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2016

Property Law Review
Issues Paper 2
Property Law Act 1974 (Qld) – Part 8 Leases and Tenancies

Commercial and Property Law

Research Centre

QUT Law

Preface

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

The members of the Centre who authored this paper are:

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The Centre gratefully acknowledges the contribution of Stephen Lumb, Barrister, Brisbane in relation to the review of Part 8, Division 5 (Summary Recovery of Possession) of the *Property Law Act 1974* (Qld).

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Attorney-General's foreword

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

The Queensland University of Technology's (QUT) Commercial and Property Law Research Centre is examining the *Property Law Act 1974* (Qld) as part of its comprehensive review of Queensland's property laws.

The review is an exciting opportunity to identify options for streamlining and modernising Queensland's property laws to create a simpler, more accessible and more efficient property law framework for this State.

The Issues Paper, *Property Law Act 1974 (Qld) – Part 8 Leases and Tenancies*, provides an opportunity for interested members of the public, business groups and the legal profession to comment on the relevance of those provisions to modern leasing practice, and to provide feedback on possible options for reform.

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

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

I encourage stakeholders and other interested members of the public to consider the issues identified by QUT in the Issues Paper and provide feedback on the questions raised.

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

How to make a submission

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

The issues raised are not intended to be exhaustive. If you think there are other opportunities to improve Part 8 of the *Property Law Act 1974* (Qld), please include these in your response.

The closing date for submissions is 30 August 2016.

Where to send your submission

You may lodge your submission by email or post.

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

Alternatively, you can post your submission to:

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

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

Privacy Statement

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

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

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

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1. Background

1.1. Review of Queensland Property Laws

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

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

This Issues Paper is concerned with Part 8 of the PLA which covers leases and tenancies and has been structured to consider the following three areas. Firstly, it discusses in detail sections in Part 8 of the PLA which were identified as requiring more complex analysis to determine whether or not reform is necessary. These sections are:

- Section 102(3) – Leases taking effect more than 21 years after 'the date of the instrument purporting to create it is void';
- Sections 105 and 106 – Obligations of lessees and lessors;
- Sections 119 and 120 – Waiver of a covenant in a lease and Effect of Licences Granted to Lessees;
- Section 121 – Provisions as to covenants not to assign etc without licence or consent;
- Section 123 – Definition of 'lease';
- Section 128 – Relief against loss of lessee's option;
- Section 129 – Abolition of yearly tenancies arising by implication of law;
- Sections 138 – Tenants and other persons holding over to pay double the yearly value;
- Section 139 – Tenant holding over after giving notice to be liable for double rent;
- Division 5 – Summary Recovery of Possession; and
- Division 6 – Agricultural Holdings.

Secondly, the issue associated with the continuing liability of an assignor under a lease following an assignment is discussed in detail in Part 6 of the Paper. The PLA currently does not address this issue and the discussion in Part 6 is intended to provide context to further consideration of whether reform in this area is required.

Thirdly, those sections of Part 8 which were identified as not requiring detailed analysis are considered in **Appendix A** and preliminary recommendations in respect of these sections are set out in that Appendix.

Feedback is being sought from stakeholders and other interested parties to the specific questions in this paper and the proposed recommendations in relation to the other sections of Part 8 set out in in **Appendix A**. The information obtained as part of this consultation process will be considered and

used for the purpose of the final report setting out recommendations in relation to the sections identified above.

2. Section 102(3) – A lease taking effect more than 21 years after 'the date of the instrument purporting to create it is void'

2.1. Overview and purpose

Section 102(3) of the PLA provides:

> A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than 21 years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void but this subsection does not apply to any term taking effect in equity under a settlement, or under an equitable power for mortgage, indemnity or other like purposes.

Prior to the introduction of relevant legislation, there was no restriction between the length of time that might elapse between the granting of a right to a lease and the commencement of the lease. These leases are known as reversionary leases. The effect of this position was that a lease granted in 1917, for example, which did not commence until 1946 was still valid.[1] The rule against perpetuity was not breached as the right to a lease was an immediate vested interest – that is, a right of entry or interesse termini only. This interest fell short of an estate in the relevant land. The actual vesting of possession of the subject land which in turn created an estate in the land did not occur until the commencement of the lease.[2] The doctrine of interesse termini was abolished by section 149 of the *Law of Property Act 1925* (UK), so that leases taking effect in the future immediately create a legal estate (albeit one which does not arise until a future date).[3] However, section 149(3) of the United Kingdom legislation imposes a limitation in relation to the grant of future leases commencing more than 21 years after being entered into. A similar provision was introduced into New South Wales in 1930 in the form of section 120A(3) of the *Conveyancing Act 1919* (NSW).

The Queensland provision was modelled on both the United Kingdom and New South Wales provision.[4] Under section 102(3) of the PLA, a lease which is specified to take effect from a date which is more than 21 years after the date of the instrument purporting to create it is void, as is 'a contract to create such a term'.[5] If the commencement of the lease is within 21 years of the date of the lease then section 102(3) of the PLA will not apply irrespective of the remoteness of the relevant contract.[6]

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[1] *Mann, Crossmin and Paulin Ltd v Registrar of Land Registry* [1918] 1 Ch 202.
[2] Emma Slessenger, 'In perpetuity' (2010) 14(5) *Landlord and Tenant Review* 165, 166.
[3] Adrian J Bradbrook, Clyde E Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths 3rd ed, 2009) 36 [1.10]. Section 149 of the 1925 Act was originally enacted as section 146 of the *Law of Property Act 1922* (UK). The 1922 legislation did not commence until 1926 when it came into operation 'contemporaneously with the Law of Property Act, 1925.' See *Re Strand & Savoy Properties & Savoy Properties, Ltd* [1960] Ch.D 327, 328.
[4] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 79.
[5] Weld, H, John Peter Thomas and Allan James Chay, (eds) *Queensland Conveyancing Law Commentary* CCH Australia Ltd (online) [25-330].
[6] See H Weld, John Peter Thomas and Allan James Chay, (eds) *Queensland Conveyancing Law Commentary* CCH Australia Ltd (online) [25-330], referring to the English case *In re Strand and Savoy Properties Ltd* (1960) Ch 582.

The operation of the equivalent provision in the United Kingdom has been described in the following way:

> The first limb of this enactment nullifies the creation of a reversionary lease limited to take effect more than 21 years from the date of the lease, eg a lease executed in 1980 for a term of ten years to run from 2005. The second limb nullifies a contract to create such a term, ie a term that will commence more than 21 years from the date of the lease by which it will eventually be created. For example, a contract made in 1980 to grant a lease for ten years in 1982, the term to run from 2005 is void.
>
> Thus, the Act relates the period of 21 years to the date of the lease, not to the date of the contract.[7]

The section expressly provides that it does not apply to terms taking effect in equity under a settlement, created out of an equitable interest under a settlement or under an equitable power for mortgage, indemnity or other like purposes.

Section 102(3) of the PLA and its interstate equivalents will not apply to an option to renew an existing lease, even if the exercise of the option means the renewed lease will not commence until after 21 years from the date of the existing lease '(or of any contract that created the existing lease).'[8] The scope of the equivalent provision in section 120A(3) of the *Conveyancing Act 1919* (NSW) in relation to options to renew has been explained in the following way:

> The reference in the section to a "contract to create such a term" is a reference to the contract to create the parent term, not the contract to give a further term if the option is exercised. Hence, as long as the parent term commences within 21 years of the contract that creates it, an option to renew that term is valid, even though the option is not exercisable within that 21 years. Thus the provision does not invalidate an option contained in a 35 year lease (granted now) to renew the lease for further term at the end of the 35 years; nor does it invalidate the further term if actually granted. Nor, by parity of reasoning, does it invalidate an option to renew contained in a 10 year parent lease, where the parent lease is to be granted 20 years from now, even though the option would not be exercisable until 30 years from now. [9]

The position is the same under section 102(3) of the PLA. The provision does not appear to have been judicially considered in Queensland.

2.2. Is there a need for reform?

2.2.1. Policy underpinning section 102(3) unclear

The policy which underpins this section and its equivalent in the United Kingdom and other Australian jurisdictions is unclear. There is some suggestion that the provision in the United Kingdom was introduced 'in order to prevent unnecessary complication of title.'[10] However, there is very little

[7] E H Burn, *Modern Law of Real Property* (Butterworths, 13th ed, 1982) 369.
[8] See *Re Strand and Savoy Properties Pty Ltd* [1960] Ch 582 and *Weg Motors Ltd v Hales* [1962] Ch 49, 68 and 78.
[9] Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010) [1540].
[10] Emma Slessenger, 'In Perpetuity' (2010) 14(5) *Landlord & Tenant Review* 165, 166 referring to Wolstenholme and Cherry Conveyancing Statutes.

commentary on this issue. Buckley J in *Re Strand & Savoy Properties, Ltd*, when considering section 149(3) of the *Law of Property Act 1925* (UK), stated:

> I must confess that when I look at the language of s 149 and the language of Sch. 15 to the Act of 1922, cl. 7, I find it difficult myself to discover what the policy of the legislature was about this. In particular, I find it difficult to understand the policy of cl. 7(2) of Sch. 15. The real property legislation of 1925 was an elaborate code which radically altered the law of the land with regard to the tenure of real property and matters relating to that subject, and there are many aspects on which one can discern what the policy of the legislature was from the terms of the Act, but in this particular regard I confess that I find myself unable to distil any particular policy out of the relevant provisions.[11]

Related to this issue is the lack of clarity regarding the reason for the nomination of 21 years as the relevant time period beyond which the term or contract is void under section 102(3) of the PLA.

2.2.2. Practical issues

There is some anecdotal evidence which suggests that in practice section 102(3) has been viewed as covering options to renew leases, even though this is not consistent with the actual legal position. This cautious approach has the potential effect of limiting the extent to which parties enter into long term commercial transactions that may include options to renew leases which commence more than 21 years after the agreement.

2.2.3. Possible artificial distinction between an option to renew contained in a lease and a right contained in 'an instrument purporting to create' a leasehold?

Section 102(3) of the PLA does not cover options to renew contained in a lease agreement. It is difficult to see the difference between an option to renew contained in a lease and a right contained in 'an instrument purporting to create' a leasehold estate. On one view, the distinction is arguably artificial. Further consideration should be given to this issue.

2.3. Other jurisdictions

As indicated above, section 102(3) replicates section 120A(3) of the *Conveyancing Act 1919* (NSW). Victoria, Western Australia and the Northern Territory all have similar provisions to section 102(3) of the PLA.[12] The South Australian legislation has a provision that abolishes the doctrine of interesse termini but does not include an equivalent section 102(3) provision of the PLA.[13]

[11] *Re Strand & Savoy Properties, Ltd* [1960] Ch.D 327, 329. Buckley J in that decision held that an option to renew a lease of 35 years for an additional 35 years was valid at [331].
[12] *Property Law Act 1958* (Vic) s149(3), *Property Law Act 1969* (WA) s74(3), *Law of Property Act* (NT) s115(3).
[13] See *Law of Property Act 1936* (SA) s24B.

2.4. Options

There is uncertainty regarding the purpose of section 102(3) of the PLA. It does not appear that the provision has been the subject of judicial consideration in Queensland. The equivalent provision in the United Kingdom has been considered judicially and in one of those cases the judge could not identify any particular policy underpinning the section. There are two potential options for section 102(3) which are considered further below.

Option 1 – Repeal the section

This option would require the repeal of the section. This approach would proceed on the basis that there does not appear to be any clear rationale for the rule. Further, the repeal of the provision may allow for greater flexibility of term in the case of commercial transactions.

Option 2 – Retain the section

The alternative option is to retain the section on the basis that there is no case law that has identified any significant issue with the provision in practice.

Questions

1. **What is the purpose of section 102(3) of the PLA?**
2. **Do you think that section 102(3) of the PLA serves any practical purpose?**
3. **Are you aware of any difficulties associated with the application of section 102(3) in practice?**
4. **Should section 102(3) of the PLA be retained?**
5. **Are you aware of any issues which might be raised by repealing section 102(3) of the PLA?**

3. Sections 105 and 106 – Obligations of lessees and lessors

3.1. Overview and purpose

Section 105 of the PLA provides:

(1) Subject to this Act and to the provisions of the lease, in every lease of land made after the commencement of this Act there shall, unless otherwise agreed, be implied the following obligations by the lessee with the lessor –

(a) **To pay rent** – that the lessee will pay the rent reserved at the time mentioned in the lease, but, if the demised premises or any part of the premises shall at any time during the continuance of the lease be destroyed or damaged by fire without fault on the part of the lessee, flood, lightning, storm, or tempest so, in any such event as to render the same unfit for occupation and use of the lessee, then and so often as the same shall happen, the rent reserved, or a proportionate part of the rent, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part of the rent shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee;

(b) **To keep in repair** – that the lessee will, at all times during the continuance of the lease, keep and, at the termination of the lease, yield up the demised premises in good and tenantable repair, having regard to their condition at the commencement of the lease, damage from fire, flood, lightening, storm and tempest, and reasonable wear and tear excepted, but this obligation is not implied in the case of a lease for a term of 3 years or for any less period of premises for the purpose or principally for the purpose of human habitation.

(2) In the case of a lease by deed any obligation implied by this section shall take effect as a covenant.

Section 106 of the PLA provides:

(1) In a lease of premises for a term of 3 years or for any less period there is an obligation -

(a) on the part of the lessor, in the case of premises for the purpose or principally for the purpose of human habitation, to provide and maintain the premises or such part as is let for such purpose in a condition reasonably fit for human habitation; and

(b) on the part of the lessee –

(i) to care for the premises in the manner of a reasonable tenant; and

(ii) to repair damage caused by the lessee or by persons coming on the premises with the lessee's permission.

(2) This section applies –

(a) to leases made after the commencement of this Act; and

(b) despite any other provision of this Act or any agreement to the contrary.

Section 105 of the PLA has its origins in sections 70 and 31 of *The Real Property Acts 1861-1963*.[14] Section 105 was incorporated to clarify the position following a Queensland Supreme Court decision which held that the implied covenants to pay rent, taxes and to keep the premises in good repair under *The Real Property Acts* applied to an unregistered parol lease of land for periods of less than

[14] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 80.

three years.[15] The Queensland Law Reform Commission (**QLRC**) held the view that although there were criticisms of the relevant case, it was 'clearly convenient there should be an appropriate implication of obligations in all leases.'[16] The QLRC's preferred approach followed the Supreme Court decision with the result that the proposed clause 105 implied an obligation on the part of the lessee to pay the rent required under the lease and keep the premises in 'good and tenantable repair', in relation to all leases 'whether of land under *The Real Property Acts* or otherwise and whether registered or by parol'.[17] The QLRC based section 105 of the PLA upon section 84 of the *Conveyancing Act 1919* (NSW).

The effect of section 105 is to imply a term in a lease which requires the lessee to pay rent and to keep the premises in repair. The obligation to keep the premises in repair is not implied in the case of a lease 'for a term of three years or for any less period of premises for the purpose or principally for the purpose of human habitation.'[18] The application of the section is subject to a contrary term in the lease agreement.

The rationale for the introduction of section 106(1)(a) of the PLA was to overcome a common law rule which was not suited to the way in which residential leasing was carried out in practice in Queensland. In England, at common law, there was no implied undertaking on the part of the lessor in a lease of a dwelling house that it was fit for human habitation or that the lessor would undertake any repairs.[19] That rule was established during a period when lengthy leases of residential property were common.[20] The common law position in England was altered by legislation which implied a condition of fitness `for human habitation' and implied a 'covenant by the landlord to repair the structure and exterior of a dwelling house let for less than seven years.'[21] The QLRC noted in its discussion in relation to the proposed section 106 of the PLA that those historical circumstances have never existed in Queensland and the common law rule was not suited to local conditions.[22] As the common law rule prevailed in

[15] See *Leahy v Canavan* [1970] Qd.R 224 discussed in Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 80.
[16] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 81.
[17] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 81.
[18] *Property Law Act 1974* (Qld) s105(1)(b).
[19] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 81.
[20] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 81.
[21] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 81.
[22] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 81.

Queensland, section 106(1)(a) was proposed as a mechanism to address the issue. In this respect the QLRC indicated that:

> The common law rule is therefore unsuited to Queensland conditions, and we propose the adoption of the principles of the Ontario and English legislation, confining, however, the obligation so imposed to tenancies for periods of three years or less. This is all the more necessary as the preceding clause [cl 105] would otherwise now ordinarily impose on the tenant an implied obligation to repair.'[23]

The rationale for the inclusion of section 106(1)(b), which imposes obligations on the lessee, was explained by the QLRC to:

> simply express the common law as stated by Denning L.J in Warren v Kean [1954] 1 QB 15, namely, that he must abstain from acts of waste and do "the little jobs about the place which a reasonable tenant would do."

A comparison of the key components of sections 105 and 106 is set out in Table 1 below.

Table 1: Comparison of sections 105 and 106 of the PLA

Section 105(1)(b)	Section 106(1)(a) and (b)
Lessee obligations subject to the PLA and the provisions of the lease.	The obligations apply despite any other provision of the PLA or any agreement to the contrary: s106(2)
Applies to leases longer than 3 years not for the purpose or principally for the purpose of human habitation.	Applies to leases for a term of 3 years (or less). Part of the obligation only applies to leases for the purpose or principally for the purpose of human habitation.
	Lessor to provide and maintain the premises in a condition reasonably fit for human habitation: s106(1)(a)
	Lessor obligation only applicable in the case of premises for the purpose or principally for the purpose of human habitation: s106(1)(a)
Lessee during the lease keep, and yield up the premises in good and tenantable repair.	Lessee to care for the premises in the manner of a reasonable tenant **and** to repair damage caused by lessee or by persons coming on the premises with the lessee's permission: s106(1)(b)
Obligation not implied in the case of a lease for a term of 3 years (or less) of premises for the purpose or principally for the purpose of human habitation.	

In summary:

- Section 105(1)(b) will not apply to a lease 3 years or less which is for the purpose or principally for the purpose of human habitation. This means that the repair obligation is not imposed on

[23] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract to Terminate the Application of Certain Imperial Statutes*, Report No 16 (1973) 81.

the lessee. For example, a lease for a private dwelling house for 2 years is not covered. However, a lease for 2 years which is not for the purpose of human habitation will be covered;

- Section 105(1)(b) will apply to a lease longer than 3 years. This means that the repair obligation will be imposed on the lessee. For example, a lease for a business premises or residence will be covered by section 105(1)(b);
- Section 106(1)(a) will apply to a lease 3 years or less which is for purpose or principally for the purpose of human habitation. The obligation is imposed on the lessor to provide and maintain premises in a condition fit for human habitation. Business leases will not fall within the scope of the section; and
- Section 106(1)(b) will apply to any lease (human habitation or business) of 3 years or less. The section imposes an obligation on the lessee to care for the premises and to repair the same.

3.1.1. Relationship between sections 105(1)(b) and 106(1)(a)

If the relevant lease is for a period 3 years or less and is for the purpose or principally for the purpose of human habitation, then the lessee repair obligation in section 105(1)(b) will not apply. However, the lease is likely to be caught by section 106(1)(a) which imposes an obligation on the lessor in relation to providing and maintaining the premises in a condition reasonably fit for human habitation.

3.2. Is there a need for reform?

3.2.1. 'Purpose of human habitation'

The terms 'human habitation' and 'purpose of human habitation' are not defined in the PLA. Section 105(1)(b) of the PLA as originally passed did not include any reference to the purpose of the short lease being for human habitation. The term was subsequently incorporated into subsections 105(1)(b) and 106(1)(a) by the *Property Law Act Amendment Act 1975* (Qld), prior to the commencement of the PLA.[24] The amendments were made to clarify the situation in relation to leases for business premises. The reason for the changes to sections 105 and 106 of the PLA was explained in the following way when the Bill was introduced into the Queensland Parliament:

> Under these sections as they presently stand, there is an obligation, except where the lease provides to the contrary, on the part of the lessee to keep leased premises for a term in excess of three years in a good state of repair. In the case of a lease of three years or less, there is an obligation on the part of the lessor to keep the premises in a good state of repair notwithstanding any agreement to the contrary. However, business premises are commonly held under short leases, and invariably there is an obligation included in the lease for the lessee to keep the premises in repair. The effect of the proposed amendment to sections 105 and 106 will be to allow this practice to continue except where the provisions of the lease itself provide to the contrary.[25]

It seems likely from the comments made by the QLRC set out above and the First Reading Speech that it was intended to cover a lease for human habitation – that is, premises other than business premises.

[24] *Property Law Act Amendment Act 1975* (Qld) s9 and s10.
[25] Queensland, *Hansard*, 24 October 1975, 1499 (Hon W.E Knox Minister for Justice and Attorney-General) (in relation to the *Property Law Act Amendment Bill*).

3.2.2. Application of the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld)

Statutory protection to residential tenants was first provided in Queensland in 1975 under the *Residential Tenancies Act 1975* (Qld). This Act was then replaced by the *Residential Tenancies Act 1994* (Qld). The *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) (**RT&RA Act**) commenced in 2009 and repealed the 1994 legislation. The main objects of the Act are to state the rights and obligations of tenants, lessors and agents for residential tenancies and residents, providers and agents for rooming accommodation.[26] The RT&RA Act applies to premises which are occupied under a residential tenancy agreement. The key definitions under the Act include:

- A 'residential tenancy agreement' is an agreement under which a person gives to someone else a right to occupy 'residential premises' as a residence. The agreement can be wholly in writing, wholly oral or wholly implied or a combination of these;[27]
- 'Residential premises' are premises used, or intended to be used, as a place of residence or mainly as a place of residence;[28] and
- 'Premises' include:
    - A part of premises and land occupied with premises;
    - A caravan or its site or both the caravan and site; and
    - A manufactured home in, or intended to be situated in, a moveable dwelling park or its site, or both the manufactured home and site; and
    - A houseboat.[29]

In the context of repair obligations, the RT&RA Act includes a number of obligations which are imposed on both the lessor and lessee depending on the type of premises which is the subject of the residential tenancy agreement. These provisions include:

- Section 185 – lessors obligations generally which include ensuring the premises and inclusions are clean and are in good repair (section 185(2)). The provision does not apply to an agreement if the premises are moveable dwelling premises consisting only of the site for the dwelling and the tenancy is a long tenancy;
- Section 186 – lessor obligations for facilities in moveable dwelling parks;
- Section 187 – lessor obligations for moveable dwelling site;
- Section 188 – lessee obligations generally which include keeping the premises and inclusions clean and not maliciously or allowing someone to else to maliciously damage the premises or inclusions;
- Section 189 – lessee obligations for facilities in moveable dwelling parks; and
- Section 190 – lessee obligations for moveable dwelling site.

3.2.3. Interaction between the PLA and the RT&RA Act

[26] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s5.
[27] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s12.
[28] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s10.
[29] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s9.

Section 27(1) of the RT&RA Act expressly provides that the PLA does not apply to residential tenancy agreements. There has been no clear articulation regarding whether a lease for the purpose or principally for the purpose of human habitation is essentially the same as a residential tenancy agreement for a residence, although as indicated in Part 3.2.1 above, there is support for the position that it covers residential premises.

The operation of the section 105(1)(b) in the context of the RT&RA Act has been described in the following ways:

> Although the *Property Law Act 1974*, s 105(1)(b) in its terms applies to leases of residential premises for a period longer than three years, the section is overridden by the *Residential Tenancies and Rooming Accommodation Act 2008*, s 27 which provides that the provisions of the *Property Law Act 1974* do not apply to residential tenancies. The obligations concerning repair of residential tenancies are found in ss 185-191, 247, 253 of the *Residential Tenancies and Rooming Accommodation Act 2008*.[30]
>
> It should be mentioned that the *Residential Tenancies and Rooming Accommodation Act 2008* applies exclusively to the tenancies of 'residential premises' which are defined to mean, in that former Act, 'premises used or intended to be used as a place of residence'. Unless there is some distinction between 'residence' and 'human habitation' which has significance in law, there appears very little reason to add this proviso in s 105(1)(b) and for the enactment of s 106(1)(a).[31]

A similar statement is made in relation to section 106(1)(b) of the PLA as follows:

> Although s 106 purports to apply to all short-term leases it will not apply to leases of residential premises because they are excluded from the ambit of the *Property Law Act 1974* by s 27 of the *Residential Tenancies and Rooming Accommodation Act 2008*.[32]

The interaction between the PLA and the *Residential Tenancies Act 1975* (Qld) (**RTA**) (now repealed) was discussed by Gummow J in *Northern Sandblasting Pty Ltd v Harris*.[33] The relevant RTA provision, section 7(a) is similar (but not the same) as section 185 of the RT&RA Act. Gummow J indicated:

> It has been suggested that, in respect of tenancy agreements to which the Residential Tenancies Act applied, the legislative scheme, which involved the commencement of both statutes on 1 December 1975, was that the Residential Tenancies Act applied to the exclusion of provisions such as s 106 of the Property Law Act. In the Court of Appeal, Pincus JA said in his dissenting judgment, and I agree:
>
> > It seems improbable that the legislature would have desired that both of these provisions, worded similarly but not identically, apply to tenancies of dwelling-houses: the intention appears to have to set out, in the [Residential Tenancies Act], a comprehensive statement of the implied obligations of the landlord and of the tenant in tenancies of dwelling-houses, rather than to oblige landlords and tenants to attempt to piece those obligations together by scrutiny of s 7 of the [Residential Tenancies Act] and ss 105 and 106 of the [Property Law Act].

[30] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co, 3rd ed, 2010) 586-587.
[31] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.190].
[32] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co, 3rd ed, 2010) 592 [14.680].
[33] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 384-385.

> Further, as indicated above, at least as regards s 7(a), the Residential Tenancies Act conferred upon tenants more comprehensive rights than ss 105 and 106 of the Property Law Act. Support for the construction preferred by? Pincus JA is provided by s 5 of the Residential Tenancies Act. This stated:
>
> > (1) Notwithstanding the Property Law Act 1974 and save as otherwise provided in this Act, this Act applies to:
> > (a) Dwelling-houses and tenancies of dwelling-houses;
> > (b) Tenancy agreements entered into or renewed before and valid and subsisting at the commencement of this Act;
> > (c) Tenancy agreements entered into after the commencement of this Act.
> > (2) The provisions of this Act apply to every tenancy agreement but nothing in this Act prevents a landlord and tenant from agreeing to terms and conditions that are not inconsistent with the rights, obligations and restrictions conferred or imposed by this Act.
>
> In my view, in the circumstances of the present case, the obligation of the appellant with respect to the fitness of the leased premises for human habitation was to be found in s 7(a)(ii) of the Residential Tenancies Act. However, even if in the present case s 5 of the Residential Act permitted a concurrent operation of s106(1)(a) of the Property Law Act, the result as indicated earlier in these reasons, would not be to avail the respondent.[34]

Section 27(1) of the RT&RA Act is more explicit than the equivalent provision in section 5 of the *Residential Tenancies Act 1975* (Qld) in terms of the exclusion of the application of the PLA to residential tenancy agreements under the RT&RA Act. However, the PLA will still apply to tenancies that are not residential tenancy agreements.[35]

3.2.4. What is not covered under the RT&RA Act?

There are a number of agreements which are excluded from the RT&RA Act including:

- A lease granted by the State under a law other than under the *State Housing Act 1945* (Qld) or the *State Housing Act 2003* (Qld);[36]
- A long-term lease entered into or granted by the South Bank Corporation in relation to premises within the South Bank corporation area;[37]
- A tenancy agreement where a regulation declares that the Act does not apply to the agreement;[38]
- A right to occupy a residential property given pursuant to a contract of sale where the term is for 28 days or less or a right to occupy under a mortgage between the parties;[39]
- A right to occupy a property for the purposes of holiday letting.[40] A tenancy for a period of more than six weeks is deemed not to be a holiday tenancy;
- A tenancy agreement where the tenant is a boarder or lodger;[41]

[34] *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 at 384-385.
[35] *Residential Tenancies and Rooming Accommodation Bill 2008* (Qld) s27(2).
[36] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s26.
[37] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s26(4).
[38] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s20.
[39] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s30.
[40] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s31.
[41] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s32.

- A tenancy agreement for premises which are part of an educational institution, hospital, nursing home or retirement village;[42]
- An agreement that is a rental purchase plan agreement with the State;[43]
- A tenancy agreement for temporary refuge accommodation where the accommodation is not approved supported accommodation;[44]
- Tenancy agreements pursuant to the *Manufactured Homes (Residential Parks) Act 2003* (Qld).[45] These agreements are governed under the Manufactured Home legislation and include provisions about the home owner's responsibilities[46] and the park owner's responsibilities[47] and obligations[48];
- A tenancy entered into by the Commonwealth, State, local government or corporation as tenant for the purpose of subletting premises to an employee of the tenant;[49]
- Headleases for affordable housing agreements;[50]
- Headleases for supported accommodation including drug rehabilitation;[51] and
- 99 year leases on Hamilton or Hayman Island and the Pacific Mirage development on the Gold Coast.[52]

The implied obligations imposed under sections 105 and 106 may potentially be applicable to these categories of lease agreements to the extent that these categories fall within the scope of the PLA provisions and are not dealt with under separate legislation or, in the case of section 105, excluded by the terms of the lease.

3.3. Other jurisdictions

Section 84 of the *Conveyancing Act 1919* (NSW) was used as the model for section 105 of the PLA and although it is in similar form to Queensland it does not exclude from its operation leases of 3 years or less that are for the purpose or principally for the purpose of human habitation. Other jurisdictions do not appear to have an equivalent provision in place.

In the case of section 106 of the PLA, similar provisions in other jurisdictions have not been identified in property legislation.

3.4. Options

The main issue with sections 105 and 106 appear to relate to the interaction between these sections, specifically subsection 105(1)(b) and 106(1)(a) which refer to a lease for the purpose of human habitation, and the provisions of the RT&RA Act which imply similar obligations in the case of

[42] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss33 and 34.
[43] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s35.
[44] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s36.
[45] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s37.
[46] *Manufactured Homes (Residential Parks) Act 2003* (Qld) s16.
[47] *Manufactured Homes (Residential Parks) Act 2003* (Qld) s17.
[48] *Manufactured Homes (Residential Parks) Act 2003* (Qld) Part 14, Divisions 1 & 2.
[49] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s38.
[50] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s39.
[51] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss41 & 42.
[52] *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) ss521-523.

residential tenancy agreements. However, section 27(1) of the RT&RA Act makes it clear that the PLA will not apply to a residential tenancy agreement under the RT&RA Act. That Act also excludes from its application certain categories of lease agreements. In some cases, the provisions of the PLA may apply to some of those excluded categories.

Subject to responses received to the questions below, the preliminary view in relation to sections 105 and 106 of the PLA is to make no changes to the provisions.

