

**Re: Victorian Law Reform Commission's Consultation 'Review of the
Property Law Act 1958'**

Thank you for your note dated 12 May 2010 covering this Consultation paper.
I suggest the following answers to the questions raised for consultation.

**1. What do you think should be the title of the new Act to replace Property
Law Act?**

We should retain the title '*Property Law Act*'. This was the title selected by Sir
Leo Cussen as part of the 1928 consolidation of Victorian legislation. It is an
accurate description of the subject matter.

In the 1915 consolidation the corresponding statute was known as the '*Real
Property Act*'. '*Real Property Act*' in most Australian States is a reference to the
Torrens system legislation hence to name the new Act '*Real Property Act*' would
create confusion. In New South Wales the statute corresponding to Victoria's
Property Law Act is the '*Conveyancing Act 1919*'. The subject matter of that Act
and of Victoria's *Property Law Act* is however broader than conveyancing.

If some variation in nomenclature is felt to be necessary or appropriate I would
suggest the title which was adopted in England in 1925 '*Law of Property Act*'.

**2. Should the provisions listed in Appendix B be expressed not to apply to
ordinary folio land?**

Yes.

**3. What features do you think a new Act should have, to make it easier to
read, navigate and understand?**

Recommending a particular structure for a new Act is difficult. What may
appear straightforward and intelligible to one mind may seem confusing and
illogical to another and vice versa. Since the present Act has in one form or
another been part of Victoria law and practice since 1958 there is much to be said
for maintaining the same general framework which exists in the present statute.

4. Should it remain possible to create legal life estates and legal future interests?

No. This step was taken in England as long ago as 1926. My own conveyancing experience has not brought to light examples of the conveyance of any legal interests other than leasehold of the simple freeholds. Life estates and the like, as a matter of conveyancing practice, are invariably dealt with in equity. The one exception which I saw years ago in a chain of Title was a grant to uses in a conveyance executed in the 1920s employing a springing use. No doubt an analysis of the precise situation confronting the conveyancer at that time (which seemed unnecessary for my purposes in perusing the chain) would explain why this rather arcane device was resorted to on this occasion. Nothing of the sort could happen now with the repeal of the Statute of Uses by the *Imperial Acts Application Act 1980*.

5. Should determinable and conditional fees be created only in equity?

Yes. The same logic underlying the answer to the previous question supports this conclusion.

6. Should determinable fees be converted to conditional fees?

No. The determinable fee has generally fared better than the conditional fee. A determination is automatic. The possibility of reverter accruing to the grantor is vested. The right of re-entry following a conditional fee probably would not be. Hence there would be a perpetuity problem.

7. Should existing estates tail be converted by statute to fee simple estates?

No. Since the precise extent of the continued existence of an estates tail is unknown, the precise effect of the conversion cannot be known.

8. Should all 'settlements' as defined in the *Settled Land Act 1958* be held under a single statutory trust?

The paper's criticisms of the obscurity of the *Settled Land Act* in the context of modern Victorian conveyancing are well justified. When I was dealing with issues in the Planning and Environment List proceeding recently relative to settled land I found it impossible despite consultation of standard texts such as Wilmar and consultations with the legal branch of the Office of Title to reach confident conclusions as to practical issues in the exercise of a life tenant's power of sale under the *Settled Land Act*. Who should be shown as vendor in the contract of sale? Who should execute the transfer of land when according to the

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register under the *Transfer of Land Act* the legal estate is vested in the trustee and not in the life tenant or tenants?

9. Should minors' property be held under a single statutory trust, instead of under the *Settled Land Act 1958*?

Yes. The same logic as supports the answer to the previous question.

10. Should the special rules of inheritance in Part V be replaced with a provision identifying the heirs by reference to the specified person's interstate successes?

Yes. There seems to be no justification for having two separate and not necessarily congruent regimes for '*takers in default*'.

11. Should the creation of rentcharges on old system land be abolished?

Yes.

12. Should Section 153 be retained and amended to make it effective in its application to registered land?

I am sceptical as to whether any leases for a term of 300 years or more with at least 200 years to run exist in Victoria. The utility of this provision, whether relating to land under the *Transfer of Land Act* or otherwise, is therefore dubious. It remains a possibility even if my doubts as to the present utility of the provision are justified that in future such long term leases will be granted in Victoria. Accordingly I would answer this question '*yes*'.

13. Should the reference to '*a natural subject of Her Majesty*' in Section 27 be replaced with '*an Australian citizen*'?

14. Should the Act continue to refer to an '*alien*'? If so, does the word need to be defined?

15. Should references to an '*alien friend*' be removed from the Act?

16. Should Section 27 be amended to make the interaction with the *Foreign Acquisitions and Takeovers Act 1975 (Cth)* clearer?

