

2016

Property Law Review Issues Paper 5

Property Law Act 1974 (Qld):

- Part 12 - Equitable interests and things in action
- Part 15 – Corporations
- Part 16 - Voidable dispositions
- Part 18 - Unregistered land
- Part 19 - De facto relationships
- Part 20 - Miscellaneous

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.

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Property Law Act 1974 (Qld) – Parts 12, 15, 16, 18, 19 and 20

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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 Parts 12, 15, 16, 18, 19 and 20 of the *Property Law Act 1974* (Qld), please include these in your response.

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

Where to send your submission

You may lodge your submission by email or post.

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

Alternatively, you can post your submission to:

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

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

Privacy Statement

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

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

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

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1. Background

1.1. Review of Queensland Property Laws

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

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

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

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

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

- Part 12 – Equitable interests and things in action;
- Part 15 – Corporations;
- Part 16 – Voidable Dispositions;
- Part 18 – Unregistered Land;
- Part 19 – Property (de facto relationships); and
- Part 20 – Miscellaneous (except for section 347 which is considered in Issues Paper 6 (pending) in the context of electronic transactions and the PLA).

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

Part 12 Equitable interests and things in action (ss 199-200)

2. Section 199 – Statutory assignments of things in action

2.1. Overview and purpose

199 Statutory assignments of things in action

- (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice –
 - (a) the legal right to such debt or thing in action; and
 - (b) all legal and other remedies for the same; and
 - (c) the power to give a good discharge for the same without the concurrence of the assignor.
- (2) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice –
 - (a) that the assignment is disputed by the assignor or any person claiming under the assignor; or
 - (b) of any other opposing or conflicting claims to such debt or thing in action;the debtor may, if the debtor thinks fit, either call upon the persons making claim to the debt or other thing in action to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to the relief of trustees.

Section 199 of the PLA reproduces section 5(6) of the *Judicature Act 1876*. Historically, assignments of choses in action were recognised in equity only and not at law. The Judicature Act altered this position so that assignments were recognised at law also if certain criteria were satisfied. The Queensland Law Reform Commission indicated that the existing statutory regime worked well but that ‘its proper place’ was in legislation dealing with property law rather than ‘a statute concerned primarily with matters of procedure.’¹ Section 199 of the PLA replicates the provision in the 1876 Act. The section does not change the equitable rules relating to assignments of choses in action. It enables the ‘assignee to sue the debtor without having to join the assignor to the proceedings.’²

Section 199 of the PLA is directed at the assignment of debts or other legal things in action.³ The section is largely procedural in nature. The term ‘legal thing in action’ and ‘chose in action’ are used interchangeably in commentary relating to assignments and are synonymous. A ‘chose in action’ has been defined in the following way:

¹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 106.

² Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 75 [5.47].

³ A right arising under a contract would fall within the scope of ‘other legal things in action’: see SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 371 [14.3.2.2].

The term 'choses in action' is used to describe all personal rights of property that can only be claimed or enforced by action and not by taking physical possession. Choses in action can refer to both a right enforceable by action, such as a debt, and the right of action itself.⁴

A legal thing in action will include a variety of actions including for damages.⁵ A key feature of a thing in action is that the right is proprietary in character, rather than personal. A personal right is not a legal thing in action as it is not property.⁶

Under section 199, an assignee is given the legal right to claim the debt or thing in action, in addition to all legal and other remedies which were available to the assignor.⁷ Further, the assignee is provided with the power to give a good discharge to the debt or receipt for the choses in action without the concurrence of the assignor.⁸ However, a number of pre-conditions must be satisfied before the assignment under section 199 is perfected. These include:

- the assignment must be in writing under the hand of the assignor;
- the assignment must be absolute and not by way of charge only;
- express notice in writing must be given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or thing in action.⁹

The section expressly provides that the assignment from the date of the notice will be subject to equities having priority over the right of the assignee.¹⁰

Any assignment under section 199 of the PLA must be absolute. This means that there must be an existing property interest where the assignee is able to take title to the legal thing in action 'in such a way as to exercise complete control over it and be able to deal with it as they wish.'¹¹ The rationale for why an assignment must be absolute rather than conditional is explained in the following way:

The basic reason why the assignment must be absolute is to ensure that the debtor or other person is protected, in that at all times he or she knows to whom payment must be made. Furthermore, the requirement that the assignment must be absolute enables the assignee to sue on the debt or chose in action in his or her name because an absolute assignment means that the assignor no longer has any interest at all in the debt or chose in action.¹²

⁴ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 370 [14.3.2.2].

⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [199.120].

⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [199.120].

⁷ *Property Law Act 1974* (Qld) ss 199(1)(a) and (b).

⁸ *Property Law Act 1974* (Qld) s 199(1)(c).

⁹ *Property Law Act 1974* (Qld) s 199(1).

¹⁰ *Property Law Act 1974* (Qld) s 199(1). The section does not apply to an agreement to assign a future chose in action or the assignment of part of a debt.

¹¹ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 380 [14.3.3.2.b].

¹² Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 76 [5.51].

2.2. Is there a need for reform?

Section 199 of the PLA simply replicates the equivalent provision in the *Judicature Act 1876* (UK). All other Australian jurisdictions have similar legislative provisions with some slight variations discussed in Part 2.3 below. There is also an established body of case law in Queensland which has considered the section and the interpretation of the section is relatively settled.¹³

2.2.1. *Personal Property Securities Act 2009* (Cth) and section 199 of the PLA

The *Personal Property Securities Act 2009* (Cth) (PPSA) was enacted well after the commencement of section 199 of the PLA. The PPSA deals with security interests in personal property. The term 'personal property' covers all forms of property, including a licence, other than real property.¹⁴ A security interest is an interest in personal property provided for by a transaction that secures payment or performance of an obligation.¹⁵ One possible issue arising from the introduction of the PPSA is the interaction between this Act and section 199 of the PLA.¹⁶ This issue was canvassed in the Victorian context in 2010 and the Victorian Law Reform Commission (VLRC) noted that:

In our research on the interaction of the Property Law Act with the PPSA, we also determined that there are two ways in which section 134 could apply to PPSA security interests. First, PPSA security interests are themselves 'things in action', so section 134 would apply to any assignment of a PPSA security interest. Secondly, a thing in action which is being assigned may be the subject of a PPSA security interest.¹⁷

The VLRC concluded that there did not appear to be any inconsistency in the application of section 134 of the *Property Law Act 1958* (Vic) and the PPSA but noted that 'section 134 is subject to the requirements of the PPSA.'¹⁸ It is possible to reach the same conclusion in the Queensland context as section 199 of the PLA and section 134 of the *Property Law Act 1958* (Vic) are very similar in the way they are drafted and the effect of each provision.

2.2.2. Electronic communications and section 199 of the PLA

A separate issue which will require further consideration relates to the application of electronic methods of communication and electronic signatures to section 199. For example, will electronic communication satisfy the requirement for writing and signing under section 199 of the PLA. This issue is discussed in detail in the context of electronic transactions and the PLA.¹⁹

¹³ The equivalent provisions in the other Australian jurisdictions also have a body of case law relevant to the interpretation of these provisions.

¹⁴ *Personal Property Securities Act 2009* (Cth) s 10.

¹⁵ *Personal Property Securities Act 2009* (Cth) s 12.

¹⁶ The *Personal Property Securities Act 2009* (Cth) was recently reviewed and a Final Report issued in 2015. The recommendations made in the Report do not appear to alter the conclusions reached in this paper in relation to the interaction between section 199 of the PLA and the PPSA.

¹⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 39 [3.53].

¹⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 39 [3.54].

¹⁹ See Issues Paper 6 (pending).

2.2.3. Assigning any part of a debt or legal thing in action

Part of a debt or thing in action cannot be assigned at law under section 199 of the PLA, although such an assignment is recognised at equity.²⁰ A further issue relevant to possible reform of section 199 relates to whether or not the assignment of a part debt should be permitted under the section. An assignment of part of a debt is not an absolute assignment because the assignor still has an interest in the debt or thing in action and usually needs to be joined in any proceedings the assignee commences against the debtor. Further,

...if parts of a debt owing by one debtor were assigned to several parties, each of these assignees, having an interest in the whole, would have to be joined in any action to recover the debt and this was impracticable.²¹

The Western Australian legislation has accommodated the assignment of part of a debt or legal chose in action since it was enacted.²² In New Zealand, the issue of whether a part debt should be permitted under the statutory assignment provisions was considered in 1992. The New Zealand Law Commission suggested that the new Act could provide that:

a part of a debt or other legal or equitable thing in action may be assigned absolutely but that the assignee may not recover judgment for that part unless every person entitled to any part of it is joined in the proceedings. This reform would not improve the procedure which must be followed but would enable the assignment to be a legal assignment, as well as making the procedure explicit.²³

The new *Property Law Act 2007* (NZ) allows the assignment of part of a thing subject to the procedural requirement in section 52(4)(a) that the assignor be joined in any proceedings brought by way of enforcement against the debtor. The procedure for the assignment of a thing in action is set out in Part 2, subpart 5 of the Act. The term 'thing in action' is defined to mean the right to receive payment of a debt and a part of a thing in action.²⁴ Section 49(5) of the Act provides that if only a part of a thing in action is assigned, the rights and obligations under sub-part 5 of the assignor and debtor relate only to the part assigned.

In Queensland, the obvious practical effect of such a change is that the assignment of any part of a debt or legal thing in action would then be a legal assignment which would provide certainty in relation to the procedure for the assignment of a part debt. It is not clear whether there is any impetus (or need) for this kind of change in Queensland.

²⁰ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 374 [14.3.3.1].

²¹ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 380 [14.3.3.2.c].

²² *Property Law Act 1969* (WA) s 20(3). The position in the United Kingdom is similar to section 199 of the *Property Law Act 1974* (Qld). Section 136 of the *Law of Property Act 1925* (UK) does not provide for the legal assignment of part debts.

²³ New Zealand Law Commission, *The Property Law Act 1952 Preliminary Paper No. 16* (1991) 62 [232].

²⁴ *Property Law Act 2007* (NZ) s 48.

Questions

1. **Should any part of a debt or legal thing in action be capable of assignment under section 199 of the PLA?**

2.2.4. Equitable thing in action

An equitable thing in action, such as the beneficial interest under a trust or will, is not expressly assignable at law under section 199 of the PLA. However, these interests are assignable at equity in whole or in part.²⁵ The section refers to notice being given to the 'debtor, trustee or other person'. This reference has been used in case law to support a view that an equitable thing in action may also be assigned under the legislative provisions.²⁶ The reasoning for this view is that there would be no reason for the reference to trustee unless a beneficial interest under a trust could be assigned under the provisions.²⁷ Commentary on this issue notes that:

Doubt has, however, been raised by a number of commentators because of the inability to legally assign an equitable chose or the fact that, procedurally, it adds nothing to the position of an equitable assignee.²⁸

In New Zealand, an equitable thing in action has always been assignable at law under section 130 of the *Property Law Act 1952* (NZ) (now repealed) and section 50(1) of the *Property Law Act 2007* (NZ).

Questions

2. **Should equitable things in action be capable of assignment under section 199 of the PLA?**

2.2.5. Assignment of future interests

A final issue relates to whether any consideration should be given to allowing certain future interests to fall within the scope of section 199 of the PLA. The terms 'future interest' or 'expectancy' are often used interchangeably and refer to property that may come into existence at a future point, but is not yet in existence.²⁹ Future property is not assignable at law for this reason and as a result an

²⁵ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 375 [14.3.3.1.c]. There are writing requirements for a disposition of an equitable interest or trust under section 11 of the *Property Law Act 1974* (Qld).

²⁶ See SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 376 [14.3.3.2] for further discussion on this issue.

²⁷ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 376 [14.3.3.2].

²⁸ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 376 [14.3.3.2]. For a detailed discussion of the reasons why the equivalent provision in New South Wales (*Conveyancing Act 1919* (NSW) s 12) does not accommodate the assignment of equitable things in action see: R P Austin, 'The Conveyancing Act, 1919 (As Amended) Section 12 and Equitable Choses in Action' (1976) 7 *Sydney Law Review* 394.

²⁹ Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 80 [5.59].

immediate disposition to another person is not possible.³⁰ However, the assignment of future property when it comes into existence is possible in equity if there is valuable consideration.³¹

The difficulty in relation to the legal assignment of future interests was explained by the New Zealand Law Commission in the following way:

The difficulty over an attempt to assign a future debt also comes down to the question of consideration. Property can be gifted by a conveyance which has immediate effect. Because a future debt is not property, an attempt to assign it amounts to no more than an agreement to do so. An agreement to do an act in the future, like any other species of ordinary contract, requires consideration.³²

The New Zealand Law Commission in its Report on the proposed new Property Law Act indicated that the proposed section in the new Act dealing with the assignment of future interests clarified 'the law relating to attempts to assign without consideration moneys to accrue in the future pursuant to existing rights (eg the assignment of a future income stream which may arise from an existing partnership agreement).'³³ Section 49(2) of the *Property Law Act 2007* (NZ) provides that a thing in action that is not capable of being assigned cannot be assigned under subpart 5. However, this provision is made subject to section 53 of the Act.³⁴ Section 53 of the *Property Law Act 2007* (NZ) now provides for the assignment of amounts payable in the future and is framed in the following way:

An assignment of an amount that will or may be payable in the future under a right already possessed by the assignor (whether the right arises before, on, or after 1 January 2008) is to be treated as an assignment of a thing in action.

The New Zealand legislation does not have the effect of making a future interest assignable at law. The subpart provides for the assignment either at law or in equity and the assignment of a future amount will still only be treated as an assignment in equity under the provisions.

Feedback will be required to determine whether stakeholders consider that an alteration to the section to include future interests in some form is required.

Questions

3. Should future things in action be capable of assignment under section 199 of the PLA?

³⁰ SA Christensen and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014) 397 [14.4.5].

³¹ Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010) 80 [5.59].

³² New Zealand Law Commission, *The Property Law Act 1952* Preliminary Paper No. 16 (1991) 69 [233].

³³ New Zealand Law Commission, *A New Property Law Act* Report No. 29 (1994) 15 [45].

³⁴ *Property Law Act 2007* (NZ) s 49(3).

2.3. Other jurisdictions

2.3.1. Australia

Each Australian jurisdiction has a similar provision to section 199 of the PLA.³⁵ Western Australia is the only legislation which expressly provides that ‘any debt or other legal chose in action will include a part of any debt or other legal chose in action.’³⁶ In the Australian Capital Territory, section 205(1) of the *Civil Law (Property) Act 2006* (ACT) includes a note which indicates that an example of a ‘thing in action’ includes ‘rights under a trust’.

2.3.2. New Zealand

The approach to assignments is drafted quite differently under the *Property Law Act 2007* (NZ) compared to section 199 of the PLA. Prior to the 2007 Act, section 130 of the *Property Law Act 1952* (NZ) was in a similar form to section 199, although the New Zealand provision expressly included ‘legal or equitable’ things in action as being assignable. The relevant process and the consequences of assignment are now set out in sections 48 to 53 of the 2007 Act. The rationale for the significant change in approach under the new Act is not clearly articulated by the New Zealand Law Commission. The Commission noted that the new sections go further than its predecessor in section 130 and that:

‘It allows any thing in action, that is, a right enforceable only by bringing legal proceedings as opposed to a right which can be enforced by taking possession, to be assigned at law by a writing signed by or on behalf of the assignor. Unlike s 130, it does not postpone the effectiveness in law of the assignment as between assignor and assignee until notice of the assignment has been given to the debtor. It separates the effect of the assignment from the effect on the debtor of the notice. But, under the new section, as under s 130, it is only absolute assignments (and not those which are conditional or by way of charge only) which are capable of taking effect at law. The section also deals with the effectiveness and completion of equitable assignments, clarifies the law relating to attempts to assign without consideration moneys to accrue in the future pursuant to existing rights (eg, the assignment of a future income stream which may arise from an existing partnership agreement), and deals with assignments of part of a thing in action, permitting such a part to be assigned at law (which cannot be done at present), subject to the observance of a procedural requirement for the joining of the assignor in any proceedings brought by way of enforcement against the debtor.’³⁷

The provisions in New Zealand appear to codify the procedure and effect of the assignment of both legal and equitable things in action and adopt a ‘catchall’ approach to statutory assignments. The provisions in the sub-part extend beyond what is contained in section 199 of the PLA. A brief overview of the operation of the subpart is below:

- a number of definitions are set out in section 48 which are relevant to the sub-part;
- details of the application of the sub-part and the limits are set out in section 49;
- the absolute assignment in writing of a legal or equitable thing in action, signed by the assignor passes to the assignee:

³⁵ *Conveyancing Act 1919* (NSW) s 12; *Law of Property Act 2000* (NT) s 182; *Law of Property Act 1936* (SA) s 15; *Conveyancing and Law of Property Act 1884* (Tas) s 86; *Property Law Act 1969* (NSW) s 12; *Property Law Act 1969* (WA) s 20; *Civil Law (Property) Act 2006* (ACT) s 205.

³⁶ *Property Law Act 1969* (WA) s 20(3).

³⁷ New Zealand Law Commission, *A New Property Law Act* Report No. 29 (1994) 14-15 [45]-[46].

- All the rights of the assignor in relation to the thing in action; and
- All the remedies of the assignor in relation to the thing in action; and
- The power to give a good discharge to the debtor.³⁸
- the effect of section 50(1) applies irrespective of whether the assignment is given for valuable consideration;³⁹
- a legal or equitable thing in action is to be treated as having been assigned in equity (whether the assignment is oral or in writing) in the circumstances set out in the section;⁴⁰
- section 51 sets out the further consequences of assignment of a thing in action including that payment of all or part of the debt to the assignor by a debtor who does not have actual notice of the assignment discharges the debtor to the extent of the payment. A debtor with actual notice of an assignment owes the debt to the assignee;
- section 52 provides that registration of an assignment under an enactment does not, of itself, give actual notice of the assignment to the debtor and section 52(1) overrides anything to the contrary in the enactment under which the assignment is registered;
- the assignment of an amount payable in the future is to be treated as an assignment of a thing in action.⁴¹

2.4. Options

The issue of whether section 199 of the PLA requires reform in some form depends on feedback received in response to the questions above. Although there is no real impetus from an interpretation perspective to justify any significant reform to section 199 of the PLA, stakeholders may have views regarding the issues identified in Part 2.2 above.