Questions

6. **Have you encountered any problems with the practical application of sections 105 and 106 of the PLA? If so, what were the problems?**

7. **Is a lease for the purpose of human habitation the same as a residential tenancy agreement – that is, an agreement under which a person gives to someone else the right to occupy residential premises as a residence?**

8. **Is it possible that there will be categories of leases excluded from the RT&RA Act which will also not have obligations implied under the PLA? If so, is this a problem in practice?**

9. **Do you think any issues arise if no changes to sections 105 and 106 are made?**

4. Sections 119 and 120 – Waiver of a Covenant in a Lease and Effect of Licences Granted to Lessees

4.1. Overview and purpose

Section 119 of the PLA provides:

119 Waiver of a covenant in a lease

(1) Where any actual waiver by a lessor or the persons deriving title under the lessor of the benefit of any covenant, obligation, or condition in any lease is proved to have taken place in any particular instance, such waiver shall not be deemed to extend to any instance, or to any breach of covenant, obligation, or condition save that to which such waiver specifically relates, not operate as a general waiver of the benefit of any such covenant, obligation, or condition.

(2) Unless a contrary intention appears, this section applies and extends to waivers effected after 28 December 1867.

Section 120 of the PLA provides:

120 Effect of licences granted to lessees

(1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only –

(a) to the permission actually given; or

(b) to the specific breach of any provision or covenant referred to; or

(c) to any other matter specifically authorised to be done by the licence;

and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence.

(2) Despite any such licence –

(a) all rights under covenants, obligations, and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, obligation, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and

(b) the condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done.

(3) Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted –

(a) to any 1 of 2 or more lessees to do any act, or to deal with the lessee's equitable share or interest; or

(b) to any lessee, or to any 1 or 2 or more lessees to assign or underlet part only of the property, or to do any act in respect of part only of the property;

the licence does not operate to extinguish the right of entry in case of any breach of covenant, obligation, or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property (as the case may be), in respect of such shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence.

(4) This section applies to licences granted after 28 December 1867.

Section 119 of the PLA has the effect that a waiver of any covenant, obligation or condition in a lease in one instance will not operate as a waiver of all future breaches of the relevant covenant, obligation or condition. The effect of the actual waiver by the lessor under section 119 of the PLA is limited to the breach to which it specifically relates. Section 120 of the PLA is related but refers to the grant by the lessor of a 'licence' to breach any covenant or provision. The effect of section 120 is that a lessor is not prevented from taking action for a future breach of a covenant or condition which is 'unauthorised by the relevant licence'. In that situation, the lessor retains his or her full powers in relation to any subsequent breach of the covenant or condition.[53]

Both sections 119 and 120 of the PLA reverse the position at common law which originated from *Dumpor's Case*.[54] The doctrine set out in that case was that a licence to assign or sub-let in one instance operated as a 'total waiver of the particular condition against assigning or subletting'.[55] The relevant condition was viewed as being an 'entire thing' that was not divisible. This meant that once the condition was breached, it was always breached and not 'capable of being waived or released as to part only.'[56] In *Dumpor's Case* the lease condition in question provided that the lessee and his assigns should not 'alienate without licence.'[57] The Court decided that the licence to assign provided by the lessor to the original lessee 'discharged the condition' which had the effect that there was no requirement for a licence for any assignments that were made subsequently.[58]

Section 120(3) of the PLA specifically relates to the power of re-entry where the lessee assigns or sublets the property without a licence and a licence is granted to some of the co-lessees but not to all of them. The section preserves the right of re-entry in relation to a breach of a covenant by the lessees who do not have the benefit of the licence. This section addresses the common law position which provides:

> A single licence to assign or sublet, whether general or particular, operated as a total waiver of the condition in the lease against assigning or subletting. It was considered that the condition was entire and any partial waiver or release, for example, in favour of one or two lessees only, destroyed the effect of the condition.[59]

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[53] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1080].
[54] (1603) 4 Co Rep 119b; 76 ER 1110.
[55] V.G Wellings and G.N Huskinson, *Woodfall's Law of Landlord and Tenant*, (The Lawbook Company, 28th ed, 1978) 481 [1-1176].
[56] V.G Wellings and G.N Huskinson, *Woodfall's Law of Landlord and Tenant*, (The Lawbook Company, 28th ed, 1978) 481 [1-1176] and Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (The LawBook Exchange Ltd, 2011) 201 referring to the comment by Lord Eldon in *Brummell v MacPherson* (1807) 14 Ves 173. Although describing the doctrine in this way, Lord Eldon still followed it as the 'law of the land'. The rule in relation to conditions was not reversed in England until 1859 and for covenants in 1860. For further commentary on the history of the doctrine see Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (The LawBook Exchange Ltd, 2011) 201-202.
[57] Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (The LawBook Exchange Ltd, 2011) 201
[58] Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (The LawBook Exchange Ltd 2011) 201
[59] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1080]

The QLRC in its report on the proposed Property Law Bill in 1974 discussed the proposed sections 119 and 120 and made the following comment:

> Another consequence of the rule in Dumpor's Case,… that conditions were not severable, was that waiver of a condition was treated as a waiver of all future breaches…and this applied also to express licence. This rule was overcome by ss124 and 125 of The Distress Replevin and Ejectment Act (which was based on English legislation passed in 1859 and 1860) and which came into force on 28th December, 1867.[60]

The QLRC's commentary in relation to the proposed clause 120 is brief and simply notes that:

> This clause provides for the case of licences mentioned above.[61]

A waiver of a breach of covenant or condition for the purposes of sections 119 and 120 does not require a formal written document.[62] Conduct can be sufficient to establish waiver as explained below:

> When a breach of condition sufficiently serious to be a ground of forfeiture of the lease occurs, the lessor is put to his election whether or not to act upon it and bring about the forfeiture, or to continue to recognise the lease. If the landlord elects to do nothing, taking the latter course, the breach is said to have been waived. One important element of waiver is proof of knowledge of the breach causing forfeiture at the time when the acts consistent with continuing the lease are alleged to have occurred. Waiver implies the commission of some positive act, with knowledge of the breach, which unequivocally affirms the lessor's intention to treat the lease as continuing.[63]

Section 119(4) expressly provides that the section applies and extends to waivers effected after 28 December 1867, unless a contrary intention appears.[64] Similarly, a licence granted to a lessee under section 120(1) is limited in its application to the actual breach or permission given, unless otherwise expressed in the licence.

4.2. Is there a need for reform?

4.2.1. Are the sections superseded by modern commercial leasing practice?

Sections 119 and 120 will not apply to 'residential tenancy agreements' under the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld).[65] Accordingly, the provisions are directed at other lease

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

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

[62] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1050].

[63] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1050].

[64] The significance of the 1867 date is that The Distress Replevin and Ejectment Act (Qld) came into force on that date.

[65] *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) s27(1).

categories apart from residential tenancies. The terms of modern commercial leases usually address issues associated with waiver of covenants and licences to assign. However, where the issue is not expressly addressed in the lease, sections 119 and 120 of the PLA provide clarification in relation to the effect of waivers on future breaches of covenants or conditions which avoids any uncertainty (if any exists in the first place).

4.2.2. Uncertainty regarding the scope and purpose of section 120(3) of the PLA

Section 120(3) of the PLA appears to cover the following situation:

- Lessor A enters into a lease with lessee B, C, D and E. The lease contains a term which provides for re-entry if the lessee assigns or sublets without a licence.
- Lessor A grants a licence to lessee B and C to assign part of the property;
- Lessee D and E are not granted a licence and breach the covenant by assigning part of the property;
- Lessor A retains his or her right of entry in relation to the property assigned by Lessee D and E as the assignment was not the subject of a licence.

Essentially, under section 120(3), consent to, or a licence for, a breach which is provided to one or more lessees, does not operate to excuse breaches by any of the other lessees who have not been provided with consent or a 'licence'.[66] The application of the provision appears to be quite limited and it is not clear how often or even if, such a situation might now arise in practice. Further, if it does arise, it is likely that the terms of lease agreement would address it. Searches of case law databases have not identified any cases which deal with this section or its equivalent in other Australian jurisdictions. The purpose of the provision and its current utility is unclear.

4.2.3. Transparency of legal position if repealed

Both sections 119 and 120 (along with the earlier iterations of the provisions) were intended to overcome the effect of the decision in *Dumpor's Case* which was decided in 1603. It appears that despite concerns that the doctrine in that case was 'extraordinary' and unreasonable it was followed as law in subsequent cases[67] until the rule was eventually abrogated by statue.[68] If sections 119 and 120 of the PLA are repealed, the general position is that the rule in *Dumpor's Case* is not revived. However, repeal of the provisions potentially means that the legal position in relation to the abrogation of the rule in *Dumpor's Case* is not transparent. Individuals seeking to determine the position in relation to the rule, in the absence of lease terms dealing with the issue, would need to track back through legislation to identify the repealed provision and understand the effect of section 20 of the *Acts Interpretation Act 1954* (Qld). This adds cost, red tape and reduces transparency of the legal position which raises broader issues of access to justice.

[66] Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales 2012-2013* (LexisNexis, 2012) 212 [32640].
[67] See for example *Brummell v MacPherson* (1807) 14 Ves 173 referred to in Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (The LawBook Exchange Ltd, 2011) 201.
[68] The rule in *Dumpor's Case* was reversed initially in England in 1859 in relation to conditions (*Law of Property (Amendment) Act 1859)* and then in 1860 (*Law of Property (Amendment) Act* 1860) for covenants.

4.2.4. The law has evolved since *Dumpor's Case*

A separate issue relates to the extent to which the legal position has evolved since *Dumpor's Case*. For example, Knox CJ in the High Court decision of *Mulcahy v Hoyne*[69] indicated that a waiver of a covenant for the future, outside the legislation, would have to be in the form of a release or a variation of the contract supported by consideration. The comment was made in the context of one of the claims by the respondent in the proceedings that the lessor had consented to the respondent doing the acts which constituted a breach of covenant and thereby waived the benefit of the covenant. These comments by Knox J were referred to in the case of *JDM Investments Pty Ltd v Todbern Pty Ltd*[70] in the context of section 120 of the *Conveyancing Act 1919* (NSW). Hamilton J in that case, however, noted that each case 'must be determined according to its own facts.'[71] Court decisions relating to breaches of contract conditions tend to suggest that a contravention of a condition in one instance does not automatically operate to then waive any rights available in relation to future breaches.[72] These ordinary contract law principles will apply to leases.[73]

4.3. Other jurisdictions

4.3.1. Australia

Most of the other States and Territories have equivalent provisions to sections 119 and 120 of the PLA. A summary of the legislative arrangements in the other jurisdictions is set out below in Table 1. Although the provisions in the other jurisdictions are similar, there are some differences in the manner in which the sections are drafted. For example, both the Northern Territory and the Australian Capital Territory sections are drafted in plain language and in a concise form.

Table 1 – Waiver arrangements in other Australian States and Territories

Jurisdiction	Legislation	Section 119 equivalent?	Section 120 equivalent?
Vic	*Property Law Act 1958* (Vic)	Yes – s148	Yes – s143

[69] (1925) 36 CLR 41.
[70] *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349 at [43].Hamilton J noted that each case must be determined according to its own facts [44]. Further, that 'Acts to constitute a waiver must be clear.'
[71] *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349, [43] and [44]. See also *Tropical Traders Ltd v Goonan* (1963) 111 CLR 41, 52-53 where the acceptance of late payment by a seller under an instalment contract on 3 occasions where time was of the essence did not mean the seller had waived the requirement that time continued to be of the essence.
[72] See for example *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349, [43] and [44]. See also *Tropical Traders Ltd v Goonan* (1963) 111 CLR 41, 52-53. For a detailed discussion of the concept of 'waiver' and its development in Australia see Jeremy Stoljar, 'The Categories of Waiver' (2013) 87 *Australian Law Journal* 482.
[73] See *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17; *Shevill v Builders Licensing Board* (1982) 149 CLR 620; Peter Butt, *Land Law* (LawBook Co, 2006, 5th ed) [15187].

Jurisdiction	Legislation	Section 119 equivalent?	Section 120 equivalent?
NSW	*Conveyancing Act 1919* (NSW)	Yes – s120	Yes – ss123 & 124
ACT	*Civil Law (Property) Act 2006* (ACT) s423	Yes – s423	Yes – ss420 & 421
WA	*Property Law Act 1969* (WA)	Yes – s73	Yes – s79
NT	*Law of Property Act* (NT)	Yes – s132	Yes – s133
Tas	*Conveyancing and Law of Property Act 1884* (Tas)	-	Yes – s16
SA	*Landlord and Tenant Act 1936* (SA)	-	Yes – ss47 & 48

4.3.2. New Zealand

Section 273 of the *Property Law Act 2007* (NZ) has a similar effect to sections 119 and 120(1) of the PLA. Although the section refers to a lease, it is deemed to also cover a licence, with any necessary modifications by virtue of section 206 of that Act. The Explanatory Note to the Property Law Bill when discussing the proposed provision indicated that the provision 'carries over the substance of section 115 of the 1952 Act.'[74]

Section 273 of the *Property Law Act 2007* (NZ) (and section 206) provide:

273 Effect of waiver

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

(2) Subsection (1) applies unless the contrary intention appears.

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(3) Sections 214, 243 to 264, and 273 apply, with all necessary modifications, to a licence as if every reference in those sections –
(a) to a lease were a reference to a licence;
(b) to a lessee were a reference to a licensee; and
(c) to a lessor were a reference to a licensor.

(4) However, sections 214, 243 to 264, and 273 do not confer on a licensee any estate or interest in land.

207 Interpretation

In this Part, unless the context otherwise requires, -

……

Licence means a licence to occupy land in consideration of –
(a) rent; or
(b) a payment in the nature of rent; or
(c) a payment in kind of any form…..

4.4. Options

[74] Explanatory Note, *Property Law Bill* (NZ) 47. The Law Commission (NZ), *A New Property Law Act*, Report No 29 (1994) provided the same explanation for the inclusion of the proposed provision (then numbered section 219). The Commission also noted that 'It applies to a licence to occupy land by virtue of the extended definition of 'lease': at [675].

Further consideration should be given to the extent to which sections 119 and 120 raise any significant issues in practice. If the sections are retained, then the form of the sections may require amendment and simplification to assist with their interpretation. Additionally, the practical utility of section 120(3) is uncertain and the provision may need to be removed from section 120.

Option 1 – Retain sections 119 and 120 but modernise the language

This option requires the retention of sections 119 and 120 of the PLA. However, it also recognises that some modification to the sections may be required to simplify both the form and language of the provisions to improve the clarity of the sections.

Option 2 – Amend sections 119 and 120 to combine into a single provision and address section 120(3)

This option would simplify the waiver provisions by consolidating them into a single provision. Section 273 (and associated provisions) of the *Property Law Act 2007* (NZ) provides one possible model for this approach. Part of the changes could also include the removal of section 120(3) if the public submissions in relation to that provision support the preliminary view that the section does not serve any current purpose.

Questions

10. **Is there a need to retain section 119 of the PLA? Why or why not?**
11. **Is there a need to retain section 120? Why or why not?**
12. **Have you ever encountered a leasing situation which potentially came within the scope of section 120(3) of the PLA? If so, can you provide a summary of the situation in which it arose?**
13. **Is it the case that the matters covered in sections 119 and 120 would usually be included as an express term of a lease agreement?**
14. **If sections 119 and 120 are repealed, what do you think the practical result or consequence might be?**

5. Sections 121 – Provisions as to covenants not to assign etc. without licence or consent

5.1. Overview and purpose

Section 121 of the PLA provides:

121 Provisions as to covenants not to assign etc. without licence or consent

(1) In all leases whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of premises leased or any part of the premises, without licence or consent, such covenant, condition, or agreement shall –

(a) despite any express provision to the contrary, be deemed to be subject –

(i) to a proviso to the effect that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the licence or consent; and

(ii) if the lease is for more than 40 years and is made in consideration wholly or partially of the erection, or the substantial improvement, addition, or alteration of buildings – to a proviso to the effect that in the case of any assignment, underletting, charging, or parting with the possession (whether by the holders of the lease or any under-lessee whether immediate or not) effected more than 7 years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within 6 months after the transaction is effected; and

(b) unless the clause contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of the licence or consent, but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent.

(2) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against the making of improvements without licence or consent, such covenant, condition, or agreement shall be deemed, despite any express provision to the contrary, to be subject to the proviso that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right to require as a condition of the licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor, and of any legal or other expenses properly incurred in connection with the licence or consent nor in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of the licence or consent, where such a requirement would be reasonable, an undertaking on the part of the lessee to reinstate the premises in the condition in which they were before the improvement was executed.

(3) In all leases, whether made before or after the commencement of this act, containing a covenant, condition, or agreement against the alteration of the user of the leased premises without licence or consent such covenant, condition, or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, despite any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of the licence or consent, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any damage to or diminution in the

value of the premises or any neighbouring premises belonging to the lessor and of any legal or other expenses incurred in connection with the licence or consent.

(4) Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the lessor shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

At common law, a lessee has the right to 'dispose of property, make physical alterations to it, or change its use, unless there is a covenant express or implied to the contrary.'[75] The lessor is equally entitled to include 'disposition, alteration and user' covenants in the relevant lease agreement.[76] A lessor has a 'vested interest in ensuring that persons he or she might consider unreliable or undesirable do not take possession of the premises.'[77] If an absolute covenant was included in the lease it could be enforced absolutely and if the covenant was qualified, the lessor could still refuse consent, reasonably or unreasonably. Further, if the lessor provided consent under a qualified covenant, he or she was entitled to demand payment of some kind for providing the relevant consent.[78] This potentially placed a lessee at a disadvantage.

What is described as the 'first statutory intervention' to partly address this imbalance occurred in England in 1892.[79] The 1892 provision was in turn incorporated into section 144 of the *Law of Property Act 1925* (UK). That provision is replicated in section 121(b) of the PLA and prohibits the imposition of a fine for a consent or licence provided by the lessor to an assignment, unless there is an express provision to the contrary. The second 'intervention' occurred in 1927 with the introduction of section 19 in the *Landlord and Tenant Act 1927* (UK). Section 19 is replicated in sections 121(1)(a), 121(2), (3) and (4) of the PLA. The QLRC explained the operation of the proposed clause 121 in the following way:

> Apart from express provision forbidding it, a tenant may assign or underlet without the landlord's consent. Leases, however, commonly contain a prohibition upon such assignment or underletting without consent, which may be absolute, or qualified by the requirement that such consent shall not be unreasonably withheld.
>
> Clause 121(1)(a) (which in substance follows s.19 of the English Landlord and Tenant Act 1927 and s. 133B of the New South Wales Conveyancing Act) will make it impossible for the landlord to withhold his consent unreasonably, the onus of proving unreasonableness being on the tenant … .
>
> Clause 121(b) (which is based on s.132 of the New South Wales Act and s.144 of the English Law of Property Act) will prevent the landlord from making payment of a premium a condition of granting his consent unless the lease expressly provides; but in all cases the landlord may require payment of his reasonable legal and other expenses incurred in connection with the licence or consent.

[75] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.2].
[76] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.3].
[77] A J Bradbrook, 'The application of the Principle of Damages to Landlord-Tenant Law (1977) *Sydney Law Review* 15, 22.
[78] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.3].
[79] *Conveyancing Act 1892* (UK) s3; Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.8].

> (Sub-clause (2) extends the principle of the above legislation to covenants etc. against making of improvements without consent, and sub-cl (3) does the same in respect of covenants against user or alteration of the premises without consent, where no structural alteration is involved.[80]

An earlier QLRC Working Paper noted that the proposed section was 'designed to improve the position of tenants.'[81]

An overview of the operation of the various parts of section 121 of the PLA is set out below in Parts 5.1.1, 5.1.2 and 5.1.3. A discussion of whether reform of section 121 is needed, the issues raised by the section and associated questions is set out in Part 5.2.

5.1.1. Section 121(1) of the PLA – leases containing a covenant, condition or agreement against assigning, underletting, charging or parting with possession of premises leased

Section 121(1) of the PLA applies to all leases that contain a covenant, condition or agreement against assigning, underletting, charging or parting with the possession of premises leased or any part of the premises without licence or consent. It applies irrespective of whether the lease was made prior to or after the commencement of the PLA. The provision makes the covenant or condition against assignment without consent or licence subject to a number of qualifications which are set out in subsections 121(1)(a) and (b) and include:

- Not withholding consent unreasonably; and
- Consent not being required where the lease is more than 40 years old and is made in consideration of the erection of buildings or the substantial improvement, addition or alteration of buildings;
- Not requiring the payment of a fine for the lease or consent.

Where there is a qualified covenant requiring consent prior to assignment, the lessee is required to seek consent from the lessor. Failure to do so is a breach of covenant and the lease may be forfeited.[82]

The provisos contained in section 121(1) are discussed in more detail below.

Licence or consent not to be unreasonably withheld (ss 121(1)(a)(i))

Section 121(1)(a)(i) of the PLA has the effect that the relevant covenant or condition which prohibits assignment of the lease without a licence or consent is subject to the proviso that the licence or consent must not be unreasonably withheld. The subsection applies despite any express provision to the contrary.

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[80] Queensland Law Reform Commission, A *Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statues*, Report No. 16 (1973) 85.
[81] Queensland Law Reform Commission, *Report of the Law Reform Commission on the Law Relating to Relief from Forfeiture of Leases and to Relief from Forfeiture of an Option to Renew and Certain Aspects of the Law Relating to Landlord and Tenant*, Report No. 1 (1970) 17.
[82] *Property Law Act 1974* (Qld) ss121(1) and 121(1)(a).

There is significant case law which considers the issue of whether consent has been unreasonably withheld in both Australia and the United Kingdom, with varying approaches adopted when considering this issue.[83] The Queensland Court of Appeal has noted that:

> There is some difference of judicial opinion as to the matters which a lessor is entitled to consider for the purpose of determining whether to refuse consent to an assignment and to which consequently the court may have regard in determining whether consent has been unreasonably withheld.[84]

Other commentators have been more explicit and have described the legal position in relation to the unreasonable withholding of consent in the following way:

> Here the law has dug itself into something of a hole, upon the seemingly simple concept of 'reasonableness' encrusting a number of complex and inelastic principles.[85]

Ultimately, whether consent has been unreasonably withheld is a question of fact and will depend on all the circumstances of the case.[86] The lessee bears the onus of establishing that consent was unreasonably withheld.[87] There are some general principles which can be extracted from the cases including:

- A lessor is entitled to take into account the effect of the proposed assignment on the lessor's ability to let 'satisfactorily the different parts of their property';[88]
- A lessor may withhold consent if a reasonable person in the lessor's position might have regarded the proposed transaction as damaging to the lessor's property interests even though another person may take a different view, provided the refusal was not designed to achieve some collateral purpose wholly inconsistent with the terms of the lease;[89] and
- It is not reasonable for a lessor to use a request for consent to require from the lessee or proposed assignee benefits beyond which are conferred under the lease.[90]

The lessor, under subsection 121(1)(a)(i), is not precluded from requiring the payment of a reasonable sum of money for any legal or other expenses incurred in connection with the licence and consent.

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[83] For further commentary on the various approaches see Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [15125]-[15131].
[84] *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 130 per Kelly S.P.J.
[85] Peter Butt 'When is a landlord acting reasonably in refusing consent' (2001) 76 *Australian Law Journal* 7, 7.
[86] *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 129 referring to *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch. 513, 521.
[87] *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 129 referring to *Pimms Ltd v Tallow Chandlers Company* [1964] 2 Q.B 547, 564.
[88] See *Pimms Ltd v Tallow Chandlers Company* [1964] 2 QB 547, 570 followed in *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 132; *Boss v Hamilton Island Enterprises Limited* [2009] 2 Qd R 115, 155 per Fraser JA.
[89] *Pimms Ltd v Tallow Chandlers Company* [1964] 2 QB 547, 570 followed in *J A McBeath Nominees Pty Ltd v Jenkins Development Corp Pty Ltd* [1992] 2 Qd R 121, 132.
[90] See for example *Hamilton Island Enterprises Ltd v Boss* [2010] 2 Qd R 115, 155-156 where Hamilton Island Enterprises required, as a condition of consent to an assignment by a sublessee, that the assignee agree to be bound by a code which regulated activities on the island (traffic control, development and entry of persons onto the island etc). Adherence to the code was not a condition of the sublease. For further discussion of this case see Peter Butt, 'Unreasonably Withholding Consent to Assignment of Lease' (2009) 83 *Australian Law Journal* 792, 796 and W D Duncan, 'Court Strikes Down Super-added Condition Placed upon Consent to Lease Assignment' (2009) *Australian Property Law Bulletin* 83 in relation to the decision at first instance which was upheld on appeal.

Most Queensland commercial leases contain a provision permitting assignment, subletting or parting with possession with consent and express the qualification that such consent is not to be unreasonably withheld. In these instances, the lease normally follows the section and the usual tests regarding reasonableness apply.

Where consent to a request for an assignment is refused unreasonably, the lessee has the option to:

- Proceed with the relevant assignment (or the 'thing for which consent has been sought'); or
- Seek a declaration from the court that consent has been unreasonably withheld.[91]

Lease for a period longer than 40 years and made in consideration of improvement of buildings etc (ss 121(1)(a)(ii))

A covenant against assignment of long 'building leases' is treated differently to other assignments in section 121 of the PLA. The covenant or condition is subject to an additional proviso that any assignment of the lease which occurs more than 7 years before the end of the term does not require consent or licence if notice in writing is given to the lessor within 6 months after the assignment occurs. This qualification will only apply in the case of a lease that:

- extends longer than 40 years; and
- is made in consideration wholly or partially of the:
    - erection of buildings; or
    - substantial improvement, addition or alteration of buildings.

The qualification applies despite any express provision to the contrary. The practical effect of the provision is that a lessor has no opportunity to withhold consent in relation to leases falling within the scope of the section. The provision does not appear to have been the subject of any judicial consideration in Queensland (or New South Wales) and its application is limited to a narrow category of leases.

No fine payable for the licence or consent (ss 121(1)(b))

The covenant or condition is also subject to the qualification that a lessor cannot impose a fine or sum of money in the nature of a fine for the licence or consent to assign.[92] This means that the lessor must either refuse consent (reasonably) 'or grant it gratuitously'.[93] This proviso is subject to an express provision to the contrary in the lease. This means that the lessor and lessee may agree otherwise in relation to the payment of a fine. Commentary indicates that a refusal by the 'lessor to give consent except upon the payment of a fine, relieves the lessee from the necessity of obtaining consent and similarly allows him or her to ignore the restriction upon assignment in the lease.'[94] However, the

[91] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [8.53] and Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing & Real Property Legislation New South Wales* (Butterworths, 2012-2013 ed, 2012) [32750.5].
[92] The term 'fine' is defined in the PLA to include a 'premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium or foregift: *Property Law Act 1974* (Qld), Sch 6.
[93] Duncan & Vann, *Property Law and Practice in Queensland*, WD Duncan & a Wallace (eds) (looseleaf) Thomson Reuters [8.1140].
[94] Duncan & Vann, *Property Law and Practice in Queensland*, WD Duncan & a Wallace (eds) (looseleaf) Thomson Reuters [8.1140].

lessor retains the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent that is given.[95]

Any request for payment beyond a reasonable sum may potentially constitute a penalty since the High Court decision in *Andrews v ANZ Banking Group Ltd*,[96] regardless of whether it is contained in a lease clause. However, the issue of whether a request for a reasonable sum of money is a penalty is a matter which would be dealt with separately to the operation of section 121 of the PLA.

5.1.2. Section 121(2) – Unreasonably withholding consent to improvement

Section 121(2) applies to all leases containing a covenant against the making of improvements without licence or consent. The relevant covenant is deemed to be subject to the proviso that the licence or consent is not to be unreasonably withheld, despite any express provision to the contrary. However, the lessor is not precluded under the section from requiring as a condition of the licence or consent:

- the payment of a reasonable sum for any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor; and
- the payment of any legal or other expenses properly incurred in connection with the licence or consent; and
- if reasonable, an undertaking that the lessee reinstate the premises in the condition in which it was before the improvement occurred, where the improvement does not add to the letting value of the holding.

The provision does not imply a right to make improvements and where the lease does not provide a right to make 'improvement' the section has no application. The word 'improvement' is not defined in the PLA. Generally the word has been interpreted to mean 'additions or alterations … which are not mere repairs or renewals'.[97] Further, an 'improvement' is a physical, rather than an economic concept and it may not necessarily be beneficial to the lessor or increase the value of the property.[98]

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[95] Under section 48 of the *Retail Shop Leases Act 1994* (Qld), a retail shop lessee is not liable to pay the lessor's legal expenses in relation to preparation, renewal or extending the lease but section 48(2) of the Act excludes from that prohibition survey fees on lease plans associated with the registration of the lease, the costs of the mortgagee's consent, lease duty on the lease and registration fees of the lease.

[96] *Andrews v Australia New Zealand Banking Group Ltd* (2012) 247 CLR 205. For a full discussion about this High Court decision and its impact generally on the doctrine of penalties see Sirko Harder, 'The Relevance of Breach to the Applicability of the Rule Against Penalties' (2013) 30 *Journal of Contract Law* 52, Bruce Taylor, 'The High Court's expansion of the doctrine of penalties in Andrews v ANZ Banking Group' (2013) *Australian Banking & Finance Law Bulletin* 106, Sandra Steel, Marcel Marquardt and Kayley Rozos, 'Revisiting the Impact of the Penalty Doctrine to Construction Contracts After Andrews v ANZ' (2014)26 *Australian Construction Law Bulletin* 127 and J W Carter, Wayne Courtney, Elisabeth Peden, Andrew Stewart and G J Tolhurst, 'Contractual Penalties: Resurrecting the Equitable Jurisdiction' (2013) 30 *Journal of Contract Law* 99.

[97] *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975, 980 per Lord Hoffman. This case was concerned with section 9(1A)(d) of the *Leasehold Reform Act 1967* (UK) which allowed for the price of a premises on the open market to be diminished by the extent to which the value of the house and premises had been increased by any improvement carried out by the tenant or his or her predecessors in title at their own expense.

[98] *Shalson v Keepers and Governors of the Free Grammar School of John Lyon* [2003] 3 All ER 975, 980 per Lord Hoffman and 984, per Lord Millett.

5.1.3. Section 121(3) – Covenant against alteration of user without consent

Section 121(3) operates in the following way:

- It applies only to leases which contain a covenant, condition or agreement against the alteration of the user of the leased premises without licence or consent;
- It applies despite any express provision to the contrary;
- The covenant, condition or agreement is deemed to be subject to the qualification that no fine or sum of money in the nature of a fine (whether by increase in rent or otherwise), is payable for the licence or consent;
- The lessor still has a right to require the payment of a reasonable sum in respect of any damage to, or diminution in the value of, the premises and any legal or other expenses incurred in connection with the licence or consent; and
- The section will not apply if the 'alteration' involves any structural alteration of the premises.

