]. See also GP Stuckey, *The Conveyancing Act 1919-1969*, (Law Book Company, 1970) at 89.

<sup>584</sup> *Property Law Act 1958* (Vic) s 73B.

<sup>585</sup> *Property Law Act 1969* (WA) s9(3).

<sup>586</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015), 120 [3.3], citing *Monarch Petroleum NL v Citco Australia Petroleum Ltd* [1986] WAR 310 at 353-355.

<sup>587</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 63(3); *Law of Property Act 1936* (SA) s 41(3).

<sup>588</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 63(4); *Law of Property Act 1936* (SA) s 41(4).

legislation further provides that despite any other law, an instrument will be a deed if it is executed in accordance with the section and:

- the instrument is expressed to be a deed; or
- the instrument is expressed to be sealed and delivered (or for an individual, sealed); or
- from the circumstances of the execution or the nature of the instrument, the parties intend it to be a deed.<sup>589</sup>

### 33.4. Options

The QLRC introduced section 47 of the PLA specifically to reform what were viewed as the unsatisfactory aspects of the law of delivery of deeds.<sup>590</sup> At common law, execution of a document in the form of a deed is taken as prima facie evidence of an intention to be bound and in this regard, such execution imports delivery. The QLRC criticized this approach, favouring instead an approach where the question of whether a deed had been delivered depended on evidence of an intention to be bound rather than on evidence of an intention not to be bound on execution.<sup>591</sup>

The Queensland provision was criticised by the Law Reform Commissioner of Victoria.<sup>592</sup> However, it is not clear that there is any problem with the section. Unlike Tasmania and South Australia,<sup>593</sup> Queensland does not have a 'saving' provision that will look to the intention of the parties rather than the strict compliance with the formalities when determining the existence of a deed.

#### Questions

**94 Are there any issues with section 47 that have arisen in practice?**

**95 Should the Queensland legislation include a provision similar to Tasmania and South Australia that take a deed as a valid if there is evidence external to the deed that the parties intended the agreement to take effect as a deed (even if the formal requirements have not been satisfied)?**

<sup>589</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 63(5); *Law of Property Act 1936* (SA) s 41(5).

<sup>590</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) 33.

<sup>591</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) 34.

<sup>592</sup> Law Reform Commissioner Victoria, *Delivery of Deeds*, Report No 10 (1980) [37] – [38].

<sup>593</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 63(4); *Law of Property Act 1936* (SA) s 41(4).

## 34. Section 48 – Construction of expressions

### 34.1. Overview and purpose

#### 48 Construction of expressions used in deeds and other instruments

- (1) In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires—
  - (a) **month** means calendar month; and
  - (b) **person** includes an individual and a corporation; and
  - (c) words indicating a gender include each other gender; and
  - (d) words in the singular include the plural and words in the plural include the singular.
- (2) A covenant, power or other provision implied in a deed or other instrument because of this or any other Act shall be construed in accordance with subsection (1).

Section 48 has a wide application as it applies to all deeds, contracts, wills, orders and other instruments. While there may be an overlap with the *Acts Interpretation Act 1954* (Qld) Duncan & Vann submit that the latter will prevail as the more specific provision.<sup>594</sup>

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

Section 48 expressly provides for situations where the context of the deed, contract or other instrument may require that expressions in sections 48(1)(a) to 48(1)(d) do not apply. This means parties are free to effectively contract out of the section. As such, there do not seem to be any issues with the operation of the section.

### 34.3. Other jurisdictions

Victoria,<sup>595</sup> New South Wales<sup>596</sup> and Tasmania<sup>597</sup> have equivalent provisions in their property legislation.

### 34.4. Options

There do not appear to be any problems with the current operation of section 48.

#### Question

**96 Are there any issues with section 48 of the PLA that should be addressed?**

<sup>594</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [48.30].

<sup>595</sup> *Property Law Act 1958* (Vic) ss 61, 83.

<sup>596</sup> *Conveyancing Act 1919* (NSW) ss 76, 181.

<sup>597</sup> *Conveyancing and Law of Property Act 1884* (Tas) s 64.



## 35. Section 49 – Implied covenants may be negated

### 35.1. Introduction and overview

#### 49 Implied covenants may be negated

- (1) Subject to this Act, a covenant, power or other provision implied under this or any other Act shall have the same force and effect, and may be enforced in the same manner, as if it had been set out at length in the instrument in which it is implied.
- (2) Any such covenant or power may, unless otherwise provided in this or such other Act, be negated, varied, or extended by—
  - (a) an express declaration in the instrument in which it is implied; or
  - (b) another instrument.
- (3) Any such covenant or power so varied or extended shall, so far as may be, operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were implied under the Act.

A covenant is a formal agreement or a promise in a deed or other document under seal.<sup>598</sup> Seddon says that ‘covenant’ generally refers to a term in a deed but it is not always used that way.<sup>599</sup> In any deed, there will be express covenants, which are the terms of the deed but there are also covenants that may be implied in the deed by statute.

