Chapter 6
Amendments to Outdated Provisions
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ESTATES TAIL

6.1 The different legal estates in freehold land that can be created in Victoria are discussed in Chapter 5.1

6.2 Until 1886, it was also possible to create a fee tail estate, which is a freehold estate limited to the (traditionally male) descendants of a grantor.2 A fee tail estate was used as a method of keeping property in the same family for generations. It is also known as an ‘entailed estate’. Whether created by limitation or by trust, an entailed interest is a ‘settlement’ which attracts the provisions of the Settled Land Act 1958 (Settled Land Act).3

6.3 It has not been possible to create an estate in fee tail in Victoria since 1886.4 It is not possible to create a fee tail estate in New South Wales, Queensland, the Northern Territory or Western Australia either.5 These jurisdictions went further than Victoria and converted existing fee tails to fee simple estates.

6.4 Victoria did not take this extra step, and a fee tail created before 1886 can still exist in this State, subject to provisions in Part VI of the Property Law Act 1958 (Property Law Act) which allow the tenant for life to ‘bar the entail’ and convert it into a fee simple estate.6

6.5 In 1984, Jude Wallace reported that only two entailed estates in registered land were believed to still exist in Victoria.7 In order to establish if this is still the case, we have consulted with Land Victoria. They have run searches on the Torrens register but are unable to conclude with certainty whether or not any entailed estates currently exist in Victoria. Perpetual, formerly Perpetual Trustees, has advised us that they know of no entailed estates still in existence in Victoria.8

SUBMISSIONS

6.6 In our Consultation Paper we asked whether the remaining estates tail should be left to run their course or, alternatively, whether they should be converted by statute to fee simple estates.9

6.7 Of the submissions that addressed the issue, Associate Professor Tehan and colleagues wholly supported conversion to fee simple.10 The Law Institute of Victoria ultimately supported conversion in the context of modernising and simplifying the law, though they observed that it is not unreasonable to maintain the status quo.11 Mr Macnamara submitted that, as the extent of the continued existence of estates tail is unknown, the precise effect of the conversion cannot be known.12

6.8 We believe that the introduction of a conversion scheme with the limited savings provisions already found in other Australian jurisdictions will address any concerns about the possible adverse effects of converting any existing fee tails.

6.9 Implementing our recommendation will close off extensive transitional arrangements in Part VI which have been in force since the creation of fee tail estates was abolished 125 years ago.
BARRING THE ENTAIL

6.10 To explain the implications of converting existing estates tail to fee simple estates, we first need to give a brief history and explanation of ‘barring the entail’.

6.11 The practice of ‘barring the entail’ has the effect of converting the fee tail to a fee simple and eliminating the interests of successors in tail and the interests of the ‘remainderman’ and ‘reversioner’. The rights of these parties are at the centre of this discussion, as they are the potential beneficiaries of vested future interests.

6.12 Historically, the execution of a ‘disentailing assurance’ had the effect of barring the entail. There were situations when a lesser interest known as a ‘base fee’ resulted from barring the entail. The resulting ‘base fee’ barred the interests of the successors in tail but not the interests of the remainderman and reversioner.

6.13 In the above circumstances, there is still a possibility of an heir (‘possibility of issue’) to stop the reversion or remainder interests from becoming vested interests. This is because a ‘base fee’ is an estate which continues ‘for so long as the entail would have continued had it not been barred’ that is, for so long as the possibility of issue existed. Once the grantee and all issue are dead, the estate reverts to the grantor.

6.14 The problem with automatic conversion of the estate tail to a fee simple arises where you have a tenant in tail and there is no possibility of an heir to inherit the estate. This state of affairs is called ‘after possibility of issue extinct’. Here, the tenant in tail only has a life estate and cannot bar the entail. In these circumstances, the interests of the remainderman and reversioner are vested future interests which are ‘no longer liable to be divested by a disentailing assurance’. Thus any automatic conversion has the effect of depriving the remainderman and the reversioner of their vested interests.

References:
1. See [5.5]–[5.6].
2. For example: ‘to A and the heirs of his body’. Section 249 of the Property Law Act 1958 (Vic) states that if such an estate is created, it is deemed to give the grantee an estate in fee simple.
3. Settled Land Act 1958 (Vic) s 8(1)(b)); see discussion in Chapter 5. Historically, the use of the fee tail estate was never common in Australia owing to different economic and social circumstances. Some commentators consider that ‘the continued recognition of the fee tail estate in some states seems only to reflect a perverse legislative desire not to interfere with antiquities’. Adrian Bradbrook et al., Australian Real Property Law (Lawbook Co, 4th ed, 2007) 51, 477.
4. Transfer of Land Statute Amendment Act 1885 (Vic).
7. Wallace (1984), ibid. There is a remote possibility that an unbarred entailed estate created prior to 1886 still exists, hence the continued existence of the provisions in Part VI of the Property Law Act 1958 (Vic).
8. Perpetual Legal, Perpetual. Perpetual is an Australian company which provides investment and trustee services in wealth management.
10. Associate Professor Maureen Tehan et al, Submission 9, 15.
11. Law Institute of Victoria, Submission 13, 9.
12. Mr Michael Macnamara, Submission 2, 2.
14. Vested future interests are existing property rights which will vest in possession when the intermediate interest (for example, a life estate) granted comes to an end. An example of a vested interest is ‘to A for life, remainder to B’. B holds a current interest in land which will vest in possession on A’s death. See discussion of legal future interests in Chapter 5.
15. Traditionally, the tenant in tail ‘barred the entail’ through the use of the ‘common recovery’ or the ‘fine’. These methods were put on a statutory footing in the Fines and Recoveries Act 1833 (Eng) under which a tenant barred the entail on the execution of a ‘disentailing assurance’. For a detailed explanation see C Harpum et al, Megarry and Wade The Law of Real Property (Sweet and Maxwell, 7th ed) (2008) [3.070]–[3.078].
16. This was due to the use of the less effective ‘fine’ as a method used to bar the entail or the failure to obtain required consent to bar the entail from a ‘protector’.
19. Ibid.
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CONVERSION PROVISION WITH LIMITED SAVINGS PROVISIONS

6.15 The statutory provisions abolishing the creation of estates tail in Queensland, New South Wales, Western Australia and the Northern Territory also provide for the automatic conversion of existing estates tail to fee simple estates.21

6.16 The legislation in these jurisdictions operates to automatically convert the ‘base fee’ to a fee simple estate as there is still a possibility of issue to stop the reversion or remainder interests from vesting. However, the legislation protects the position of the vested future interests by excluding from the conversion provisions the estate of a tenant in tail where there is no possibility of a succeeding heir (or ‘after possibility of issue extinct’). We recommend the adoption of similar provisions in the new Property Law Act.22

6.17 If similar statutory provisions are adopted in Victoria, any entailed estates which still exist will be converted to fee simple estates. The only interest remaining to be considered will be the life estate of the last tenant in tail where there is no possibility of issue. We recommend this life estate be dealt with entirely under the Settled Land Act, thereby enabling repeal of the remaining estate tail provisions in the Property Law Act.23

6.18 The legislative models adopted in Queensland and Western Australia are preferred to the New South Wales model.24 In addition to the abolition and conversion provisions, the Queensland legislation preserves the remainder interest in the case of minors’ property. We submit that preserving the remainder to a third party in this situation is not in keeping with our complete conversion approach.

RECOMMENDATION

38. All existing estates tail should be converted by statute to fee simple estates. Section 249 should be retained and amended to provide that:

(a) From the commencement of the new Property Law Act, any person entitled to an estate tail, whether legal or equitable, in any land shall be deemed to be entitled to an estate in fee simple to the exclusion of any estates or interests limited to take effect after the determination or in defeasance of the estate tail and to the exclusion of all estates or interests in reversion on the estate tail.

(b) In the situation where any minor is entitled to an estate tail and any estate or interest would pass to another person on the death of the minor who has not attained full age and has no issue, the minor should be deemed to take an estate in fee simple.

(c) The definition of ‘estate tail’ should include the estate in fee into which an estate tail is converted where the issue in tail is barred but the persons claiming estates by way of remainder are not barred (a ‘base fee’), and an estate in fee voidable or determinable by the entry of the issue in tail.