A covenant which requires premises to be used for a particular purpose is a covenant against changing that use, 'since a covenant not to use premises except in a certain way is a covenant not to use them in any other way.'[99] If the covenant is an absolute prohibition on changing use then the lessor is entitled to enforce the provision and is not required to take into account considerations of reasonableness.[100] If the covenant prohibits alteration of user except with prior consent, then the lessor under section 121(3) cannot demand money (in the form of a fine or increased rent) in return for consent, unless the alteration in user involves a structural alteration.'[101] Thomas J in *Re Archos*[102] when discussing section 121(3) of the PLA noted:

> It is also to be noted that whilst s. 121(1) of the *Property Law Act* makes certain provisions in relation to the unreasonable withholding of consents with respect to assignments and underleases, there is a significantly limited provision with respect to covenants and conditions concerning the user of premises. This is contained in s. 121(3) which relevantly provides that in all leases containing a covenant against alteration of the user of the leased premises without consent such covenant shall be subject to a proviso "that no fine or sum of money…shall be payable for or in respect of the licence or consent". Thus the legislature has not seen fit to legislate against the unreasonable withholding of consents to changes of use of premises where the parties have agreed to a limitation of the user.[103]

Where a court determines the reasonableness of the sum requested by the lessor in respect of any damage to or diminution in the value of the premises or neighbouring premises belonging to the lessor, the lessor is bound to grant the licence or consent on the payment of the relevant sum.[104]

5.2. Is there a need for reform?

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[99] *Barina Properties Pty Ltd v Bernard Hastie (Australia) Pty Ltd* [1979] 1 NSWLR 480 at 492. See also Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [1578].
[100] *Barina Properties Pty Ltd v Bernard Hastie (Australia) Pty Ltd* [1979] 1 NSWLR 480 at 487 and *Re Archos* [1994] 1 Qd R 223, 224. See also Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [1578].
[101] Peter Butt, *Land Law* (Lawbook Co, 5th ed, 2006) [1578].
[102] *Re Archos* [1994] 1 Qd R 223, 224.
[103] *Re Archos* [1994] 1 Qd R 223, 224.
[104] *Property Law Act 1974* (Qld) s121(4).

There are some aspects of section 121 of the PLA which will require further consideration and feedback during this review to assess whether reform is necessary. These issues are discussed in detail below.

5.2.1. Avoidance of section 121(1)(a)(i) in practice

As indicated in Part 5.1.1 above, section 121(1)(a)(i) applies despite any express provisions to the contrary whereby the parties contract out of the provision. However, alternative methods have been used to avoid the application of the section. These include:

- Drafting the covenant as an absolute prohibition against assigning;[105]
- Including as a term of the lease a pre-condition that the lessee must first offer to surrender the lease to the lessor before the lessee's right of assignment with consent arises;[106]
- Ensuring the lease includes words to the effect that 'the lessee may assign the lease with consent but consent will not be withheld in the case of a responsible and respectable person.'[107] The issue then becomes one of whether the proposed assignee is a responsible or respectable person, rather than whether the consent is unreasonably withheld; and
- Ensuring the lease term does not refer to the need for consent but does include a list of conditions or criteria which the assignee must satisfy such as:
    - The proposed assignee is a respectable person;
    - All rent is paid up and there are no existing breaches of covenants;
    - If the proposed assignee is a company, the assignee obtains satisfactory directors' guarantees of the lease; and
    - The assignee pays reasonable fees of the lessor in connection with the assignment.[108]

The question in these cases is not whether consent has been unreasonably withheld but whether the conditions have been met and section 121(1)(a)(i) has no application – that is, the issue of consent does not arise at all.[109] This approach was discussed in the case of *Tamsco Ltd v Franklins Ltd*[110] where Young CJ stated:

[105] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [14.790].
[106] See *Creer v P&O Lines of Australia Ltd* (1971) 125 CLR 84 (which considered s133B(1) of the *Conveyancing Act 1919* (NSW)). The decision was followed in *Bocardo SA v S&M Hotels Ltd* [1980] 1 WLR 17, 23 which considered s19(1) of the *Landlord and Tenant Act 1927* (UK), the equivalent of the NSW provision. Megaw LJ in *Bocardo* considered that s19 and discusses in some detail the purpose of s19(1) at 21-23. He notes that the 'effect of s19(1) of the Act of 1927, on its true analysis, was merely to make statutory an implied term which must already have been implied, if the express words were to have any sensible purpose'.
[107] See *Moat v Martin* [1950] 1 KB 175, 178-180.
[108] *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349 – see [30] for a discussion of the legal background in relation to assignment and section 133B(1) of the *Conveyancing Act 1919* (NSW).
[109] *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349. See also Peter Butt, 'Landlord's Refusal to Consent to Assignment' (2001) 75 *Australian Law Journal* 76, 76.
[110] *Tamsco Ltd v Franklins Ltd* (2001) 10 BPR 19,077.

> …that if one wishes to set down a series of conditions that the tenant must fulfil before the lease can be assigned, one must not make the assignment subject to consent, but rather draft the lease to remove any reference to consent and set out the preconditions.[111]

Both Queensland and New South Wales legislation do not allow for the parties to exclude the operation of the equivalent section 121(1)(a)(i) (and the New South Wales equivalent). However, the legislation in Victoria and Western Australia differs and enables the lessor to exclude the operation of the equivalent provision by the 'inclusion of an appropriately worded covenant in the lease.'[112] The practical outcome of this approach is that a lessor would be entitled to withhold consent for any reason, irrespective of the reasonableness.

The position in the United Kingdom is more explicit in relation to withholding consent in the case of certain leases. Section 19(1) of the *Landlord and Tenant Act 1927* (UK) was amended in 1995.[113] That amendment applies only to 'qualifying leases'[114] and only covers 'assignment'. It allows a lessor and lessee to enter into an agreement which sets out the circumstances in which consent to assign may be withheld and any conditions subject to which consent may be granted.[115] The relevant 'circumstances' or 'conditions' must not be framed by reference to 'any matter falling to be determined by the landlord or by any other purposes of the agreement', except in the limited circumstances set out in section 19(1C) of the *Landlord and Tenant Act 1927* (UK).[116] Commentary on this amendment indicates that as a consequence of this amendment:

> where an agreement is made which satisfies these criteria, the landlord may withhold consent to assignment where the circumstances specified in the agreement exist, or grant consent only on the

[111] *Tamsco Ltd v Franklins Ltd* (2001) 10 BPR 19,077 at [47]. See also Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [14.790]. For an illustration of an attempt to avoid the NSW equivalent provision (*Conveyancing Act 1919* (NSW), s133B see *JB Northbridge Pty Ltd v Winners Circle Group Pty Ltd* [2014] NSWSC 950. In that decision Rein J was unable to 'accept that the draftsman of the lease was seeking to avoid the impact of s133B', and did not accept that the landlord's consent was not required for an assignment to a new lessee. He further noted that clauses could be drafted to exclude a landlord's need for consent referring to authorities including *JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349, *Tamsco Ltd v Franklins Ltd* (2001) 10 BPR 19,077 and *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513. See also Dr Stephen Pallavicini and Marie Boustani, 'JB Northbridge Pty Ltd v Winners Circle Group Pty Ltd, (2014) *Australian Property Law Bulletin* 137 and commentary on the case in Duncan, WD, Sharon Christensen, Amy Hoban, Dr Stephen Pallavicini, Jamie Bedelis (eds), *Commercial and Retail Leases in Australia* (online looseleaf) (Thomson Reuters) [90.500]

[112] A J Bradbrook, 'The Application of the Principle of Mitigation of Damages to Landlord-Tenant Law' (1977) *Sydney Law Review* 15, 23.

[113] This amendment occurred as a result of section 22 of the *Landlord and Tenant (Covenants) Act 1995* (UK).

[114] These cover new tenancies entered after the 1995 Act came into force and do not cover residential tenancies – that is, it applies to 'non-agricultural business leases' see Martin Davey, 'Privity of Contract and Leases – Reform at Last', (1996) 59 *Modern Law Review* 78, 91. Davey indicates that 'Commercial building lease assignments which by law (s19(1)(b) of the 1927 Act) did not require the landlord's consent except in the last seven years of the term are now brought within the new modified regime.' At [91]

[115] *Landlord and Tenant Act 1927* (UK) s19(1A).

[116] These are where the 'other' person's power to determine that matter is required to be exercised reasonably or the lessee is given an unrestricted right to have any such determination reviewed by an independent person: *Landlord and Tenant Act 1927* (UK) s19(1C)(a) and (b).

specified conditions, without fear of a legal challenge by the tenant on the grounds that the landlord is acting unreasonably.[117]

Further discussion of the position in other jurisdictions is set out in Part 5.3 below.

Questions

15. **Do you think section 121(1)(a)(i) should be repealed and the relevant proviso regarding the payment of fines and unreasonably withholding consent be dealt with in the relevant lease between the parties?**

16. **If the section is retained, do you think consideration should be given to adopting an approach similar to Victorian or Western Australian legislation which would exclude the application of section 121(1)(a)(i) if the lease contains an express provision to the contrary?**

17. **Do you think it is appropriate to allow the parties to contract out of section 121(1)(a)(i)?**

18. **Do you think excluding the application of the section in this way would then result in standard form clause being included in leases expressly excluding the operation of the section, effectively making the section obsolete in practice?**

19. **Do you think the parties should have the opportunity to negotiate the circumstances in which consent to assign (only) may be withheld and any conditions subject to which consent may be granted? If so, is the approach adopted in the *Landlord and Tenant Act 1927* (UK), sections 19(1A) and (1C) a possible model?**

5.2.2. Utility of section 121(1)(a)(ii) – Lease for period longer than 40 years and made in consideration of improvement of buildings etc

This section effectively only applies to long 'building leases' where the lease covenants are, amongst others, to erect a new building on vacant land or demolish and rebuild a new building on improved land. A form of this provision appears to have originally been enacted in section 19(1) of the *Landlord and Tenant Act 1927* (UK) but the rationale for its inclusion in that jurisdiction and its subsequent adoption in Queensland is difficult to ascertain.[118] The scope of the section is limited and arguably it has no current practical application.

Further, a lease of 40 years or more would invariably contain a provision for assignment which required the lessor's consent. It is difficult to see the policy reason behind the section permitting assignment subletting or parting with possession without consent in these circumstances and then only requiring the lessor to be notified 6 months later. Where the lease requires consent to an

[117] Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: the Landlord and Tenant (Covenants) Act 1995', (1996) 55 *Cambridge Law Journal* 313, 349.
[118] Mark Wonnacott, *The History of the Law of Landlord and Tenant in England and Wales* (LawBook Exchange, 2011) 202. See pages 197-203 for a discussion of the historical position in relation to the alienation of a lease.

assignment by the lessor, regardless of the length or nature of the lease, the lessor should be entitled to be notified at the time that the request is sought and not 6 months after the assignment occurs.

The United Kingdom Law Commission in 1985, when reviewing the equivalent provision in the *Landlord and Tenant Act 1927* (UK),[119] recommended that the section was not sufficiently useful in its present form to merit preservation and that it should 'cease to have effect.'[120] Amendments made to the *Landlord and Tenant Act 1927* (UK) in 1995 has the effect that this provision will not apply to 'qualifying' leases in relation to any assignment of the lease.[121] These are essentially new tenancies entered after 1995 other than a residential tenancy.[122] The effect of the amendment to section 19 on leases longer than 40 years has been explained as follows:

> This….has removed the practical significance of this provision for most leases granted after 1995. This is because qualified covenants against assignment are generally found in business leases, which will be qualifying leases.'[123]
>
> Commercial building lease assignments which by law (s19(1)(b) of the 1927 Act) did not require the landlord's consent except in the last seven years of the term are now brought within the new modified regime.[124]

Questions

20. **Have you applied section 121(1)(a)(ii) in practice? If so, what were the circumstances giving rise to the application of the section?**
21. **Are there any policy reasons why section 121(1)(a)(ii) should be retained?**
22. **Do you think repealing section 121(1)(a)(ii) will create any problems in practice?**

5.2.3. Clarifying the meaning of the term 'improvement' in section 121(2) and the relevance of 'reinstatement' of premises

Subsection 121(2) is directed at ensuring that a request for consent or a licence to undertake an improvement is not unreasonably withheld by a lessor. However, there has previously been some issues regarding what the term 'improvement' actually means and whether it encompasses something which improved the value of the premises or whether an alteration was sufficient. As indicated in Part

[119] *Landlord and Tenant Act 1927* (UK) ss19(1)(b)
[120] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [7.78]. For further discussion on this provision see [7.72] – [7.78]. The initial Working Paper on this issue recommended that that the provision be extended to apply 'not merely to long building tenancies, but to all long tenancies (and judgment was reserved as to what the minimum length should be); and so as to cover absolute covenants as well as qualified ones.' See Law Commission (UK), *Provisional Proposals Relating to Covenants Restricting Dispositions, Parting with Possession, Change of User and Alterations*, Working Paper No. 25 (1970) [7.75]. This recommendation has not been implemented.
[121] *Landlord and Tenant Act 1927* (UK) s19(1D).
[122] *Landlord and Tenant Act 1927* (UK) s19(1E).
[123] Charles Harpum, Stuart Bridge and Martin Dixon (Thomson Reuters, 8th ed, 2012) *The Law of Real Property* [19-106]
[124] Martin Davey, 'Privity of Contract and Leases – Reform at Last' (1996) 59 *Modern Law Review* 79, 91.

5.1.2 above, the term 'improvement' has been interpreted by current case law to be some physical change (alteration) to the premises which is not necessarily beneficial to the lessor and does not necessarily increase the value of the property.[125] The physical change can cover alterations or additions which are not merely repairs or renewals.

There may be some benefit in considering an amendment to the section to better reflect current case law on the meaning of 'improvement'. This would assist with clarifying the scope of the section.

The effect of section 121(2) does not preclude the lessor requiring as a condition of the licence or consent (where reasonable) an undertaking on the part of the lessee to reinstate the premises in the condition they were in before the improvement. It may be timely for the language in this section to be altered to reflect current practices. For example, in the case of leases involving office space,[126] modern building techniques have evolved so that fit-outs, in some cases, can be easily erected and removed.[127] A direct obligation to reinstate is unusual in a modern commercial lease setting.[128]

Questions

23. **If section 121(2) of the PLA is retained, should the word 'improvement' be replaced by the term 'physical alteration' or 'alteration' to assist with the interpretation of the provision and reflect current case law on its meaning?**

24. **Should the issue of 'reinstatement' be removed from section 121(2) and simply left as a matter for the parties to include in the terms of the relevant lease?**

25. **Alternatively, should the language of section 121(2) relating to 'reinstatement' be amended to better reflect modern building and leasing practices, particularly in relation to fitouts?**

26. **Should a lessor be entitled to unreasonably withhold consent in relation to a request to make an improvement?**

5.2.4. Utility and interpretation of s121(3) ('alteration of user')

One of the key objectives underpinning section 121(3) of the PLA is to imply a proviso against imposing a fine in circumstances where a lessee requested a change in the use of the premises. One concern relates to the potential for a lessor to circumvent the effect of the section in relation to the imposition of a fine. Commentary on the section succinctly summarises this issue as follows:

[125] *Shalson v Keepers and Governors of the Free Grammar School* [2003] 3 All ER 975. *Skiwing Pty Ltd v Trust Company of Australia* [2006] NSWCA 276.
[126] Retail shop leases are dealt with under *Retail Shop Leases Act 1994* (Qld).
[127] Lessors may commonly pay for fit out as an incentive in which case the property in the fit out remains with the lessor. Where the lessee undertakes the fit out of the premises, in most instances, it can be removed upon the termination of the lease.
[128] The lease term is often drafted so as to require the lessee to 'yield up the premises in good and substantial repair and condition'.

> ...there is nothing to prevent the landlord from withholding his consent altogether (however unreasonably), the tenant may be forced, if he is to obtain his change of user, to accept a new lease, and this lease, though it permits the new user, may be granted only on payment of a premium or at a rent which is higher, or on more onerous terms. Even in those cases in which the sub-section seems effectively to prevent the taking of a fine, therefore, the landlord may nonetheless obtain one in this roundabout way.[129]

A second possible issue with section 121(3) relates to the reference to 'structural alterations' which are excluded from the proviso set out in the section.[130] The Law Commission (UK) noted in relation to the equivalent United Kingdom provision, that:

> The provision against fines made in section 19(3) of the 1927 Act does not apply where the change of user involves structural alterations. This seems to us a puzzling feature of the sub-section, because the making of the structural alterations themselves would not be governed by a user covenant, and if they were reasonable they could be carried out with no fine at all by virtue of sub-section (2).[131]

Where an alteration of user may possibly require structural alteration to make the premises suitable for the new use it is not clear how sections 121(2) (relating to 'improvements') and section 121(3) will interact.

A third potential issue relates to the rationale for the different treatment of covenants against alteration of user and covenants prohibiting improvements without consent, with the latter category requiring the relevant consent not to be unreasonably withheld. One reason for the difference may be that an alteration of user has a broader impact on the premises and lease and, arguably, a lessor should be able to retain control over the premises and determine whether or not he or she will consent to such a change irrespective of the reason for refusal. However, the rationale is not completely clear.

Questions

27. **Do you see any issues with the way in which section 121(3) operates? If so, what are these issues?**
28. **What is a 'structural alteration' referred to in section 121(3)?**
29. **Why are 'structural alterations' referred to in section 121(3) but excluded from the scope of the proviso?**
30. **Is a 'structural alteration' an 'improvement' under section 121(2) of the PLA?**
31. **How do sections 121(2) and 121(3) interact in practice?**
32. **Can sections 121(2) and (3) be combined in some way to simplify the sections? If so, in what form?**

[129] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [3.26] and [4.8].

[130] A separate issue may arise in relation to whether the imposition of such a premium in the case of a structural alteration is a penalty for the purposes of the expanded category of penalties set out in *Andrews v Australia New Zealand Banking Group Ltd* (2012) 247 CLR 205.

[131] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [6.15] -[6.16].

33. If section 121(3) is retained and not combined with section 121(2), what form should it take? For example:

(a) Should a proviso be included that consent should not be unreasonably withheld?;
(b) Should the section cover any alteration of user?;
(c) Should a lessor be entitled to require the payment of any reasonable compensation as a condition of consent?

34. If section 121(3) remains, should the parties be able to contract out of section 121(3)?

5.2.5. Changes in commercial leasing landscape since the enactment of the original provisions upon which sections 121(2) and (3) of the PLA are based

As indicated in Part 5.1 above, section 121 of the PLA is based on legislation in the United Kingdom which was enacted in the 1920s. The leasing landscape since that time (and since the 1970s in Queensland) has altered. Some of these changes include:

- Leases were historically longer in duration than current leases. This meant that a need to reconfigure the premises or alter its use was more likely to arise during the term of a long lease. Leases now tend to be shorter so that if a lessee wants to alter use or reconfigure the premises a new lease is often entered into;
- Fit-outs are now often included as a lessor incentive in the lease agreement or the issue is dealt with in the lease. The parties agree on the payment, construction and post lease responsibility for removal. Accordingly, there is rarely a requirement that the lessee reinstate, at least in relation to these fit-outs;
- As discussed in Part 5.2.3 above, changes in building practices mean that fit-outs can often easily be erected and dismantled in a short period of time; and
- Lessees are now more likely not to request an alteration of user but will move and negotiate fit-out incentives as part of a new lease agreement with a lessor.

These changes in leasing practices do raise the question of the utility of both sections 121(2) and 121(3) in their current form. In the case of section 121(2) this may mean that the section should be redrafted to simply preserve the proviso that a lessor should not 'unreasonably' withhold consent but that the remaining part of the section may be unnecessary and could be dealt with as part of the lease agreement. In the case of section 121(3), further consideration should be given to whether the proviso in relation to alteration of user that no fine is payable in respect of a consent or licence for the alteration (and the remaining part of the section) should be removed completely and dealt with as part of usual lease terms.

Questions

35. **Do you consider that sections 121(2) and (3) have any current utility?**

36. **Is there a need for section 121(2) of the PLA at all? Should the parties be able to negotiate these issues as part of a standard lease?**

37. **Should section 121(3) be removed completely and the parties address the issue of alteration of user in the terms of the relevant lease agreement?**

5.2.6. Other issues – written reasons for refusal and lessee access to compensation

Currently under section 121(1) of the PLA, there is no obligation on the lessor to provide written reasons for a refusal to provide consent to a request for assignment. From the lessee's perspective, this potentially creates difficulties in making an assessment as to whether or not the lessor's grounds for withholding consent are reasonable (or unreasonable). This may impede the lessee's ability to simply assign on the basis that the refusal was unreasonably withheld or when considering whether to seek a declaration from the Court in relation to a refusal.[132]

Sections 121(2) and (3) provide for the lessor to require payment of a reasonable sum where an improvement or change of use would cause 'damage to or diminution in the value of the premises or any neighbouring premises' belonging to the landlord. However, section 121 does not provide for any type of compensation to the lessee for loss arising out of factors such as unreasonable withholding of consent, or delay in providing a decision in response to a request for assignment. In New Zealand, section 228 of the *Property Law Act 2007* (NZ) enables a lessee (where he or she suffers loss) to recover from the lessor any payment made as a condition of the lessor giving consent and damages for any loss suffered because of the lessor unreasonably withholding consent and delay in either giving notice of the consent or the refusal.[133]

The Law Commission (UK) in 1985 recommended that a lessor should be liable in damages where consent is unreasonably withheld or a decision is unreasonably withheld.[134] The *Landlord and Tenant Act 1988* (UK) introduced some of these recommendations in relation to applications for consent or approval on or after 28 September 1988.[135] Under the Act, a lessor is obliged to provide or refuse consent within a reasonable time of the lessee making written application. Further, where there is refusal or consent subject to conditions, the lessor is required to serve written notice on the tenant

[132] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [8.12] - [8.16].
[133] *Property Law Act 2007* (NZ) s228 and s226(2).
[134] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [8.65].
[135] This was the date the *Landlord and Tenant Act 1988* (UK) came into force.

within a reasonable time period of the reasons for refusal or the conditions subject to which consent would be granted.[136] A lessee is entitled to claim damages for a breach of these obligations.[137]

Questions

38. **Do you think a lessor should be required to give reasons to the lessee for refusing to consent to an assignment or refusing to issue a licence to assign? If so, why? If not, why?**

39. **Do you think a lessor should be liable in damages for unreasonably withholding either consent in relation to a request for consent to assignment (or other request under section 121 of the PLA)? If so, why? If not, why not?**

40. **Do you think a lessor should be liable in damages for delaying a decision in relation to a request for consent to assignment (or other request under section 121 of the PLA)? If so, why? If not, why?**

5.3. Other jurisdictions

5.3.1. Australia

New South Wales and the Northern Territory have provisions which are almost identical to section 121 of the PLA. Victoria and Western Australia provisions replicate section 121(1) of the PLA, although section 121(1)(a)(ii) dealing with long building leases is not included in these jurisdictions. Further, a lessor is not precluded from requiring the payment of a reasonable sum in respect of any legal or other expense incurred in relation to the consent. The sections in Victoria and Western Australia are both subject to an express provision to the contrary contained in the lease. Tasmania, South Australia and the Australian Capital Territory do not have a provision which is equivalent to section 121 of the PLA.

The position in each State and Territory is summarised in Table 1 below.

[136] *Landlord and Tenant Act 1988* (UK) s1(3). See also Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: the Landlord and Tenant (Covenants) Act 1995' (1996) 55 *Cambridge Law Journal* 313, 348.
[137] *Landlord and Tenant Act 1988* (UK) s4.

Table 1: Jurisdictional comparison of section 121 of the PLA

PLA Section	NSW[138]	Vic[139]	WA[140]	NT[141]	Tas	SA	ACT
s121(1)(a)(i)	Yes	Yes[142]	Yes[143]	Yes	-	-	-
s121(1)(a)(ii)	Yes	No	No	Yes	-	-	-
s121(1)(b)	Yes	Yes	Yes	Yes	-	-	-
s121(2)	Yes	No	No	Yes	-	-	-
s121(3)	Yes	No	No	Yes	-	-	-
s121(4)	Yes	No	No	Yes	-	-	-

5.3.2. New Zealand

Sections 225 to 228 of the *Property Law Act 2007* (NZ) set out the provisions relevant to covenants and conditions not to assign. The regime in New Zealand is different to section 121 of the PLA and operates as follows:

- Section 225 – sets out the parameters of the application of sections 226 to 228. Those sections apply if there is a covenant in a lease that the lessee will not, without consent, do one (or more) of the things listed in subsection 225(1)(a) to (f). These matters include transferring or assigning the lease, entering into a sublease, parting with possession or changing the use of the leased premises from a use that is permitted under the lease.[144] The section also provides that sections 226 to 228 do not prevent a lease from including a covenant binding the lessee absolutely not to do any of the things referred to in subsection (1);[145]
- Section 226 – applies to a lessor who receives after 31 December 2007 an application from the lessee requiring consent to do 1 or more of the things referred to in section 225(1)(a) to (f). Under section 226(2) a lessor must:
    - Not unreasonably withhold consent; and
    - Must within a reasonable time give the consent or notify the lessee in writing that the consent is withheld;
- Section 227 sets out the circumstances where consent is deemed to be unreasonably withheld for the purposes of section 226.[146] These circumstances include where:
    - As a condition of consent the lessor requires the payment of an amount or other consideration or imposes on the lessee any unreasonable condition or precondition;
    - Consent is withheld because the lessee is bankrupt or is in receivership or liquidation.

[138] *Conveyancing Act 1919* (NSW) s133B.
[139] *Property Law Act 1958* (Vic) s144(1).
[140] *Property Law Act 1969* (WA) s80.
[141] *Law of Property Act* (NT) s134.
[142] Unless the lease contains an express provision to the contrary: *Property Law Act 1958* (Vic) s144(1).
[143] *Property Law Act 1969* (WA) s80(1) – 'unless the lease contains an express provision to the contrary'.
[144] Creating a mortgage over the leasehold estate or interest is also included in the list: ss225(1)(f).
[145] *Property Law Act 2007* (NZ) s225(2). Section 225(3) expressly provides that sections 226 to 228 do not apply if the lease includes a covenant in accordance with subsection 225(2) binding the lessee absolutely not to do any of the things referred to in subsection (1).
[146] Section 227(2) of the *Property Law Act 2007* (NZ) provides that subsection 227(1) does not limit section 226(2)(a).

The lessor is not prevented from requiring the lessee, if the lease so provides, to pay the reasonable legal or other expenses of the lessor giving consent. Where the lessor refuses consent or gives consent subject to conditions, the lessor is required when requested in writing by the lessee to give written notice of the reasons for the decision;[147] and

- Section 228 – where a lessor withholds consent unreasonably, the lessee or any assignee, sublessee, mortgagee or person in possession of the leased premises who suffers loss can recover damages and any payment made by the lessee.

The relevant provisions in the *Property Law Act 2007* (NZ) are extracted at **Annexure 1**.

5.3.3. United Kingdom

The legislative position in the United Kingdom in relation to assignment of leases is effectively the same as in Queensland under section 121 of the PLA. The main difference is that the relevant statutory provisions are set out in two separate Acts as follows:

- sections 19(1), (2) and (4) of the *Landlord and Tenant Act 1927* (UK); and
- section 144 of the *Law of Property Act 1925* (UK).[148]

The issue of covenants restricting dispositions, alterations and change of users has been considered extensively in the United Kingdom since approximately 1950.[149] Some of the recommendations made have been implemented. These changes are discussed in further detail in Parts 5.2.1and 5.2.5 above.[150]

5.4. Options

As discussed in Part 5.2 above there are a number of different issues associated with section 121 of the PLA which could be addressed through some changes to the provisions. The available options

[147] *Property Law Act 2007* (NZ) s227(3).

[148] Section 144 of the *Law of Property 1925* (UK) deals with the proviso that no fine is to be exacted for a licence or consent to assign (unless the lease contains an express provision to the contrary). The section also indicates that the lessor is not precluded from requiring the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent.

[149] It appears that consideration of the issues commenced with the report by the Leasehold Committee (the Jenkins Committee) in 1950 (Cmnd 7982). The recommendations by the Jenkins Committee were accepted in principle in a Government White Paper, *Government Policy on Leasehold Property in England and Wales* (1953), Cmnd 8713 but these were not implemented: see Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Changes of User*, Report No. 141 (1985) [4.9]. Following this, the Law Commission set up the Landlord and Tenant Working Party to consider these types of covenants 'afresh'. The Law Commission (UK) published *Provisional Proposals Relating to Covenants Restricting Dispositions, Parting with Possession, Change of User and Alterations*, Working Paper No. 25 in 1970. The Working Party did not agree with the recommendations of the Jenkins Committee: see Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Changes of User*, Report No. 141 (1985) [4.10]. The Law Commission subsequently produced Report No. 141 on these issues in 1985.

[150] The recommendations in Law Commission Report No. 141 (1985) were implemented in part in the *Landlord and Tenant Act 1988* (c26) (UK).

include retaining the provision in its current form; repealing the section and replacing it with a simplified version; or finally, amending the section to specifically address some of the issues identified.

Option 1 – Retain section 121 of the PLA in its current form

This first option would mean no changes are made to section 121 of the PLA and the provision would remain in its current form. The rationale for making no changes is based on the fact that the area mostly litigated appears to relate to the 'unreasonableness' of a lessor withholding of consent. In that context, the concept of reasonableness is determined on a case by case basis and is dependent on the particular circumstances of each case. This enables the law around reasonableness to evolve to meet new social and economic circumstances.[151]

Question

41. Should section 121 of the PLA be retained in its current form?

Option 2 – Repeal section 121 of the PLA and replace it with a modified, simpler provision[152]

This approach recognises that the current provision is based on legislation initially drafted in 1927. It provides an opportunity to recraft the section in a way that is simple, concise and addresses some of the issues identified in Part 5.2 above. Depending on the feedback received following consultation on this section, the new provision could:

- Exclude the exception in relation to building leases (ss121(1)(a)(ii));
- Clarify the interaction between improvements, structural alterations and alterations to user (ss121(2) and 121(3)); and
- Generally simplify the operation of section 121.

Sections 225 to 228 of the *Property Law Act 2007* (NZ) provide an illustration of one possible approach to re-drafting section 121 of the PLA. Part 5.3.2 above provides an overview of the operation of these sections. The New Zealand approach incorporates additional matters which are not addressed currently in Queensland in legislation. These matters include:

- Enabling a lessee to recover damages from a lessor where consent is unreasonably withheld;
- a requirement that the lessee be notified in writing that the consent is withheld; and
- details of when consent is deemed to be unreasonably withheld.[153]

[151] Law Commission (UK), *Covenants Restricting Dispositions, Alterations and Change of User*, Report No. 141 (1985) [8.7].
[152] The content of any proposed change is also dependent on the responses to the consultation questions set out throughout Part 5.2 above.
[153] This list of what constitutes unreasonable withholding is non exhaustive: see s227(2).

