



Victorian  
Law Reform  
Commission

# Disputes Between Co-owners Report

## Victorian Law Reform Commission

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## Preface

This is the first Report published by the Victorian Law Reform Commission. It proposes a simpler and cheaper method for dealing with disputes between co-owners.

The Commission acknowledges the valuable work of Jamie Walvisch on this reference. Jamie played a major role in the preparation of the earlier *Disputes Between Co-owners: Discussion Paper* and took primary responsibility for the drafting of this Report. We also acknowledge the editing work of Trish Luker. The Commission thanks members of our expert Advisory Committee, who are listed on the following page. The Advisory Group made helpful suggestions about our approach and commented on an earlier draft of this Report.

The Report includes a draft Bill. The process of preparing the draft Bill assisted us in refining our recommendations. The Commission expresses its appreciation to Eamonn Moran, Chief Parliamentary Counsel, for making available resources enabling the Bill to be drafted, as well as to Jayne Atkins, from the office of Chief Parliamentary Counsel, who undertook the onerous task of drafting the Bill.

The Commission is grateful to the Chief Justice, the Honourable Justice John Harber Phillips AC; the Honourable Justice Murray Kellam, President of the Victorian Civil and Administrative Tribunal; and His Honour Chief Judge Glen Waldron AO, for their advice.

The Commission also thanks all those who made submissions, or who participated in consultations. Submissions are listed in Appendix 1 of this Report.

The final recommendations in the Report are the responsibility of the whole Commission.

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## Terms of Reference

On 27 April 2001, the Attorney-General, the Honourable Rob Hulls, MP, gave the Victorian Law Reform Commission a reference:

1. To review Part IV of the *Property Law Act 1958*, with a view to introducing simpler and cheaper processes
  - for the resolution of disputes between co-owners
  - for the sale or physical division of co-owned land
2. To consider whether similar processes should be introduced to deal with co-ownership of other forms of property, for example chattels.

## Abbreviations

AC	Appeal Cases
ACLD	Australian Current Law Digest
ADR	Alternative Dispute Resolution
ALJR	Australian Law Journal Reports
BPR	Butterworths Property Reports
cf	compare with
CLR	Commonwealth Law Reports
Co Rep	Cokes Reports
eg	for example
ER	English Reports
Fam Law	Family Law (UK)
ie	that is
NSWLR	New South Wales Law Reports
PLA	<i>Property Law Act 1958</i>
P Wms	Peere Williams Reports, Chancery and Kings Bench (UK)
s	section (ss pl)
TLA	<i>Transfer of Land Act 1958</i>
V Conv R	Victorian Conveyancing Reports
VCAT	Victorian Civil and Administrative Tribunal
VCAT Act	<i>Victorian Civil and Administrative Tribunal Act 1988</i>
VCCAV	Victorian Community Council Against Violence
VR	Victorian Reports
WAR	Western Australian Reports

## Overview of this Report

### OUR AIM

The laws which apply to people who own property together (co-owners) are technical and complex and they affect many people. The complexity of the law makes it difficult and expensive for people who own property together to end co-ownership or to resolve disputes without going to court. The Attorney-General has given the Commission this reference so that the law can be simplified and clarified. The aim of this Report is to make sale or division of co-owned land easier, to minimise potential disputes, and to spell out mechanisms for resolving any disputes that arise.

### OUR PROCESS

In June 2001 the Commission published *Disputes Between Co-owners: Discussion Paper*. This Discussion Paper outlined the current law relating to co-ownership, and suggested a number of possible reforms. It called for submissions to be made to the Commission by 1 August 2001.

We received sixteen submissions, from a variety of people and organisations.<sup>1</sup> The submissions covered a wide range of issues, and form the basis of many of the Commission's recommendations. Submissions are treated as public documents, unless they are identified by the author as confidential. Members of the public may contact the Commission to obtain copies of submissions.

After examining the submissions, the Commission convened an Advisory Committee to provide advice and assistance in the formulation of our recommendations. Members of the Advisory Committee are listed in the front of this Report. The Advisory Committee provided us with valuable comments on a draft of the Report. The views and recommendations expressed in this Report are, however, those of the Commission, not those of the Advisory Committee.

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1 See Appendix 1 for a list of submissions.

The Commission also consulted with a number of individuals on different aspects of the Report. These included John Barry, Deputy Registrar of Titles, Land Registry; Ian Gilbert, Director, Australian Bankers' Association; John Hartigan, Director, Land Registry and Registrar of Titles, Land Victoria; Michael Macnamara, Deputy President, Victorian Civil and Administrative Tribunal; John Abbott, Deputy Solicitor, Ian Palfery, Solicitor and Gary Ray, Solicitor (Victoria), Legal Department, Commonwealth Bank; Elizabeth Wentworth, Legal Counsel, Banking Ombudsman; and the Property Committee, Property and Environmental Law Section, Law Institute of Victoria. Advice was also sought in relation to jurisdictional issues from the Honourable Justice Phillips AC, Chief Justice, Supreme Court of Victoria; His Honour Chief Judge Waldron AO, Chief Judge, County Court of Victoria; and the Honourable Mr Justice Kellam, President, Victorian Civil and Administrative Tribunal.

Having formulated our recommendations and written the Report, the Commission sought assistance from the Office of Chief Parliamentary Counsel to produce a draft Bill. This Bill puts our recommendations into a legislative framework.<sup>2</sup>

## STRUCTURE OF THE REPORT

The Report is divided into four chapters—an introductory chapter and three substantive chapters. In each of the substantive chapters we discuss existing laws, and make recommendations about changes we believe should be made to these laws. Some legal and technical terms are set out in the glossary, which appears in boxes embedded in the text.

Chapter 1 provides background information in relation to co-ownership in Victoria. It explains the two types of co-ownership that exist in Victoria: tenancies in common and joint tenancies. It also briefly examines the Torrens System—the main system of registration of land titles that exists in Victoria.

Chapter 2 focuses on the creation of joint tenancies and tenancies in common. We propose some changes to the requirements for creating co-owned interests, including requiring people to specify the type of interest they wish to create, as well as recommending some forms of community education that could be undertaken.

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<sup>2</sup> See Appendix 3 for a copy of the draft Bill.

Chapter 3 looks at the mechanisms for converting a joint tenancy into a tenancy in common ('severing' a joint tenancy). We recommend some new methods of severance, including the registration of an 'instrument of severance'.

Chapter 4 examines the law covering sale or division of co-owned property, and the other remedies that are available to co-owners when property is sold or divided. We make a number of recommendations for reform in this area, including recommending that disputes be heard by the Victorian Civil and Administrative Tribunal (VCAT) instead of by the Supreme Court or County Court, and broadening the remedies available to co-owners when co-ownership comes to an end.

The Report also includes three appendices. Appendix 1 is a list of those who provided submissions to the Commission. The Commission's recommendations are listed in Appendix 2. Appendix 3 contains the draft Bill produced with the assistance of the Office of the Chief Parliamentary Counsel, Victoria.



## Chapter 1

# Co-ownership in Victoria: Background

### WHAT IS CO-OWNERSHIP?

1.1 Co-ownership exists when two or more people have an interest in property (either land or some other form of property, such as chattels) which entitles them to possess the property at the same time.

#### **Chattels**

Chattels are goods which are not affixed to land, for example a car, white goods, jewellery, a boat or caravan.

1.2 Married couples and de facto partners often become co-owners of land when they buy a house together. People may also become co-owners of land if they buy a house together to live in, or for investment purposes, or if they inherit land under a will.

1.3 People can also co-own personal property, for example goods or shares in a company. Co-ownership often occurs when people open a bank account together or when property such as company shares or goods is left to them in a will.

A and B, who are friends, buy a beach house together. They are co-owners.

T leaves all her property 'to my children'. T's three children become co-owners of the property.

### WHAT TYPES OF CO-OWNERSHIP EXIST IN VICTORIA?

1.4 Two forms of co-ownership are recognised in Victoria and other parts of Australia. These are the joint tenancy and the tenancy in common. The most important difference between tenancy in common and joint tenancy is that joint tenants have a right of survivorship. This means that when a joint tenant dies, the property belongs to the remaining joint tenant or joint tenants. The right of survivorship arises because joint tenants are

seen as sharing the same interest in the property, rather than as having separate interests. Because each of them is treated as having the same interest in the whole property, a joint tenant's interest in the property simply vanishes when she or he dies. A joint tenant can convert his or her interest into a tenancy in common by selling or giving the interest away while he or she is alive (this is known as severance),<sup>3</sup> but he or she cannot leave it to anyone by will, so as to defeat the right of survivorship.

**Joint tenancy**

A joint tenancy exists where two or more people own a single interest in property. If a joint tenant dies, the surviving joint tenant(s) are entitled to the whole of the property.

**Tenancy in common**

A tenancy in common exists where two or more people have separate interests in property, which entitle them to possession at the same time. Each can leave their separate share to someone by will.

X, Y and Z are joint tenants of land. X dies. The land belongs to Y and Z. This is referred to as survivorship.

1.5 By contrast, tenants in common are seen as having separate (although undivided) shares in the property, which entitle them to possess the property at the same time. When a tenant in common dies, survivorship does not apply. His or her interest in the property passes to the beneficiaries nominated under his or her will, or is distributed under the legal rules governing inheritance when a person dies without a will (intestate).<sup>4</sup>

X, Y and Z are tenants in common of land. Z dies leaving all his land to P. P becomes a tenant in common with X and Y.

<sup>3</sup> In certain situations, other dealings with the land may also result in severance of the joint tenancy. For a more detailed explanation of severance, see Chapter 3.

<sup>4</sup> When a person dies without leaving a will, or leaving a will that does not dispose of all of his or her property, the property will usually be divided, according to specific rules, amongst any surviving spouse, children or next of kin. See Division 6 of Part I of the *Administration and Probate Act 1958*.

**Torrens System**

The Torrens System is a system of land title which normally provides a guarantee of title to people whose interests in land are registered.

**THE TORRENS SYSTEM**

1.6 The title to almost all land in Victoria is registered under the Torrens System.<sup>5</sup> The Torrens Register<sup>6</sup> is made up of 'folios of the Register'<sup>7</sup> which are held in the Land Registry (previously known as the Office of Titles). The folio of the Register records the people<sup>8</sup> with interests in the particular piece of land. Generally speaking, registration guarantees the interest of the person named on the certificate of title. A person who becomes registered is normally protected against having her or his title challenged. In addition, a person who searches the title can usually assume that the certificate of title is accurate, subject to some exceptions set out in the legislation.

1.7 A person who is registered as the owner (proprietor) of the land holds a certificate of title, which contains the same information as the folio of the Register. It describes all the people with interests in that property.<sup>9</sup> When an interest in land is transferred to another person, the certificate of title must normally be lodged with the Land Registry to enable it to be amended. As joint tenants share the same interest in the property, rather than having separate interests, they only receive a single certificate of title between them. The certificate of title may be held by any one of the co-owners. Because tenants in common hold separate interests in the

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- 5 Land registered under the Torrens System ('Torrens land') is to be contrasted with what is called 'general law land', which is treated according to different rules. The Registrar of Titles is directed to convert general law land to Torrens land with 'all reasonable speed': *Transfer of Land Act 1958* s 9. This is an ongoing process presently being undertaken by the Land Registry. Currently, approximately 3% of the marketable parcels of property in Victoria remain unconverted. While this means that there is still general law land in existence, documents dealing with this land can no longer be recorded on the general law register: *Property Law Act 1958* s 6(2). This means that owners of such land have limited protection, creating a further incentive to convert to Torrens land when dealing with the land in any way. It is for these reasons that this Report does not discuss general law land.
- 6 Hereafter simply the 'Register'.
- 7 *Transfer of Land Act 1958* s 27.
- 8 We have used the term 'people' to refer to all legal 'persons', including individuals and corporations.
- 9 Prior to 1989, the folio of the Register was known as the 'original certificate of title', and the certificate of title was the 'duplicate certificate of title'. Although, technically, duplicate certificates of title no longer exist, people often still refer to what is now simply the 'certificate of title' as the 'duplicate certificate of title'.

property, they may receive separate certificates, known as ‘interest titles’.<sup>10</sup> These certificates set out the exact interest which the tenant in common holds in the property. As a matter of practice, however, interest titles are rarely issued.

1.8 The Register is now being converted to a computerised record of title. This means that all interests in Torrens land will eventually be recorded on an electronic database. With certain exceptions, the Land Registry expects this process to be completed by early 2002. Once the interests held in a particular property are entered into the database, it is possible to search online to discover what those interests are and who owns them.<sup>11</sup>

10 *Transfer of Land Act 1958* s 30(2).

11 The computerisation of titles may one day lead to electronic conveyancing, thereby eradicating the need for paper certificates of title. This possibility is currently being investigated by the Land Registry. However, at present, paper certificates of title, containing a print-out of the interests in the property, are still provided to the registered owner. These print-outs contain certain security mechanisms, to distinguish them from the print-outs available from online searching of the Register.

## Chapter 2

# Creation of Tenancies in Common and Joint Tenancies

### INTRODUCTION

2.1 The Commission's terms of reference require it to review the *Property Law Act 1958* with a view to introducing simpler and cheaper processes for resolving disputes between co-owners. Such disputes often arise due to a lack of awareness about the different types of co-owned interests. People may not understand the difference between a joint tenancy and a tenancy in common. As a result, they may unintentionally create a joint tenancy when, if they had been fully informed, they would have preferred a tenancy in common. This can later lead to conflict and litigation. It is therefore important to ensure that the rules for the creation of co-owned interests are clear and simple, so that potential disputes can be avoided.

2.2 This Chapter provides a summary of the rules governing the creation of tenancies in common and joint tenancies. It concludes with recommendations for changes to the law.

### EXISTING LAW

2.3 In the case of land, co-owners usually receive their interest in property under a document such as a transfer of land or a will. In the case of other types of property, for example goods, property may be given or sold to co-owners without using a document. If a document is used, it will often specify whether the co-owners are joint tenants or tenants in common. However, if the document does not make this clear, or if no document is used, rules are needed to determine whether the co-owners are joint tenants or tenants in common.

**Transfer of land**

A transfer of land is the standard document used to transfer an interest in land.

## Common Law

2.4 There are two bodies of law which affect the nature of a co-owner's interest—common law and equity. For historical reasons, common law favours joint tenancies.<sup>12</sup> This means that if the requirements for a joint tenancy are satisfied,<sup>13</sup> and there is no indication that the co-owners are intended to be tenants in common,<sup>14</sup> the law will assume that they are joint tenants. Survivorship will then apply if one of the joint tenants dies.

2.5 This general presumption of a joint tenancy applies only if the requirements known as the 'four unities' are satisfied. The four unities require joint tenants to receive the same interest in the property (unity of interest), at the same time (unity of time), under the same document or transaction (unity of title).<sup>15</sup> Joint tenants must also have the same right to possess the land (unity of possession), an attribute which they share with tenants in common.

### Common law

Common law is a body of law which comes from cases decided by judges, rather than from laws made by parliament.

### Equity

Equity is a branch of judge-made law which originally developed in different courts from the common law. Equitable principles have historically been concerned with fairness. Today equity is administered by the same courts as the common law.

F leaves land in her will to her three children, A, B and C. If the will does not indicate they are to take separate interests in the property, the common law will assume they are intended to be joint tenants and survivorship will apply.

- 
- 12 One reason that joint tenancies were favoured was because it was easier for prospective purchasers of land to investigate a single title to land than to investigate the titles of each tenant in common. Today, when a title to land is registered under the Torrens System, investigation of title does not present the same difficulties.
- 13 See below para 2.5.
- 14 An indication that the co-owners are intended to be tenants in common usually arises through 'words of severance' which show an intention that the co-owners are to have separate shares. For example, if property is given to parties 'in equal shares', it will be assumed that the intention was to give them the property as tenants in common, not as joint tenants.
- 15 Where land is left to people under a will, it is not required that they become entitled at the same time. For example, if T leaves property by will to her three children when they turn 18, they will become joint tenants when they each turn 18, even though this will happen at different times.

## Equity

2.6 The assumption that co-owners are joint tenants can sometimes produce unfair results. To overcome this problem, the area of law known as equity sometimes treats co-owners as tenants in common, even though the common law treats them as joint tenants.<sup>16</sup> In these situations, a person who becomes entitled to the whole of the property by survivorship (ie the remaining joint tenant) will hold the property on trust for those who inherit from the deceased joint tenant (see the examples below).

2.7 There are at least three situations<sup>17</sup> in which equity treats people as tenants in common, even though they may be joint tenants at common law. The first arises where property is purchased by co-owners who are business partners. The second occurs where co-owners contribute unequally to the purchase price of property. The third situation is where co-owners are joint owners of a mortgage. Each of these situations is discussed below.

### BUSINESS PARTNERS

2.8 Business partners who acquire property for the purpose of the partnership do not normally intend the principle of survivorship to operate—they do not intend that the partner who lives the longest should become entitled to the whole of the property. Therefore, although they may be joint tenants at common law, equity will generally treat business partners as tenants in common.<sup>18</sup>

16 As already noted, laws relating to property ownership have developed through two different court systems: the common law courts and the courts of equity. As these systems have now been fused, it has been necessary to develop rules to deal with any conflicting principles that may have arisen over time. These rules are often complex and subject to various exceptions. For the purpose of this Report, however, it is sufficient to note that, as a general rule, the equitable principles will usually prevail. Where one person holds the property at common law and another person holds an equitable interest, a trust is created. That is, the person with the common law interest will hold it on trust for the person that equity deems to be the owner (the person with the equitable interest).

17 In *Malayan Credit v Jack Chia-MPH Ltd* [1986] 1 AC 549 the Privy Council decided that the situations in which the law of equity may determine that co-owners are regarded as tenants in common are not limited to these three situations.

18 *Lake v Craddock* (1733) 3 P Wms 158; 24 ER 1011.

A and B are business partners who buy property together. If they purchase as joint tenants, under the common law B is entitled to the property when A dies. However, equity treats B as holding A's share on trust for those who inherit A's property.

### UNEQUAL CONTRIBUTION TO PURCHASE PRICE

2.9 When co-owners contribute unequally to the purchase price of property, equity will generally treat them as tenants in common with interests proportionate to their contributions,<sup>19</sup> although at common law they may be joint tenants. When they contribute equally, however, they will be assumed to be joint tenants in equity as well as at common law.

A and B purchase land together. A contributes \$75,000 and B contributes \$25,000. If there is no indication in the transfer of the land to A and B that they are to be tenants in common, then at common law they will be regarded as joint tenants. However, equity will assume they did not intend survivorship to apply, and will treat them as tenants in common in proportions which reflect their contribution to the purchase price (A having a  $\frac{3}{4}$  interest, B having a  $\frac{1}{4}$  interest). If A dies, at common law the interest in the entire property will pass to B under the survivorship principle. In equity, however, B will hold a  $\frac{3}{4}$  interest on trust for those who inherit A's property.

If A and B each contribute \$50,000, they will be joint tenants at common law and in equity. If A dies, B will be entitled to the whole of the property.

19 Different equitable principles apply if the purchasers are husband and wife. If a husband and wife become joint tenants of a property to which they contributed unequally to the purchase price, it is assumed that a contribution of more than half of the purchase price made by the husband was intended to benefit the wife. He may prove this was not his intention. If the wife contributes more than half of the purchase price, it is presumed she intended to retain the benefit of her contribution. Again, it may be established that this was not her intention.

## MORTGAGEES

2.10 The third situation in which equity presumes that co-owners are tenants in common arises when two or more people lend money on the security of a mortgage over property. This principle applies whether they lend equal or unequal amounts. This means that if one of the investors (mortgagees) dies before the mortgage loan is repaid, the surviving investor will normally hold the mortgage on trust for those who inherit from the deceased investor, proportionate to the deceased investor's contribution.

F borrows \$75,000 from A and \$25,000 from B. As security for the loan, A and B jointly take a \$100,000 mortgage over F's property. If there is no indication in the mortgage document that A and B are to be tenants in common, then at common law they will be regarded as joint tenants. However, equity will assume they did not intend survivorship to apply, and will treat them as tenants in common in proportions which reflect their contribution to the mortgage loan (A having a  $\frac{3}{4}$  interest, B having a  $\frac{1}{4}$  interest). If A dies, at common law the interest in the entire property will pass to B under the survivorship principle. In equity, however, B will hold a  $\frac{3}{4}$  interest on trust for those who inherit A's property.

