

# THE LAST CHAPTER IN QUEENSLAND PROPERTY LAW UPDATING AND CONSOLIDATION?

## THE WORKING PAPER OF THE QUEENSLAND LAW REFORM COMMISSION ON THE REFORM OF THE REAL PROPERTY ACTS IN QUEENSLAND

By

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In this article, references to the "Act" or to a section or other portion of an Act are, unless the context requires otherwise, to the Real Property Acts 1861-1988 or the relevant portion thereof. Similarly, references to the "1877 Act", to the "1952 Act" or "1986 Act" are to the Real Property Acts 1877-1988, the Real Property Acts Amendment Act 1952 or the Real Property Acts and Other Acts Amendment Act 1986 respectively.

### 1. Introduction

In June 1989, the Queensland Law Reform Commission issued a Working Paper<sup>1</sup> dealing with the subject of the Real Property Acts in Queensland. The paper was circulated widely throughout the legal profession in Queensland, particularly, among the solicitor's branch, and to other interested parties, and invites comment. The closing date for submissions was stated in the Paper to be the 29 September 1989, but was expected to be extended in practice to the end of the year, as the practicalities of the matter were that no final report in respect of the Real Property Acts could be completed and submitted to the Minister until the early months of 1990. The practice of the Commission is to consider submissions on a Working Paper before submitting the final report on the matter to the Minister. The form of a report, which is not published by the Commission, is that it is a version of the relevant working paper, amended, where necessary, to take account of submissions received following its issue.

The Paper is the product of intensive work at the Commission over most of the period since the start of 1986, although earlier work at the Commission, notably that conducted by Mr Justice Ryan during his membership of the Commission between 1980 and 1984 laid a considerable amount of the groundwork. This earlier work culminated in the issue of a preliminary Working Paper dealing with the subjects of writs of execution, caveats, and bills of encumbrance and mortgages.<sup>2</sup> The outcome of this earlier Working Paper in terms of legislation and the legislative history of the Real Property Acts in Queensland up to and including the 1986 legislation was discussed in an earlier article by the author which was published in this Journal in 1986.<sup>3</sup> Accordingly, this article does not deal with any of these matters, nor repeat any matters contained in that earlier article, but is designed to complement its treatment of the subject.

In mid 1988, the Commission issued a very brief discussion paper containing, draft new sections 44 and 44A designed to replace the existing provisions of the Real Property Acts appertaining to the concept of indefeasibility of title and the related powers of the Court

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1. A Working Paper of the Law Reform Commission on a Bill in respect of an Act to reform and consolidate the Real Property Acts of Queensland, Q.L.R.C. W.P. 32.
2. Law Reform Commission: Working Paper on a Bill to amend the Real Property Acts with respect to those Provisions relating to Writs of Execution, Bills of Encumbrance and Bills of Mortgage, and Caveats, Q.L.R.C. W.P. 25.
3. A.A. Preece: Reform of the Real Property Acts in Queensland, (1986) 2 QITLJ 41.

to rectify the Register,<sup>4</sup> together with associated statutory definitions and a very brief commentary. The issue of such a discussion paper, in advance of the main working paper, is an unusual course of action for the Commission, but was felt to be justified in this case by the unique importance of the concept of indefeasibility of title, and its centrality to the whole Torrens system of registration of title to land. The Commission wished to gauge the reaction to this draft before completing the draft bill which is appended to the Working Paper.<sup>5</sup> The Discussion Paper was circulated widely to interested parties, in particular to solicitors practising in Queensland, by the vehicle of the Proctor. The Commission received very little comment on this Paper, and so determined that there was very little strong adverse reaction. In the outcome the provisions of the draft bill dealing with these matters, sections 6 (definitions), 39 (Estate of registered proprietor paramount) and 40 (Powers of Court to rectify Register) are substantially the same as the drafts in the Discussion Paper.