Questions

42. **Do you think there is merit in repealing section 121 of the PLA and replacing it with a provision/s that is concise, simple and addresses some of the issues identified in Part 5.2 above?**

43. **Do you think the approach adopted in New Zealand could be adapted to Queensland and used as a replacement for section 121 of the PLA?**

Option 3 – Repeal section 121 of the PLA

The repeal of section 121 of the PLA recognises that it is possible to draft leases in a way which circumvents the application of the section, despite the section stating that it applies notwithstanding anything in the lease. It is arguable in those circumstances that the purpose of section 121 has become limited and repeal is an option to consider.

Question

44. **Do you think section 121 of the PLA should be repealed?**

Option 4 - Modify section 121 of the PLA[154]

Modification of section 121 of the PLA could include simplification of its language, the possible exclusion of the long building lease exception set out in section 121(1)(ii) and clarification of the interaction between sections 121(2) and 121(3). It would not involve a complete redrafting of the provision as proposed in Option 2 above.

Questions

45. **Should section 121 of the PLA be modified in the way proposed above in this option?**

46. **Are there any other changes to the section which are necessary or desirable?**

[154] The content of any modified provision is also dependent on the responses to the consultation questions set out throughout Part 5.2 above.

Annexure 1 – sections 225 – 228 *Property Law Act 2007* (NZ)

225 Application of sections 226 to 228

(1) Sections 226 to 228 apply if there is a covenant in a lease that the lessee will not, without the consent of the lessor, do 1 or more of the following things:

(a) transfer or assign the lease;
(b) enter into a sublease;
(c) part with possession of the leased premises;
(d) change the use of the leased premises from a use that is permitted under the lease;
(e) create a mortgage over the leasehold estate or interest;
(f) do any of the things referred to in paragraph (a), (b), (c), (d), or (e) in relation to any part of the leased premises, or for any part of the term of the lease.

(2) Sections 226 to 228 do not prevent a lease from including a covenant binding the lessee absolutely not to do any of the things referred to in subsection (1).

(3) To avoid doubt, sections 226 to 228 do not apply if, and to the extent that, a lease includes, in accordance with subsection (2), a covenant binding the lessee absolutely not to do any of the things referred to in subsection (1).

226 Consent to assignment, etc, or change of use

(1) This section applies to a lessor who receives after 31 December 2007 an application by a lessee requesting the lessor's consent to do 1 or more of the things referred to in section 225(1)(a) to (f) (whether the lease came into operation before, on, or after that date).

(2) The lessor—

(a) must not unreasonably withhold consent to the doing of the thing or things specified in the application (whether or not the covenant expressly provides that consent must not unreasonably be withheld); and
(b) must, within a reasonable time,—
(i) give the consent; or
(ii) notify the lessee in writing that the consent is withheld.

227 When consent is unreasonably withheld

(1) For the purposes of section 226(2)(a), consent is unreasonably withheld if,—

(a) as a condition of, or in relation to, giving consent, the lessor—
(i) requires the payment of an amount (whether by way of additional rent, or by way of premium or fine) or other consideration; or
(ii) imposes on the lessee any unreasonable condition or precondition; or
(b) consent is withheld because the lessee—
(i) is bankrupt (if the lessee is an individual); or
(ii) is in receivership or liquidation (if the lessee is a company); or
(iii) is in receivership or is being liquidated under section 342 of the Companies Act 1993 (if the lessee is an overseas company).

(2) Subsection (1) does not limit section 226(2)(a), nor does it prevent the lessor from requiring the lessee, if the lease so provides, to pay the reasonable legal or other expenses of the lessor in giving consent.

228 Damages may be recovered from lessor if consent is unreasonably withheld

(1) A person specified in subsection (2) who suffers loss because of a failure by a lessor to comply with section 226(2) may recover from the lessor—

(a) any payment required to be made or other consideration referred to in section 227(1)(a); and
(b) damages for any loss suffered because of any other failure by the lessor to comply with section 226(2).

(2) The persons referred to in subsection (1) are—

(a) the lessee; or

(b) any assignee, sublessee, mortgagee, or person in possession of the leased premises.

6. Continuing Liability of an Assignor of a Lease

6.1. Overview and purpose

At common law, a lease of land creates both an estate in the land for the period specified and a contract between the lessor and lessee.[155] The original parties to a lease have both privity of estate and privity of contract. A lease agreement will contain covenants that a lessor and lessee are required to comply with. Privity of contract between the original parties to a lease survives assignment of a lease. The obligations of an original lessor or lessee can only be discharged by the execution of a release by those parties supported by consideration. Problems arise particularly when there are breaches of a lease by assignees of the lease. In that situation, an original lessee who has not been discharged might be sued on the lease contract if a lessor is unable to recover their losses caused by the assignee of the lease.[156]

The discussion below is intended to provide context to the issue of whether or not an original lessee who assigns his or her interest in a lease should remain liable for breaches of covenants by the immediate assignee or any subsequent assignees to the lease.

6.1.1. Privity of contract – what does it mean to obligations under the lease after disposition?

Where either the lessor or lessee disposes of their relevant interest, privity of contract between the parties means that an original lessee remains liable to the original lessor to perform all obligations under the lease for the term of the original lease. Similarly, the original lessor remains liable in relation to covenants under the lease applicable to the lessor.[157] In simple terms, the express covenants in a lease are enforceable between the parties as a matter of contract law.[158] The problem this situation potentially creates is more acute in relation to the liability of the original lessee, particularly in relation to long leases. If the original lessee assigns the lease, the contractual liability remains for the term of the lease irrespective of further assignments.[159] This means that if a subsequent assignee falls into arrears and the lessor is unable to recover the amount from the assignee directly, the lessor could claim from the original lessee. Further, if, for example, the original lease included provisions for rent review, the original lessee could be liable for rent increases (or reductions) if an assignee fell into arrears.

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[155] Martin Davey, 'Privity of Contract and Leases – Reform at Last', (1996) 59 *Modern Law Review* 78, 79.
[156] *Teller Home Furnishers Pty Ltd (in liq) v Horburgh* [1967] VR 313.
[157] WD Duncan, 'The Continuing Liability of Original Lessees After Assignment of Lease – Time For Reconsideration?', (2005) 12 *Australian Property Law Review* 93, 93.
[158] Peter Butt, *Land Law*, (LawBook Co., 5th ed, 2006) [15144].
[159] Although lessor's remains liable to the original lessee through the duration of the lease after assignment, the practical effect is minimal since lessors 'still tend to be the dominant party in negotiations' and 'rarely undertake extensive liabilities in the terms of the lease which they have been responsible for drafting.': see Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995' (1996) 55 *Cambridge Law Journal* 313, 314-315.

A lessor has the discretion to elect to commence proceedings against the original lessee, the assignee in breach or the previous assignees.[160] The original lessee remains directly and primarily liable to the lessor for the entire term of the lease and cannot demand that the lessor 'exhaust his remedies against the defaulter'.[161] However, the lessor is not able to recover twice and if he or she recovers from the original lessee for breaches committed by the assignee then the original lessee is indemnified by the defaulting assignee.[162] In Queensland, the indemnity may not be available in the case of a registered lease unless the transfer of the lease has been registered.[163]

If the assignor (lessee) wishes to escape further liability after an assignment, the lessor and the original lessee (the assignor) must either expressly agree to discharge the obligations under the lease, or a term in the lease must release the assignor from such obligations. Such a discharge would not be implied merely from the fact of an assignment.

As a matter of commercial practice, it is common for a lessor to require as a condition of assignment that the assignee enter into a deed of covenant with the lessor to the effect that the assignee will perform all the covenants in the lease.[164] If a deed is entered into, this creates privity of contract between the lessor and the assignee which 'obviates the need to inquire whether any individual covenants touch and concern the land as the assignee will be bound, in accordance with her or his contract with the lessor, to perform all the obligations in the lease.'[165]

6.1.2. Privity of estate – what does it mean to obligations under the lease after disposition?

Privity of estate exists between any persons who stand in the relationship of lessor and lessee.[166] This means that it will exist between the original lessor and original lessee and any subsequent parties who 'succeed in the interests of the original parties' such as assignees.[167] For example, where a lessor assigns the reversion, there will no longer be privity of estate between the original lessor and the original lessee. However, privity of estate will exist between the new lessor and original lessee. Where both original parties assign their interests in a lease, privity of estate will no longer be present between those parties but it will exist between the assignees.[168]

The effect of the existence of privity of estate is that covenants in a lease are enforceable between the parties if the covenants 'touch and concern' the land.[169] An assignee will be liable for breaches of

[160] Bill Duncan, 'The Continuing Liability of Original Lessees After Assignment of Lease – Time for Reconsideration' (2005) 12 *Australian Property Law Journal* 93, 98
[161] Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995' (1996) 55 *Cambridge Law Journal* 313, 315.
[162] *Moule v Garrett* (1872) LR 5 Exch 132.
[163] *Murphy v Harris* [1924] St R Qd 187.
[164] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [14.850].
[165] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [14.850].
[166] Peter Butt, *Land Law*, (LawBook Co., 5th ed, 2006) [15144].
[167] Peter Butt, *Land Law*, (LawBook Co., 5th ed, 2006) [15144].
[168] Peter Butt, *Land Law*, (LawBook Co., 5th ed, 2006) [15144].
[169] Butt notes that in the context of privity of estate, the distinction between an assignment and sublease is critical. An assignment is the transfer of the 'whole of the lessee's interest in the lease, where a sublease is the

covenants that touch and concern the land committed during the 'currency of the assignee's term.'[170] The assignee's liability does not extend to breaches occurring prior to the assignment of the lease to the assignee or those that occur after further assignments.[171]

6.1.3. What is the current position in Queensland?

The position in Queensland in relation to non-retail commercial leases remains the same as the common law. In the case of retail shop leases, section 50A of the *Retail Shop Leases Act 1994* (Qld) has the effect that an assignor of a lease may be released from liability under the retail lease covenants upon an assignment if the prescribed disclosure procedure is properly undertaken in respect of both the incoming assignee and the lessor.[172]

The issue of the ongoing liability of an assignor was considered briefly in the 1986 QLRC Working Paper[173]. The QLRC noted that:

> However, the area where difficulty is seen to arise is that the original lessee remains responsible to his lessor for observing covenants in the lease even though he has assigned the lease to a sublessee and is still responsible if that sublease makes a further assignment.'[174]

The QLRC considered the adoption of a provision with the effect that in every transfer of a lease there is an implied covenant by the 'transferee with the transferor' to perform and observe all covenants in

transfer of something less than the whole of the lessee's interest and the original lessee retains his or her own leasehold interest and creates a new leasehold interest out of it. In the case of a sublease there is no privity of estate between the lessor and sub-lessee. See Peter Butt, *Land Law*, (LawBook Co., 5th ed, 2006) [15144].

[170] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [14.870].

[171] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [14.850]. An exception to this general principle may arise where the breach is a continuing breach such as a breach of covenant to keep the premises in repair. In that situation a second assignee may be liable for the whole breach even where part of the damage was caused by the first assignee: at [14.870].

[172] The disclosure process refers to the lessor, assignor and assignee each complying with sections 22B (Assignor's and prospective assignee's disclosure obligations to each other) and section 22C (Lessor's and prospective assignee's disclosure obligations to each other) or any order from QCAT specified in section 22E(2) which is imposed on a disclosing person. The release from liability will only apply if all parties have made proper disclosure. The section does not release any guarantor of the assignor. The extent of the ongoing liability of a guarantor would depend on the terms of the guarantee.

[173] Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986).

[174] Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986) 50.

the lease (express and implied) and to indemnify the transferor against all actions arising out of 'non-observance' of the covenants.[175] The QLRC did not see a need to include a provision in this form.[176]

Sections 117 and 118 of the PLA alter the common law position in relation to an assignment of the reversion following the purchase or transfer of freehold land subject to a lease. The common law position was that covenants in the lease were not enforceable between the assignee of the reversion (that is, the new owner) and the lessee on the basis that the 'reversion was not land to which covenants could attach.'[177] The effect of section 117 of the PLA is that the benefit of covenants that touch and concern the land will be enforceable by the assignee of the reversion. Section 118 of the PLA has the effect that the assignee of the reversion is required to comply with the lessor's covenants that touch and concern the land.[178]

6.2. Is there a need for reform?

It is clear from the discussion in Part 6.1 above that an original lessee may be liable for the defaults of a subsequent assignee whose identity the lessee is not aware and over whose occupancy they have not consented. The original lessee is never going to be in a position to exercise any degree of control over the assignee of a lease. This simply means that if the original (or subsequent assignees) are unable to negotiate a release from liability from the original lessor, they remain potentially liable for the defaults of subsequent unknown assignees for the duration of the lease. If there were a rent review provision in the original lease to which the original lessee subscribed, the burden could potentially be greater when rent increased through that mechanism thus increasing the amount of arrears in cases of default. The original lessee could not even be relieved by the bankruptcy of the defaulting assignee.[179]

The only relief might come when there has been subsequent agreement between the original lessor and a subsequent lessee varying the terms of the lease in a way not contemplated by the terms of the original lease. In that situation the original lessee is not a party to the variation. The liability would then be limited to the position prior to the variation.[180]

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[175] Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986) 50 -51. The QLRC noted that this would give effect to the statutory principle in *Moule v Garrett* (1872) 7 L.R.Ex 101. The Working Paper referred to legislation in other Australian jurisdictions with an equivalent provision. These included *Property Law Act 1953* (Vic) s77(1)(c), *Transfer of Land Act* (WA) s95 and *Real Property Act* (SA) s152.

[176] The QLRC indicated that 'Once again, the acceptance of a statutory form of indemnity will be considered in the course of revision of the Real Property Act.' See Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974-1985*, Working Paper 30 (1986) 51.

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

[178] An equivalent provision is set out in section 62 of the *Land Titles Act 1994* (Qld) which provides that on the registration of an instrument of transfer (including a transfer of reversion) for a lot or interest in a lot, all rights and liabilities of the transferor vest in the transferee. 'Rights' is defined in the Act to include the right to sue on the terms of the lease and to recover debts or to enforce liabilities under the lease: *Land Titles Act 1994* (Qld) s62(4).

[179] *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1995] QB 95 (CA).

[180] *Friends Provident Life Office v British Railways Board* [1996] 1 All ER 336 (CA).

The United Kingdom altered the common law position in relation to the ongoing liability of original lessees after assignment by the introduction of the *Landlord and Tenant (Covenants) Act 1995*. That Act effectively abolished the principle of privity of contract between the original lessor and lessee following assignment of the lease by the lessee. The qualifications to, and scope of, this change is discussed in more detail in Part 6.3.3 below. The introduction of the *Property Law Act 2007* (NZ) in New Zealand did not alter the common law position regarding the ongoing liability of an original lessee following assignment of the lease.

Whether or not the position in Queensland should be altered is contingent on whether there is a sufficient problem to warrant consideration of reform in this area. It should be noted that there is no suggestion in relation to guarantors of the lessee. The continuing liability of a guarantor would depend upon the terms of the guarantee.[181] A summary of some of the arguments for and against reform are discussed below.

6.2.1. Arguments supportive of reform

As discussed above, one of the key issues associated with a lease assignment relates to the ongoing liability of the lessee after assignment of the lease arising from the doctrine of privity of contract. There are a number of issues that potentially arise from this including:

- An original lessee who enters into a long lease and assigns their interest in the lease may be exposed to an action for many years after the assignment. The breach which may give rise to an action on the part of the lessor may relate to an assignee who has taken on the lease following several other assignments; [182]
- In a modern leasing context, retaining a claim against an original lessee for breaches of a covenant that potentially may be years from the original assignment of the lease has been described as:

  > faintly ridiculous, especially given the fact that once the lease has been assigned, the original lessee loses not only privity of estate but any control over, or even knowledge of, the actions of the lessor in their acceptance of subsequent assignees;[183]

- Other practical solutions to this issue have been adopted as standard practice in some commercial leases. For example:
  - in the case of leases to private corporations, a director's guarantee will often be provided or required as a condition of assignment set out in the lease;[184]
  - bank guarantees of rent may be required as a condition of providing a lease.

  However, these practices do not release the original (or even subsequent) lessees.

[181] *Simmons v Lee* [1988] 2 QdR 671 (CA).
[182] Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 611 [8.15.06].
[183] W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 103.
[184] W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 101.

- In a large number of cases lessors do retain some control over the acceptance or rejection of a potential assignee of the lease through the operation of the assignment qualifications;[185] and
- The question of whether it is appropriate in non-retail leases to maintain this right in the lessor in modern leasing practice.

6.2.2. Arguments supportive of retaining existing position

There are some valid reasons for retaining the current position in Queensland. These include:

- The reform in the United Kingdom occurred partly against the background of commercial leases extending for long periods of time. This meant that there was great prospect of multiple assignments of the lease throughout its term, thereby increasing the risk of the original lessee being liable for the breach of an obligation by a subsequent assignee.[186] The position in Queensland (and Australia more generally) is different in that the volume of cases relating to original lessee liability is not as large due generally to shorter term leases;[187]
- Although reform to address this issue in the context of retail leases has occurred in Queensland and other Australian jurisdictions, this reform was directed at a 'specific' and potentially 'vulnerable' market which may be, but not in all cases, distinguishable from the commercial (that is, non-retail) leasing situation;[188] and
- There do not appear to be any significant public or political calls for reform in this area in relation to commercial leases.[189]

6.3. Other jurisdictions

6.3.1. Australia

The other Australian jurisdictions have not altered the common law position in relation to the ongoing liability of the original lessee following the assignment of a lease in relation to non-retail leases.[190] The principle of privity of contract and its consequences following a lease assignment remain in Australia. In the case of retail leases, New South Wales, Victoria and South Australia have also abolished the

[185] W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 102
[186] W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 101.
[187] W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 101.
[188] W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 103. See page 102 for a brief summary of the consumer protection aspect of the retail leasing legislation reforms.
[189] W D Duncan, 'The Continuing Liability of Original Lessees after Assignment of Lease – Time for Reconsideration' 12 (2005) *Australian Property Law Journal* 93, 102.
[190] Although the Victorian Law Reform Commission undertook a review of the *Property Law Act 1958* in 2010.

privity of contract rule if certain preconditions are met under the respective retail leasing legislation in those States.[191]

6.3.2. New Zealand

The issue of continuing liability of an assignor of a lease was discussed in New Zealand by the Law Commission in 1991 as part of the broader review undertaken of the *Property Law Act 1952* (NZ).[192] The Law Commission highlighted the following issues of concern arising from the common law position in New Zealand at the time the paper was published:[193]

- A lessee assigning a lease remained contractually bound to perform all obligations in the balance for the duration of the lease and any periods of extensions of term or renewal in the original lease;
- The ongoing liability of the original lessee after assignment could potentially extend for years, depending on the term of the lease;
- The original lessee's rights against any subsequent assignee will depend on the existence of a chain of deeds of indemnity;
- A lessor will usually pursue the original lessee if the current assignee has become insolvent;
- An assignor has concurrent liability with the current lessee. The assignor is not a guarantor of the liability of the current lessee and is not released by dealings between the lessor and current lessee to which the assignor has not consented; and
- The assignor impliedly authorises the assignee (and any successor of the assignee) and the lessor to do whatever the assignor could have done in relation to the lease, including entering into variations of the lease.[194]

The Law Commission (NZ) suggested that the position be changed so that the lessee's ongoing liability was as a guarantor rather than as a 'concurrent obligor'.[195] A Final Report produced by the Law Commission in 1994 also suggested a more significant change in the form of a provision in the proposed new Property Law Act under which an assignor would automatically be released from future liability after a maximum period of 5 years from the date of the assignment of the lease.[196] The rationale for the addition included:

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[191] *Retail Leases Act 1994* (NSW) s41A; *Retail Leases Act 2003* (Vic) s62; *Retail and Commercial Leases Act 1995* (SA) s45A.

[192] Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991) [441] – [454].

[193] See Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper* Preliminary Paper No. 16 (1991) [441] – [446].

[194] The Law Commission referred to the case of *Centrovincial Estates plc v Bulk Storage Ltd* (1983) 46 P&CR 393 in relation to this principle. However, the concern identified by the Law Commission regarding variations was no longer relevant following the 2007 decision in *Friend's Provident Life Office v British Railways Board* [1996] 1 All ER 336 (CA) which was followed in the New Zealand decision in *Wholesale Distributors Limited v Gibbons Holdings Limited* (2007) 5 NZ ConvC 194,493. This decision clarified that an original lessee is not liable for any greater burden arising from a variation unless the lease expressly allows for such a variation.

[195] Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) [27] and Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 612 [8.15.06].

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

- Placing a cap on the assignor's liability; and
- The assignor would be equated with a guarantor with the consequence that the assignor would also be released by any variation of the lease made without the assignor's consent.[197]

Further, the Report also included a proposal that the 'touching and concerning' test should not apply so that the benefit and burden of all covenants would pass on assignment.[198]

The proposed reform recommendations in England were considered and discounted by the Law Commission in both the 1991 Preliminary Paper and 1994 Report. The Law Commission (NZ) described the proposal in England at the time in the following way:

> The Law Commission of England and Wales in its report entitled *Landlord and Tenant Law: Privity of Contract and Estate* (Law Com No 174 188) has proposed radical change. In essence, that Commission suggests that after an assignment the assignor should be released but that the landlord should be empowered to insist that the assignor guarantee the performance of the immediate assignee. Even that guarantee would lapse when the assignee ceased to be the tenant so that, on a second assignment, the landlord would lose the personal covenant of the original tenant/assignor. This report has not yet been implemented by the legislature.[199]

The position ultimately adopted by the New Zealand Parliament in the new *Property Law Act 2007* (UK) did not reflect the Law Commission's recommendations in relation to the liability of the original lessee.[200] Section 241 of the *Property Law Act 2007* (NZ) governs the ongoing liability of the 'transferor or assignor' of a lease.[201] The section operates as follows:

- Where there has been a transfer or assignment of a lease, the transferor or assignor remains liable to the lessor for:
    - The payment of the rent payable under the lease; and
    - The observance and performance of all covenants of the lease;[202]
- Liability does not extend to a covenant that was not binding on the lessee or lessor immediately before the transfer or assignment;[203] and
- Where a variation of the lease occurs with the agreement of the transferee or assignee and the lessor without the consent of the transferor or assignor, the liability of the transferor or assignor does not increase beyond that provided for by the lease at the time of the assignment or transfer.[204] The variation can only increase liability of the transferor or assignor to the extent that it is provided for in the lease at the time of transfer.[205]

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[197] Subject to rent reviews and other matters contemplated in the lease document at the time of the assignment: Law Commission (NZ), *A New Property Law Act*, Report No. 29 (1994) [28].
[198] Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) [8.15.06]. In the case of personal covenants, Bennion et al indicated that the provision would 'operate prospectively only in the case of personal covenants.'
[199] Law Commission (NZ), *The Property Law Act 1952,* Preliminary Paper No 16 (1991) [447].
[200] Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (2nd ed, Brookers Ltd, 2009) 612 [8.15.06].
[201] The terms 'assignor' and 'transferor' are not defined in the Act.
[202] *Property Law Act 2007* (NZ) s241(1).
[203] *Property Law Act 2007* (NZ) s241(3).
[204] *Property Law Act 2007* (NZ) s241(2).
[205] *Property Law Act 2007* (NZ) s241(4). Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 613 [8.15.06]. Bennion et al note that: 'At common law if a

Section 241 will apply to a transfer or an assignment of a lease that comes into operation on or after 1 January 2008, whether or not the lease itself came into operation before, on or after that date.[206] In practical terms, this means that the 'date of assignment is the relevant date.'[207]

A statutory indemnity is also provided to the transferor or assignor (or previous transferor or assignor) under section 242 of the *Property Law Act 2007* (NZ) for non-payment of rent or the breach of any other covenant of the lessee. The indemnity covers the transferor or assignor and anyone claiming through the transferor or assignor and any previous transferor or assignor.[208]

The introduction of section 241 in the *Property Law Act 2007* (NZ) does not modify the common law position in relation to the liability of original lessees in New Zealand.[209] A significant potential impact of the section is that it extends the continuing liability to assignees who subsequently assign the lease.[210] Prima facie, these assignees are liable for a breach of covenant by a subsequent lessee 'even when they are not bound by privity of contract or estate.' This is because the section applies to a 'transferor' or 'assignor' and the interaction of sections 241 and 242 suggest it is not limited to the original lessee.[211]

Annexure 2 extracts sections 241 and 242 of the *Property Law Act 2007* (NZ).

The *Property Law Act 2007* (NZ) did adopt the Law Commission's recommendation that the distinction between personal covenants and those which touch and concern the land should be abolished. Under sections 231 to 233 of the Act, the burden of 'every lessor covenant and the benefit of every lessee covenant run with the reversion'[212] which has the effect of burdening the assignor further.

6.3.3. United Kingdom

The most significant reform to this area of law has occurred in the United Kingdom by virtue of the *Landlord and Tenant (Covenants) Act 1995* (UK) which commenced on 1 January 1996. The Act, prima

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subsequent assignee negotiated a variation of the lease, this did not affect the original lessee's liability which remained measured by the contract to which it was a party. Assignee's liability was limited to the period of their tenure, their liability dependent on privity of estate.' At [8.15.06]

[206] *Property Law Act 2007* (NZ) s239.

[207] Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed 2009) [8.15.06].

[208] *Property Law Act 2007* (NZ) s242(1)(c).

[209] Emma Tait, 'Liability of Lessees and Assignees of Commercial Leases in New Zealand', (2008) 39 *Victoria University of Wellington Law Review* 193, 210.

[210] Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd. 2nd ed 2009) 617 [8.15.09].

[211] This is because section 242(1)(c)(ii) contemplates subsequent transferors and assignors. For further commentary on this issue and the alternative interpretation that can be given to 'transferor' and 'assignor' see Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 617 [8.15.09] and Emma Tait, 'Liability of Lessees and Assignees of Commercial Leases in New Zealand', (2008) 39 *Victoria University of Wellington Law Review* 193, 217.

[212] Emma Tait, 'Liability of Lessees and Assignees of Commercial Leases in New Zealand', (2008) 39 *Victoria University of Wellington Law Review* 193, 208. These provisions relate to leases coming into operation on or after 1 January 2008.

facie, abolishes the privity of contract principle.[213] However, this is subject to a number of significant qualifications under the Act. The Act has been described as legislating 'against the principle of the tenant's ongoing liability.'[214] The legislation was introduced against a historical backdrop in England of significant criticism of the principle of privity of contract in relation to its application to former lessees under a lease of commercial property, particularly long leases. The reason for the increased concern about the application of the doctrine in the context of commercial leases has been explained in the following way:

> The reasons for this would appear to lie in changes to the traditional landlord and tenant relationship which occurred because of developments in the property world. The most notable change was that whereby commercial property came to be seen primarily as an investment vehicle by a class of landlords typically constituted by institutional investors such as banks, life insurance companies and pension funds. This led to the growth of sophisticated upwards only rent review clauses, and an increasing insistence on the provision of an elaborate chain of sureties as landlords sought to shift as much risk of the venture as possible away from themselves and onto other parties. In this changed climate it was only a matter of time before business failed. When that happened former tenants, who had long disposed of their property, would face unexpected ruin as they were made responsible for breaches of covenant occurring after they had disposed of their interest. The dangers were most obvious in relation to non payment of rent or breach of repairing obligations by an assignee over whom the former tenant would have no control.[215]

The Law Commission delivered a Working Paper in 1986 about the issue and 'provisionally' proposed that the principle of privity of contract be abolished.[216] Consultation was undertaken in relation to the Working Paper and the Law Commission produced a report in 1988.[217] That report 'significantly diluted' the proposals made in the Working Paper including enabling a lessor to obtain a guarantee from the lessee 'on assignment a guarantee of the immediate assignee's liability (but no more) where it was reasonable to do so.'[218] Further reform action did not occur until 1993 and the *Landlord and Tenant (Covenants) Act 1995* was passed in 1995. The final form of the Act is significantly different to the proposed form in the 1988 Law Commission Report with key differences including only applying to leases after the commencement of the Act rather than all leases as initially contemplated.[219]

Key features of the Act include:

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[213] Martin Davey, 'Privity of Contract and Leases – Reform at Last', (1996) 59 *Modern Law Review* 78, 79.
[214] Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (Brookers Ltd, 2nd ed, 2009) 611 [8.15.06].
[215] Martin Davey, 'Privity of Contract and Leases – Reform at Last' (1996) 59 *Modern Law Review* 78, 81. For further information regarding the history to the reform see also Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995' (1996) 55(2) *Cambridge Law Journal* 313, 328-331.
[216] Law Commission (UK), *Landlord and Tenant Privity of Contract and Estate Duration of Liability of Parties to Leases* Working Paper No. 95 (1986).
[217] Law Commission (UK), *Landlord and Tenant Law Privity of Contract and Estate* Report No. 174 (1988).
[218] Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995' (1996) 55(2) *Cambridge Law Journal* 313, 328. Bridge notes that at the time of the 1988 Report the justifications for removing the principle of privity of contract following assignment of a lease were being countered by the lessor lobby.: [328].
[219] Stuart Bridge, 'Former Tenants, Future Liabilities and the Privity of Contract Principle: The Landlord and Tenant (Covenants) Act 1995' (1996) 55(2) *Cambridge Law Journal* 313, 330.