If A and B each contribute \$50,000 to the loan, they will also be considered joint tenants at common law and tenants in common in equity. If A dies, at common law the mortgage over the entire property will pass to B, but B will hold a  $\frac{1}{2}$  interest in the mortgage on trust for those who inherit A's property.

### Legislation: *Transfer of Land Act 1958*

2.11 Common law and equitable principles can be overridden or modified by legislation. As noted above, most land in Victoria is now registered under the Torrens System. The rules that apply to Torrens land are contained in the *Transfer of Land Act 1958*. It is therefore necessary to examine how this Act affects the principles outlined above.

2.12 The *Transfer of Land Act 1958* contains two provisions which apply to the creation of joint tenancies and tenancies in common: sections 33(4) and 30(2). Section 33(4) states that:

(a)ny two or more persons named in any instrument as transferees mortgagees lessees or as taking any estate or interest in land shall unless the contrary is expressed be deemed to be entitled jointly and not in shares and every such instrument when registered shall take effect accordingly.

2.13 This section applies the same presumption of joint tenancy which exists under the common law. It means that if a document transferring or mortgaging the land, which is lodged for registration, does not indicate whether the co-owners are joint tenants or tenants in common, they will be registered as joint tenants. The effect of the provision is that people may become joint tenants of land, without being aware of the differences between a joint tenancy and a tenancy in common.

2.14 Section 30(2) of the *Transfer of Land Act 1958* provides that

(t)wo or more persons who are registered as joint proprietors of land shall be deemed to be entitled thereto as joint tenants.

2.15 The precise meaning of this provision has never been tested in the Victorian courts. While there is some dispute as to its possible meaning,<sup>20</sup> it is generally interpreted as meaning that only people registered as joint tenants under the Torrens System have the same rights as a joint tenant at common law.<sup>21</sup> In other words, the principle of survivorship will only operate if proprietors register as joint tenants, or if the presumption of joint tenancy under section 33(4) of the *Transfer of Land Act 1958* applies. In all other cases, survivorship will not apply.

2.16 It follows that the provisions in the *Transfer of Land Act 1958* relating to the creation of tenancies in common and joint tenancies in Torrens land have a similar effect to the principles that operate at common law and in equity.

20 See Victorian Law Reform Commission, *Disputes Between Co-owners: Discussion Paper* (2001) (hereafter Discussion Paper) paras 2.14–16.

21 See *Hircock v Windsor Homes (Development) No.3 Pty Ltd* [1979] 1 NSWLR 501, 506.

## PROPOSED REFORMS

### Specification of the Nature of the Co-owned Interest upon Registration

2.17 Documents presented for registration at the Land Registry may not describe the nature of the co-owned interests being created. People may simply register as co-owners, without specifying whether they wish to be joint tenants or tenants in common. While there are rules for determining what type of interest is created in such a situation,<sup>22</sup> they can be quite complex. This can lead to disputes, especially when the parties did not consider the type of interest that they wanted to create.

2.18 In the Discussion Paper published in relation to this reference, the Commission asked whether instruments that are presented for registration in the Land Registry should specify whether the co-owners are intended to be joint tenants or tenants in common.<sup>23</sup> Under such a scheme, instruments that do not specify the nature of the interest would not be registered. This would require people to consider the type of interest that they wish to create, as well as clarifying the nature of the interest created.

2.19 There was general support for this proposal in the submissions received by the Commission.<sup>24</sup> A Victorian barrister, Mr T M Johnstone, noted that section 54 of the *Land Titles Act 1925* (ACT) requires specification of the nature of the interest, and ‘works very effectively’.<sup>25</sup> Such a reform has also been recommended by the Western Australian<sup>26</sup> and Queensland<sup>27</sup> law reform commissions.

22 See above para 2.4–16.

23 Discussion Paper paras 2.23–6.

24 See, eg, Submissions 7, 11 and 16. Cf Submission 15.

25 Submission 7. Section 54 of the *Land Titles Act 1925* (ACT) provides that ‘a transfer to 2 or more persons shall not be registered unless those persons are expressed to be either joint tenants or tenants in common’.

26 Law Reform Commission of Western Australia, *Report on Joint Tenancy and Tenancy in Common*, Project No 78 (1994) paras 2.25–6.

27 Queensland Law Reform Commission, *Consolidation of Real Property Acts*, Report No 40 (1991) 20, Draft Bill s 37(1). It should be noted that this recommendation has not been adopted in Queensland. Instead, section 56 of the *Land Title Act 1994* (Qld) provides that, if the instrument does not show the nature of the co-ownership, the Registrar must register the co-owners as tenants in common.

2.20 Some concern was raised that such a requirement may ‘cause more problems than it would solve’.<sup>28</sup> In particular, it was suggested that people may not understand the difference between the types of interest, and may specify a particular interest without being fully aware of the implications. This may lead to future conflict or injustices. The Commission acknowledges that this could be a possible consequence of requiring specification. However, there is a similar problem under the current system. At present, when people do not specify the nature of their interest, they will usually be joint tenants, regardless of their intention or awareness of the implications of joint tenancy. It seems more likely that people will create a co-owned interest that they do not fully understand under the current system, as their attention will not necessarily be drawn to the existence of the two types of co-ownership. If specification is required, people are more likely to become aware that two types of co-owned interests exist, and will be prompted to discover the difference between those interests.

2.21 In addition, the Commission notes that many conveyancing transactions are undertaken by lawyers or conveyancing companies, who should understand the difference between a joint tenancy and a tenancy in common. A conscientious conveyancing lawyer would normally explain this difference, but this may not always occur. Requiring specification will help to ensure that lawyers provide an explanation of the difference to their clients, so that the clients can then make informed decisions about the type of co-ownership they want. In the case of those who do their own conveyancing, the Commission anticipates that sufficient information will be provided on the back of the transfer document,<sup>29</sup> as well as by community education,<sup>30</sup> to enable people to adequately understand the different types of co-owned interests. They can then make an informed decision as to the desired type, or seek further advice.

2.22 Finally, as we discuss below,<sup>31</sup> there will still be some circumstances in which co-owners will be able to claim that they actually have an interest which is different from that specified in the document. This will avoid injustices that may be caused by requiring people to specify the type of co-owned interest, when they may not fully understand the implications of their choice.

2.23 The Commission believes that the advantages of requiring specification of the nature of the co-owned interest outweigh the possible disadvantages,

28 Submission 12.

29 See below paras 2.59–64.

30 See below paras 2.59–64.

31 See below paras 2.24–31.

and therefore recommends that specification be required. The Land Registry should refuse to register any instruments that do not specify the type of co-ownership.<sup>32</sup> This should include any electronic conveyancing instruments, as well as traditional transfer documents. A provision similar to section 54 of the *Land Titles Act 1925* (ACT) would be appropriate.

### ! RECOMMENDATION

- 1 That a provision be inserted into the *Transfer of Land Act 1958* that requires any instrument submitted for registration (including any electronic instruments) to specify whether co-owners are intended to be joint tenants or tenants in common. The Land Registry must refuse to register any instrument which does not state the nature of the co-ownership.

## CONSEQUENCES OF SPECIFICATION OF THE NATURE OF THE CO-OWNED INTEREST

### Register not Determinative

2.24 Co-owners are currently registered as either joint tenants or tenants in common. Generally speaking, the entry in the Register determines the nature of the interest. If people are registered as joint tenants, they will be joint tenants, and survivorship will apply. If they are registered as tenants in common, survivorship will not apply.

2.25 There are limited exceptions to this principle. These exceptions include situations where people become registered as the result of their fraud,<sup>33</sup> or where people behave in such a way as to create an obligation to hold the land for a third party.<sup>34</sup> We do not propose any change to these exceptions.

32 In the case of wills that do not specify the nature of the interest to be held by the beneficiaries, the executor of the will will have to make a determination, according to the rules relating to unregistered and unregistrable interests (see below paras 2.44–55), as to whether there was an intention to create a joint tenancy or a tenancy in common, and specify the interest to be registered by the Land Registry accordingly.

33 *Transfer of Land Act 1958* ss 42(1), 44.

34 For example, where A contracts to sell the land to B, or declares that he holds it on trust for B, B may be held to own the property in equity, despite the fact that A is listed as the owner in the Register: *Babr v Nicolay* (1988) 164 CLR 604. There are other exceptions to the principle that the Register determines the nature of the interest of a person who is registered, which are not relevant in this context.

2.26 Certain equitable principles also currently apply to co-owners of Torrens System land. These include the presumptions that co-owners who contribute unequally to the purchase price of the property, or who are business partners or mortgagees, will be tenants in common at equity.<sup>35</sup> These equitable principles only determine the nature of co-ownership as between the co-owners themselves. They do not apply to people who acquire interests from co-owners in reliance on the Land Register.

A and B are business partners who are registered as co-owners of land. A dies. B becomes registered as the sole owner of the land, due to the operation of the survivorship principle. C examines the Register, finds that B is the sole owner of the land, and purchases it from B. The people who inherit under A's will would have been able to make a claim against B for a share in the property, as A and B were tenants in common at equity. However, C's registration will prevent a claim being made against him.

2.27 The Discussion Paper asked whether, if co-owners are required to specify the nature of their interest upon registration,<sup>36</sup> the entry in the Register should be determinative of the type of co-owned interest.<sup>37</sup> Under this approach, if the co-owners specified that they wanted to be joint tenants, then they would be joint tenants, regardless of the circumstances. There would no longer be a situation in which people who were joint tenants at common law could establish that they were tenants in common in equity. Co-owners who register as joint tenants would not be able to establish that they are actually tenants in common at equity, even if, for example, they had contributed unequally to the purchase price of the property. An entry on the Register specifying the nature of the co-owners' interests would be conclusive.

2.28 The submissions received by the Commission overwhelmingly rejected this proposal.<sup>38</sup> They argued that this would lead to injustices, for example

35 See above paras 2.8–10.

36 As recommended above: see Recommendation 1.

37 See Discussion Paper paras 2.27–39.

38 See, eg, Submissions 4, 6, 10, 12, 15 and 16.

between parties who did not fully understand the nature of the interest they were creating. Mr Johnstone noted:

It is inevitable that there will always be problems with those whose financial contributions are not accurately reflected on the title and those whose intentions as to inheritance are not accurately reflected on the title. The system can limit and inhibit disputes about debt or equity, and about inheritance rights (by creating a default situation) but a rule which makes the title conclusively determinative would create far more injustice than any litigation directed to create fairness.<sup>39</sup>

2.29 While it may be possible to create a list of exceptions to cater for situations where such injustices are likely to arise, it is doubtful that such a list would be sufficiently comprehensive. If it were, the scope of the exceptions would be so broad as to make the rule virtually meaningless. The current situation, in which equitable principles can operate to alleviate such injustices, was seen as preferable:

To render the register conclusive as between the co-owners would exclude the possibility of exploring a whole range of wider equitable consideration [sic] in circumstances where there seems to be no compelling public policy for their exclusion.<sup>40</sup>

2.30 In addition, there are other situations in which a person can claim an interest in Torrens land based on equitable principles.<sup>41</sup> As Michael Macnamara, a Deputy President of the Victorian Civil and Administrative Tribunal, notes:<sup>42</sup>

The policy which is to some degree evident in the **Transfer of Land Act** ... is that the register is regarded as conclusive so far as third parties are concerned but not conclusive with respect to rights, obligations, entitlements and so forth existing between immediate parties... Why should the law of co-ownership be made an exception to the way that these matters are dealt with under the **Transfer of Land Act**?

The Commission does not believe that there are any convincing reasons for treating co-owned interests differently from other interests.

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39 Submission 7.

40 Submission 15.

41 For example, a person who has contracted to purchase land can claim an equitable interest as against the vendor of the land: *Barry v Heider* (1914)19 CLR 197.

42 Submission 15.

2.31 In light of these factors, the Commission does not recommend making the Register determinative as between the co-owners.

### Operation of Equity

2.32 We have recommended that, even if co-owners are required to specify the type of co-owned interest that they want, registration should not determine the nature of co-owners' interests between themselves. As we have seen, there are already some situations in which co-owners registered as joint tenants are presumed to be tenants in common in equity.<sup>43</sup> It is now necessary to determine whether each of these presumptions should be retained.

#### ***MORTGAGEES AND BUSINESS PARTNERS***

2.33 There is currently a presumption, called an equitable presumption, that business partners and mortgagees who are joint tenants at common law are tenants in common at equity.<sup>44</sup> The main reason for the operation of equity in these circumstances is to overcome the unfairness which may be caused by treating business partners and mortgagees as joint tenants. Equity assumes that business partners and mortgagees do not ordinarily intend the principle of survivorship to operate. It is therefore appropriate to treat them as tenants in common, unless it is clearly shown that they intended to be joint tenants.

2.34 Our view is that this should continue to be the case, even if the legislation requires specification of the nature of the interest. Business partners and mortgagees may make a conscious decision to become registered as joint tenants of land for practical reasons, but as between themselves they will normally want to be tenants in common. For example, in the case of mortgagees, creating a joint tenancy means that borrowers (mortgagors) can make repayments and obtain a receipt from any one of the co-owners, which will bind the other co-owners. This is administratively convenient for lenders, and also protects borrowers if the mortgagee who is paid does not pass the money on. However, because mortgagees are normally tenants in common as between themselves, the entire investment does not pass to the surviving mortgagees if one of the mortgagees dies.<sup>45</sup> Similar factors apply in the case of business partners. It should, of course, still be open to mortgagees or business partners to establish that they actually intended to create a joint tenancy as between themselves.<sup>46</sup>

43 See above paras 2.8–10.

44 See above paras 2.8 and 2.10.

45 For a more detailed explanation of this point, see Discussion Paper paras 2.34–6.

**OTHER CO-OWNERS**

2.35 An equitable presumption of tenancy in common also applies to co-owners who contribute unequally to the purchase price of the property. In such circumstances, it is seen as unfair to have the survivorship principle apply, given that people may not have actually considered the type of co-ownership they wanted. They may have become joint tenants simply by virtue of the general presumption of joint tenancy, rather than by a conscious decision. If they had considered the matter, they may well have chosen a tenancy in common instead, given the disparity in purchasing price. Equity therefore treats them as tenants in common.

2.36 The Commission believes that the recommendation that co-owners specify the nature of their interest may require a change to this presumption. Under the current law, people who contribute to the purchase price of property may become registered as joint tenants simply because they fail to indicate which form of co-ownership is required. Our recommendation will require them to choose between registering as joint tenants or tenants in common. This will mean that they are unlikely to register as joint tenants unless they actually intend survivorship to apply. Unlike the situations of business partners or mortgagees, there are no administrative reasons why people who contribute unequally to the purchase price of property would choose to become registered as joint tenants. In these circumstances, the question arises as to whether people who are registered as joint tenants should continue to be able to claim that under equitable principles they are tenants in common?

2.37 On the one hand, it may be argued that people should be bound by their decision as to the nature of the co-owned interest—if they specified a joint tenancy, they should be joint tenants in equity as well as common law. If they are allowed to specify a joint tenancy, but then claim they really intended to be tenants in common, the value of requiring specification seems to be undermined. On the other hand, there are some situations where it may be unjust for people to be treated as joint tenants in equity as well as common

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46 The current practice of the Land Registry is to ascertain the mortgagee's intention from the mortgage document: 'The intention of mortgagees to hold the interest between themselves as tenants in common is deduced from the mortgage, if in the body of the mortgage, the mortgagees indicate that they advanced particular sums to the overall advance. In such cases the office permits a legal personal representative to be registered for the interest of a deceased. If there is no such recital, the mortgagees would be presumed joint and normal rules related to survivorship would enable the surviving mortgagee/s to apply to be registered.' Submission 10. The Commission does not anticipate a need for the Land Registry to alter this practice.

law. For example, a person may not understand the implications of her or his decision to specify a joint tenancy, or may feel unable to insist on being registered as a tenant in common because of her or his relationship with the other co-owner.

2.38 The Commission believes that a fair balance can be achieved by providing that, apart from the situation of business partners of mortgagees, the registration of co-owners as joint tenants will create a presumption that the equitable interest will be the same as the registered interest. That is, it will be presumed that, if people specify that they wish to be joint tenants (thereby becoming joint tenants at law), they will also be joint tenants in equity. This presumption will replace the existing law, under which people who make unequal contributions to the purchase price of property are assumed to be tenants in common in equity.<sup>47</sup> It will apply to all co-owners other than business partners or mortgagees.

2.39 This new presumption will reinforce the specification requirement, as people will be assumed to have the interest that they specified. However, because this is only a presumption, it will be possible to show that they actually intended to be tenants in common. This will leave room to avoid any injustices that may arise by a rigid application of the rule. It will be necessary to provide evidence of sufficient strength to overcome the fact that the co-owners have chosen to specify their interest to be a joint tenancy. The mere fact of having contributed unequally to the purchase price will not be sufficient to overcome the fact that a joint tenancy was actually specified. It will be necessary to provide more specific evidence of an intention to become tenants in common at the time that the interest was created.<sup>48</sup>

47 We note that this approach does not affect the equitable presumptions which arise when a husband contributes unequally to the purchase price of property transferred into the name of himself and his wife, and vice versa. In the former case, it is presumed that the husband's contribution is a gift to the wife, whereas in the latter it is assumed that the wife did not intend to benefit the husband but to retain an interest based on her contribution. The recommendation deals only with the nature of the co-owners' interests and not the size of their share.

48 It should be noted that there are other legal measures that may still apply in such circumstances, which could lead to a different result. For example, in the case of married or de facto partners, section 79 of the *Family Law Act 1975* or Part IX of the *Property Law Act 1958* may lead to a different distribution of property interests. It could also be possible to argue for the creation of a constructive trust, with the beneficiaries having interests in proportion to their indirect contribution to the property, in certain circumstances: see, eg, *Muschinski v Dodds* (1985) 60 ALJR 52.

2.40 This capacity to rebut the presumption that the equitable interest is the same as the registered interest should not be limited to cases in which co-owners contributed unequally to the purchase price, and in which they can provide additional evidence that they intended there to be a tenancy in common. Rather, in line with the current law,<sup>49</sup> it should be possible to rebut this presumption in any situation where evidence about the parties' intention to create a tenancy in common is sufficiently strong to outweigh the fact that they have specified that they are to be registered as joint tenants.

2.41 The effect of this recommendation will be to repeal the presumption of joint tenancy which applies to registered interests.<sup>50</sup> Instead, it will be presumed that a co-owner is entitled to the specified interest, except in the case of business partners or mortgagees. Any change will, however, be prospective only. The presumption of joint tenancy will continue to apply to interests registered prior to any legislative reforms.

2.42 We note that, at present, there are some circumstances in which the application of equitable principles will result in one person holding property on trust for another (this is known as a constructive trust). Our recommendations are not intended to displace these principles.

#### **UNREGISTERED INSTRUMENTS**

2.43 The Commission recommends that this new presumption should also apply prior to registration. That is, if co-owners have specified in an unregistered (but registrable) instrument<sup>51</sup> that they wish to be joint tenants, then in the absence of contrary evidence they will be joint tenants.<sup>52</sup> As with registered interests, factors such as having made an unequal contribution to the purchase price will not be sufficient to overcome this presumption.<sup>53</sup> For it to be otherwise would be to allow different presumptions to apply to the same instrument, depending on whether or not it has been registered. The type of interest that is

49 See *Malayan Credit v Jack Chia-MPH Ltd* [1986] 1 AC 549, in which it was decided that the categories in which co-owners may be joint tenants at law but tenants in common in equity were not limited to the cases of business partners, mortgagees or co-owners who contributed unequally to the purchase price.

50 *Transfer of Land Act 1958* ss 30(2) and 33(4). See above paras 2.11–16.

51 Such as a transfer document that has been completed, but not yet registered. This is to be compared with unregistrable instruments: see below paras 2.44–55.

52 Unless they are business partners or mortgagees.

53 See above para 2.39.

passed should depend on whether the parties have been forced to consider the type of interest they wish to create, rather than on whether the document is actually registered.<sup>54</sup>

## ! RECOMMENDATIONS

- 2 That the equitable principle that business partners or mortgagees who are registered as joint tenants are tenants in common in equity should continue to apply, in the absence of a contrary intention.
- 3 That co-owners, other than business partners or mortgagees, who register as joint tenants should be presumed to be joint tenants in equity. This includes co-owners who contributed unequally to the purchase price of the land.
- 4 That co-owners should be able to establish that their registered interest differs from their interest in equity by proving that there was a contrary intention at the time the interest was created.
- 5 That the fact that a particular interest was specified provides strong evidence of an intention to create that interest.
- 6 That Recommendations 2–5 also apply to co-owned interests that are created by registrable instruments that have not been registered.
- 7 That sections 30(2) and 33(4) of the *Transfer of Land Act 1958* be repealed.