(d) The definition of ‘estate tail’ should exclude the estate of a tenant in tail after possibility of issue extinct.
**SPECIAL RULES OF INHERITANCE**

6.19 Part V of the Property Law Act sets out special rules of inheritance for real property which date from the 19th century. The general purpose of these rules is to ascertain the identity of an heir when a deed or any other instrument is expressed as a grant of land to an heir.

6.20 These sections have limited application. They apply where an instrument confers an estate or interest in land ‘limited’ to the heirs of a deceased person. In practice this can occur only where an instrument creates an estate in fee tail. The rules in this part are also discriminatory, in that they favour male lines over female lines of inheritance.

6.21 The Scrutiny of Acts and Regulations Committee of the Victorian Parliament recommended in 2005 that Part V should be repealed. The government supported the recommendation in principle and said it would consider repealing Part V after an examination of whether it has any continuing operation and whether transitional or other provisions may need to be developed.

6.22 The function of Part V could be served by applying the same rules of inheritance that apply where a person dies intestate (without a valid will covering all of their estate). Part I, Division 6 of the Administration and Probate Act 1958 (Administration and Probate Act) sets out non-discriminatory rules for distributing the residuary estate of a person who dies intestate in Victoria among the deceased’s partner or partners and other relatives. The use of the intestacy provisions for interpreting the term ‘heirs’ and similar words in property instruments was recommended by the Ontario Law Reform Commission and has been adopted in New Zealand.

6.23 Application of the intestacy scheme would be consistent with the rule in the Wills Act 1997 for construing a disposition by will to a person’s issue, without limitation as to remoteness. Section 43 of that Act provides that, subject to a contrary intention, the disposition must be distributed to that person’s issue in the same manner as if the person had died intestate leaving only issue surviving.

6.24 In our Consultation Paper, we proposed that Part V be replaced with a section which provides that, subject to contrary intention, an instrument conferring an estate or interest in land on the ‘heir’ or ‘heirs’ or ‘next of kin’ or ‘family’ or ‘relatives’ of a person should be deemed to confer that estate or interest on the person or persons who would be entitled to take beneficially on intestacy under Part I Division 6 of the Administration and Probate Act and in the same shares.

6.25 All submissions that addressed the issue supported the proposal. Mr Macnamara commented ‘there seems to be no justification for having two separate and not necessarily congruent regimes for “takers in default”’.  

**RECOMMENDATION**

39. The special rules of inheritance in Part V should be replaced with a provision that, subject to contrary intention, a disposition other than a will which confers an estate or interest in land on the ‘heir’ or ‘heirs’, or ‘next of kin’, or ‘family’ or ‘relatives’ of a person should be deemed to confer that estate or interest on the person or persons who would be entitled to take beneficially on intestacy under Part I Division 6 of the Administration and Probate Act 1958 and in the same shares.
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THE ENLARGEMENT OF LONG LEASES TO FREEHOLD TITLE

6.26 Section 153 of the Property Law Act provides a procedure by which a lease can be enlarged into a freehold (fee simple) estate if the lease was originally created for a term of at least 300 years, and has at least 200 still to run. The lease must not be liable to be determined by re-entry for breach of condition, nor must any rent of more than nominal money value be payable.

6.27 The lessee, anyone deriving title under a lessee,33 and certain interested persons34 (the ‘entitled person’) may unilaterally enlarge the leasehold into a fee simple by registering a deed of declaration ‘in the office of the Registrar-General’.35 The fee simple estate is deemed to be created upon registration of the deed.36

6.28 The procedure for enlargement of leases is outdated, since the intention of the Transfer of Land (Single Register) Act 1998 (Single Register Act) was to abolish the registration of deeds in the Office of the Registrar-General.37 Since 1998, the Registrar-General has not accepted deeds of enlargement lodged in accordance with section 153.

PURPOSE OF SECTION 153

6.29 Section 153 can be traced back to the Conveyancing and Law of Property Act 1881 (Eng),38 and is equivalent to section 153 of the English Law of Property Act 1925.39 Apart from Victoria, only two other jurisdictions in Australia have a similar provision: New South Wales and Tasmania.40

6.30 The rationale for the provision seems to be that very long term leases with no provision for re-entry, and for which no rent of money value is payable, are practically equivalent to freehold.41 The leading commentary on the English Law of Property Act 1925 states:42

The section enables the conversion into a fee simple of a long term in a case where it is practically impossible that evidence of title to the reversion in fee could exist at the expiration of the term, at least where the reversion is not vested in a corporation, and where also if such evidence did not exist the value of the reversion must be infinitesimally small at the time of conversion.

6.31 Section 153 provides a means of converting leases in circumstances where the tenant cannot acquire freehold title by adverse possession. It applies only to leases which do not reserve the right of forfeiture or re-entry for breach of a condition.43 This means that, even if a lease provides for the tenant to pay rent, the landlord’s title is not affected if the tenant fails to pay it.44

CURRENT USE OF THE PROVISION

6.32 English and Australian commentators agree that section 153 is rarely used.45 The Law Institute of Victoria commented in its submission that there are unlikely to be many leases in existence to which the section could apply.46 Land Victoria is unable to provide an estimate of the number of leases of 300 years or more in existence, although they are believed to be rare.

6.33 The Duties Act 2000 has recently been amended to ensure that long leases and section 153 are not used to avoid payment of duty. Victoria abolished duty on leases in April 2001. The Duties Amendment Act 2009 inserted section 7(1)(b)(v) and (va) ‘to ensure that duty is chargeable on leasing arrangements which effectively transfer ownership’ of the fee simple.47
6.34 The new provisions charge duty on the grant of a lease where consideration other than the rent reserved is payable (such as a premium), or where there is an arrangement that the lessee or an associated person obtains an interest in the fee simple. Where duty has been paid under those provisions on a leasing arrangement which provides for enlargement into fee simple under section 153 of the Property Law Act no duty is chargeable on the subsequent enlargement.\(^\text{48}\) Otherwise, the enlargement is a dutiable transaction.\(^\text{49}\)

6.35 We asked the State Revenue Office if they were aware of how common 300 year leases are in Victoria. They replied:

*The SRO is not currently aware of any instances of 300 year leases being created or in existence. The longest example that we are aware of is a 299 year lease. However, please note that it is only in recent years, with the amendments to the Duties Act 2000 commencing in 2009 and the relevant policy work taking place from a few years preceding, that the SRO has kept any record of long term leases. Further, until the amendments introduced in 2009, there was no reason for leases to be submitted to the SRO and any that we did look at was as a result of our own research.*

6.36 Although few, if any, leases to which section 153 could apply exist, no one appears to know for sure that the provision no longer serves a purpose. It is still possible to create 300 year leases which are not liable to be determined by re-entry and do not require more than a nominal money value to be paid. If they do exist, they may well have been created in the expectation that they could be converted to freehold. However, if the person entitled to the reversion can be identified, it may not be necessary to rely on the procedure under section 153 because the lease could be enlarged by agreement.

**SHOULD THE PROVISION BE RETAINED?**

6.37 In our Consultation Paper we asked whether section 153 should be retained and amended to make it effective in its application to registered land. Three submissions agreed that it should be retained and amended,\(^\text{50}\) even though there is doubt that many leases would be covered by the provision. Two submissions called for it to be repealed.\(^\text{51}\)

6.38 Mr Hope and Dr Vout put the view that section 153 should be replaced with a provision that limits the maximum duration of leases to 99 years. They suggested that this would limit the power of landlords to control land long after their deaths, and ensure that freehold title remains the principal long term estate.

6.39 Land Victoria described section 153 as archaic and commented that the historical considerations underlying the section have no relevance or application to today’s system of land registration.\(^\text{52}\) Land Victoria further submits that section 153 is inconsistent with the principle that a purchaser ought to be able to rely on the title data in the register.

6.40 Section 42(2)(e) of the *Transfer of Land Act 1958* (*Transfer of Land Act*) creates an express exception to indefeasibility of title for the interest of a tenant in possession of the land. The scope of the tenant’s interest protected by the section is broadly interpreted\(^\text{53}\) and may include the statutory right of a tenant in possession to enlarge the lease to freehold under section 153 of the Property Law Act. The tenant’s statutory right to enlarge the lease would not appear on the register and is difficult for a purchaser of the reversionary estate to discover.
6.41 After considering the submissions, we have concluded that section 153 should be retained for five years and then repealed. It is possible that leases to which the section currently or potentially applies still exist. Lessees would have five years within which to exercise their right to convert the lease to freehold.

