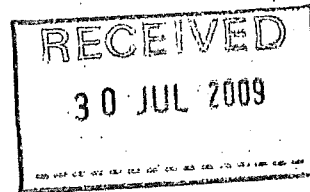


29 July 2010

Associate Professor Pamela O'Connor
Victorian Law Reform Commission
DX 144
Melbourne VIC 3000

Submission No. 16

Dear Associate Professor O'Connor

PROPERTY LAW REVIEW

Thank you for your letter dated 23 April 2010 inviting comment from State Trustees concerning the Victorian Law Reform Commission's (VLRC) review of the Property Law Act 1958.

We confine our response to Chapters 4 and 7 of the Consultation Paper and the issue of the ability of a donee appointed under an enduring power to attorney to lodge a Queen's caveats on behalf of a donor.

Chapter 4: Trusts of Land

We believe that the current dual scheme regulating trusts of land in Victoria is in need of reform and requires simplification.

State Trustees agrees with the VLRC's discussion comments that the distinction between trusts for sale, regulated by the *Property Law Act*, and trusts with a mere power to sell, which attract the *Settled Land Act 1958*, is confusing for both settlers and some legal practitioners. State Trustees administers some testamentary trusts where it could have been apparent from the outset that making them subject to the *Settled Land Act* would invite difficulty during administration, particularly where funds have not been set aside and expressed to be made available to meet the cost of outgoings. In such circumstances it is often unclear whether the creation of a trust with a mere power to sell was inadvertent or intentional.

In our experience, the difficulty in administering trusts with a mere power of sale arises where the trust is a "dry" trust i.e. one with no available funds to cover repairs and outgoings, and where the life tenant is obliged under the instrument of trust to effect repairs and refuses to do so. Where the property deteriorates and falls into disrepair, the trustee has no power to force the life tenant to repair and cannot sell the property without an order from the Court. Similarly, where the trustee has an obligation under the trust instrument to effect repairs, insure or pay other outgoings, but has no access to funds, the trustee has no power to sell the property, even where it has fallen into disrepair, without an order from the Court.

However, where the trust creates a binding trust for sale, a trustee has the power to sell trust property if the life tenant will not fund repair costs and there are no trust funds available to meet the costs.

We agree that the law should make equivalent provision for those not so well advised in the creation of a trust of land. We believe that a statutory mechanism enabling the creation of a single statutory trust, with provisions that confer on trustees specific powers to deal with trust property, may go some way to resolving this issue. Well drafted statutory provisions could assist both legal practitioners and settlers to consider the balance of power to be distributed between trustee and tenant for life. Legislation should also specify that some or all of a trustees' statutory powers apply unless the instrument of trust expressly provides otherwise. Consideration could also be given to providing trustees with the power to bring current settlements under the provisions of new legislation, thus giving it retrospective effect.

Conveyances by administrators of persons with a mental illness

In our view, section 30(1) of the *Property Law Act* is unnecessary and of no practical use. Administrators are empowered under Division 3A of the *Guardianship and Administration Act 1986* to undertake all acts and exercise all rights which a represented person could have done if the represented person was not under a legal disability. It therefore seems unnecessary that section 30(1) merely echoes the present statutory position. We therefore believe that section 30(1) should be repealed.

Queen's Caveats

While the VLRC's Terms of Reference require it to focus on the desirability of change to Victoria's property laws in relation to the *Property Law Act* and the law of easements and covenants as governed by, inter alia, the *Transfer of Land Act*, we would also like to comment briefly on another issue arising under the *Transfer of Land Act*.

In protecting the interests of a donor under an enduring power of attorney, who has lost capacity, it would be useful for an attorney under enduring power of attorney (financial) to be able to take effective measures to stop unauthorised third party dealings with the donor's land, such as where the donor is persuaded to sign documents to transfer their property for inadequate or no consideration.

The Registrar of Titles has the discretion to enter a Queen's caveat or registrar's caveat against a property's title to, for example, prevent fraud. The caveat prohibits any transfer or dealing with the land belonging to a registered proprietor under a disability.

Where State Trustees is appointed by VCAT to administer the legal and financial affairs of persons under a disability, it can successfully apply to have the Registrar of Titles use his discretion to enter Queen's caveats against property belonging to


represented persons. The anomaly, however, is that where State Trustees is acting as attorney under an enduring power of attorney (financial) where the donor has lost capacity, it has been unsuccessful in persuading the Registrar of Titles to exercise his discretion to register Queen's caveats against property belonging to the donor. The use of the Registrar's discretion to allow a Queen's caveat in such cases would be a valuable protection for the donor against third parties who could otherwise unscrupulously take advantage of the donor.

The Registrar has advised that he will not exercise his discretion under section 106(a) of the Transfer of Land Act to lodge a Queen's caveat on the donor's land because this would require him to examine evidence as to the donor's soundness of mind. He has advised that only a VCAT administration or guardianship order would be sufficient evidence of 'unsoundness of mind' for the Registrar to record a Queen's caveat.

We believe VCAT should be given specific power to give a declaration that an enduring power of attorney is valid, the powers of the donee are currently exercisable, the powers extend to protection of the donor's interest in his/her real estate (or a given property) and the donor of the power has lost mental capacity. A consequential amendment would be required to section 106(a) of the *Transfer of Land Act* such that the Registrar of Titles would be permitted, in exercising his discretion, to rely upon the declaration of VCAT as to a donor's soundness of mind.

Should you have any queries or would like to discuss any aspect of our submission, please contact Alistair Craig

Yours faithfully,


A G Fitzgerald
Managing Director