- The Act applies to leases granted on or after 1 January 1996;[220]
- There is no distinction between legal and equitable assignments, the Act applies in the same way;[221]
- The act applies to all covenants of a lease, whether or not the covenant has reference to the subject matter of the lease and whether the covenant is express, implied or imposed by law;[222]
- The requirement that covenants 'touch and concern' or have reference to the subject matter of the lease before the benefits and burdens can pass to assignees of the lease or the reversion is abolished;[223]
- A lessee (original or an assignee) is released from the burden of leasehold covenants when he or she assigns the lease.[224] The lessee also ceases to be entitled to the benefit of the lessor covenants of the lease;[225]
- This release is potentially subject to the lessee entering into an 'authorised guarantee agreement' guaranteeing the performance of the relevant covenant by the next immediate assignee;[226]
- The assigning lessee will remain liable where the assignment has been made in breach of covenant or assignments made by operation of law;[227] and
- Where the lessor assigns the reversion in the leased premises he or she may be released from the lessor covenants and if released, ceases to be entitled to the benefit of the lessee covenants of the lease as from the assignment.[228]

Clearly the most significant impact of the Act is the release of the original lessee and all subsequent lessees (where assignments have occurred) from any obligation to perform covenants under the lease once the lease is assigned. However, as highlighted in the summary of the key features of the *Landlord and Tenant (Covenants) Act 1995* (UK) above, the general release is not absolute as a lessor may require the original lessee to enter into an authorised guarantee agreement as a condition of the

[220] *Landlord and Tenant (Covenants) Act 1995* (UK) Annotations Commencement Information.
[221] *Landlord and Tenant (Covenants) Act 1995* (UK) s28(1).
[222] *Landlord and Tenant (Covenants) Act 1995* (UK) s2(1).
[223] *Landlord and Tenant (Covenants) Act 1995* (UK) ss2 and 3. Commentary on these changes indicate that it now means that there is no need to show privity of estate and sections 141 and 142 of the *Law of Property Act 1925* (UK) are no longer applicable to leases granted on or after 1 January 1996: Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 248 [6.6.1]. These sections are similar to sections 117 and 118 of the *Property Law Act 1974* (Qld).
[224] *Landlord and Tenant (Covenants) Act 1995* s5(2)(b).
[225] *Landlord and Tenant (Covenants) Act 1995* s5(2)(b).
[226] *Landlord and Tenant (Covenants) Act 1995* s16(1) and (2).
[227] *Landlord and Tenant (Covenants) Act 1995* s11.
[228] *Landlord and Tenant (Covenants) Act 1995* s6. The lessor may apply to be released in accordance with the procedure under section 8 of the Act. Since the decision in *London Diocesan Fund v Phithwa (Avonridge Pty Co Ltd Pt 20 defendant)* [2005] UKHL 70 the lessor can stipulate in the original lease that the lessor's liability ceases when the reversion is assigned and there will not be a need to serve a notice under the Act. These 'Avonridge' clauses are now included in most professionally drafted commercial leases and commentary indicates that they render 'the original landlord immune from liability after he has assigned the reversion and, more importantly, placing the tenant in a position in which he has limited remedies for future breaches of covenant. This is exactly what the LTCA was intended to avoid.' See Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012).

assignment.[229] This is to address concerns that the lessor no longer has a remedy if a lessee in possession defaults on the lease.[230] The guarantee can only be required in order to guarantee the performance of the covenants for the next immediate assignee, not more generally for subsequent assignees.[231] A lessor can require the lessee to enter into an authorised guarantee agreement where there is a qualified or absolute covenant against assignment.[232] The majority of commercial leases will fall within one of these categories and the lessor may be able to require the lessee to provide the guarantee in a large number of cases.[233] The ultimate outcome of requiring this guarantee is that the lessor than always has two possible sources to claim from if there is a breach of covenant.[234]

The *Landlord and Tenant (Covenants) Act 1995* (UK) is not without criticism including the limited case law on the provisions and the fact that the provisions of the Act can be difficult to interpret.[235] Other commentators view it is as an 'equitable' solution to the problem of ongoing lessee liability after assignment.[236]

6.4. Options

Consultation on this issue is required in order to determine whether reform in this area in Queensland is required and justified. If reform is supported and the rationale for it is sound, then further consideration will need to be given to how the area is reformed, taking into account any submissions on this area received during the consultation period. One possible approach to reform in this area is to introduce legislative changes to release the original lessee from liability upon assignment but enable the lessor to require an incoming assignee to provide some form of security as a condition of consent to the assignment.

Questions

47. **Should an original lessee continue to be liable for breaches of a subsequent assignee over which the original lessee has no control?**

48. **Do you think there should be any change to the current law in Queensland regarding liability of an assignor of a lease? Is so, what change do you think should be made?**

49. **If the ongoing liability of a lessee is addressed, should the lessee be released from:**

[229] *Landlord and Tenant (Covenants) Act 1995* s16.
[230] Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 249 [6.6.2.1].
[231] Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 249 [6.6.2].
[232] See *Landlord and Tenant (Covenants) Act 1995* s16(3).
[233] Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 250 [6.6.2.1.1].
[234] Emma Tait, 'Liability of Lessees and Assignees of Commercial Leases in New Zealand' (2008) 39 *Victoria University of Wellington Law Review* 193, 217. See Malcolm Dowden, 'Has the UK Court Created a Lease Guarantee Nightmare?' (2012) 30 *Journal of Property Investment and Finance* 83 for a discussion on the authorised guarantee agreement.
[235] Martin Dixon, *Modern Land Law* (Routledge, 8th ed, 2012) 249 [6.6.2] referring to the comments of Lightman J in *First Penthouse v Channel Hotels and Properties* [2003] EWHC 2713 where he indicated in relation to section 3 of the Act that '[t]he Act is the product of rushed drafting and its provisions create exceptional difficulties.'
[236] See Emma Tait, 'Liability of Lessees and Assignees of Commercial Leases in New Zealand' (2008) 39 *Victoria University of Wellington Law Review* 193, 217.

a. **all liability from the date of the assignment;**
b. **all liability from a specified period after the assignment (eg 3, 5 or 10 years) depending upon the length of the balance of the term remaining?**

50. Should the lessee be released from personal covenants only or all covenants including those that touch and concern the land?

51. Should the liability of an assignor of a lease be limited to the period during which that immediate assignee holds the lease?

Annexure 2 – sections 241 and 242 *Property Law Act 2007* (NZ)

241 Transferor or assignor remains liable

(1) If there has been a transfer or assignment of a lease, the transferor or assignor remains liable to the lessor for—

(a) the payment of the rent payable under the lease; and

(b) the observance and performance of all covenants of the lessee.

(2) However, if, without the consent of the transferor or assignor, the transferee or assignee agrees with the lessor to vary the lease, the variation does not increase the liability of the transferor or assignor beyond that provided for by the lease at the time of the transfer or assignment.

(3) Subsection (1) does not apply to a covenant that, immediately before the transfer or assignment, was not binding on the lessee, or on the lessor, as the case requires.

(4) Subsection (2) does not apply if the lease provides for the variation.

242 Covenant implied in transfer or assignment of lease

(1) Every transfer or assignment of a lease must be taken to contain a covenant by the transferee or assignee with the transferor or assignor that, on and after the date of the transfer or assignment, the transferee or assignee will—

(a) pay the rent payable under the lease as and when it falls
due; and

(b) observe or perform every other covenant of the lessee;
and

(c) indemnify the following persons against all claims and expenses for the non-payment of the rent or the breach of any other covenant of the lessee:

(i) the transferor or assignor and anyone claiming through the transferor or assignor:

(ii) any previous transferor or assignor.

(2) Subsection (1)(c)(ii) applies whether—

(a) the transfer or assignment of the lease by the previous transferor or assignor came into operation before, on, or after 1 January 2008; and

(b) the non-payment of rent or the breach of any other covenant of the lessee results from an act or omission of—

(i) the transferee or assignee; or

(ii) a successor in title of the transferee or assignee.

7. Section 123 –Definitions for Div 3

7.1. Overview and purpose

The parts of section 123 relevant to this paper provide:

123 Definitions for div 3

In this division -

lease includes an original or derivative under-lease, also a grant as a fee farm rent, or securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have the lease granted.

***Note: The other definitions in section 123 are not extracted here.**

Division 3 of Part 8 of the PLA is directed at relief from forfeiture and the key sections cover the following areas:

- Restriction on and relief against forfeiture (section 124);
- Powers of the court to protect an under-lessee on forfeiture of a superior lease (section 125);
- Recovery of costs and expenses by the lessor (section 126); and
- Relief against loss of lessee's option (section 128).

The definition of 'lease' in section 123 of the PLA is critical for the purpose of the application of these sections. A lease is defined in section 123 of the PLA to include:

> an original or derivative under-lease, also a grant as a fee farm rent, or securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have the lease granted.

Equitable leases are clearly covered under the definition of lease in section 123 of the PLA.[237]

7.2. Is there a need for reform?

7.2.1. Arrangements in place other than options to renew

Before a lessor can enforce a right of re-entry or forfeiture for a breach of any covenant, obligation or condition or agreement in the lease under section 124 of the PLA, the lessor must serve a notice on the lessee.[238] However, section 124 is only applicable where there is a 'lease' which includes 'an agreement for a lease where the lessee has become entitled to have the lease granted'.[239]

[237] Young, Peter, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed 2012 LexisNexis) [32680.5]. V.G Wellings and G.N Huskinson (eds) *Woodfall's Law of Landlord and Tenant* (1978, 28th ed, Sweet& Maxwell Limited) 171 [1-0417] and Mark Wonnacoott, *The history of the law of landlord and tenant in England and Wales* (2011, The Lawbook Exchange Ltd) 51.
[238] *Property Law Act 1974* (Qld) s124(1).
[239] *Property Law Act 1974* (Qld) s123.

An issue which has arisen in practice is whether the following scenario creates an 'agreement for a lease where the lessee has become entitled to have the lease granted': [240]

- There is an agreement for a lease which does not arise from an option to renew;
- The potential lessee breaches a term of the agreement for lease; and
- The lessor wants to prevent or restrain the lessee from formally taking possession of the property or, alternatively, if the lessee is in possession of the property, the lessor wants to remove the lessee from the premises.

This creates uncertainty for both parties as it is not clear whether the lessor is required to give notice under section 124 of the PLA before enforcing a right of re-entry or forfeiture. The requirement to issue a notice is contingent on the existence of a lease. [241]

The phrase 'entitled to have the lease granted' has been interpreted to mean 'so entitled as if there had been no forfeiture.'[242] This interpretation of the words:

> Presupposes that the lease is susceptible of specific performance; and so where a tenant under an agreement for a lease (as distinct from under a lease actually granted) has breached the agreement in a way that would preclude an order for specific performance, there is no "lease" for the purposes of section 129, and so no need for the landlord to give notice under that section.[243]

However, the potentially circuitous effect of the words and 'obvious anomaly' of this part of the definition of 'lease' has been articulated in the following way:

> if there had been a breach of condition sufficiently serious to attract the consequence of forfeiture (against which relief was being sought) how could Equity decree specific performance of the agreement so that it could be treated as one such, "where the lessee has become entitled to have his lease granted".[244]

7.2.2. Options to renew

The definition of 'lease' becomes relevant where the lessee is unable to rely upon section 128 of the PLA.[245] In many instances, section 124 of the PLA is used as an alternative option for relief for a lessee by claiming that the lessor cannot exercise a right of re-entry or forfeiture because the lessor

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[240] Although the extent of the problem is not reflected in the Court decisions relating to the relevant provisions of the *Property Law Act 1974* (Qld)

[241] Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [8.1320].

[242] Young, Peter, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed, 2012, LexisNexis) [32680.5] referring to a number of cases including *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247, 9249 and *Greville v Parker* [1910] AC 335, 339. V.G Wellings and G. N Huskinson, *Woodfall's Law of Landlord and Tenant Vol 1* (1978, 28th ed, Sweet & Maxwell Limited) [1-1934] 866-867.

[243] Butt, Peter *Land Law* (LawBook Co. (2010) 6th ed). This quote refers to section 129 of the *Conveyancing Act 1919* (NSW). This is the equivalent section to section 124 of the *Property Law Act 1974* (Qld).

[244] Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [8.1320].

[245] See Part 8 of this Issues Paper for a discussion of the operation of section 128 of the PLA. In essence, the section a lessee does not necessarily lose the right to an option to renew if the lessee has breached an obligation under the lease if certain conditions are satisfied.

failed to provide the required notice to the lessee. In that situation, the lessor's counter-claim is that there is no lease in existence.

There have been differences in the interpretation given to the phrase 'entitled to have the lease granted' in the cases considering this issue in both Queensland and other jurisdictions with equivalent provisions. Part of the reason for the differences can be attributed to the differing terms of the lease clauses relevant to the options to renew and the conditions included in these. This inevitably creates some uncertainty from the perspective of both a lessee and lessor regarding the legal position in cases involving options to renew and when an option to renew becomes an agreement for lease. An overview of some of the approaches taken in relation to this issue by the Courts is below:

- The circuitous approach involves reading after the word 'entitled', the words 'but for the forfeiture sued upon';[246]
- An entitlement to have a lease granted will cover a situation where a lessee, who at any time, has acquired a right to have his or her lease granted, despite losing the right by subsequent breach of some covenant or condition;[247] and
- Immediately upon exercise of the option by the lessee the lessee acquires, in equity, the right to a new lease provided the lessee, at the time of exercise, has complied with all the lease covenants. Subsequent breaches of the original lease cannot affect the grant of the lease.[248] On this reasoning, the lessor would have to give notice under section 124 of the PLA.[249]

The recent Queensland Court of Appeal decision of *Grepo v Jam Cal Bundaberg Pty Ltd*[250] approached the phrase 'where the lessee has become entitled to have the lease granted' in a different way. This case concerned an option to renew a lease and involved consideration of the application of section 128 of the PLA (and section 124). Under the lease, the lessee was entitled to exercise an option to renew by giving the relevant notice of exercise, provided that the lessee was not in breach up until the expiry of the lease. The lessee gave notice of the exercise of the option prior to the expiry of the lease. The lessee breached conditions of the lease after the exercise of the option. The definition of lease became relevant in this case when considering the application of

[246] *Shodroske v Hadley* (1908) 27 NZLR 377 approved in *Parker v Greville* (1909) 28 NZLR 461. Note that this decision was overturned by the Privy Council in *Greville v Parker* [1910] AC 335, 339.
[247] Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [8.1320] referring to the reasoning of Young J in *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247.
[248] This is the approach adopted by Young J in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1989) 4 BPR 9575.
[249] The decision in *Beca Developments Pty Ltd v Idameneo (No 92) Pty Ltd* (1989) 4 BPR 9575 related to the equivalent New South Wales provisions in the *Conveyancing Act 1919* (NSW) s 128 (definitions) and s 124 (relief against forfeiture). Skapinker approved this approach and noted that the 'breach can, however, be taken into account in equitable proceedings by the lessee for specific performance of the grant of the new lease when the lessor refuses to grant that new lease by reason of the breach.': see Skapinker, Diane. 'A lessor's rights and obligations on exercise of an option to renew a lease', (1994) 68 *Australian Law Journal* 217, 220-221.
[250] *Grepo v Jam Cal Bundaberg Pty Ltd* [2015] QCA 131. This case is also considered in further detail in the context of section 128 of the PLA in Part 8 of this Issues Paper.

section 128 of the PLA (and section 124). The Court considered in detail the authorities relevant to one of the issues in the case regarding when an option to renew becomes an agreement for lease.[251]

The Court interpreted the obligation in the relevant option clause that the lessee not be in breach of the lease until expiry as a condition precedent to the new lease coming into existence. Holmes JA noted that:

> Absent the performance of those conditions, no entitlement to a further term arose. The option could be called an agreement for a lease but it could not be characterized as an agreement for a lease with the lessee then being entitled to the lease so as to meet the definition in s 123, and make available relief under s 124.[252]

The Court considered that the lessor was not obliged to grant a new lease because there were breaches of covenants in the lease up to and at the date of the expiry of the lease.[253]

In the case of options to renew, the proposed amendments to section 128 of the PLA are intended to clarify that the section extends to breaches of covenants that occur after the notice to exercise the option has occurred. If the proposed amendments are adopted, this will mean that section 128 of the PLA may still apply to situations where:

- The lessee exercised an option to renew by providing the requisite notice;
- A condition of the lease permitting the option to renew also required that the lessee did not breach any covenants up until the expiry of the original lease; and
- The lessee breached covenants after giving the notice to renew but before the lease expired.

This will mean that possible claims relying on section 124 of the PLA and associated issues of determining if an option to renew is a 'lease' will become less common.

However, the proposed amendments to section 128 of the PLA will not, of course, address the issues of interpretation in relation to other arrangements discussed in Part 7.2.1 above.

7.3. Other jurisdictions

7.3.1. Australia

Both the Western Australian and Victorian forfeiture provisions define 'lease' in a similar way to Queensland which includes 'an agreement for a lease where the lessee has become entitled to have his lease granted.'[254] The position in New South Wales is similar and provides:

> an original or derivative under-lessee, a grantee under such a grant as aforesaid, his or her executors, administrators, and assigns, a person entitled under an agreement as aforesaid, and the executors, administrators, and assigns of the lease. [255]

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[251] *Grepo v Jam Cal Bundaberg Pty Ltd* [2015] QCA 131, [58]-[66] where Holmes JA reviews the various authorities on this issue.
[252] *Grepo v Jam Cal Bundaberg Pty Ltd* [2015] QCA 131 [64].
[253] *Grepo v Jam Cal Bundaberg Pty Ltd* [2015] QCA 131 [64].
[254] *Property Law Act 1969* (WA) s81(5) and *Property Law Act 1958* (Vic) s146(5(a). The term is defined in the same way in the United Kingdom: see *Law of Property Act 1925* (UK) s146(5).
[255] *Conveyancing Act 1919* (NSW) s128.

7.3.2. New Zealand

The definition of 'lease' under the *Property Law Act 2007* (NZ) includes 'an agreement to lease' without the added reference to where the lessee has become entitled to have the lease granted.'[256] This definition is consistent with the one set out in the predecessor legislation to the 2007 Act.[257] The forfeiture provisions in New Zealand use the term 'cancellation' and are, effectively, a code which cannot be contracted out of.[258] Relief from cancellation is available in New Zealand in the case of both an agreement to lease and where there is a concluded and in force lease.[259]

7.4. Options

Option 1 – Make no changes to the definition of 'lease' in section 123 of the PLA

This approach means that the status quo in relation to the definition of 'lease' remains the same and the reference to an 'agreement to lease' is qualified by the inclusion of the words 'where the lessee has become entitled to have the lease granted'. This may be a viable option, particularly if the proposed amendment to section 128 of the PLA discussed in Part 8 of this Issues Paper is adopted. This will then mean that section 128 of the PLA may be available to cover a broader category of options to renew and claims in relation to section 124 of the PLA may be less common.

However, there may still be arrangements in place where it is not clear whether they can be characterised as a 'lease' for the purposes of sections 123 and 124 of the PLA.

Option 2 - Amend the definition of 'lease' in section 123 of the PLA

This approach proposes the amendment of the definition of 'lease' to remove any uncertainty regarding the interpretation given to the words 'where the lessee has become entitled to have the lease granted' and avoid the circuitous result described in Part 7.2 above. However, the terms of any proposed amendment depends upon the extent of any issues in practice associated with applying that part of the definition of 'lease'. Feedback from stakeholders during the consultation process for this Issues Paper will be relevant in this respect.

Questions

52. **Have you experienced any difficulties in practice arising from the definition of 'lease' in section 123 of the PLA, specifically in relation to determining if the arrangement in place is 'an agreement for a lease where the lessee has become entitled to have the lease granted'?**

53. **Do you think the inclusion of the words 'where the lessee has become entitled to have the lease granted' creates any interpretation difficulties?**

[256] *Property Law Act 2007* (NZ) s4.
[257] *Property Law Act 1952* (NZ) s104A.
[258] For a discussion on the relevant provisions in the, *Property Law Act 2007* (NZ) see Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (2nd ed, 2009, Bookers Ltd) [8.20.09] 658-662.
[259] see Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey, *New Zealand Land Law* (2nd ed, 2009, Bookers Ltd) [8.20.09] 662.

54. **Do you think the definition of 'lease' in section 123 of the PLA needs to be amended? For example, by removing the words 'where the lessee has become entitled to have the lease granted'?**

55. **Do you think amending the definition in the way illustrated in Question 3 above will make any difference to any possible interpretation issues?**

8. Section 128 –Relief Against Loss of Lessee's Option

8.1. Overview and purpose

The parts of section 128 relevant to this paper provide:

128 Relief against loss of lessee's option

(1) In this section –

(a) a reference to an option contained in a lease is a reference to a right on the part of the lessee to require the lessor –

(i) to sell, or offer to sell, to the lessee the reversion expectant on the lease; or

(ii) to grant, or offer to grant, to the lessee a renewal or extension of the lease, or a further lease, of the demised premises or a part of the demised premises, whether the right is conferred by the lease or by an agreement collateral to the lease; and

(b) a reference to a breach by a lessee of the lessee's obligations under a lease containing an option is reference to a breach of those obligations by an act done or omitted to be done before or after the commencement of this Act in so far as the act or omission would constitute a breach of those obligations if there were no option contained in the lease.

(2) This section applies to and in respect of leases granted before or after the commencement of this Act and options contained in such leases, and has effect despite any stipulation to the contrary.

(3) In this section –

prescribed notice means a notice in writing that –

(a) specifies an act or omission; and

(b) states that, subject to any order of the Court under subsection (6), a lessor giving the notice proposes to treat that act or omission as having precluded a lessee on whom the notice is served from exercising an option contained in the lease.

(4) Where an act or omission that constituted a breach by a lessee of the lessee's obligations under a lease containing an option would, but for this section, have had the effect of precluding the lessee from exercising the option, the act or omission shall be deemed not to have had that effect where the lessee purports to exercise the option unless, during the period of 14 days next succeeding the purported exercise of the option, the lessor serves on the lessee prescribed notice of the act or omission and-

(a) an order for relief against the effect of the breach in relation to the purported exercise of the option is not sought from the court before the expiration of the period of 1 month next succeeding service of the notice; or

(b) where such relief is so sought –

(i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting relief; or

(ii) where relief is granted upon terms to be complied with by the lessee before compliance by the lessor with the order granting relief, the lessee fails to comply with those terms within the time stipulated by the court for the purpose.

***Note: sections 128(5) – (13) are not extracted here.**

Options to renew leases are often included in lease agreements. Generally, the exercise of the options by the lessees is made dependent or conditional upon the lessee not being in default under the lease.[260] This requires the lessee to perform and observe all the conditions and covenants in the lease. Options are strictly construed and at common law the position was that the option could be lost by reason of 'trivial' breaches on the part of the lessee.[261] This often resulted in a 'harsh' outcome for lessees. The New South Wales Law Reform Commission looked at this issue in 1968 after a New South Wales Court of Appeal decision, the effect of which was described in the following way by the Commission:

> The result of the judgment of the Full Court would appear to be that a breach of a covenant, however trivial and however long before the time for exercise of the option the breach may have occurred, prevents the exercise of the option although the lessor may have waived the breach so far as concerns forfeiture of the original term.[262]

The New South Wales Law Reform Commission recognised that 'such a condition could operate harshly' and recommended the inclusion of additional provisions in the *Conveyancing Act 1919* (NSW) (sections 133C to 133G) to extend relief of tenants on application to the Court in relation to options and rights of renewal or purchase.[263] The Queensland Law Reform Commission recommended the inclusion of similar clauses in section 128 when considering this provision in 1974.[264]. As with the amendment to the New South Wales provisions, section 128 of the PLA is intended, in part, to 'temper the harshness' of the common law. [265]

In essence, section 128 gives a lessee some prospect of relief against a loss of a right to exercise an option to renew. The section applies to both options to purchase the reversion and options to renew leases.[266] The section applies to leases granted before or after the commencement of the PLA and to the options contained in these leases. The section applies irrespective of whether there is any stipulation to the contrary in the lease.[267] Under section 128(4), a lessor who intends to refuse an option to renew a lease on the basis that the lessee has breached an obligation under the lease must provide the lessee with a notice.[268] The notice must be in writing, identify the act or omission

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[260] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co, 3rd ed, (2010)) 613-615 [14.950]

[261] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial* Statues, Report No. 16 (1973) 87.

[262] New South Wales Law Reform Commission, *Options in Leases,* Report No. 5 (1968). The Court of Appeal decision referred to by the Commission was *Gilbert 1 McCaul (Aust) Pty Ltd v Pitt Club Ltd* (1957) 59 SR NSW 122. In that case, the lease had an option to renew subject to the tenant duly and punctually paying the rent. The tenant was not paid on the due dates during the term of the lease but the lessor did not object to the lateness and always accepted the payments. The lessor refused to grant the new lease on the ground that the tenant had not punctually paid the rent during the original lease.

[263] New South Wales Law Reform Commission, *Options in Leases,* Report No. 5 (1968).

[264] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial* Statues, Report No. 16 (1973) 87.

[265] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co, 3rd ed, (2010)) 613-615 [14.950].

[266] *Property Law Act 1974* (Qld) s128(1)(a).

[267] *Property Law Act 1974* (Qld) s128(2).

[268] *Property Law Act 1974* (Qld) s128(4).

and state that the lessor proposes to treat the act or omission as precluding the lessee from exercising an option contained in the lease.[269] The lessor is required to give the notice within 14 days after the lessee has purported to exercise the option.

Under section 128(4), a lessee does not necessarily lose the right to the option to renew if the lessee has breached an obligation under the lease. However, where the lessor does issue the prescribed notice, the 'deeming effect' of section 128(4) does not apply if:[270]

- The lessee does not seek an order for relief against the effect of the breach from the court within 1 month of the lessor's notice being received; or
- Where the lessee does seek such relief and:
    - Relief is not granted; or
    - Relief is granted but the lessee fails to comply with ordered terms within the time stipulated by the Court.

The section sets out the procedure for an application for relief to the Court, the matters the Court may take into consideration and the orders the Court can make.[271] The lessor has the burden of proof in relation to establishing the breaches of the lease.[272] The lessee has the burden of proof that relief against loss of option should be ordered.[273]

8.2. Is there a need for reform?

A recent decision of the Queensland Court of Appeal, *Grepo v Jam-Cal Bundaberg Pty Ltd*[274] (**Grepo case**), has highlighted and illustrated a defect with section 128 of the PLA. In summary, section 128 of the PLA does not adequately address breaches that occur after the exercise of the option but before the expiry of the lease. As discussed in Part 8.1 above, commercial leases usually have standard provisions that govern the exercise of an option to renew a lease. These provisions require the lessee to:

- give notice of the exercise of an option to renew within the specified time given; and
- have paid all rent and observed all lessee covenants, up to the date of the expiry of the lease.

Problems arise, however, because an option is usually required to be exercised before the expiration of the lease. At the time of exercising the option, a lessee may not be in breach of the lease. However, the lessee may subsequently be in breach, prior to the expiry of the lease term.

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[269] *Property Law Act 1974* (Qld) s128(3).
[270] *Property Law Act 1974* (Qld) ss128(4)(a) and (b).
[271] *Property Law Act 1974* (Qld) ss128(5), (6), (7) and (8).
[272] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co, 3rd ed, (2010)) 613-615 [14.950].
[273] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co, 3rd ed, (2010)) 613-615 [14.950] and Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed 2012 LexisNexis) [32790.1].
[274] *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131.

In Grepo's case, the 3 year lease contained an option to renew which the lessee was entitled to exercise by giving the requisite notice, provided the lessee was not in breach of the lease up until the expiry of the lease. An overview of the facts in Grepo's case is below:

- The lessee gave the requisite notice to exercise the option prior to the expiration of the lease;[275]
- The lessors did not provide a 'prescribed notice' under section 128(4) of the PLA within the relevant 14 day period after the exercise of the option to renew by the lessee;
- The lessors served Notices to Remedy Breaches of Covenant on the lessee during October and December 2012 and also in August 2013 (even though the lease had expired on 30 May 2013);
- After the expiration of the lease, the lessors gave notice to the lessee to deliver up possession;[276] and
- The Court at first instance did not find that the lessee had breached any clauses of the lease regarding payment of rent, control of termites so as to disentitle the lessee from exercising the option. The lessors' claim for recovery of possession of the premises from the lessee was dismissed at first instance.

The lessors appealed the decision.

The parties raised a number of arguments in the appeal. The lessee claimed:

- that the failure of the lessors to give the notice under section 128(4) meant that the lessors were unable to rely on the breaches which occurred after notice of the exercise of the option was given; and
- as an alternative argument, that an equitable lease had come into existence once the exercise of the option to renew occurred. On that basis, pending the commencement of the new term, the lessee could seek relief against forfeiture relying on section 124 of the PLA. This reliance was on the basis that 'lease', as defined in section 123 of the PLA, included 'an agreement for lease where the lessee had become entitled to have the lease granted.'

The lessors claimed that:

- section 128 of the PLA did not apply at all to breaches which occurred after the 'purported exercise' of the option to renew; and
- section 124 of the PLA was not applicable to relieve the lessee against a possible forfeiture of the agreement for lease. This was because a necessary precondition of the exercise of the option was that there were no breaches up until the expiry of the lease. The lessors claimed this precondition had not been satisfied. The 'agreement for the lease' could not then be described as being 'one where the lessee had become entitled to have the lease granted' as defined under section 123 of the PLA.

[275] The notice was given on 5 November 2012. The lease expired on 30 May 2013.
[276] The notice to deliver up possession was given in October 2013 – the lessors apparently believed that a lease existed.

A summary of the analysis of section 128 of the PLA by the Court of Appeal is below:[277]

- the expression 'purported exercise' of the option to renew occurred at the time the notice of exercise of the option was given;
- the notice of exercise gave 'notice of intention' by the lessee to take up the entitlement of a new lease but that right was subject to the precondition that the lessee was not in breach of the lessee's obligations up until the expiry of the lease;
- this meant that the issue of a new lease was subject to a precondition that there be no breaches of the original lease up until the expiry of that lease; and
- the lessee was not entitled to exercise the option to renew the lease because of the breaches of the lease covenants after the 'purported exercise' of the option. As a consequence, section 128 of the PLA does not apply.

In terms of sections 123 and 124 of the PLA the lessee had claimed that an 'agreement for lease' came into effect between the date of the exercise of the option and the expiry of the lease. The Court of Appeal formed a different view set out below:

- the lessors were not obliged to grant a new lease at the time of the exercise of the option and up until the expiry of the lease as the lessee had failed to comply with the precondition of not breaching the lease terms;
- In those circumstances, the lessee's rights could not be categorised as being based upon 'an agreement for lease' whereby the lessee was 'entitled to have a new lease granted'. This had the effect that the definition of 'lease' under section 123 of the PLA could not be satisfied;[278] and
- As no agreement for lease came into existence sufficiently to satisfy the definition of 'lease' under section 123, the lessee could not take advantage of the rights afforded under section 124.

Commentary on this case notes that:

> This decision clarifies the position in Queensland in respect of the application of ss123, 124 and 128 of the *Property Law Act 1974*, with respect to post notice breaches. It leaves a lessee in this position unable to test whether or not the breaches after the purported exercise of an option to renew are of sufficient gravity to bring about a forfeiture of the new lease. By characterising the condition that the lessee not be in breach of the lease until expiry of the term, as a precondition to taking up the new lease, it takes consideration of those breaches out of the statutory framework of protection.[279]

This was previously an issue in New South Wales in relation to the equivalent provisions of the *Conveyancing Act 1919* (NSW). The issue related to the effect of the section on breaches which

[277] Holmes JA delivered the main judgment in this decision and analysed a number of conflicting New South Wales authorities on a similar provision in the *Conveyancing Act 1919* (NSW) prior to the amendment of that Act in 2001 to address the uncertainty. The New South Wales decisions are discussed in detail at [38] – [51].
[278] The term 'lease' is defined in section 123 of the *Property Law Act 1974* (Qld) to include 'an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition, and an agreement for a lease, where the lessee has become entitled to have the lease granted.' Section 123 is reviewed in Part 7 of this Issues Paper.
[279] Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [8.1785].

occurred after the lessor had given the prescribed notice and before the lease expired.[280] This is now clarified by s 133E of New South Wales legislation which applies the section to breaches occurring before or after the exercise of the option.'[281] The Explanatory Memorandum to the amending Bill explained the reason for the amendment of the section 133E of the *Conveyancing Act 1919* (NSW) in the following way:

> A lease that provides for its renewal, or for purchase of the land demised, at the option of the lessee may make provision for avoidance of the option if the lessee breaches certain specified conditions. Section 133E of the *Conveyancing Act 1919* affords the lessee the right to have a court decide whether a particular breach does or does not operate to preclude the option, but only (as the section now stands) in relation to a breach occurring before service by the lessee of a notice of exercise of the option. The lease may require that such a notice be served a considerable time before expiry of the term of the leaser. **Schedule 1 [4]** repeals and replaces the section in order to extend the jurisdiction of the court to adjudicate with respect to breaches occurring after, as well as those occurring before, service of that notice.[282]

The position now in New South Wales is that a lessor wishing to rely upon breaches occurring after the exercise of the option in order to terminate a lease, must give a 'prescribed notice' in relation to those breaches. This enables the 'seriousness' of the breaches to be 'tested to determine whether or not they might lead to a forfeiture of the new lease.'[283]

8.3. Other jurisdictions

The New South Wales provision was the same as Queensland until it was amended in 2001 to address the same issue recently raised in the Grepo case. Details of section 133E of the *Conveyancing Act 1919* (NSW) and its reform is discussed in Part 8.2 above. Western Australia has an equivalent provision to Queensland which is set out in sections 83A to 83E of the *Property Law Act 1969* (WA).[284] The Western Australian provisions also do not address the issue of breaches of obligations which may occur after the lessee has given notice of the exercise of the option.