Questions

- 4. Are you aware of any problems with the operation of section 199 of the PLA? If so, please provide details.**

³⁸ *Property Law Act 2007* (NZ) s 50(1).

³⁹ *Property Law Act 2007* (NZ) s 50(5).

⁴⁰ This aspect of the *Property Law Act 2007* (NZ) is discussed in more detail in relation to section 200 of the *Property Law Act 1974* (Qld).

⁴¹ *Property Law Act 2007* (NZ) s 53.

3. Section 200 – Efficacy in equity of voluntary assignments

3.1. Overview and purpose

200 Efficacy in equity of voluntary assignments

- (1) A voluntary assignment of property shall in equity be effective and complete when, and as soon as, the assignor has done everything to be done by the assignor that is necessary in order to transfer the property to the assignee –
 - (a) even though anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and
 - (b) provided that anything so remaining to be done is such as may afterwards be done without intervention of or assistance from the assignor.
- (2) This section is without prejudice to any other mode of disposing of property, but applies subject to the provisions of this and of any other Act.

The enactment of a statutory assignment process for choses in action under the Judicature Act did not ‘impair the efficacy of assignments in equity.’⁴² Prior to the introduction of a statutory assignment process, the earlier test in *Milroy v Lord*⁴³ was that an attempted gift would not be given effect in equity unless ‘the donor has done everything which....was necessary to be done in order to transfer the property’. The QLRC in its 1973 Report indicated that since the introduction of the statutory procedure for assignment, the test in *Milroy v Lord* had given rise to differing judicial opinions.⁴⁴ The QLRC noted that within the High Court decision of *Anning v Anning*⁴⁵ there were a number of approaches to formulating the relevant test regarding whether there had been an effective assignment in equity. The two main approaches can be described as the ‘Higgins J approach’ and the ‘Griffith CJ approach’ and these are summarised below:

- the Higgins J approach provides that everything should be done by the donor which is within the donor’s power to do in order to transfer the property. This meant that an assignment of a chose in action would be incomplete if the donor had not given the debtor notice of the assignment since this was within the power of the donor to do so, irrespective that the assignee could also provide the notice;
- the Griffith CJ approach provides that the words ‘necessary to be done’ in the Milroy test should be construed to mean ‘necessary to be done by the donor’. This had the effect that if what remained to be done could equally be done by the assignee the assignment should be regarded as effective.

⁴² Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 106.

⁴³ *Milroy v Lord* (1862) 4 De G.F & J 264.

⁴⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 106.

⁴⁵ *Anning v Anning* (1907) 4 CLR 1049.

Section 200 was introduced to resolve this uncertainty and the QLRC preferred the approach of Griffith CJ and this is reflected in the section.⁴⁶

The QLRC also considered it necessary to confine the operation of the provision to ‘effecting a transfer in equity so as not to disturb ordinary rules of priority.’⁴⁷

3.2. Is there a need for reform?

There does not appear to be any impetus for the removal of section 200 of the PLA. It is a provision which clarifies the approach to assignments in equity, has not presented any significant issues in the case law in Queensland and appears consistent with the common law approach.

3.3. Other jurisdictions

3.3.1. Australia

Section 200 is unique to Queensland and is not replicated in any form in any other Australian jurisdiction. In 2010, the VLRC considered whether the *Property Law Act 1958* (Vic) should be amended to include a provision similar to section 200. The VLRC noted that:

The reasoning behind the Queensland provision, as expressed in reform discussions in 1973, was that ‘the time has come for this conflict of authority to be resolved by legislation’. While the approach of the Queensland legislation was helpful in a time of uncertainty, we suggest that, as the previous conflict in this area has been resolved, there is now no need to introduce a similar or extended statutory provision. Furthermore, as no other Australian jurisdiction has put these principles on a statutory footing, to do so would inhibit harmonisation of law in this area.

On this basis, we propose that section 134 be retained in its current form and that no provision be added relating to the completion of a voluntary assignment in equity.⁴⁸

The issue does not appear to have been considered by any other reform body in Australia recently.

3.3.2. New Zealand

Part 2, Sub-part 5 of the *Property Law Act 2007* (NZ) addresses the issue of giving effect to an assignment in equity. The provision is expressed in a different way to section 200 of the PLA but the effect is similar. The relevant provisions are extracted below:

⁴⁶ The approach of Griffith CJ was also supported in *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 6.

⁴⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 107.

⁴⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010) 60 [8.33]-[8.34]. Following consultation on this issue of whether section 134 of the *Property Law Act 1958* (Vic) should include a provision for voluntary assignments taking effect only in equity, the VLRC confirmed its position that no addition should be made to section 134: see Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 39 [3.52].

50 How thing in action assigned⁴⁹

(5) A legal or equitable thing in action is to be treated as having been assigned in equity (whether the assignment is oral or in writing) if –

- (a) the assignee has given valuable consideration for the assignment; or
- (b) the assignment is complete.

(6) Subsection (5) –

- (a) prevails over any rule of equity to the contrary; but
- (b) applies subject to sections 24 and 25.

(7) An assignment to which subsection (5) applies is complete when the assignor has done everything that needs to be done by the assignor to transfer to the assignee (whether absolutely, conditionally, or by way of charge) the rights of the assignor in relation to the thing in action.

(8) Subsection (7) applies even though some other thing may remain to be done, without the intervention or assistance of the assignor, in order to confer title to the rights on the assignee.

Section 51 of the Act then sets out the further consequences of an assignment which applies to both a thing in action assigned in accordance with section 50(1) or a thing assigned in equity.⁵⁰

3.4. Options

The preliminary recommendation in relation to section 200 of the PLA is that it should be retained.

Questions

- 5. Do you disagree with the preliminary recommendation that section 200 of the PLA should be retained? If not, please provide reasons for your view.**

⁴⁹ The term 'assignment' is defined to mean 'an instrument effecting or relating to an assignment': *Property Law Act 2007* (NZ) s 48.

⁵⁰ *Property Law Act 2007* (NZ) s 51(1).

Part 15 Corporations (ss 223-227)

Part 15 comprises sections 223 to 227 and these provisions are directed at corporations sole or corporations aggregate.

4. Section 223 – Devolution of property of corporation sole

4.1. Overview and purpose

223 Devolution of property of corporation sole

Where either before or after the commencement of this Act any property or interest in the property is or has been vested in a corporation sole (including the Crown), the same shall, unless and until disposed of by the corporation, pass and devolve to and vest in and be deemed always to have passed and devolved to and vested in successors from time to of such corporation.

This section only applies to a corporation sole. The existence of corporations sole dates back to the middle ages in England. These entities were created and used for the purpose of enabling office-holders of the Church of England to hold title to church property.⁵¹ A corporation sole is characterised by only one person occupying a specified office and ‘each and several of the persons in perpetuity who succeed’ that person in the office.⁵² Commentary on the history of corporations sole notes that:

The common lawyers treated the occupant of the office and his successors as an artificial person in which title to church property could be vested. Each occupant of the office for the time being represented the corporation which however still subsisted during a vacancy in the office. Problems arising from transfers of property to the corporation during a vacancy were met by legislation providing for the property to vest in the successor upon his appointment....⁵³

At the time of considering the inclusion of provisions relating to corporations sole in 1973, the QLRC acknowledged that corporations sole were not commonly encountered in Queensland, although it noted these corporations could be created expressly in a number of ways, including by statute.⁵⁴ It is a consistent theme in commentary that very few corporations’ sole now exist.⁵⁵

⁵¹ R P Austin and M Ramsay, *Ford’s Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.030].

⁵² EH Burn and J Cartwright, *Cheshire and Burn’s Modern Law of Real Property* (Oxford University Press, 17th ed, 2006) 923.

⁵³ R P Austin and M Ramsay, *Ford’s Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.030].

⁵⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

⁵⁵ See for example, Charles Harpum, et al, *The Law of Real Property* (Sweet & Maxwell Limited, 6th ed. 2000) 48 [3–27].

One of the rules at common law regarding a corporation sole is ‘that a leasehold interest may not be granted to a corporation sole in his corporate capacity but only in his natural capacity.’⁵⁶ This meant that a lease granted to a corporation sole passed to his personal representatives and not to his successors. Further, at common law personal property cannot be vested in a corporation sole.⁵⁷ Section 223 of the PLA was introduced to overcome these rules so that ‘proprietary interests such as leaseholds pass to the successors of a corporation sole and not to his personal representatives.’⁵⁸ The section is based on the equivalent provisions in the English *Law of Property Act 1925* and the *Property Law Act 1958* (Vic).⁵⁹

4.2. Is there a need for reform?

The section has not been considered judicially in Queensland. There are a number of corporation soles in existence in Queensland which have been established under legislation. These include the Public Trustee of Queensland,⁶⁰ the Treasurer of Queensland,⁶¹ the Coordinator-General,⁶² the Queensland Treasury Corporation⁶³ and the Minister for Economic Development Queensland.⁶⁴ The Acts which establish these corporations sole generally provide, in one form or another, that the corporation:

- is a body corporate with perpetual succession;
- has a seal; and
- may sue and be sued in its corporate name.

Further, in some cases, the relevant provisions also provide that corporations sole have all the powers of an individual and may, for example:

- enter into contracts;
- acquire, hold, dispose of, and deal with, property; and
- appoint agents and attorneys etc.

However, despite the existence of these Acts which create corporations sole, there may still be gaps in these provisions which potentially require the retention of section 223.

⁵⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

⁵⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [223.60]).

⁵⁸ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

⁵⁹ See *Property Law Act 1958* (Vic) s 176.

⁶⁰ *Public Trustee Act 1978* (Qld) s 8.

⁶¹ *Financial Accountability Act 2009* (Qld) s 53.

⁶² *State Development and Public Works Organisation Act 1971* (Qld) s 8.

⁶³ *Statutory Bodies Financial Arrangements Act 1982* (Qld) s 4 and *Queensland Treasury Corporation Act 1988* (Qld) s 5. The Under Treasurer is the constituted corporation sole under the name Queensland Treasury Corporation.

⁶⁴ *Economic Development Act 2012* (Qld) s 12.

4.3. Other jurisdictions

Section 176 of the *Property Law Act 1958* (Vic) is equivalent to section 223 of the PLA. As indicated in Part 4.1 above, the provisions in the PLA were modelled on the Victorian sections. The VLRC recommended the retention of section 176 with the incorporation of section 60(5) of that Act into section 176. Section 60(5) provides that:⁶⁵

A disposition of freehold land to a corporation sole by his corporate designation without the word “successors” shall pass to the corporation the fee-simple or other the whole interest which the disposer had power to dispose of in such land unless a contrary intention appears in the disposition.

The Report did not provide any detail regarding why the section should be retained, although it noted that corporations sole still existed in Victoria. This recommendation has not been implemented to date in Victoria.

The arrangement in the *Law of Property Act 1936* (SA) is quite different from Queensland and Victoria, although it has a similar effect. Section 24D (1) of the South Australian Act provides that:

- (1) A corporation sole established under an Act has, and will be taken always to have had –
 - (a) perpetual succession and a common seal; and
 - (b) the capacity to sue and be sued in the corporation’s name; and
 - (c) subject to any limitations imposed under an Act, all the powers of a natural person.

4.4. Options

Section 223 should be retained in some form, however the language in the section should be modernised and simplified.

Questions

6. Do you think section 223 of the PLA should be retained?

⁶⁵ The equivalent provision in Queensland is located in section 29(2) of the *Property Law Act 1974* (Qld).

5. Section 224 – Vacancy in corporation and section 225 – Transactions with corporations sole

5.1. Overview and purpose

224 Vacancy in corporation

Where either before or after the commencement of this Act there is or has been a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate (in any case in which the vacancy affects the status or powers of the corporation) at the time when, if there had been no vacancy, any interest in or charge on property would have been acquired by the corporation, such interest shall despite such vacancy vest and be deemed to have vested in the successor to such office on the successor's appointment as a corporation sole, or in the corporation aggregate (as the case may be), but without prejudice to the right of such successor, or of the corporation aggregate after the appointment of its head officer, to disclaim that interest or charge.

225 Transactions with corporation sole

Any contract or other transaction expressed or purporting to be made with a corporation sole, or any appointment of a corporation sole as trustee, at a time when there was a vacancy in the office and no administrator acting, shall on the vacancy being filled take effect and be deemed to have taken effect as if the vacancy had been filled before the contract, transaction or appointment was expressed to be made or was capable of taking effect, and on the appointment of a successor shall be capable of being enforced, accepted, disclaimed or renounced by the successor.

The QLRC indicated that the proposed section 224 (referred to as section 223 in the QLRC Report) was included to displace the common law rule that applied to both corporations sole and aggregate that during a vacancy in office 'the corporation is capable of no corporate act.'⁶⁶ This means that a 'grant or devise' of land to a corporation during a vacancy is void. The same reasoning was provided in relation to the introduction of section 225 of the PLA.⁶⁷ Both sections 224 and 225 are based on the equivalent provisions in the *Property Law Act 1958* (Vic).⁶⁸ Section 224 of the PLA applies to both a corporation sole and a corporation aggregate. The characteristics of a corporation sole are described in Part 4.1 above. A corporation aggregate is:

a legal entity constituted by two or more members (corporate or individual) associated for some common venture or by a single member with whom others could associate for some common venture.⁶⁹

⁶⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

⁶⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

⁶⁸ See *Property Law Act 1958* (Vic) ss 177 and 178. The Victorian provisions in turn are based on the English legislation, *Law of Property Act 1925*.

⁶⁹ EH Burn and J Cartwright, *Cheshire and Burn's Modern Law of Real Property* (Oxford University Press, 17th ed, 2006) 923.

Incorporation as a corporation aggregate facilitated the holding of property by a fluctuating group of persons, such as local government organisations and university colleges, and the dealings of the group with other persons in order to advance the group's collective aim.⁷⁰

A corporation aggregate was originally a creation of common law and it was eventually settled by the courts that the creation of this type of entity required the consent of the monarch in the form of a grant of a royal charter.⁷¹ Both the Chartered Accountants Australia and New Zealand⁷² and The Institution of Engineers Australia are examples of corporations aggregate created by charter.⁷³ A modern example of a corporation aggregate is a registered company (one member or multiple members).

Section 224 of the PLA is directed at interests in, or charges on, property and applies if:

- there is, or has been, a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate; and
- at the time of the vacancy, an interest in or charge on property would have been acquired by the corporation had the vacancy not existed.

If these circumstances exist then the relevant interest is deemed to have been vested in the successor to the office of the corporation sole or aggregate. However, the deeming effect of the section is not absolute as any successor is able to 'disclaim that interest or charge.'

Section 225 of the PLA only applies to a corporation sole and is directed at contracts or other transactions with these entities. The section applies:

- where any contract or other transaction is expressed or purporting to be made with a corporation sole; or
- to any appointment of a corporation sole as trustee; and
- there was a vacancy in the office and no administrator acting.

When the vacancy is filled, any contract, other transaction or appointment of a corporation sole as trustee takes effect and is deemed to have taken effect as if the vacancy had been filled before the contract, transaction or appointment was expressed to be made or was capable of taking effect. On the appointment of a successor, these contracts or other transactions are capable of being enforced, accepted, disclaimed or renounced.

The reference to the words 'and no administrator acting' in section 225 of the PLA is a reference to the appointment of an administrator under section 226 of the PLA. If an administrator is appointed under section 226, the corporation's powers devolve to the administrator and acts of the

⁷⁰ R P Austin and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.050].

⁷¹ R P Austin and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.020].

⁷² The Chartered Accountants and New Zealand was previously known as the Institute of Chartered Accountants.

⁷³ Some aspects of the *Corporations Act* may apply to chartered corporations because of the 'effect of expressions defined in the Act such as 'body' or 'body corporate'. See R P Austin and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010) 33 [2.060] for further commentary on this issue.

administrator bind the corporation, rather than any acts of the successor under section 225 of the PLA.⁷⁴

5.2. Is there a need for reform?

5.2.1. Section 224 of the PLA

Corporations sole created by legislation still exist in Queensland. It is not clear whether the relevant legislation creating these entities specifically address the effect of a vacancy in the office on interests or charges acquired during a vacancy. In the case of corporations aggregate there is suggestion in commentary that ‘corporations created by or under statutes will rarely have a “head” in the sense used here and will be invested with powers in such a manner as to exclude the operation of the rule.’⁷⁵ However, again the absence of certainty regarding possible gaps in enacting Acts supports a position that the section should probably be retained but with some amendments discussed in Part 5.4 below.

5.2.2. Section 225 of the PLA

As indicated above, this section only applies to a corporation sole. It is not clear why corporations aggregate were also not included in the section and this exclusion has been described as leaving ‘curious gaps’.⁷⁶ In particular, the question has been raised in commentary as to why it was not extended to corporations aggregate ‘which experience similar difficulties during a vacancy in the headship’.⁷⁷

The reference in section 225 to the appointment of a corporation sole as trustee originated from section 180(3) of the *Law of Property Act 1925* (UK) where it was included to avoid any uncertainty regarding the Public Trustee acting as a trustee.⁷⁸ In Queensland, there is a strong argument that there is no uncertainty in relation to the Public Trustee of Queensland acting as trustee as the *Public Trustee Act 1978* (Qld) confers broad powers on the Public Trustee.⁷⁹ Other comments made in relation to section 225 of the PLA include that it is unlikely that a contract would be made by a corporation sole at a time when there is a vacancy in the office.⁸⁰ Further, it has been suggested

⁷⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [225.30].