6.42 Any applicable long leases that are not converted into freehold once the section is repealed could still be converted by agreement with the person who is entitled to the reversion. Although it might be difficult to identify the reversioner, it should be possible to do so. Any long lease to which the right of enlargement in section 153 still applies must have been created since 1910.

6.43 We think that the separate review of the law of leases, which we suggest in Chapter 8, should examine whether to limit the maximum duration of leases.

**IS SECTION 153 STILL OPERATIVE?**

6.44 By operation of section 153(7), the leasehold is enlarged into a fee simple upon registration of a deed of declaration in the office of the Registrar-General. Land Victoria has submitted that section 153 is no longer operative because there has been no process for registering a deed in the office of the Registrar-General since the commencement of the Single Register Act.

6.45 Section 22(2) of that Act inserted section 6(2) into the Property Law Act:

> Despite sub-section (1), no deed conveyance or other instrument may be registered in the office of the Registrar-General under that sub-section and from the commencement of section 6 of the Transfer of Land (Single Register) Act 1998.

6.46 The amendment creates an apparent conflict between section 6(2) and section 153(7).

6.47 Land Victoria’s interpretation is that section 6(2) is inconsistent with section 153(7), with the effect that it forbids the registration of a deed of declaration under section 153(7) and implies that provision. On this view, section 153 is inoperative since there is no mechanism by which the lessee can exercise the right to enlarge the lease to freehold title.

6.48 An alternative interpretation is that, in providing for registration of a deed of declaration, section 153(7) is a ‘special’ provision which overrides the general prohibition on registration of deeds in section 6(2). This interpretation relies on two general principles of statutory interpretation.

6.49 The first principle is that an interpretation is preferred which avoids finding that statutory provisions are inconsistent, “for Parliament is generally presumed to intend both provisions to operate without there being any such implicit repeal or derogation”. If section 153(7) is read as an exception to section 6(2), both provisions can operate within their respective spheres.

6.50 The second principle is set out in Section 32(1) of the Charter of Human Rights and Responsibilities Act 2006:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

6.51 One of the human rights recognised in section 20 of the Charter is that ‘A person must not be deprived of his or her property other than in accordance with law.’
6.52 The property right of a lessee under a qualifying lease includes the statutory right to enlarge. If section 6(2) is interpreted as an implied repeal of section 153(7), the lessee is deprived of the right to enlarge. The deprivation would occur in an arbitrary manner, since section 153 confers a statutory right to enlarge while denying any means of exercising it.

6.53 Because it accords with principles of statutory interpretation and preserves existing property rights, we prefer the interpretation that section 153(7) is an exception to the general prohibition on registration of deeds in section 6(2). We therefore do not consider that section 153 has been inoperative since 1998.

TRANSCITIONAL PROVISIONS

6.54 Pending the proposed repeal of section 153 in five years time, transitional arrangements are required to enable lessees under any existing qualifying leases to exercise their right to enlarge. Although we see no legal obstacles to the registration of deeds of declaration by the Registrar-General in accordance with the current section 153(7), additional provisions are needed to authorise the Registrar to make the appropriate amendments to the Torrens register.

6.55 The current provision in section 153(7) for registration in the office of Registrar-General should be replaced with other procedures more in conformity with current methods of dealing in both registered and old system land.

6.56 In the case of registered land, provision should be made in the Transfer of Land Act for the deed of declaration to be deemed to be an instrument of transfer of the land, and upon registration to vest the fee simple estate in the person in whom the lease was previously vested.

6.57 In the case of old system land, an additional provision is needed. A deed of declaration should be included in the definition of ‘specified dealing’ in section 4(1) of the Transfer of Land Act. The amendment will enable the person in whom the lease was previously vested to lodge the deed of declaration with the Registrar under section 22 of the Transfer of Land Act. The lodgement of a specified dealing empowers the Registrar to create under section 24 a folio for the land (provisional as to subsisting interests) showing the lodging party as the registered proprietor in fee simple. The recording of the deed would act as a trigger for conversion of old system land to registered land.

RECOMMENDATIONS

40. The new Property Law Act should contain a sunset provision which provides that the provisions for the enlargement of long leases (in section 153 of the current Property Law Act 1958) cease to have effect five years from the commencement of the new Property Law Act.

41. Section 153(7) should be amended to provide that, until the new sunset provisions take effect, a deed of declaration by a lessee shall be registered by the Registrar either:

   (a) under a new Division to be inserted into Part IV of the Transfer of Land Act 1958, or

   (b) in the case of old system land, under section 22 of the Transfer of Land Act 1958.

42. The definition of ‘specified dealing’ in section 4(1) of the Transfer of Land Act 1958 should be amended to include a lessee’s deed of declaration under section 153(6) of the Property Law Act 1958.
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MERGER

6.58 Merger can occur when the owner of an estate or interest in land obtains a greater estate or interest in the same land. At common law, the lesser estate or interest merges with the greater estate or interest so that only one, the greater, remains.56 For example, if a lessee acquires the freehold title, the lease will be extinguished and only the freehold title will remain. Merger can also occur where the holder of a rentcharge acquires the freehold title.

6.59 At common law, merger was automatic, regardless of the intention of the acquirer of the interest or estate. Under equitable principles, merger occurs only where the acquirer of the greater estate or interest intends it.57 There is an equitable presumption against merger where it would not be in the interest of the acquirer.58

SECTION 185

6.60 Section 185 of the Property Law Act provides that:

There shall be no merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity.

6.60 This means that there will be no merger at common law unless there would also have been merger under the rules of equity.59 The effect of section 185 is that merger no longer occurs automatically but only where the acquirer intended it at the time of acquiring the greater interest.

6.60 Section 185 is based on the similarly worded section 185 of the English Law of Property Act 1925. Similar provisions have been adopted in all Australian jurisdictions.60

6.61 On its face, section 185 appears to be expressly limited to estates in land. Robinson argues that the equitable rule of merger does not extend to interests in land.61 However, the authorities indicate that the provision does apply to interests in land such as rentcharges.62

6.62 The issue of whether or not merger has occurred can become important in certain contexts. One example would be where a lessee acquires a prescriptive easement over a neighbouring property, and then acquires the freehold title to the leased land. The acquirer may want to retain the benefit of the easement for the remainder of the term of the lease.

6.63 It is currently unclear whether an easement that was appurtenant to a leasehold estate survives the merger of that estate. In Wall v Collins,63 an expressly granted easement was held by a tenant who subsequently acquired the freehold. The Court of Appeal for England and Wales held that the easement was not extinguished:64

Merger of the lease into a larger interest in the dominant tenement is not in itself fatal to the continued existence of the easement, for the period for which it was granted.

6.64 Wall v Collins has not been judicially considered in Australia, and it is uncertain whether it would be followed in Victoria. The decision has been strongly criticised for departing from the previous understanding that an easement or covenant does not survive the extinguishment of the estate to which it was appurtenant.65

6.65 If Wall v Collins is not followed in Victoria, extinguishment of the lesser estate by merger could destroy a valuable interest which is appurtenant to that estate.
The Torrens statutes modify the application of the rules of merger to registered interests. In *English, Scottish and Australian Bank Ltd v Phillips*,66 the High Court of Australia held that, where a registered owner acquired a registered mortgage over the land, the mortgage was not merged. The decision turns on the nature of a Torrens mortgage as a ‘creature of statute’, and the provision of a distinct statutory mechanism for the discharge of registered mortgages. The court also noted that:67

*The question of whether registered interests may without any change in the register be extinguished by merger in estates in land under the system is not necessarily involved in the decision of this appeal.*

In a subsequent case, *Cooper v Federal Commissioner of Taxation*,68 the High Court held that, where a registered proprietor of land acquires a registered lease over the land, the lease does not merge so long as it remains registered as a separate estate or interest on the register.