Section 49 provides that a covenant, power or other provision implied into an instrument by the PLA or any Act will have effect as if it has been set out in the instrument itself. Unless otherwise provided, the parties to an instrument where a covenant or power has been implied may exclude, vary or extend the implied covenant or power in the instrument itself. Alternatively, the parties may exclude, vary or extend an implied covenant or power in another instrument.<sup>600</sup> Where the covenant or power has been varied or extended by method, the implied covenant or power will operate as if the variations or extensions were implied by the Act.

The Queensland provision was drawn from the NSW equivalent.<sup>601</sup> However it is much wider as the NSW provision is limited to deeds whereas the Queensland provision applies to instruments which includes a deed, a will and an Act.<sup>602</sup>

<sup>598</sup> Encyclopaedic Australian Legal Dictionary (LexisNexis) (definition of ‘covenant’).

<sup>599</sup> Nicholas Seddon, *Seddon on Deeds*, (Federation Press, 2015) 12.

<sup>600</sup> See discussion at 35.2 below as to whether express words are required if the negation, variation, or extension is contained in another instrument.

<sup>601</sup> *Conveyancing Act 1919* (NSW) s 74. See also Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 35.

<sup>602</sup> *Property Law Act 1974* (Qld) schedule 6 (definition of ‘instrument’).

## 35.2. Is there a need for reform?

Duncan and Vann<sup>603</sup> note that there may be some issue with the interpretation of section 49(2). If the implied covenant or power is negated, varied or extended, an ‘*express declaration in the instrument in which it is implied*’<sup>604</sup> is necessary. However, from a plain language reading of the section, if an implied covenant or power is negated, varied or extended by another instrument, such an express declaration is not required. This would mean an implied covenant or power could be excluded or modified without an express declaration if there is a direct inconsistency with a term in another instrument.

Commentary on the equivalent provision in NSW has indicated that the maxim ‘*Expressum facit cessare tacitum*’ (what is expressed renders what is implied silent) would apply. Under this view, an implied covenant that is inconsistent with an express covenant will be excluded.<sup>605</sup>

## 35.3. Other jurisdictions

NSW is the only other jurisdiction in Australia that has an equivalent provision. In New Zealand, the *Property Law Act 1952* (NZ)<sup>606</sup> contained a very similar provision to section 49. With the introduction of the *Property Law Act 2007* (NZ)<sup>607</sup> the language was modernised but the substance of the provision was retained.

## 35.4. Options

As there does not seem to be a great deal of controversy with the provision, the options for reform are basically limited to modernising the language. The underlying principles: that implied covenants take effect unless excluded or modified (provided such modification or exclusion is allowed); and that an express covenant will override an implied covenant (again, provided such modification or exclusion is allowed) are sound and essential legal principles. There may be no need for reform.

### Question

**97 Are there any issues with the operation of section 49 of the PLA that have arisen in practice? If so, how should those issues be addressed?**

<sup>603</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [PLA.49.90].

<sup>604</sup> *Property Law Act 1974* (Qld) s 49(2)(a).

<sup>605</sup> Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales*, (Lexis Nexis Butterworths, 2012-2013) at [32137.1].

<sup>606</sup> *Property Law Act 1952* (NZ) s 68 (now repealed).

<sup>607</sup> *Property Law Act 2007* (NZ) s 283. The Law Reform Commission New Zealand supported modernising the language while retaining the substance of the provision: Law Commission New Zealand, *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16, (1991) 77, [259].

## 36. Section 50 – Covenants entered into by a person with self and other(s)

### 36.1. Overview and purpose

#### 50 Covenants and agreements entered into by a person with himself or herself and another or others

- (1) Any covenant, whether express or implied, or agreement entered into by a person with the person and 1 or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.
- (2) This section applies to covenants or agreements entered into before or after commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to the person and 1 or more other persons, but without prejudice to any order of the court made before such commencement.

At common law, a person cannot contract with himself, even if the agreement is entered into between the person on the one hand and the same person together with another person or other people on the other.<sup>608</sup> This means, for example, that a partnership cannot enter into an effective agreement with another partnership if there is a partner common to both groups.<sup>609</sup>

Section 50 of the PLA abolishes the common law rule and is taken from an equivalent provision in place in the UK,<sup>610</sup> NSW<sup>611</sup> and Victoria<sup>612</sup>. The QLRC felt that the provision was necessary in light of section 14 of the PLA, which allows a person to convey or lease property by a person to a person jointly with another or others.<sup>613</sup>

The effect of section 50 is that it will treat an agreement between A with A and B as an agreement between A and B, but without converting it into such an agreement (as this would affect the rights of contribution as between A & B).<sup>614</sup>

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<sup>608</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.50.30].

<sup>609</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.

<sup>610</sup> *Law of Property Act 1925* (UK) (c 20 Geo 5) s 82.

<sup>611</sup> *Conveyancing Act 1919* (NSW) s 72.

<sup>612</sup> *Law of Property Act 1958* (Vic) s 82.

<sup>613</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.

<sup>614</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.50.90].

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

The section has been described as ‘remedial and facultative rather than prohibitive of any particular transaction.’<sup>615</sup> Given this, it is considered that the section in its current form does not raise any significant issues.

### **36.2.1. Preliminary recommendation**

It is recommended that the section be retained with modernised language as appropriate.