⁷⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [224.60].

⁷⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [225.60].

⁷⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [225.60].

⁷⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [225.30].

⁷⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [225.30].

⁸⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [225.30].

that the only transactions likely to be ‘covered would be of a passive kind not requiring any action by the corporation sole (eg appointment by power of attorney).’⁸¹

5.3. Other jurisdictions

Sections 177 and 178 of the *Property Law Act 1958* (Vic) are equivalent provisions to sections 224 and 225 of the PLA. South Australia has a different drafting approach to the issue of a temporary vacancy. Section 24D(2) of the *Law of Property Act 1936* (SA) uses the term ‘right or liability’ and provides:

(2) A right or liability that a corporation sole or corporation aggregate would have acquired or incurred but for the occurrence (before or after the commencement of this section) of a temporary vacancy in the office or offices of the corporation will be treated as having taken effect on the filling of the vacant office or offices as if the vacancy or vacancies had been filled before the right or liability was acquired or incurred.

5.4. Options

5.4.1. Option 1 – Retain both sections 224 and 225 with some amendment

Both sections 224 and 225 of the PLA are retained under this option with amendments to modernise the language in the sections. Further, section 225 could be amended by removing the reference to the appointment of a corporation sole as trustee in the light of the broad powers conferred on the Public Trustee under the *Public Trustee Act 1978* (Qld). However, this approach assumes that there are no other corporations sole that act as trustees.

5.4.2. Option 2 – Amend sections 224 and 225 by consolidating the provisions into a single section

This option is modelled on section 24D(2) of the *Law of Property Act 1936* (SA) which is extracted in Part 5.3 above. The premise is that a ‘right or liability’ would capture the transactions covered by both sections 224 and 225 of the PLA. The ability of a successor to disclaim or renounce is arguably implicit, however, the express reference to this in sections 224 and 225 could be retained if the provisions are consolidated.

Questions

7. Are you aware of any other corporations sole that may act as trustees?
8. Do you think sections 224 and 225 require amendment? If so, why?
9. Do you see any issues which may arise by combining section 224 and 225 into a single provision?

⁸¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [225.30].

6. Section 226 – Corporation incapable of acting

6.1. Overview and purpose

226 Corporation incapable of acting

- (1) Where, because of the death or incapacity (whether before or after the commencement of this Act) of any 1 or more of the officers or members of a corporation or for any other reason, the corporation ceases to be capable of acting –
 - (a) either generally or in respect of a particular transaction or transactions; and
 - (b) either temporarily or for an indefinite or any lesser period;the court may, on the application of any officer or member of the corporation or the personal representative of such member or of any creditor or person having or appearing to have any claim against the corporation, appoint an administrator.
- (2) The court may in its discretion appoint any administrator for an indefinite period or for a fixed period or until the happening of any specified event and on such terms and conditions as to remuneration out of the assets of the corporation and otherwise as it thinks fit.
- (3) Unless the court otherwise directs, the administrator shall, to the exclusion of the corporation and any officer or member of the corporation, have authority to and may exercise all the powers of the corporation subject to such terms and conditions (if any) as the court sees fit to impose.
- (4) Unless the court otherwise directs, the administrator may delegate any of the powers exercisable by the administrator.
- (5) The court may in its discretion on the application of the administrator or of any person referred to in subsection (1) –
 - (a) give to the administrator directions –
 - (i) as to the exercise of any of the powers exercisable by the administrator; and
 - (ii) as to any question or matter arising in or with respect to the affairs of the corporation; or
 - (b) remove or replace the administrator.
- (6) On any application under this section the court may make such order for the payment of costs as it thinks fit.
- (7) This section applies to any corporation, whether a corporation aggregate or corporation sole –
 - (a) incorporated under the *Associations Incorporation Act 1981*; or
 - (b) incorporated or registered under the Corporations Act; or
 - (c) constituted under any other Act.
- (8) Where an order is made under this section for the appointment, removal or replacement of an administrator in relation to a company incorporated or registered under the Corporations Act the order shall not take effect until the lodgment within 7 days of the making of the order, or such longer period as the court may allow, of an office copy of the order with the Australian Securities and Investments Commission.

Section 226 of the PLA appears to have been included to address a concern of the QLRC regarding the effect of the death, incapacity or otherwise of all members and officers of a body corporate and

the inability of the corporation to actually act in those circumstances.⁸² At the time the QLRC undertook its review in 1973 it indicated that this scenario was:

happening with recurring frequency, particularly in the case of small proprietary companies of which the only directors and shareholders are husband and wife who are killed in the same motor accident.⁸³

The QLRC's concern appeared to be in relation to those situations where none of the deceased had left a will, which it described as 'virtually insoluble'. Further, the QLRC noted that there was no means by which the corporation's affairs could be conducted while waiting for the appointment of an administrator which could take 'many months'.⁸⁴ The QLRC indicated that:

What is needed is some procedure by which the court can, during such a period, appoint a person who can administer the affairs of the corporation. Such procedure exists under s 23 of The Building Units Titles Act of 1965, or the R.E.I.C Acts. We therefore propose a clause, modelled principally on s 23, which will enable an administrator to be appointed to the affairs of a corporation during any period when it is incapable of acting. This will ensure that it will be possible to preserve the assets of the corporation and to carry on and complete transactions entered into by it until the conduct of its affairs can be returned to normal.⁸⁵

Commentary suggests that the scope of section 226 of the PLA extends to a wide variety of situations where a company may be incapable of acting including:

- disagreements and deadlocks among directors or members;
- legal disabilities in exercise of directors' and members' powers; and
- death, disappearance and physical incapacity.⁸⁶

However, the section will not cover situations where a company is acting ultra vires.⁸⁷ The section potentially covers a broad range of entities and expressly provides that it applies to any corporation whether a corporation aggregate or corporation sole –

- incorporated under the *Associations Incorporation Act 1981* (Qld); or
- incorporated or registered under the Corporations Act; or

⁸² Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109.

⁸³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 109-110.

⁸⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 110.

⁸⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 110.

⁸⁶ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [226.270]. See [226.30] – [226.240] for further commentary on situations that may give rise to incapacity.

⁸⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [226.270].

- constituted under any other Act.

However, in practice, a court would only exercise its discretion under section 226 to appoint an administrator where:

The incapacity has arisen from a difficulty not brought about by the directors or members deliberate act to create it and **where other available remedies are inconvenient or impracticable** in the circumstances of the case. Indeed although the section does not expressly say so, its purpose appears to be to provide a machinery for corporate action where all concerned are agreed on the action, but there is a practical difficulty in carrying it out; hence the fact that an application under the section is opposed by an interested party may be grounds for refusing an order under it.⁸⁸ **[emphasis added]**

Section 226 operates in the following way:

- where because of death or incapacity the corporation is not capable of acting generally or in respect of a particular transaction an application can be made to the court to appoint an administrator;
- an application can be made by:
 - any officer or member of the corporation; or
 - the personal representative of a member; or
 - any creditor or person having or appearing to have any claim against the corporation;⁸⁹
- the court has discretion whether or not it will appoint any administrator, for what time period and on such terms and conditions as it thinks fit;⁹⁰
- the administrator has the authority and may exercise all the powers of the corporation subject to other directions of the court;⁹¹
- where an order is made under the section for the appointment, removal or replacement of an administrator in relation to a company registered or incorporated under the *Corporations Act 2001* (Cth), the order does not take effect until the lodgement of a copy of the order with ASIC.⁹²

6.2. Is there a need for reform?

It is unclear how regularly section 226 of the PLA has been relied upon in practice. Prima facie, the section appears to have a potentially wide application. However, as suggested above, it is likely to operate as a last resort provision where other remedies are not suitable and there is agreement regarding the action to be taken.

6.3. Other jurisdictions

⁸⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [226.270].

⁸⁹ *Property Law Act 1974* (Qld) s 226(1).

⁹⁰ *Property Law Act 1974* (Qld) s 226(2).

⁹¹ *Property Law Act 1974* (Qld) ss 226(3)-(5).

⁹² *Property Law Act 1974* (Qld) s 226(8).

There do not appear to be any equivalent provisions to section 226 of the PLA in other Australian jurisdictions.

6.4. Options

Feedback from stakeholders is required to determine the current role of section 226 of the PLA, its utility and whether or not reform is appropriate.

Questions

10. Are you aware of how often the process under section 226 of the PLA is used in practice?

11. Is section 226 of the PLA still necessary?

7. Section 227 – Corporate contracts and transactions not under seal

7.1. Overview and purpose

227 Corporate contracts and transactions not under seal

- (1) Contracts and other transactions may be made or effected by any body corporate, wherever incorporated, as follows –
 - (a) a contract or other transaction which if made or effected by or between individuals would by law be required to be in writing, signed by the party to be charged with it or effecting the same, may be made by the corporation in writing signed by any person under its authority, express or implied; and
 - (b) a contract or other transaction, which if made or effected by or between individuals would by law be valid although made by parol only, and not reduced to writing, may be made by parol by the corporation by any person acting under its authority, express or implied.
- (2) A contract or other transaction made or effected under this section shall be effective in law, and shall bind the corporation and the corporation's successors and all other parties to the contract or other transaction.
- (3) A contract or other transaction made or effected under this section may be varied or discharged in the same manner in which it is by this section authorised to be made or effected.
- (4) Nothing in this section shall be taken to prevent a contract or other transaction from being made or effected under the seal of the corporation.
- (5) This section –
 - (a) applies to the making, effecting, variation or discharge of a contract or transaction after the commencement of this Act, whether the corporation gave its authority before or after the commencement of this Act; and
 - (b) does not apply to contracts made by any company within the meaning of the Corporations Act, or by any corporation incorporated under any other Act which expressly prescribes the manner and form in which contracts may be made or transactions effected by or on behalf of such corporation.

At common law, contracts and transactions of a corporation were required to be effected under the corporate seal, except in respect of basic day to day transactions.⁹³ The QLRC acknowledged that a number of statutes modified the common law rule and placed a company in the same category as an individual for the purpose of the required formalities associated with contracts and other transactions.⁹⁴ However, the QLRC was concerned that some legislation in place in 1973 did not

⁹³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 110. For a historical overview of the development of the rule see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [227.30], [227.60] and [227.90].

⁹⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 110.

have provisions which addressed the common law rule in all cases, including corporations created by letters patent under the *Religious Educational and Charitable Institutions Act 1861* (Qld).⁹⁵

Section 227 of the PLA is directed at the making or effecting of contracts and other transactions by a body corporate (wherever incorporated) and has the effect of displacing the common law rule requiring corporate acts to be effected under corporate seal. It applies to 'any body corporate, wherever incorporated.' The term body corporate is not defined in the PLA nor is it defined in the *Acts Interpretation Act 1954* (Qld) (**AI Act**). The section also refers to a 'corporation'. This term is defined in Schedule 1 of the AI Act to include a body politic or corporate.

Section 227 operates in the following way:

- If a contract or other transaction if made between individuals is legally required to be in writing and signed, then a corporation may make a contract or transaction in writing and signed by any person under the corporation's authority (express or implied);⁹⁶ and
- if a contract or other transaction made by parol only is legally valid if made between individuals, it may also be made by the corporation by any person acting under its authority (express or implied).⁹⁷

The section has been interpreted as an enabling provision which is permissive in nature, rather than mandatory.⁹⁸ The section 'does not dictate the means by which a company may make a contract.'⁹⁹

Section 227(5) of the PLA expressly states that:

- the section applies to the making, effecting, variation or discharge of a contract or transaction after the comment of the Act, whether or not the corporation gave its authority before or after the commencement of the PLA;¹⁰⁰ and
- it does not apply to contracts made by any company within the meaning of the *Corporations Act 2001* (Cth); or
- it also does not apply to any corporation incorporated under any other Act which expressly prescribes the manner and form in which contracts may be made or transactions effected by or on behalf of such corporation.¹⁰¹

⁹⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 110. Under section 106H of the *Associations Incorporation Act 1981* (Qld) an application can be made to the Minister for authority to transfer the corporation's incorporation from the *Religious Educational and Charitable Institutions Act 1861* (Qld) to a company limited by guarantee under the *Corporations Act 2001* (Cth) or the *Corporations (Aboriginal and Torres Strait Island) Act 2006* (Cth).

⁹⁶ *Property Law Act 1974* (Qld) s 227(1)(a).

⁹⁷ *Property Law Act 1974* (Qld) s 227(1)(b).

⁹⁸ *LK Bros Pty Ltd v Collins and Anor* [2004] QSC 026 [21]. For further commentary on this issue see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [227-120] – [227.150].

⁹⁹ *LK Bros Pty Ltd v Collins and Anor* [2004] QSC 026 [21]. For further commentary on this issue see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [227-120 - 227.150].

¹⁰⁰ *Property Law Act 1974* (Qld) s 227(5)(a).

¹⁰¹ *Property Law Act 1974* (Qld) s 227(5)(b).

A 'company' under the *Corporations Act 2001* (Cth) means a company registered under that Act.¹⁰²

7.2. Is there a need for reform?

In practical terms the exclusions set out in section 227(5)(b) require an assessment to be undertaken of the relevant entity to determine if it is a:

- company within the meaning of the *Corporations Act 2001* (Cth); or
- corporation which has been incorporated under any other legislation which sets out a process for the making of contracts or effecting transactions.

In this respect, it is not clear which bodies corporate the section will cover, if any, and whether or not section 227 of the PLA is still relevant.

7.3. Other jurisdictions

Victoria is the only jurisdiction that has a provision similar to section 226 of the PLA. However, the relevant section is located in section 31A of the *Instruments Act 1958* (Vic).

7.4. Options

It is difficult to assess whether or not reform or amendment of section 227 of the PLA is required. Feedback from stakeholders will be relevant to this issue.

Questions

12. Are you aware of how often section 227 is used in practice?

13. Is it likely that there are bodies corporate which are not excluded under section 227(5)(b) of the PLA and which may still rely upon the signing process set out under section 227(1)?

14. Do you think section 227 of the PLA is still necessary?

¹⁰² *Corporations Act 2001* (Cth) s 9. The meaning of the section is also enlarged for the purpose of specific provisions of the Act specified in the section 9 definition. See Ford, Austin & Ramsay's *Principles of Corporations Law*, LexisNexis (online)[1.051].

Part 16 Voidable dispositions (ss 228-230)

8. Section 228 – Voluntary conveyances to defraud creditors voidable

8.1. Overview and purpose

228 Voluntary conveyances to defraud creditors voidable

- (1) Subject to this section, every alienation of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person prejudiced by the alienation of property.
- (2) This section does not affect the law of bankruptcy for the time being in force.
- (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

Section 228 is directed at addressing a situation where voluntary conveyances are made with the intent to defraud creditors. Its origins are derived from 16th century English legislation¹⁰³ which avoided 'feigned, covinous and fraudulent conveyances with intent to delay, hinder or defraud creditors.'¹⁰⁴ The section is essentially a restatement of the relevant English provision in the *Law of Property Act 1925*¹⁰⁵ with the main difference that the word 'alienation' is used rather than 'disposition' to make it clear that the section covered dispositions of all kinds of property whether real or personal.¹⁰⁶

Section 228 operates in the following way:

- it has the general effect of making voidable every alienation of property, with intent to defraud creditors. The alienation of the property is voidable at the instance of the person prejudiced by the alienation;¹⁰⁷

¹⁰³ *13 Eliz 1 c 5* (Fraudulent Conveyances) (1571).

¹⁰⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [228.30].

¹⁰⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 111. See *Law of Property Act 1925* (UK) s 172 (the section has now been repealed).

¹⁰⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 111. The QLRC noted that the Victorian equivalent used the term 'conveyance' in the place of 'disposition' and the corresponding provision in section 37A of the *Conveyancing Act 1919* (NSW) use the word 'alienation'.

¹⁰⁷ *Property Law Act 1974* (Qld) s 228(1).

- ‘alienation’ is not defined in the PLA but it has been interpreted broadly to mean ‘parting with property or some interest in property’;¹⁰⁸
- it does not extend to any estate or interest in property conveyed for valuable consideration and in good faith to a person who does not have notice of the intent to defraud creditors at the time of the conveyance;¹⁰⁹ and
- it does not affect the law of bankruptcy.¹¹⁰

The section (and its interstate equivalents) has been considered in different contexts in a variety of decisions.¹¹¹ Whether there is an intention to defraud, is determined on the facts of each case.¹¹²

8.2. Is there a need for reform?

One of the key considerations in relation to reform of section 228 of the PLA is the extent to which a similar provision in the *Bankruptcy Act 1966* (Cth) covers some or all of the situations in which section 228 may apply. In this respect, when considering the introduction of section 228 of the PLA, the QLRC noted that:

To a large extent the field of fraudulent dispositions is now occupied by s 121 of the Commonwealth Bankruptcy Act, which, however, is confined to dispositions by bankrupts as such. The foregoing sections of the property legislation are not, however, confined to insolvents so affect dispositions which are not within the scope of the Commonwealth legislation.¹¹³

Section 121 of the *Bankruptcy Act 1966* (Cth) has been amended since 1973.¹¹⁴ Commentary on section 121 of the *Bankruptcy Act 1966* (Cth) indicates that in the context of bankruptcy, the section ‘supersedes’ the State and Territory ‘voluntary conveyance’ provisions, including section 228 of the PLA.¹¹⁵ However, it appears from case law that any suggestion that section 121 of that Act covers the same subject matter as section 228 of the PLA has been rejected.¹¹⁶ In the New South Wales

¹⁰⁸ For a full discussion on the meaning of this term see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [228.60].

¹⁰⁹ *Property Law Act 1974* (Qld) s 228(3).