The question of Australia's relationship with the rest of the world and foreign nationals is properly the domain of the Commonwealth Parliament. I submit that State law should, if it is thought necessary, exclude any common law rule against

'aliens' or 'non-citizens' owning land in Victoria. Beyond that all further rules relative to that matter should be left to the Commonwealth Parliament.

17. How should the overlap and inconsistency between Section 28B and equivalent provisions in the *Co-operatives Act 1996* and *Co-operative Housing Societies Act 1958* be corrected?

The issue of minors' contracts to borrow money should be dealt with in the statutes which establish and govern the affected institution.

18. Should Section 30(1), concerning conveyances by an administrator on behalf of a patient within the meaning of the *Mental Health Act 1986*, be repealed?

Yes. These matters should be dealt with under the *Guardianship and Administration Act*.

19. Should Section 21, concerning the acquisition of property by a married couple, be retained?

No. The repeal would not revive the abolished common law rule Section 14(2) *Interpretation of Legislation Act 1984*.

20. Should Sections 167, 168 and 170, concerning the property rights of married women, be repealed? Should they be replaced by Sections 156 and 157(1) of the *Marriage Act 1958*?

All of these provisions appear to be obsolete and should be repealed.

21. Should all restraints on anticipation be abolished?

Yes.

22. Should assignments of leases be exempted from the requirement of a deed, where the lease itself is not required to be in writing?

No. It is one thing for the relationship between landlord and tenant and short term leases to be exempted from the requirement of writing. The relationship between the immediate parties to a landlord and tenancy arrangement may be sufficiently straightforward not to require further formality at least for short term arrangements. Where a third person is introduced a measure of complexity arises such that the requirement of writing is appropriate.

23. Should a deed be required for a declaration of trust of land?

No. The requirement of this additional formality could in particular cases create an injustice.

24. Should there be a requirement that the deed of trust be witnessed?

No. If it is accepted that a deed has been executed by the grantor there would be potential injustice in denying its effectiveness merely for the lack of a witness.

25. Should signed writing be required for creating or passing a legal or equitable interest in personal property?

Yes. Refer to the answer to question 22.

26. Should Section 134, concerning assignment of a thing in action, include provision for voluntary assignments taking effect only in equity?

No. I respectfully concur in the views of the VLRC at paragraphs [8.33] and [8.34].

27. Should the test for the exercise of the court's discretion in Section 49(2) be put on a statutory footing? If so, should the test be an 'exceptional circumstances' test or a 'just and equitable' test?

Yes. The test should be a 'just and equitable' test.

28. Should Section 49(2) be extended to allow the court to award part of a deposit or damages?

Yes. The approach adopted by Crockett J in *Kadissi v Jankovic* [1987] VR 255 should be embodied in the statute.

29. Should Section 56(1) be amended to remove references to 'other property', and to enable enforcement of a covenant by third party beneficiaries who were not identified or in existence at the time of the conveyance or other instrument?

No. The section should be amended so as to give effect to the recommendation of the Law Revision Committee of England in its sixth Interim Report in 1937.

30. Should Sections 209-212, concerning execution of judgments, be amended to require recording by the Registrar of Titles?

Yes.

31. Should Sections 213-218, concerning execution of judgments, be repealed?

Yes.

32. Should Section 270 be extended to enable the distribution of shortages, as well as excess of measurement, in proportion to the respective areas of allotments?

Yes.

33. Should Victoria adopt a mistaken improver relief provision? If so, should it encompass mistakes as to identify as well as mistakes as to title?

Yes. The provision should cover both the situation where the improver makes a mistake as to the allotment upon which he erects a building as well as the situation where the improver believes he has Title but loses it by reason of termination of a chain of contracts see *Ex parte Karynette Pty Ltd* [1992] 2 Qd R 211.

34. If Victoria adopts a mistaken improver provision, which court, courts or tribunal should have jurisdiction?

The jurisdiction should be given to VCAT's Real Property List.

35. Should Victoria have a discretionary relief provision for building encroachments?

Yes.

36. Should the limitation period for recovery of land continue to apply in relation to portions of land adjacent to a property boundary?

Yes.

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37. If the limitation provisions are amended, what provision should be made for persons in adverse possession of portions of land at the time the amendments come into force?

Unnecessary to answer.

38. If Victoria adopts a building encroachment provision, which court or courts or tribunal should have jurisdiction?

It should be possible to deal with these matters in the County or Supreme Court. VCAT's Real Property List is a far more appropriate forum than the Magistrates' Court to deal with issues of Title to land.

39. Do you agree with the other proposals set out in Appendix A?

Yes, except insofar as any of them is inconsistent with the answers already given.

With kind regards,

M. F. Macnamara