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<sup>615</sup> *Re Broons* [1989] 2 Qd R 315 at 317.

## 37. Sections 51 and 52 – Receipt in instrument

### 37.1. Overview and purpose

#### 51 Receipt in instrument sufficient

- (1) A receipt for consideration money or securities in the body of a deed or other instrument shall be a sufficient discharge for the same to the person paying or delivering the same without any further receipt for the same being endorsed on the deed or instrument.
- (2) This section applies only to deeds or instruments executed after the commencement of this Act.

#### 52 Receipt in instrument or endorsed evidence

- (1) A receipt for consideration money or other consideration in the body of a deed or instrument or endorsed on the deed or instrument shall in favour of a subsequent purchaser not having notice that the money or other consideration acknowledged to be received was not in fact paid or given wholly or in part be sufficient evidence of the payment or giving of the whole amount of the money or other consideration.
- (2) This section applies to deeds or instruments executed or endorsements made before or after the commencement of this Act.

Sections 51 and 52 are closely related and are dealt with together. The sections address situations where a deed or other instrument contains a receipt for purchase money or consideration. The first situation arises where the deed or other instrument contains a clause in the body of the deed acknowledging receipt of consideration money or security. The second situation is where a receipt for consideration money or other consideration is contained the body of the deed or is indorsed on the deed itself.

Historically, a receipt in the body of a deed was conclusive proof at law so that the person giving the receipt was estopped from denying that the money or securities had not been received.<sup>616</sup> However, in equity, if evidence could be adduced to show that the money or security had in fact not been paid, the seller could be granted an equitable lien which might ultimately result in an order for sale.<sup>617</sup>

A practice also developed to indorse a receipt on the deed itself (even where the deed contained a receipt clause in the body of the deed).<sup>618</sup> Like the receipt clause in the body of a deed, such an indorsed receipt under seal would give rise to an estoppel but equity would still be able to intervene if the purchase money was not in fact paid.<sup>619</sup>

Section 51 effectively makes the equitable rule prevail. The section provides that the receipt clause is a sufficient discharge for the person paying or delivering the consideration money. ‘Sufficient’ is not

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<sup>616</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.30].

<sup>617</sup> Stanley Robinson, *The Property Law Act Victoria*, (Law Book Co, 1992) 141.

<sup>618</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.30].

<sup>619</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.30].

the same as conclusive<sup>620</sup> which means that vendor may still seek to recover an amount that is in fact due.

Prior to the enactment of section 52, even if there was a receipt clause in the deed itself the absence of an indorsed receipt would put a subsequent purchaser on notice as to whether the purchase money or consideration had in fact been paid.<sup>621</sup> Section 52 functions so that lack of an endorsed receipt no longer is constructive notice that the payment has not in fact occurred, provided there is a receipt clause in the body of the deed.<sup>622</sup>

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

Duncan and Vann<sup>623</sup> submit that section 51 produces 'no significant legal consequences' as between the parties to the deed or instrument, but confirms the equitable position which was in effect in Queensland from the time of the *Judicature Act 1876* (Qld).

Section 52 has disposed of the practice of indorsing receipts on a deed or instrument where that deed or instrument contains a receipt clause in the body.<sup>624</sup>

Duncan and Vann submit that a subsequent purchaser who obtains registered title for land under the *Land Title Act 1994* (Qld) would not need to rely on section 52 as such a purchaser would have indefeasible title.<sup>625</sup> Duncan and Vann also question whether it was ever the case in Queensland that the lack of an indorsed receipt was sufficient to put a subsequent purchaser on notice.<sup>626</sup>

### 37.3. Other jurisdictions

Equivalent provisions are in place in Victoria,<sup>627</sup> NSW,<sup>628</sup> and Tasmania.<sup>629</sup> In these jurisdictions, however, the provision is limited to deeds, whereas in Queensland the provisions apply to deeds and instruments, or in the case of section 51, deeds and 'other' instruments.

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<sup>620</sup> Stanley Robinson, *The Property Law Act Victoria*, (Law Book Co, 1992) 141, [2] citing *Re Duce and Boots Cash Chemists Southern Ltd's Contract* [1937] 1 Ch 642 at 649, 650.

<sup>621</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.30], citing *Greenslade v Dare* (1855) 20 Beav 284; 52 ER 612 at 292 (Beav), 615 (ER).

<sup>622</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.30].

<sup>623</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.60].

<sup>624</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.51.60].

<sup>625</sup> Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.120]; *Land Title Act 1994* (Qld) ss 184-185.

<sup>626</sup> Although it is noted that this was the position in England: Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.52.30].

<sup>627</sup> *Property Law Act 1958* (Vic) ss 67-68.

<sup>628</sup> *Conveyancing Act 1919* (NSW) ss 39-40

<sup>629</sup> *Conveyancing and Law of Property Act 1884* (Tas) ss 67-68.

## 37.4. Options

Assuming section 51 does little more than preserve an equitable position that has been the law in Queensland from at least 1876, it is prudent to consider whether the section adds anything useful. It may be that section 51 serves no purpose at all, in which case it could be repealed.

Section 52 is unlikely to be relevant for registered land under the *Land Title Act 1994* (Qld). Given that old system land is all but eliminated in Queensland, the continued purpose served by section 52 is doubtful.

