IN THE MATTER OF:

REVIEW OF PROPERTY LAW ACT 1958
CONSULTATION PAPER

SUBMISSION

A. Introduction

1. The authors make this submission in response to the call for submissions made in the *Review of the Property Law Act Consultation Paper* (**the Consultation Paper**) published by the Victorian Law Reform Commission (**the Commission**) in April 2010.

2. The authors do not wish to make submissions regarding each of the questions posed in the Consultation Paper and collected at pp 84 and 85 thereof. The authors generally agree with the views of the Commission for the reasons expressed in the Consultation Paper save for the questions and opinions set out below.

B. Chapter 6 – Question 12 (Enlargement of Long Leases)

3. We agree that s 153 of the *Property Law Act* 1958 (Vic) (**the Act**) should be repealed. However, instead of replacing it with a substitute mechanism for the conversion of long leases (being leases with a term of at least 300 years with at least 200 years to run and without provision for re-entry on the part of the reversioner) (**long lease**) to freehold, the authors consider that it would be better to legislatively limit all leases (including long leases) with a term exceeding 99 years and with more than 99 years to run, to a maximum term of 99 years.

4. The advantage of such a statutory maximum term on leases of real property would be:

   a) to limit the ability of land owners to control land long after their death (for similar reasons as the rule against perpetuities) other than by means of a trust (statutory or equitable);

b) to preserve or restore the value of the reversionary interest, thereby increasing the likelihood that the reversion holder will be identified and that transmission of the reversionary interest will occur;

c) to ensure that the principal long term interest in real property remains freehold, thereby promoting simplicity in the system of land tenure in Victoria.

5. The greater identifiably of the holder of a reversionary interest will also assist the holders of long leases, if they wish, to identify and negotiate with that person or entity to acquire the reversionary interest and thereby convert the combined interest into freehold. If it does not already exist, a form or procedure may be required for the unification of a long leasehold and the reversionary interest into freehold.

6. Meanwhile, companies and any other persons or entities which for commercial reasons require tenure longer than 99 years and which are unwilling or unable to purchase the freehold in certain property may always include in the lease an option to renew.

C. Chapter 8 – Question 25 (Interests in Personal Property)

7. The authors note that some items of personal property may be more valuable than some real property (e.g. works of original art; jewellery; luxury vehicles). The focus on real property in both statute and the common law remains more a hangover of feudalism than a reflection of the "great Australian dream". The authors accept that the home remains the single largest asset of most Victorians. Nevertheless, the increase in affluence since the Second World War means that no small number of Victorians own valuable items of personality for pleasure, as an investment (e.g. part of superannuation) or both.

8. For these reasons, the authors believe that greater consideration should be given to the protection of high value chattels and the recording and evidencing of dealings with it.

9. The authors note the recent enactment of the *Personal Property Security Act* 2009 (Cth) (as amended – **the Security Act**) and the substantial legal regime created by that Act for the registration of certain interests in personal property and for the prioritisation of such interests.

10. It would be consistent with the purposes of the Security Act and the legal structures created by it if ownership of personal property, including changes in that ownership not otherwise dealt with in that Act as a security interest, could be registered with the Registrar of Personal Property Securities. It seems to the authors odd that registration of a security interest in certain property should occur without the capacity to register absolute ownership free of any security interests, at least where high value chattels are involved (where the concern is for proof of ownership and not predominantly consumer protection).

11. The authors disagree with the proposal in para. 8.21 of the Consultation Paper as an absolute statement. The Commission should recommend to the Attorney-General that an option be canvassed with the Commonwealth Attorney-General to provide for voluntary registration of ownership and change of ownership of personal property which has a value greater than a certain amount, say, initially, $100,000 (on the estimated value of owner). Registration would, however, be evidence of title rather than the source of title, since purchasers or donors of such high value personal property could not know from the nature (unlike real property or shares in ships) or item of the property itself whether it was registered without conducting a title search or being told of registration.

12. Legal dispositions of registered personal property would be required to comply with transfer requirements (registration of a transfer form). Equitable dispositions would follow the usual equitable rules for dispositions of Torrens title property.

D. Chapter 10 (Third Party Rights – section 56(1))

13. We submit that any amendment to section 56(1) of the Act be only for the purposes of confirming and clarifying the existing judicial interpretation of that section.[1]

14. Undoubtedly the doctrine of privity has shortcomings and it was these shortcomings that led to the creation of s 56. However, privity of contract should remain part of the Australian body of law. Despite the occasional harsh outcome that may result from privity of contract, privity gives a degree of economic and legal certainty and, to that end, efficacy. Any modification to privity of contract will likely have wide reaching ramifications to the law of property.