54 It will still be necessary to have the instrument registered in order to gain the protections offered to co-owners of property by the *Transfer of Land Act 1958*.

## Other Interests

2.44 The recommendations outlined above relate to interests in Torrens land that can be registered by the Land Registry. While most co-ownership disputes will probably relate to such property, there are other property interests which cannot be registered. These include unregistrable interests in land, such as leases of less than three years. They also include equitable interests in land or other property that cannot be registered, such as the interest of a beneficiary of a trust. Personal property, including goods, shares and bank accounts, can also be co-owned, but cannot be registered.

2.45 As it is not possible to rely on the Torrens Register to specify the nature of the interests held in such property, it is necessary to have rules to determine what type of co-owned interest is created. For example, if a person leaves a house to his or her three children in a will, but does not specify what type of co-ownership interest is to be created, will the children become joint tenants or tenants in common? If two people buy a car together and then one of them dies, will the principle of survivorship apply?

2.46 As discussed above,<sup>55</sup> Victorian law currently presumes that when property is transferred to co-owners who acquire the same interest, at the same time, in the same document, a joint tenancy is created. This applies to all interests in property, including those that cannot be registered under the Torrens System.

2.47 In contrast to the current Victorian position, New South Wales (NSW), Queensland and the Australian Capital Territory (ACT) have legislation which provides that when property is sold, given away or left by will to co-owners it is to be presumed that they are tenants in common, unless the transaction under which they obtain their interest makes it clear that they are joint tenants.<sup>56</sup> The principle applies even if there are no words in the document indicating they are to be tenants in common. The NSW, Queensland and ACT provisions all apply to land and other forms of property.<sup>57</sup>

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55 See above para 2.4.

56 *Conveyancing Act 1919* (NSW) s 26; *Property Law Act 1974* (Qld) s 35 (see also *Land Title Act 1994* (Qld) s 56; *Law of Property (Miscellaneous Provisions) Act 1958* (ACT) s 3; *Land Title Act 2000* (NT) s 57. But cf *Land Titles Act 1980* (Tas) s 44; *Real Property Act 1886* (SA) s 74; *Transfer of Land Act 1893* (WA) s 60). The NSW and ACT legislation applies only when a document is used. In Queensland this is not necessary. Certain transactions are excluded from the operation of this presumption.

57 There is some doubt as to whether they apply to what are known as 'rights of action', such as bank accounts.

H and W are left a car by will. In New South Wales the law assumes they are tenants in common, unless the will makes it clear they are joint tenants. If H dies, his interest passes to the beneficiaries under his will. W does not take the whole car by survivorship.

2.48 In the Discussion Paper, the Commission asked whether Victoria should maintain its current presumption, or amend it to coincide with that of NSW, Queensland and the ACT.<sup>58</sup> A number of submissions argued in favour of altering the current presumption,<sup>59</sup> with some raising the possibility of completely abolishing joint tenancies.<sup>60</sup>

#### **NO ABOLITION OF JOINT TENANCIES**

2.49 We do not support the abolition of joint tenancies. Land Registry statistics estimate that 92.05% of co-owned land is held by joint tenants, and only 7.95% by tenants in common.<sup>61</sup> Although this high percentage of joint tenancies could be due to the operation of the current presumption of joint tenancy—that is, people are not consciously choosing to be joint tenants, but are simply assigned a joint tenancy interest as a default position—there is no evidence that this is the case. It is quite possible, in fact, that joint tenancies are considered by many to be highly desirable. In the absence of any empirical evidence showing that joint tenancies are no longer of value, the Commission does not recommend their abolition.<sup>62</sup>

58 Discussion Paper paras 2.49–62.

59 See, eg, Submissions 4, 6, 7 and 11.

60 Submissions 2, 6 and 7.

61 At the request of the Commission, the Land Registry examined a sample of approximately 800,000 folios that had recently been loaded onto their automated titles system. Of these, 42.75% were held by sole proprietors, 52.70% by joint tenants and 4.55% by tenants in common.

62 This position is supported by Submission 11.

### NO PRESUMPTION OF TENANCY IN COMMON

2.50 It is arguable that having a statutory presumption of tenancy in common instead of the current presumption of joint tenancy could, in some cases, be more consistent with the intentions of people who dispose of property to co-owners. This was the reason why the Law Reform Commission of Western Australia recommended the adoption of a presumption that co-owners are tenants in common:

[I]f a testator donates a boat to his adult children, A and B, at common law...the children would take as joint tenants, with the consequence that upon the death of one of the children the survivor would remain as sole owner to the exclusion of the deceased co-owner's estate. Many would view this as unfair and it is unlikely that if the testator at the time of making the will was aware of the legal distinction between joint tenancy and tenancy in common he would have made the grant in joint tenancy.<sup>63</sup>

2.51 Another argument in favour of this approach is that it would contribute to greater uniformity in State laws: 'The Institute expresses a slight preference for consistency with states which have introduced a default presumption that co-owners hold as tenants-in-common.'<sup>64</sup> Submissions noted that the presumption of tenancy in common works well in the States which have adopted it.<sup>65</sup>

2.52 The Commission does not, however, support the adoption of a presumption that co-owners are tenants in common. The suggestion that a presumption of tenancy in common is more consistent with the intention of those who create co-owned interests is speculative. There could equally be cases where, if people considered the issues, they would choose to create a joint tenancy.<sup>66</sup> It is possible that a presumption that co-owners be regarded as tenants in common may actually defeat the intention of the person disposing of the interest.

2.53 In addition, the current position is relatively well understood by lawyers and conveyancers, and any change could lead to confusion. The scope of the

63 Law Reform Commission of Western Australia, above n 26, paras 2.36–7. See also the Northern Territory Law Reform Committee, *Report on the Law of Property*, Report No 18 (1998), in which it was argued in the Explanatory Memoranda to clause 35 that the presumption of joint tenancy 'gives rise to inequity and many de facto relationships favour a tenancy in common'.

64 Submission 16.

65 Submissions 4 and 7.

66 For such an example, see Discussion Paper para 2.53.

equitable exceptions makes it unlikely that the current law will lead to injustice. In these circumstances, it does not seem worthwhile altering the law in this area, especially given the small number of interests that would be affected. As noted above, most co-ownership disputes are likely to concern Torrens land. Most of these disputes will be covered by the Commission's recommendation to require specification of the nature of the interest where possible. Any modification of the presumption would only apply to the small class of interests that are not created by a registrable instrument.

2.54 We also believe that some practical difficulties could arise if the presumption were altered. One possible example relates to bank accounts. Under the current law, if two people open a joint bank account without specifying the nature of the co-ownership, it will be presumed that they will be joint tenants. If one dies, the other will become sole owner of the account. There should be little reason for the bank to refuse the surviving owner continuing access to that account. If there was a presumption of tenancy in common, banks would be required to freeze accounts on the death of one co-owner, so that the correct proportions of the account could be split between the existing co-owner and the beneficiaries under the deceased co-owner's will. This could cause problems for the surviving co-owner, who may not be able to access their money.

2.55 Given the small number of interests concerned, and the equivocal evidence about the benefits of and need for such a change, the Commission recommends that the current presumption of joint tenancy should be retained for interests which are not created by a registrable instrument.<sup>67</sup>

#### **! RECOMMENDATION**

- 8 That the presumption of joint tenancy be retained for co-owned interests which are not created by a registrable instrument.

<sup>67</sup> It should be noted that the Commission's recommendation not to alter the presumption of joint tenancy may have been different if the presumption were to apply to registered Torrens interests. However, given the recommendation that specification of the nature of the interest be required for such interests (thereby making any presumption redundant), it has been unnecessary for the Commission to decide this point.

## No Modification to ‘Four Unities’ Requirement

2.56 The Discussion Paper raised the possibility of allowing joint tenancies to be created without the ‘four unities’ being present.<sup>68</sup> This would allow people to become joint tenants even if they do not receive their interest under the same document or transaction at the same time. Alternatively, it could allow people to become joint tenants with different interests (eg, one joint tenant holds a quarter share, the other a three-quarter share).

### Four unities

The four unities require that: (1) joint tenants receive the same interest in the property (unity of interest); (2) the interest be received at the same time (unity of time); (3) the interest be received under the same document or transaction (unity of title); (4) the tenants have the same right to possess the land (unity of possession).

2.57 There was limited support for this proposal in the submissions received by the Commission.<sup>69</sup> For example, Michael Macnamara argued that: ‘I see no reason why parties should not be given the option to choose the form of co-ownership which suits

them and achieve that result without conformity to the principle of the “four unities”’.<sup>70</sup>

2.58 In general, however, it was considered that altering the four unities requirement would undermine the concept of joint ownership, was confusing and would lead to increased complexity.<sup>71</sup> The Commission agrees with these concerns, and does not recommend modifying the four unities requirement. Any instrument presented to the Land Registry for registration, which seeks to specify a joint tenancy in the absence of the four unities, should be rejected.

## Education

2.59 The Discussion Paper noted that it would be helpful if people presenting documents for registration were given information about the differences between joint tenancies and tenancies in common. The provision of information becomes particularly important if people are required to specify the nature of their interest upon registration—it is vital that they understand their options.

68 For a full discussion of this option, see Discussion Paper paras 2.40–8.

69 See Submission 15. Cf Submissions 7, 8, 10, 11 and 16.

70 Submission 15.

71 See, eg, Submissions 7, 8, 10, 11 and 16.

2.60 Currently, there are a few avenues by which people can obtain such information. For example, the Land Registry provides a brochure entitled *Your Guide to Transfer of Land*, which contains a brief description of the difference between a joint tenancy and a tenancy in common. Similar information can be found electronically, within the Land Channel's guide to buying a property.<sup>72</sup> The Law Institute of Victoria runs a 'Dial-a-Law' telephone service, which also includes information about buying property. This service also briefly discusses the difference between the two forms of co-ownership.

2.61 While these avenues are all potentially useful, each of them only discusses co-ownership within the framework of a general guide to purchasing property. Often the relevant information is buried within a vast quantity of other information, and is difficult to find. In addition, people who are interested in discovering the difference between joint tenancy and tenancy in common for reasons other than purchasing property may not think to look at a guide to purchasing property. For these reasons, the Commission recommends that the Land Registry produce a clear and simple publication specifically related to co-ownership of property. This pamphlet should be readily available at the Registry offices, and could also be distributed more widely.<sup>73</sup>

2.62 Another option raised in the Discussion Paper was to include a short statement which explains the difference between co-owned interests in the transfer document.<sup>74</sup> Most of the submissions the Commission received on this issue supported this proposal.<sup>75</sup> One minor concern was that the inclusion of such a statement 'might persuade people to conduct their own legal affairs without first obtaining sufficient legal advice tailored to their particular needs'.<sup>76</sup> It was agreed, however, that this concern could be alleviated by limiting the statement to an explanation of the nature of co-ownership interests, and including a caution that legal advice should be obtained if people are unsure about the type of co-ownership which is appropriate to their needs.<sup>77</sup>

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72 <[http://www.land.vic.gov.au/web/root/domino/cm\\_da/lcnlc2.nsf/frameset/buy?OpenDocument](http://www.land.vic.gov.au/web/root/domino/cm_da/lcnlc2.nsf/frameset/buy?OpenDocument)>.

73 For example, it could be made available to property law and wills practitioners, conveyancing companies, real estate agents and Community Legal Centres.

74 It should be noted that the Discussion Paper stated that *Transfer of Land Act 1958* s 120(2)(h) provided for documents to be in a prescribed form. Section 120(2)(h) now provides that forms are to be in a 'form approved by the Registrar'.

75 See, eg, Submissions 7, 11 and 15.

76 Submission 11.

2.63 Current transfer documents already contain a section for notes on the back of the document. It would be possible for the statement to be included in this section. A marker could be included near the section of the transfer that requires the nature of the interest to be specified, pointing to the existence of the explanation on the back.

2.64 It has been noted above<sup>78</sup> that Victoria will eventually move from a paper-based conveyancing system to electronic conveyancing. It will be necessary to ensure that the explanatory statement also exists in electronic transfer documents.<sup>79</sup> Although the electronic conveyancing system is still in development, discussions with the Land Registry have indicated that it should be possible for the conveyancing program to contain a hyperlink to such a statement.

#### ! RECOMMENDATIONS

- 9 That the Land Registry produce a publication on co-ownership.
- 10 That a short statement explaining the difference between a tenancy in common and joint tenancy be included on transfer documents.
  - Paper transfer documents should have this statement on the back of the document.
  - Electronic conveyancing programs should contain a link that leads to the statement.

77 Submission 11.

78 See above n 11.

79 See Submission 16.



## Chapter 3

# Converting a Joint Tenancy into a Tenancy in Common

3.1 In Chapter 2, the Commission proposed some reforms to simplify and clarify the rules for the creation of co-ownership. Even if the rules for the creation of co-owned interests are clarified, and co-owners make more informed decisions about whether they want to create a joint tenancy or a tenancy in common, in certain circumstances they may wish to change the type of interest that was created. Most commonly, co-owners may wish to convert a joint tenancy into a tenancy in common.

3.2 The main reason joint tenants may want to convert their interest into a tenancy in common is to remove the possibility that the other joint tenant(s) will become entitled to the whole property. In other words, a joint tenant may decide that she or he no longer wants the principle of survivorship to apply.

3.3 There are a number of reasons why people may want to exclude survivorship. For example, people who are married or in domestic relationships, and own property as joint tenants with their partners, may want to convert their interest to a tenancy in common after they separate from their partners. Although spouses may apply for division of property under the *Family Law Act 1975* (Cth), and domestic partners may make a similar application under the *Property Law Act 1958*,<sup>80</sup> these processes take time and require mutual consent or a court order. While spouses or domestic partners are negotiating about division of their property, they may want to convert their interest to a tenancy in common. They can then make a will leaving the interest in the property to their children or other people, in case they die before the property division is finalised.

80 The *Family Law Act 1975* (Cth) enables the Family Court, in the case of spouses, to divide the property between the parties on a just and equitable basis. The *Property Law Act 1958* allows for similar division by a State court, in the case of domestic partners (including de facto, gay and lesbian partners): see below n 164.

3.4 There is often a desire to convert an interest from a joint tenancy to a tenancy in common quickly. For example, a joint tenant who is elderly or terminally ill may not wish the other joint tenant to become entitled to the property when she or he dies. This is why it is important to ensure that the rules relating to the conversion process are simple and clear.

3.5 This chapter provides a summary of the rules governing the conversion of joint tenancies into tenancies in common. We then look at the problems with the current law, before recommending some avenues for reform.

### EXISTING LAW

3.6 Conversion of a joint tenancy into a tenancy in common is known as severance—a person ‘severs’ the joint tenancy. The process is simplest when there are only two co-owners. If one of them severs the joint tenancy by, for example, selling her or his interest to a third party,<sup>81</sup> the new co-owners will hold the property as tenants in common, with equal shares in the property.

X and Y are joint tenants. X sells his interest to P. P and Y become tenants in common. If P dies, her interest passes to the beneficiary nominated in her will.

3.7 The situation is slightly more complex if there are more than two joint tenants. In such a case, if one of the joint tenants severs his or her interest, he or she will become a tenant in common with the other joint tenants. The other joint tenants remain joint tenants as between themselves. The right of survivorship continues to apply amongst those joint tenants, but does not affect the person who has become a tenant in common.

X, Y and Z are joint tenants. X sells his interest to P. P becomes a tenant in common with a  $\frac{1}{3}$  interest in the property. Y and Z remain joint tenants of the other  $\frac{2}{3}$ . If Y dies, Z will become owner of Y’s interest by survivorship. Z and P will then be tenants in common, with Z having a  $\frac{2}{3}$  interest and P having a  $\frac{1}{3}$  interest in the property.

<sup>81</sup> Selling one’s interest to a third party will sever a joint tenancy because the four unities will no longer be present: see above paras 2.56–8. The co-owned interests in the property will have been obtained at different times under different documents. There are a number of other ways of severing a joint tenancy. These are discussed in detail below.

3.8 In Victoria it is clear that a joint tenant cannot sever a joint tenancy of land by simply notifying the other joint tenants of her or his intention to do so.<sup>82</sup> It is probably also impossible to sever a joint tenancy of personal property (for example goods) by expressing an intention to sever.<sup>83</sup> Instead, a joint tenant of land or personal property may sever the joint tenancy by:

- transferring the interest to another person by way of sale or as a gift;<sup>84</sup>
- making an enforceable contract of sale or a gift which is recognised as effective in equity;
- transferring the property to a trustee to hold for the benefit of a third party;
- declaring that she or he is a trustee of the property for a third person;
- transferring his or her interest to him or herself as a tenant in common;<sup>85</sup> or
- agreeing with all the co-owners to sever the joint tenancy.

These methods of severing a joint tenancy are discussed in more detail in the Discussion Paper.<sup>86</sup>

### WHY REFORM THE LAW IN THIS AREA?

3.9 The current methods for converting joint tenancies into tenancies in common are unnecessarily complex. Instead of being able to follow a simple conversion procedure, a joint tenant who wishes to sever the joint tenancy will have to use one of the six methods outlined above. While this will not be a problem when there is agreement between the joint tenants to sever the joint tenancy, it creates complications when one joint tenant cannot persuade the other(s) to do so.

82 *Corin v Patton* (1990) 169 CLR 540; *Patzak v Lytton and the Registrar of Titles* [1984] WAR 353.

83 In England, Lord Denning suggested that notice given to the other joint tenants of an intention to sever is sufficient to sever a joint tenancy of goods: see *Burgess v Rawnsley* [1975] Ch 429. However, in the New South Wales case of *Abela v Watson* [1983] NSWLR 308, the wife's intention to sever the joint tenancy of certain articles of furniture was held to be insufficient.

84 This would include joint tenants transferring their interests to each other: *Wright v Gibbons* (1949) 78 CLR 313. On this point, see Submission 4.

85 See *Property Law Act 1958*, s 72 (3). It is not completely clear whether this process is effective to sever the joint tenancy: see Joyce Tooher, 'Testate or Intestate: Is There Anything Left for the Estate? Unilateral Severance of a Joint Tenancy' (1998) 24 *Monash University Law Review* 422, 430–3.

86 Discussion Paper paras 3.7–18.

3.10 When there is no agreement between the joint tenants to sever the joint tenancy, a joint tenant will either have to transfer his or her interest to a third party, declare him or herself trustee for a third party, or transfer the property to him or herself as a tenant in common. The main problem with transferring the interest to a third party or declaring oneself trustee for a third person, is that these methods of severance involve the joint tenant passing an interest in the property to someone else. The joint tenant may instead wish to sever the joint tenancy but retain an interest in the property. The alternative of transferring property to oneself seems unnecessarily convoluted, and is only available in relation to land.<sup>87</sup>

3.11 An additional problem arises in relation to land under the Torrens System. Most of the methods of severance outlined above require production of the certificate of title.<sup>88</sup> If the certificate of title is in the possession of another joint tenant, a joint tenant may not be able to register a transfer of her or his interest. The desire to sever the joint tenancy may be delayed by the other joint tenant unreasonably withholding production of the certificate.<sup>89</sup> If the certificate of title is held by a mortgagee (for example, a bank which has lent the money to purchase the land), the joint tenant who wishes to sever the tenancy will have to ask the bank to produce the certificate of title for registration. It may take some time for a bank to decide whether to produce the duplicate certificate of title.<sup>90</sup> This will create difficulties for joint tenants who wish to sever the joint tenancy quickly, because they think they may soon die.

3.12 Due to these complexities, the current requirements often act to defeat the intention of joint tenants to convert their interest into a tenancy in common. As solicitor Phillip Hamilton noted in his submission to the Commission:

The creation of a joint tenancy seems to offer considerable convenience when the joint tenants are all like-minded (eg with life partners). However even in this nuclear setting, I have observed a total breakdown in the relationship which

87 See Discussion Paper para 3.17 and see n 85 above.

88 The certificate of title is required by the Land Registry prior to registering any transfer of an interest in the land. It would therefore be necessary to produce the certificate in order to sever the joint tenancy by transferring the interest to a third party, a trustee or oneself.