In *Shell Co of Australia Ltd v Zanelli and Another*,69 the New South Wales Court of Appeal held that merger does not destroy a lease upon transfer of the fee simple to the lessee, so long as the interest remains on title. However, while finding that there was no merger by mere registration of both interests, merger was found to have occurred when the Registrar subsequently noted on the title that merger had occurred.70 This had been done after an application by the acquirer of both registered interests.71

**HOW THE REGISTRAR DEALS WITH MERGER**

The Australian Capital Territory and New South Wales have provisions that allow the Registrar to make entries on the register to reflect a merger.72 Queensland has a provision dealing specifically with lots being transferred to the mortgagee of the lot.73

The provisions in the Australian Capital Territory and New South Wales are broadly framed to allow the Registrar to give effect to merger. For example, section 12(1)(i) of the *Real Property Act 1900* (NSW) provides that:

*The Registrar-General may, where the Registrar-General is satisfied that an estate or interest has been extinguished by merger, make such a recording in the Register as the Registrar-General considers appropriate.*

The practice in New South Wales is that, if a transfer of land or registered lease, mortgage or charge mentions that the transferee holds a lesser estate or interest in the same capacity, the estate or interest is retained in the register.74 If the lesser interest is not mentioned in the transfer, the Registrar-General notifies the lodging party that a request for merger can be lodged within 28 days. If a request is not lodged, then the interest will remain on the register.75

We recommend that a provision similar to section 12(1)(i) of the *Real Property Act 1900* (NSW) be adopted in Victoria to empower the Registrar to note merger on the folio upon application by the registered proprietor of the interests or estates. Since the application can be made after the greater interest has been registered, the provision will avoid any need to delay registration of dealings to determine whether merger is intended.

**RECOMMENDATION**

43. Section 185 should be retained and provision should be made in the *Transfer of Land Act 1958* for the Registrar, upon the application of the proprietor of interests or estates in the land, to record the merger of the interests or estates.

66 *Halbury’s Laws of Australia* (online) [185–1140).
67 Harpur et al (2008), above n 15, 834–35; Robinson (1992), above n 6, 421–22; *Halbury’s Laws of Australia* (online) [185–1140).
68 Ibid.
69 Section 185 has not been applied to the merger of easements and covenants under the doctrine of unity of seisin or to the severance of a joint tenancy by the acquisition by a joint tenant of a separate and distinct interest in the land (often termed severance by merger).
70 *Law of Property Act 2000* (NT) s 16; *Conveyancing Act 1919* (NSW) s 10; *Property Law Act 1974* (Qld) s 17; *Law of Property Act 1936* (SA) s 13; *Supreme Court Civil Procedure Act 1933* (Tas) s 1.46; *Property Law Act 1969* (WA) s 18; *Civil Law (Property) Act 2006* (ACT) s 206.
71 Robinson (1992), above n 6, 421.
72 See eg, Harpur et al (2008), above n 15, [31–037]. See also *Wolstenholme and Cherry’s Conveyancing Statutes* (Stevens & Sons, 1927 ed) 443; Halbury’s *Laws of Australia* (online version) [295–8405], [185–1140].
73 [2007] 3 WLR 459.
75 See eg, *Wall v Collins* (2007) 3 WLR 459 [73] where Carnwath LJ indicates that a legal treatise is incorrect on this point; also *Halbury’s Laws of Australia* (online) [245–4250], noting that covenants are terminated by merger. For criticism of the ruling, see Tristan Ward *et al* (2008), above n 15, [185–1140].
76 *English, Scottish and Australian Bank Ltd v Phillips* (1938) 57 CLR 302, 322.
77 *Halbury’s Laws of Australia* (online) [295–8405], [185–1140].
78 *Wall v Collins* (2007) 3 WLR 459 [73] where Carnwath LJ indicates that a legal treatise is incorrect on this point; also *Halbury’s Laws of Australia* (online) [245–4250], noting that covenants are terminated by merger. For criticism of the ruling, see Tristan Ward *et al* (2008), above n 15, [185–1140].
79 *Halbury’s Laws of Australia* (online) [295–8405], [185–1140].
80 Ibid.
81 See eg, *Cooper v Federal Commissioner of Taxation* (online) [245–4250], noting that covenants are terminated by merger. For criticism of the ruling, see Tristan Ward *et al* (2008), above n 15, [185–1140].
82 *English, Scottish and Australian Bank Ltd v Phillips* (1938) 57 CLR 302, 322.
83 *Halbury’s Laws of Australia* (online) [295–8405], [185–1140].
84 *Wall v Collins* (2007) 3 WLR 459 [73] where Carnwath LJ indicates that a legal treatise is incorrect on this point; also *Halbury’s Laws of Australia* (online) [245–4250], noting that covenants are terminated by merger. For criticism of the ruling, see Tristan Ward *et al* (2008), above n 15, [185–1140].
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PRESUMPTIONS OF SURVIVORSHIP

6.73 When two or more persons wish to be co-owners of property, they can choose to hold in one of two different ways. If they hold as ‘tenants in common’ in equal or unequal shares, each co-owner has a distinct interest which will pass to his or her heirs when that owner dies. If the co-owners hold as ‘joint tenants’, they do not own a distinct share which forms part of their estate on death. Instead, the rules of survivorship operate.

6.74 If one of the joint tenants dies, his or her interest is extinguished. Title to the property remains with the surviving joint tenant or tenants, whose interests are ‘correspondingly enlarged’. When all but one of the joint tenants has died, the surviving joint tenant becomes sole owner. In a sense, joint tenancy is a lottery of life in which the surviving joint tenant takes all and the heirs of the predeceasing joint tenants receive nothing.

6.75 Where all the joint tenants of property have died, it is necessary to determine the order in which their deaths occurred. In some circumstances it is not possible to determine the order of the deaths as a question of fact. A typical example of this would be in a car crash, where there are multiple fatalities and the joint tenants died at around the same time. In these circumstances, a legal presumption as to the order of the deaths is needed, to give effect to the common intent of the joint tenants that the rules of survivorship should operate.

6.76 Section 184 of the Property Law Act provides that, where the order of deaths is uncertain, the order of deaths will be presumed to be in order of seniority, with the younger having outlived the elder. A similar rule exists in New South Wales, Queensland and Tasmania.

6.77 Currently the relevant portion of section 184 reads:

(where … two or more persons have died in circumstances rendering it uncertain which of them survived the others, such deaths shall (subject to any order of the Court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority.

6.78 In its submission Land Victoria suggested that section 184 be amended to remove ambiguity arising from the words ‘subject to any order of the court’. We think the provision was intended to mean that the presumption operates unless the court makes a contrary order. It could be read as meaning that the presumption operates only upon an order of the court.

6.79 The ambiguity would be removed if the words ‘subject to any order of the Court’ were replaced with the words ‘unless a court otherwise orders’. The amendment would make it clear that no court order is required for the operation of the presumption that the younger person survived the elder person. The amendment would also make it clear that the presumption operates unless a court makes a contrary order.

RECOMMENDATION

44. Section 184 should be amended to omit the words ‘subject to any order of the Court’ and to substitute the words ‘unless a court otherwise orders’.
ALIEN FRIENDS

6.80 Section 27 of the Property Law Act permits an ‘alien friend’ living in Victoria to acquire, hold and dispose of ‘every description of property whether real or personal’ in the same manner as ‘a natural born subject of Her Majesty’.

6.81 At common law, an alien cannot acquire, hold or transfer land. Section 27 overrides this rule as it applies to alien friends and ensures that the equality of property rights it confers applies to personal property as well as real property.

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

6.83 The section is arcane and needs updating.

MEANING OF TERMS

6.84 Historically, an ‘alien’ was a person born outside the monarch’s dominions. Before and after federation, an alien was a person who was not a British subject. When the Property Law Act commenced, an alien was defined in the Nationality and Citizenship Act 1948 (Cth) as a person who was not a British subject, citizen of Ireland or living in a British protectorate. Today, Australian citizens are no longer British subjects and British subjects can be aliens. Australia’s citizenship and immigration legislation no longer refers to aliens, and the term is not generally used to describe foreign nationals.

6.85 Certainly the meaning of ‘alien’ is not plain from a reading of the Property Law Act and needs to be construed with reference to subsequent developments in statutory and case law. The distinction between ‘alien friend’ and other aliens—alien enemies—is even more obscure.

6.86 It has been said that an alien friend for the purposes of section 27 of the Property Law Act is a subject of a nation with which Victoria is at peace. As Australia has not declared war with another nation since World War II, the distinction between alien friend and alien enemy is either not applicable or impossible to draw with certainty.

6.87 Even if a national enemy could be identified, section 27 would not necessarily prevent a subject of the enemy nation from acquiring and dealing with property. At common law, ‘a subject of a State at war with this country, but who is carrying on business here, is not treated as an alien enemy’. Robinson has observed that, insofar as section 27 is limited to residents of Victoria, no one living in Victoria can be an enemy alien.