¹¹⁰ *Property Law Act 1974* (Qld) s 228(2).

¹¹¹ For further detailed commentary on the operation of the section and related decisions see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [228.30] – [228.210].

¹¹² Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 73 [30597.10].

¹¹³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 111.

¹¹⁴ The amendments strengthened the ability of the trustee to recover under section 121 prior to a person becoming bankrupt. For more information about the amendments see PP McQuade and MGR Gronow, *Australian Bankruptcy Law and Practice* (Thomson Reuters) (online) [121.0.10].

¹¹⁵ PP McQuade and MGR Gronow, *Australian Bankruptcy Law and Practice* (Thomson Reuters) (online) [121.0.20].

¹¹⁶ See *Zaravinos v Houvardas* (2004) 32 Fam LR 490. See also *Ashton v Prentice* [1998] FCA 1464 where Hill J indicated that the amended section 121 of the Act ‘covers more or less the same area as the section it replaced, although, if anything, it is now framed in such a way as to make it rather easier for a Trustee to succeed than was earlier the case.’

Court of Appeal decision of *Zaravinos v Houvardas* Sheller JA expressly stated in relation to section 37A of the *Conveyancing Act 1919* that:

Section 121 is not an exhaustive enactment of the topic of the avoidability of fraudulent transfers and was not intended to operate to the exclusion of state laws on that subject, even if the transferor was or became bankrupt.¹¹⁷

Clearly s 121 does not cover the field covered by s 37A. It is concerned only with enabling a trustee in bankruptcy in certain circumstances to avoid certain transfers.¹¹⁸

Section 228 of the PLA is still available even after the debtor becomes bankrupt, although in such a situation the official trustee is the appropriate person to commence proceedings under section 228. However, it is more likely the official trustee would make the application under section 121 of the *Bankruptcy Act 1966* (Cth) and any other creditor will be unable to commence proceedings under section 228 of the PLA.¹¹⁹

8.3. Other jurisdictions

8.3.1. Australia

Each Australian jurisdiction has a provision which is generally in the same form as section 228 of the PLA.¹²⁰ There are some slight variations in terms of the language used. For example:

- in Victoria, section 172(2) of the *Property Law Act 1958* (Vic) refers to ‘insolvency, bankruptcy and disentailing assurance’ instead of simply ‘bankruptcy’ which is the position in section 228(2) of the PLA;
- section 172(3) of the *Property Law Act 1958* (Vic) covers alienation for ‘valuable consideration and ‘in good faith’ or ‘upon good consideration’ and ‘in good faith’ whereas the equivalent provision in section 228(3) of the PLA only refers to ‘valuable consideration and good faith’;¹²¹
- the South Australian provision does not include a subsection which refers to the law of bankruptcy not being affected by the relevant section;¹²²
- Section 40 of the *Conveyancing and Law of Property Act 1884* (Tas) only refers to ‘disentailing assurance’.

The VLRC considered the voidable disposition provisions in Division 9 of the *Property Law Act 1958* (Vic) in 2010 when that Act was reviewed. The VLRC recommended that section 172 of the Act be retained for the following reasons:

¹¹⁷ (2004) 32 Fam LR 490 [40].

¹¹⁸ *Zaravinos v Houvardas* (2004) 32 Fam LR 490 [41].

¹¹⁹ See Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [228.30] for discussion on this issue.

¹²⁰ See *Property Law Act 1958* (Vic) s172; *Conveyancing Act 1919* (NSW) s 37A; *Law of Property Act 1936* (SA) s 87; *Law of Property Act* (NT) s 208; *Property Law Act 1969* (WA) s 89.

¹²¹ The South Australian and Western Australian provisions in this respect are in the same form as the Victorian section.

¹²² See *Law of Property Act 1936* (SA) s 82.

This provision ensures that a person cannot put property in the name of a third party in order to place it beyond their reach of creditors with the intention of defrauding them. Any person prejudiced by a conveyance with the intention to defraud may set the conveyance aside, even if the person is not a creditor. The person transferring the property need not be insolvent.

Section 121 of the *Bankruptcy Act 1966* (Cth), which regulates the validity of transfers to defeat creditors by a person who later becomes bankrupt, overlaps this provision but does not completely displace it.¹²³

8.3.2. New Zealand

The *Property Law Act 1952* (NZ) included section 60 which was in essentially the same terms as section 228 of the PLA. The new property law regime introduced into New Zealand in 2007 in the form of the *Property Law Act 2007* (NZ) reformulated and extended the approach in section 60. The Explanatory Note to the Property Law Bill 2006 summarises the changes in the following way:

Subpart 6 of Part 6 is a reformulation and extension of section 60 of the 1952 Act, which itself derives from the Statute of Elizabeth (13 Eliz 1, c 5). The concept of recovering, for general creditors, property transferred by a debtor to put it beyond the reach of general creditors is thus a very old one indeed. The subpart puts into statutory form much of the common law gloss which section 60 has attracted. It also clarifies procedures, especially when application is made by an individual creditor and the debtor has not yet been bankrupted or, if a company, put into liquidation.

The relevant provisions are set out in sections 344 to 350 of the *Property Law Act 2007* (NZ). The provisions apply to dispositions of property made after 31 December 2007 to a debtor who:

- was insolvent at the time, or became insolvent as a result of making the disposition; or
- was engaged, or was about to engage, in a business or transaction for which the remaining assets of the debtor were, given the nature of the business or transaction, unreasonably small; or
- intended to incur, or believed, or reasonably should have believed, that the debtor would incur, debts beyond the debtor's ability to pay.¹²⁴

In addition, the debtor must have intent to prejudice a creditor, or the disposition by way of gift, or without receiving reasonably equivalent value in exchange.¹²⁵

Part 6, subpart 6 of the *Property Law Act 2007* (NZ):

- clarifies what it means for a disposition to prejudice a creditor, explains what a disposition by way of gift includes and indicates when a debtor must be treated as insolvent.¹²⁶ The term 'disposition' is also defined broadly in section 345(2) and means, amongst other things:
 - a conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity;
 - the creation of a trust;

¹²³ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 138.

¹²⁴ *Property Law Act 2007* (NZ) ss 346(1) and (2).

¹²⁵ *Property Law Act 2007* (NZ) s 346(1).

¹²⁶ *Property Law Act 2007* (NZ) s 345(1).

- the grant or creation, at law or in equity, of a lease, mortgage, charge, servitude, licence, power, or other right, estate, or interest in or over property;
- sets out the process for making an application for a court order setting aside certain dispositions of property. Only a creditor who claims to be prejudiced by a disposition of property or the liquidator (if the company is a company in liquidation) may apply for an order;¹²⁷
- where a valid application has been made under section 347 of the Act, the court can make an order if satisfied that the applicant has been prejudiced by a disposition of property.¹²⁸ The order can either:
 - vest the property in one of the persons specified in section 350 of the Act; or
 - require a person who acquired or received property through the disposition to pay reasonable compensation to the person specified in section 350 of the Act,¹²⁹
- section 350 overrides the *Land Transfer Act 1952* (NZ);¹³⁰
- the court must not make an order to set aside a disposition of property:
 - against a person who acquired the property for valuable consideration and in good faith without knowledge of the fact that it had been the subject of a disposition to which subpart 6 applies; or
 - the person acquired the property through a person who acquired it in the above circumstances.¹³¹

8.3.3. United Kingdom and Singapore

The *Law of Property Act 1925* (UK) included section 172 which was in the same form as section 228 of the PLA. This provision was removed from the UK legislation in 1985. The position now is that conveyances made with the intent to defraud creditors are dealt with under the *Insolvency Act 1986* (UK).¹³²

In Singapore, section 73B of the *Conveyancing and Law of Property Act* (CAP 61) sets out the position in relation to voluntary conveyances to defraud creditors. The section is essentially in the same form as section 228 of the PLA. In 2013, the Insolvency Law Review Committee produced a final report regarding insolvency law in Singapore with the aim of streamlining and consolidating the two sources of law located in the *Companies Act* (Cap. 50) and the *Bankruptcy Act* (Cap 20).¹³³ Part of that review considered the avoidance provision in section 73B and the removal of the equivalent provision in the United Kingdom into the insolvency legislation. The recommendation of the Committee is to move the section into the 'New Insolvency Act and amend the provision to mirror

¹²⁷ *Property Law Act 2007* (NZ) s 347. The word 'creditor' is defined in section 4 of the Act to include a person who is a creditor within the meaning of section 240 of the *Companies Act 1993* and a person who can provide a debt under the *Insolvency Act 2006*.

¹²⁸ *Property Law Act 2007* (NZ) s 348(1).

¹²⁹ *Property Law Act 2007* (NZ) s 348(2). The persons specified in section 350 of the Act include the Official Assignee, if the debtor is bankrupt, or the debtor if the debtor is a company in liquidation etc or in every other case, the person directed by the court under subsection (2).

¹³⁰ *Property Law Act 2007* (NZ) s 350(2).

¹³¹ *Property Law Act 2007* (NZ) s 349.

¹³² *Insolvency Act 1986* (UK) ss 423-425. For further information on this process see Charles Harpum, et al, *The Law of Real Property* (Sweet & Maxwell, 6th ed, 2000) 172 [5.080].

¹³³ Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee*, Final Report (2013) 184-185 [52]-[54].

the section in the United Kingdom.¹³⁴ The relevant reforms proposed in relation to the insolvency law in Singapore do not appear to have been implemented to date.

The Insolvency Law Review Committee made a number of observations in relation to the differences between section 73B (equivalent provision to section 228 of the PLA) and section 423 of the *Insolvency Act 1985* (UK) including:¹³⁵

- the UK section covers only undervalue transactions compared to the broader category of ‘every’ conveyance of property’ set out in the Singaporean provision (mirrored in Australia);
- the UK section considers the ‘purpose’ of the transaction rather than whether there was ‘intention to defraud creditors’; and
- the availability of different remedies in place of simply making the transaction ‘voidable’.

8.4. Options

Section 228 of the PLA appears to have a relevant function in Queensland. Subject to any significant issues identified during the consultation period, the section may benefit from re-drafting to simplify its terms.

Questions

15. Do you think section 228 of the PLA should be retained?
16. Do you have any concerns about its current operation in practice? If so, please provide details of these concerns.
17. Do you think there is any confusion in practice regarding the interaction between section 228 of the PLA and section 121 of the *Bankruptcy Act 1966* (Cth)?

¹³⁴ Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee*, Final Report (2013) 185 [54].

¹³⁵ Insolvency Law Review Committee, *Report of the Insolvency Law Review Committee*, Final Report (2013) 184 [53].

9. Section 229 – Voluntary disposition of land how far voidable as against purchasers

9.1. Overview and purpose

229 Voluntary disposition of land how far voidable as against purchasers

- (1) Every voluntary alienation of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.
- (2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud merely because a subsequent conveyance for valuable consideration was made, if such subsequent conveyance is made after the commencement of this Act.

Section 229 of the PLA has similar historical origins to sections 228 and 230. The statute 27 Eliz I, c 4 of 1584 was construed by the courts so that ‘an intent to defraud was conclusively inferred (except as against a charity) from the mere fact that a voluntary conveyance was followed by a conveyance of the same land for value.’¹³⁶ This created problems as the initial recipient of the land – that is, the voluntary grantee did not have certainty of tenure.¹³⁷

The effect of this harsh interpretation of 27 Eliz I, c 4, was, in effect, to enable anyone who made a voluntary conveyance of land to change his or her mind by subsequently selling the land for value; for the voluntary conveyance was voidable at the instance of the subsequent purchaser even though the subsequent purchaser took the land with notice of the prior voluntary conveyance.¹³⁸

In England, the presumption of the courts when interpreting the imperial legislation was altered by legislation.¹³⁹ In Queensland this was eventually set out in provisions of The Mercantile Acts.¹⁴⁰ Part of the QLRC’s justification for the inclusion of section 229 of the PLA was to simplify and modernise the ‘archaic and somewhat unclear language’ in these earlier provisions.¹⁴¹

The effect of section 229 of the PLA is that a voluntary alienation is not voidable at the instance of a subsequent purchaser unless the alienation was made with the intention to defraud the purchaser. Further, the section expressly provides that a voluntary disposition is not deemed to have been

¹³⁶ GW Hinde, et al, *Land Law in New Zealand* (Butterworths, 1997).

¹³⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [229.30]).

¹³⁸ GW Hinde, et al, *Land Law in New Zealand* (Butterworths, 1997) 217 [2.107].

¹³⁹ The relevant English Act was the *Voluntary Conveyances Act* 1893. See Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 111.

¹⁴⁰ See sections 48 and 49 of The Mercantile Acts.

¹⁴¹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 111.

made with intent to defraud merely because a subsequent conveyance was made for valuable consideration.¹⁴² The word ‘disposition’ is defined broadly 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.¹⁴³

The term ‘conveyance’ includes a transfer within the meaning of the *Land Title Act 1994* (Qld). This means that section 229 of the PLA will apply to registered land. The effect of this is that a registered owner of the property who obtained the title to the property as a volunteer would have the same right of indefeasibility as a person who obtained the title through a purchase for valuable consideration.¹⁴⁴

9.2. Is there a need for reform?

It is not clear whether section 229 of the PLA serves any current purpose and whether it is relied upon in practice. Judicial consideration of this section appears to have been limited in Queensland and in the other Australian jurisdictions. In a Preliminary Paper reviewing the *Property Law Act 1952* (NZ), the Law Reform Commission (NZ) asked whether there was any purpose in re-enacting a version of section 61 of that Act into the new property law legislation in New Zealand. The section was not re-enacted in the *Property Law Act 2007* (NZ).

9.3. Other jurisdictions

9.3.1. Australia

Each Australian jurisdiction has a section that has a similar effect to section 229 of the PLA, although not always identical in form. An overview of the provisions in the other States and Territories is set out below:

- the Northern Territory, Tasmanian and Western Australian provisions are essentially identical, although section 41(1) of the *Conveyancing and Law of Property Act 1884* (Tas) uses the word ‘disposition’ instead of ‘alienation’;¹⁴⁵
- the sections in South Australia and Victoria are also very similar to the Queensland provision. However, both jurisdictions use the word ‘disposition’ and define it to include every mode of disposition referred to or mentioned in the *Real Property Act 1886* (in the case of South Australia) and the *Transfer of Land Act 1958* (Vic) (in the case of Victoria);¹⁴⁶

¹⁴² *Property Law Act 1974* (Qld) s 229(2).

¹⁴³ *Property Law Act 1974* (Qld) s 3, sch 6.

¹⁴⁴ See *Land Title Act 1994* (Qld) ss 180 and 184.

¹⁴⁵ See *Law of Property Act* (NT) s 209, *Property Law Act 1969* (WA) s 90 and 91 and *Conveyancing and Law of Property Act 1884* (Tas) s 41.

¹⁴⁶ *Law of Property Act 1936* (SA) s 87 and *Property Law Act 1958* (Vic) s 173 and 174. See also *Civil Law (Property) Act 2006* (ACT) s 240. Section 240(2) of that Act is similar to the exception in section 229(2) of the PLA, although it is expressed in terms of the document by which the voluntary disposition is made is registered before a subsequent purchase of the land the voluntary disposition is not taken to have been made with intent

- in New South Wales, section 37B of the *Conveyancing Act 1919* (NSW) is similar but uses the phrase ‘every instrument (other than a will) which operates, or on registration would operate as a voluntary alienation of land’.¹⁴⁷

The VLRC recommended that the equivalent provisions, sections 173 and 174, of the *Property Law Act 1958* (Vic) be retained.¹⁴⁸ However, there is no detail provided in the report which explains the reasoning for the recommendation.

9.3.2. New Zealand

Prior to 2007, section 61 of the *Property Law Act 1952* (NZ) was in a similar form to section 229 of the PLA. However, this changed with the commencement of the new property legislation in 2007. The New Zealand Law Reform Commission reviewed section 61 and commented that:

It is a little difficult to see the purpose of perpetuating this water-downed version of the original rule. Under modern New Zealand conveyancing conditions it is hard to conceive of a situation in which a voluntary alienation could be used as a means of defrauding a subsequent purchaser and, even if that did occur, would it really be necessary to rely upon the statute before a court could deprive the volunteer of the benefit of the transferor’s fraud? A party to a fraud cannot take advantage of it; nor, it is thought, can a volunteer. On the other hand, an innocent volunteer would get an indefeasible title under the Land Transfer Act if *Bogdanovic v Koteff* (1988) 12 NSWLR 472 is followed in New Zealand. If the section is re-enacted it will therefore need to include a clause overriding that Act.¹⁴⁹

Section 61 is not re-enacted in the *Property Law Act 2007* (NZ). An overview of the way in which the new subpart dealing with dispositions that prejudice creditors is set out in Part 8.3.2 above.

9.3.3. United Kingdom

In the United Kingdom, section 173 of the *Law of Property Act 1925* (UK) is in the same form as section 229 of the PLA.

9.4. Options

Any changes to, or repeal of section 229 of the PLA depends on whether the section serves any current purpose in Queensland. Stakeholder feedback is required on this issue.

Questions

18. Does section 229 of the PLA still serve a purpose in practice in Queensland?

to defraud a subsequent purchaser only because of the absence of valuable consideration or only because of the subsequent purchase.

¹⁴⁷ See *Conveyancing Act 1919* (NSW) s 37B(1).

¹⁴⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 138.

¹⁴⁹ New Zealand Law Commission, *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) 76 [258].

10. Section 230 – Acquisitions of reversions at an under value

10.1. Overview and purpose

230 Acquisitions of reversions at an under value

(1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of under value.

(1A) In subsection (1) –

Reversionary interest includes an expectancy or possibility.