### Question

**98 Are there any reasons to retain sections 51 and 52?**

## Part 20 Miscellaneous (section 347)

### 38. Section 347 – Service of Notices

#### 347 Service of notices

- (1) A notice required or authorised by this Act to be served on any person or any notice served on any person under any instrument or agreement that relates to property may be served on that person—
  - (a) by delivering the notice to the person personally; or
  - (b) by leaving it for the person at the person’s usual or last known place of abode, or, if the person is in business as a principal, at the person’s usual or last known place of business; or
  - (c) by posting it to the person by registered mail as a letter addressed to the person at the person’s usual or last known place of abode, or, if the person is in business as a principal, at the person’s usual or last known place of business; or
  - (d) in the case of a corporation by leaving it or by posting it as a letter addressed in either case to the corporation at its registered office or principal place of business in the State.
- (1A) A notice so posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post the notice would be delivered.
- (2) If the person is absent from the State, the notice may be delivered as provided in subsection (1) to the person’s agent in the State.
- (2A) If the person is deceased, the notice may be so delivered to the person’s personal representative.
- (3) If the person is not known, or is absent from the State and has no known agent in the State or is deceased and has no personal representative, the notice shall be delivered in such manner as may be directed by an order of the court.
- (4) Despite anything in subsections (1) to (3), the court may in any case make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery of any notice.
- (5) This section does not apply to notices served in proceedings in the court, nor where the person serving the notice prevents its receipt by the person on whom the notice is intended to be served
- (6) This section applies unless a contrary method of service of a notice is provided in the instrument or agreement or by this Act.

#### 38.1. Overview and purpose

Section 347 of the PLA provides that, unless modified by another part of the PLA, or the instrument or agreement in question, any notice that is:

- ‘required or authorised’ by the PLA to be served on a person; or
- served on a person under an instrument or agreement that relates to property,

may be served on that person:



- personally;
- by leaving the notice at, or posting it by registered mail to, the person's usual or last known residence or business; or
- for a corporation, by leaving the notice at, or posting it to, the registered address of the corporation or the corporation's principal place of business.

If the notice is sent via post it will be deemed to have been served (unless shown otherwise) at the time when in the ordinary course of post the notice would be delivered.<sup>630</sup>

Section 347 makes provision for the service of notices if the person who is required to be served is absent from Queensland, deceased or unknown. The section does not apply to service of legal notices or if the PLA, or the instrument or agreement in question, provides a contrary method of service of notice.

## 38.2. Is there a need for reform?

Section 347 provides for the service of notices on a person or a corporation by post or in person or when the person is absent from the state, unknown or deceased. The section does not deal with serving notices electronically. Before we consider any potential issues with the section, it is necessary to discuss the interaction of the PLA and the *Electronic Transactions (Queensland) Act 2001* (Qld) (ETA).

### 38.2.1. The Property Law Act 1974 and the Electronic Transactions (Queensland) Act 2001

The PLA governs many aspects of property transactions in Queensland including both residential and commercial transactions. However, the PLA was written in 1973 and has not been substantially updated since. While the PLA has remained unchanged the digital economy has caused significant change to business practices, contract formation and methods of communication.

This is most evident in the increased use of email for negotiating contracts and the rise of online shopping and electronic contracts. However, it can also be seen in the case of electronic property transactions, such as those taking place under the *Electronic Conveyancing National Law (Queensland) Act 2013* (Qld).

The ETA aims to fill the gap between traditional commercial practices and the rapidly developing electronic space by facilitating the development of electronic commerce.<sup>631</sup> The ETA makes provision for documents to be signed electronically<sup>632</sup> and also facilitates the giving of information<sup>633</sup> in electronic form.

<sup>630</sup> *Property Law Act 1974* (Qld) s 347(1A).

<sup>631</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 (Queensland) Act 2001* (Centre for Commercial and Property Law QUT, 2002) <http://eprints.qut.edu.au/4388/> 15 [2.3].

<sup>632</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 14.

<sup>633</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) ss 11-12.

However, there is some uncertainty regarding the interaction between the PLA and the ETA. This can be seen not only with the issue of serving of notices but also with requirements for writing and signature.

### 38.2.2. Electronic signature

In a previous Issues Paper, titled *Sales of Land and Other Related Provisions*,<sup>634</sup> the Commercial and Property Law Research Centre (the **Centre**) considered the operation of the ETA in relation to section 59 of the PLA. The section 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.*

The *Sales of Land* Issues Paper<sup>635</sup> asked whether a legislative definition of ‘electronic signature’ should be included in the ETA or whether section 59 of the PLA should be amended to expressly include contracts formed and signed electronically.<sup>636</sup> Since that paper was drafted, the Supreme Court of Queensland handed down the decision of *Stellard Pty Ltd v North Queensland Fuel Pty Ltd*.<sup>637</sup>

*Stellard*<sup>638</sup> involved a question of whether an email exchange was sufficient to satisfy the writing and signature requirements in section 59 of the PLA. The court accepted that the email was ‘writing’. This conclusion is consistent with the *Acts Interpretation Act 1954* (Qld) which defines writing to include ‘any mode of representing or reproducing words in a visible form.’<sup>639</sup>

On the issue of signature, section 14 of the ETA provides that an electronic signature will meet the requirement for a manuscript signature under a statutory provision if:

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<sup>634</sup> Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) – Sales of Land and Other Related Provisions*, (2016), 39-44

[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf).