6.88 The meaning of a ‘subject of Her Majesty’ has also changed over time, as Australia has emerged as an independent nation. Nowadays it is likely to be interpreted to mean an Australian citizen. The Property Law Act 1974 (Qld) and the Aliens Act 1913 (Tas) permit aliens to deal with property on the same basis as Australian citizens.

76 Wright v Gibbons (1949) CLR 313, 330 (Latham CJ).
77 Succession Act 1981 (Qld) s 65; Presumption of Survivorship Act 1921 (Tas); Conveyancing Act 1919 (NSW) s 35.
78 Land Victoria, Submission 18.
79 Re Dougher, Ex parte Bell (1863) 1 QSCR 91, 95.
80 Section 27 of the Property Law Act 1958 derives from s 58 of the Supreme Court Act 1915 and before that, s 3 of the Aliens Act 1890.
81 Calvin’s Case (1609) 77 ER 377, 396.
82 See eg, Aliens Act 1890 (Vic) ss 5, 9; Aliens Act 1947 (Cth) s 5.
83 Later renamed the Australian Citizenship Act 1948 (Cth).
84 Nationality and Citizenship Act 1948 (Cth) s 5. While this Act introduced the distinction between an Australian and a British subject, it continued to define an ‘alien’ with reference to his or her status as a British subject.
85 Australian Citizenship Amendment Act 1984 (Cth).
86 In Shaw v Minister for Immigration and Multicultural Affairs (2003) 218 CLR 28 the High Court determined that an ‘alien’ includes at least anyone born outside Australia (including in the United Kingdom) to parents who were not Australian citizens and who entered Australia after the commencement of the Australian Citizenship Act 1948 and has not been naturalised under Australian law.
87 Robinson (1992), above n 6, 36.
88 Janson v Driefontein Consolidated Mines Ltd [1902] AC 484; 505–06; Schaffenious v Godberg [1916] 1 KB 284.
89 Robinson (1992), above n 6, 36.
90 Property Law Act 1974 (Qld) s 15A.
91 Aliens Act 1913 (Tas) s 3.
INTERACTION WITH COMMONWEALTH LEGISLATION

6.89 Section 27 is expressed to apply ‘notwithstanding any law or usage to the contrary’. Although it overrides common law rules, it does not override Commonwealth legislation.

6.90 The Commonwealth Parliament has the power under the Constitution to make laws that directly and indirectly determine the rights of aliens. Investment by foreign nationals is regulated under the Foreign Acquisitions and Takeovers Act 1975 (Cth) (Foreign Acquisitions and Takeovers Act). Most foreign investment proposals involve the purchase of real property.

6.91 By operation of the Foreign Acquisitions and Takeovers Act, a foreign person cannot acquire a legal or equitable interest in any residential real estate or vacant land, or commercial real estate over a specified value, in Australia without the prior approval of the Treasurer, on the advice of the Foreign Investment Review Board. The Act also regulates foreign control of certain business enterprises and mineral rights. It applies to all natural persons, whether resident in Australia or not, and all corporations, whether incorporated or carrying on business in Australia or not.

6.92 Although it is wide ranging, the Foreign Acquisitions and Takeovers Act does not ‘cover the field’. In other words, it does not apply to the exclusion of any State or Territory law that is capable of operating concurrently with it.

6.93 Section 27 of the Property Law Act can operate concurrently with it. The Foreign Acquisitions and Takeovers Act does not apply to foreign nationals who are permitted to stay in Australia indefinitely, such as New Zealand citizens and permanent residents, and who have lived in Australia for at least 200 days in the previous 12 months. Section 27 of the Property Law Act ensures that the common law rule that an alien cannot hold or transfer land does not apply to members of this group who live in Victoria.

6.94 Section 27 is also broader in scope than the Foreign Acquisitions and Takeovers Act because it encompasses all forms of property.

6.95 It appears that, even though its scope has changed, section 27 does have significance today for some foreign nationals. However, the archaic language of the section hampers the task of identifying who those foreign nationals are.
We asked in the Consultation Paper for comments about how the provision should be updated and whether its interaction with the Foreign Acquisitions and Takeovers Act should made clearer.97

The Law Institute of Victoria responded that section 27 should be revised for consistency with the relevant provisions of the Foreign Acquisitions and Takeovers Act. Alternatively, the references to ‘a natural born subject of Her Majesty’ should be replaced with ‘an Australian citizen’, and an alien should be identified as any person who is not a citizen.98

The Law Institute of Victoria also observed that section 109 of the Constitution makes it clear that the Foreign Acquisitions and Takeovers Act prevails over the Property Law Act to the extent of any inconsistency and no further clarification in the text of section 27 is necessary. However, it does see value in including a note to section 27 which cross references to the Foreign Acquisitions and Takeovers Act.99

We agree that section 27 should be updated in the context of the Foreign Acquisitions and Takeovers Act but also note that a ‘foreign person’ for the purposes of that Act is not the same as a non-citizen under the Australian Citizenship Act 2007 (Australian Citizenship Act). As the purpose of section 27 is to override the common law concerning non citizens, we consider that primacy should be given to ensuring consistency with the Australian Citizenship Act.

For this reason, we favour updating the wording of section 27 to directly align with the definition of a citizen under the Australian Citizenship Act. The current reference to ‘a natural born subject of Her Majesty’ would be replaced with a reference to an Australian citizen because this is how the term is likely to be interpreted nowadays. Instead of referring to an alien, the provision would refer to a person who is not an Australian citizen. This definition by exception should encompass any interpretation of the term ‘alien’ for the purpose of overriding the common law rule.

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

(a) provides that a person is not prevented from acquiring, holding or disposing of real or personal property in Victoria by reason only that the person is not an Australian citizen within the meaning of the Australian Citizenship Act 2007 (Cth)

(b) includes a note stating that investment by foreign persons is regulated by the Commonwealth under the Foreign Acquisitions and Takeovers Act 1975 (Cth).
Chapter 6

Amendments to Outdated Provisions

MARRIED WOMEN

6.101 The Property Law Act contains a number of provisions protecting the property rights of married women. In most cases, the reason why they are in the Act is to override a common law principle that discriminates against married women because of their marital status. These provisions appear unnecessary nowadays in view of subsequent changes in attitudes and expectations and the widespread removal of discriminatory laws and practices.

6.102 One submission said that provisions of this type are obsolete and that repealing them will not revive the common law.\(^{100}\) The Scrutiny of Acts and Regulations Committee reached a similar conclusion following its review of similar provisions in the Marriage Act 1958 (Marriage Act) in 2004. It recommended that the provisions in that Act be repealed and said that it was ‘extremely unlikely’ that the discriminatory common law principle would be revived as a result.\(^{101}\)

6.103 We agree that repealing these provisions is unlikely to revive the common law. Section 14(2) of the Interpretation of Legislation Act 1984 (Interpretation of Legislation Act) states that repealing an Act or provision does not revive anything not in force or existing at the time that the repeal becomes operative, unless the contrary intention expressly appears.

6.104 Nevertheless, the equal status that women now have at law is not uniformly found in the community. The provisions in both the Property Law Act and the Marriage Act put beyond doubt that, regardless of residual discriminatory practices and beliefs in the community, all women have the same rights as men to own, control, deal with and dispose of real and personal property.

6.105 The persistence of discriminatory attitudes in the community, combined with the possibility that common law principles could be revived, fosters a conservative approach to the idea of repealing the provisions. We note that the government declined to agree with the Scrutiny of Acts and Regulations Committee that the similar provisions in the Marriage Act should be repealed. Its response to the Committee’s report, tabled in Parliament on 3 May 2005, said:

These provisions should be retained to ensure that outdated common law rules that prevent married women from exercising their rights cannot be revived.

Retaining the provisions would, for example, deter mischievous litigants from attempting to rely on old common law to unnecessarily prolong litigation to their own advantage.

6.106 For this reason, we are cautious about repealing provisions that protect hard won rights and which serve an educative purpose when those rights are challenged. The provisions in the Property Law Act concerning the property rights of married women certainly need updating but the rights they create should continue to be expressly preserved in the new Property Law Act.
HUSBAND AND WIFE TO BE COUNTED AS TWO PERSONS

6.107 Section 21 reverses a common law rule of construction that applied where ownership of real or personal property was limited to, or held in trust for, a husband and wife and a third party. The effect of the common law rule was that the third party got one half, as the husband and wife were counted as one person.