(2) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

Historically, equity protected the interests of the 'expectant heir'.¹⁵⁰ There was an assumption that the heir was in a vulnerable position and often 'inclined' to enter into 'unconscionable bargains'. Relief would be granted in equity relying on constructive fraud.¹⁵¹ Eventually in the mid-19th century transactions were set aside in equity simply because the price paid appeared inadequate.¹⁵² In order to establish that the transaction was fair, the onus of proof was imposed upon the person entering into the transaction with the expectant heir. Commentary on this situation indicates that:

This approach came to be regarded not only as a hindrance to unconscionable bargains but to fair and reasonable ones too.¹⁵³

Legislation has since been introduced in Australia (and the United Kingdom) to alter the effect of the equitable doctrine.

The practical effect of the section is to make it clear that under value alone is not sufficient to set aside an acquisition of a reversionary interest for money or money's worth. The onus of proof is not altered by the section. The object of the section has been described as follows:

To protect those expectant heirs who may be under some duress or coercion to sell their reversionary interests without knowledge or full appreciation of the value of those interests.¹⁵⁴

¹⁵⁰ Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

¹⁵¹ Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

¹⁵² Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

¹⁵³ Peter Young, et al, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012) 76 [30620.5].

¹⁵⁴ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [230.30].

The QLRC in its discussion of the proposed section 230 recognised that ‘improvident bargains by expectant heirs now recall a social milieu which is largely past.’¹⁵⁵ However, the Commission’s view was that there is ‘no harm, and may well be some good’ in adopting the provision.¹⁵⁶

10.2. Is there a need for reform?

It is not clear whether section 230 of the PLA serves any current purpose. The section does not appear to have been the subject of judicial consideration. Further, there are arguably alternative options to address any issues raised in relation to under value, including through equitable principles.

10.3. Other jurisdictions

Each Australian State and Territory has a provision which is in a similar form to section 230 of the PLA.¹⁵⁷

10.3.1. Victoria

The VLRC recommended that section 175 of the *Property Law Act 1958* (Vic), the equivalent provision to section 230 of the PLA, be repealed. The Commission indicated that:

It is sufficient to rely on the equitable jurisdiction to set aside on grounds such as, fraud, undue influence and other unconscionable conduct.¹⁵⁸

The VLRC appeared to place some weight on the views of the Law Reform Commissions in Northern Ireland and Ireland. The earlier review undertaken by the Law Reform Commission of Ireland in 2004 recommended the repeal of the provision equivalent to section 130 of the PLA. The Commission noted that:

It is difficult to justify singling out such transactions nowadays and this matter should be left to be dealt with under the wide equitable jurisdiction to strike down “improvident” bargains and transactions vitiated by improper conduct such as fraud, duress, undue influence or other unconscionable behaviour.¹⁵⁹

¹⁵⁵ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 111-112.

¹⁵⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 111-112.

¹⁵⁷ See *Property Law Act 1958* (Vic) s 175, *Conveyancing Act 1919* (NSW) s 37C, *Law of Property Act 1936* (SA) s 88, *Law of Property Act* (NT) s 210, *Conveyancing and Law of Property Act 1884* (Tas) s 42, *Property Law Act 1969* (WA) s 92, *Civil Law (Property) Act 2006* (ACT) s 241.

¹⁵⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) 138.

¹⁵⁹ Law Reform Commission (Ireland), *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* LRC CP 34 (2004) 126 [8.40].

The later review undertaken by the Northern Ireland Reform Commission in 2009 endorsed the recommendation that the section be repealed and that it was sufficient to rely on the equitable jurisdiction to address these types of situations.¹⁶⁰

The VLRC recommendation has not been implemented to date in Victoria.

10.3.2. United Kingdom and New Zealand

The *Law of Property Act 1925* (UK) has retained section 174 which is in identical terms to section 230 of the PLA.

Section 62 of the *Property Law Act 1952* (NZ) was effectively in the same terms as the Queensland provision. However, that provision was not re-enacted in the *Property Law Act 2007* (NZ).

10.4. Options

10.4.1. Option 1 – Retain section 230 of the PLA in its current form

Under this option, section 230 of the PLA is retained on the basis that it has not raised any issues of interpretation and Queensland's position would remain consistent with the other Australian jurisdictions.

10.4.2. Option 2 – Repeal section 230 of the PLA

The repeal of section 230 of the PLA could be justified on the basis that the provision evolved as a result of historical circumstances involving expectant heirs and equity's response to a perceived imbalance of the bargaining position of these individuals. The purpose of the section was to overcome the approach of equity to set aside a transaction simply on the face of inadequate payment. The repeal of the section would simply mean that any issue where under value is raised could be addressed through ordinary equitable principles.

Questions

19. Do you think section 230 of the PLA should be repealed and dealt with under ordinary equitable principles?

¹⁶⁰ See Northern Ireland Law Commission, *Consultation Paper Land Law NILC 2* (2009) 178 [10.23].

Part 18 Unregistered Land (ss 234-254A)

Part 18 of the PLA applies only to unregistered land, subject to section 241 which is discussed in detail in Part 12 below. The term ‘unregistered land’ is defined in the PLA to mean:

land that has been granted in fee simple and is not registered land or land granted in trust under the Land Act.¹⁶¹

Part 18 is divided into the following four divisions:

- Division 1 which defines the term ‘instrument’ for the purposes of the Part and clarifies the application of the Part to unregistered land;¹⁶²
- Division 2 includes provisions which deal with the conveyance of unregistered land including qualifying common law rules;¹⁶³
- Division 3 comprises provisions which set out the requirements for the registration, recording of deeds, other instruments and wills and the process surrounding this; and¹⁶⁴
- Division 4 sets out the process for the compulsory conversion of unregistered land to registered land in Queensland.¹⁶⁵

At the time of the introduction of Part 18 of the PLA the QLRC indicated that almost ‘all freehold land in Queensland’ had been brought under the provisions of the Real Property Acts.¹⁶⁶ However, the Commission noted in 1973 that there still existed ‘some few hundreds, possibly thousands, of acres of ‘old system’ land elsewhere in the State’, particularly in regional areas.¹⁶⁷

11. Division 4 – Compulsory Registration of Title

11.1. Overview and purpose

Division 4 of the PLA comprises sections 250 to 254A. The Division is directed at bringing any remaining old system land under the provisions of the *Land Title Act 1994* (Qld).¹⁶⁸

¹⁶¹ *Property Law Act 1974* (Qld) Sch 6. Note: This definition may require amendment as land granted under trust under the *Land Act 1994* (Qld) is registered land and can be found within the freehold land register.

¹⁶² *Property Law Act 1974* (Qld) ss 234 and 234A.

¹⁶³ *Property Law Act 1974* (Qld) ss 235-240.

¹⁶⁴ *Property Law Act 1974* (Qld) ss 241-249.

¹⁶⁵ *Property Law Act 1974* (Qld) ss 250-2254A.

¹⁶⁶ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 3.

¹⁶⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 3.

¹⁶⁸ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.18.DIV.4.30].

250. Progressive registration of unregistered land*

- (1) The registrar may from time to time by gazette notice (the *prescribed notice*) direct that any unregistered land described, or that all such land in any area defined, in the notice shall be subject to this division and that, unless an application to bring the land under the Real Property Acts is made within the period of time as is specified in the prescribed notice (the *specified time*) by the person entitled to make such application, such land shall be liable, under the further provisions of this division, to be brought under the Real Property Acts and a certificate of title issued for it in the name of the public trustee free from any estates, encumbrances, liens or interests whatsoever otherwise than are registrable under the *Real Property Act 1861* (*registrable interests*) and which shall have been allowed by the registrar under this section and which immediately prior to the issue of such certificate of title were registered in respect of that unregistered land.
 - (2) In addition to publication of the prescribed notice as provided in subsection (1), the registrar shall give to each person appearing to the registrar (whether by reference to records of any local government or otherwise) to be the owner of the land and to each person appearing to have an interest in the land a copy of such notice together with a written statement briefly explaining the nature of this division.
 - (3) The registrar may also cause a copy of the prescribed notice and a statement briefly explaining the nature of this division to be advertised in a newspaper published in Brisbane and in addition where in the opinion of the registrar the land is situated at a distance more than 50km from Brisbane in any newspaper circulated in the neighbourhood of the land to which such notice relates.
 - (4) Within the specified time the person entitled in respect of any land the subject of a prescribed notice to make application to bring the land under the provisions of Real Property Acts, shall make and afterwards with due diligence proceed with an application to bring the land under those Acts.
 - (5) Any person claiming to be entitled to any registrable interests in respect of any land the subject of a prescribed notice may within the specified time make application to have such interests noted on any certificate of title which may issue in respect of such land under this section and on the making of the application the Real Property Acts shall apply to such application as if it were an application to bring unregistered land under those Acts, with any necessary modification to meet the circumstances of the case.
- (5A) If the applicant establishes the claim, the registrar upon issuing a certificate of title for the land shall note on the certificate the interest of the applicant under the *Real Property Act 1861*, section 33
- (6) – (11).....

***Section 250 has not been extracted in its full form.**

After the commencement of the *Real Property Act 1861* (Qld) in Queensland, all grants by the Crown of fee simple estates were required to be made under that Act. However, the *Real Property Act 1861* (Qld) only provided a voluntary process for the conversion of existing grants of fee simple made prior to the commencement of that Act. Owners of old system land were reluctant to apply to convert their title to one registered under the 1861 Act partly because of the process involved and the associated costs.¹⁶⁹ Division 4, Part 18 of the PLA was introduced to facilitate the compulsory conversion of remaining old system land to registered land under the *Real Property Acts* and subsequently the *Land Title Act 1994* (Qld).

In considering the options regarding when and how compulsory conversion should occur the QLRC noted that:

¹⁶⁹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.18.DIV.4.30].

The critical moment in relation to old system land is the occasion on which such land is dealt with, usually by sale, mortgage, lease or some other such disposition inter vivos. It is at this point of time that old system land should be made obligatory at such time to bring land under The Real Property Acts, since it is on the occasion of a disposition of this kind that investigation of title to the land is undertaken, usually by the purchaser or mortgagee.....

We recommend that an application to bring land under The Real Property Acts should be compulsory on any occasion on which it is sought to register an instrument in accordance with the provisions of Division 3 of this Part.¹⁷⁰

The process under the Division is set out below:

- section 250 provides for the progressive registration of unregistered land in Queensland. Under this provision the Registrar is able to serve a prescribed notice on the owner of the old system land directing that it be brought under the Real Property Acts. The owner has a specified period of time within which to make an application to do so. If an application is not made or the application is rejected the land will be brought under the Real Property Acts and a certificate of title issued for it in the name of the Public Trustee;
- even where land has been vested in the Public Trustee, an applicant still has an opportunity to make an application to have the land converted to registered land under the applicant's name, rather than the Public Trustee. This process is set out in section 251 of the PLA and is available for a period of 12 years from the date the land is vested in the Trustee;
- if the applicant does not make use of the process in section 251 of the PLA within the time period, the relevant land which has already vested in the Public Trustee under section 250, then vests in the Crown, absolutely.¹⁷¹ However, section 252(2) of the PLA still provides a further opportunity for a person who would have been entitled to make an application under section 251 of the PLA to make an application to the Court within 5 years after the land is vested in the Crown for an order that the Registrar take such action as the Registrar might have taken on an application under section 251 of the PLA;
- the powers and duties of the Registrar in relation to the process under Division 4 are set out in section 253 of the PLA;
- an investigator of old system title is established under section 254 of the PLA;
- section 254A of the PLA confirms that Division 4 continues to operate after the commencement of the *Land Title Act 1994* (Qld).

11.2. Is there a need for reform?

All identifiable old system land in Queensland has now been brought under the Real Property Acts. In 2013 a small portion (8 square meters) of old system land came to the attention of the Titles Registry when an attempt was made to deal with it. It is possible that other small tracts of land may come to light in the future through a dealing of some type. The likely scenario is that any remaining old system land will be remainders from earlier subdivisions of larger tracts of unregistered land

¹⁷⁰ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 116.

¹⁷¹ *Property Law Act 1974* (Qld) s 252.

which has since been brought under the *Land Title Act 1994* (Qld). For example, small remainders may have been left over from two (spatially) separate subdivisions. The Titles Registry has indicated that if any remaining slivers of land are identified they are likely to be located in or near regional centres such as Toowoomba and Warwick.

The current process under Division 4 of the PLA is directed at the compulsory conversion of identifiable old system land to registered land. If an applicant cannot be identified for the purpose of section 250 of the PLA, the land will be converted and then vested in the Public Trustee for a period of 12 years until it is eventually vested in the Crown absolutely.¹⁷² Any remaining old system land is unlikely to be identifiable by the Titles Registry until an attempt is made to deal with it. Although it may be possible to search through old records to identify the original owner, that owner will be deceased and identifying heirs and successors may be difficult. If the owner was a corporation, the corporation is unlikely to still exist. Further, assuming any land actually still exists, it is likely to be only small tracts of limited value.

11.3. Preliminary Recommendation

For all intents and purposes the position in Queensland is that the conversion of all identifiable old system land to registered land is complete. However, it is possible that a limited amount of unidentified unregistered land exists. In this respect, the current conversion process in Part 4 is too cumbersome and lengthy. Further, before the land vests in the Crown absolutely under Division 4, it will vest in the Public Trustee for an extended period of time. The ongoing involvement of the Public Trustee may not be appropriate given the likely characteristics of any remaining old system land described below.

The preliminary recommendation is that the Division should be repealed and replaced with a simpler process that reflects the fact that any unregistered land:

- is not able to be identified by the Titles Registry until someone attempts to deal with it;
- is likely to be small slivers of land only, probably of limited value and located in regional areas;
- may not have a clearly identifiable owner or may have an identifiable owner who is now deceased or in the case of a corporate owner, no longer exists;
- must be converted to registered land before any dealing can occur.

A broad framework for a simpler process to deal with this land when it is brought to the attention of the Titles Registry might include:

- the Registrar undertaking a process of public notification, seeking anyone who claims a legitimate interest in the land to come forward within a specified time period;
- if no person with an interest in the land comes forward, the Registrar should be able to declare that the land is unallocated state land;
- if a person with an interest through legal title, succession laws or a claim to possessory title comes forward either in response to the public notification or otherwise and the

¹⁷² *Property Law Act 1974* (Qld) s 252.

Registrar is satisfied the claim is meritorious then the Registrar should be able to bring the land under the *Land Title Act 1994* (Qld) and onto the Register with the claimant as the registered owner;

- where an interest is based on a claim to possessory title, a meritorious claim may be established in a similar way to an adverse possession claim which generally requires evidence of continuous occupation for 30 years;
- in the case of either a legal title or possessory title claim, a time limited review or appeal mechanism should also be available under the new provision prior to the registration of the interest under the *Land Title Act 1994* (Qld).

The Public Trustee should remain outside the process for the reasons set out above in Part. The conversion process should remain in the PLA, rather than the *Land Title Act 1994* (Qld).

Questions

20. Do you think Division 4 of the PLA should be repealed?

21. Do you think Division 4 should be replaced with a simpler process that recognises that the only remaining unregistered land in Queensland is limited, is unable to be identified until it is dealt with and is likely to comprise very small tracts of land?

22. Do you have any suggestions in relation to how the process could be simplified? If so, please provide details.

23. Do you think the broad framework set out in Part 11.3 above is a starting point for a new process?

24. Do you think any remaining unregistered land should be converted to unallocated state land?

12. Division 3: Registration of Deeds

Section 241 Registration of instruments and wills*

(1) After the commencement of this Act -

- (a) any agreement in writing, deed, conveyance or other instrument (except a lease for less than 3 years) affecting any estate in land may; and
- (b) any will or devise affecting any estate in land may; and
- (c) any other instrument, record or document which, prior to the passing of this Act, might have been registered under the *Registration of Deeds Act 1843* may; and
- (d) every Act shall;

under this division, be registered, enrolled or, as the case may be, recorded in the land registry.

(2) A reference in any Act or instrument to, or to registration of an instrument under, the *Registration of Deeds Act 1843* or the *Titles to Land Act 1858* shall be construed as a reference to this division.

***Note: Division 3 of the PLA also includes sections 242-245 which are not reproduced here.**

12.1. Overview and purpose

The registration of deeds affecting old system land was governed by the *Registration of Deeds Act 1843* which still applied in 1973 when the QLRC was considering the inclusion of Division 3 in the PLA.¹⁷³ The 1843 Act applied to other categories of instruments beyond old system land deeds. During its review the QLRC noted that:

The Act of 1843 originally contained provision for the registration or enrolment of a variety of deeds and documents, such as Acts of Parliament, charters of incorporation of public companies.... And certificates of births, marriages and deaths, all of which were to be registered or enrolled by the Registrar-General.In Queensland the duties and powers of the Registrar-General in relation to deeds were, by The Registrar of Titles Act of 1884 (48 Vic No.4), transferred to the Registrar of Titles, whose office was created by that Act. Finally, by The Registration of Deeds Act of 1899 (63 Vic No. 6) any necessity for registering under the Act of 1843 instruments, other than deeds relating to unregistered land, was dispensed with and **that Act of 1843 has since continued to be utilised only in relation to old system land**.¹⁷⁴ [emphasis added]

Section 234A of the PLA provides that Part 18 applies only to unregistered land and any estate or interest in unregistered land. However, this is made subject to section 241 of the PLA. The qualification appears to have been included to accommodate the requirement in section 241(1)(d) that Acts must be registered, enrolled or recorded in the Titles Registry.

Section 241 of the PLA enables a variety of instruments to be registered or recorded in the Titles Registry. These include any agreement in writing, deed or other instrument or any will. In each of

¹⁷³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 114.

¹⁷⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 114.

these instances the relevant instrument must affect any estate in land. Additionally, the section provides that any instrument, record or document which, prior to the passing of the PLA, may have been registered under the *Registration of Deeds Act 1843* may also be registered or recorded in the titles registry.