89 The Land Registry can require co-owners to produce the certificate of title, but this may take some time: *Transfer of Land Act 1958* s 104(3).

90 If the tenant is proposing to transfer his or her interest to a third party, the bank will need to consider whether the third party can repay the mortgage loan. Even if the joint tenant is transferring the property to him or herself, it may take some time for the bank to produce the certificate of title.

leaves one party powerless to withdraw from the previously constituted joint tenancy arrangement, and left with the knowledge that if they die, the other will nonetheless accede by survivorship to the entirety.<sup>91</sup>

There have been several reported cases in which joint tenants have made unsuccessful attempts to carry out their intention to sever a joint tenancy in land.<sup>92</sup>

## PROPOSED REFORMS

### Severance of Joint Tenancies of Torrens Land

3.13 In the Discussion Paper, the Commission examined two possible reforms in relation to Torrens land: severance by service of a written notice and severance by registration of an instrument of severance.<sup>93</sup>

#### SERVICE OF A WRITTEN NOTICE

3.14 The Commission suggested that it may be possible to allow joint tenants to sever a joint tenancy by simply notifying the other co-owners that he or she wishes to sever the joint tenancy. This proposal has been adopted in England, where a joint tenancy can be severed by giving notice in writing to the other joint tenants.<sup>94</sup>

3.15 While this process would be quick, simple and cheap, enabling severance without delay, it could create uncertainty as to whether severance has occurred.<sup>95</sup> As the submission from the Victorian Bar pointed out,<sup>96</sup> severance by notice would not require the degree of formality which usually applies to dealings with interests in land. Notices may be ambiguous, or there may be a dispute about whether a notice has actually been received. This could lead to increased litigation.

91 Submission 2.

92 See, eg, *Corin v Patton* (1990) 169 CLR 540; *Freed v Taffel* [1984] 2 NSWLR 322.

93 See Discussion Paper paras 3.23–31.

94 *Law of Property Act 1925* (UK) s 36(2). It should be noted that this only creates an equitable tenancy in common, as common law tenancies in common cannot exist in England. See also Law Reform Commission of Western Australia, above, n 26, para 3.34, in which the Commission recommended that service of a written notice on the other joint tenants should be effective to sever a joint tenancy in Torrens land in equity. The Commission recommended that severance should not be effective at common law until an instrument of severance was registered.

95 See, eg, Submissions 11 and 12.

96 Submission 12.

3.16 In addition, the informality and simplicity of the process could make it easier for unscrupulous people who are beneficiaries under a will to use fraud to overcome survivorship, by alleging that the joint tenancy had been severed.

3.17 The submission from the Victorian Bar also argued that this approach ‘would run contrary to the fundamental principles underlying the Torrens system of registration by creating further uncertainty in land titles’.<sup>97</sup> It would undermine the principle that the Torrens Register should reflect the nature of the interests held by co-owners, as provision for severance by service of a notice would not result in any change to the Register.

3.18 It is the Commission’s view that these disadvantages outweigh the advantages of allowing severance by written notice.<sup>98</sup> This view was overwhelmingly supported by the submissions received on this point.<sup>99</sup> The Commission does not recommend that such an approach be introduced for Torrens land in Victoria.

#### REGISTRATION OF AN INSTRUMENT OF SEVERANCE

3.19 Instead of allowing severance by service of a written notice, provision could be made for a joint tenant to sever his or her interest in Torrens land by registering an ‘instrument of severance’.<sup>100</sup> The Land Registry could prescribe a standard form for this purpose, in which a joint tenant declares that he or she wishes to become a tenant in common. This form would then be lodged at the Land Registry, converting the joint tenancy interest into a tenancy in common. A joint tenancy can be severed in this way in Tasmania.<sup>101</sup>

3.20 This approach would be simpler than the current method of severance. It would allow a joint tenant to sever the joint tenancy without

97 Submission 12.

98 This was also the view of the New South Wales Law Reform Commission: New South Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy*, Report No. 73 (1994) paras 7.17–20.

99 See Submissions 7, 9, 11, 12, 15 and 16. Cf Submissions 2 and 4.

100 In the Discussion Paper, we called this document a ‘declaration’ of severance. Throughout the *Transfer of Land Act 1958*, however, documents that are registered or capable of being registered with the Land Registry are referred to as ‘instruments’: s 3. For the purposes of conformity with the scheme laid down in the *Transfer of Land Act 1958*, we have decided to refer to such documents as ‘instruments’ of severance.

101 *Land Titles Act 1980* (Tas) s 63; see also *Land Title Act 1994* (Qld) s 59 which allows severance by registration of a transfer.

disposing of his or her interest to a third party, or without transferring the interest to him or herself. It is a straightforward method of severance that avoids the artificiality of many of the current modes of severance.

3.21 In addition, requiring an instrument of severance would avoid the problems of uncertainty raised by allowing severance by service of a written notice. The information required for the instrument could be determined by the Land Registry, avoiding any problem of ambiguity. As the instrument would need to be lodged with the Land Registry, there could be no dispute as to whether severance had taken place, or whether that was the intention of the joint tenant. It would also lead to the Register being modified to reflect the nature of the interests held.

3.22 While lodging an instrument of severance will be slower and more complex than service of a written notice, the Commission believes that the benefits of certainty outweigh this concern. Several submissions received by the Commission supported this view, arguing that ‘severance of the joint tenancy should be a simple matter, such as the lodgement of a declaration at the Office of Titles [Land Registry]’:<sup>102</sup>

Given that it is possible to effect what is essentially a unilateral severance by for instance one joint tenant transferring his or her interests to a company controlled by him or her, there seems to be no virtue or point in not providing a more direct, straight forward and cheaper means of achieving the same result by allowing a joint tenant simply to register a form of declaration under the **Transfer of Land Act** severing his interest in the joint property and rendering a separate share.<sup>103</sup>

3.23 The Commission supports legislative reform to allow the severance of joint tenancies by lodging an instrument in a form approved by the Land Registry.<sup>104</sup> We note that this method of severance will be in addition to those already in existence—it is not intended that it replace the current methods.<sup>105</sup>

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102 Submission 6.

103 Submission 15. See also Submissions 6, 7, 9, 11, 12 and 16.

104 It will be important to ensure that the form and procedure for lodgement are clear and simple.

105 It should be noted that severing a joint tenancy by lodging an instrument of severance may have capital gains tax implications. Any such implications, however, will arise in relation to any transaction that severs a joint tenancy (including the existing six methods)—it will not be the result of changes made by introducing a new method of severance. Such implications should therefore not affect the decision to implement a new, simpler method of severance. The Commission notes that stamp duty will not be payable in relation to such transactions: *Duties Act 2000* s 54.

**! RECOMMENDATIONS**

- 11 That a provision be inserted into the *Transfer of Land Act 1958* enabling severance of joint tenancies by registration of an instrument of severance in a form approved by the Land Registry.
- 12 That a provision be inserted into the *Transfer of Land Act 1958* making it clear that this method of severance is in addition to existing methods of severance.

**Time of Severance**

3.24 The Discussion Paper noted that two issues of timing arise if it becomes possible to sever a joint tenancy of Torrens land by registration of an instrument of severance.<sup>106</sup> Firstly, it is possible that a joint tenant will complete and sign an instrument of severance, but not ensure that it is lodged with the Land Registry prior to his or her death. Should this be seen as a sufficient indication of his or her intention to sever the joint tenancy? Secondly, a joint tenant may lodge the form with the Land Registry, but due to delays it may not actually be registered by the Land Registry prior to the joint tenant's death. Should this be sufficient to convert the joint tenancy to a tenancy in common?

3.25 In the Discussion Paper, the Commission suggested that an instrument which has been lodged for registration in the Land Registry, but not yet registered, should sever the joint tenancy in equity prior to actual registration.<sup>107</sup> In such a situation, the joint tenant has performed all the steps he or she could possibly take, and the matter is out of his or her hands. The joint tenant's intention should not be impeded by the delay of a third party (the Land Registry).

3.26 We also said that an instrument which had not been lodged should not be effective to sever a joint tenancy. It is possible that a joint tenant may fill out such a form, and then change her or his mind. Until the time she or he actually lodges the form, the decision to sever the joint tenancy should not be viewed as final. To do otherwise may lead to added uncertainty, and increased litigation, as people seek to show whether or

106 Discussion Paper para 3.32.

107 Discussion Paper para 3.33.

not the joint tenant had definitively decided to sever the joint tenancy or not. The requirement that the instrument be lodged also requires the joint tenant to consider the decision to sever carefully.

3.27 The Commission maintains these views. In order to provide sufficient certainty and clarity to the rules, the Commission recommends that it should be necessary to lodge the instrument in order for severance to occur. Severance will take place upon lodgement. At this stage the co-owners will still be shown on the Register as joint tenants, so they will be joint tenants under the law. However, if the joint tenant happens to die after lodging the instrument, but prior to its registration, the joint tenancy should be treated as having been effectively severed (converted to a tenancy in common) in equity.

#### **! RECOMMENDATIONS**

- 13 That an instrument of severance should only be effective to sever a joint tenancy if it is lodged with the Land Registry.
- 14 That severance of a joint tenancy should be effective upon lodgement of an instrument of severance. The joint tenancy will have been severed even if the joint tenant dies prior to its registration.

#### **Production of the Certificate of Title upon Registration**

3.28 At present, the Land Registry usually requires the certificate of title to be produced before altering the nature of an interest in property. There are two reasons for this. Firstly, it allows the Land Registry to ensure that the correct person is dealing with the property, and not someone trying to defraud the true owner. Secondly, it enables the Land Registry to physically modify the certificate to reflect any changes made.

3.29 Requiring production of the certificate of title from a joint tenant can cause problems, however, because only one certificate is issued to joint tenants. As noted above,<sup>108</sup> the certificate may be in the possession of another joint tenant, who can frustrate an attempt to sever the joint tenancy

108 See para 3.11.

by unreasonably refusing to hand it over.<sup>109</sup> Alternatively, a bank that has provided a joint tenant with a mortgage over the land may hold the certificate as security. The joint tenant will have to ask the bank to provide the certificate, which the bank may not automatically do.<sup>110</sup>

3.30 Where the certificate of title is held by one joint tenant, he or she can be ordered by a court to produce it.<sup>111</sup> A bank which holds the certificate as a mortgagee may also be prepared to produce it, if the transaction which is to be registered does not affect the bank's security interest. In addition, the Registrar has power to dispense with production of the certificate of title,<sup>112</sup> or to order that it be produced.<sup>113</sup> However, in each of these situations there could be great delays in obtaining the certificate. This could create difficulties if a joint tenant wishes to sever the joint tenancy quickly, due to ill health or old age, and may ultimately thwart his or her desire to sever the joint tenancy.

3.31 The Discussion Paper raised the possibility of avoiding these problems by introducing a legislative provision which dispenses with the need to produce the certificate of title when registering an instrument of severance. As long as a joint tenant could prove to the Land Registry's satisfaction that she or he is the holder of a joint tenancy interest in the property, she or he could simply fill out the required form and lodge it with the Registry, without providing the certificate of title. This is the current situation in Tasmania,<sup>114</sup> and was also recommended by the New South Wales Law Reform Commission.<sup>115</sup>

109 Joycey Tooher, above n 85.

110 In practice, banks will often require a production fee before releasing the certificate of title.

111 *Mitrovic v Koren* [1971] VR 479.

112 *Transfer of Land Act 1958* s 104(5).

113 *Transfer of Land Act 1958* s 104(3).

114 *Land Titles Act 1980* (Tas) s 63; see also Joycey Tooher, 'Windfall By Wager or Will? Unilateral Severance of a Joint Tenancy' (1998) 24 *Monash University Law Review* 399, 402.

115 New South Wales Law Reform Commission, *Unilateral Severance of a Joint Tenancy*, Report No 73 (1994) Recommendation 4. The Law Reform Commission of Western Australia recommended that the Registrar be given discretion to dispense with the requirement to produce the certificate of title: above n 26, para 3.35.

3.32 There was strong support for this proposal in the submissions.<sup>116</sup> The Victorian Bar noted that:

The production of the certificate of title may require the co-operation of other joint tenants in situations where the owner registering the declaration of severance prefers not to confront the other joint tenants or rely on their co-operation when it is unlikely to be forthcoming.<sup>117</sup>

3.33 As the submission from the Victorian Community Council Against Violence pointed out, the need to avoid potential confrontations will be particularly important in cases of violence:

It is easier for a victim of violence to sever relations without having any contact with the perpetrator of the violence. This could be achieved by allowing for the registration of a declaration of severance without the production of the Certificate of Title.<sup>118</sup>

3.34 Officers of the Land Registry told the Commission that the requirement to produce the certificate of title makes it harder for someone to pose as a person with an interest in the land and to fraudulently register a document.<sup>119</sup> To ensure that a co-owner is lodging the instrument, rather than someone else who has an interest in defeating survivorship, the Land Registry should require proof of identity before accepting the instrument. In addition, if the Land Registry is required to notify all co-owners of the severance, and to send a copy of the notice to the relevant land,<sup>120</sup> co-owners will probably become aware of any fraudulent attempt to sever the joint tenancy. They would then be able to object to the severance on the basis of fraud.<sup>121</sup>

3.35 A possible disadvantage of allowing severance in the absence of the certificate of title is that there will be some certificates that do not accurately

116 See Submissions 2, 9, 12 and 15.

117 Submission 12.

118 Submission 9.

119 It should be noted that occasions in which fraud is likely to occur will be extremely rare. It will only arise when a person who is likely to inherit the co-owned property by will (or due to intestacy laws) knows that the testator of the will is a joint tenant, that if he or she dies the property will go to the other joint tenants rather than to the person likely to inherit and so pretends to be the joint tenant and fraudulently lodges an instrument of severance.

120 See below Recommendations 18–21.

121 The true owner is protected against such fraud by *Transfer of Land Act 1958* s 44(1). Other joint tenants, who may also be defrauded out of their right to survivorship, will also be protected by s 44(1).

reflect the nature of the co-ownership. This problem is of little practical concern, however, as the correct nature of the interest will be recorded on the Register and the certificate can be amended the next time it is produced for any transaction. In addition, the Commission notes that it is currently possible for a joint tenant to sever without any amendment of either the Register or the certificate of title. For example, a co-owner may sever a joint tenancy by declaring that he or she is a trustee for a third party, or by making an enforceable contract of sale or gift that is recognised as effective in equity. In these cases there is already a difference between the co-ownership interest recorded in the Land Registry and the co-ownership interest which actually operates between the co-owners.

3.36 Given the benefits of such a proposal, and the absence of any significant disadvantages, the Commission recommends that registration of instruments of severance be allowed without requiring the certificate of title to be produced.

#### **! RECOMMENDATION**

15 That a joint tenant who lodges an instrument of severance not be required to provide the certificate of title prior to registration of the instrument.

#### **MORTGAGEES**

3.37 Members of the Property Committee of the Law Institute of Victoria raised concerns with the Commission about joint tenant mortgagors (borrowers) who wish to sever joint tenancies.<sup>122</sup> These concerns relate to the Commission's recommendation that instruments of severance can be registered in the absence of the certificate of title. As noted above, it is not uncommon for mortgagees (especially banks) to hold the certificates of title of properties over which they have a mortgage.<sup>123</sup> The owner(s) of that property will require the mortgagee's permission to obtain that certificate, if it is required for any dealings. This gives the mortgagee a modicum of control over the property, to ensure that it is not dealt with in a way that is contrary to its security interest in the property.

122 Submission 16. See also Submission 12.

123 Although we refer throughout this section to 'mortgagees', our discussion applies equally to holders of other security interests.

3.38 Mortgagees may be concerned that allowing severance without production of the certificate of title may allow co-owners to affect the mortgagee's interests, without the mortgagee having any control over the matter. This concern is unfounded. Where all the joint tenants mortgage their co-owned land, the security interest of the mortgagee will not be affected by conversion of the joint tenancy into a tenancy in common. The mortgage will still be enforceable against each of the co-owners.<sup>124</sup> This is also the case where a single joint tenant persuades a mortgagee to lend money on the security of the joint tenant's undivided interest in the property. In the latter situation, severance may make the mortgagee better off, as the conversion to a tenancy in common will mean that the mortgage is not vulnerable to extinction if the joint tenant with the mortgage dies before the other joint tenant.<sup>125</sup>

3.39 In addition, we note that the possibility of severing a joint tenancy without the mortgagee's permission already exists in relation to those methods of severance that do not require the certificate of title. For example, it is already possible for a mortgagor, without the mortgagee's knowledge, to declare that they hold the property on trust for a third party—thereby severing the joint tenancy.

3.40 Although we have argued that severance will not affect a mortgagee's interest, we understand that mortgagees may still be concerned about the results of allowing severance without requiring the certificate of title. The Commission therefore recommends a legislative provision that confirms that severance by registration of an instrument of severance, without the mortgagee's consent, will not affect the enforceability of the mortgagee's interests under the mortgage.

3.41 Finally, we note that many mortgage documents currently contain a term to the effect that any transfer or disposition of the property without the mortgagee's consent amounts to a default of the mortgage. Lodging an instrument of severance without the mortgagee's consent may be a technical breach of such a provision. In our view, joint tenants should be able to

124 Mortgagors will usually be personally liable to repay the debt. Because they are usually liable individually as well as jointly, this personal liability will continue after the joint tenancy is severed. Severance of a joint tenancy will not affect the security interest of a mortgagee. The New South Wales Law Reform Commission also commented that severance will not disadvantage mortgagees: see above n 118, paras 8.31–3; Joycey Tooher, above n 114, 402.

125 If a joint tenant who has mortgaged her or his share dies, the mortgagee's security interest is extinguished: *Lord Abergavenny's Case* (1607) 6 Co Rep 78b; 77 ER 373.

sever by lodging an instrument of severance, despite any such clause. As noted above, we have recommended that such severance should not affect the mortgagee's interests under the mortgage. At the same time, we recommend that the conversion of a joint tenancy into a tenancy in common should not be a breach of a term requiring a mortgagee's consent to dealings with the land.

## ! RECOMMENDATIONS

- 16 That the enforceability of a mortgage or security interest against a co-owner should not be affected by registration of an instrument of severance.
- 17 That severance of a joint tenancy by registration of an instrument of severance, without the consent of any mortgagees or holders of security interests, should not be considered a breach of any term in a contract that requires the mortgagee, or holder of the security interest, to consent to any dealings with the land.

### NOTIFICATION OF SEVERANCE

3.42 At present, it is possible for a joint tenant to sever a joint tenancy without notifying the other joint tenants that he or she is doing so. He or she can sell the interest to a third party, or declare that he or she holds the interest on trust for another person. While in some cases the other joint tenant(s) may find out about the severance, in others they will not.<sup>126</sup>

3.43 There are a number of reasons why a joint tenant may wish to know that the joint tenancy has been severed. For example, if a joint tenancy has been used for estate planning purposes,<sup>127</sup> parties who are relying on the fact of the joint tenancy<sup>128</sup> may want to know of the severance, so that they can make other arrangements. Alternatively, a party who has

126 Joint tenants will obviously know of the severance if it is done by agreement. In the methods of severance that involve a transfer of the interest, for which the certificate of title is required, it is also possible the other joint tenants will find out about the severance, as they may hold the certificate (which the other joint tenant will have to obtain from them). This will not always be the case—it is possible that the joint tenant who wishes to sever the joint tenancy may him or herself hold the certificate, and transfer the interest without informing the other co-owners. There is no need for a joint tenant to be informed of a severance that has taken place by a declaration of trust.

127 See Discussion Paper para 3.39.

128 That is, people who expect the principle of survivorship to operate in their favour.

contributed more to the purchase price of the property may wish to know that his or her interest has been converted to a tenancy in common, so that he or she can seek a declaration that his or her share of the new tenancy in common should be proportionately greater than that of the other co-owner. This becomes especially important if the interest on the Register is changed,<sup>129</sup> as it will be desirable for the Register to accurately reflect the co-owners' shares. In such cases, joint tenants may see it as unfair that the joint tenancy has been severed without their knowledge.