The only legislative developments in relation to the Real Property Acts since 1986 have been minor amendments which were effected by the *Real Property Acts Amendment Act 1988*. The Commission was fully consulted on this brief legislation which as well as making provision for the lodgment of documents by means of a document exchange (s.8), and simplifying the issue of certificates for subdivision of land in some special cases (s.6), implemented a proposal emanating from the Commission in relation to advertising requirements (discussed fully in Chapter X of the Working Paper which deals with advertising requirements) which had an immediate cost saving (ss.5,9). This was that no advertising should be necessary in the case of transmissions by death where a grant had been taken out, and the application is for transmission to the personal representative. In such cases the application for the grant has to be advertised and the personal representative is subject to the jurisdiction of the Court, so that requirement of further advertising is a severe case of overkill.

However, there was in 1988 an administrative development with a major bearing upon the process of review of the Real Property Acts. In June 1988, as part of a reorganisation of Government departments the new structure in the portfolio of the Minister for Lands, became that of four autonomous departments, one of which was to be a new Department of Freehold Land Titles, a department which included the Titles Office, which had formerly been part of the Department of Justice. The first Director of the Department of Freehold Land Titles has also been appointed Registrar of Titles, and it is expected that these two positions will be held by the same person for the foreseeable future. The other Departments in the Portfolio of the Minister of Lands are the Land Administration Commission, the Department of the Valuer-General and the Department of the Surveyor-General, which is now called the Department of Geographic Information.

One of the expressed reasons in favour of this administrative reorganisation was the collection under one Minister of all departments intimately concerned with the collection and processing of information relating to land. It was believed this would assist in achieving a comprehensive and efficient computerised land information system in Queensland. As part of the reorganisation there were also to be two people in a Land information Unit to liaise regarding the establishment of an efficient land information system.

The new department of Freehold Land Titles was made responsible for the Property Law Act and Building Units and Group Titles Act as well as the Real Property Acts.

Since the Master and Deputy Masters remained under the administrative control of the Justice Department, a temporary arrangement was immediately negotiated between the acting Director of the new department, the Acting Registrar, the Under Secretary of Justice and

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4. Sections 44, 109, 123 and 126 of the 1861 Act, ss.11 and 50 of the 1877 Act and the provisions relating to the acquisition of a title by adverse possession contained in the Real Property Acts Amendments Act 1952.

5. Q.L.R.C. W.P. 32, Appendix, Part 1, 199.

the Solicitor-General, whereby the services of the current personnel continued to be made available.

Queensland has been in the unusual position, as compared with other jurisdictions employing a Torrens system of title registration by having an office of Master of Titles. The Master's role has extended mainly to vetting applications to bring titles under the Real Property Acts, transmission by death and applications for titles by adverse possession. The first role has essentially ended with the completion of the process of bringing land under the Acts, the last role is small in that there are only about a dozen such applications a year. The second role is substantial but to some extent involves a second guessing of the role of the personal representative, who is subject to the separate supervisory jurisdiction of the Supreme Court. The pros and cons of retaining the position of Master are discussed at length in the Working Paper,<sup>6</sup> leading to the Commission's recommendation that the Master and Deputy Masters be replaced with a legal officer or team of legal officers, in order to improve the speed with which the Registrar of Titles may obtain high quality legal advice. As a result of administrative decisions, this objective was achieved early in 1989, although the legal officer currently retains the position of Master of Titles, since it is a statutory one, which will remain unless and until abolished by Statute.

As the administrative change affects ministerial responsibility for the Real Property Acts, it means that the Commission will ultimately report in this matter to the Minister of Lands as well as to the Minister for Justice and Attorney-General. This will be the first time since the Commission's inception in 1969 that it has reported to another Minister, although it is understood that the Working Paper<sup>7</sup> issued at the end of 1986, dealing with the *Property Law Act 1974-1986* has been passed over to the Minister of Lands for implementation. The completion of the reference of the Real Property Acts will also be the last major instalment of the Commission's very extensive work in the field of property law, whose legislative results began with the enactment of the *Trusts Act* in 1973, and continued with the *Property Law Act* in 1974 and the *Succession Act* in 1981.