An 'instrument' is defined broadly in section 234 of the PLA to include:

not only a conveyance and other deeds but also all instruments in writing of any kind, under which real or leasehold estate is affected or is intended so to be including –

- (a) a certificate under section 101; and
- (b) a power of attorney registered under an Act.

An instrument which does not affect an estate in land will not fall within the scope of section 241 of the PLA. The only exception to the requirement that the relevant agreement, deed or instrument affects any estate in land arises from subsection 241(1)(d) which relates to the registration or recording of every Act in the Register. The registration or recording of 'every Act' is mandatory, however, this is not the position in relation to the other instruments set out in sections 241(1)(a) and (b) where registration is discretionary.¹⁷⁵

In order to register an instrument under section 241 of the PLA, one or more of the parties to the relevant instrument needs to initiate the process by lodging the document in the Titles Registry.¹⁷⁶ The other sections of Division 3, Part 18 operate in the following way:

- section 243 sets out the process for the signature requirements in relation to dead or absent parties to any instrument;
- section 244 governs the receipt and endorsement process undertaken by the Registrar once the certified copy of the instrument is lodged;
- section 245 addresses the issue of mistakes in registration by providing that the registration of deeds is not ineffectual because of any omission, misdescription or error occurring in the circumstances set out in that section.

12.2. Is there a need for reform?

12.2.1. Section 241(1)(a)-(c) – registering, recording deed, conveyance, other instrument, will or devise etc

The rationale for the enactment of legislation such as the *Registration of Deeds Act 1843* was to avoid secrecy in conveyancing which made it easier for property owners to prove their title when selling their land or providing security over their land.¹⁷⁷ Further, having a place to register deeds also promoted 'the use of more formal and properly-drawn instruments.'¹⁷⁸ The register was not

¹⁷⁵ The registration or recording of an instrument, record or document which, prior to the passing of the PLA, may have been registered under the *Registration of Deeds Act 1843* is also discretionary. See *Property Law Act 1974* (Qld) s241(1)(c).

¹⁷⁶ *Property Law Act 1974* (Qld) s 242.

¹⁷⁷ Butt, Peter *Land Law* (LawBook Co., 5th ed, 2006) [1988].

¹⁷⁸ Butt, Peter *Land Law* (LawBook Co., 5th ed, 2006) [1988].

intended to be a system of registration of title of old system land, although not registering a relevant instrument potentially impacted on the priority of deeds.

In the case of section 241(1)(c) of the PLA it is highly unlikely that there are any remaining instruments, documents or records which prior to the passing of the PLA might have been registered under the 1843 Act. Further, the Department of Natural Resources and Mines indicates that:

All land in Queensland identified as previously being under the *Registration of Deeds Act 1843* has now been brought under the *Land Title Act 1994*.¹⁷⁹

In Queensland, there have been no new lodgements of instruments in the register of deeds since 2011.¹⁸⁰ Between 2000 and 2011 there have only been 34 entries.¹⁸¹ The types of instruments which have been lodged for registration include a Power of Attorney unrelated to any estate or interest in land, a pre-emptive rights deed relating to registered land and a release of mortgage sub-demise.¹⁸²

As discussed above, in the absence of any remaining unregistered land in Queensland section 241(1) is obsolete.

12.2.2. Section 241(1)(d) – requirement to register or record ‘every Act’

The Titles Registry currently receives signed copies of all Queensland Acts passed and records them in the Registry. There is limited commentary explaining the historic rationale for the requirement to record Acts of Parliament in this way. However, the practice was probably aimed at having a central repository of Acts passed in the 19th and early 20th centuries. Recording in this way commenced in an era where the volume of legislation being passed was much lower and therefore it was arguably logical and reasonably easy for it to be recorded under the *Registration of Deeds Act 1843*. However, the practice is now archaic and arguably obsolete, particularly given the responsibilities of the Office of the Queensland Parliamentary Counsel (**OQPC**). The *Legislative Standards Act 1992* (Qld) establishes the position of Queensland Parliamentary Counsel and sets up the OQPC.¹⁸³ One of the purposes of this Act includes ensuring that Queensland legislation, and information relating to Queensland legislation, is readily available to access publicly.¹⁸⁴ Consistent with this objective, some of the key functions of the office are to:

- ensure the Queensland statute book is of the highest standard; and
- make arrangements for the printing and publication of Bills, Queensland legislation; and
- make arrangements for access, in electronic form, to Bills presented to the Legislative Assembly and Queensland legislation.

¹⁷⁹ Department of Natural Resources and Mines, *Land Title Practice Manual (Queensland)* https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf [0-0000] (accessed 12 May 2016).

¹⁸⁰ Information provided by the Titles Registry.

¹⁸¹ Information provided by the Titles Registry.

¹⁸² Information provided by the Titles Registry.

¹⁸³ *Legislative Standards Act 1992* (Qld) s5(1) and (2).

¹⁸⁴ *Legislative Standards Act 1992* (Qld) s3(1)(c).

The OQPC maintains a website which sets out, among other things, the Queensland legislation collection created and maintained since 1991 and also legislation passed from 1963.¹⁸⁵ This material is publicly available and easily searchable on this website.

The mandatory obligation imposed under section 241(1)(d) serves no current purpose. The Titles Registry is not utilised to search for past and current Queensland enactments.

12.3. Preliminary Recommendation

For the reasons set out in Part 12.2 above, Division 3 of the PLA should be repealed.

Questions

25. Does Division 3 of the PLA serve any current purpose?
26. Do you agree with the preliminary recommendation that Division 3 of the PLA should be repealed?

¹⁸⁵ See OQPC website at: http://www.legislation.qld.gov.au/Core_pages/about_oqpc.htm

13. Division 1: Application of part – interpretation and Division 2: Sales and Conveyances

13.1. Division 1: Application of part - interpretation

Section 234 of the PLA defines the term ‘instrument’ for the purposes of Part 18. Section 234A deals with the application of Part 18 and expressly provides that, except for section 241, Part 18 of the PLA only applies to unregistered land. The definition of ‘instrument’ is relevant to Divisions 2 and 3 and if these Divisions are repealed, then the need to retain the definition for the purposes of Part 18 is removed. In the case of section 234A, the proposed repeal of Division 3 (see Part 12 above) means the reference to section 241 in section 234A should be removed. Further, if Division 4 is repealed but replaced with a simpler conversion process, section 234A will need to be retained to make it clear that the Part only applies to unregistered land.

13.2. Division 2: Sales and conveyances

Division 2 is only applicable to sales and conveyances of old system land. The sections in the Division include:

- section 235 has the effect that a person is only able to convey an estate that he or she is entitled to dispose of.¹⁸⁶ This section overcame a common law position where a conveyance by a person with less than full title could operate as an unlimited conveyance in certain circumstances;
- section 236 establishes that a deed of feoffment is ‘equivalent to livery of seisin for all titles made after 1 January 1844.’¹⁸⁷ Historically in medieval England land was generally conveyed only by feoffment with livery of seisin. This occurred by the person ‘seised’ of the interest in land and the person who was to receive the interest attending a public ceremony in front of witnesses on the land or within sight of the land. The land was formally delivered to the recipient, often evidenced by a symbolic gesture including the passing of a clod of earth.¹⁸⁸ The recipient of the conveyed land was said to be ‘seised’ of the land and could exercise the owner’s rights over the land.¹⁸⁹ There was no need for formal documentation to record the transaction. This requirement changed over time and eventually deeds of feoffment were used;
- section 236 of the PLA has the effect of validating any feoffment executed prior to 3 January 1842 in order to remove any uncertainty regarding titles in Queensland made before the *Registration of Deeds Act 1843* came into force.¹⁹⁰ The QLRC noted when considering the proposed section 236 that:

¹⁸⁶ G.P Stuckey, *The Conveyancing Act, 1919-1969* (Law Book Company, 2nd ed, 1970)40 [140].

¹⁸⁷ Carmel Macdonald et al, *Real Property Law in Queensland* (Lawbook Co. 2010 3rd ed) 264 [9.20]. The *Registration of Deeds Act 1843* (7 Vic No 16), s25 came into effect on this date.

¹⁸⁸ Carmel Macdonald et al, *Real Property Law in Queensland* (Lawbook Co. 2010 3rd ed) 264 [9.20]

¹⁸⁹ Charles Harpum et al *The Law of Real Property* (2010, 6th ed, Sweet & Maxwell) [3.018] 45.

¹⁹⁰ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [236.30].

...although it is perhaps unlikely that any doubt will now arise in Queensland in relation to titles made before 1843, it is preferable to avoid any such possibility by retaining s 19 in its existing form.¹⁹¹

- section 237 of the PLA was introduced to reduce the period of time required to establish the commencement of title. The section reduces the time period from 60 years to 30 years. At common law a purchaser of old system land was entitled to request proof of the seller's title to the relevant land going back for a period of 60 years prior to the sale of the land.¹⁹² In practice this created difficulties as it usually meant that a variety of deeds and instruments were required in order to establish the commencement of the relevant title;
- section 238 is intended to simplify the process of conveying unregistered land by 'limiting the number of enquiries which may be raised by a purchaser on the abstract of title in order to satisfy the purchaser as to the vendor's title';¹⁹³
- section 239 is directed at reducing the length and expense of old system conveyances by operating as a word-saving provision.¹⁹⁴ The section provides for the inclusion of general words to specify the rights and things intended to be conveyed, in circumstances where the relevant conveyance does not expressly provide for them;¹⁹⁵
- section 240 applies to conveyances of old system land after 1 December 1975 and has the effect that a conveyance by a grantor will only pass whatever estate, right or interest the grantor had at the time of the conveyance.

As indicated in Part 11 above, all unregistered land in Queensland identifiable by the Titles Registry has now been converted to registered land and brought under the *Land Title Act 1994* (Qld). If any remaining tracts are identified through a dealing in the future, the land would be converted to registered land before it could be dealt with in any event.

13.3. Preliminary Recommendation

Division 2 is now obsolete and should be repealed.

¹⁹¹ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 113.

¹⁹² Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 113-114. For detailed commentary on section 237 of the PLA see Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [237.30]-[237.90].

¹⁹³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [238.30].

¹⁹⁴ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 114.

¹⁹⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [239.30] and Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 114.

Questions

- 27. Does Division 2, Part 18 of the PLA serve any current purpose?**
- 28. Do you agree with the position that Division 2 of Part 18 of the PLA is obsolete?**
- 29. Do you agree with the preliminary recommendation that the Division should be repealed?**

Part 19 Property (de facto relationships ss 255 - 344)

14. De facto relationships

14.1. Overview

Part 19 of the PLA comprises sections 255 to 344. The Part was inserted into the PLA by the *Property Law Amendment Act 1999*¹⁹⁶ which was assented to and commenced operation on 21 December 1999.¹⁹⁷ The PLA was amended following a review by the QLRC into the law governing de facto relationships. The review commenced in 1990 and a final report was completed in 1993.¹⁹⁸ The review was initiated as a result of concerns regarding the adequacy of the laws governing property distribution between de facto couples in Queensland.¹⁹⁹

Sections from the legislation which set out the purpose of the Part are extracted below.

255 Main purposes of pt 19

This part has the following main purposes –

- (a) to facilitate the resolution of financial matters at the end of a de facto relationship;
- (b) to recognise de facto partners should be allowed to plan their financial future, and resolve financial matters at the end of their relationship, by a cohabitation or separation agreement;
- (c) to facilitate a just and equitable property distribution at the end of a de facto relationship in relation to the de facto partners and, in particular cases, any child of the de facto partners;
- (d) to provide for declaratory relief to help persons ascertain their existing interests in property of de facto partners;
- (e) to provide for injunctive relief to help persons protect their existing and adjusted interests in property of de facto partners;
- (f) to provide for declaratory relief about the existence or non-existence of a de facto relationship and to avoid the duplication of proceedings if the existence or non-existence of a de facto relationship is relevant in 2 or more proceedings;
- (g) to facilitate the resolution of matters concerning a de facto relationship by the Supreme Court, the District Court or a Magistrates Court.

.....

256 How main purposes are to be achieved

The way in which these purposes are to be achieved includes –

- (a) providing in division 3 for the resolution of financial matters by de facto partners; and
- (b) providing in division 4 for the resolution of financial matters by courts; and
- (c) providing in division 5 for declaratory relief about the existence or non-existence of de facto relationships; and
- (d) providing in division 6 for the jurisdiction and powers of the Supreme Court, the District Court and Magistrates Courts to deal with matters under this part.

¹⁹⁶ *Property Law Amendment Act 1999* (Qld) (Act No. 89 of 1999).

¹⁹⁷ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [PLA.PT.19.30].

¹⁹⁸ Queensland Law Reform Commission, *De Facto Relationships* Final Report No. 44 (1993).

¹⁹⁹ Queensland Law Reform Commission, *De Facto Relationships* Working Paper No. 40 (1992) 3.

14.2. Federal legislation and Part 19 of the PLA

The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) made a number of amendments to the *Family Law Act 1975* (Cth) in relation to de facto matters. The amendments provide for de facto couples in Australia at the end of a relationship to have property and maintenance matters dealt with under the *Family Law Act 1975* (Cth).²⁰⁰ Prior to the amendments, parties to a de facto relationship following its breakdown were required to access both Part 19 of the PLA to deal with financial matters and the *Family Law Act 1975* (Cth) to deal with disputes involving children.²⁰¹ The key provisions commenced on 1 March 2009.²⁰² As a consequence of the amendments to the Commonwealth legislation, Part 19 of the PLA now applies to limited, and arguably shrinking, categories of de facto relationships. Broadly, Part 19 will apply:

- where the relationship was in existence at, or commenced on or after, 21 December 1999 and the breakdown in the relationship occurred before 1 March 2009. However, parties can agree to opt into the *Family Law Act 1975* (Cth) regime, rather than Part 19 of the PLA if certain specific matters are satisfied; or
- where the breakdown occurred on or after 1 March 2009 and an application cannot be brought under the *Family Law Act 1975* (Cth). This may arise where jurisdictional or geographical requirements under the Commonwealth Act cannot be met by the parties.²⁰³

14.3. Continuing use of Part 19 in Queensland

Generally, Part 19 is used infrequently now following the commencement of the amendments to the *Family Law Act 1975* (Cth) in 2009. The Centre has undertaken some preliminary consultation with the Queensland Law Society's Family Law Committee in relation to the current utility of Part 19 of the PLA. In response to specific questions, the Committee has confirmed that:²⁰⁴

- Part 19 is used rarely following the introduction of the de facto provisions in the *Family Law Act 1975* (Cth);
- However, Part 19 of the PLA could still have application in relation to matters which do not fall under the *Family Law Act 1975* (Cth);
- There is utility in retaining Part 19 of the PLA for a further period of at least 5 years, with a review at the end of that timeframe to determine its ongoing relevance;

²⁰⁰ Justice Garry Watts, *De Facto Property Under the Family Law Act* (19 December 2008) 2.

²⁰¹ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [257.30].

²⁰² The new provisions relating to de facto couple property settlements were able to be enacted under the *Family Law Act 1975* (Cth) as a result of most of the States, including Queensland, referring their powers pursuant to ss51(xxxviii) of the Constitution.

²⁰³ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf Thomson Reuters [257.30].

²⁰⁴ Email from Queensland Law Society 8 February 2016.

- There is no reason why the Part could not be included as a stand-alone Act. However, the Committee suggested that Part 19 remain in the PLA in order to avoid any unnecessary amendments.

14.4. Recommendation

In the light of the decreasing use of Part 19 of the PLA, there is very little point in reviewing or revising the provisions in this Part. However, the Part should be retained for a further period of 5 years. At that time, the repeal of the Part should be considered.

Recommendation

- **The provisions in Part 19 of the PLA should be retained.**
- **Part 19 of the PLA should be reconsidered in 5 years, with a view to repealing the Part.**

Part 20 Miscellaneous (ss 345-351)

Part 20 comprises sections 345 to 351 and these provisions are wide ranging and varied. This paper does not consider section 347 of the PLA which provides for the service of notices under the PLA and applies unless there is a contrary method of service of a notice specified. Section 347 is reviewed in the separate paper which considers electronic transactions and the PLA more broadly.

No changes are recommended in relation to sections 350 or 351 as these are standard machinery provisions included in most legislation. The sections provide that:

- the chief executive may approve forms for use under the PLA;²⁰⁵ and
- the Governor in Council may make regulations under the PLA and also specify that the regulations may be about fees.²⁰⁶

15. Section 345 – Protection of solicitors and others adopting this Act

15.1. Overview and purpose

345 Protection of solicitors and others adopting this Act

- (1) The powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed to be included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction, and a solicitor, counsel or conveyancer shall not be deemed guilty of neglect or breach of duty, or become in any way liable, because of the person omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place of them, in any case where this Act would allow of the person doing so.
- (2) Nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.
- (3) Where the solicitor, counsel or conveyancer is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.
- (4) Where such persons are acting without a solicitor, counsel or conveyancer, they shall also be protected in like manner.

²⁰⁵ *Property Law Act 1974 (Qld)* s 350.

²⁰⁶ *Property Law Act 1974 (Qld)* s 351.

Section 345 of the PLA is copied from both the *Law of Property Act 1925* (UK) and section 176 of the *Conveyancing Act 1919* (NSW).²⁰⁷ The section is declaratory and provides that:

- the powers given under the Act and the covenants, provisions and stipulations which are deemed to be included or implied are deemed to be proper powers, covenants and provisions to be given by or contained in instruments or applied to contracts; and
- a solicitor, counsel or conveyancer is not liable in negligence for failing to negative any power or covenant implied by the Act.²⁰⁸

The protection provided by the section extends to trustees, executors and others for whom the solicitor is acting²⁰⁹ and persons acting on their own behalf.²¹⁰

There is very little commentary which identifies the rationale for this provision. The QLRC notes that the provision was 'self-explanatory' and provided no further detail regarding its operation.²¹¹

15.2. Is there a need for reform?

There are no cases in Queensland which consider this section. As discussed in Part 15.3 below, a number of other Australian jurisdictions also have equivalent sections. The VLRC when it reviewed the *Property Law Act 1958* (Vic) recommended that the equivalent provisions, sections 180 to 182, should be retained and redrafted for clarity.²¹² The Commission also recommended that the three sections be unified into a single section in the same way as section 345 of the PLA.²¹³ However, there is no explanation provided in relation to the rationale for the retention of the section.