6.108 Section 21 abrogates the rule by providing that, for the purposes of acquisition of any interest in property under a disposition after 1914, the husband and wife are counted as two persons.

6.109 One submission pointed out that repealing the provision would not revive the abolished common law rule of construction because of the operation of section 14(2) of the Interpretation of Legislation Act. Although section 14(2)(c) says that, unless the contrary intention expressly appears, the repeal of an Act or provision does not revive ‘anything not in force or existing at the time that the repeal becomes operative’, it may not apply to a rule for the construction of instruments. At common law, the repeal of a statute or statutory provision means that the law must be applied as if the provision had never existed.

6.110 Even if section 14(2)(c) of the Interpretation of Legislation Act does apply to rules of construction, repealing section 21 of the Property Law Act could create unnecessary uncertainty as to the share of a husband and wife in co-ownership with a third person. Retaining the provision makes the law clear. For this reason, we consider that section 21 should be retained in the new Property Law Act. The one other submission that commented on this provision agree.

PROPERTY RIGHTS OF MARRIED WOMEN

6.111 At common law, a woman’s identity merged upon marriage with her husband’s and all her property transferred to his custody. The restrictions on a married woman’s capacity to own and deal with property began to be lifted in Victoria with the passage of the Married Women’s Property Act 1884. Most of the remaining restrictions were finally removed by sections 2 and 3 of the Marriage (Property) Act 1956, which now appear as sections 156 and 157 of the Marriage Act.

6.112 Section 156(1) of the Marriage Act states that a married woman is capable of acquiring, holding or disposing of any property whatsoever ‘as if she were a femme sole and whether separately or jointly or in common with any other person including her husband’.

6.113 Section 157(1) of the Marriage Act abolished the concepts of separate property and property held for separate use in equity, which had provided some scope for a married woman to control or benefit from property notwithstanding the common law. Section 157(2) ended the ability to impose in future any restrictions on the enjoyment of any property by a woman, or restraints on anticipation or alienation, that could not have been imposed on a man.

6.114 The Scrutiny of Acts and Regulations Committee of the Victorian Parliament recommended that sections 156 and 157 of the Marriage Act should be repealed. As an alternative, the Committee said the provisions should be transferred to the Property Law Act. The Government did not support the Committee’s recommendation but did support the alternative.
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6.115 Sections 167, 168 and 170 of the Property Law Act remove the same restrictions as those removed by sections 156 and 157(1) of the Marriage Act.

- Section 167 enables a married woman to dispose of property or property interests without a separate examination, acknowledgement, or her husband’s concurrence.
- Section 168 gives a married woman power by deed to disclaim an estate or interest in land without her husband’s concurrence.
- Section 170 enables a married woman to acquire, hold and dispose of property as a trustee or personal representative.

6.116 The introduction of a new Property Law Act would provide the opportunity to rationalise the two sets of provisions. Compared to the equivalent provisions in the Marriage Act, sections 167, 168 and 170 are narrower in scope. The provisions in the Marriage Act can better serve an educative and symbolic purpose because they are expressed as positive rights. Both are out of date and would need to be revised if transferred to the new Act.

6.117 We proposed two options for reform in the Consultation Paper:

- repeal both sets of provisions, with the express intention this will not revive any common law, statutory provisions or presumptions or interpretation, or
- replace sections 167, 168 and 170 of the Property Act with sections 156 and 157(1) of the Marriage Act.

6.118 Of the three responses we received, two favoured the first option and one favoured the second. There is clear agreement that the provisions in the Property Law Act are archaic and should be repealed. We consider that repealing them with a savings provision would ensure that the common law rules are not revived. However, having a clear statement in legislation that married women have the same legal capacity to deal with property as single women (and all men) serves an important educative and normative function.

6.119 Discriminatory practices against women that were once the common law persist in some parts of the community. The fact that they are now unlawful is better specified in legislation than implied from an absence of any provisions permitting them. For example, section 20 of the Charter of Human Rights and Responsibilities Act 2006 merely states that a person must not be deprived of his or her property ‘other than in accordance with the law’. The provisions in the Property Law Act and the Marriage Act concerning the property rights of married women leave no doubt about what the law is.

6.120 In view of the government’s decision not to repeal sections 156 and 157 of the Marriage Act, and the benefit in retaining statutory provisions which recognise and protect the property rights of married women, we consider that the provisions in section 156 and 157(1) should be updated as necessary and transferred into the new Property Law Act.

RECOMMENDATION

46. Sections 167, 168 and 170, concerning the property rights of married women, should be replaced in the new Property Law Act by the provisions that currently appear at sections 156 and 157(1) of the Marriage Act 1958. Those provisions should be transferred from the Marriage Act 1958 to the new Property Law Act and updated.
Amendments to Outdated Provisions

6.121 Section 169 gives the court the discretion to empower a married woman who is restrained from anticipation or alienation of her property or interest in property to dispose of or charge it if the transaction appears to be for her benefit.

6.122 A restraint on anticipation or alienation of property is a condition imposed only on a married woman. It provided a means of vesting property in a married woman that would be preserved for her benefit free of the influence of her husband to dispose of it. The restraint prevented her from disposing of the property or subjecting it to a liability.

6.123 Restraints of this type have been abolished in all jurisdictions in Australia. In Victoria, section 157(2) of the Marriage Act makes a restraint on anticipation or alienation imposed after the commencement of the Marriage (Property) Act 1956 void. It does not apply to pre-existing restraints. Although, like Victoria, most jurisdictions only abolished future restraints, Western Australia, Queensland and South Australia have now abolished them altogether. Western Australia, Queensland and South Australia have now abolished them altogether. Western Australia, Queensland and South Australia have now abolished them altogether.

6.124 Under section 169 of the Property Law Act, a woman whose ability to deal with property is restricted by a pre-existing restraint can apply for an order to perform a particular transaction. However, the court is not empowered to make an order removing the restraint. If it does not consider the transaction to be for her benefit, it has the discretion not to make an order at all.

6.125 Few, if any, restraints on anticipation or alienation are likely to exist today. None have been validly created for at least 54 years. The operation of section 169 is at odds with the right to be treated equally before the law. For this reason, we proposed in our Consultation Paper that all restraints on anticipation and alienation should be abolished in Victoria. The submissions we received in response supported the idea.

RECOMMENDATION

47. Any restraints on anticipation in dispositions created before the commencement of the Marriage (Property) Act 1956 and still in operation should be made void. The relief provisions in section 169 of the Property Law Act 1958 would then be redundant and should be repealed.

6.126 Restraints on anticipation are mentioned in section 153(6)(a), according to which a married woman with a relevant interest in the property is eligible to apply for enlargement of a long lease without the concurrence of her husband even if she is subject to a restraint. We have recommended that section 153 be repealed, subject to a sunset provision, and see no need for a separate amendment to section 153(6)(a).
Chapter 6

Amendments to Outdated Provisions

DEBT ENFORCEMENT

6.127 Part III of the Property Law Act, comprising sections 208 to 220, is an assortment of provisions for the enforcement of debt. In most cases, the practices to which they refer no longer exist and the dense language obscures, rather than conveys, the meaning.

6.128 Perhaps because they are arcane, these provisions have been left unexamined when new debt enforcement legislation and practices have been introduced. We have now analysed each of them and assessed whether they should be retained in a new Property Law Act. We have concluded that many can be repealed and the rest should be amended and either retained in the new Act or transferred to the Sheriff Act 2009 (Sheriff Act).

6.129 We have also examined section 71, concerning the release of part of any land affected by the execution of a judgment, and concluded that it should be repealed (see Appendix A).

MAKING LAND LIABLE TO SATISFY DEBTS

6.130 At common law, a debt due to the Crown operates as a charge on the debtor’s property.

6.131 The Crown once had extraordinary powers to enforce and recover its debts. It could seize the body, land, goods and debts and other choses in action of its debtors by a process known as a writ of extent. A writ of extent could be issued immediately on the authority of a judge, on the basis of an affidavit that the debt was in danger of being lost if ordinary methods of recovery were used. A Crown debt was not discharged by bankruptcy and could be enforced even if the property had since passed to someone else.