<sup>635</sup> Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) – Sales of Land and Other Related Provisions*, (2016)

[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf).

<sup>636</sup> Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) – Sales of Land and Other Related Provisions*, (2016), 46

[http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf).

<sup>637</sup> [2015] QSC 119.

<sup>638</sup> *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119.

<sup>639</sup> *Acts Interpretation Act 1954* (Qld) schedule 1 (definition of ‘writing’). See also SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts*, (2014) Federation Press, 347, citing *Kavia Holdings Pty Ltd v Suntrack Holdings Pty Ltd* [2011] NSWSC 716, [33] per Pembroke J.

- (a) a method is used to identify the person and to indicate the person’s intention in relation to the information communicated; and
- (b) the method used was either—
  - (i) as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement’ or
  - (ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
- (c) the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a).<sup>640</sup>

In the context of the case, Martin J held that the method identified the party and indicated their intention to be bound to the contents as a contract and the admission in the pleadings about sending the email proved that the method fulfilled its functions as a signature.<sup>641</sup>

It is not clear from the decision whether the method used would have sustained scrutiny if the parties had denied sending the email or typing their name on the email.<sup>642</sup>

The final requirement is that the party receiving the email consents to the method of signature being used.<sup>643</sup> Martin J held that by negotiating by email, and particularly by making the offer by email, that the party had consented by conduct to the method of signature.<sup>644</sup> It was not clear from the judgment what method of signature was used, but it has been argued that the consent by conduct found in the *Stellard* case was consent to the use of email (the method of communication) not a consent to the use of the signature method.<sup>645</sup>

### 38.2.3. Other provisions in the PLA that require signature

Aside from section 59, there are a number of provisions in the PLA that require writing signed by a person to make the assurance, promise or notice effective at law.<sup>646</sup> The *Stellard*<sup>647</sup> decision is authority for the proposition that an email will be taken to be both in writing and signed by the sender of the email (or if an agent, the principal) if the person can be identified and the person’s intention can be established by further evidence. Apparently, this will be true even in the absence of the person’s typed name on the email or a statement as to who is accepting the earlier offer.<sup>648</sup>

It is clear from the case law that the writing and signature requirement of section 59 of the PLA can be fulfilled electronically if the requirements of section 14 ETA are satisfied. A further issue for

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<sup>640</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 14.

<sup>641</sup> *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 [67].

<sup>642</sup> See for example *Williams Group Australia Pty Ltd v Crocker* [2016] NSWCA 265.

<sup>643</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 14(1)(c).

<sup>644</sup> *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 [68].

<sup>645</sup> S Christensen, ‘Beware the email contract – no signature required’, *Australian Property Law Bulletin*, July 2015, 101.

<sup>646</sup> For example, *Property Law Act 1974* (Qld) ss 10, 11, 56, 131.

<sup>647</sup> *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119.

<sup>648</sup> *Stellard Pty Ltd v North Queensland Fuel Pty Ltd* [2015] QSC 119 [66].

consideration is whether the ETA should apply to the signature requirements in other provisions of the PLA that require writing signed by a person.

If the ETA applies, this may mean that a guarantee<sup>649</sup> or assurance of land<sup>650</sup> sent by email could be binding and enforceable on the sender (or the sender's principal) even in the absence of a typed signature in the email itself.

Some of the questions around the use of electronic signatures were considered in the *Sales of Land Issues Paper*<sup>651</sup> and feedback on those questions will be included in a final report to be produced at a later date.

### 38.2.4. Electronic notices under the PLA?

The ETA applies to a requirement or permission in a State law to give information in writing.<sup>652</sup> Does that mean the ETA applies to a notice required by the PLA (or another statute) to be given in writing?

The PLA does not expressly provide for service of notices by email or other electronic means. As discussed above, the PLA provides that where a notice is required or authorised to be served on a person by the PLA itself or under an instrument or agreement that relates to property, the service may be effected using one of several methods. Essentially, the methods available are either by post or by personal service. The *Acts Interpretation Act 1954* (Qld) will allow for a notice under section 347 to be served on a person or a body corporate by sending it 'by post, telex, facsimile or similar facility' to the residential or business address of the person.<sup>653</sup> However, it has been held that 'similar facility' does not include email.<sup>654</sup> This means under the PLA and the *Acts Interpretation Act 1954* (Qld) a notice may be served either personally, by post or by fax.

While it may appear that the ETA could offer a method of electronic service for a notice under section 347 of the PLA, it is not clear that the ETA applies. The ETA provides that if a State law<sup>655</sup> requires or permits a person to give information<sup>656</sup> in writing, the requirement or permission is satisfied if the person gives the information in such a way that:

- the information is readily available for subsequent reference; and
- the person given the information consents to the information being given electronically.<sup>657</sup>

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<sup>649</sup> *Property Law Act 1974* (Qld) s 56.