### Notification Prior to Severance

3.44 In the Discussion Paper,<sup>130</sup> it was noted that one way of overcoming such a problem would be to require a joint tenant to notify the other joint tenants of her or his intention to sever the joint tenancy, prior to the severance. This would then give the other joint tenants a chance to object to any such severance before it occurred. This is the case in Queensland, where the Registrar may only register the instrument of severance if she or he is satisfied that a copy of the instrument has been given to all other joint tenants.<sup>131</sup>

3.45 One problem with requiring notification before severance is that it may lead to delays in obtaining severance, if a joint tenant has lost contact with one or more of the other joint tenants. It may also defeat the intention of a joint tenant. For example, if a joint tenant dies after signing a transfer to a third party, but before notifying the other co-owners, the joint tenancy will not be severed and survivorship will operate.

3.46 Another problem arises in circumstances of violence. It is undesirable to require victims of violence to contact the perpetrator of violence prior to severance. This could lead to people feeling too fearful to exercise their right to sever a joint tenancy, or to reprisals by the perpetrator prior to severance, in an attempt to stop the severance taking place.

129 For example, due to a transfer of the interest. Compare this with severance by declaration of a trust, which would usually not result in the Register being changed.

130 Discussion Paper paras 3.40–2.

131 *Land Title Act 1994* (Qld) s 59(2). See also Joycey Tooher, above n 114, 405. This approach was also recommended by the Law Reform Commission of Western Australia, above n 26, para 3.34.

133 Discussion Paper para 3.43.

3.47 Furthermore, requiring a joint tenant to notify other joint tenant(s) prior to severance would make a straightforward process more complex. It seems contrary to the Commission's desire to create a simpler, more direct method of severance. This was noted by Michael Macnamara, a Deputy President of the Victorian Civil and Administrative Tribunal:

As things stand it would be possible to effect a severance by transfer to a controlled company without notice to the other co-owner. There is no reason why notice should be required [prior to severance] when a more straight forward and direct route to the same object is being used.<sup>132</sup>

Consequently, we do not recommend that notification before severance should be necessary.

### Notification After Severance

3.48 The Discussion Paper noted that an alternative would be to require the Registrar to notify the other joint tenants after severance has taken place.<sup>133</sup> If severance were to be allowed upon registration of an instrument of severance, notification could be sent to the other joint tenants' last known addresses when the instrument is registered. Such a system exists in Tasmania.<sup>134</sup>

3.49 The current system in New South Wales is broader. It applies to all transactions which will sever a joint tenancy, not just registration of instruments of severance. Joint tenants may be required to provide the names and addresses of the other joint tenant(s), and any other people who may be affected by the severance of the joint tenancy, to the Registrar-General. The Registrar-General must then notify the other joint tenants that a dealing that may sever the joint tenancy has been lodged.<sup>135</sup>

3.50 Requiring notification after severance takes place avoids the problems of delay noted above, while ensuring that the joint tenants are made aware that the nature of their interest has changed. Although they

132 Submission 15.

133 Discussion Paper para 3.43.

134 *Land Titles Act 1980* (Tas) s 63(2). This approach was also recommended by the New South Wales Law Reform Commission and the Law Reform Commission of British Columbia: New South Wales Law Reform Commission, above n 115, Recommendation 3; Law Reform Commission of British Columbia, *Report on Co-ownership of Land*, LRC 100 (1988) 54.

135 *Real Property Act 1900* (NSW) s 97. The Registrar-General is not required to notify people who the documentation makes clear will already be aware of the severance.

will not be able to object to the severance prior to it taking place, if necessary they will be able to seek a declaration in court that they are entitled to a different interest.<sup>136</sup>

3.51 The potential for fraud to occur, due to the Land Registry not requiring the certificate of title prior to registration of an instrument of severance,<sup>137</sup> would also be largely averted by requiring such notification. The Land Registry could be required to send confirmation of the severance to all joint tenants, as well as to the address of the property involved in the transaction.<sup>138</sup> This would normally ensure that the owners of the property would receive this notification, and could then object to the severance on the basis of fraud.<sup>139</sup>

3.52 Requiring notification by the Land Registry also avoids some of the problems that may arise in circumstances of violence, as a joint tenant will not be required to personally contact the other joint tenant(s). By the time the perpetrator of violence is notified, severance will already have taken place, and so it will not be possible for him to exert pressure on the other joint tenant to stop her from severing the joint tenancy.

3.53 The New South Wales (NSW) approach, under which the Registrar-General is required to notify joint tenants of all severing transactions (not just registration of an instrument of severance), would also overcome the problem of some joint tenants not knowing that the nature of their interest has been changed on the Register. As noted above,<sup>140</sup> under the existing system, whether a joint tenant finds out about severance will depend on factors such as which joint tenant actually holds the certificate of title. If the Land Registry is required to inform joint tenants of any transaction that would sever a joint tenancy, this inconsistency would be removed. Joint tenants would be advised of all severing transactions which change the nature of the interest on the Register.<sup>141</sup>

136 Because, for example, they contributed unequally to the purchase price of the property.

137 See above para 3.34.

138 This is different from the NSW legislation, which does not require the joint tenant who is severing the joint tenancy to be notified: *Real Property Act 1900* (NSW) s 97(5).

139 *Transfer of Land Act 1958* s 44(1).

140 See above n 126.

141 The Commission notes that there will still be a limited number of cases in which it will be possible for a joint tenancy to be severed without the other joint tenant(s) being informed, as not all methods of severance will pass through the Land Registry. For example, it will still be possible to declare oneself trustee of the property for a third party. As these changes are not recorded on the Register, however, the consequences may not be as severe as for those dealings that result in the amendment of the interests noted on the Register.

3.54 One possible problem with the NSW legislation is that it requires the Registrar-General to give notice upon lodgement of the dealing, rather than upon registration. Under section 12A of the *Real Property Act 1900* (NSW), the Registrar-General can refuse to register the dealing until the expiration of a period expressed in the notice. This would give people a certain time to object to the registration. As noted above, however, joint tenants often want severance to take place immediately. Any delay in enabling severance can potentially defeat their intention. Given that the only real ground on which a party can object to severance taking place is fraud, which is adequately dealt with by section 44(1) of the *Transfer of Land Act 1958*,<sup>142</sup> there seems to be little reason for imposing any additional time barriers prior to allowing severance. Instead, the Commission recommends that any such notice be sent upon registration. Joint tenants will still be able to object on the grounds of fraud, or seek a declaration that their interest should be different to that which is recorded on the Register, but the severance will not be delayed.

3.55 The submissions received by the Commission generally supported the proposal that the Land Registry provide joint tenants with notification of severance of the joint tenancy, as '[c]o-owners should be aware of the state of their co-ownership'.<sup>143</sup> The Victorian Bar noted that '[t]here is no reason why the Registrar of Titles cannot factor in a service of notice of the severance to the other co-owners in the same way that the Registrar currently advises registered proprietors that a caveat has been lodged against the title'.<sup>144</sup>

3.56 The Commission recommends that the Land Registry be required to notify joint tenants of any registered transaction that severs a joint tenancy. Such notification will be sent upon registration of the transaction that severs the joint tenancy. Notification should be sent to all joint tenants, including the one who has severed the joint tenancy, in an attempt to avoid any potential fraud. If the severance is fraudulent, or the proportions shown on the certificate of title are incorrect, a co-owner who is affected will be able to have the Register amended.<sup>145</sup> Although there was some

142 See above n 121.

143 Submission 15. See also Submissions 4, 6, 9, 12 and 16. Cf Submissions 2 and 7. Submission 11 favoured notifying the other joint tenant(s) both before and after severance.

144 Submission 12. The Commission notes that, unlike in the case of caveats, notification of severance will not prevent registration of the severing transaction.

145 *Transfer of Land Act 1958* s 103.

support for notifying mortgagees or other security interest holders of the severance,<sup>146</sup> we have not made such a recommendation, as severance will generally not affect the pre-existing rights of holders of security interests.<sup>147</sup>

3.57 The Land Registry will incur costs in providing this notification. The Commission recommends that the fee charged by the Land Registry for lodgement of the relevant transaction should permit cost recovery for notification.

#### ! RECOMMENDATIONS

- 18 That a provision be inserted into the *Transfer of Land Act 1958* requiring the Land Registry to notify all joint tenants of any dealing that severs the joint tenancy.
- 19 That such notification be sent upon registration of the dealing that severs the joint tenancy.
- 20 That co-owners who seek to sever a joint tenancy be required to provide the Land Registry with the names and last-known addresses of all joint tenants, where these are known. A failure to provide last-known names and addresses should not hinder the severance process.
- 21 That notification be sent to all joint tenants (including the person who proposes to sever the joint tenancy) at their last-known address, as well as to the co-owned property (if practicable).
- 22 That the fee charged by the Land Registry for lodgement of the relevant transaction should permit cost recovery for notification.

<sup>146</sup> See, eg, Submission 7.

<sup>147</sup> See above paras 3.38–40 and Recommendation 16.

## DIVORCE

3.58 In Victoria, when people divorce, the divorce revokes any disposition of property in their wills to the divorced spouse.<sup>148</sup> If a divorced person dies prior to changing his or her will, the property will not pass to their divorced spouse—it will instead be treated as if that spouse had died before him or her, and will pass to other people nominated in the will.<sup>149</sup> This provision is intended to reflect what the majority of divorcing spouses would have intended, if they had considered the issue.

T is married to B. T makes a will under which B is to inherit all of her property. The will states that, in the event that B dies prior to T, the property will go to their child, C. Five years after making the will, T and B divorce. T does not change her will. Two years later, T dies. Although T's will states that her property should go to B, this will not apply because of the divorce. All of T's property will instead go to C.

3.59 The Commission received a submission from Michael O'Loghlen, QC, questioning whether a similar rule should apply in the case of joint tenancies:

Suppose a married couple who separate and, later, divorce. Frequently enough, the couple will not apply for division of property under the Family Law Act, whether through ignorance, or through their unwillingness to incur the considerable legal costs involved. In such cases, should the fact of their divorce amount either to prima facie evidence, or to conclusive evidence, of the severance of their joint tenancy? The question arises, particularly, where the couple purchased the matrimonial home as joint tenants and, after the divorce, one of them continues to occupy the matrimonial home.<sup>150</sup>

3.60 The Commission believes that this is a good suggestion. It is likely that spouses who divorce would intend that any joint tenancy held between them would be severed. It is possible that they may not understand the law sufficiently to know that they must take additional steps to sever the joint tenancy. As a result, their desire to leave the property to other people (such as their children) in their will may be defeated. It should, of course, be

148 *Wills Act 1997* s 14. This only applies to wills made prior to the divorce. It also does not apply if it appears that the spouses did not want the disposition to be revoked upon the ending of the marriage.

149 If no-one else is nominated in the will, it will pass according to the rules of intestacy.

150 Submission 5.

possible to specify that they do not wish to sever the joint tenancy. For example, the spouses may make an agreement about division of their property, which states that the joint tenancy should continue despite the divorce. Any such agreement should be formed no later than 12 months after the finalisation of the divorce.<sup>151</sup> To avoid potential litigation, such agreements should be in writing. The Commission recommends, however, that the general situation should be that joint tenancies are severed in circumstances of divorce.<sup>152</sup> Our earlier recommendation that severance should not affect the rights of mortgagees or other holders of security interests should also apply in this situation.

3.61 At present, when one joint tenant dies, and a surviving joint tenant tries to claim her or his share according to the principle of survivorship, the Land Registry will require proof of the other joint tenant's death. At the same time, it would be possible for the Land Registry to ask whether the parties were divorced. If they had divorced after the creation of the joint tenancy, in the absence of any written evidence of a contrary intention,<sup>153</sup> the Land Registry should refuse to transfer the interest to the remaining joint tenant. In addition, the Land Registry may want to consider creating a notice of dissolution of marriage, that co-owners can file upon divorce, which would allow the Register to be brought into line with the nature of the interests held.

#### ! RECOMMENDATION

23 That a provision be inserted into the *Property Law Act 1958* specifying that, in the absence of written evidence of a contrary intention, parties who divorce after the creation of a joint tenancy be deemed to have severed the joint tenancy.

151 This is the period of time in which applications for division of property should be made under the *Family Law Act 1975* (Cth).

152 The Commission notes that any such rule will not interfere with the right of the courts to divide property between spouses under the *Family Law Act 1975* (Cth) or the *Property Law Act 1958* (Vic).

153 That is, evidence that the parties intended to remain joint tenants after the ending of their marriage.

### Severance of Joint Tenancies of Personal Property

3.62 It is possible that joint tenants of personal property (for example, goods) will also wish to convert their interest to a tenancy in common. As conflicts about joint tenancies of goods and other personal property rarely arise, Victorian law in this area is unclear. Although the need for specific provisions in the area will be uncommon, it would still be useful to clarify the situation, in an attempt to avoid future problems.

3.63 There is no Register for most forms of personal property. It is therefore not possible to provide for the registration of an instrument of severance, as is the case under the Torrens System.

3.64 In the Discussion Paper, the Commission tentatively suggested that joint tenants of personal property should be able to sever the joint tenancy by giving a written declaration of severance to the other joint tenants. This was recommended by the New South Wales Law Reform Commission,<sup>154</sup> and is similar to the current situation in England.<sup>155</sup>

3.65 Such a proposal would provide a simple process for severing joint tenancies of personal property. It could be done swiftly, to provide for those cases where severance is sought at short notice. There are two main problems with this approach. Firstly, there is great potential for ambiguity. It is possible that there may be confusion as to whether a joint tenant really intended to sever the joint tenancy by virtue of a particular notice. For example, will a notice that simply states 'I don't want you to have any of my property' be sufficient to sever a joint tenancy of a car?

3.66 Secondly, there is potential for dispute over whether a notice has been served on the other joint tenant(s). While it is not necessary that the other co-owner actually receive the notice,<sup>156</sup> it is important that the severing co-owner actually take steps to serve it on him or her, to provide evidence of the intention to end the joint tenancy. Otherwise, it would be possible to dispute whether he or she intended to sever the joint tenancy, or was still considering the matter. Attempting service provides an irrevocable indication of an intention to sever.

154 New South Wales Law Reform Commission, above n 115, Recommendation 14.

155 The law in England is not entirely clear, but joint tenancies of goods can probably be severed by notice: *Burgess v Rawnsley* [1975] 3 All ER 142.

156 Although it is desirable that people are informed that severance has taken place, so that they can plan their affairs accordingly, as they cannot stop the severance occurring it is not necessary that they be informed.

3.67 Both of these problems can be largely resolved by requiring notices to be in a prescribed form and, in the case of a dispute, requiring proof that attempts were made to serve the form on the other co-owner(s).<sup>157</sup> Having a prescribed form will remove any potential ambiguity in the wording of the notice. The form could be made available by legal representatives, or purchased from a newsagent or post office. Requiring proof that attempts were made to serve the notice will provide evidence that there was a definite intention to sever the joint tenancy.<sup>158</sup> Such proof could be provided by a registered mail receipt, sent to the last-known address of the other co-owner(s), or by evidence of personal service. This procedure also has the advantage of being quick and simple—it merely requires a joint tenant to fill out a form and serve it on the other joint tenants, while retaining some evidence of that service.

3.68 The submissions received by the Commission on this matter supported the introduction of a simple process of severance for personal property.<sup>159</sup> Some concern was raised in relation to certain forms of personal property, such as bank accounts and intellectual property.<sup>160</sup> It was argued that it may not be possible to simply apply such a scheme across the board, given the nature of these kinds of property, and the fact that they may be governed by specific legislation.<sup>161</sup> The Commission agrees with these concerns. Therefore, while the Commission recommends that it should be possible to sever joint tenancies in goods by serving a written notice on the other co-owner(s), it does not recommend extending this recommendation to all forms of personal property.

157 The notice should include a statement indicating how service should be effected, and that it is necessary to retain evidence of service.

158 Particular problems of proof arise in the case of joint tenancies. By their nature, disputes will only arise on the death of one joint tenant. It therefore often becomes difficult to ascertain whether they intended to sever the joint tenancy. For this reason, the Commission recommends requiring written evidence of attempts to serve any such written notice, in an effort to avoid disputes about the deceased co-owner's intention.

159 See Submissions 4, 7, 11 and 15. Cf Submission 12.

160 See, eg, Submissions 11 and 12.

161 For example, the *Copyright Act 1968* (Cth) or the *Patents Act 1990* (Cth).

**! RECOMMENDATIONS**

- 24 That a provision be inserted into the *Property Law Act 1958* allowing joint tenancies of goods to be severed by service of a written notice.
- 25 That the notice be in a prescribed form.
- 26 That the notice be served upon all other joint tenants at their last-known addresses. Service should either be personal or by registered mail.
- 27 That in the event of a dispute as to whether severance has taken place, proof should be provided that attempts were made to serve the notice on all other joint tenants.

## Chapter 4

# Ending Co-ownership of Property

4.1 In Chapters 2 and 3 we have discussed the creation of joint tenancies and tenancies in common and how joint tenancies are converted into tenancies in common. Rather than changing the type of co-ownership, people may want to end it by selling the property and dividing the proceeds between them ('sale'), or by physically dividing the property ('division').<sup>162</sup> Co-owned property can be sold or divided with the agreement of all of the co-owners. If co-owners disagree, however, or if a co-owner cannot agree to sell because he or she is not an adult or lacks legal capacity, a process is required to authorise sale or division. Various other disputes may also arise between co-owners. For example, a co-owner may want to recover the cost of improving or maintaining the property from the other co-owners. Procedures are also required to resolve these conflicts.

4.2 This Chapter examines the most appropriate forum in which to hear disputes relating to co-ownership issues.<sup>163</sup> The Report then recommends mechanisms for resolving disputes relating to co-owned land, including alternative dispute resolution processes, the power to order sale or division of the land, and rules for accounting between the co-owners. Finally, the Report makes recommendations about resolving disputes over co-owned personal property, such as goods.

162 Traditionally, physically dividing property has been called 'partition'. The Commission calls this process 'division', and will refer to it in this way throughout the remainder of the Report. Division of the property is to be contrasted with the division of the proceeds of sale, which is also referred to as 'sale'.

163 Throughout the remainder of this Report, disputes relating to the sale and division of co-owned property, and disputes as to financial accounting that should take place between the co-owners, will be referred to as 'co-ownership disputes'. This term is not intended to include other potential disputes between co-owners, such as disputes concerning whether a co-owned interest is a joint tenancy or a tenancy in common.

## WHICH IS THE MOST APPROPRIATE FORUM TO HEAR CO-OWNERSHIP DISPUTES?

### Existing Law

4.3 The law draws a distinction between spouses, ‘domestic partners’<sup>164</sup> and other co-owners. When relationships break down between spouses or domestic partners, a court can order that co-owned land is divided between them on a just and equitable basis. Spouses can seek an order from the Family Court under section 79 of the *Family Law Act 1975* (Cth), while domestic partners can seek an order from a Victorian court<sup>165</sup> under Part IX of the *Property Law Act 1958*.

4.4 Other co-owners who wish to end co-ownership of land must rely on Part IV of the *Property Law Act 1958* (‘Part IV’).<sup>166</sup> This will include, for example, family members who have been left the property by will or people who have purchased property as co-owners for investment purposes. Part IV requires applications to end co-ownership to be made to the County Court or the Supreme Court.<sup>167</sup> There are rules which govern whether sale or division of the property can be ordered by the court and how the proceeds of sale are distributed.<sup>168</sup>

164 ‘Domestic partners’ are people who are or have been in a ‘domestic relationship’. A ‘domestic relationship’ is defined as ‘the relationship between two people who, although not married to each other, are living or have lived together as a couple on a genuine domestic basis (irrespective of gender)’: *Property Law Act 1958* s 275. This includes gay and lesbian or heterosexual de facto partners, who pass certain qualifying requirements set out in the *Property Law Act 1958* (such as having lived together for two years, or having had a child).

165 The Magistrates’, County or Supreme Court, depending on the value of the property at stake.

166 Spouses and domestic partners can also use Part IV of the *Property Law Act 1958*. This may occur if they do not fall within the scope of the provisions of the *Family Law Act 1975* (Cth) because, for example, the dispute does not relate to a ‘matrimonial cause’, or within the scope of Part IX of the *Property Law Act 1958* because, for example, they have not lived together for a sufficient time. Alternatively, there may be reasons why they prefer to use Part IV of the *Property Law Act 1958*. In such cases, it is necessary to have clear rules clarifying the interaction between proceedings under Part IX of the *Property Law Act 1958* or the *Family Law Act 1975* (Cth), and proceedings under Part IV of the *Property Law Act 1958*: see below paras 4.27–32.