The Working Paper is structured in such a way as to deal at length in individual Chapters with key areas such as indefeasibility of title, the position of volunteers, unregistered interests, assurance of title and compensation, mortgages, leases, easements and trusts, restrictive covenants, advertising requirements, caveats and writs of execution. Also, there are several introductory Chapters dealing with such matters as the legislative history of the Real Property Acts and identifying particular needs for reform. All this discussion leads up to the draft bill which is set out in Part 1 of the Appendix, and is followed by a section by section commentary on this draft in Part 2 of the Appendix. This commentary refers at appropriate points to detailed discussion of particular topics in the earlier part of the Working Paper. The remainder of the Paper consists of a table of destinations of the existing provisions of the Real Property Acts (Part 3 of the Appendix), which are all proposed to be repealed, selected comparisons with South Australia and Victoria (Part 4 of the Appendix), a very brief statement of the impact of the draft bill on other legislation (Part 5 of the Appendix) and concludes with a brief summary of the main recommendations for the convenience of readers (Part 6 of the Appendix), a general index and table of cases.

The remainder of this article summarises the main reforms proposed in the Working Paper.<sup>8</sup>

## 2. Consolidation of existing legislation

The draft bill repeals and consolidates the existing Real Property Acts into a single Real

6. Ibid. at 23-25.

7. Q.L.R.C. W.P. 30.

8. A brief summary of the main recommendations is set out in Part 6 of the Appendix to the Working Paper, at 316.

Property Act of 94 sections and 4 schedules, to be retained as a separate legislative enactment from the *Property Law Act* 1974-1986 and the *Building Units and Group Titles Act* 1980-1988.

The legislation relating to the Torrens system in Queensland is currently spread over the following Acts, not counting legislation which merely amends or repeals earlier legislation:

*Real Property Act* 1861-1988

*Real Property Act* 1877-1988

*Real Property (Commonwealth Defence Notification) Act* 1929

*Real Property (Commonwealth Titles) Act* 1924

*Real Property (Local Registries) Act* 1887

*Real Property Acts Amendment Act* 1952

*Real Property Acts Amendment Act* 1956-1974

*Real Property Act Amendment Act* 1976

*Real Property Act Amendment Act* 1978

*Real Property Acts Amendment Act* 1979

*Registrar of Titles Act* 1884

The draft bill provides in s.5 for the repeal of all this legislation.

### 3. The bringing of remaining old system land under the Real Property Acts

The remaining amount of old system land is understood to be now only of the order of 100 parcels. In order to avoid cluttering the new legislation, this is provided for in the savings provisions and is intended to be brought under the Real Property Acts as soon as possible by use of the powers contained in s.250 of the *Property Law Act* 1974-1986. Virtually all this land involves some special factor which has prevented its registration under the Torrens system. A number of parcels are Railway Department land, others are obscure pieces forming parts of roads, others have missing owners. There is no practical way of dealing with them other than by the exercise of the compulsory powers under the *Property Law Act* 1974-1986.

### 4. Simplification of the legislation

Simplification of the legislation has been proposed through much more extensive use of appropriate defined terms (see ss.6 and 7 of the Bill), and reconciliation of this terminology with that employed in the *Acts Interpretation Act* 1954-1977, and other property legislation, such as the *Property Law Act* 1974-1986, and the *Succession Act* 1981-1986.

Examples are the use of the term "registered land" as in s.4 of the *Property Law Act* 1974-1986, in place of the much more cumbersome, and frequently occurring "land under the [provisions of the] Real Property Act", "Registrar" in place of "Registrar of Titles", "office" in place of "office of the Registrar of Titles" and "lodged" and "produced" in place of "lodged and/or produced at the office of the Registrar of Titles".

Provision is made in s.7<sup>9</sup> that appropriate references to persons, include personal representatives, trustees in bankruptcy, attorneys and solicitors etc. so that express references to these persons do not have to be made anywhere else in the Bill.