<sup>650</sup> *Property Law Act 1974* (Qld) s 11.

<sup>651</sup> Commercial and Property Law Research Centre, *Property Law Review Issues Paper: Property Law Act 1974 (Qld) – Sales of Land and Other Related Provisions*, (2016), 39-45, [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0012/474897/issues-paper-property-law-act-1974-sales-of-land-and-other-related-provisions.pdf).

<sup>652</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) ss 11-12.

<sup>653</sup> *Acts Interpretation Act 1954* (Qld) s 39.

<sup>654</sup> *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30 [25].

<sup>655</sup> Defined to include a written or unwritten law of Queensland or any instrument made or having effect under such law: *Electronic Transactions (Queensland) Act 2001* (Qld) schedule 2 (definition of 'State law').

<sup>656</sup> 'Give information' is defined to include a number of actions, including 'give, send or serve a notification': *Electronic Transactions (Queensland) Act 2001* (Qld) s 10(c).

<sup>657</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) ss 11-12.

Application of section 11 is limited by the exclusions in Schedule 1 to the ETA. According to section 7A the ETA does not apply to a 'transaction, requirement, permission, electronic communication or other matter of a kind' in Schedule 1.<sup>658</sup> Exclusion 5 in Schedule 1 is 'a requirement or permission for document to be served personally or by post'.<sup>659</sup> As section 347 of the PLA essentially permits notices to be served either personally (including by leaving at an address) or by post, there is an argument that utilising the ETA to facilitate the service of notices under section 347 is excluded. While the *Acts Interpretation Act 1954* (Qld) will allow the notice to be served by facsimile, it does not allow service by email.

This means that where a notice is required or authorised to be served on a person under the PLA or under an instrument that relates to property, unless the parties have agreed otherwise, electronic service is risky. Additionally, if the service of notice under section 347 arises from an instrument or agreement relating to property, it is arguable that the notice is required under the instrument or agreement and is not a requirement or permission arising under a state law.<sup>660</sup> While section 26E of the ETA extends the operation of section 8 and 23 to 25 to the performance of contracts, this extension does not specifically refer to sections 11 or 14 of the ETA.

### **38.2.5. Other provisions in the PLA that require service of notice**

Section 347 applies subject to a contrary method of service – either agreed by the parties in the instrument or agreement in question or as provided in the PLA itself. Generally, where the PLA imposes an obligation to serve or give notice in writing, the method of service is not specified.<sup>661</sup>

There are some places however where the PLA is more prescriptive regarding the method of service. For example, a notice of termination of tenancy given under division 4 of part 8 of the PLA provides that the notice will be sufficiently given if: delivered personally; delivered by registered post; left with an adult residing at the premises; delivered to the person who usually pays the rent; or posted up in a conspicuous place on the premises.<sup>662</sup> The parties are, of course, able to agree on a different method of giving such notice.<sup>663</sup>

If section 347 is amended to allow electronic delivery of notices, it becomes relevant to consider whether other sections in the PLA that impose an obligation to give or serve notice and provide a method of serving that notice should be modified to accommodate electronic delivery. However, as the parties are able to agree to any form of service or giving of notices, it may not be necessary to expressly provide for electronic delivery other than in section 347.

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<sup>658</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 7A.

<sup>659</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 7A and schedule 1 s 5.

<sup>660</sup> For support of this view, see SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts*, (2014) Federation Press, [12.4.7.2], 347, referring to the Commonwealth equivalent of the *Electronic Transactions (Queensland) Act 2001* (Qld).

<sup>661</sup> For example, see, among other provisions, *Property Law Act 1974* (Qld) s 38(5); s 64(1); s 84(1)(a)-(b); s 85(2).

<sup>662</sup> *Property Law Act 1974* (Qld) s 132.

<sup>663</sup> *Property Law Act 1974* (Qld) s 130(1).

### 38.2.6. Time for delivery

Section 347 provides that delivery of a notice sent by post is taken to have been served at the time when by the ordinary course of post the notice would be delivered unless the contrary is shown.<sup>664</sup> Generally speaking this has been taken to be about 2 to 3 days from the time the letter is sent. In early 2016, Australia Post restructured its delivery times and fees, with a result that the ordinary course of postal delivery is now longer than previously. It has been suggested that the deemed delivery provisions should be altered to refer to a stated number of days.<sup>665</sup> Such approach is used in New South Wales where the legislation provides that service is effected on the fourth working day after sending unless the contrary is shown.<sup>666</sup>

As already discussed, it is unlikely that the ETA applies to service of notices under section 347. Even if the ETA applies, it does not specify a set number of days or deemed delivery time for receipt of a notice served electronically. Under the ETA the time of receipt of a notice served by email or electronic communication is:

- when the email is capable of being retrieved by the addressee at an email address designated by the addressee; or
- if an email address is not designated, when the email is capable of being retrieved by the addressee at an email address of the addressee and the addressee has become aware that the electronic communication was sent to that address.<sup>667</sup>

### 38.3. Other Australian jurisdictions

Several jurisdictions in Australia<sup>668</sup> have similar provisions which have been based on the UK legislation.<sup>669</sup> The Queensland provision was drawn from the equivalent Western Australia property legislation.<sup>670</sup>

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<sup>664</sup> *Property Law Act 1974* (Qld) s 347(1A). This is also provided by the *Acts Interpretation Acts 1954* (Qld) s 39A(1)(b).