167 The County Court usually only hears matters in which the value of the property is less than \$200,000. With the consent of the parties, however, the County Court can hear claims relating to land of a higher value: *County Court Act 1958* ss 3, 37(2)(b).

168 See below paras 4.43–4 and 4.59–66.

4.5 Co-owners of chattels who wish to end their co-ownership can also rely on the provisions of the *Family Law Act 1975* (Cth) if they are spouses, or Part IX of the *Property Law Act 1958* if they are domestic partners. In other cases, co-owners will have to apply to either the County or Supreme Court to end the co-ownership, depending on the value of the chattels.<sup>169</sup>

## Proposed Reforms

### SCOPE OF PROPOSALS

4.6 This Report does not examine the rules which apply to ending the co-ownership of property held by spouses or domestic partners. These situations involve issues that fall outside the Terms of Reference.<sup>170</sup> The Commission's focus in this Report is on Part IV of the *Property Law Act 1958* as it relates to co-owned land, and section 187 of the *Property Law Act 1958* as it relates to co-owned chattels.

### REASONS FOR REFORM

4.7 In the Discussion Paper, the Commission said that it may be unnecessary to require people wishing to resolve co-ownership disputes relating to land to apply to the Supreme Court or the County Court.<sup>171</sup> The Commission suggested that requiring people to apply to these courts may involve needless expense and delay. Filing fees in the Supreme Court and the County Court are costly,<sup>172</sup> and there can be significant delays in having a matter heard. There are also additional costs, such as hearing fees. Given the complexity and formality of hearings in such courts, legal representation is usually necessary, which further increases the cost. As a general rule, if a party loses a matter in the Supreme Court or County Court, he or she will also be liable to pay the other party's legal costs, which could make the matter very expensive. Given the number of matters that can be heard by the Supreme Court, there can be considerable delay before any determination is made.

169 *Property Law Act 1958* s 187.

170 The Commission also has no jurisdiction in relation to the Commonwealth *Family Law Act 1975*.

171 See Discussion Paper para 4.24. Similar concerns can be raised in relation to disputes over co-owned chattels, which must also be heard in these courts.

172 As at 26 November 2001, the filing fee in the Supreme Court is \$650 and in the County Court is \$429.

4.8 Concern about the formality, expense and delay of requiring these matters to be heard in the Supreme or County Courts was clearly evident in the submissions.<sup>173</sup> For example, Mr Boyapati, who is currently involved in an attempt to end co-ownership of his property, states:

I am in dispute with my co-owners and have commenced action in the Supreme Court last year (Aug 2000) and the hearing is expected on Nov 2001. What a ridiculously long time and expense for a simple matter!<sup>174</sup>

## THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL (VCAT)

### Land

4.9 The Commission's tentative view in the Discussion Paper was that the solution would be to allow co-ownership disputes to be heard by the Victorian Civil and Administrative Tribunal (VCAT).<sup>175</sup> The Discussion Paper noted that VCAT already has jurisdiction over some disputes relating to land.<sup>176</sup> Advantages of having such matters heard in VCAT include lower costs,<sup>177</sup> less formality,<sup>178</sup> quicker hearing times and the availability of alternative dispute resolution mechanisms.<sup>179</sup>

173 See, eg, Submissions 6, 12 and 13.

174 Submission 13.

175 Discussion Paper para 4.29.

176 VCAT hears a range of property law matters, including applications for removal of easements and rights of way: see, for example, *Planning and Environment Act 1987* s 60; *Subdivision Act 1988* s 36.

177 The filing fees in VCAT vary depending on the nature of the matter, but are much lower than in the Supreme or County Courts. For example, as at 26 November 2001, applications to hear matters in the Real Property List range from \$23–\$170. There is also no general rule in VCAT that the party who loses the matter must pay the other party's costs, although costs can be awarded if appropriate: *Victorian Civil and Administrative Tribunal Act 1998* (hereafter VCAT Act) s 109.

178 Section 98(d) of the VCAT Act provides that the Tribunal 'must conduct each proceeding with as little formality and technicality, and determine each proceeding with as much speed, as the requirements of this Act and the enabling enactment and a proper consideration of the matters before it permit'. In practice, it is often possible for applicants to act on their own behalf, without the need for legal representation. In fact, legal representation is only allowed in specified circumstances: VCAT Act s 62.

179 VCAT Act ss 83–93. For a discussion of alternative dispute resolution see below paras 4.33–42.

4.10 This proposal was accepted by most of those who made submissions to the Commission.<sup>180</sup> For example, the Victorian Bar noted that:

The resolution of co-ownership disputes, particularly applications for sale and partitions [sic] requires adherence to legal principles and a strong sense of practicality. Co-ownership disputes often arise due to personal disputes that are unrelated to property or financial contributions. The Victorian Bar believes that these disputes might benefit from hearings in a relatively less formal forum. The Real Property List of VCAT could be a useful forum for parties to resolve these issues.<sup>181</sup>

4.11 Although there were some concerns raised about the constitution of the Tribunal, as well as about VCAT's jurisdiction, we believe that these can be adequately dealt with by the mechanisms outlined below.<sup>182</sup> In light of the advantages of cost, speed and informality, the Commission recommends that co-ownership disputes relating to land be heard by VCAT.<sup>183</sup>

### Personal Property

4.12 The Commission recommends that VCAT's jurisdiction should extend to co-owned goods as well as land. There seems to be little justification for maintaining a distinction between these types of property. This is particularly the case in relation to applications that relate to both co-owned land and goods. Currently, disputes may arise as to whether certain items are fixtures (and so form part of the land, to be dealt with by Part IV), or goods (to be dealt with under section 187 of the *Property Law Act 1958*). If VCAT had jurisdiction in relation to both land and goods, it would not be necessary to determine which type of property it was—the Tribunal would have the capacity to deal with it. In addition, the process for determining how the property should be divided would not differ depending on whether the property was land or goods.

180 See Submissions 6, 12, 13, 15 and 16. Cf Submission 1.

181 Submission 12.

182 See below paras 4.18–26 and Recommendations 32–4.

183 The Commission notes that there is a specialist Land and Environment Court in New South Wales with jurisdiction to deal with land-related matters. If a similar court were to exist in Victoria, it is likely that the Commission would recommend that co-ownership disputes be heard by such a body. In the absence of a specific land-related forum, however, VCAT seems to be the best available alternative.

4.13 The Commission does not, however, recommend extending VCAT's jurisdiction to other forms of personal property, such as businesses, bank accounts or intellectual property. These forms of property raise different issues from those raised by land or goods,<sup>184</sup> which may be quite technical. The Commission does not believe it is appropriate for VCAT to determine matters relating to such property. VCAT's jurisdiction should be limited to co-owned land and goods.

4.14 As we only recommend extending VCAT's jurisdiction to goods, it is important to ensure that current mechanisms for division and sale of personal property other than goods are retained. The power of the Supreme or County Court to order sale or division of chattels in section 187 of the *Property Law Act 1958* may apply to such property, although this is unclear.<sup>185</sup> While the term 'chattel' is ordinarily associated with tangible personal property such as goods, in certain contexts it can have a broader meaning that includes forms of property such as bank accounts and intellectual property. A determination has never been made as to the precise meaning of 'chattel' in the context of section 187 of the *Property Law Act 1958*.<sup>186</sup> It is possible that a court may interpret 'chattel' broadly in this context, in which case it would be possible to make an application to the Supreme or County Court under section 187 for the division of co-owned personal property other than goods. This possibility should be kept open. For this reason, the Commission does not recommend repealing section 187 of the *Property Law Act 1958*.

4.15 However, by retaining section 187 of the *Property Law Act 1958*, a problem arises. It would be possible for people to choose whether to institute proceedings for division or sale of co-owned goods in the Supreme or County Courts, or in VCAT. This may disadvantage less wealthy co-owners, who could be forced into expensive court proceedings, rather than having the matter determined by the cheaper, less formal avenue of VCAT. We believe that all matters relating to co-owned goods should be heard by VCAT.<sup>187</sup> To solve this problem, the Commission recommends amending section 187 of the *Property Law Act 1958*, to provide that matters cannot

184 See Submission 12.

185 In addition to this general power of sale or division, co-ownership of some forms of personal property may be dealt with by specific Acts: see, eg, *Designs Act 1906* ss 25A–25B.

186 There are indications that the equivalent provision in the New South Wales *Conveyancing Act 1919* does not apply to such forms of property: see *Naziridis v Rimis* (1985) 9 BPR 16, 201; [1985] ACLD 826.

187 Subject to the jurisdictional issues raised in paras 4.22–6 below.

be heard under section 187 if they can be heard by VCAT (under the provisions relating to co-owned goods).<sup>188</sup>

### No Monetary Limit

4.16 It may be argued that there should be a jurisdictional limit on VCAT's ability to hear such matters—that disputes concerning property above a certain value should automatically be heard by the Supreme Court, due to their 'importance'. The Commission does not agree with this argument. The mere monetary value of a property will not effect the complexity of the dispute. Requiring all people to attend the Supreme Court in such circumstances may disadvantage those in a weaker financial position. Any potential complexities that may arise in such circumstances could adequately be dealt with by VCAT's power to refer matters to the Supreme Court under section 77 of the VCAT Act.<sup>189</sup> This view was supported by property solicitor Mr Bill Rowson, who stated:

[I]t is my view that if co-owners cannot agree upon the sale of a property and it is necessary to seek a Court Order, on application for sale of the property [the matter] should be capable of being referred to a less formal jurisdiction than the Supreme or County Court irrespective of the value of the property with the appropriate rights of appeal in the event that either party is dissatisfied with the outcome.<sup>190</sup>

### Rights of Third Parties

4.17 Finally, the Commission notes that its recommendation that co-ownership disputes be heard by VCAT is not intended to remove any rights that third parties, such as mortgagees,<sup>191</sup> may have in relation to such matters. Under the current law, interested parties may have a right to be

188 As the effect of this recommendation is to limit the Supreme Court's jurisdiction in relation to chattels, it will be necessary to follow the procedures laid down in section 85 of the *Constitution Act 1975*.

189 See below para 4.26.

190 Submission 6.

191 A person who has a mortgage over the whole of the land will not usually need to be a party, because the mortgagee's security interest will not be affected by the division or sale. The proceeds of any sale will be bound by the security interest: *Fulton v 523 Nominees Pty Ltd* [1984] VR 200.

joined as a party to such disputes if their interest is affected.<sup>192</sup> The Commission recommends that this right be retained.<sup>193</sup>

## ! RECOMMENDATIONS

28. That the Victorian Civil and Administrative Tribunal (VCAT) be given jurisdiction in relation to disputes concerning the sale and division of all co-owned land and goods ('co-ownership disputes').

29. That section 187 of the *Property Law Act 1958* be amended to provide that matters cannot be heard under section 187 if they can be heard by VCAT under the provisions relating to co-owned goods.

### CONSTITUTION OF VCAT

4.18 Some concern was raised about the expertise of the members of VCAT, and their ability to deal with some of the legal complexities that may arise in co-ownership disputes. This concern arises because it is possible for people without legal qualifications to be appointed to sit on VCAT.<sup>194</sup>

4.19 The Commission does not regard this as a convincing reason for not allowing co-ownership disputes to be heard by VCAT. Under the VCAT Act, the President of VCAT determines how the Tribunal is to be constituted for the purposes of each proceeding.<sup>195</sup> The Tribunal constituted to hear a matter must include a legal practitioner.<sup>196</sup> This requirement, as well as the President's discretion to choose the particular member to sit on a particular Tribunal, is probably sufficient to provide for appropriate expertise in relation to co-ownership disputes. However, in a further attempt to meet this concern, the Commission recommends that co-ownership disputes should be heard by a Tribunal that includes a member who, in the

192 See, eg, *Fulton v 523 Nominees Pty Ltd* [1984] VR 200.

193 The Commission notes that section 60 of the VCAT Act allows VCAT to join parties to a matter if the Tribunal considers that they ought to be bound by, or have the benefit of, orders made in the proceedings; if their interests are affected by the proceeding; or if it is desirable to join them for any other reason. This provision seems sufficiently broad to enable third parties such as mortgagees to be joined to appropriate co-ownership-related proceedings.

194 VCAT Act ss 13–14.

195 VCAT Act s 64(3).

196 VCAT Act s 64(2).

opinion of the President, has knowledge of, or experience in, property law matters.<sup>197</sup>

### ! RECOMMENDATION

30. That the Tribunal hearing co-ownership disputes is to be constituted by, or include, a member who, in the opinion of the President of VCAT, has knowledge of, or experience in, property law matters.

### JURISDICTION OF VCAT: EXCLUSIVE OR CONCURRENT?

4.20 A second concern that was raised was whether VCAT's jurisdiction should be 'exclusive' or 'concurrent'. If exclusive jurisdiction is conferred, all co-ownership disputes will be heard by VCAT. It will not be possible to have disputes heard in another forum.<sup>198</sup> If an application were filed in a body other than VCAT, they would have to refuse to hear any matters relating to co-ownership disputes. If the jurisdiction is concurrent, co-owners will have a choice about which forum to lodge their application in: VCAT, the Supreme Court or the County Court.<sup>199</sup>

4.21 The main advantage of making VCAT's jurisdiction exclusive is that it avoids the problem of 'forum shopping', in which parties tactically choose the forum which most advantages them. This could allow a wealthier co-owner to force other co-owner(s) into expensive court proceedings, by choosing to have the matter heard in the Supreme Court rather than VCAT. For the reasons noted above, it seems inappropriate in most cases for co-ownership disputes to be heard by the Supreme Court. If VCAT's jurisdiction was exclusive, appeals to the Supreme Court would still be possible, but only in relation to questions of law.<sup>200</sup>

4.22 The main disadvantage of making VCAT's jurisdiction exclusive arises in cases which cover a range of matters.<sup>201</sup> This concern was raised by Mr Mulvany, a Victorian barrister, who noted that co-ownership disputes

197 Similar provisions apply in relation to matters heard under the *Children and Young Persons Act 1989* and the *Community Services Act 1970*. Matters arising under those Acts must be heard by a person with child welfare experience: VCAT Act, Schedule 1, cl 5 and 6.

198 This would not include appeals from decisions made by VCAT, or any matters that are actually referred to another body by VCAT: see below para 4.26.

199 As noted above, matters could only be lodged in the County Court if the value of the property did not exceed \$200,000, or by agreement of the parties: see above n 167.

200 VCAT Act s 148.

201 See below.

often occur in a broader context than simply determining how co-owned property should be divided:

In practice a partition claim (i.e. a claim to an order for sale and division of the proceeds) is most commonly sought as one part of a wider dispute arising in contexts such as:-

- (i) partnership;
- (ii) the Corporations Law (e.g. where title to land used by a company is held by shareholder/directors);
- (iii) *de facto* relationships;
- (iv) farming relationships;
- (v) joint ventures.

In the particular case the wider dispute might well “span” more than one of these kinds of claim.<sup>202</sup>

4.23 The problem raised by Mr Mulvany is that in these situations, courts other than VCAT<sup>203</sup> will have jurisdiction over the related matters, such as the part of the dispute involving Corporations Law issues. If VCAT’s jurisdiction is exclusive, it would be necessary to separate the co-ownership related aspect of the dispute from the rest of the dispute,<sup>204</sup> so that VCAT could deal with the co-ownership issues. This could become unnecessarily complex or artificial. In addition, in certain circumstances, which laws should actually be applied to the sale or division of co-owned property will depend on the context.<sup>205</sup> This capacity to consider the interrelationship of matters would be lost if all co-ownership related disputes had to be heard by VCAT.

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202 Submission 1.

203 Either the Magistrates’, County, Supreme or Federal Courts.

204 Which body would actually separate the issues would depend on where the application was filed. If it was filed in a court, the court would have to determine which part of the dispute related to co-ownership, and refuse to hear such matters. Alternatively, if the matter was filed in VCAT, the Tribunal would only hear the co-ownership related matters, and refer the rest of the proceedings to the appropriate court.

205 For example, if co-owned property is partnership property, it is possible that the provisions of the *Partnership Act 1958* should be applied, rather than Part IV of the *Property Law Act 1958*: see *Tenture Pty Ltd v Costala Pty Ltd* (Unreported, Supreme Court of Victoria, McDonald J, 15 July 1997); (1997) V Conv R ¶ 54-565.

4.24 The Commission believes that an appropriate compromise between these conflicting concerns can be reached by a provision which holds that the Supreme Court or County Court do not have jurisdiction to hear co-ownership disputes about land or goods over which VCAT has jurisdiction, unless they are of the opinion that there are special circumstances that justify a hearing by the Court.<sup>206</sup> In the case of co-ownership disputes, special circumstances will arise when the matter is complex or when there is an interrelationship with other matters which fall outside VCAT's jurisdiction.

4.25 Under such a scheme, it would be possible to lodge an application directly in the Supreme Court or County Court if desired. This could be done, for example, where the co-ownership dispute arose in the context of a partnership dispute, or upon the breakdown of a joint venture. However, the Supreme or County Courts would have to refuse to hear co-ownership related matters, unless there were special circumstances that justified such a hearing. If the matter was rejected by the court, it would be necessary for the applicants to file a new application in VCAT.

4.26 In addition, we note that section 77 of the VCAT Act provides a mechanism to deal with the situation where a party makes an application to VCAT which involves issues that fall outside VCAT's jurisdiction,<sup>207</sup> or matters of great complexity. Section 77 provides that the Tribunal may, on application by a party or of its own initiative, make an order striking out any part of a proceeding, if it considers that the subject-matter of the proceeding would be more appropriately dealt with by a body other than VCAT. The Tribunal also has power to refer such matters to the relevant body. This would allow VCAT to refer complex matters to the Supreme or County Courts.<sup>208</sup>

206 A similar provision exists for planning matters: VCAT Act s 52. As the effect of this recommendation is to limit the Supreme Court's jurisdiction in relation to co-ownership disputes, it will be necessary to follow the procedures laid down in section 85 of the *Constitution Act 1975*.

207 Such as disputes involving the matters outlined in para 4.22 above.

208 The Commission notes that VCAT can also, on the application of a party or on its own initiative, refer any questions of law arising in a proceeding to the Supreme Court for decision: VCAT Act s 96.

**! RECOMMENDATIONS**

31. That the jurisdiction of the Supreme and County Courts to hear co-ownership disputes<sup>209</sup> be limited to matters in which there are special circumstances that justify a hearing by these Courts.

- The existence of such special circumstances should be determined either by the Supreme or County Courts, or by the Victorian Civil and Administrative Tribunal (VCAT) under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998*.
- Factors to be taken into account in determining whether there are special circumstances should be whether the matter is complex, or whether there is an interrelationship with matters over which VCAT has no jurisdiction.

32. That appeals to the Supreme Court of decisions made by VCAT in relation to co-ownership disputes should lie on questions of law alone.

**JURISDICTION OF VCAT: SPOUSES AND DOMESTIC PARTNERS**

4.27 If our recommendation to confer exclusive jurisdiction on VCAT to determine co-ownership disputes is implemented, there may still be a conflict between VCAT's jurisdiction to order division or sale of co-owned land or goods, and the jurisdiction of Victorian courts to divide the property of domestic partners under Part IX of the *Property Law Act 1958*, or of the Family Court to divide the property of married couples under the *Family Law Act 1975* (Cth). For example, there may be several co-owners, only some of whom are married or living together as domestic partners. The co-owners who are not married or in a domestic relationship may bring proceedings in VCAT, while the other co-owners may apply for a division of property under Part IX or the *Family Law Act 1975* (Cth). VCAT needs powers to deal with this problem.

4.28 A conflict could also arise where all of the co-owners are married or domestic partners (to or of each other), and one partner applies to the Supreme Court or the Family Court for a division of property, while the other partner applies to VCAT. Although we think that spouses or domestic partners are more likely to rely on the provisions of the *Family Law Act*

<sup>209</sup> See above Recommendation 28.

1975 (Cth) or Part IX of the *Property Law Act 1958*, it is necessary to have some means of resolving jurisdictional conflicts of this kind.

4.29 If all of the co-owners are married or domestic partners, three situations could arise. Firstly, it is possible that the co-owned property would already be subject to an application for division of the property under Part IX or under the *Family Law Act 1975* (Cth) ('alternative proceedings'). In this situation, the Commission recommends that VCAT adjourn any proceedings relating to that property, pending the outcome of the alternative proceedings.<sup>210</sup> If the matter is resolved by the other court, VCAT could then terminate the proceedings. If, however, the court does not dispose of the matter,<sup>211</sup> the VCAT application could be reactivated.