Another vehicle of simplification has been the combination of a number of provisions dealing with the same subject matter, often widely spread through the legislation, into one new provision. Examples of this are s.18 combining the provisions relating to advertising requirements which were previously spread through ss.19, 89, 95 and 117 of the 1861 Act, s.33 of the 1877 Act and s.55 of the *Real Property Acts Amendment Act* 1952, and s.25 and the Third Schedule, combining the provisions relating to the issue of certificates of title which were previously comprised in ss.10A, 33, 49, 50, 94 and 119 of the 1861 Act and

9. Q.L.R.C. W.P. 32, Appendix, Part 1, 208.

s.17 of the 1877 Act as well as being the subject of the *Real Property Act Amendment Act 1976*. Most of this provision is contained in the Third Schedule, because the Commission felt that details of this nature as to the issue of certificates of title are unwieldy when set out as a section of the Act. The alternative of making this provision by regulation was rejected on the grounds that the details of issue of a certificate of title are too important to be left to delegated legislation.

The provisions of the *Real Property (Commonwealth Defence Notification) Act 1929*, *Real Property (Commonwealth Titles) Act 1924*, are all subsumed into a new s.30 of the draft bill.

Another example of consolidation of disparate provisions in the Real Property Acts relating to the same or related subject matter is that all provisions relating to indefeasibility are collected in the new s.39. Furthermore, it proved possible to combine all provisions dealing with priorities of registration into one new s.38.

### **5. Modernisation of the wording of the legislation**

Much of the current legislation is of the Victorian era, and modernisation of the wording has reaped great dividends in shortening its length and in clarification.

### **6. Repeal of otiose provisions.**

In the course of its investigations, the Commission formed the opinion that many current provisions need not be reproduced in the draft bill. For the convenience of those seeking to compare the current provisions with those in the draft bill, a table of destinations of the current provisions in the Bill is set out in Part 3 of the Appendix to the Working Paper. This includes explanations of the repeals.

Considering first the provisions of the 1861 Act, it was felt unnecessary to retain s.1, since there is a system of registration in force, so that there is no longer the need that existed in 1861 to positively sweep away all inconsistent laws, but rather to maintain the structure of registration already in existence with suitable amendments. Sections 12, 13, 13A were repealed in accordance with a recommendation to remove the position of Master of Titles. Sections 16-31 and 93 will no longer be required because of the virtual disappearance of old system land. The savings provisions maintain the effect of these provisions in respect of any extant old system land. Section 19 may be omitted as the present relevance of this section is essentially limited to the advertising requirements which are incorporated in the new s.18. Section 46, providing that surrendered deeds and instruments dated prior to existing certificates of title need not be produced during conveyancing, has not been reproduced as it is felt to be a matter now governed generally by contracts of sale, and largely irrelevant as for all practical purposes old system land has ceased to exist. Section 47 was recommended for repeal as it was thought to be an unnecessary restatement of the existing rights of the lessor. Section 53 dealing with options to purchase in registered leases is felt to be unnecessary in the light of court decisions.<sup>10</sup>

It has been possible to greatly reduce in length and complexity the provisions relating to covenants, ss.67-76. In view of duplication between some of these provisions and section 49 of *Property Law Act 1974-1986*, and the desirability of locating provisions relating to covenants in leases and mortgages in the respective parts of the draft bill, it has been possible to reduce the part of the draft bill dealing with covenants to two sections: s.74 dealing with implied covenants, and s.75 reproducing with amendment s.76A of the 1861 Act, dealing with the incorporation of provisions contained in a memorandum.

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10. See Chapter VIII of the Working Paper, section on leases, 140-143.

The Commission found it possible to absorb all the required provisions in relation to trusts, with the exception of applications to the Court, into a new s.76. Applications to the Court are dealt with in the new ss.79, 80 in conjunction with applications relating to estates of deceased persons. The only cost of this simplification is the removal of the "no survivorship" provisions in ss.80, 81. These are recommended for repeal as it appeared to the Commission that they are hardly ever used.<sup>11</sup> Section 84 was felt to be superfluous in the light of the provisions of the *Trusts Act* 1973-1986.

Section 110 was felt to be unnecessary as a result of the advent of prescribed forms, for which see s.14, and s.138 was left out as duplicating the general law in providing for witness expenses. Section 139 has not been reproduced because it is widely accepted that the requirement of a certificate of correctness has ceased to be relevant in its original form. However, there is a need for a transferee or grantee of an interest to signify acceptance of the transaction either personally or through a solicitor which it is felt can be achieved by appropriate drafting of prescribed forms which is required by the proposed terms of s.14.