<sup>665</sup> SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts*, (2014) Federation Press, 330.

<sup>666</sup> *Interpretation Act 1987* (NSW) s 76. Interestingly the *Conveyancing Act 1919* (NSW) s 170 (which is similar to the Qld provision in section 347) provides that documents delivered by a document exchange are deemed served on the second business day after delivery.

<sup>667</sup> *Electronic Transactions (Queensland) Act 2001* (Qld) s 24(1). For a discussion of when an email is capable of being received and when an email address has been designated, see SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts*, (2014) Federation Press, 348-351.

<sup>668</sup> For example, *Property Law Act 1958* (Vic) s 198; *Conveyancing and Law of Property Act 1884* (Tas) s 85; *Law of Property Act 1936* (SA) s 112.

<sup>669</sup> *Law of Property Act 1925* (UK c 20).

<sup>670</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) 117; *Property Law Act 1969* (WA) s 135.

Generally the provisions are similar in that they facilitate service of notices personally or by post and exclude service of notices for court proceedings. Generally, the sections provide that notices served by post are deemed to be served at the time when by the ordinary course of post the notice would be delivered.

NSW takes a somewhat different approach by actually prescribing a set number of days for service in particular circumstances. The NSW property legislation provides that service by delivery of the notice to a document exchange facility of which the person to be served is a member will be taken to have been served two business days after delivery to the facility.<sup>671</sup> Additionally, NSW's *Interpretation Act 1987* (NSW) also provides that a document served by post in Australia or in an external territory is taken to be have been effected on the fourth working day (the equivalent of a business day) after the letter was posted.<sup>672</sup>

## 38.4. Options

There are several options for dealing with the service of notices under the PLA. The first is to repeal the section, leaving the service of statutory notices to be dealt with under the *Acts Interpretation Act 1954* (Qld) and other notices by the terms of the relevant contract. A second option is to clarify the operation of the ETA in relation to section 347 by removing the exclusion in the Schedule to the ETA. A third option is to amend the PLA to include its own rules for email delivery and deemed receipt.

### 38.4.1. Repeal section 347

The first option is to repeal section 347. If section 347 is repealed, service of a notice in writing on a person or a corporation could be given:

- in accordance with the agreement or instrument under which the notice is being given; or
- as directed in another part of the PLA; or
- in accordance with the *Acts Interpretation Act 1954* (Qld), which allows service in person, by post or facsimile or similar facility.<sup>673</sup>

The most significant disadvantage of repealing section 347 is in relation to notices under contracts. Currently if a contract does not have a notice provision, section 347 provides potential methods of service and a deeming provision for notices sent by post. If section 347 is repealed and the contract does not contain a notice provision the parties are able to give the notice using any method that brings the notice to the attention of the intended recipient. In the event of a dispute the sender will need to prove actual receipt.

Repeal will also remove the provisions about service where a person is out of the State, deceased or unknown. Currently, the PLA provides that if the person to be served is out of the State or deceased, then service can be effected by delivery to the person's agent or personal representative. If the person is: unknown; out of the state with no known agent; or deceased with no person representative, then

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<sup>671</sup> *Conveyancing Act 1919* (NSW) ss 170(1)(c) and 170(1A). See also the *Evidence Act 1995* (NSW) s 160 which presumes that an article sent by post in Australia was received on the 4<sup>th</sup> working day after posting.

<sup>672</sup> *Interpretation Act 1987* (NSW) s 76(1)(b).

<sup>673</sup> *Acts Interpretation Act 1954* (Qld) ss 39-39A.



service is as directed by court order. If section 347 is repealed, these situations may all require an order of the court if no other provision is included.

One advantage of this approach is that consistent methods of service for all property related statutory notices or other documentation can be established under *the Acts Interpretation Act 1954* (Qld). Similar considerations as discussed under 38.4.2 will apply to a review of the *Acts Interpretation Act 1954* (Qld) to allow electronic service.

### **38.4.2. Electronic service under the PLA**

The second option is to amend section 347 to allow a notice required or authorised by the PLA or served in relation to an instrument or agreement relating to property to be served personally, by post, facsimile or email. The advantage of this option is that consistent rules for service of notices under the PLA and contractual notices can be created. The ability for contracting parties to set their own rules for service of notices should still apply.

As part of this option consideration would need to be given to:

- (a) whether consent is required by the recipient to the use of email. In the absence of a provision in section 347 there may be an argument that the ETA applies to notices required to be in writing and consent is required. The interaction of a proposed section 347 and the ETA should be made clear;
- (b) if a deeming provision for the receipt of notices sent by email should be introduced, different to the ETA, section 24. This issue is considered below 38.4.3;
- (c) expanding the methods of electronic service to include provision of a notice by providing access through an electronic link to a notice located on a cloud based server.