4.30 Secondly, it is possible that proceedings will not yet have been initiated under Part IX or the *Family Law Act 1975* (Cth). In such a case, the Commission recommends that, in the initial directions hearing of the matter, VCAT should advise parties of the possibility of initiating alternative proceedings. On the application of either party a short adjournment should be granted to enable the parties to seek advice as to the best avenue to pursue.<sup>212</sup> If either party then chooses to initiate proceedings in another court, the Commission again recommends that VCAT adjourn the proceedings, pending the resolution of that hearing. If neither party has filed an application in another court by the end of the adjournment, VCAT would be at liberty to continue with its hearing.

**Directions hearing**

A directions hearing is a short hearing in which the future progress of the matter is determined. For example, dates for swapping any relevant documents or for attending mediation may be established at a directions hearing.

4.31 Thirdly, it is possible that, after having been advised by VCAT at the directions hearing of the availability of the alternative avenues for

210 In fact, if the matter falls within the jurisdiction of the *Family Law Act 1975* (Cth), VCAT will not have the capacity to hear the application, as it will be exclusively within the Family Court's jurisdiction. VCAT will have no choice but to adjourn or terminate the matter.

211 Because, for example, the matter is found not to fall within the jurisdiction of the court to which the application was made. For example, the claim of an applicant under Part IX may be rejected because the co-owners do not satisfy the definition of 'domestic partners': see above n 164. Similarly, a 'matrimonial cause' is required in order to bring the matter within the jurisdiction of the Family Court: see *Family Law Act 1975* (Cth) ss 4(ca)(ii)–(iii) for definitions of a 'matrimonial cause'.

212 This should only be possible if the parties are, or may be, spouses or domestic partners.

proceeding, both parties will decide to continue under Part IV of the *Property Law Act 1958*. One party may then change his or her mind after the VCAT hearing has begun, and subsequently file an application under Part IX of the *Property Law Act 1958* or under the *Family Law Act 1975* (Cth). Again, the Commission recommends that the VCAT matter should be adjourned, pending the outcome of the alternative proceeding. In this case, however, it is possible that VCAT could require the party that belatedly filed the alternative application to pay the other party's costs in the VCAT application. Such an order would be justifiable, on the basis that he or she was provided with an opportunity to transfer the matter to the other court at an earlier date, and by refusing to do so had unreasonably prolonged the proceedings. The VCAT Act provides the Tribunal with the power to award costs in such a situation.<sup>213</sup>

4.32 Where only some of the parties are married or domestic partners, the Commission recommends that VCAT also be given discretion to adjourn proceedings. Alternatively, it could decide to order division of the property or of the proceeds of sale between all of the co-owners. If it did so, it might then make orders to ensure that the proceeds of any sale of property to which married or domestic partners are entitled are protected. It could do this, for example, by ordering that the proceeds of sale be paid to a trustee.<sup>214</sup> This would ensure that the proceeds of the sale are not dissipated before the determination of an application under Part IX of the *Property Law Act 1958* or the *Family Law Act 1975* (Cth).

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213 VCAT Act s 109(b).

214 See below para 4.50.

## ! RECOMMENDATIONS

33. That in appropriate circumstances, in the initial directions hearing of co-ownership disputes that are heard by VCAT, the parties be advised of the possibility of filing applications for the division of the property in dispute under section 79 of the *Family Law Act 1975* (Cth) or Part IX of the *Property Law Act 1958* ('alternative proceedings').
34. That, on the application of a party, VCAT be given the power to temporarily adjourn proceedings to provide the parties time to initiate alternative proceedings. Such an adjournment should be brief, to avoid unnecessary delay. If alternative proceedings have not been initiated by the end of the adjournment period, VCAT should be at liberty to continue with its proceedings.
35. That VCAT be given the power to adjourn proceedings pending the resolution of any alternative proceedings that have been initiated. If the matter is resolved by the alternative proceedings, the VCAT application should be terminated. If the matter is not resolved, the VCAT application can be reactivated.

## ALTERNATIVE DISPUTE RESOLUTION

4.33 We have recommended that VCAT should determine disputes between co-owners. In this section we discuss the procedures which should apply in hearing such disputes, including the use of alternative dispute resolution (ADR) processes prior to hearings. ADR involves parties to the dispute attempting to resolve the dispute through methods such as compulsory conferences, conciliation or mediation.

### Compulsory conference

A compulsory conference is a forum in which the parties meet to identify and clarify the issues in dispute, the questions of fact and law that would be decided by a hearing, and the potential outcome of the hearing for either party, in an attempt to promote settlement of the matter.

4.34 In the Discussion Paper, it was argued that a formal ADR procedure should be available in relation to co-ownership disputes.<sup>215</sup> Such disputes are often about minor matters, and could potentially be resolved by a process such as mediation. This could help co-owners avoid protracted disputes and reduce their costs, as

<sup>215</sup> Discussion Paper para 4.31.

well as relieve the court or tribunal which has power to resolve such disputes of part of its caseload.

4.35 The submissions received by the Commission generally supported the use of ADR processes for the resolution of co-ownership disputes.<sup>216</sup> The Law Institute of Victoria noted that the presence of well-established ADR mechanisms at VCAT was ‘one of the factors which led members of the Property Committee to support jurisdiction being conferred on the Victorian Civil and Administrative Tribunal’.<sup>217</sup> The Victorian Bar noted:<sup>218</sup>

ADR is an appropriate mechanism for resolving co-ownership disputes because disputes frequently involve personal disputes that have become so severe that they impede effective resolution of the dispute. ADR may be especially useful to such cases.

4.36 There were two main concerns raised by the submissions. One concern was raised by the Victorian Bar:<sup>219</sup>

It is...important that the mediators or conciliators...are legally qualified and possesses [sic] expertise in property law, because legal and personal issues are frequently interconnected in co-ownership disputes.

4.37 The Commission agrees with this concern. Some of the issues involved in co-ownership disputes can be quite complex, and it would be very useful for the mediators to have at least a basic understanding of the relevant property law principles. The Commission recommends that mediators used in this area possess at least some expertise in property law.

4.38 The other concern was raised by the Victorian Community Council Against Violence (VCCAV):<sup>220</sup>

While ADR can be a cheap and effective alternative to litigation, some models are based on the assumption that parties come to the table as equals. This is especially the case for negotiation, mediation and conciliation; victims of violence who participate in these forums can thus be disadvantaged. This heightens the potential for unfair outcomes.

216 See Submissions 7, 11, 12, 15 and 16. Submission 9 supported the introduction of ADR, as long as issues of violence are taken into account: see below paras 4.38–40.

217 Submission 16. The VCAT Act provides for compulsory conferences and mediation: VCAT Act ss 83–93.

218 Submission 12.

219 Submission 12.

220 Submission 9.

4.39 The Commission acknowledges that this may be a problem in co-ownership disputes, particularly where the dispute is between family members.<sup>221</sup> We recommend that VCAT develop protocols to deal with situations where there is a risk of violence. These protocols should include procedures to exclude appropriate cases from mediation. The suitability of mediation in particular circumstances could be ascertained by interviewing the parties prior to mediation.<sup>222</sup> VCAT should also ensure that mediators are aware of the possibility of violence in these matters, and understand how to deal with cases in which this arises.

4.40 VCCAV also argued that ADR should not be compulsory, so that people are not forced to use it in cases which involve violence.<sup>223</sup> The Commission agrees with this submission.<sup>224</sup> There may be a number of circumstances in which ADR is not appropriate, including those disputes in which the parties have a history of violence. Instead, the Commission recommends that the decision as to whether ADR should take place in a particular dispute should be made by VCAT at a directions hearing. The Commission recommends that there should be a preference for ADR to take place, but either party should be free to argue particular grounds for not wishing to engage in such procedures. VCAT should also be able, on its own initiative, to direct that ADR not take place in a certain dispute. This could occur if, for example, the Tribunal member hearing the matter believes that there is a possibility of violence,<sup>225</sup> even if such concerns have not been raised by the parties to the matter.

221 The Commission notes that circumstances of violence are most likely to arise in the context of married or domestic partners. Even if the Commission's recommendations are implemented, most co-ownership disputes between such co-owners will not be heard by VCAT, but will continue to be heard either by the Family Court under the *Family Law Act 1975* (Cth) or the Supreme or County Courts under Part IX of the *Property Law Act 1958*. Although this reduces the potential for circumstances of violence to be present in co-ownership disputes heard by VCAT, it does not eliminate such a possibility.

222 Such a procedure is provided for in relation to mediation in the Family Court: see *Family Court Rules 1984* Order 25A.

223 Submission 9.

224 See also Submission 7. But cf Submission 12.

4.41 The Commission recommends that the method of ADR should also be determined by VCAT at a directions hearing. The methods currently available under the VCAT Act seem appropriate.<sup>226</sup> In complex matters, it may be useful for the dispute to be referred to a compulsory conference<sup>227</sup> in order to ascertain the relevant issues and properly inform the parties of their options. In less complex matters, moving directly to mediation<sup>228</sup> may be more appropriate.

4.42 In the Discussion Paper, the Commission questioned whether ADR should be available at VCAT prior to making an application, or after the application has been made. In light of the recommendations outlined above, which require the issues of whether ADR should be available and the method of ADR to be used to be determined at a directions hearing, it is clear that we recommend that such processes be made available after filing an application. However, we also believe it is desirable to publicise the availability of voluntary alternative dispute resolution services, for example services provided by the Dispute Settlement Centre of Victoria. Such services could be accessed by co-owners prior to the need to pay for or file any application with VCAT. If the ADR is unsuccessful, the parties could then proceed to VCAT if necessary. The Commission recommends noting the existence of such services on the application form for those co-ownership disputes that are to be heard by VCAT.

225 This could be ascertained by, for example, interviewing the parties prior to mediation: see above para 4.39.

226 See Submission 15. We note that VCCAV expressed a preference for arbitration instead of mediation: Submission 9. While arbitration may be a suitable alternative to formal court proceedings, the Commission does not believe it is a necessary alternative to matters that are to be heard by the less formal VCAT.

227 VCAT Act ss 83–7.

228 VCAT Act ss 88–93.

**! RECOMMENDATIONS**

36. That alternative dispute resolution (ADR) processes be made available to parties in co-ownership disputes.
37. That the use of ADR in a particular matter be determined in a directions hearing. There should be a preference for the use of ADR, but VCAT should, on the application of either party or of its own initiative, be able to determine that ADR is not appropriate in the circumstances. Such circumstances would include a history of violence between the parties.
38. That the type of ADR to be used in a particular matter be determined in a directions hearing, in accordance with the powers of VCAT under the *Victorian Civil and Administrative Tribunal Act 1998* sections 83–93.
39. That the person nominated to mediate co-ownership disputes have some expertise in property law.
40. That VCAT develop a protocol to deal with potential issues of violence.
41. That the application form to VCAT for the hearing of co-ownership disputes note the existence of voluntary alternative dispute resolution services, such as those provided by the Dispute Settlement Centre of Victoria.

**SALE AND DIVISION OF CO-OWNED LAND****Existing Law**

4.43 It is possible that co-ownership disputes that come before VCAT will not be resolved by alternative dispute resolution. In such circumstances, it becomes necessary to determine the procedure for hearing such disputes. At present, sale and division of co-owned land is dealt with by Part IV of the *Property Law Act 1958*. Under Part IV, physical division of the land is the primary remedy for a co-owner who wants to end co-ownership. This means that the court<sup>229</sup> must order division of the land unless the situation is one in which it has power to order a sale instead.

229 The Supreme Court or County Court: see above para 4.4.

4.44 Part IV allows the County or Supreme Court to order a sale instead of division in three situations:<sup>230</sup>

1. If a co-owner asks for a sale instead of division, the Court may order a sale of the land and the division of the proceeds if this would be 'more beneficial' than physical division of the property (section 222);<sup>231</sup>
2. If a co-owner, or more than one co-owner whose collective interests amount to a share of half or more, asks the Court to direct a sale, the Court is required to order a sale, unless it sees good reason to the contrary (section 223);
3. If a person with an interest in the property asks the Court to direct a sale, the Court may order a sale, unless some or all of the other parties interested in the property undertake to purchase the share of the person requesting a sale (section 224).

4.45 In the Discussion Paper, the Commission recommended reforming Part IV for a number of reasons. These included its archaic language, the fact that circumstances have changed significantly since the laws were passed, and the expensive, time consuming and rigid nature of the procedure laid down.<sup>232</sup> Some of these concerns have been addressed above, in particular by the recommendations that co-ownership disputes be heard by VCAT rather than the Supreme or County Courts, and that alternative dispute resolution mechanisms be made available. The proposal to make the procedure for selling or dividing co-owned property more up-to-date and flexible was also supported in the submissions.<sup>233</sup>

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230 For more information on these provisions, see Discussion Paper paras 4.7–8.

231 This may be because of the nature of the property, the number of people with an interest in it, because a person with an interest is absent or does not have legal capacity (eg if one of the co-owners is a child) or for any other reason.

232 See Discussion Paper paras 4.9–12.

233 See, eg, Submissions 4, 7, 11, 12 and 15.

### Approaches to Reform: Appoint Trustees or Provide Broad Discretion?

4.46 Two approaches to reform of the division and sale provisions were discussed in the Discussion Paper.<sup>234</sup> The first approach, which has been taken in New South Wales (NSW)<sup>235</sup> and Queensland,<sup>236</sup> is to give a court the power to appoint trustees to oversee the sale or division of the land (the NSW approach). The second approach, which was recommended by the Law Reform Commission of British Columbia in 1988,<sup>237</sup> is to give a court (or some other body) discretion to order division or sale of the land as is appropriate (the British Columbia approach).

4.47 The submissions generally favoured the flexibility of the British Columbia approach:

[I]t would be advantageous to give more flexibility in the application process and the powers and discretions of a court or tribunal to make appropriate orders and overcome hurdles such as those specified in paragraph 4.7 of the Paper (sections 222-224 of the Property Law Act).<sup>238</sup>

4.48 Rather than restricting the situations in which sale of co-owned property can be ordered, as is the case under the current law, the British Columbia approach would give VCAT a broad discretion in the matter. This is likely to lead to a fairer outcome.

4.49 The VCCAV submitted that in certain situations, such as where there is a risk of violence, the NSW approach would be preferable. Having a trustee appointed 'provides a mechanism which avoids direct contact between co-owners. Further, it removes power from an individual party, and places it with a neutral third party, removing the possibility of coercion'.<sup>239</sup> Other occasions in which it would be necessary to appoint a trustee include situations in which some of the co-owners are minors or are incapable of looking after their own affairs.

234 See Discussion Paper paras 4.12–21.

235 *Conveyancing Act 1919* (NSW) s 66G.

236 *Property Law Act 1974* (Qld) s 38.

237 Law Reform Commission of British Columbia, *Report on Co-ownership of Land*, LRC 100 (1988).

238 Submission 11. See also Submissions 4, 12 and 16. But cf Submission 9.

239 Submission 9.

4.50 While we acknowledge that these circumstances would require the presence of a trustee, we do not believe that it should be necessary to appoint trustees in all cases. Such a requirement would be cumbersome, and may lead to additional expense and delay for the parties. Instead, the Commission recommends providing VCAT with a broad discretion to order division or sale of the land as is seen to be appropriate. We recommend that this discretion should include the power to appoint or remove trustees where necessary. Trustees should be appointed where there are circumstances of violence, or where some of the co-owners are minors or are incapable of looking after their own affairs. VCAT should also have the power to direct the trustees as to the terms and conditions of the sale, and to distribute the proceeds in any manner VCAT sees fit.

### **VCAT's Powers**

4.51 Although we recommend providing VCAT with a broad discretion to determine whether co-owned property is sold or divided, we do not believe this discretion should be unfettered. There are certain factors that VCAT should take into account in making its determination.

4.52 The Discussion Paper noted that, when the current legislation was passed, land was largely used for agricultural purposes.<sup>240</sup> At that time it may have been appropriate for physical division of the land to be the main remedy for a joint tenant or tenant in common who wanted to end the co-ownership. However, co-owners today are more likely to want the land to be sold and the proceeds divided between them. For this reason the Commission recommends that sale of co-owned property should be the primary remedy ordered by VCAT. Sale of the property should be generally available, and not restricted to specific circumstances as is now the case.

4.53 There will, however, be certain cases in which division of the property may be preferable. We do not want to exclude this possibility. The Commission therefore recommends that, whilst sale should be the primary remedy, VCAT should be empowered to order division of the

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240 Discussion Paper para 4.10.

land if justice requires it. In determining whether division should be ordered instead of sale, VCAT should take into account matters such as the following:

- the use being made of the property, such as whether it is being used by one or more of the co-owners for residential or business purposes;
- the nature of the property, including the practicality of dividing it, and whether such division will reduce its value;
- whether the property is unique or has special value to one or more of the co-owners.<sup>241</sup>

4.54 The Commission recommends that VCAT should also be able to permit the other co-owners to buy the property.<sup>242</sup> This will provide co-owners with the option of retaining the property, if division is not possible. Such a purchase could either be by private sale at market price (as determined by VCAT or an independent valuer) or by allowing the co-owners to bid at an auction. In the event of such an auction, VCAT could set a reserve price, to ensure that a fair price is received by all co-owners.

4.55 If VCAT is to order the sale of property, it is important to ensure that it has power to ensure that a fair and proper sale takes place. VCAT should have power to order an independent valuation of the property, set a reserve price, determine a timeframe for the sale, or provide for any other necessary terms and conditions. It should also have power to postpone a sale in a situation where it would be unfair for the applicant to seek a sale, such as where the applicant is under an obligation to allow a person to live on the property. The Commission recommends that VCAT should also be able to make any other procedural rules necessary to ensure that a just and equitable sale or division of co-owned property takes place.

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241 In such cases, it may be more appropriate for VCAT to instead use its power to permit one co-owner to purchase the property from the other: see below para 4.54. For example, the Victorian Bar noted that '[a]n offer of sale at a fixed price to one co-owner can also be included in the discretion, e.g. where one co-owner's historical association to the property is so strong that it would be unfair to force a sale to a stranger': Submission 12.

242 See, eg, Submission 12.

## ! RECOMMENDATIONS

42. That sections 221–32 of the *Property Law Act 1958* be repealed.
43. That a provision be inserted into the *Property Law Act 1958* giving VCAT the power to order sale of co-owned land and the division of the proceeds, or division of the land, or a combination of both sale and division.
44. That the powers of VCAT in relation to co-ownership disputes be broad, and include directly ordering sale or division, or appointing or removing trustees where necessary or desirable. Trustees will be necessary where any of the co-owners are minors or are incapable of looking after their own affairs. Trustees will be desirable where there is a history of violence between the parties.
45. That VCAT be given power to direct any appointed trustees as to the terms and conditions of the sale, and to distribute the proceeds in any manner VCAT sees fit.
46. That VCAT generally order sale of land and division of the proceeds, unless it would be just and equitable to order division of the land in the circumstances.
47. That in determining whether it is just and equitable to order division of the land in the circumstances, VCAT should take into account matters such as:
- the use being made of the land, such as whether it is being used by one or more of the co-owners for residential or business purposes;
  - the nature of the property, including the practicality of dividing it, and whether such division will reduce its value;
  - whether the property is unique or has special value to one or more of the co-owners.
48. That VCAT be given power to permit other co-owners to buy the land, either at private sale or at auction. In such circumstances, VCAT should be empowered to order the sale to be at a fair market price (as determined by an independent valuer), or to set a reserve price for the auction.

49. That VCAT be given sufficient powers to ensure a fair and proper sale or division of the land takes place. This would include providing VCAT with the power to order an independent valuation of the land, set a reserve price, determine a timeframe for the sale, or order sale or division on any other necessary terms and conditions.
50. That VCAT should be given power to create any other rules necessary to ensure that a just and equitable sale or division of co-owned land takes place.

### COMPENSATION FOR DIFFERENCES IN VALUE

4.56 We have recommended that on application by a co-owner, VCAT should have power to order a sale of co-owned land and division of the proceeds, or physical division of the land. For practical reasons (for example, because of the location of buildings on the land) VCAT may decide to divide the land in proportions which do not correspond with the entitlement of the various co-owners. Even if the portions received by the co-owners are equal in size they may not be precisely equal in value. For example, in the case of a farm, the portion allocated to one co-owner might have a river frontage, while the portion allocated to the other may not.