In New Zealand, the *Property Law Act 1952* (NZ) included an identical provision to section 345 of the PLA.²¹⁴ The section was omitted from the new Act on the basis that:

protections of this kind are inappropriate and that solicitors and other persons should, whether or not they have relied upon or used powers in the new Act or implied covenants, have their decisions scrutinised in the same way as would be done in relation to the express provisions of documents.²¹⁵

²⁰⁷ Queensland Law Reform Commission, *A Bill to Consolidate, 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.

²⁰⁸ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013* (LexisNexis, 2012) 259 [3373.1].

²⁰⁹ *Property Law Act 1974* (Qld) s 345(3).

²¹⁰ *Property Law Act 1974* (Qld) s 345(4).

²¹¹ Queensland Law Reform Commission, *A Bill to Consolidate, 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.

²¹² Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Vic), Final Report (2010) 139.

²¹³ Victorian Law Reform Commission, *Review of the Property Law Act 1958* (Vic), Final Report (2010) 139.

²¹⁴ See *Property Law Act 1952* (NZ) s 154.

²¹⁵ New Zealand Law Commission, *A New Property Law Act*, Report No. 29 (1994) 416 [802].

15.3. Other jurisdictions

New South Wales,²¹⁶ Victoria²¹⁷ and Tasmania²¹⁸ have equivalent provisions to section 345 of the PLA.

15.4. Options

The current utility of section 345 of the PLA is not clear and the New Zealand Law Commission comments raise a significant point in terms of why special protection is provided to solicitors and others under section 345 of the PLA. A basic duty owed by a legal practitioner to a client is that they will perform the role of legal adviser competently.²¹⁹ This duty extends to knowing the law in the relevant area that he or she is advising on. Further, where the actions of the legal practitioner fall short of sustaining a claim in negligence, the actions may still be scrutinised in a disciplinary process under the *Legal Profession Act 2007* (Qld) to determine if the conduct constitutes professional misconduct or unsatisfactory professional conduct.²²⁰ There is no policy reason which would support excluding the actions of the solicitor or counsel from scrutiny.

The preliminary recommendation in relation to section 345 is that it should be repealed.

Questions

30. Do you disagree with the preliminary recommendation that section 345 be removed from the PLA? If so, please provide your reasons.

²¹⁶ *Conveyancing Act 1919* (NSW) s 176.

²¹⁷ *Property Law Act 1958* (Vic) ss 180-182.

²¹⁸ *Conveyancing and Law of Property Act 1884* (Tas) s 84.

²¹⁹ Stephen Corones, et al, *Professional Responsibility and Legal Ethics in Queensland* (LawBook Co., 2nd ed, 2014) 314 [9.05].

²²⁰ Stephen Corones, et al, *Professional Responsibility and Legal Ethics in Queensland* (LawBook Co., 2nd ed, 2014) 314 [9.05]. See *Legal Profession Act 2007* (Qld) Ch 4.

16. Section 346 – Restriction on constructive notice

16.1. Overview and purpose

346 Restriction on constructive notice

- (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless –
 - (a) it is within the purchaser’s own knowledge, or would have come to the purchaser’s knowledge, if such searches as to instruments registered or deposited under any Act, inquiries, and inspections had been made as ought reasonably to have been made by the purchaser; or
 - (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser’s counsel as such, or of the purchaser’s solicitor or other agent as such, or would have come to the knowledge of the purchaser’s solicitor or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
- (2) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, condition, provision, or restriction contained in any instrument under which the purchaser’s title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.
- (3) A purchaser shall not because of anything in this section be affected by notice in any case where the purchaser would not have been so affected if this section had not been enacted.
- (4) This section applies to purchases made either before or after the commencement of this Act, save that where an action is pending at the commencement of this Act the rights of the parties shall not be affected by this section.

Under the general law, all equitable interests bound every transferee of land except a bona fide purchaser for value of a legal estate in the land who did not have notice of the interest.²²¹ If the purchaser had notice of the equitable interest prior to acquiring the legal estate, the purchaser would take title subject to that interest.²²² Notice of such an interest encompasses actual, constructive and imputed knowledge.

Section 346 of the PLA replicates the common law so that a purchaser acquiring an interest in property is only prejudicially affected by notice of any instrument, fact or thing if the purchaser has:

- actual knowledge of the interest.²²³ It is irrelevant how the knowledge was acquired;²²⁴
- constructive knowledge of the interest. This is notice which would have come to the purchaser’s knowledge had the purchaser undertaken searches, inquiries and inspections as he or she ought reasonably have made.²²⁵ For example, caveats lodged under the *Land Title Act 1994* (Qld) and settlement notices are searchable on the register and will give notice of pre-existing unregistered interests to a prospective purchaser of a legal estate.

²²¹ Michael Harwood, *Modern English Land Law* (Sweet & Maxwell, 2nd ed, 1982) 517.

²²² Michael Harwood, *Modern English Land Law* (Sweet & Maxwell, 2nd ed, 1982) 517.

²²³ *Property Law Act 1974* (Qld) s 346(1)(a).

²²⁴ Michael Harwood, *Modern English Land Law* (Sweet & Maxwell, 2nd ed, 1982) 517.

²²⁵ *Property Law Act 1974* (Qld) s 346(1)(a).

- imputed knowledge. This is the actual or constructive knowledge of the purchaser's solicitor, counsel or other agent obtained in relation to the 'current' transaction only.²²⁶ The knowledge of this third party representative is 'imputed' to the purchaser.²²⁷ This is a variation to the position at general law where knowledge of a solicitor obtained in a different transaction unconnected to the current one could be imputed to the current transaction.

The term 'purchaser' is defined in the PLA to mean:

a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property.²²⁸

The section is not applicable to registered property as section 184(2)(a) of the *Land Title Act 1994* (Qld) expressly provides that the registered proprietor is not affected by actual or constructive notice of an unregistered interest affecting the lot.²²⁹

16.2. Is there a need for reform?

There has been no instance in Queensland since the PLA commenced where section 346 has been applied to determine priorities in equitable interests. The Courts, when considering cases involving priorities, apply settled rules. As previously discussed in this review, all identifiable old system land has now been brought under the *Land Title Act 1994* (Qld) and its predecessors, the Real Property Acts. Further, a registered proprietor of a lot is not affected by actual or constructive notice of an unregistered interest affecting the lot. In the absence of any remaining old system land and the exclusion of registered land from section 346, the ongoing utility of the section is doubtful.

16.3. Other jurisdictions

South Australia and Victoria have similar legislative provisions to section 346 of the PLA.²³⁰ The provisions in Tasmania and New South Wales are also the same, subject to one additional subsection. Section 164(1A) of the *Conveyancing Act 1919* (NSW) provides:

(1A) Omission to search in any register or list kept by, or filed with, the Australian Securities and Investments Commission, whether within New South Wales or elsewhere, shall not of itself affect a purchaser of land with notice of any mortgage or charge.²³¹

²²⁶ *Property Law Act 1974* (Qld) s 346(1)(b).

²²⁷ *Property Law Act 1974* (Qld) s 346(1)(b).

²²⁸ *Property Law Act 1974* (Qld) s 3, sch 6. The term valuable consideration is defined to include marriage but does not include a nominal consideration in money: s 3, sch 6.

²²⁹ This is subject to section 184(3)(b) which excludes the effect of section 184(1)(a) if there has been fraud by the registered proprietor. The predecessor provision was section 109 of the *Real Property Act 1861*.

²³⁰ *Law of Property Act 1936* (SA) s 117; *Property Law Act 1958* (Vic) s 199.

²³¹ The Tasmanian provision is in *Conveyancing and Law of Property Act 1884* (Tas) s 5(1A).

However, this section does not impact on the position where the purchaser has actual or constructive knowledge of a company security.²³² In that case, the purchaser will be affected by such notice.

Victoria is the only jurisdiction which has recently reviewed its notice provision as part of the broader review of the *Property Law Act 1958* (Vic). The VLRC recommended the retention of the section and made the following comments:

Section 199 applies to unregistered interests in registered land as well as old system land. Equitable priority rules, which include the concept of notice, are used to resolve conflicts between unregistered dealings. The question of whether equitable priority rules should continue to be used to determine the priority of unregistered interests should be examined as part of the review of the *Transfer of Land Act 1958*.

16.4. Options

Section 346 of the PLA does not have any ongoing utility and the preliminary recommendation is that the provision should be repealed.

Questions

31. Do you disagree with the conclusion that section 346 of the PLA should be repealed? If so, please provide your reasons.

²³² Peter Young, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013* (LexisNexis, 2012) 249 [33500.25].

17. Section 348 – Payments into and applications to court

17.1. Overview and purpose

348 Payments into and applications to court

- (1) Payment of money into court under this or any other Act shall effectually exonerate the person making the payment.
- (2) Every application to the court shall be by summons at chambers, except where it is otherwise provided in this Act (expressly or by implication) or in a regulation made under this Act.
- (3) On an application by a purchaser, notice shall be served in the first instance on the vendor unless the court dispenses with such service.
- (4) On an application by a vendor, notice shall be served in the first instance on the purchaser unless the court dispenses with such service.
- (5) On any application, notice shall be served on such persons (if any) as the court thinks fit.
- (6) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

The QLRC indicated in its 1973 Report that section 348 of the PLA was included in the Act to regulate payments into court and applications which are made to court under a section of the PLA.²³³ The section is not intended to allow payment into court instead of paying the creditor.²³⁴ Where there is uncertainty regarding to whom the payment should be made, proceedings should be instituted to clarify this issue.²³⁵

The process around the actual payment of the money into Court is governed by the *Uniform Civil Procedure Rules 1999* (Qld) (UCPR) 560. This provision provides that where a person is required or permitted by an Act, the UCPR, an order of the court or another law or practice to pay into or deposit money into court, any payment made must be accompanied by an affidavit which is served on all other parties.²³⁶ The disposal of money paid into court is then governed by UCPR, Rule 561.

²³³ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 118.

²³⁴ Peter Young, et al, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013*, (Butterworths, 2012) 255 [33650] and Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [348.30].

²³⁵ Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [348.30].

²³⁶ UCPR, Rule 560(2) and (3).

17.2. Is there a need for reform?

17.2.1. Section 348(1): Payments into court

There have been no decisions in Queensland which have considered section 348(1) of the PLA. The equivalent provision in New South Wales was considered in the Federal Court decision of *Digiplus Pty Ltd v RSL Com Partners Pty Ltd*.²³⁷ Gyles J accepted the respondent's argument and approach to interpreting section 171 of the New South Wales Act which was:

It is submitted that the text of s 171 requires a two-stage process – first a particular provision must be found in a statute such as ss 12, 66 and 98 of the Conveyancing Act and s 95 of the Trustee Act 1925 (NSW) which authorises payment into court and then the second stage is the exoneration effected by s 171 upon that payment in being made.²³⁸

There are a number of provisions in the PLA which enable the payment of money into court including:

- Section 95 which is directed at overcoming the injustice that may be done to mortgagors by acceleration clauses by providing relief against acceleration in the stated circumstances. Payment into court of an instalment amount is a precondition to the mortgagor applying to the court for relief from the consequences of default specified in section 95(1);
- Section 101 facilitates redemption in the case of unknown or absent mortgagees. The application to the court may be made by a person entitled to redeem the mortgaged premises. The court may order the amount of debt which is ascertained to be paid into court. A certificate from the registrar that it has been paid operates to discharge the mortgage debt, although any amount which is shown by a person entitled to the mortgage debt to still be outstanding is still a debt due under the mortgage;
- Section 199(2) enables the payment into court of the debt by the debtor where there is notice that the assignment is disputed. The payment must be made 'under and in conformity with the provisions relating to relief of trustees.

The application of section 348(1) of the PLA to payments made under these provisions is unlikely as the payments into court are linked to proceedings or processes provided for in the sections. In the case of other Acts, the *Trusts Act 1973* (Qld) also authorises the payment into court of trust money or securities.²³⁹ However, this Act explicitly addresses the issue of the effect of the payment into court by providing that the receipt or certificate of the proper officer is a sufficient discharge to the trustee or trustees for the funds paid into court.²⁴⁰

The concept of 'exoneration' is broad, open to interpretation and unqualified. The VLRC recommended that the equivalent provision in the *Property Law Act 1952* (Vic) be amended to make it clear that a person is not exonerated if the payment made does not meet the liability incurred.

It is difficult to identify a situation where section 348 of the PLA would be utilised in practice. If section 348 of the PLA is retained, the section may require amendment to clarify what is meant by

²³⁷ *Digiplus v RSL Com* (2003) 202 ALR 117.

²³⁸ *Digiplus v RSL Com* (2003) 202 ALR 117, 124 [20].

²³⁹ *Trusts Act 1973* (Qld) s 102(1).

²⁴⁰ *Trusts Act 1973* (Qld) s 102(2).

‘exonerate’. This may simply require using a term such as ‘discharge’ and explicitly stating discharge only occurs if the full liability is met by the payment.

17.2.2. Section 348(2)-(6): Application to court

These provisions set out the general procedure for making applications to court, service requirements and costs. Under the UCPR proceedings are either initiated by an application or a claim.²⁴¹ However, in the case of section 348(2) of the PLA, the effect of UCPR 10(b) is that the matter would proceed by application under the UCPR rather than by ‘summons at chambers’. The provisions in sections 348(2)-(6) are provided for in the UCPR and there does not appear to be any utility in retaining provisions which may potentially be inconsistent with the process under the UCPR.

17.3. Other jurisdictions

The legislative provisions in New South Wales, South Australia and Victoria only include a section equivalent in form to section 348(1) of the PLA.²⁴² New South Wales previously had an identical provision to section 348(2) which was amended following recommendations made by the New South Wales Law Reform Commission when reviewing Supreme Court procedure in New South Wales.²⁴³ The Commission noted in its Report that it had identified four thousand instances of provisions in legislation which affected procedure in the Supreme Court and that there was likely to be more provisions that had not been identified.²⁴⁴ In order to avoid inconsistency between the proposed Supreme Court Act and some of this other legislation it recommended the repeal of a number of provisions from a variety of Acts, including section 171 of the *Conveyancing Act 1919* (NSW).²⁴⁵

Tasmania has retained a provision which is similar in approach and form to section 348 of the PLA.²⁴⁶ The VLRC recommended that section 202 be amended and that it apply to registered land.²⁴⁷ The Commission noted:

Payment into court exonerates the person from making the payment. Amend the provision to state that the payment does not exonerate the person when the person’s liability exceeds the amount paid into court.²⁴⁸

²⁴¹ UCPR 8(2).

²⁴² See *Conveyancing Act 1919* (NSW) s 171; *Law of Property Act 1936* (SA) s 119; *Property Law Act 1958* (Vic) s 202.

²⁴³ New South Wales Law Reform Commission, *Second Report of the Law Reform Commission on Supreme Court Procedure* Report No. 14 (1971).

²⁴⁴ New South Wales Law Reform Commission, *Second Report of the Law Reform Commission on Supreme Court Procedure* Report No. 14 (1971) 13-14.

²⁴⁵ New South Wales Law Reform Commission, *Second Report of the Law Reform Commission on Supreme Court Procedure* Report No. 14 (1971) Schedule 2, 136.

²⁴⁶ *Conveyancing and Law of Property Act 1884* (NSW) s 92.

²⁴⁷ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) Appendix A, 142.

²⁴⁸ Victorian Law Reform Commission, *Review of the Property Law Act 1958* Final Report (2010) Appendix A, 142.

17.4. Options

Stakeholder feedback is required in relation to the ongoing utility of section 348(1) of the PLA. The preliminary recommendation in relation to subsections 348(2) to (6) is that these sections should be repealed.

Questions

- 32. Do you think section 348(1) of the PLA has any current utility? If so, please explain your reasons why.**
- 33. Do you disagree with the preliminary recommendation that sections 348(2) – (6) be repealed in the light of the *Uniform Civil Procedure Rules 1999* (Qld)?**

18. Section 349 – Forms

18.1. Overview and purpose

349 Forms

- (1) Where by this Act any application, instrument or document is authorised or required to be made in the approved form, such form, if the application, instrument or document is to be registered in respect of land under the Real Property Acts, shall in addition to any of the requirements of this Act –
 - (a) be attested under the requirements of the Real Property Acts; and
 - (b) unless in any case the registrar otherwise directs, bear the endorsement referred to in the *Real Property Act 1861*, section 139.
- (2) The registrar may, before registering any such application, instrument or document, require proof by statutory declaration or otherwise of any matter because of which the applicant or person seeking registration claims to be entitled to registration of the application, instrument or document.
- (3) This section applies despite any other section of this Act.

Section 349 was not originally proposed in the 1973 draft Property Law Bill set out in the QLRC's Report. It was subsequently added to the Bill prior to it being passed in 1974. The section operates in the following way:

- where any application, instrument or document is authorised or required to be made in the approved form;
- if the application, instrument or document is to be registered in respect of land under the Real Property Acts, the form of the application, instrument or document should:
 - comply with the requirements under the PLA; and
 - be attested under the requirements of the Real Property Acts; and
 - bear the endorsement referred to in section 139 of the *Real Property Act 1861*.²⁴⁹

The registrar is also entitled to request proof of certain matters prior to registering any application, instrument or document.²⁵⁰

18.2. Is there a need for reform?

18.2.1. Section 139 of the Real Property Act has been omitted

The rationale for the inclusion of section 349 is not clear and there is no commentary which assists in this respect. Section 139 of the *Real Property Act 1861* was omitted from the *Land Title Act 1994* (Qld). That section enabled the Registrar-General to refuse to receive and register any application for bringing land under the Act unless there was an endorsement on a certificate regarding the

²⁴⁹ *Property Law Act 1974* (Qld) s 349(1).