A further consideration if this option is adopted is the need to update the methods for service of notices or disclosure documentation required under other property related legislation (e.g., *Body Corporate and Community Management Act 1997* (Qld) or *Land Sales Act 1984* (Qld)). Service of these notices is governed by the *Acts Interpretation Act 1954* (Qld). To ensure consistency with the PLA, options include adding electronic notice provisions to each individual statute or amending the *Acts Interpretation Act 1954* (Qld) to allow electronic service.

### **38.4.3. Specifying deemed delivery**

Regardless of the option adopted, consideration should be given to the desirability of deemed delivery provisions for post, facsimile and email.

The current deeming provision for post refers to delivery on the day it would be received in ‘the ordinary course of the post.’<sup>674</sup> In the event of a dispute about delivery, evidence of ‘ordinary course of post’ for the particular destination is required. An alternative is to adopt the approach in NSW of specifying a time, for example, four business days, as the deemed time of delivery.

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<sup>674</sup> *Property Law Act 1974* (Qld) s 347(1A).



For delivery by facsimile the current approach of deeming receipt at the time a clear facsimile transmission report is produced may be adopted.

For delivery by email or other electronic methods, the options are:

- (a) maintain the current deeming provisions in the ETA which provide for receipt when the email become capable of being retrieved, in the case of a designated email address, or when the email comes to the attention of the recipient, if no designation; or
- (b) specify a deemed time of delivery, for example 'on the same business day' or 'within 4 hours'. An additional requirement for consent to delivery by email may be necessary. Consent may be given generally to electronic communication or as a term in a contract. Various examples of this approach appear in Commonwealth legislation. For example, under the *Corporations Act 2001* (Cth), notices given by electronic methods in specific circumstances will be taken to have been given or sent on the business day after being sent.<sup>675</sup> Similarly, a document given to a person by the Migration Tribunal via electronic means is taken to be received at the end of the day on which the document was transmitted.<sup>676</sup>

#### **38.4.4. Service by making available**

An issue for consideration is whether the PLA or other statutory provisions should allow notices to be served by making the notice 'available' electronically, for example on a website or through a service like Dropbox.

In *Conveyor v Basetec*<sup>677</sup> it was held that sending an email, which included a link to a document on Dropbox, did not amount to giving the document 'by an electronic communication' as stated in the section 11 of the ETA. This was because the 'data, text or images within the document in the Dropbox was [not] itself electronically communicated' to the recipient.<sup>678</sup> Instead, the recipient was given the means to obtain the information.

It is becoming increasingly common for commercial parties to provide documents through cloud based services such as Dropbox, usually due to the size of the documentation. This minimises the circumstances in which an email may be rejected by a mail server and not delivered to the recipient. Recognition of the need to expand available methods of electronic service to accommodate changes in commercial practice has occurred in the area of product disclosure statements. Provision has been made for financial services disclosures and product disclosure statements to either be given or made available electronically.<sup>679</sup>

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<sup>675</sup> *Corporations Act 2001* (Cth) s 600G(5).

<sup>676</sup> *Migrations Act 1958* (Cth) s 379C(5).

<sup>677</sup> *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30.

<sup>678</sup> *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30 at [28].

<sup>679</sup> ASIC has provided detailed guidance for corporations using digital disclosure: Australian Securities & investments Commission, *Regulatory Guide 221: Facilitating Digital Financial Services Disclosures* (March 2016).

Given the increased use of electronic communication and its changing nature it is appropriate to taken into account the need to ensure any new service provisions in the PLA are adaptable to current and future electronic methods of service.

### **Questions**

**99 Should section 347 of the PLA be repealed? If so, why?**

**100 If section 347 is retained, should it be amended to allow the service of notices by electronic means? Should section 347 apply to all other provisions in the PLA where a notice is required to be given? If not, what sections should be excluded and why?**

**101 Should the PLA set a time period (e.g. one business day) for deemed delivery of email or continue to rely on the ETA provisions?**

**102 Should the provisions that relate to the deemed service by post be amended to specify a set time period, (e.g. four business days) after which the notice is deemed to be served if the document has been sent by Australia Post?**

**103 Should the PLA include provision for a notice or document to be served by 'making the document available' electronically (e.g. on a website)? What conditions should attach to this provision?**

## Appendix

### Proposed Preliminary Recommendations

| PROPERTY LAW ACT 1974 (QLD) |   |   |
|-----------------------------|---|---|
| Section                     |   | Preliminary recommendation  |
| 37A                         | Property held on statutory trust for sale                                       | Retain  |
| 37B                         | Property held on statutory trust for partition                                  | Retain  |
| 39                          | Trustee on statutory trusts for sale or partition to consult persons interested | Retain  |
| 40                          | Right of co-owners to bid at sale under statutory power of sale                 | Retain  |
| 41                          | Sale or division of chattels  | Retain  |
| 43                          | Liability of co-owner to account  | Retain  |
| 54                          | Effect of joint contracts and liabilities                                       | Retain  |
| 55                          | Contracts for the benefit of third parties                                      | Retain.<br><b>104 Are you aware of any problems with section 55 of the PLA?</b>                               |
| 57                          | Effect of provisions as to conclusiveness of certificate etc                    | Retain<br><b>105 Do you agree with the preliminary recommendation that section 57 of the PLA be retained?</b> |

# Resources

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