15. It should be kept in mind that the common law doctrine of privity also includes privity of estate and the arguments presented in opposition to privity ignore the impact of privity of estate. In fact, privity of estate may benefit 3rd parties, as in the reversion of an estate and reversioner's rights to receive income from an existing lease. Specifically, see s 141 of the *Act* which confirms privity of estate (as opposed to privity of contract which is negatived in s 56).

16. We also note that restriction (or, at the extreme end, removal) of privity of contract would almost undoubtedly result in increased litigation. Put conversely, expanding the scope of s 56 as it now stands could create more, rather than less, uncertainty. On one view, by removing privity of contract and creating uncertainty, it is conceivable to say that any justice provided to a 3rd party comes at the cost of the named contractual parties. In that regard we suggest that, if s 56 is to be amended, it be done with a view to providing certainty by clarifying the need to identify the a) purported benefit, b) the intent of the grantor, and c) the 3rd party.

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[1] See for example *Jones v Bartlett* (2000) 205 CLR 166

Summary – Third Party Rights

17. We submit that s 56 be amended as follows:

- remove the reference to "other property" as that is clearly not consistent with case law and the history of that section;[2]
- require that the benefit, and the intent of the person conferring the benefit, be clear and unambiguous;
- require any 3rd party relying on the provision be clearly identifiable and in existence;
- all amendments to be drafted using contemporary drafting language; and
- unless the Commission is aware of parties avoiding the provisions of a deed through lack of indented pages, the reference to indenture in subclause (2) is probably superfluous and should be removed.

E. Chapter 12 (section 270)

18. We agree that s 27 be amended to allow distribution of excess by a proportional method however we have reservations in regard to redrawing boundaries in the event of a shortage. Arguably, s 270 applies only to equal allotments, which means that any equal distribution of excess will be proportionate anyway. To that extent, we submit that s 270 be expanded (or at least clarified) to apply to mixed sized groups of allotments. In regard to shortages of measurement, should that shortage result in a reduction in plot size, we envisage the reduction potentially being viewed by the landowner as governmental repossession and, accordingly, should be approached cautiously. Unless the Registrar can provide compelling evidence that this measure is necessary, we do not agree that such an amendment be enacted. If s 270 is amended to permit reduction in plot sizes, we recommend that the landowner be exempt of any penalty by means of the reduction of their land, e.g. for any

[2] Curiously, it is noted in *Jones v Bartlett* that s 56 spawned from an indentured party's need to rely on the provisions of a contract to which they were not a party. Conceivably, this encompassed all property rights including real property. Contrast this with the currently accepted view that the words "other property" were not intended to change the law but were (inadvertently?) inserted into the predecessor UK Act by means of consolidating statute; see *Beswick v Beswick* [1968] AC 58.

planning requirement that requires a minimum plot size, had that requirement been satisfied prior to the reduction in land.

F. Chapter 12 (Mistaken Improver Relief)

19. We do not agree that a party who improves an innocent 3rd party's property, even mistakenly and innocently, should be entitled to compensation, regardless of whether the improvement occurred as a result of mistaken title or mistaken identity. Despite the harshness of this position, it is ultimately a contest between two innocent parties and the property owner is, absent fraud, acquiescence, or some other mitigating factor, more "innocent" than the improver. Further, an order of compensation could create financial hardship for a landowner that has not committed any wrong. We also note that the Commission appears to rely on a Queensland law reform publication authored 37 years ago and a case which is over half a century old. The Consultation Paper acknowledges that mistaken improver compensation originates from a time when land identification was deficient. Development of technology in the areas of property registration and identification is a more suitable solution to the problem of mistaken improvement.

20. If, however, the Commission is committed to pursuing a compensation remedy for a mistaken improver, the compensation payable should be subject to a *discount* and should give thorough consideration to the ability of the land owner to pay compensation, including a valuation of yield (similar to s 5A(3)(f) of the *Valuation of Land Act* 1960 (Vic)). Discounting the amount of compensation is justifiable on the basis of the landowner's lack of fault and also to reflect any loss of amenity or opportunity the landowner may suffer, even despite an increase in the improved property's value. If the law is amended to provide compensation to the improver based solely on "before and after" valuations, there is fertile ground for dispute and inequity upon the landowner.

21. Finally, there seems to be an inverse correlation between mistaken improvements and building encroachments (the latter may be viewed as a mistaken *detriment*); see

paragraphs 24 to 29 below. If the Commission recommends adopting a mistaken improver provision, it may be beneficial to locate any relevant legislative drafting in proximity to encroachment provisions.