Turning to a consideration of the 1877 Act, it should be remembered that with the passage of the 1986 Act, a substantial portion of this Act has already been repealed. Sections 1-3 and 52 automatically lose their import once the rest of the Act is repealed, or in the case of s.3 all of the defined terms in the 1877 Act with any continuing significance are incorporated in the new s.6. Sections 6 and 7, dealing with appraisers are repealed as no longer relevant, and together with ss.8, 10 effectively relate only to old system land.

Section 20 may be repealed as its provisions are no longer required in the light of the new s.61 and the provisions of the *Property Law Act* 1974-1986. Section 23 declared that transfers might be made subject to the grant of a lesser interest by the transferee in favour of the transferor. Sections 23-28 of the Act of 1877 dealt with transfers subject to a charge or an easement. These provisions were unique to Queensland, and the question arises as to their utility and need for continuation. All save s.23 were repealed in 1986, as the existence of the new structure of prescribed forms was felt to render the provisions otiose, while s.23 was retained merely as a declaration of principle, which is no longer felt to be necessary.

Section 47 provides for compensation for improvement by registered proprietors subsequently ejected. If it were to be retained this provision would belong with the remedies (sections 123-126 of the 1861 Act) in the new s.39. However, it is felt to be an unnecessary restatement of the inherent right of such a person to claim compensation and so is recommended for repeal. Section 49, relating to the status of registrable but unregistered documents, was felt to be unnecessary, particularly in the light of the new s.7.

## 7. Clarification of ambiguities and correction of deficiencies

### (a) Exceptions to indefeasibility

The new s.39 seeks to clarify the existing exceptions to indefeasibility. The issues involved are discussed at length in Chapters IV-VI of the Working Paper. In particular, it is made clear that volunteers are entitled to the benefits of indefeasibility.<sup>12</sup> There is a very limited definition of what amounts to fraud in s.39(1), so as to provide some certainty without unduly cramping the style of the Courts in applying this exception. The position regarding options in unregistered leases is made clearer by s.39(2)(c). The exception relating to prior certificates of title is made considerably less uncertain by s.39(3)(a)-(c). Severe limitations are placed on the exceptions for omitted easements by s.39(3)(d), so as to avoid the problems raised by decisions such as *Pryce v. McGuinness*.<sup>13</sup>

11. *Ibid.*, see discussion in Chapter VIII on Trusts, 156-160.

12. Contrast *King v. Smail* [1958] V.R. 273 with *Koteff v. Bogdanovic* (1988) 12 N.S.W.L.R. 472.

13. [1966] Qd.R. 591.

**(b) Compensation for loss of title**

Deficiencies in the procedures regarding compensation for loss of title, have been addressed in the new s.41, which essentially adopts the Victorian provisions.<sup>14</sup> The short limitation period which was so disastrous in *Breskvar v. White*<sup>15</sup> has been removed. It is believed that the difficulties associated with the decisions in *Mayer v. Coe*<sup>16</sup> and *Armour v. Penrith Projects Pty Ltd*<sup>17</sup> which appear to unduly restrict recovery by persons suffering loss as a result of fraudulent registration will be remedied by the new provisions. Instead of the previous general right to sue for deprivation of interest, s.41(1) confers a right to be indemnified for loss or damage in consequence of any of a number of specified events. There is no longer any need to sue the defaulter as a precondition of seeking indemnity from the State, the Crown being, of course, subrogated to the rights of the claimant by s.41(2). There are a number of qualifications to this right in addition to the existing exemption of breaches of trust, set out in s.41(4). These were the result of extensive analyses of exceptions in other Australian and major Canadian jurisdictions possessing a Torrens system of land registration, and apply where a company seal is improperly used, the claimant or agent causes or substantially contributes to the loss, or where the error is in relation to boundaries, and there has been no loss induced by reliance on the state of the register. Under ss.41(5), (6) claims may be compromised without court action, and ex gratia payments may be made.

**(c) Writs of execution**

The provisions regarding writs of execution, s.82, have been clarified, and the period in which a priority sale may take place has been extended to six months. The Commission felt unable to recommend more wide-ranging changes, as it has a separate reference on execution of judgments in general.