8.4. Options

There are some possible options available in relation to addressing the practical effect of the Court of Appeal decision in the Grepo case.

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[280] Peter Young, Anthony Cahill and Gary Newton, *Annotated Conveyancing and Real Property Legislation New South Wales* (2012-2013 ed 2012 LexisNexis) [32790.15]; Peter Butt, *Land Law* (LawBook Co. (2010) 6th ed) 424 [15234]. For a detailed discussion of the New South Wales decisions on this provision prior to its amendment in 2001 see *Grepo v Jam-Cal Bundaberg Pty Ltd* [2015] QCA 131, [38]-[51].

[281] The provision was amended by the *Land Titles Legislation Amendment Act 2001* (NSW).

[282] Explanatory Notes *Land Titles Legislation Amendment Bill 2001* (NSW)

[283] Duncan and Vann, *Property Law and Practice in Queensland*, WD Duncan and A Wallace (eds) (looseleaf) Thomson Reuters [8.1785].

[284] The unreported Supreme Court decision of *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd & Ors* [2002] WASC 54 considered sections 83A – 83D of the *Property Law Act 1969* (WA).

Option 1 – Make no changes to section 128 of the PLA

This option would mean that section 128 of the PLA will remain in its current form. The interpretation of this provision has been clarified in the Grepo case. In essence, breaches of a lease which occur after the service of by the lessee of a notice of exercise of the option will not fall within the scope of section 128 of the PLA. This approach may not, arguably, be appropriate and could operate 'harshly' to the disadvantage of lessees.

Option 2 - Amend section 128 of the PLA to address the issue of post notice breaches

This approach would require an amendment to section 128 of the PLA in a form similar to section 133E of the *Conveyancing Act 1919* (NSW) so that post notice breaches of the original lease can still fall within the scope of the process set out under the section. This would enable the court to adjudicate with respect to breaches occurring after, as well as those occurring before, service of the notice of the exercise of the option to renew provided by the lessee.

Questions

56. **Do you think the protection afforded to lessees under section 128 of the PLA should extend to breaches of lease conditions which occur after the notice of exercise of option has been given until the expiry of the lease?**

57. **Do you think the 2001 amendments made to section 133E of the *Conveyancing Act 1919* (NSW), set out at Attachment A is a suitable model for Queensland?**

9. Section 129 – Abolition of yearly tenancies arising by implication of law

9.1. Overview and purpose

Section 129 of the PLA provides:

(1) No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by 1 months' notice in writing expiring at any time.

(2) This section shall not apply where there is a tenancy from year to year which has arisen by implication before the commencement of this Act, and, in the case of any such tenancy in respect of which the date of its creation is unknown to the lessor or lessee, as the case may be, who is seeking to determine the same, such tenancy shall, subject to any express agreement to the contrary, be determinable by 6 months' notice in writing expiring on the day immediately before the first anniversary of the coming into operation of this Act, or any date afterwards.

Section 129 of the PLA was modelled on the equivalent provision in New South Wales, section 127 of the *Conveyancing Act 1919* (NSW), which has applied in that State since 1920.[285] Section 129 was introduced to address the common law rule which implied a periodic tenancy from year to year where there was a tenancy but no express agreement as to its duration.[286]

Historically, there was no requirement for formalities for the purpose of granting a lease.[287] Following the enactment of the *Statute of Frauds* in 1677[288] in England, leases not in writing and signed by the parties were to take effect as leases at will, with the exception of leases not exceeding a period of three years and at rack (market) rent.[289] However, there were situations where a lease had been agreed by parties but the required formalities had not been complied with before the lessee entered possession and started paying rent.[290] As a consequence of the formality requirements set out in the *Statute of Frauds 1677* these tenancies were of no effect. The common law courts circumvented the strict formality requirements by implying a year to year tenancy where the parties:

- could show a lease for a fixed term had been agreed upon; and
- the lessee had entered possession and paid rent pursuant to that agreement.[291]

[285] Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 87.
[286] Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 87.
[287] Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1526].
[288] 29 Car 11 c3 s1
[289] Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1526] and WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 128-129.
[290] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 128.
[291] Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1526] and WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 129.

The tenancy was a tenancy at will when the lessee entered possession. Once the lessee commenced paying rent under the agreement the tenancy stopped being a tenancy at will and became an implied tenancy from year to year which was determinable by six months' notice.[292] Although the implication of a year to year tenancy overcame issues with formality requirements, these types of tenancies also created some practical inconveniences. The Queensland Court of Appeal in the case of *Brisbane City Council v Council Club Inc*[293] described these concerns in the following way:

> Tenancies from year to year are subject to some inconvenient incidents of their own. Such a tenancy is determinable only on six months' notice expiring at the end of a completed year of the tenancy…. . Apart from the length of notice required, it is not always easy to say precisely when a particular tenancy began or, in consequence, when it is due to end, so as to fix the time at which the notice to quit should be limited to expire.

Section 129 of the PLA was introduced to address these concerns. The QLRC when considering the introduction of the proposed section 129 of the PLA favoured the 'abolition of the legal implication of yearly tenancies'.[294] In particular, it identified section 127 of the *Conveyancing Act 1919* (NSW) as a model clause.[295] The practical effect of section 129 of the PLA is to convert the tenancy from year to year which would otherwise be implied at law from payment of rent into a tenancy at will, making it determinable by either party by written notice of one month.'[296] An illustration of the mischief the section was intended to address is described as follows:

> The section was enacted to remove the anomaly caused by the creation of a tenancy from year to year at law from a mere holding over. Without the section, one could envisage a situation where a tenancy for a fixed term expired, under which, say, monthly notice to quit was required and the tenant holding over and paying rent would be in a far better position without the agreement, as then, a yearly tenancy having been created, 6 months' notice would be required to determine it.[297]

However, the 'tenancies at will' concept which is attributed to section 129 of the PLA is different to the tenancy at will at common law. This latter tenancy category arises when a person enters a property with the owner's consent and commences paying rent on the basis that either party can

[292] Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1526] and WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 129. Six months' notice was the period of notice required to determine a periodic tenancy from year to year. Either party could give notice.

[293] *Brisbane City Council v Council Club Inc* [1995] QCA 163.

[294] Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 87.

[295] Queensland Law Reform Commission, *A Bill to Consolidate, Amend, and Reform the Law Relating to Conveyancing, Property, and Contract and to Terminate the Application of Certain Imperial Statutes*, Report No. 16 (1973) 87.

[296] *Brisbane City Council v Council Club Inc* [1995] QCA 163.

[297] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1920]

terminate the tenancy without notice.[298] An act which is inconsistent with the intention of the parties that the tenancy continues is all that is required to determine it.[299]

9.1.1. Operation of section 129 of the PLA

In order for section 129 of the PLA to operate, a tenancy 'with no agreement as to duration' must exist. The term 'with no agreement as to its duration' is not defined in the PLA but has been interpreted in case law to mean no agreement between the parties 'operative at common law to incorporate as part of it a provision that it was to continue for a term of years or be at will or a periodic tenancy' – that is, no agreement as to duration which is effective to create a legal lease for the period agreed.[300] Section 129 of the PLA is limited in scope and it will not, of course, apply in circumstances where an implied tenancy from year to year would not have arisen at law.[301] Further, it is generally accepted that it does not apply to:

- an express agreement to create a tenancy from year to year;[302]
- tenancies of a periodic nature, regardless of the period chosen. Commentary suggests that if the section did apply to all periodic tenancies then the 'ludicrous position would be achieved whereby a weekly or fortnightly tenancy would require 1 months' notice to quit.'[303]

The right to terminate a tenancy under section 129 of the PLA has arisen in the following situations:

- A lessee enters possession of premises under a lease which is subsequently declared to be void.[304] For example, where a lease is entered into subject to the consent of a Minister under a statutory provision and this consent is not obtained prior to the lessee entering into possession and paying rent or after the consent is refused by the Minister;[305]
- A lessee holds over after the expiry of a fixed term lease and there is no express holding over provision in the lease. If the circumstances of the particular case do not exclude an agreement to 'hold upon the terms of the old lease' and the lessee continues to pay rent and retains possession on the same terms and conditions as the expired lease, the tenancy will be

[298] Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1534] and WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 131.
[299] Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1534] and WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 131 referring to *Wheeler v Mercer* [1957] AC 416 at 427 per Lord Simonds. A common law tenancy at will is not assignable: see Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1534].
[300] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 129 citing *Dockrill v Cavanagh* (1944) 45 SR (NSW) 78 at 83. Peter Butt, *Land Law* (LawBook Co, 5th ed, 2006) [1532] referring to the NSW equivalent provision set out in section 127 of the *Conveyancing Act 1919* (NSW).
[301] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 131.
[302] *Brisbane City Council v The Council Club Inc* [1995] QCA 163. A notice to terminate an express yearly tenancy would need to
[303] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1920]
[304] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 131.
[305] *Palmdale Insurance Ltd v Sprenger* [1988] 1 QdR 414 at 418-419 and *Mooloolaba Slipways Pty Ltd v Cashlaw Pty Ltd* [2011] QSC 236 at [79] – [80].

determinable under section 129.[306] This situation can be compared to the expiration of a lease which includes an express holding over provision. In that situation the tenancy converts into some form of periodic tenancy and will be determinable as a periodic tenancy. The relevant notice provisions in section 130 of the PLA must be complied with;[307]

- A lessee is in possession under an unregistered lease exceeding three years. Where a lease has been entered into but does not comply with statutory formalities especially in relation to registration of the lease under the *Land Title Act 1994* (Qld) or *Land Act 1994* (Qld);[308] and
- A lessee enters possession during negotiations for lease and the lessee commences rental payment but negotiations are never concluded. This situation arose in the case of *Brisbane City Council v Council Club Inc* [1995] QCA 163. The lease in this case was never finalised and executed and the Club remained in occupation for over 18 years paying a nominal rent. The lessor gave notice under section 129 of the PLA. The Club indicated that the Council was required to give 6 months' notice to quit on the basis that it had a year to year tenancy. The Court found that the arrangement was an implied tenancy from year to year with no agreement as to its duration at law and the notice given under section 129 of the PLA was appropriate.[309]

However, there is still a significant degree of uncertainty regarding the full extent of the application of section 129 of the PLA. This is discussed in further detail below.

9.2. Is there a need for reform?

There is consensus amongst commentators that the most significant issue arising from section 129 of the PLA relates to the uncertainty associated with determining whether or not it applies to the particular lease or tenancy which is under consideration.[310] Further, there is 'poor understanding' of the limited circumstances leading to the creation of a 'tenancy at will' under section 129[311] and the subtle differences between that type of tenancy and a tenancy at will arising by operation of law which can only be terminated under section 137 of the PLA.

The QLRC reconsidered section 129 of the PLA in its 1986 Working Paper and noted that early commentary on the section which suggested that it was directed at the situation involving a tenant

[306] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 133.
[307] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1920] and WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 131-132 referring to the cases of *Palmdale Insurance Ltd v Sprenger* [1988] 1 QdR 414 (FC) and *Mooloolaba Slipways Pty Ltd v Cashlaw Pty Ltd* [2011] QSC 236 at [79]-[80].
[308] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.1920].
[309] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.
[310] Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co., 3rd ed, 2010) [14.220]; WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 128.
[311] This type of tenancy has been described as a 'statutory tenancy at will'.

holding over and the requirement that six months' notice would still be required to be given.[312] The QLRC indicated that:

> The problem with the original version of the section is that it is not entirely clear whether it applies to the other circumstances in which yearly or indeed other periodic tenancies might be implied from payment of rent.[313]

The amendment proposed by the QLRC was intended to remove uncertainties associated with the application of section 129 of the PLA by clarifying that the section 'applies to all circumstances where a periodic tenancy would otherwise be implied from payment of rent'.[314] The amendments proposed to the section were not implemented.[315]

Cases which have come before the court in relation to section 129 of the PLA (or the equivalent New South Wales provision) will often involve a dispute as to whether or not the subject lease can be properly characterised as one where 'there is no agreement as to its duration at law.'[316] For example, in *Brisbane City Council v Council Club Inc*[317] one of the issues under appeal was whether section 129 of the PLA applied. The Council Club did not dispute that the premises were 'held on a tenancy from year to year'; rather it claimed that the tenancy was the product of actual agreement by the parties to be 'inferred from the circumstances so identified, not of any mere implication or presumption of law.'[318] Clearly, the origin of the lessee's right to possession is important in these cases.[319]

The complexity associated with determining whether or not the tenancy in question is one which falls within the scope of section 129 of the PLA can be illustrated by the practical guidance provided by Duncan to practitioners who may need to consider whether notice under section 129 of the PLA is required:

> Questions to be considered by practitioners dealing with this situation might be:
> 1) Is there in existence an agreement for lease?
> 2) Is it a lease for a period exceeding three years or a term created by the exercise of an option?
> 3) Did the lessee take possession in the first instance under this lease and have the impression that this lease was valid and enforceable?
> 4) Is there some factor which denies that agreement full efficacy through informality or lack of registration or something else, for instance, Ministerial consent?
> 5) Can the lessee force the lessor to comply with the formalities?
> 6) Are any parties in breach of the lease?

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[312] Queensland Law Reform Commission, *Working Paper on a Bill to Amend the Property Law Act 1974-1985* (No. 30, 1986) p33.
[313] Queensland Law Reform Commission, *Working Paper on a Bill to Amend the Property Law Act 1974-1985* (No. 30, 1986) p33.
[314] Queensland Law Reform Commission, *Working Paper on a Bill to Amend the Property Law Act 1974-1985* (No. 30, 1986) p33.
[315] The proposal in the Working Paper in relation to amending section 129 of the PLA was also endorsed in the Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974 – 1986* Report No. 37 (1987).
[316] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.
[317] *Brisbane City Council v Council Club Inc* [1995] QCA 163.
[318] *Brisbane City Council v Council Club Inc* [1995] QCA 163, 5-8.
[319] Duncan indicates that 'In most cases in which s 129 can be invoked, there is an informal lease somewhere in the background': See WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.

7) Has the freehold to which the lease is subject been transferred since the commencement of the lease?[320]

9.3. Other jurisdictions

9.3.1. Australia

As indicated in Part 9.1 above, section 129 of the PLA is based on the New South Wales provision set out in section 127 of the *Conveyancing Act 1919* (NSW). Northern Territory also has a similar provision.[321] The form of the provision in Western Australia is slightly different to the other jurisdictions. Section 71 of the *Property Law Act 1969* (WA) provides only that no tenancy from year to year is implied by payment of rent. Section 72 of that Act then sets out the process for the termination of a periodic tenancy or 'a tenancy of uncertain duration'.[322] The other Australian jurisdictions (Victoria, South Australia and Tasmania) do not appear to have a similar provision to section 129 of the PLA.

9.3.2. New Zealand

Prior to 2007, section 105 of the *Property Law Act 1952* (NZ) provided:

> ***105 Tenancy from year to year not to be implied***
>
> No tenancy from year to year shall be created or implied by payment of rent; and if there is a tenancy it shall be deemed in the absence of proof to the contrary to be a tenancy determinable at the will of either of the parties by one month's notice in writing.

Section 105 of the New Zealand Act was reviewed as part of the broader review undertaken of the *Property Law Act 1952* (NZ). When the section was first considered by the Law Commission in 1991 there had not been a definitive decision on the interpretation of the section by the Court of Appeal. The generally accepted interpretation of the section in first instance decisions was that it abolished 'all tenancies by implication of the law and replaces the difficult and complicated rules which prevail at common law with one uniform rule for the determination of the nature of all indefinite tenancies.'[323] The Law Commission noted that a more restrictive view had been taken of the equivalent provision in Australia which meant that the section was not applicable unless at common law the tenancy would have been treated as a tenancy from year to year.[324] The Law Commission

[320] WD Duncan, 'When can a tenancy be terminated under s129 of the Property Law Act 1974 (Qld)?' (2014) 34 *Queensland Lawyer* 128, 134.
[321] *Law of Property Act* (NT) s144.
[322] *Property Law Act 1969* (WA).
[323] Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991) [604].
[324] Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper*, Preliminary Paper No. 16 (1991) [605].

indicated that the position should be clarified in New Zealand by rewriting section 105 to confirm the view taken by New Zealand Courts.[325]

The section was considered further by the Law Commission in 1994 when a replacement section was proposed. The intended effect of the proposed new section is summarised below:

> Sub-section (1) applies whenever a lessee is in possession of any land under a lease entered into at any time, but no agreement, either express or implied, has been made between the lessee and the lessor as to the duration of the term. The lease is then deemed to be terminable at the will of either party by not less than 20 working days' notice in writing given at any time. The new section omits the reference contained in s 105 to tenancies from year to year, and thus confirms the view taken at first instance in New Zealand decisions, that the operation of the section is not to be confined to situations in which at common law there would have been a tenancy from year to year. (In Australia the opposite position has prevailed.).[326]

The final revised version of section 105 is now set out in sections 210 and 211 of the *Property Law Act 2007*(NZ). These are extracted in full at Annexure 3.

9.4. Options

The key issue in relation to section 129 of the PLA is the absence of clarity in relation to the circumstances in which it will apply. This has been an ongoing concern since, at least, 1986 with the proposed repeal and replacement of the section by the QLRC with the primary intent of removing uncertainties and simplifying the provision.[327] The term 'no agreement as to its duration' has proven to be problematic when determining whether a tenancy falls within the scope of section 129 of the PLA and the reference to a 'tenancy determinable at the will' of either party adds to the general confusion when interpreting section 129 and differentiating it from a proper tenancy at will subject to section 137 of the PLA.

One approach to clarifying and simplifying section 129 of the PLA is set out below:

> 129(1) No tenancy shall, after [insert date of commencement of amendment] be implied by payment of rent;
>
> (2) Where a lessee enters possession of land under a lease but there is no enforceable agreement as to the duration of the term, there shall arise between the parties a tenancy determinable by either of the parties by one month's notice in writing expiring at any time;
>
> (3) Nothing in this section affects the express creation of a periodic tenancy.

[325] Law Commission (NZ), *The Property Law Act 1952: A Discussion Paper,* Preliminary Paper No. 16 (1991), [605]. The consultation question issued by the Law Commission in relation to this section asked: **Q151 Should it be confirmed that there can be 'statutory tenancy' regardless of whether at common law there would have been a tenancy from year to year?.**

[326] Law Commission (NZ), *A New Property Law Act* Report No. 29 (1994) [537].

[327] Queensland Law Reform Commission, *A Bill to Amend the Property Law Act 1974 – 1986* Report No. 37 (1987) 10.

Questions

58. **Do you think that the circumstances in which section 129 of the PLA apply are clear? If not, why not?**

59. **Do you think section 129 of the PLA should be amended to clearly set out the circumstances in which the section will apply?**

60. **Do you think the following form of section 129 is a viable option?**

129(1) No tenancy shall, after [insert date of commencement of amendment] be implied by payment of rent;
(2) Where a lessee enters possession of land under a lease but there is no enforceable agreement as to the duration of the term, there shall arise between the parties a tenancy determinable by either of the parties by one month's notice in writing expiring at any time;
(3) Nothing in this section affects the express creation of a periodic tenancy.

Annexure 3 – Property Law Act 2007 (NZ) ss210 and 211

210 Implied term of lease if no other term agreed

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

211 Obligations of lessee to remain in force if lessee remains in possession of land with lessor's consent after term of lease has expired

If section 210(1)(b) applies, all the obligations of the lessee under the lease that are consistent with the lease being terminable at will remain in force until the time that the lease is terminated in accordance with section 210(2).

10. Section 138 – Tenants and other persons holding over to pay double the yearly value

10.1. Overview and purpose

Section 138 of the PLA provides:

> Where any tenant for years, including a tenant from year to year or other person who is or comes into possession of any land by, from or under or by collusion with such tenant, wilfully holds over any land after –
> (a) determination of the lease or term; and
> (b) after demand made and notice in writing has been given for the delivery of possession of the land by the lessor or landlord or the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;
>
> then the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of such land, be liable to the person so kept out of possession at the rate of double the yearly value of the land so detained for so long as the land shall have been so detained, to be recovered by action in any court of competent jurisdiction.

Section 138 of the PLA originated from section 1 of the *Landlord and Tenant Act 1730* which was held to apply in Queensland.[328] The QLRC described the purpose of that section to 'discourage tenants from holding over after determination of their lease or tenancy by penalising them at the rate double the yearly value of the premises.'[329] The QLRC also noted that the section did not apply to weekly tenancies or periodic tenancies for any period less than from year to year and did not consider there was any real justification for extending the provision to weekly and other short periodic tenancies. The rationale for not extending the provision in this was explained by the QLRC in the following way:

> such tenancies are generally of less valuable premises; they can be readily determined; there are summary procedures for recovery of possession; and, apart from the Act in question, the lessor in such cases remains entitled to damages in the form of mesne profits (which may be greater than the rent payable where the market value is higher than the agreed rent…).[330]

The effect of section 138 is that where any lessee for years wilfully holds over after the determination of a lease and demand is made and a notice in writing is given for the delivery of possession, double the yearly value of the land will be recoverable in any court of competent jurisdiction.[331]

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

[329] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 90.

[330] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 91.

[331] Carmel MacDonalad, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (LawBook Co, 3rd ed, 2010) 580 [14.450].

10.2. Is there a need for reform?

10.2.1. Establishing that the holding over was 'wilful'

The term 'wilfully' has been considered by the Courts. It has been interpreted to mean a 'contumacious act of the lessee'.[332] In *French v Elliott*[333] the term 'wilfully holds over' was considered by Paull J who indicated:

> It has been held that 'wilfully' means 'contumaceously', but I can see no reason why the old English word 'wilfully' does not exactly express the true meaning of the statute. The statute does not mean that a tenant is a contumaceous tenant. It deals only with the moment of time when the tenancy comes to end. At that moment of time a tenant may say" 'I shall stay on. I think I have the right to do so.' His staying on is not wilful. On the other hand, a tenant may say: 'I will stay on, although I know I have no right to do so.' That is will, and well illustrates the now sometimes forgotten distinction between 'I shall' and the insistent 'I will'. In this case there was, in my judgment, a sufficient muddle on both sides to prevent the wilfulness arising, since the defendant may not unreasonably have thought that he could not be disturbed until the arbitration had taken place.[334]

It can be difficult to obtain evidence that a holding over was wilful within the meaning of the provision. It is arguably simple to raise a bona fide right to possession through other mechanisms such as obtaining legal advice to that effect. For example, this occurred in the case of *Grainger v Williams*[335] where the Supreme Court considered the equivalent provision to section 138 of the PLA found in the Imperial Statute, 4 Geo 2, c 28 (1731), section 1 in force in Western Australian. In that case the tenant allegedly 'holding over' had received legal advice which led them to believe that they had a right to do so.[336] Simmonds J concluded on that basis that there could not be wilfulness in those circumstances and that the claim under the Imperial Statue could not be justified.[337]

10.2.2. Calculation of 'double the yearly value of the land'

There have also been difficulties associated with determining how 'double the yearly value of the land' is calculated. The phrase has been interpreted in a number of different ways. The first approach is that it means double the value of the premium on the lease – that is, what the lease is worth.[338] The alternative approach is to calculate it as double the yearly rent.[339] A more recent approach is set out in the decision of Simmonds J in *Grainger v Williams*.[340] Although the relevant provision of the Imperial statute was held not to apply, Simmonds J still considered the issue of the 'yearly value' on the basis

[332] *Trivett v Hurst* [1937] St.R.Qd 265, 271.
[333] *French v Elliott* [1959] 3 All ER 886, 874. This case considered section 1 of the *Landlord and Tenant Act 1730* (the equivalent provision to section 138 of the PLA).
[334] *French v Elliott* [1959] 3 All ER 886, 874.
[335] [2005] WASC 286
[336] *Grainger v Williams* [2005] WASC 286, [22].
[337] *Grainger v Williams* [2005] WASC 286, [23].
[338] *Trivett v Hurst* [1937] St R Qd 265 at 275.
[339] *Public Curator v LA Wilkinson (Northern) Ltd* [1933] QWN 28.
[340] *Grainger v Williams* [2005] WASC 286

that some of the issues that arose were also relevant to the alternative claims made for damages for trespass and for mesne profits.[341] Simmond J's approach is described below:

> That 'double yearly value' was in the nature of damages which might have been received for 'the use of the freehold and everything connected with it during the time possession was withheld' (at[25]) equating the damages concept with mesne profits being damages for trespass payable by a lessee in possession after forfeiture of a lease (at[52]).[342]

10.2.3. Alternative remedy available

A person in possession of land not paying rent or remaining upon land without a legal right would be a trespasser and liable to damages for trespass which is generally calculated at the rate of the rental.[343] Those damages can only be claimed from the time when the 'defendant ceased to hold as tenant and became a trespasser.'[344] In a number of cases mesne profits and the equivalent to section 138 of the PLA have been pleaded in the alternative.[345]

10.2.4. The provision is out of step with commercial practice

The imposition of a 'penalty' or consequence in the form set out in section 138 of the PLA is out of step with commercial expectations in modern leasing practice. The historical origins of the equivalent eighteenth century provisions developed against the backdrop of the prevalence of year to year tenancies arising more frequently by operation of law because of the absence of written agreements. Tenants who held over leases would often do so for extended periods of time to the detriment of the lessor. The rationale for the introduction of these historical provisions is no longer consistent with current leasing practices, particularly in the commercial context.[346]

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[341] *Grainger v Williams* [2005] WASC 286 at [24].
[342] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [3.400].
[343] Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) [2.6], [17.17]. Damages for trespass are known as 'mesne profits'.
[344] Adrian J Bradbrook, Clyde Croft and Robert S Hay, *Commercial Tenancy Law* (LexisNexis Butterworths, 3rd ed, 2009) [17.17]. See also *Grainger v Williams* [2005] WASC 286, [57].
[345] See for example, *Grainger v Williams* [2005] WASC 286, *French v Elliott* [1959] 3 All ER 886 and *Warne v Nolan* [2001] QSC 053. In the Queensland case of *Warne v Nolan* damages pursuant to section 138 of the *Property Law Act 1974* (Qld) was pleaded in the alternative to the claim for damages for trespass. The claim under section 138 of the PLA was ultimately not considered by Justice Muir.
[346] The *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) excludes the application of the *Property Law Act 1974* (Qld) to 'residential tenancy agreements' under that Act (see section 27(1)).

10.3. Other jurisdictions

Western Australia, Tasmania and the Northern Territory appear to be the only other jurisdictions in Australia which have retained the equivalent provision to section 138 of the PLA.[347]

10.4. Options

There are a number of issues associated with section 138 of the PLA. Primarily, there is an absence of clarity regarding how the calculation of 'double the yearly value' should be undertaken. Further, establishing that a holding over is wilful has been shown from the few decisions to be very difficult from an evidentiary perspective. The current utility of the section is questionable, particularly as an alternative remedy is available in the form of a claim for damages for trespass as compensation for use and occupation of the land. The section itself is often pleaded in the alternative to a claim for damages.

Option 1 – Retain and amend section 138 of the PLA

This option would result in the retention of the section 138 of the PLA but with some amendments to clarify its application and how 'double the yearly rent' should be calculated.

Option 2 – Repeal section 138 of the PLA

This option would result in section 138 of the PLA being repealed. There is an alternative and appropriate remedy available to address a situation where a lease is held over by a tenant. Section 138 of the PLA does not add anything additional to this alternative remedy. The section has been the subject of only a limited number of situations in Queensland.

Questions

61. **Do you think section 138 of the PLA has any current utility?**
62. **Do you think repealing section 138 of the PLA will create any practical problems?**
63. **Do you think a claim for damages for trespass is an equally effective alternative to section 138 of the PLA?**

[347] In Western Australia, the provision is found in section 1 of the Imperial statute, 4 Geo 2, c 28 (1731). The Tasmanian provision is contained in *Landlord and Tenant Act 1935* (Tas) s 9. The Northern Territory has a holding over provision in relation to a life tenant and holding over leased premises in sections 27 and 152 of the *Law of Property Act* (NT).

11. Section 139 – Tenant holding over after giving notice to be liable for double rent

11.1. Overview and purpose

Section 139 of the PLA provides:

(1) Where a lessee who has given notice of intention to quit the land held by the lessee at a time specified in such notice does not accordingly deliver up possession at the time so specified, then, the lessee shall after that time be liable to the lessor for double the rent or sum which would have been payable to the lessor before such notice was given.

(2) Such lessee shall continue to be liable for such double rent or sum during the time the lessee continues in possession, to be recovered by action in any of competent jurisdiction.

Section 139 of the PLA is a re-enactment of historical English and Queensland provisions. The QLRC summarised the background to the provision as follows:

> Section 18 of the Distress for Rent Act 1737 was intended to provide for the converse case, i.e where a tenant gives notice of his intention to quit but fails to deliver up possession on due date, and this section has been re-enacted in Queensland in s.38 of the The Distress Replevin and Ejectment Act of 1867.
>
> By contrast with the earlier statute, the notice contemplated by the Act of 1737 need not be in writing; the better view is that short periodic tenancies are within its scope: see Woodfall, ...and the lessor's claim is limited to double rent; which may be less than the value of the premises on the open market.[348]

The effect of section 139 of the PLA is to make the lessee liable for double the rent payable under the tenancy where the lessee gives notice of intention to quit the land but fails to deliver up possession. The notice given by the lessee does not need to be in writing. The section has rarely been the subject of any Court proceedings in Queensland. However, it was successfully relied upon in a cross-claim in Federal Court case of *Pacific National (ACT) Limited v Queensland Rail*.[349]

[348] Queensland Law Reform Commission, A *Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 91.