22. The authors are of the opinion that the Magistrates Court is the appropriate jurisdiction for matters involving mistaken improvements where the claim is less than the general financial limit ($100,000) and the Supreme Court where the claim exceeds that limit or where difficult issues of equity are involved.

Summary – Mistaken Improver Relief

23. The authors do not agree that a mistaken improver be entitled to compensation. However, if this principal is brought into Victorian law, we submit it should adopt the following features:

- any compensation order resulting from mistaken improvement should incorporate a *discount* factor in favour of the landowner;
- any order for compensation should have regard to the ability of the landowner to pay the compensation and, to that extent, compensation should have regard to the probable income yield arising from the improvement, such that the landowner can afford the compensation (subject always to the discount mentioned above); and
- the process for addressing mistaken improvements should be clearly distinguished from building encroachments, at least in respect to the valuation of the improvement.

G. Chapter 12 (Encroachment and Boundary Disputes)

24. We submit, subject to comments below, that the rule of adverse possession continues to apply to Victorian land and that legislation regarding boundary disputes be clarified accordingly. Within the limitation period we support the creation of functional mechanisms to deal with encroachments and boundary disputes, however those mechanisms should be clear and amalgamated within one act.

25. The rule of adverse possession is not without detractors and many people view property ownership as an unalienable right which is, for the most part, reflected through the Torrens system of registration. However, that is not to say that adverse possession doesn't perform a necessary function in Australian property law. It worth noting that over the last 30 years New South Wales has actually increased the role that adverse possession plays in land ownership. Prior to 1979, claims of adverse possession were not recognised in NSW under the *Real Property Act* 1900 (NSW). Amendments to section 45 of the RPA in 1979 permitted possessory claims to whole plots only and further amendments in 2001 allowed possessory claims in limited circumstances to partial plots of registered land.

26. A consistent approach of applying adverse possession to whole and partial plots of property will provide certainty and allow claims and defences to be dealt with more confidently. The application of adverse possession to boundaries, including encroachments, should be clarified and made consistent across all relevant legislation (including the *Fences Act* 1968). *Within the limitation* period we see a benefit in refining the existing legislative mechanism for dealing with boundary disputes and creating a new mechanism for building encroachments where the cost of removing and rectifying the encroachment is substantial. For example, in some cases removal of an encroachment such as an external load-bearing wall, may require a complete dismantling of the entire structure, even though the vast majority of the structure is not an encroachment. In these types of circumstances, a court of competent jurisdiction should have discretionary power to order the affected land be registered in the name of the encroaching owner upon payment of compensation by the encroacher to the original landowner. We also support the view that any compensation payable by this means is subject to a *premium*. This will encourage encroachers to be careful when building close to boundaries and also act as a mitigating factor against property developers that might use this provision to their advantage (by making "mistakes" of encroachment resulting in acquisition of fragments of adjoining property). We also recommend that the original landowner be exempt of any penalty by means of the reduction of their land, e.g. for any

planning requirement that requires a minimum plot size, had that requirement been satisfied prior to the reduction in land.

27. The authors are of the opinion that matters involving boundary disputes should remain with the Magistrates Court (unless the matter exceeds the financial threshold, in which case the matter should be heard in the Supreme Court). Where a matter is predominantly a valuation dispute, and issues of ownership and entitlement to compensation are not in dispute, it may be appropriate to hear the matter in the Valuation List at VCAT.

28. Further, given that fence and boundary disputes, and also encroachments, are similar in nature it seems appropriate to co-locate any legislation dealing with these issues.

Summary – Encroachment and Boundary Disputes

29. The authors submit that the following features be adopted in Victorian property law:

- subject to any exceptions noted in the *Limitation of Actions Act* 1958, legislation should confirm that adverse possession applies to Victorian land and should make clear that any mechanisms for dealing with disputed boundaries apply only within the limitation period;
- Subject to payment of compensation by the encroacher, we support the granting of a discretionary court power to order transfer of the land upon which the encroachment rests to the encroacher in circumstances where the cost of removing the encroachment exceeds the damage to the adjoining property owner;
- any land gained by an encroacher by means of such discretionary power must be subject to compensation and, for the reasons noted above, such compensation should include a premium in favour of the original land owner;
- all legislative mechanisms for dealing with boundary disputes should be co-located; and

- in regard to transitional arrangements, given that we support the continuation of rule of adverse possession, our only recommendation is that legislation confirms that the limitation period and the rules of possession should not be affected as a result of any amendment or improved dispute resolution mechanism.

Dr Paul Vout
Dawson Chambers

Mr James Hope
Principal
Hope Lawyers