²⁵⁰ *Property Law Act 1974* (Qld) s 349(2). Section 349 applies despite any other section of the PLA: see s 349(3).

correctness of the instruments signed by the applicant or by his solicitor. As a result, section 349(1)(b) is obsolete.

18.2.2. Attestation requirements (PLA s 349(1)(a))

The only other provisions in the PLA which appear to provide for an instrument to be in an approved form and anticipate the possible registration of the instrument are:

- memorandum of variation of mortgage;²⁵¹
- a request by a tenant in tail for entry of title in fee simple;²⁵²
- the release or disclaimer of a power of appointment.²⁵³

The approved forms for each of these provisions were originally included in Schedule 2²⁵⁴ of the PLA but this schedule was removed in 1995.²⁵⁵ The provisions dealing with forms are now set out in the AI Act and require any approval or availability under authorising law of a form or a new version of a form to be notified in the gazette.²⁵⁶ There do not appear to be any approved forms gazetted dealing with a request by a tenant in tail for entry of title in fee simple and the release or disclaimer of a power of appointment.

In terms of amending a registered mortgage, section 76 of the *Land Title Act 1994* (Qld) deals with that process and any amendment is required to be registered with the Titles Registry on Form 13. Section 79 of the PLA was introduced to address a gap under the Real Property Acts which did not provide for the variation of a mortgage.²⁵⁷ This created significant practical inconvenience as any variation required the discharge of the existing mortgage and the execution of a new mortgage.²⁵⁸ However, section 76 was subsequently included in the *Land Title Act 1994* (Qld) as it was considered 'appropriate to insert the power to vary mortgages over registered land in the Bill.'²⁵⁹ The Land Title Practice Manual notes that:

If the purpose of the amendment is a variation in accordance with s 79 of the *Property Law Act 1974*, usually prepared prior to the commencement of the *Land Title Act 1994*, the terms of the variation in the appropriate form under the *Property Law Act 1974* should be deposited with a Form 13.

In the case of a release or disclaimer of a power of appointment and a request by a tenant for entry of title in fee simple, assuming these provisions have any currency, a 'General Request' to register these instruments could be made on Form 14.

²⁵¹ *Property Law Act 1974* (Qld) s 79(2).

²⁵² *Property Law Act 1974* (Qld) s 22.

²⁵³ *Property Law Act 1974* (Qld) s 205(3).

²⁵⁴ Form 22 (Request by Tenant in Tail for Entry of Title in Fee Simple); Forms 3-6 (Variation of Mortgage); Form 17 (Release or Disclaimer of Power).

²⁵⁵ The amending legislation was the *Statute Law Revision Act (No. 2) 1995* (Qld).

²⁵⁶ *Acts Interpretation Act 1954* (Qld) s 48(5).

²⁵⁷ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 60.

²⁵⁸ Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 60.

²⁵⁹ Queensland Law Reform Commission, *Consolidation of Real Property Acts* Report No. 40 (1991) cl 51, 25.

Section 349(1)(a) of the PLA makes it clear that it is the form, if the relevant instrument is to be registered, which must be attested under the requirements of the Real Property Acts. Under the *Land Title Act 1994* (Qld), an instrument may only be registered by the registrar if it complies with the Act. The only specific requirement under the *Land Title Act 1994* (Qld) in relation to ‘attestation’ or valid execution is set out in section 161 of the Act. That section specifies what constitutes valid execution by a corporation and an individual. In the case of an individual, an instrument is validly executed if it is executed in a way permitted by law and the execution is witnessed by a person specified in Schedule 1 of the Act.²⁶⁰

Section 349 is arguably no longer necessary as an instrument may only be registered under the *Land Title Act 1994* (Qld) if it complies with that Act and it appears capable of registration. In this respect, the method of attestation of an instrument in any form needs to comply with section 161 of the *Land Title Act 1994* (Qld).

18.3. Other jurisdictions

No other Australian jurisdiction has a provision equivalent to section 349.

18.4. Options

Section 349 of the PLA does not appear to have any current utility and the preliminary recommendation is that the section should be repealed.

Questions

34. Do you disagree with the conclusion that section 349 of the PLA has no current utility? If so, please provide your reasons.

²⁶⁰ *Property Law Act 1974* (Qld) ss 161(2)(a) and (b).

Resources

Part 12 – Equitable interests and things in action

A. Articles/Books/Reports

Austin, R P, 'The Conveyancing Act, 1919 (As Amended) Section 12 and Equitable Choses in Action' (1976) 7 *Sydney Law Review* 394

Austin, RP and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010)

Bennion, Tom, David Brown, Robert Muir and Kenneth Palmer, *New Zealand Land Law* (Bookers Ltd, 2nd ed, 2009)

Christensen, SA and WD Duncan, *The Construction and Performance of Commercial Contracts* (Federation Press, 2014)

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Hinde, GW and DW McMorland, *Land Law in New Zealand* (Butterworths, 1997)

Law Commission (NZ) *The Property Law Act 1952* Preliminary Paper No. 16 (1992)

Law Commission (NZ) *A New Property Law Act* Report No. 29 (1994)

New Zealand Law Commission, *A New Property Law Act* Report No. 29 (1994)

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

Peter Radan and Cameron Stewart, *Principles of Australian Equity and Trusts* (Butterworths, 2010)

Victorian Law Reform Commission, *Review of the Property Law Act 1958* Consultation Paper (2010)

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

Whittaker, *Review of the Personal Property Securities Act 2009* Final Report (2015)

B. Legislation

Civil Law (Property) Act 2006 (ACT)

Conveyancing Act 1919 (NSW)

Conveyancing and Law of Property Act 1884 (Tas)

Law of Property Act 2000 (NT)

Law of Property Act 1936 (SA)

Personal Property Securities Act 2009 (Cth)

Property Law Act 1952 (NZ) (repealed)

Property Law Act 1958 (Vic)

Property Law Act 1969 (WA)

Property Law Act 1974 (Qld)

Property Law Act 2007 (NZ)

C. Cases

Anning v Anning (1907) 4 CLR 1049

Norman v Federal Commissioner of Taxation (1963) 109 CLR 6

Thomas v National Australia Bank Limited [1999] QCA 525

D. Other

New Zealand Parliament, Explanatory Note Property Law Bill (NZ)

Part 15 - Corporations

A. Articles/Books/Reports

Austin, RP and M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 14th ed, 2010)

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

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Harpum, Charles, Malcolm Grant and Stuart Bridge, *The Law of Real Property* (Sweet & Maxwell Limited, 6th ed, 2000)

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

B. Legislation

Acts Interpretation Act 1954 (Qld)

Corporations Act 2001 (Cth)

Economic Development Act 2012 (Qld)

Financial Accountability Act 2009 (Qld)

Law of Property Act 1925 (UK)

Property Law Act 1958 (Vic)

Public Trustee Act 1978 (Qld)

Queensland Treasury Corporation Act 1988 (Qld)

State Development and Public Works Organisation Act 1971 (Qld)

Statutory Bodies Financial Arrangements Act 1982 (Qld)

C. Cases

LK Bros Pty Ltd v Collins and Anor [2004] QSC 026

Part 16 – Voidable dispositions

A. Articles/Books/Reports

Australian Law Reform Commission, *General insolvency Inquiry* Report No.45 (1988)

Bennion, Tom, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers, 2nd ed, 2009)

Burn, EH and J Cartwright, *Cheshire and Burn’s Modern Law of Real Property* (Oxford University Press, 17th ed, 2006)

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Harpum, Charles, Malcolm Grant and Stuart Bridge, *The Law of Real Property* (Sweet & Maxwell Limited, 6th ed. 2000)

Hinde, GW and DW McMorland, *Land Law in New Zealand* (1997, Butterworths)

Insolvency Law Review Committee (Singapore), *Report of the Insolvency Law Review Committee*, Final Report (2013)

Law Reform Commission (Ireland), *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* LRC CP 34 (2004)

McQuade, PP and MGR Gronow, *Australian Bankruptcy Law and Practice* (Thomson Reuters) (online)
New Zealand Law Commission, *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991)

Northern Ireland Law Commission, *Consultation Paper Land Law* NILC 2 (2009)

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

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

Young, Peter, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* LexisNexis (2012)

B. Legislation

Bankruptcy Act 1966 (Cth)

Civil Law (Property) Act 2006 (ACT)

Conveyancing Act 1919 (NSW)

Conveyancing and Law of Property Act 1884 (Tas)

Conveyancing and Law of Property Act (CAP 61) (Singapore)

Insolvency Act 1986 (UK)

Land Title Act 1994 (Qld)

Law of Property Act 1936 (SA)

Law of Property Act (NT)

Law of Property Act 1925 (UK)

Property Law Act 1952 (NZ) (repealed)

Property Law Act 1958 (Vic)

Property Law Act 1969 (WA)

Property Law Act 1974 (Qld)

Property Law Act 2007 (NZ)

C. Cases

Ashton v Prentice [1998] FCA 1464

Marcolongo v Chen (2011) 274 ALR 634

Zaravinos v Houvardas (2004) 32 Fam LR 490

D. Other

Explanatory Note *Property Law Bill* (NZ) (2006)

Part 18 – Unregistered land

A. *Articles/Books/Reports*

Bennion, Tom, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers, 2nd ed, 2009)

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

Butt, Peter *Land Law* (LawBook Co., 5th ed, 2006)

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Harpum, Charles, Stuart Bridge and Martin Dixon, *The Law of Real Property* (Sweet & Maxwell, 6th ed, 2010)

Hinde, GW and DW McMorland, *Land Law in New Zealand* (Butterworths, 1997)

MacDonald, Carmel, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010)

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

Stuckey, GP, *The Conveyancing Act, 1919-1969* (Law Book Company, 2nd ed, 1970)

B. *Legislation*

Land Act 1994 (Qld)

Land Title Act 1994 (Qld)

Legislative Standards Act 1992 (Qld)

Property Law Act 1974 (Qld)

C. *Other*

Department of Natural Resources and Mines, *Land Title Practice Manual (Queensland)* https://www.dnrm.qld.gov.au/_data/assets/pdf_file/0006/97134/land-title-practice-manual.pdf (accessed 12 May 2016)

Part 19 – Property (de facto relationships)

A. Articles/Books/Reports

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

B. Legislation

De Facto Relationships Act 1991 (NT)

Domestic Partners Property Act 1996 (SA)

Domestic Relationships Act 1994 (ACT)

Family Law Act 1975 (Cth)

Property Law Act 1974 (Qld)

Property (Relationships) Act 1984 (NSW)

Relationships Act 2003 (Tas)

Relationships Act 2008 (Vic)

C. Other

Queensland Law Reform Commission, *De Facto Relationships* Working Paper No. 40 (1992)

Queensland Law Reform Commission, *De Facto Relationships* Final Report No. 44 (1993)

Watts, Garry (Justice), *De Facto Property Under the Family Law Act* (19 December 2008)

Explanatory Memorandum, *Relationships Bill 2007* (Vic)

Part 20 - Miscellaneous

A. Articles/Books/Reports

Corones, Stephen, Nigel Stobbs and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (LawBook Co., 2nd ed, 2014)

Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters

Gray, Kevin, *Elements of Land Law* (Butterworths, 1987)

Harwood, Michael, *Modern English Land Law* (Sweet & Maxwell, 2nd ed, 1982)

MacDonald, Carmel, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010)

New South Wales Law Reform Commission, *Second Report of the Law Reform Commission on Supreme Court Procedure* Report No. 14 (1971)

New Zealand Law Commission, *A New Property Law Act*, Report No. 29 (1994)

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

Queensland Law Reform Commission, *Consolidation of Real Property Acts* Report No. 40 (1991)

Stuckey, G.P, *The Conveyancing Act 1919-1969* (The Law Book Company, 2nd ed, 1970)

Thomas, David, Bernard Cairns and Bridget Cullen, *Uniform Civil Procedure Queensland 2016* (Lawbook Co, 2016)

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

Young, Peter, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013* (LexisNexis, 2012)

B. Legislation

Acts Interpretation Act 1954 (Qld)

Conveyancing Act 1919 (NSW)

Conveyancing and Law of Property Act 1884 (Tas)

Land Title Act 1994 (Qld)

Law of Property Act 1925 (UK)

Law of Property Act 1936 (SA)

Law of Property Act (NT)

Legal Profession Act 2007 (Qld)

Property Law Act 1952 (NZ) (Repealed)

Property Law Act 1958 (Vic)

Property Law Act 1974 (Qld)

Statute Law Revision Act (No. 2) 1995 (Qld)

Trusts Act 1973 (Qld)

Uniform Civil Procedure Rules 1999 (Qld)

C. Cases

Digiplus v RSL Com (2003) 202 ALR 117

D. Other

Legal Services Commission, *Negligence*, Fact Sheet 3 (January 2016)
http://www.lsc.qld.gov.au/_data/assets/pdf_file/0009/97749/negligence.pdf

Attachment A – Property Law Act 2007 (NZ) ss48-53

Subpart 5—Assignment of things in action

48 Interpretation

In this subpart, unless the context otherwise requires,—

absolute, in relation to an assignment, means—

- (a) not conditional; or
- (b) not by way of charge only

assignment means an instrument effecting or relating to an assignment

debt includes an obligation to—

- (a) pay money;
- (b) deliver or transfer property;
- (c) do or not do any other thing

debt owing includes an obligation that is due to be performed

debtor means a person (including a trustee) who is under an obligation to pay a debt

payment of a debt includes the performance of an obligation that is not an obligation to pay money

thing in action—

- (a) means a right to receive payment of a debt; and
- (b) includes part of a thing in action.

49 Application of subpart

- (1) This subpart applies to an assignment of a thing in action made only on or after 1 January 2008.
- (2) A thing in action that is not capable of being assigned cannot be assigned under this subpart.
- (3) However, subsection (2) applies subject to section 53.
- (4) This subpart does not affect the application of section 18.
- (5) If only part of a thing in action is assigned, the rights and obligations under this subpart of the assignor, the assignee, and the debtor relate only to the part assigned.

50 How thing in action assigned

- (1) The absolute assignment in writing of a legal or equitable thing in action, signed by the assignor, passes to the assignee—
 - (a) all the rights of the assignor in relation to the thing in action; and
 - (b) all the remedies of the assignor in relation to the thing in action; and
 - (c) the power to give a good discharge to the debtor.
- (2) Subsection (1) applies whether or not the assignment is given for valuable consideration.
- (3) Subsection (1) applies subject to—
 - (a) section 51; and
 - (b) any equities in relation to the thing in action that arise before the debtor has actual notice of the assignment and would, but for subsection (1), have priority over the rights of the assignee.
- (4) The priority of an assignment to which subsection (1) applies and which is not given for valuable consideration is to be determined as if the assignment had been given for valuable consideration.
- (5) A legal or equitable thing in action is to be treated as having been assigned in equity (whether the assignment is oral or in writing) if—
 - (a) the assignee has given valuable consideration for the assignment; or

(b) the assignment is complete.

(6) Subsection (5)—

(a) prevails over any rule of equity to the contrary; but

(b) applies subject to sections 24 and 25.

(7) An assignment to which subsection (5) applies is complete when the assignor has done everything that needs to be done by the assignor to transfer to the assignee (whether absolutely, conditionally, or by way of charge) the rights of the assignor in relation to the thing in action.

(8) Subsection (7) applies even though some other thing may remain to be done, without the intervention or assistance of the assignor, in order to confer title to the rights on the assignee.

51 Further consequences of assignment of thing in action

(1) This section applies to a thing in action assigned in accordance with section 50(1) or in equity.

(2) Payment of all or part of the debt to the assignor by a debtor who does not have actual notice of the assignment discharges the debtor to the extent of the payment.

(3) The debt owing by a debtor who has actual notice of the assignment is payable to the assignee.

(4) However, the debt is payable to another assignee if,—

(a) before discharge, the debtor receives actual notice of the assignment of the same thing in action to the other assignee; and

(b) the rights of the other assignee in relation to the thing in action have priority over the rights of the first assignee.

(5) A debtor may interplead in any proceeding brought against the debtor for the payment of the debt, or apply to a court for an order determining the entitlement to any right in relation to a thing in action, if the debtor has actual notice—

(a) that an assignment of the thing in action is disputed by the assignee or anyone claiming under the assignor; or

(b) that there are other opposing or conflicting claims in relation to the thing in action.

52 Further provisions about assignments

(1) The registration of an assignment under an enactment does not, of itself, give actual notice of the assignment to the debtor.

(2) Subsection (1) overrides anything to the contrary in the enactment under which the assignment is registered.

(3) Joint debtors have actual notice of the assignment of a thing in action or of any matter referred to in section 51 if any of them has actual notice of the assignment or matter.

(4) The assignor must be joined in any proceeding brought by the assignee against the debtor if—

(a) only part of a thing in action has been assigned in accordance with section 50(1); or

(b) there has been an assignment only in equity of all or part of a thing in action.

(5) For the purposes of subsection (4), an assignor may be joined in proceedings—

(a) when the proceedings are brought or subsequently; and

(b) if subsequently, whether before or after the expiry of the limitation period within which the proceedings must be brought in order to avoid a limitation defence applying to a claim made in the proceedings.

53 Assignment of amounts payable in future

An assignment of an amount that will or may be payable in the future under a right already possessed by the assignor (whether the right arises before, on, or after 1 January 2008) is to be treated as an assignment of a thing in action.