**8. Reconciliation of the real property legislation with other property legislation**

The Commission was fully aware throughout this review of the need to ensure that the final instalment of its review of property law in Queensland conform with the existing property legislation, and in particular with the *Property Law Act 1974-1986*, to which it must be complementary. This principle had particular application in relation to the definition and interpretation provisions and the provisions relating to mortgages, which were extensively overhauled in form though not in substance.<sup>18</sup>

**9. New provisions**

The Commission found it appropriate to approach this review on the basis that the existing Torrens system was basically functioning adequately in Queensland, and that there was much more of a problem with the form of the legislation than with its substance. Accordingly, there are no drastic proposals for change in the system, but rather a series of small improvements recommended.

**(a) Leases**

In view of the success of the provision for variation of mortgages in s.79 of the *Property Law Act 1974-1986*, similar provision for variation of registered leases is included in s.61 of the draft bill, and provision for variation of easements in s.70.

14. *Transfer of Land Act 1958* (Victoria), ss.109, 110.

15. [1978] Qd.R. 187.

16. (1968) 88 W.N. (Pt.I) (N.S.W.) 549.

17. [1979] N.S.W.L.R. 98.

18. Sections 49, 56-65 of the draft bill.

Provision is made in s.52 for a lease register where needed on account of complexity of dealings in relation to a particular title.

#### (b) Mortgages

Apart from a general overhaul of the provisions relating to mortgages, and reconciliation with the provisions of the *Property Law Act 1974-1986*, provisions have been added limiting the liability of a mortgagee in possession of a leasehold interest, s.63, and providing for variation of priority between mortgages, s.60.

#### (c) Easements

The provision for variation of easements has already been mentioned. Easements are one of the few areas where the provisions are expanded, and the draft bill stipulates clearly the manner in which easements may be created for the purpose of registration, s.67, registered, s.68, surrendered, 69, and varied, s.70, or created over the proprietors land, displacing the rule against such creation at common law, s.71. The dangers of misconstruction of plans illustrated by *Rock v. Todeschino*<sup>19</sup> and *Hutchinson v. Lemon*<sup>20</sup> are dealt with by s.72, but provision is made for the implication of easements from a plan of subdivision in limited cases, s.73.

#### (d) Caveats

Substantial changes are proposed in respect of caveats in order to reduce the problem of nuisance caveats, including simplification of the removal procedure, by requiring proceedings by the caveator to maintain a caveat in effect within 14 days of a notice served by a person affected requiring removal, s.88(2)(a).

The provision preventing the lodging of a second caveat on substantially the same grounds has been tightened, so as to block the much used loophole of withdrawing a caveat just before expiry of the three month period within which proceedings must currently be brought to maintain its effect, s.91. Compensation for the lodging of a caveat without reasonable cause is proposed to be made easier to recover by reversing the onus of proof in such cases, and extending the provision to other improper conduct such as failing to withdraw or bring about the lapsing of a caveat without reasonable cause, s.85.

#### (e) Miscellaneous

Provision is made for withdrawal of a memorandum registering covenants for incorporation in documents, by s.75, because the existing s.76A is deficient in that there is no obvious method for removing covenants registered by this means which prove defective.

An increase in maximum value of land for transfer of land of deceased without a grant of representation being taken out, to \$100,000, and provision for variation by regulation is effected by s.77 in order to secure consistency with equivalent provisions in the *Land Act 1962-1988*.

It is provided in s.21 of the draft bill that any person dissatisfied with the exercise or non-exercise of the Registrar's powers may require reasons to be stated in writing within seven days, or such further time as is reasonable in the circumstances. This is felt to be a suitable check on excessive pedantry in requisitioning.

The amount of advertising required by the Act by s.18 has been scaled down after

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19. [1983] Qd.R. 356.

20. [1983] Qd.R. 369.

investigation of other Torrens jurisdictions found that most possessed far less advertising requirements than are current in Queensland.

The provisions governing instruments have been extensively recast and rearranged but without any intention to make significant changes. In this connection, it should be borne in mind that most of these provisions were heavily amended in 1986.