[349] [2006] FCA 91. The plaintiff in the proceedings, National Rail, failed in its estoppel claim and claims under the *Trade Practices Act 1974* (Cth) in relation to a container terminal it occupied but which was owned by the defendant, Queensland Rail (**QR**). QR cross-claimed in the proceedings including a claim under section 139 of the *Property Law Act 1974* (Qld).

11.2. Is there a need for reform?

11.2.1. The provision is out of step with commercial practice

As is the case with section 138 of the PLA, the imposition of a 'penalty' or consequence in the form set out in section 139 of the PLA is out of step with commercial expectations in modern leasing practice. The historical origins of the equivalent eighteenth century provisions developed against the backdrop of the prevalence of year to year tenancies arising more frequently by operation of law because of the absence of written agreements. Tenants that held over leases would often do so for extended periods of time to the detriment of the lessor. The rationale for the introduction of these historical provisions is no longer consistent with current leasing practices, particularly in the commercial context.[350] In the absence of this provision, the claim to double rent would now be treated as a penalty under the general law. The objectives of a contemporary Statute should not be to create a penalty without justification, particularly in circumstances such as these where ordinary remedies are more than adequate.

11.2.2. Rules of the Court more efficient

Historically, removing tenants who were holding over was often a protracted process. The Uniform Civil Procedure Rules are now more efficient in providing summary and expeditious processes to remove defaulting tenants from land.

11.3. Other jurisdictions

Tasmania and the Northern Territory have provisions equivalent to section 139 of the PLA.[351] It is significant that the most populous jurisdictions in Australia do not have this provision.

11.4. Options

There is some doubt regarding whether section 139 of the PLA has any current relevance. Further consideration should be given to repealing the provision.

Questions

64. Do you think section 139 of the PLA has any current utility?

65. Are existing remedies adequate?

66. Do you think repealing section 139 of the PLA will create any practical problems?

[350] The *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) excludes the application of the *Property Law Act 1974* (Qld) to 'residential tenancy agreements' under that Act (see section 27(1)).
[351] *Landlord and Tenant Act 1935* (Tas) s 10 and *Law of Property Act* (NT) subsection 152(1)(b).

12. Division 5, Part 8 (sections 140-152) – Summary recovery of possession[352]

12.1. Overview and purpose

Division 5, Part 8 of the PLA comprises a number of provisions commencing from section 140 and ending with section 152.[353] Division 5 provides for the summary recovery of possession of land by a landlord against the tenant or any person claiming under the tenant and in actual occupation of the land where the tenant or person fails to deliver up possession of the land.[354] Two of the key provisions of the Division are extracted below.

> **141 Summary proceedings for recovery of possession**
>
> (1) When the term or interest of the tenant of any land held by the tenant as tenant for any term of years or for any lesser estate or interest whether with or without being liable for payment of rent –
>
> (a) has expired by effluxion of time; or
>
> (b) has been determined by notice to terminate or demand of possession;
>
> and the tenant or any person claiming under the tenant and in actual occupation of the land or any part of the land fails to deliver up possession of such land or part, the landlord may by complaint under this division proceed to recover possession of that land or part of it.
>
> (2) The power to recover possession of any land or part of land conferred by this division shall be in addition to, and not, except where otherwise provided, in derogation from, any other power, right, or remedy of the landlord.
>
> **142 Mode of proceeding**
>
> (1) Subject to this Act proceedings under this division for the recovery of possession of any land referred to in section 141 may be heard and determined by a Magistrates Court in a summary way under the *Justices Act 1886*, upon the complaint in writing of the landlord or the landlord's agent.
>
> (2) The complaint shall be heard and determined at a place where it could be heard and determined were it a complaint for a breach of duty committed in the Magistrates Courts district within which the land concerned is situated or, where the land concerned is situated in more than 1 such district, in any of those districts.

[352] The Centre gratefully acknowledges the contribution of Stephen Lumb, Barrister, Brisbane in relation to the review of Division 5, Part 8 of the *Property Law Act 1974* (Qld). This section of the Issues Paper has been adapted from material prepared by Stephen Lumb on Division 5.

[353] For a detailed overview of the legislative history of Division 5 of the *Property Law Act 1974* (Qld), including earlier recovery of possession legislation in Queensland see Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.2300].

[354] The discussion of Division 5 of the PLA adopts the terminology used in the Division which refers to 'landlord' and 'tenant'.

12.1.1. Scope of Division 5 of the PLA

The scope of Division 5 of the PLA is limited in so far as the recovery of possession of land by landlords against tenants is concerned. Firstly, the Division does not apply to 'residential tenancy agreements' under the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) by virtue of section 27(1) of that Act.[355] Secondly, there are limits to the categories of non-residential tenancies which the Division covers. Commentary on the Division summarises the application of the Division in the following way:

> It does not apply where a tenancy has been determined by way of forfeiture, but it does apply to tenancies by attornment created by mortgages. Its basic application is to:
>
> (a) the holding over of fixed term tenancies which have expired by effluxion of time, where notice has been given; or
> (b) periodic tenancies which have been determined by notice.
>
> It also applies to land held by a tenant of any lesser estate, with or without liability for payment of rent. This may contemplate tenancies at will or sufferance which can be terminated merely by demand for possession. The tenancy at will contemplates the situation where the tenant whose lease has expired, holds over with the landlord's permission – without having paid rent on a periodic basis….. a tenant at sufferance could fall within the ambit of this Division, that is, a tenant who initially entered under a valid tenancy, but holds over without the landlord's assent or dissent.[356]

The power to recover possession under Division 5 is in addition to any other power, right or remedy of the landlord, except where otherwise provided.[357]

12.1.2. Operation of Division 5 of the PLA

Section 141 of the PLA enables a landlord to proceed to recover possession of land where the term or interest of the tenant has:

- expired by effluxion of time; or
- been determined by notice to terminate or demand possession.[358]

The relevant tenancy under section 141 of the PLA can be for any term of years or for any lesser estate or interest, with or without any liability on the part of the tenant for rent. Proceedings initiated under Division 5 in relation to land referred to in section 141 of the PLA may be heard and determined by a Magistrates Court in a summary way under the *Justices Act 1886* (Qld).[359]

Division 5 refers to both recovery of possession and the delivering up of possession. However, the latter phrase is used in the context of the tenant failing to deliver up possession of the land. It is

[355] Section 27(1) of the *Residential Tenancy and Rooming Accommodation Act 2008* (Qld) provides that 'The *Property Law Act 1974* does not apply to residential tenancy agreements.'
[356] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.2380].
[357] *Property Law Act 1974* (Qld) s141(2).
[358] *Property Law Act 1974 1974* (Qld) s141(1).
[359] *Property Law Act 1974* (Qld) s142(1).

generally accepted that the legislature in using this phrase was not intending to make any distinction between an action to recover possession of land and action for delivery of possession.[360] The relief provided under Division 5 is for recovery of possession by the landlord of the relevant land in circumstances where the tenant has failed to deliver up possession.

The landlord or landlord's agent must make a complaint in writing in order to commence proceedings.[361] The contents of the complaint for the purposes of Division 5 are prescribed in section 143(1) of the PLA and must be in an approved form.[362] The complaint must contain:

- a brief description of the land or premises to identify the land; and
- where the land is situated; and
- details of the landlord; and
- a statement that the land was held under a tenancy and (where practicable) the nature of the tenancy under which the land was held; and
- the date on which the tenancy expired by effluxion of time or determined by a notice to terminate or demand of possession; and
- a statement that the defendant failed to deliver up possession.

The process after a complaint is made by the landlord is as follows:

- a Justice may issue a summons directed to the defendant requiring the defendant to appear at the Magistrate's Court to answer the complaint;[363]
- the complaint can be heard and determined in the defendant's absence;[364]
- the Court may order that a warrant be issued against the defendant requiring and authorising any person to whom it is addressed to take and give possession of the land the subject of the complaint to the landlord;[365]
- the order may be made where the defendant fails to appear or fails to show to the court's satisfaction reasonable cause why such a warrant should not be issued;[366]
- the warrant is sufficient authority to the person it is addressed to enter (by force if necessary) into and upon the land;[367] and

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[360] This can be compared to the Supreme Court decision in *Finance Allotments Pty Ltd v Young* [1961] Qd R 452 in the context of mortgages where there was a distinction between 'delivery of possession' and 'recovery of possession'. The claim made in that case in the statement of claim was to 'recover the possession of the lands' and the plaintiff then subsequently claimed the 'delivery of possession' by the mortgagee of the relevant land. Gibbs J indicated that 'it is quite erroneous to regard 'recovery of possession' and 'delivery of possession' as interchangeable terms [455]. In the context of the relevant civil procedure rules in place in 1961, Gibbs J noted that 'Although both a judgment for recovery of land and a judgment for the delivery of possession of land may be enforced by a writ of possession, where the judgment is to deliver up possession of land the writ of possession can only be sued out on filing an affidavit under 'O51, r2, showing that the judgment was served and that it had not been obeyed' [455]

[361] *Property Law Act 1974* (Qld) s142(1).

[362] *Property Law Act 1974* (Qld) s143(1).

[363] *Property Law Act 1974* (Qld) s144(1).

[364] *Property Law Act 1974* (Qld) s144(3).

[365] Where the complaint was made by an agent, the agent (or landlord's agent) can be given possession of the land: *Property Law Act 1974* (Qld) ss145(1) and 146(1).

[366] *Property Law Act 1974* (Qld) ss145(1) and (2).

[367] *Property Law Act 1974* (Qld) s146(2).

- the complaint may also include a further complaint that the defendant is indebted to the landlord for rent or mesne profits (or both).[368]

12.1.3. Other provisions of Division 5 of the PLA

The other provisions of Division 5 of the PLA are:

- Section 148 which provides for a rehearing of the complaint where:
  - the defendant failed to appear at the hearing of the complaint and the order that the warrant be issued was made ex parte; and
  - the defendant makes an application for a rehearing within 7 days after the date on which the order was made; and
  - the Magistrate considers there is a proper reason to do so;[369]
- Section 149 which sets out the powers of the Court on an application under Division 5. For example, the section confirms that the powers conferred under Division 5 are in addition to the powers of the court under the *Justices Act 1886* (Qld).[370] In relation to a claim for rent or mesne profits, the Court has and may exercise all or any of the powers conferred by the *Magistrates Courts Act 1921* (Qld) on a Magistrates Court;[371]
- Section 150 which has the effect that no action or prosecution can be brought against the Justice who constituted a Court which issued a warrant under Division 5.[372] The section also extends the protection to a Clerk of the Court who issues a warrant and persons who execute warrants;[373]
- Section 151 which provides protection to a landlord against a trespass action where there has been some irregularity or informality in the manner of obtaining possession.[374] However, the party 'aggrieved' may bring an action for any such irregularity or informality;[375] and
- Section 152 which provides that a landlord who does not have a lawful right of possession at the time the warrant was executed is not protected from the consequence of a civil action by pleading the issue and execution of the warrant.[376]

12.2. Is there a need for reform?

Recovery of possession of land under Division 5 of the PLA does provide a simplified and reasonably expeditious process. Some benefits of the Division to tenancies which fall within its scope include:

- The Magistrate's Court is a lower cost jurisdiction than the District Court or Supreme Court so it is potentially more accessible to the parties;

[368] *Property Law Act 1974* (Qld) s147(1).
[369] *Property Law Act 1974* (Qld) s148(1).
[370] *Property Law Act 1974* (Qld) s149(1).
[371] *Property Law Act 1974* (Qld) s149(3).
[372] *Property Law Act 1974* (Qld) ss150(a).
[373] *Property Law Act 1974* (Qld) ss150(b) and (c).
[374] *Property Law Act 1974* (Qld) s151.
[375] *Property Law Act 1974* (Qld) s151.
[376] *Property Law Act 1974* (Qld) s152(1).

- A broader category of complainants can make a complaint. For example, the landlord's agent or solicitor;[377] and
- Proceedings do not depend on the valuation of the land.[378]

However, these advantages need to be considered in the context of the other matters raised below.

12.2.1. Division 5 of the PLA is limited in scope

The language used in section 141 of the PLA creates some uncertainty regarding the precise scope of the tenancies to which Division 5 applies. The section refers to 'the term or interest' of the tenant of any land held by the tenant as a tenant for any term of years 'or for any lesser estate or interest'. The phrase 'any lesser estate or interest' is often found in conjunction with the reference to 'fee simple'. The reference is less clear in the context in which it appears in section 141 of the PLA. Further, factual questions will arise in relation to whether a particular category of tenancy will fall within the scope of Division 5. Some of the possible questions include:

- Has the tenancy expired by effluxion of time?;
- Has the tenancy been determined by notice to terminate?; and
- Has the tenancy been determined by a demand for possession?

In the case of tenancies determined by notice to terminate, technical arguments could be raised about the appropriateness of the notice given under Division 4 of the PLA which can impact on whether the Division can be relied upon in that situation.[379] In circumstances where there is the potential for genuine dispute in relation to such matters, it is likely clients would be advised to commence proceedings in the District Court or Supreme Court (whichever is appropriate) rather than risk a finding that Division 5 has no application.

A number of tenancies clearly do not fall within the scope of Division 5 including:

- residential tenancy agreements under the *Residential Tenancies and Rooming Act 2008* (Qld);[380] and
- tenancies which have been determined by forfeiture. Relief against forfeiture is only available in the Supreme Court.

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[377] *Property Law Act 1974* (Qld) s142(1) where a complaint can be made by the landlord or landlord's agent. 'Agent' is defined in section 140 of the *Property Law Act 1974* (Qld) to mean a person usually employed by the landlord in the letting or the land or in the collection of the rents of the land; or a person specifically authorised in writing to act in the particular matter by the landlord; or a solicitor authorised to act on behalf of the landlord.

[378] However, it is conceded in commentary on Division 5 that the Magistrates Court has its own jurisdictional limit of $150,000 and no jurisdiction to hear proceedings for the recovery of land irrespective of value except by virtue of Division 5 of the PLA. See Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.2400].

[379] For example, a notice under section 130 of the *Property Law Act 1974* (Qld). Section 131 sets out the form and content of the notice given and indicates that it is not enforceable under Division 5 unless it is in writing.

[380] Applications can be made to QCAT under Chapter 6, Part 2 of the *Residential Tenancies and Rooming Act 2008* (Qld) arising from the failure of a tenant to leave premises. QCAT can make a termination order. A 'termination order' is an order of a Tribunal terminating a residential tenancy agreement or rooming accommodation agreement: *Residential Tenancies and Rooming Act 2008* (Qld), Schedule 2.

The current policy reason underpinning Division 5 of the PLA is not clear. The Division provides an alternative mechanism for the recovery of possession for only a limited pool of tenancies. In this respect, there is no monetary limit imposed on the value of the tenancy the subject of the claim in the Magistrates Court made pursuant to Division 5. The focus is on the nature of the tenancy. This is despite the fact that the Magistrates Court has its own jurisdictional limit of $150,000 and no jurisdiction to hear proceedings for the recovery of land, except by virtue of Division 5 of the PLA.

12.2.2. Uncertainty regarding whether Division 5 of the PLA is used in practice

It is not clear whether the remedy provided for in Division 5 is one which is commonly sought in practice, even where the relevant tenancy falls within the scope of the Division.[381] Notices to quit under the PLA which are issued under Division 4 of the PLA would also be used by mortgagees seeking possession of mortgaged premises where there is an attornment clause in the mortgage constituting the mortgagor as a periodic tenant (weekly or monthly etc) for the purpose of potential 'ejectment' from the land. Although it is accepted that the Division applies to tenancies by attornment created by mortgages, in practice, proceedings relating to recovery of possession are usually commenced in the District Court (or Supreme Court), rather than relying on Division 5 of the PLA.[382] As indicated in Part 12.2.1 above, arguments about the nature of a tenancy and the application of the Division are best conducted in the District or Supreme Courts as these could become quite complex.

12.2.3. Alternative option for recovery of possession under the *Uniform Civil Procedure Rules 1999* (Qld)

The power to recover possession of land under Division 5 is in addition to any other power, right or remedy of the landlord.[383] In modern leases, the usual practice is that an express term is included in the lease agreement providing for re-entry and taking of possession of the land by the lessor in the event of default. If there is no such express term in the lease agreement, there is implied in every lease[384] of land that in the event of the defaults specified in the lease, the lessor may re-enter upon the demised premises (or part of the premises) and determine the estate of the lessee in the premises.[385] Landlords in Queensland may seek to recover possession of land from a tenant and to enforce such an order under the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) in conjunction with

[381] Searches of the publicly available Magistrates Court decisions from 2006 do not identify any cases brought under Division 5 of the PLA. Clearly, further evidence from the Magistrates Court decisions would be needed to confirm the extent to which the Division is used in practice.
[382] Section 68(1)(b)(i) of the *District Court Act 1967* (Qld) gives the District Court jurisdiction for enforcing, by delivery of possession, of any mortgage, encumbrance, charge or lien where the amount owing does not exceed the monetary limit. See for example *Cuppaidge v Baldwick & Baldwick* [2000] QDC 252 where proceedings were commenced in the District Court for the recovery of possession of mortgaged land. The proceedings were commenced by the plaintiff who was the assignee of the bank's interest under the mortgage. Although the actual application before the Court related to striking out certain paragraphs of the defence filed by the defendant's to the District Court action.
[383] *Property Law Act 1974* (Qld) s151(2).
[384] Within the meaning of the *Property Law Act 1974* (Qld).
[385] *Property Law Act 1974* (Qld) s107(d). The section applies to leases made after the commencement of the PLA.

section 90 of the *Civil Proceedings Act 2011* (Qld) (**the CPA**). A landlord may seek an order that it is entitled to possession of the leased premises or for recovery of possession of land or an order for possession of land.[386] The advantage of this procedure is that it is not dependent upon the nature of any particular leasehold or tenancy arrangement. The critical issue is whether the landlord is entitled to possession of the land.[387]

12.2.4. The process under the UCPR

Other than an appeal, there are two types of originating process under the UCPR, namely an application and a claim.[388] A landlord may commence proceedings by way of an application if a substantial dispute of fact is unlikely[389] or otherwise, by way of a claim.[390] An originating application does not require the filing of a statement of claim and can be supported by way of affidavit. The position in relation to a landlord commencing proceedings by way of claim is slightly different and the claim must state briefly the nature of the claim made or relief sought in the proceeding and must attach a statement of claim.[391] Once a claim is served, the defendant then has 28 days after the date of service to file a notice of intention to defend. This notice must also attach the defendant's defence.[392]

If the defendant does not file a notice of intention to defend a claim within the time period:

- If the landlord's claim for relief is for recovery of possession of land only, the landlord may file a request for a judgment for recovery of possession of the land as against the defendant (and costs);[393] and
- If the landlord's claim for relief is for recovery of possession of land together with a claim for debt or liquidated demand (such as rent) under UCPR 283, the landlord is entitled to a judgment against the defendant on all or any of the claims for relief the landlord could request under those rules if that were the only claim for relief against the defendant.[394]

If the defendant does file a notice of intention to defend, there is provision in the UCPR for the landlord to apply for summary judgement in the proceeding if the landlord can satisfy the Court that the

[386] See *Viclee Nominees Pty Ltd v Team Venture Pty Ltd* [2009] QSC 47 as an illustration of a Supreme Court proceeding where the plaintiff sought, and was granted, an order that it was entitled to possession of the premises it leased to the defendant.
[387] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.2400].
[388] See UCPR 8(2). A claim is governed by UCPR 22 and a statement of claim must be attached to the claim. An application is governed by UCPR 26 and the originating document is referred to as an Originating Application (see Form 5).
[389] UCPR 11(a) and 25.
[390] UCPR 9.
[391] UCPR 22.
[392] See UCPR 137 and 139.
[393] UCPR 287. However, the plaintiff is not entitled to the judgment if the plaintiff's claim is for 'delivery of possession under a mortgage.': UCPR 286(4).
[394] UCPR 287. See also *RHG Mortgage Corporation Limited v Property Angels Investments Pty Ltd* [2011] QDC 066, 9.

defendant has no real prospect of successfully defending all or part of the landlord's claim and there is no need for a trial of the claim or part of the claim.[395]

12.2.5. If an order for possession of land is made, how can it be enforced?

A person entitled to enforce an order (other than an order for the payment of money into court) may obtain an enforcement warrant from the Court under section 90(1) of the CPA. An enforcement warrant may contain an order directed to enforcing the original order, including an order authorising an enforcement officer to enter and deliver possession of land.[396] These provisions are complemented by the following provisions in the UCPR:

- UCPR 896 which provides that an order for the possession of land may be enforced by an enforcement warrant under UCPR 915; and
- UCPR 915 which provides that a court may issue an enforcement warrant in the approved form authorising an enforcement officer to enter on the land described in the warrant and deliver possession of the land and appurtenances to the person entitled to possession.

12.2.6. In which jurisdiction can the proceedings be brought?

A proceeding to recover possession of land can be commenced in either the Supreme Court or, if it has jurisdiction, the District Court. The District Court has jurisdiction to hear and determine an action to recover possession of any land where the value of the land does not exceed the monetary limit of the District Court which is $750,000.[397] The determination of the monetary limit in relation to the recovery of possession of leased premises can be problematic in those cases involving recovery of part of the land, for example a shop within a shopping centre (small or large). Commentary on the issue of valuation notes that 'problems arise with individual tenancies in large complexes where there is no separate valuation of the demised premises.'[398]

12.2.7. Injunctive or declaratory relief not available under Division 5

If a tenant (defendant) wished to seek declaratory relief in response to a complaint seeking recovery of possession, the tenant would need to bring such relief in the Supreme Court. In those circumstances, the Magistrates Court could stay the Division 5 proceedings pending the hearing of the other proceeding but would not be obliged to do so.[399] This creates a potential procedural

[395] UCPR 292.
[396] *Civil Proceedings Act 2011* (Qld) s90(2)(d).
[397] *District Court of Queensland Act 1967* (Qld) subs68(1)(b)(xi). The value of the land is determined by reference to the most recent valuation made by the valuer-general under the *Land Valuation Act 2010* (Qld) current at the time of instituting the proceeding. If there is no such valuation in respect of the land, the current market value of the land exclusive of improvements.
[398] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.2400].
[399] See *Boyd v Halstead, Ex Parte Halstead* [1985] 2 Qd R 249. If Division 5 was not available under the *Property Law Act 1974* (Qld), a landlord would be required to commence proceedings in either the District

disadvantage for tenants in relation to seeking appropriate declaratory or injunctive relief where there is a valid basis to do so. In the absence of Division 5 of the PLA, the landlord would be required to commence proceedings in either the District Court or the Supreme Court depending on the monetary jurisdiction. In those circumstances, a tenant could seek declaratory or injunctive relief by way of counterclaim in the same proceeding.[400] That would avoid the possibility of split proceedings.

12.3. Options

It is clear from the discussion in Part 12.2 above that there are some limitations to the ongoing utility of Division 5 of the PLA. Further, there is an alternative process under the UCPR available to landlords seeking to recover possession of land which can also be expeditious in certain circumstances. However, further feedback on the extent to which the Division has been relied upon would be useful for the purposes of the review and assessing the options available in relation to Division 5. Some possible options are set out below.

Option 1 – Retain Division 5 of the PLA with amendments to clarify its scope

If Division 5 is retained in the PLA, there is benefit in clarifying its language, particularly in relation to the tenancies which do fall within the scope of the Division and those tenancies which fall outside the Division.

Option 2 – Repeal Division 5 of the PLA

The repeal of Division 5 of the PLA would occur on the basis that there is an alternative process under the UCPR for landlords to seek recovery of possession of land which would be available in relation to the limited number of tenancies that actually fall within the scope of Division 5 of the PLA. Further, the repeal of the Division would also be justified on the basis that it does not appear to be used widely in practice.

Court or Supreme Court depending on the monetary jurisdiction. The monetary jurisdiction is determined by the value of the land upon which the demised premises are situated.

[400] If in the District Court, this would occur by virtue of section 69 of the *District Court Act 1967* (Qld).

Questions

67. **Are you aware of the extent to which Division 5 of the PLA is relied upon in practice?**

68. **Would you rely on Division 5 in practice? If so, why? If not, why not?**

69. **Are you aware of any current policy rationale underpinning Division 5 of the PLA and its application to the limited pool of tenancies? If so, what is this rationale?**

70. **Is there a justifiable benefit to Division 5 of the PLA in relation to the tenancies to which it applies?**

71. **Do you think there is any utility in maintaining Division 5 in circumstances where:**
    a. **It is only available in relation to a limited number of tenancies; and**
    b. **There is an alternative process available under the *Uniform Civil Procedure Rules 1999* (Qld) to recover possession of land?**

72. **Do you see any disadvantages to repealing Division 5 of the PLA? If so, what do you think these disadvantages are?**

73. **If Division 5 is retained, do you think that the scope of the application of the Division requires clarification?**

13. Division 6, Part 8 (sections 153-167) – Agricultural holdings

13.1. Overview and purpose

Division 6, Part 8 of the PLA encompasses a large number of provisions commencing from section 153 and ending with section 167. The definitions relevant to Division 6 are extracted below.

> **153 Definitions for div 6**
> (1) In this division –
>
> **absolute owner** means the owner or person capable of disposing by appointment or otherwise of the fee simple or whole interest in a holding, although the land or the person's interest in the land is mortgaged or encumbered or charged.
>
> **compensation** means compensation payable under this division or compensation payable under any agreement which by this division is deemed to be substituted for compensation under this division.
>
> **contract of tenancy** means a letting of a holding for a term, or for lives, or for lives and years, or from year to year, under a contract entered into at any time after 1 January 1905.
>
> **determination of tenancy** means the cesser of a tenancy by effluxion of time or from any other cause.
>
> **holding** means any parcel of agricultural land (which expression includes land suitable for dairying purposes) of an area of not less than 5 acres held by a tenant under a landlord.
>
> **landlord** means the person for the time being entitled to possession of a holding, as the absolute owner of the land, subject to a contract of tenancy.
>
> **tenant** means the person in possession of a holding under a contract of tenancy.
>
> (2) The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under this division.

13.1.1. History

At common law in certain circumstances, physical objects attached to the land are regarded as part of the land – that is, 'whatever is attached to the soil becomes part of it.'[401] The individual who owned the fixture loses his or her property in it and title in the object vests in the owner of the land or soil.[402] Many exceptions to the application of the common law rule have developed over the years including where a fixture was erected by a tenant for 'ornament or convenience or for the purpose of trade'.[403]

[401] Lynden Griggs, 'The Doctrine of Fixtures: Questionable Origin, Debatable History, and a Future that is Past' (2001) 9 *Australian Property Law Journal* 1 at 1.
[402] Lynden Griggs, 'The Doctrine of Fixtures: Questionable Origin, Debatable History, and a Future that is Past' (2001) 9 *Australian Property Law Journal* 1 at 2; Carmel MacDonald, Les McCrimmon, Anne Wallace and Michael Weir, *Real Property Law in Queensland* (Lawbook Co, 3rd ed, 2010) 111 [4.210]. For an overview of the historical basis of the rule of fixtures see Lynden Griggs, 'The Doctrine of Fixtures: Questionable Origin, Debatable History, and a Future that is Past' (2001) 9 *Australian Property Law Journal* 1 at 2-3.
[403] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.3000].

Historically, however, agricultural fixtures have not fallen within any of the exceptions to the common law rule. In this respect, the QLRC when discussing the inclusion of this Division in the PLA noted:

> By virtue of the decision in Elwes v Maw (1802) 3 East. 38, fixtures erected by a tenant for agricultural purposes are not so removable, which means that these become at common law once and for all the property of the landlord when affixed to the realty. That decision…..has in England been gradually eroded by a line of statues.. There is a similar statue in New South Wales… and legislation to similar effect exists in other Australian States.
>
> In general, the approach of this legislation to the problem of agricultural fixtures has been twofold: (1) to confer on the tenant a right to remove fixtures erected by him, provided that this is done during the tenancy or within a reasonable period thereafter (in England, two months), that it is done without causing substantial or avoidable damage, and that the tenant gives notice of his intention to remove, so as to afford to the landlord an opportunity of buying the improvements; and (2) to confer on the tenant a right to compensation for certain specified improvements, including fixtures, made but not removed by him.'
>
> In Queensland for some reason which is not entirely clear, the corresponding local statute The Agricultural Holdings Act of 1905 .. adopted only the latter alternative, and conferred on the tenant no general right of removal of fixtures erected by him except in the case of fruit trees (s.15).[404]

Division 6 of the PLA, as proposed by the QLRC, generally followed the terms of the *Agricultural Holdings Act 1905* (Qld) subject to some changes as follows:

- The QLRC raised concerns that the *Agricultural Holdings Act 1905* (Qld) did not prohibit contracting out of the compensation provisions of that Act. The QLRC noted that the effect of this was that most of the professionally drafted agricultural tenancy agreements contained a provision excluding the Act, so that the tenant:

  > is placed in the same position, as regards improvements, as prevails at common law under the rule in Elwes v Maw. He cannot remove fixtures because of that rule, and he cannot claim the statutory compensation for improvements because the provisions of the Act are excluded by agreement.'[405]

  The QLRC's solution to this issue was to incorporate clause 153(2) (now section 154(2)) which provided 'that any agreement having the effect of taking away or limiting the tenant's right to compensation for improvements should be unenforceable except in respect of such improvements as are particularly specified in the tenancy agreement.'[406] The rationale for including this subsection was to limit the use of provisions in lease agreements excluding the right to compensation which the QLRC considered were becoming standard form;[407] and

[404] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 93-94.
[405] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 95.
[406] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 94.
[407] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 95.

- Including a provision which allows a tenant to remove fixtures erected by him or her, subject to some limits. The parties would also be able to contract out of such a provision. The QLRC noted that this would place agricultural tenants on the same level as other tenants in relation to removal of fixtures.[408]

The object of Division 6 is to give agricultural tenants the right to remove tenant's fixtures and the right to compensation where fixtures installed by the tenant cannot be removed at the termination of the tenancy. The rationale for the legislation comes from the principle that tenant's fixtures at law did not include agricultural fixtures at the conclusion of any lease.