6.132 A debt between subjects does not operate as a charge, though under English law a debt secured by or arising under a bond or specialty has long been able to be attached to the debtor’s land.

6.133 To enforce a debt between subjects, the creditor needs to sue the debtor. However, a judgment by the court in the creditor’s favour does not itself operate as a charge on the debtor’s property. The court issues a process of execution to direct the sheriff to seize and sell the property of the judgment debtor in order to satisfy the debt. The debtor may then deal with the land only subject to the creditor’s rights of execution, and a purchaser or mortgagee takes the land subject to those rights.

SECTION 208(1)

6.134 Section 208(1) makes the whole of a debtor’s real property in Victoria and powers liable for the satisfaction of his or her debts, whether owed to the Crown or to anyone else, in the same manner as land was liable for bonds and specialty debts in English law. It applies to ‘every possible estate and interest in land of every possible description’. In conjunction with other provisions, it allows a court to issue a warrant for the seizure and sale of a debtor’s land, or interests in land, to satisfy the debt.

6.135 Furthermore, this provision makes the remedies and processes for seizing, selling and disposing real property in satisfaction of a debt the same as those that apply to personal property. As a result, there is only one process of execution in Victoria for directing the sheriff to seize and sell property of any type in order to satisfy a judgment debt.

6.136 Section 208(1) should be retained because it continues to serve a purpose, but it needs to be expressed more clearly. The current wording has survived almost unchanged since 1813.
POWERS AND RESPONSIBILITIES OF THE SHERIFF

6.137 The powers and responsibilities of the sheriff under a process of execution are distributed between the Property Law Act, the Sheriff Act and the Supreme Court (General Civil Procedure) Rules 2005 (Supreme Court Rules).

6.138 The relevant provisions in the Property Law Act are sections 208(2)–(4), 219 and 220. They apply to old system land as well as to land recorded on ordinary folios.

SECTION 208(2)

6.139 This provision ensures that the debtor’s equitable interests are subject to a writ of execution. It empowers the sheriff or other officer to whom any process of execution is made to take any land or other interests in real property that are held in trust for the debtor. The property is taken free of all encumbrances of the person who is in possession of it.

6.140 Section 208(2) was formed from legislation dating back to 1915.120 It has not been amended since, except to replace a reference to a ‘writ’ of execution with a ‘process of execution’ in 1986.121 In the meantime, the Sheriff Act has been enacted ‘to provide a legislative framework for the appointment of the sheriff, deputy sheriff and sheriff’s officers and their functions, powers and duties’.122 Part 3 of that Act, comprising sections 13–33, sets out the sheriff’s enforcement functions and powers.

6.141 Section 23 of the Sheriff Act empowers the sheriff to:

seize or take possession of recoverable property in accordance with the relevant court and enforcement legislation or a warrant that authorises the seizure of property, regardless of who has possession of the recoverable property.

6.142 The sheriff is required to exercise the powers under section 23 to seize or take possession of recoverable property in accordance with the warrant or ‘court and enforcement legislation’.123 ‘Court and enforcement legislation’ includes the Property Law Act.124 However, in our view section 208(2) of the Property Law Act does not authorise the sheriff to do any more than permitted by section 23 of the Sheriff Act (and the warrant).

6.143 Section 23 of the Sheriff Act seems to empower the sheriff to seize or take possession of a debtor’s property if held by someone else for any reason, including where it is held in trust. By comparison, section 208(2) is limited to property held in trust.

6.144 We also note that section 208(2) applies to land and interests in real property, while section 23 applies to ‘recoverable property’. ‘Recoverable property’ is defined as ‘the property specified in a warrant that may be lawfully seized under the warrant,’ in which case it could be real property, personal property or both. The sheriff could not seize or take possession of property held in trust unless it is specified on the warrant. If it is not specified in the warrant, section 208(2) would not authorise the sheriff to take it.

6.145 Although section 208(2) is expressed to apply to ‘any process of execution’ directed to the sheriff ‘or other officer’, nowadays the only type of process of execution issued for the seizure or possession of land and interests in real property is a warrant directed to the sheriff. Having compared the two provisions, we are of the view that section 23 of the Sheriff Act overlaps section 208(2) of the Property Law Act and probably makes it redundant as far as it applies to the sheriff’s powers.
6.146 Nevertheless, section 208(2) continues to serve a purpose because it provides that the property that is held in trust is taken by the sheriff free of all encumbrances of the person who is in possession of it. For this reason we recommend that it be updated rather than repealed.

6.147 As the sheriff’s powers, functions and duties are now set out in the Sheriff Act, section 208(2) should be updated and transferred to that Act.

SECTION 208(3)

6.148 Section 208(3) states that the sheriff is under no duty to take possession of the debtor’s land before selling it. It adds a proviso that the land cannot be sold until one month after notice of the sale is published in the Government Gazette and local newspapers.

6.149 This provision was drawn from section 123 of the Real Property Act 1915 (repealed) and section 180 of the Supreme Court Act 1915 (repealed).

6.150 We said in the Consultation Paper that section 208(3) should be reviewed to ensure consistency with the Supreme Court Rules. None of the submissions we received responded to the suggestion, but the Department of Justice has informed us that it agrees.

6.151 Order 69.06 of the Supreme Court Rules requires the sheriff to advertise the time and place of sale and particulars of seized property (of any type) ‘in the manner which seems to the sheriff best to give publicity to the sale’ and does not specify any period of notice before the sale takes place. This allows the sheriff to use more modern methods than publication in the Gazette or local papers, such as publishing online, though the advertisement must comply with the Supreme Court Rules concerning form and content.

6.152 Order 69.06 also imposes obligations on the creditor to serve a copy of the warrant on the Registrar (where land is being sold), and a copy of the advertisement on the debtor, and then provide the court and the sheriff with evidence of compliance with these requirements.

6.153 We prefer the procedures contained in order 69.06 of the Supreme Court rules to those in section 208(3) of the Property Law Act. By requiring the sheriff to publicise the sale in what seems to her to be the best manner, attention is given to achieving a satisfactory outcome rather than complying with a prescribed process. We remain of the view that section 208(3) should be revised to be consistent with order 69.06. We also consider that the revised section should be transferred to the Sheriff Act, so that it is co-located with other provisions concerning the execution of warrants.

6.154 Finally, although it is beyond the scope of our current terms of reference, we note that order 69.06 of the Supreme Court Rules, concerning advertising the sale of property seized under a warrant, will need updating, to remove the distinctions it makes between ‘land under the operation of the Transfer of Land Act’ and ‘other land’.
SECTION 208(4)

6.155 Section 208(4) empowers the sheriff to execute a valid and effectual deed of conveyance or transfer of a debtor’s land to the purchaser. It was amended in 1986, to replace the reference to a writ of *fieri facias*. It needs updating but remains relevant.

6.156 This provision would be better co-located with related provisions at sections 24 and 25 of the Sheriff Act. Section 24 empowers the sheriff to sell property seized under warrant, and section 25 ensures that the person who buys it in good faith and without notice of any defect or want of title acquires good title.

SECTION 219

6.157 Section 219 gives the sheriff broad powers to seize and sell a judgment debtor’s personal property, being money, bank notes, specialties or other securities, for money in execution of the debt. It is related to sections 23 of the Sheriff Act, as discussed above, and section 33(3) of that Act, which deals with the sheriff discharging the debt. For this reason we consider that section 219 should be transferred to the Sheriff Act and the language updated.

SECTION 220

6.158 Section 220 empowers the sheriff to exercise the debtor’s powers over property for the benefit of the judgment creditor. This provision could also usefully be transferred to the Sheriff Act rather than incorporated into a new Property Law Act. The language of the section should be updated.

RECOMMENDATIONS

49. Sections 208(2) and (4), 219 and 220, concerning the powers of the sheriff to seize and dispose of a debtor’s property in execution of a debt, should be updated and transferred to the *Sheriff Act 2009*.

50. Section 208(3), concerning the procedures for the sale of a debtor’s land by the sheriff, should be revised to be consistent with order 69.06 of the *Supreme Court (General Civil Procedure) Rules 2005* and transferred to the *Sheriff Act 2009*.

REGISTRATION OF DEBTS TO BIND LAND

6.159 When a judgment debt binds land, the judgment debtor cannot dispose of it to prevent it from being taken in execution and can only dispose of it subject to the claims of the execution creditor.  

6.160 Under the Property Law Act, a judgment will not bind or affect land until a process of execution has been issued. The execution does not have priority over other interests in the land until the warrant is delivered to the sheriff and details about it have been recorded by the Registrar. Purchasers, mortgagees and other judgment creditors are thereby alerted to the priority of the execution over later dealings.

6.161 Sections 209–218 of the Property Law Act apply to old system land. All are outdated and only sections 209–212 remain operative. We discuss them in turn below and conclude that all can be repealed and replaced where necessary by procedures under the Transfer of Land Act.
Amendments to Outdated Provisions

SECTIONS 209–212

6.162 These provisions set out procedures for the Registrar-General to record details about executions. They are outdated because dealings relating to old system land have been recorded by the Registrar, rather than the Registrar-General, ever since the deeds registry was closed to new registrations in 1999.¹²⁷

6.163 The Registrar is now empowered by sections 26E and 26F of the Transfer of Land Act to record in an identified folio a ‘judgment, decree, execution or process of a court’ affecting an old system land parcel. Lodgement of the dealing with the Registrar triggers the creation of an identified folio, if one does not already exist.¹²⁸

6.164 By operation of section 26I of the Transfer of Land Act, the priority of an execution recorded in an identified folio is determined in accordance with section 6 of the Property Law Act. This means that registration of an instrument made and executed bona fide and for value gives priority over all other instruments not previously registered.¹²⁹

6.165 While section 6 of the Property Law Act regulates the priority of recorded executions, sections 209–212 protect purchasers, mortgagees and judgment creditors from being affected by unrecorded executions.

6.166 Section 209 provides that a judgment does not bind land unless a process of execution is issued. However, the execution does not affect the interests of purchasers, mortgagees or other judgment creditors unless details about the execution are recorded by the Registrar General in a publicly available book against the name of the debtor.

6.167 Registration of the execution protects the judgment creditor against the claims of buyers, lenders and other creditors who obtain an interest in the land after registration. To remain effective, sections 210 and 211 require the execution to have been registered or re-registered within five years of the creation of the subsequent competing interest. This saves the subsequent buyer, lender or creditor from searching records further back in time than five years to discover prior judgments.

6.168 Section 212 prevents execution between parties being prejudiced by failure to register.¹³⁰ A failure to register an execution does not invalidate it.

6.169 The corresponding provisions for Torrens system land, at section 52 of the Transfer of Land Act, are more straightforward. Rather than giving a proprietary interest to the judgment creditor, registration of the process of execution under the Transfer of Land Act limits the ability of the judgment debtor to deal in the land. After the Registrar records the judgment, order or process of execution, no other instrument dealing with the land can be registered until the land is sold and title transferred under the process of execution, or three months has expired, whichever happens first.

6.170 We asked in the Consultation Paper whether sections 209–212 should be updated to require recording by the Registrar rather than the Registrar-General. Three submissions agreed that they should.¹³¹ Land Victoria pointed out that very few applications are made under these sections and they could be repealed without adverse consequence.¹³²
Amendments to Outdated Provisions

6.171 The alternative suggested by Land Victoria is that, rather than lodging an execution under the Property Law Act, a party would apply to the Registrar under sections 26E or 26F of the Transfer of Land Act (amended as necessary) to record the execution on an identified folio. Section 52 would be amended to provide that a process of execution recorded under sections 26E or 26F has the same effect as to priority as a recording made under section 52.

6.172 We see merit in the suggestion by Land Victoria as it would introduce a simpler system and further catalyse the conversion of old system land to Torrens system land.

SECTIONS 214–215

6.173 Section 214 provides in substance that, so far as any purchasers, mortgagees and judgment creditors are concerned, the Crown’s ancient common law and statutory rights to take priority over other debts do not affect any freehold land or lease (‘chattel real’) unless and until a memorandum containing the required particulars is left with the Registrar-General. The Registrar-General is required to enter the particulars in a book called the ‘Index of Debtors and Accountants to the Crown’. The book must be searchable by the public, although a fee for searching it may be charged.

6.174 Section 215 then requires the Crown to re-register the particulars on the same basis as processes of execution must be re-registered under section 210 to remain enforceable against purchasers, mortgagees or execution creditors.

6.175 The Crown’s powers of enforcement that are limited by sections 214 and 215 are no longer used. This is not surprising, as these provisions were derived from legislation written nearly 200 years ago. The law relating to the civil proceedings by and against the Crown is now set out in the Crown Proceedings Act 1958. Section 17 of the Act provides the general rule that the Crown shall not enforce a demand against a public debtor or against any of the debtor’s property ‘in any other manner than one subject could enforce a claim against another subject and his property’, and shall have ‘such and the same lien claim and rights as any subject has and can enforce, and no other’. This rule raises an inference that special procedures for the Crown are abolished.

6.176 The Registrar is unaware of sections 214 and 215 ever being invoked. No ‘Index of Debtors and Accountants to the Crown’ exists. The Department of Justice has informed us that debts to the Crown are now invariably enforced by warrant. We have found no reason to retain these provisions and received no opposition to our proposal in the Consultation Paper that they be repealed.

6.177 We see no reason why the procedure by which a court order for recovery of a debt may bind land, and the priority it has over other interests, should not be the same for old system land as it is for land recorded in an ordinary folio under the Transfer of Land Act.

RECOMMENDATION

51. Sections 209, 210, 211, 212, 214 and 215 of the Property Law Act 1958 should be repealed and section 52 of the Transfer of Land Act 1958 should be amended to provide that a judgment, decree, order or process of execution recorded under sections 26E or 26F of that Act has the same effect as to priority of the execution as a recording made under section 52(2) of that Act. As a consequential amendment, section 26I of the Transfer of Land Act 1958 should be amended to exclude an interest recorded under section 26E or 26F.

127 Transfer of Land Act 1958 (Vic) s 126.
128 Transfer of Land Act 1958 (Vic) ss 26E(1)(a), (4).
129 Property Law Act 1958 (Vic) s 6(1).
130 Wallace (1984), above n 6, 299.
131 Mr Michael Macnamara Submission 2; Associate Professor Maureen Tehan et al Submission 9; Law Institute of Victoria Submission 13.
132 Land Victoria, Submission 18, 2.
133 The New South Wales (Debts) Act 1813 (54 Geo 3, c 15) (Imp) s 4.
135 Land Victoria, Submission 18, 2.
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OTHER OBSOLETE PROVISIONS IN PART III

SECTION 213

6.178 Section 213 provides that a purchaser is not affected by a pending suit to recover or assert title to a property (a *lis pendens*) unless or until a memorandum containing specified information is left with the Registrar-General, who must enter the details into the publicly available book prescribed by section 209.

6.179 Lodging the memorandum is a dealing that triggers the creation of an identified folio for the land, if one does not already exist, under the Transfer of Land Act. Section 52(1) of the Transfer of Land Act states that no *lis pendens* shall bind or affect any land under the operation of that Act except as provided by that Act.

6.180 As the Transfer of Land Act makes no provision for the recording of *lis pendens*, section 213 of the Property Law Act is inconsistent with section 52(1) of the Transfer of Land Act and should be repealed.

SECTIONS 216–218

6.181 Section 216 provides for a ‘quietus’ to be registered in the ‘Index of Debtors and Accountants to the Crown’. A quietus is an instrument acknowledging that a Crown debt has been discharged. A seller who was a debtor or accountant to the Crown could not transfer good title until a quietus was entered on the record.136

6.182 Section 217 enables the discharge of the estates of debtors and accountants to the Crown on such terms as are thought to be proper. Section 218 provides that discharging part of the estate of a debtor or accountant to the Crown under section 217 does not affect the Crown’s claim on other land liable for the debt.137

6.183 The Registrar is unaware of these provisions ever being invoked.138

6.184 We proposed in our Consultation Paper that these provisions be repealed. All submissions commenting on the proposal agreed.139

RECOMMENDATION

52. Sections 213, 216, 217 and 218 should be repealed.

136 Robinson (1992), above n 6, 464 citing Wilde v Fort (1812) 4 Taunt 334; 128 ER 359.
137 Ibid 465.
138 Land Victoria, Submission 18, 2.
139 Mr Michael Macnamara, Submission 2; Associate Professor Maureen Tehan et al, Submission 9; Law Institute of Victoria, Submission 13; Land Victoria, Submission 18.