13.1.2. Application of provision

Division 6 of the PLA applies to a contract of tenancy entered into after the commencement of the PLA.[409] A 'contract of tenancy' is defined under the PLA to mean:

> a letting of a holding for a term, or for lives, or for lives and years, or from year to year, under a contract entered into at any time after 1 January 1905.[410]

The term covers a single contract.[411] A 'holding' means:

> any parcel of agricultural land (which expression includes land suitable for dairying purposes) of an area of not less than 5 acres held by a tenant under a landlord.[412]

The term 'agriculture' will extend to a wide variety of farming activity as long as the area of land is at least 5 acres.[413] A landlord under Division 6 is defined as an absolute owner of the holding (subject to a contract of tenancy) entitled to possession of the holding.[414]

A provision in a contract of tenancy is unenforceable if it limits the right of a tenant to compensation in respect of an improvement unless the contract of tenancy:

- Specifies the improvement;
- Places an obligation upon the tenant to make such an improvement within the terms of the tenancy; and

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[408] Queensland Law Reform Commission, *A Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing, Property and Contract and to Terminate the Application of Certain Imperial Statutes* Report No. 16 (1973) 95.
[409] *Property Law Act 1974* (Qld) s154(1)(b).
[410] *Property Law Act 1974* (Qld) s153.
[411] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.3130].
[412] *Property Law Act 1974* (Qld) s153.
[413] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.3070].
[414] Commentary about mortgagees and Division 6 of the PLA suggests that the definition of landlord would exclude mortgagees and that 'on default under a mortgage, the mortgagee is capable of disposing of the whole interest in the holding and … for the purposes of the section may become a landlord upon default only.' See Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.3080].

- Specifies the amount of compensation payable (if any).[415]

The provisions of Division 6 are expressly stated to be in addition to any other right, power or privilege of a tenant arising under an agreement or otherwise.[416]

Division 6 of the PLA does not apply to a lease or licence from the Crown under any law in force relating to the leasing and occupying of Crown land.[417] Most of the larger pastoral properties in Queensland are still State lease-holdings which are subject to a separate regime under the *Land Act 1994* (Qld). The arrangements in relation to fixtures and improvements under that Act depend on the type of improvement and the way in which the lease ended. Section 157(2) of the *Land Act 1994* (Qld) provides that, subject to both Chapter 5, part 5 of the Act and the conditions of a lease, the improvements on the lease become the property of the State when the lease expires. However, if a lease is forfeited or surrendered the former lessee can only remove the lessee improvements with the written approval of the Minister.[418] Commentary on this issue suggests that:

> ..the State's rights during the term of a lease to improvements that are fixtures (which are the same as those it has in respect of land in general the subject of a lease) will be subject to the rights it has granted to the lessee in relation to their use and enjoyment and 'will not [if the right of removal is subsisting] stand in the way of … [a lessee] exercising dominion over them once the … [lease] is no longer in force.'[419]

Under the *Land Act 1994* (Qld), where a lease is forfeited, surrendered or expires and the State receives payment from an incoming lessee or buyer for improvements on the land, then the State must pay the amount to the previous lessee.[420]

13.1.3. How does Division 6 operate?

An overview of the key provisions in Division 6 is set out below.

13.1.3.1. Section 155 – Tenant's property in fixtures

Section 155(1) gives the tenant a right to remove certain fixtures at any time during the tenancy or within 2 months after the tenancy has terminated. The fixture remains the property of the tenant for as long as the tenant has a right of removal under the PLA. The fixtures that a tenant is able to remove under section 155(1) are any engine, machinery, fencing or other fixture affixed to a holding by the tenant of the holding and any building erected by the tenant on the holding.[421] The tenant must not do any avoidable damage to any other building or other part of the holding when removing a fixture or building under section 155(1) of the PLA.[422]

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[415] *Property Law Act 1974* (Qld) s154(2).
[416] *Property Law Act 1974* (Qld), s154(3).
[417] *Property Law Act 1974* (Qld), s154(2).
[418] *Land Act 1994* (Qld), s243(1) and 327I.
[419] Extracted from Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters (Chris Boge (Land Act 1994)) [Thomson Reuters] 22585 [L246.8].
[420] *Land Act 1994* (Qld) s247.
[421] A tenant is not entitled to remove a building on the holding if the tenant is entitled to compensation under the PLA (or otherwise) in relation to the building.
[422] *Property Law Act 1974* (Qld) s155(4).

The right of removal is subject to:

- The tenant performing his or her obligation under the lease, including paying all rent owing; and
- The tenant giving notice of intention to remove the fixture at least 1 month before both the exercise of the right and termination of the tenancy.[423]

If the landlord gives the tenant a counter notice before the notice period expires in writing electing to purchase a fixture or building, the right to remove the fixture under section 155(1) ceases, in addition to it no longer remaining the property of the tenant.[424] However, the landlord is liable to pay the tenant fair value of that fixture or building.[425]

The section applies subject to any agreement to the contrary contained in the contract of tenancy.[426]

13.1.3.2. Section 156 – Tenant's right to compensation

Section 156 of the PLA provides a tenant with a right to compensation in relation to certain specified fixtures and improvements that are not removed by the tenant under section 155.[427] These improvements are set out in Schedule 4, Parts 1 and 2 and include:

- Drainage of land;
- Erection or enlargement of buildings;
- Making of fences;
- Formation of silos;
- Making of water meadows or works of irrigation;
- Making of dams for the conservation of water, or wells;
- Clearing of land;
- Liming of land;
- Manuring or fertilising of land with purchased artificial or other purchased manures or fertilisers;
- Laying down pasture with clover, grass, Lucerne, sainfoin, or other seeds sown more than 2 years prior to the determination of the tenancy;
- Making of plantations of bananas or pineapples; planting of sugarcane; and
- Planting of orchards with fruit trees permanently set out.

Commentary on this section notes that:

> This section alters the common law rule that a tenant was not entitled to compensation where the tenant had improved the land and quit the holding. Such a rule could always be altered by a

[423] *Property Law Act 1974* (Qld) s155(2)
[424] *Property Law Act 1974* (Qld) s155(3).
[425] *Property Law Act 1974* (Qld) s155(3).
[426] *Property Law Act 1974* (Qld) s155(5).
[427] In some cases it may be difficult to remove some fixtures or improvements such as fencing which is why a tenant is unable to rely upon section 155 of the PLA in relation to objects of this type: Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.3130].

> compensation agreement contained in the lease itself. Compensation is now governed by this Division.[428]

The improvements included in Schedule 4 have not been amended since the PLA came into force in 1975.

13.1.3.3. Section 157 – Intended improvements

Section 157 of the PLA is closely linked to section 156. Compensation is not payable in relation to any improvement under Schedule 4, part 1 unless, prior to carrying out the particular improvement, the tenant has given the lessor 'not more than three months' nor less than two months' written notice of her or his intention to do so.[429] The landlord may object to the proposed improvements and refer the matter to arbitration.[430] The arbitrator has two options under section 157 as follows:

- If satisfied that the proposed improvement will increase the value of the holding to an incoming tenant and will be a 'suitable and desirable' improvement, the arbitrator shall make an award accordingly and the tenant will be entitled to compensation for every improvement made under the award;[431] and
- If satisfied that the improvement will not increase the value of the holding to an incoming tenant, and will be an 'unsuitable and undesirable improvement', the tenant shall not be entitled to compensation if the tenant makes the improvements notified.[432]

If the tenant and landlord do not enter an agreement within 1 month after the notice is given or if the matter is referred to arbitration, then within 1 month after the award by the arbitrator is made, the landlord may undertake to make the improvement and charge the tenant interest for the improvements at the rate specified in the section.[433] The landlord is not able to make the improvement if the notice of the tenant is previously withdrawn.[434] The tenant is entitled to make the improvement and claim compensation in default of any agreement or the lessor not making the improvement within a reasonable period of time.[435]

13.1.3.4. Section 158 – Agreements

This section enables a landlord and tenant to dispense with any notice required under Division 6 by agreement or conduct and enter into an agreement regarding by whom and the mode in which any improvement is to be made in addition to payment of compensation or other money.[436] This provision

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[428] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.3130].
[429] *Property Law Act 1974* (Qld) s157(1). The section only refers to improvements listed in Part 1 of Schedule 4. These proposed improvements will require notice in accordance with s157 of the PLA. However, the section does not apply to improvements listed in Part 2 of Schedule 4. As a consequence, any lack of notice will not affect a tenant's right to compensation.
[430] *Property Law Act 1974* (Qld) s157(2).
[431] *Property Law Act 1974* (Qld) s157(2A).
[432] *Property Law Act 1974* (Qld) s157(2B).
[433] *Property Law Act 1974*(Qld) s157(3).
[434] *Property Law Act 1974* (Qld) s157(3).
[435] *Property Law Act 1974*(Qld) s157(4).
[436] *Property Law Act 1974* (Qld) s158(1)(a).

is subject to section 154(2) which provides that a contract of tenancy will be unenforceable in so far as it takes away or limits the right of a tenant to compensation in relation to an improvement.[437] The matters required to be included in the tenancy agreement under section 154(2) are:

- the particular improvement or improvements;
- that the tenant is required to make the improvement; and
- the compensation (if any) that is payable in relation to the improvement.

If the agreement provides for compensation then this is deemed to be substituted for any compensation payable under Division 6 and no further right to compensation will be available under that Division.[438]

13.1.3.5. Section 164 - Contract of tenancy and mortgagee in possession

Section 164(1) of the PLA enables a tenant to claim compensation from a mortgagee where it is or would have been due to the tenant from the mortgagor. The entitlement arises where there is a contract of tenancy with the mortgagor and the land is mortgaged at the time the contract is made or is subsequently mortgaged and the mortgagee enters into possession of the holding.[439] The mortgagee in possession is required to give the tenant 6 months written notice that the mortgagee intends to 'deprive the tenant of possession of the holding'.[440] The mortgagee has additional obligations in relation to paying compensation and is required to pay for the tenant's crops and any expenditure made by the tenant in the expectation of holding the land for the full term of the tenancy which is being brought to an early end.[441] In all other respects, the mortgagee is effectively deemed to be the landlord.[442]

13.1.3.6. Other provisions

The other provisions of Division 6 of the PLA are:

- Section 159 which provides that in the absence of an agreement between the parties, every matter or question arising under Division 6 shall be determined by arbitration under Schedule 5. That Schedule sets out the applicable arbitration rules;
- Section 160 sets out the notice requirement for a claim for compensation. Under the section a claim for compensation is not enforceable unless at least two months before the 'determination of the tenancy' the tenant gives notice in writing to the landlord claiming compensation.[443] A landlord is entitled to claim a set-off by giving notice within one month of the tenant's notice of intended claim;[444]
- Section 161 sets out a number of rules to guide the arbitrator in ascertaining the amount of compensation payable to the tenant in respect of any improvements made by the tenant. The

[437] *Property Law Act 1974* (Qld) s158(1)(b).
[438] *Property Law Act 1974* (Qld) s158(2).
[439] *Property Law Act 1974* (Qld) s164(1).
[440] *Property Law Act 1974* (Qld) s164(2).
[441] *Property Law Act 1974* (Qld) s164(3).
[442] *Property Law Act 1974* (Qld) s164(4).
[443] *Property Law Act 1974* (Qld) s160(1).
[444] *Property Law Act 1974* (Qld) s160(2).

rules also include specified set offs against improvements which the arbitrator can take into account including any sum due to the landlord from the tenant for rent or otherwise;[445]

- Section 162 enables the recovery of an arbitrator's award in the District Court if it is not paid within 14 days;
- Section 163 addresses the situation where the landlord is a trustee entitled to receive the rents and profits;
- Section 165 permits an incoming tenant to be compensated by a landlord where that tenant has paid compensation directly to the outgoing tenant with the written consent of the landlord;
- Section 166 provides that a tenant does not lose his or her right to compensation because of a change or changes in 'tenancy';[446] and
- Section 167 enables the landlord (or any person authorised by the landlord) to enter the holding for the purpose of viewing the 'state' of the holding.

13.2. Is there a need for reform?

13.2.1. The Division is not known well and relied upon rarely in practice

Written feedback from experienced rural practitioners suggests that this part of the PLA is not generally used or relied upon in practice. The parties to leases that would fall within the scope of Division 6 conduct business by agreements which include clauses addressing the installation and removal of fixtures and improvements. There is an absence of any significant case law in Queensland in relation to Division 6. The last case in Queensland was in 1999 and was an application seeking a declaration that an oral arrangement entered into between the parties was not a contract of tenancy for the purpose of section 153 of the PLA.[447] There have been decisions under the previous Queensland Act in 1933 and 1955.[448] Clearly, to the extent that the Division has been used, Court decided disputes have been limited.

13.2.2. The Division is out of step with commercial practice

The section arguably serves little purpose. As indicated above, it seems that the general practice in Queensland is to deal with issues of improvements in relation to agricultural holdings in the terms of the lease. The view in practice appears to be that the appropriate time to address the issue of fixtures and improvements is when the terms of the lease are being negotiated and to have the agreed terms clearly documented in the lease. The clauses dealing with improvements will often include a term that

[445] *Property Law Act 1974* (Qld) s161(c).
[446] Duncan & Vann *Property Law and Practice in Queensland* WD Duncan, A Wallace (eds) (looseleaf) Thomson Reuters [8.3460].
[447] See *Zoch v Burke* [1999] QSC BC9906260. The declaration sought was refused as the parties were directed to file a statement of claim and notice of intention to defend and defence respectively to enable the application for the relief sought to be properly considered.
[448] See *Wylie & Gibson v McDermott* [1933] St R Qd 1 and *Re Brown; Morrison's Arbitration* [1955] St R Qd 223. In *Re Brown* the parties could not agree on compensation payable under the *Agricultural Holdings Act 1905* (Qld) for improvements made. The matter went to arbitration and the Arbitrator subsequently referred it to the Full Court for opinion.

compensation for the relevant improvements have been taken into account when calculating the consideration or rental payable and that no additional compensation is payable. A summary of some of the key matters often addressed in lease agreements for agricultural holdings include:

- The condition of, and maintenance responsibility for, existing fencing and sheds;
- Use of water entitlements. This can cover maintenance responsibility for water pumps and dealings with water entitlements more generally. In the case of bores, these are usually identified in the lease along with information about whether or not they are equipped with pumps (working or not working). Submersible pumps can usually be removed at the end of the lease if a tenant has installed them and obligations in relation to larger pumps for irrigation are usually included in the lease terms;
- Husbandry obligations for the land;
- Entitlement to crops that may be planted towards the end of the lease; and
- Removal of improvements constructed with the lessor's consent. The relevant clause may permit the removal of these by the lessee at his or her cost, without any rights of compensation.

13.2.3. Not all agricultural tenancies are formed with the benefit of legal advice and a detailed agreement

There are, undoubtedly, contracts of tenancies created by short letters or emails between the landlord and the tenant and possibly an agent which are not reviewed by a legal practitioner at all and which do not incorporate terms regarding fixtures and improvements. Again, evidence from practitioners suggests that they only see a small percentage of lease and share-farming transactions that actually take place. Accordingly, the value of Division 6 may be its role as a default regime where the relevant issues are not addressed in the agreement reached between the parties.

13.2.4. Other issues with Division 6 of the PLA

13.2.4.1. Schedule 4 of the PLA requires updating

As indicated in Part 13.1.3.2 above, section 156 of the PLA provides a tenant with a right to compensation in relation to certain specified improvements that are not removed by the tenant under section 155. The improvements are prescribed and set out in Schedule 4 of the PLA. However, the categories listed have not been reconsidered or revised since the PLA commenced in 1975. Changes in land use practices since 1975 have not been considered for the purposes of the improvements listed in the Schedule. Further, it is unclear what is covered by the term 'wells' for the purpose of Item 6, Part 1 of the Schedule and whether a bore is covered. Other uncertainties include:

- Whether the term 'works of irrigation' includes pipelines or centre pivots;
- Updating Part 2 of Schedule 4 to expressly identify the increased adoption of leucaena-grass pastures which is commonly planted as an improvement; and

- Addressing improvements such as cell grazing fencing[449] and contour banking.[450]

13.2.4.2. Arbitration in the absence of agreement between the parties

Division 6 of the PLA has adopted an arbitration process for any matter or question arising under the Division where the parties have not reached agreement.[451] Matters or questions that may arise under the Division include the amount of compensation the tenant is entitled to under section 156 of the PLA. The arbitration process to be followed in relation to an issue arising under Division 6 is set out in Schedule 5 of the PLA.[452] In relation to assessing the amount of compensation payable to a tenant for improvements, section 161 of the PLA sets out rules which the arbitrator is required to use as a 'guide'.

Leaving aside the separate issue of the appropriateness of the use of arbitration in relation to this Division more generally, there are some other aspects of the arbitration framework under Division 6 which requires further consideration including:

- The default referral of the choice of arbitrator to the Minister in the absence of agreement between the parties;[453] and
- Whether the absence of a requirement that the relevant arbitrator appointed have any specific expertise in relation to agricultural matters, including valuation skills is an issue in practice.

The other more general issue is whether arbitration is the most appropriate dispute resolution mechanism for the purposes of Division 6. In New South Wales agricultural fixtures and improvements are regulated under *Agricultural Tenancies Act 1990* (NSW). An 'owner' or tenant can apply to the Civil and Administrative Tribunal for determination of any disputes arising under that Act. The operation of the *Agricultural Tenancies Act 1990* (NSW) is discussed in more detail in Part 13.3 below.

13.2.4.3. Crops planted towards the end of a tenancy

It appears that in practice there is some uncertainty regarding the approach in relation to crops planted towards the end of a tenancy, particularly where these do not produce a yield until after the tenancy comes to an end. Division 6 does not specifically address this issue and there does not appear to be a settled and accepted approach in practice.

[449] Fixed cell grazing systems can require significant infrastructure outlays for fencing and stock water systems and associated labour etc.
[450] Contour banking can require significant financial outlay and once undertaken can benefit the land in terms of erosion control (and prevention) for an extended period of time.
[451] *Property Law Act 1974* (Qld) s159(1).
[452] *Property Law Act 1974* (Qld) s159(1).
[453] *Property Law Act 1974* (Qld) Schedule 5, Pt 1, item 1

13.3. Other jurisdictions

13.3.1. Australia

New South Wales, Victoria and Tasmania have legislation in place which provides a statutory right to remove agricultural fixtures. Table 1 below sets out a brief overview of the rights provided.

Table 1 – Removal of fixtures in other jurisdictions

Jurisdiction	Application	Fixture or Improvement	Fixture property of tenant?	Tenant can remove fixtures?	Notice required?
NSW[454]	Farm[455]	Both.[456]	Yes[457]	Yes[458]	Yes[459]
Victoria[460]	Rented premises	Fixture, renovated, altered or added to rented premises.[461]	Yes	Yes	No[462]
Tasmania[463]	Farm or lands	Farm-building, other building, engine, machinery[464]	Yes	Yes	Yes[465]

[454] *Agricultural Tenancies Act 1990* (NSW).
[455] 'Farm' is defined to mean 'a piece of land not less than 1 hectare in area occupied or used by a tenant and which is wholly or mostly used or intended to be used for agricultural purposes. The term 'agricultural purposes' is then defined to mean 'grazing, dairying, pig-farming, poultry farming, viticulture, orcharding, bee-keeping, horticulture, vegetable growing, the growing of crops of any kind, forestry, or any combination of those things: *Agricultural Tenancies Act 1990* (NSW) s4(1).
[456] The term 'improvement' means any work or thing carried out on a farm in the course of a tenancy, being a work or thing that would be of value to an incoming tenant, but does not include the repair or replacement of any work or thing on the farm when the tenant first became a tenant: *Agricultural Tenancies Act 1990* (NSW) s4(1). The term 'fixture' is defined in the context of section 10 to include a building: see s10(6).
[457] This is not expressly stated but it is implicit as the fixture becomes the property of the owner of the land if the owner decides to purchase the fixture from the tenant: *Agricultural Tenancies Act 1990* (NSW) s10(4).
[458] It is an implied term of the tenancy that the fixture can be removed by the tenant: *Agricultural Tenancies Act 1990* (NSW) s10(1)). In the case of fixtures, compensation is payable where the owner decides to purchase the fixture: *Agricultural Tenancies Act 1990* (NSW) s10(4). The compensation to be paid needs to be 'fair'.
[459] The tenant must provide reasonable oral or written notice to the owner: *Agricultural Tenancies Act 1990* (NSW) s10(3).
[460] *Property Law Act 1958* (Vic).
[461] The Act refers to 'fixtures on, or renovated, altered or added to, a rented premises': *Property Law Act 1958* (Vic) s154A(1).
[462] Any removal of fixtures must occur before the agreement terminates or during any extended period of possession of the premises: *Property Law Act 1958* (Vic) s154A(1).
[463] *Landlord and Tenant Act 1935* (Tas).
[464] Either for agricultural purposes or for the purposes of trade and agriculture. Consent of the landlord is required for the erection of the buildings and fixtures.
[465] Compensation is payable if after receiving notice from the tenant to remove the fixtures the landlord elects to purchase them. The compensation payable is the 'value' of the fixtures and buildings: *Landlord and Tenant Act 1935* (Tas) s26(2).

In Victoria, the tenant's statutory entitlement to remove fixtures is not available if the lease provides otherwise or the landlord and tenant agree otherwise.[466] These jurisdictions vary in the case of 'improvements'. The Tasmanian legislation appears to only address the issue in relation to tenant's right to remove fixtures (and buildings) erected with the consent of the landlord. The Victorian provision also expressly relates only to the removal of fixtures installed on a 'rented premises' and 'renovations, alterations or additions to rented premises'. Neither the Tasmanian nor the Victorian legislation explicitly refers to improvements. The *Agricultural Tenancies Act 1990* (NSW) regulates both fixtures added, and improvements made to, farms in New South Wales. The Act distinguishes between improvements carried out by the tenant and fixtures affixed to a farm by a tenant. As discussed above, the Act provides the tenant with a right to remove these fixtures.[467] However, there are a number of sections in the Act which address the issue of improvements carried out by tenants with or without consent of the landlord.[468] Further, improvements carried out by the 'owner' of the farm with or without the consent of the tenant also fall within the scope of the Act.[469] The word 'improvement' is defined to mean:

> any work or thing carried out on a farm in the course of a tenancy, being a work or thing that would be of value to an incoming tenant, but does not include the repair or replacement of any work or thing on the farm when the tenant first became a tenant, except as provided by this Act.

Compensation is payable to a tenant under the New South Wales Act for improvements made by the tenant.[470]

There is no statutory right given to a tenant in the Australian Capital Territory, Northern Territory, South Australia or Western Australia to remove fixtures affixed to agricultural land during a tenancy.

13.3.2. New Zealand

New Zealand has adopted a single provision in its *Property Law Act 2007* (NZ) to specifically address the issue of the removal of fixtures affixed by a lessee.[471] A lessee has a right to remove any 'trade, ornamental or agricultural fixture' that the lessee has affixed to any leased premises.[472] The removal of the fixture must occur either while the lessee is in lawful possession of the premises or during a reasonable period after the lessee ceases to be in lawful possession of the premises.[473] The general right of removal is subject to agreement to the contrary between the lessee and lessor.[474] The exercise of the removal right is subject to some conditions including the requirements that the lessee:

- Causes as little damage as possible to the leased premises; and
- Making good any damage caused during the removal; and

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[466] *Property Law Act 1958* (Vic) s154A(3).
[467] *Agricultural Tenancies Act 1990* (NSW) s10(1).
[468] *Agricultural Tenancies Act 1990* (NSW) ss 6 & 7.
[469] *Agricultural Tenancies Act 1990* (NSW) ss 8 & 9.
[470] *Agricultural Tenancies Act 1990* (NSW) s15. An owner is also entitled to compensation if the owner is responsible for the improvement: s16.
[471] Section 266 of the *Property Law Act 2007* (NZ) uses the terms 'lessee' and 'lessor'.
[472] *Property Law Act 2007* (NZ) s266(1).
[473] *Property Law Act 2007* (NZ) s266(1)(a)(b).
[474] *Property Law Act 2007* (NZ) s266(2).

- Compensating the lessor if any damage is not made good by the lessee.[475]

The section does not cover 'improvements' made by the lessee during the tenancy. The New Zealand Law Commission when discussing the issue of agricultural fixtures noted that:

> The Law Commission has the impression that lessees of New Zealand farms and their advisers do not place much (if any) reliance upon this Imperial Act; that people taking leases of farms either ensure that they have express written agreement enabling them to remove fixtures or incorrectly rely upon the general exception for trade fixtures without realising that is does not apply.[476]

The Law Commission agreed with an earlier proposal that it was unnecessary to have a separate regime for agricultural fixtures and that these should be treated in the same way as trade fixtures.[477]

13.4. Options

Any possible options regarding Division 6 of the PLA depends significantly on the extent to which the provision is currently used in practice. The Division could be simplified and agricultural fixtures could be treated in a similar way to other fixtures – that is, the tenant has a right to remove them within the parameters of the relevant provision. This would mean that sections dealing with improvements would be removed from the Division and simply addressed within the terms of the lease agreement in place between the parties. Further consideration of this Division is required following any submissions received on this issue.

Questions

74. **Are you aware of the extent to which Division 6 might still be relied upon in relation to leases that fall within its scope?**

75. **Is the Division still relevant in the light of modern leasing practice?**

76. **To what extent do current lease agreements for agricultural land address the issue of fixtures and improvements?**

77. **Is there a generally accepted standard clause in lease agreements in relation to agricultural fixtures and improvements? If so, how are fixtures and improvements addressed?**

78. **Is there a standard approach in lease agreements in relation to crops planted before a tenancy expires but which cannot be harvested until after the tenancy comes to an end?**

79. **What dispute resolution clauses are included in lease agreements for agricultural holdings?**

[475] *Property Law Act 2007* (NZ) s266(3(a)-(d).
[476] New Zealand Law Commission, *The Property Law Act* 1952, Preliminary Paper No. 16 (1991) 190 [593]. The Imperial Act was the Landlord and Tenant Act 1851 s3.
[477] New Zealand Law Commission, *The Property Law Act 1952* (Preliminary Paper No. 16, (1991) 190 [595] and [596]. The Final Report did not alter the position: Law Commission, *A New Property Law Act,* Report No. 29, (1994) 26 [96].

80. **Are the unremoved fixtures and improvements specified in Schedule 4 of the PLA covered in standard lease agreements?**

81. **Should a tenant of an agricultural holding be able to claim compensation for fixtures which cannot be removed under statutory provisions or should this be a matter between the parties?**

82. **Do you think improvements generally should be dealt with under the PLA or left to the parties to negotiate and manage as part of the lease agreements?**

83. **Do you think Division 6 of the PLA should be retained?**

84. **If so:**

    a. **Do you think agricultural fixtures should be dealt with any differently from other fixtures?;**
    b. **Should improvements be included in the Division?;**
    c. **Should parties be able to contract out of the provisions?**

85. **Do you think the use of arbitration to resolve disputes under Division 6 is a suitable model to resolve disputes? If not, what other approaches may be appropriate?**

86. **If the provisions relating to improvements remain, do you think any assessment of compensation should be carried out by an 'expert' qualified to 'value' agricultural improvements and fixtures?**

87. **Does Schedule 4 of the PLA reflect modern farming practices in terms of improvements?**

88. **Are there items in Schedule 4 which should be excluded or are there matters which should be incorporated into the Schedule to reflect current agricultural practices in relation to improvements?**

89. **Do you think there is any need to limit the items listed in Schedule 4 at all? If so, why? If not, why?**

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APPENDIX A: *Property Law Act 1974* (Qld) – Part 8 Proposed Preliminary Recommendations

PROPERTY LAW ACT 1974 (QLD)		
PART 8 LEASES AND TENANCIES		**PROPOSED APPROACH**
Division 1 Rights, powers and obligations		
102(1), (2), (4), (5) & (6)	Abolition of interesse termini as to reversionary leases and leases for lives	Retain and redraft for clarity and simplified language.
104	Voluntary waste	Retain and redraft for clarity and simplified language.
107	Powers in lessor	Retain and redraft for clarity and simplified language.
109	Short forms of covenants and obligations of lessees	Retain and redraft for clarity and simplified language.
110	Cases in which statutory obligations or powers not implied	Retain and redraft for clarity and simplified language.
111	Lessee to give notice of ejectment to the lessor	Retain and redraft for clarity and simplified language.
112	Provisions as to covenants to repair	Amend. Section 112(1) should be redrafted to clarify that it applies to both a breach of a repair covenant and the failure to make good following the end of the lease. Section 112(2) should be repealed as section 124 of the PLA covers the same matters. Section 112(3) which sets out the notice process should be repealed in order to prevent duplication of provisions. Notices under the PLA are dealt with in section 347. Section 112(4) should be retained subject to consideration of appropriate transitional provisions generally in relation to any proposed legislation.

PROPERTY LAW ACT 1974 (QLD)		
Division 2 Surrenders, assignments and waiver		
113	Head leases may be renewed without surrendering under-leases	Retain and redraft for clarity and simplified language.
114	Provisions as to attornments by tenants	Subject to repealing section 114(1)(b), retain and redraft for clarity and simplified language. Section 114(1)(b) refers to the creation or conveyance of a rent charge to issue or issuing out of the land. Section 176 prohibits the creation of rent charges created after the commencement of the PLA. It is highly unlikely that any rent charges prior to the commencement of the PLA still exist. Section 114(1)(b) should be repealed on the basis that it is now obsolete.
115	When reversion on a lease is surrendered etc. the next estate to be deemed the reversion	Retain and redraft for clarity and simplified language.
116	Apportionment of conditions on severance	Retain subject to the contrary agreement of the parties and the requirements of the *Land Title Act 1994* (Qld).
117	Rent and benefit of lessee's covenants to run with the reversion	Retain and redraft for clarity and simplified language.
118	Obligation of lessor's covenants to run with reversion	Retain and redraft for clarity and simplified language.
122	Involuntary assignment no breach of covenant	Retain and redraft for clarity and simplified language.
Division 3 Relief from forfeiture		
123	Definitions for div 3	Apart from the definition of 'lease' which may require amendment, retain and redraft for clarity and simplified language. Similarly, the definition of 'proceedings' should be updated in accordance with the *Uniform Civil Procedure Rules*.
123A	Application of div 3	Retain and redraft for clarity and simplified language.

PROPERTY LAW ACT 1974 (QLD)		
124	Restriction on and relief against forfeiture	Retain with two amendments. Firstly, removing section 124(6)(b) which relates to a breach of a covenant, condition or agreement against assigning etc which occurred before the commencement of the PLA. The provision is obsolete. The second amendment relates to section 126 and is explained below in that section.
125	Power of court to protect under-lessee on forfeiture of superior leases	Retain and redraft for clarity and simplified language.
126	Costs and expenses	Repeal and relocate part of the section by inserting into section 124(1) the words 'all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer or otherwise' after the word 'compensation' in section 124(1).
127	Relief against notice to effect decorative repairs	Repeal. This provision is obsolete.
Division 4 Termination of tenancies		
130	Notice of termination of tenancy	Retain and redraft for clarity and simplified language.
131	Form and contents of notice	Retain and redraft for clarity and simplified language.
132	Manner of giving notice	Retain and redraft for clarity and simplified language.
133	Notice to terminate weekly tenancy	Retain and redraft for clarity and simplified language.
134	Notice to terminate monthly tenancy	Retain and redraft for clarity and simplified language.
135	Notice to terminate yearly tenancy	Retain and redraft for clarity and simplified language.
136	Notice to terminate other periodic tenancy	Retain and redraft for clarity and simplified language.
137	Notice to terminate other tenancies	Retain and redraft for clarity and simplified language.