4.57 To deal with these situations, the Commission recommends that VCAT should have power to order that the land is divided in proportions which do not correspond with the co-owners' respective entitlements, and to order a co-owner or co-owners to pay monetary compensation to the other co-owner(s) to take account of any differences in the value of the portions received.

**! RECOMMENDATION**

51. That VCAT's jurisdiction in relation to co-ownership disputes should include the power to:

- divide co-owned land in portions that differ from the co-owners' entitlements; and
- order the payment of money to compensate for differences in the value of the portions of land received by the co-owner(s) when the land is divided.

**REMEDIES IN ADDITION TO DIVISION AND SALE OF LAND**

4.58 When an application is made to VCAT for division or sale of co-owned property, a co-owner may seek other remedies as well. For example, a co-owner may want compensation for money he or she has spent on improving the land, or may want another co-owner to account for money received from a third person who has rented the property.

**Existing Law**

4.59 The common law principles which determine the availability of these remedies are archaic and complex. The principles governing the rights of co-owners when property is divided and sold are set out in detail in the Discussion Paper.<sup>243</sup> These principles are summarised below.

**COMPENSATION FOR IMPROVEMENTS**

4.60 When land is divided or sold, a co-owner who has paid for improvements to the property can require the other co-owners to contribute to the cost of the improvements. The amount payable is the cost of the improvements or the increase in the value of the land, whichever amount is the lesser. If the improvements have not increased the value of the land, other co-owners have no obligation to contribute to the cost of the improvements. This principle prevents a co-owner seeking reimbursement for money expended on the land which has not benefited the other co-owners.

243 Discussion Paper paras 5.3–12. See also Heather Conway, 'Partition Actions and Accounting Adjustments Between Co-owners' (1999) 7 *Australian Property Law Journal* 9.

### **REIMBURSEMENT FOR MONEY SPENT BY A CO-OWNER IN REPAYING A JOINT DEBT**

4.61 If a co-owner pays a debt for which other co-owners are also liable (for example, a payment of mortgage interest) he or she can recover the other co-owners' share of the payment.

### **MONEY SPENT ON RUNNING COSTS OR MAINTENANCE OF THE PROPERTY**

4.62 Common law principles do not entitle a co-owner to require other co-owners to contribute to money spent on running costs or maintenance. For example, if a co-owner pays an insurance premium, replaces broken pipes, or pays for pest control treatment of a house, he or she cannot recover a share of this expenditure from the other co-owners.

### **OBLIGATION TO PAY RENT**

4.63 Because all co-owners have a right to occupy the property, a co-owner who chooses not to do so cannot require a co-owner who does occupy the property to pay an amount for that occupation (occupation rent). There are two exceptions to this rule. Firstly, when the property is divided or sold, a co-owner in occupation must pay an amount compensating a co-owner who has been excluded from possession of the property. They must have been physically excluded from the property. It is not enough to show that it was impracticable for the co-owners to continue to occupy the property, for example because their relationship had broken down.

4.64 Secondly, an exception applies where a co-owner in sole occupation claims compensation from the other co-owners for improvements he or she has made to the land.<sup>244</sup> Here it is thought fair that a person who is claiming compensation from the other co-owners should have to pay an occupation rent to them.

### **ACCOUNTING FOR RENT PAID BY A THIRD PERSON**

4.65 Section 28A of the *Property Law Act 1958* provides that a co-owner who receives more than his or her share is accountable to the other co-owners. This means that a co-owner who collects rent from a third person is required to give the other co-owners their share of the rent. The principle

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244 See above para 4.60.

does not appear to apply to money which is earned by a co-owner as a result of his or her own exertions. For example, a co-owner who runs a business on the property would not have to share the profits of the business with the other co-owners.

### **DAMAGES TO THE PROPERTY**

4.66 If a co-owner damages the property, he or she will have to compensate the other co-owners for that damage.

## **Proposed Reforms**

### **VCAT TO HAVE JURISDICTION**

4.67 Earlier in this Chapter the Commission recommended that VCAT should have jurisdiction to order division and sale of co-owned property. The Commission's view is that VCAT should also have power to make orders relating to payment of compensation and accounting between co-owners. These powers could previously have been exercised by the County Court or Supreme Court at the same time that these courts exercised their jurisdiction to order division and sale. It makes sense to provide VCAT with a similar flexibility to take into account all relevant factors when making an order for sale or division. As the Victorian Bar noted:

The commencement and pursuit of legal proceedings normally signifies a practical end to a relationship in a joint tenancy. These situations inevitably result in the sale or partition of the property. Accordingly, courts should be granted powers that are sufficiently flexible to respond appropriately as a case may require. The power of the court should enable it to take account of the typical issues that tend to divide the parties, such as expenditure, outgoings, occupation and other matters calling for financial adjustment.<sup>245</sup>

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245 Submission 12.

**! RECOMMENDATIONS**

52. That when VCAT makes an order for division or sale of co-owned land it may also direct that:

- compensation be paid by a co-owner to other co-owners;
- one or more co-owners should account to the other co-owners for amounts received; and
- an adjustment be made to a co-owner's interest to take account of amounts payable by co-owners to each other.

**LEGISLATIVE SPECIFICATION OF REMEDIES**

4.68 The Discussion Paper examined whether the common law principles which determine when remedies are available to co-owners should continue to apply (as is the case in NSW), or whether the principles governing the availability of these remedies should be set out in legislation.<sup>246</sup> It also considered whether existing remedies such as the payment of compensation should be extended, for example to allow a co-owner to recover compensation expended on maintenance of the property. The submissions which commented on this matter supported legislative provisions setting out the situations in which these remedies were available:

If it is possible to codify the law, it may assist in providing simplicity and greater clarity as to the rights and duties of co-owners, assist in estate planning and streamline dispute resolution.<sup>247</sup>

4.69 The Commission's goal is to propose simpler and cheaper processes to resolve disputes between co-owners. Legislative specification of the remedies available to co-owners when property is divided or sold is consistent with this goal. It would also provide greater certainty to co-owners, making it easier for them to resolve disputes without obtaining a VCAT order. The model which the Commission proposes is similar to that recommended by the Law Reform Commission of British Columbia, which provides the deciding body with discretion to order compensation and accounting between co-owners in a variety of circumstances.<sup>248</sup>

<sup>246</sup> Discussion Paper paras 5.14–22.

<sup>247</sup> Submission 11. See also Submissions 7, 12, 15 and 16.

<sup>248</sup> The draft British Columbia legislation dealing with this matter was set out in para 5.17 of the Discussion Paper.

4.70 The Commission also takes the view that some changes should be made to existing principles, so as to allow a fair outcome to be achieved between co-owners when property is sold or divided. The Commission proposes two changes to common law principles. Firstly, the Commission recommends that VCAT should have power to order a co-owner to contribute to maintenance costs borne by another co-owner, as well as to costs expended in improving the property, when the property is sold or divided. It seems unfair that the law does not permit a co-owner to recover costs incurred to prevent depreciation in the value of the property. All of the submissions which commented on this matter supported this approach.<sup>249</sup>

4.71 Secondly, the Commission recommends that the power to order a co-owner who has occupied the property to pay rent to the other co-owners should be extended, to cover situations where, because of a breakdown in a relationship, a co-owner has suffered a detriment as a result of having to vacate the property. In England, courts have taken the view that this approach is available under the common law.<sup>250</sup> In *Forgeard v Shanahan*,<sup>251</sup> Justice Kirby (then President of the Supreme Court of New South Wales, Court of Appeal) criticised the more restrictive Australian approach, which requires evidence that a co-owner has been physically excluded from the property, before a co-owner in occupation must pay rent for occupying the property.

4.72 The Commission does not recommend that occupation rent should always be payable when one person remains in occupation of property after a relationship ends. However, there will be some situations where the person in occupation has obtained significant benefits from remaining on the property, while a co-owner who has left possession has had to find accommodation elsewhere. In these circumstances the Commission believes that VCAT should have power to take account of the value of the benefits received by the occupying co-owner in making an order for payment of money.

249 See Submissions 7, 12 and 15.

250 *Chhokar v Chhokar* [1984] FLR 313; 14 Fam Law 269.

251 (1994) 35 NSWLR 206, 215–17.

**! RECOMMENDATIONS**

53. That in exercising its powers, VCAT should consider whether it would be just and equitable to make an order to:

- reimburse a co-owner proportionately for an amount reasonably expended by the co-owner in improving the land;
- compensate a co-owner for costs reasonably incurred for the maintenance or insurance of the property;
- compensate a co-owner who has paid more than his or her proportionate share of mortgage repayments, rates, purchase money instalments or other outgoings for which the co-owners are liable;
- compensate a co-owner for damage caused by an unreasonable use of the land by another co-owner; or
- require a co-owner who has occupied the land to pay an amount equivalent to rent, to a co-owner who did not occupy the land.

54. That VCAT should only have power to order payment of occupation rent:

- to offset money received by that co-owner as reimbursement for money expended in relation to the land;
- where the co-owner claiming occupation rent has been excluded from the property; or
- where the co-owner claiming occupation rent has suffered detriment because it was impracticable for him or her to co-occupy the property with the other co-owner.

### AVAILABILITY OF REMEDIES

4.73 The Recommendations outlined above contemplate that VCAT should only have power to make orders for compensation when an application is made for division or sale of the property. Limiting the availability of these remedies to the situation when co-ownership has come to an end prevents a co-owner who has spent money on the property calling on the other co-owner(s) to contribute to expenditure to which he or she has not agreed, until the value of the property is realised. It also prevents a claim being made for occupation rent for the purpose of forcing a co-owner out of possession of the property. When hearing an application for sale or division of the property, VCAT would also be able to make orders which take account of any damage caused by a co-owner's unreasonable use of the land.

4.74 The Commission has also considered whether VCAT should be able to order an accounting between co-owners for rent received (where one co-owner receives more than his or her share) independently of sale and division proceedings. This is the case under the current law.<sup>252</sup> It is arguable that co-owners should be treated in the same way as other people (for example business partners) who cannot seek a remedy in VCAT requiring a person to account for amounts received, but must take proceedings in court. On balance, however, the Commission takes the view that VCAT should be able to make an order requiring a co-owner who has received more than his or her share of rents to account to the other co-owners, even if no application has been made for division and sale. Such an order could be made under section 28A of the *Property Law Act 1958*.<sup>253</sup> This approach would provide a remedy for co-owners who want to retain the property in its present form (without having to apply for sale or division of the property), in those circumstances where one co-owner has kept more than his or her share of rents. In practice, however, it is likely that co-owners will seek these remedies at the same time as applying for sale or division of the land.

252 *Property Law Act 1958* s 28A.

253 Section 28A requires an accounting in respect of all property, not just land or goods. As VCAT's jurisdiction in this area will only relate to land or goods, it will not be possible to use this provision to apply to VCAT for an accounting in relation to other forms of property, such as intellectual property. Co-owners of such property who require an accounting will have to apply to a court for an order under section 28A.

**! RECOMMENDATIONS**

55. That VCAT should have power to order a co-owner who has received more than his or her just share of rents or other payments from a third party to account to the other co-owners.
56. That a co-owner should be able to make an application that another co-owner account for money received without also applying for division or sale of the land.

**SALE AND DIVISION OF CO-OWNED GOODS**

4.75 In addition to having jurisdiction to hear co-ownership disputes that relate to land, the Commission has recommended that VCAT should also have power to hear disputes relating to co-owned goods.<sup>254</sup> The Commission notes that such disputes will be rare outside the context of marriage or domestic relationships.<sup>255</sup> In most cases co-owners will have little to gain by refusing to agree to end co-ownership. However, in a few situations the parties may be unable to resolve the dispute, because the property cannot easily be divided or because one of the co-owners is unwilling to sell it. Problems are most likely to concern co-owned goods such as co-owned family heirlooms, racehorses or boats. It is necessary to determine when applications relating to such co-owned goods can be made to VCAT for sale or division of the property, and what powers VCAT will have in hearing such matters.

**Existing Law**

4.76 Where the dispute involves co-owned chattels,<sup>256</sup> a co-owner may apply to the County or Supreme Court for a division of the chattels under section 187 of the *Property Law Act 1958*. Section 187 only applies to co-owners who have an interest of half or more in chattels. Although the section does not explicitly give a court power to order sale, in NSW it has

254 See above paras 4.12–15 and Recommendations 30 and 31. The Commission reiterates its view, noted above, that VCAT’s jurisdiction should not relate to all forms of personal property, but should be limited to the case of goods.

255 As noted above, disputes over co-owned goods within marriage or domestic relationships will usually be dealt with under the *Family Law Act 1975* (Cth) or Part IX of the *Property Law Act 1958*.

256 See above para 4.14 for the distinction between goods and chattels.

been determined that the equivalent provision<sup>257</sup> permits an order of sale to be made.<sup>258</sup>

### Proposed Reforms

4.77 The Discussion Paper tentatively recommended that it should not be necessary for applications to be made by co-owners with an interest in the property of a half or more.<sup>259</sup> This is the current situation in relation to land, where co-owners who are entitled to an interest of less than half may apply for division of the property. This proposal was unanimously supported by those who made submissions on this point. The Submission from the Victorian Bar commented that:

This restriction prejudices the “minority” without supervening benefits. A decision whether a dispute involving co-owned goods is resolved by dividing or selling goods should be determined by the merits of the claim rather than the size of the interest.<sup>260</sup>

4.78 The Commission recommends that VCAT should have power to order sale of co-owned goods on the application of a co-owner regardless of the size of the interest.<sup>261</sup> VCAT’s powers in relation to an application should be similar to those recommended for co-ownership disputes concerning land. That is, VCAT should ordinarily order sale of the goods, although the parties can argue that division of the goods would be more appropriate in the circumstances. The procedural matters outlined above in relation to land,<sup>262</sup> such as the power of VCAT to appoint trustees where appropriate, to order independent valuation of the property, or to create necessary rules, should be equally applicable to goods.

257 *Conveyancing Act 1919* (NSW) s 36A.

258 *Ferrari v Beccaris* [1979] 2 NSWLR 181.

259 Discussion Paper para 6.6.

260 Submission 12. See also Submissions 7 and 11.

261 We note that we have not recommended repealing section 187 of the *Property Law Act 1958*, as it may apply to personal property other than goods: see above para 4.14 and Recommendation 31. Any application under section 187 in relation to such property will still require the applicant to have an interest of half or more in the chattel.

262 See Recommendations 46–58.

4.79 VCAT should also have powers to order compensation in the case of an unequal division, to account between co-owners who have received unequal amounts of rent or profits in relation to the goods, or to order reimbursement or financial compensation of co-owners where justice requires it.<sup>263</sup> The principles to be applied in these cases should, where appropriate, be the same as for co-ownership disputes concerning land.<sup>264</sup>

### ! RECOMMENDATIONS

57. That a provision be inserted into the *Property Law Act 1958* giving the Victorian Civil and Administrative Tribunal the power to order sale of co-owned goods and the division of the proceeds, or division of the goods, or a combination of both sale and division.
58. That co-owners of goods can make an application to the Victorian Civil and Administrative Tribunal for sale or division of the goods regardless of their share in the goods. It should not be necessary for the applicant to own an interest of a half or more in the goods.
59. That Recommendations 46–58 above should, where appropriate, also apply to co-ownership disputes involving goods.

263 For example, it is possible that one co-owner may expend money making improvements to goods, such as a car, that increase its value. Alternatively, one co-owner may have received all the payments from renting out a co-owned boat, and not have accounted to the other co-owner(s).

264 In most cases, it will be appropriate to apply the same principles to goods as for land. For example, if a co-owner has expended money improving the goods, she or he should be entitled to be compensated for that expenditure in the same way as for land. In some circumstances, however, it will be necessary to modify the principles to make them applicable to goods. In particular, it makes little sense to talk of compensation for the 'occupation' of goods. Instead, compensation should be available where one party has used the goods (and he or she is either claiming compensation for money expended on the goods, has excluded the other party from the goods, or has caused the other party to suffer detriment). This would allow a party who has, for example, been excluded from use of a co-owned caravan to claim compensation for losing the benefit of using the caravan.



## Appendices

**Appendix 1: Submissions Received**

**Appendix 2: Recommendations**

**Appendix 3: Draft Proposals for a Statute Law  
Amendment (Co-ownership of  
Property) Bill**

## Appendix 1

### Submissions Received

1. Mr M E Mulvany, Barrister
2. Mr Phillip Hamilton, Solicitor and Notary
3. Mr D F Dugdale, Law Commission of New Zealand
4. Mr David Bennett, Solicitor-General of Australia
5. Mr Michael O’Loughlen QC, Barrister
6. Mr Bill Rowson, Rowson Eddey & Co, Solicitors
7. Mr T M Johnstone, Barrister
8. Miss Roz Curnow, The Institute of Legal Executives (Victoria)
9. Ms Mary Amiridis, Victorian Community Council Against Violence
10. Mr John Hartigan, Land Registry & Registrar of Titles, Land Victoria
11. Mr Eamonn Moran, Chief Parliamentary Counsel
12. Mr Mark Derham QC, The Victorian Bar
13. Dr Ed Boyapati, Member of the public
14. Ms P M Faulkner, Department of Human Services
15. Mr Michael Macnamara, Victorian Civil and Administrative Tribunal
16. Mr Peter Lowenstern, Law Institute of Victoria

## Appendix 2

# Recommendations

### Chapter 2

#### Creation of Tenancies in Common and Joint Tenancies

##### Specification of the Nature of the Co-owned Interest upon Registration

1. That a provision be inserted into the *Transfer of Land Act 1958* that requires any instrument submitted for registration (including any electronic instruments) to specify whether co-owners are intended to be joint tenants or tenants in common. The Land Registry must refuse to register any instrument which does not state the nature of the co-ownership.
2. That the equitable principle that business partners or mortgagees who are registered as joint tenants are tenants in common in equity should continue to apply, in the absence of a contrary intention.
3. That co-owners, other than business partners or mortgagees, who register as joint tenants should be presumed to be joint tenants in equity. This includes co-owners who contributed unequally to the purchase price of the land.
4. That co-owners should be able to establish that their registered interest differs from their interest in equity by proving that there was a contrary intention at the time the interest was created.
5. That the fact that a particular interest was specified provides strong evidence of an intention to create that interest.
6. That Recommendations 2-5 also apply to co-owned interests that are created by registrable instruments that have not been registered.
7. That sections 30(2) and 33(4) of the *Transfer of Land Act 1958* be repealed.
8. That the presumption of joint tenancy be retained for co-owned interests which are not created by a registrable instrument.
9. That the Land Registry produce a publication on co-ownership.

10. That a short statement explaining the difference between a tenancy in common and joint tenancy be included on transfer documents.
  - Paper transfer documents should have this statement on the back of the document.
  - Electronic conveyancing programs should contain a link that leads to the statement.

### Chapter 3

## Converting a Joint Tenancy into a Tenancy in Common

### Severance of Joint Tenancies of Torrens Land

11. That a provision be inserted into the *Transfer of Land Act 1958* enabling severance of joint tenancies by registration of an instrument of severance in a form approved by the Land Registry.
12. That a provision be inserted into the *Transfer of Land Act 1958* making it clear that this method of severance is in addition to existing methods of severance.
13. That an instrument of severance should only be effective to sever a joint tenancy if it is lodged with the Land Registry.
14. That severance of a joint tenancy should be effective upon lodgement of an instrument of severance. The joint tenancy will have been severed even if the joint tenant dies prior to its registration.
15. That a joint tenant who lodges an instrument of severance not be required to provide the certificate of title prior to registration of the instrument.
16. That the enforceability of a mortgage or security interest against a co-owner should not be affected by registration of an instrument of severance.
17. That severance of a joint tenancy by registration of an instrument of severance, without the consent of any mortgagees or holders of security interests, should not be considered a breach of any term in a contract that requires the mortgagee, or holder of the security interest, to consent to any dealings with the land.
18. That a provision be inserted into the *Transfer of Land Act 1958* requiring the Land Registry to notify all joint tenants of any dealing that severs the joint tenancy.

19. That such notification be sent upon registration of the dealing that severs the joint tenancy.
20. That co-owners who seek to sever a joint tenancy be required to provide the Land Registry with the names and last-known addresses of all joint tenants, where these are known. A failure to provide last-known names and addresses should not hinder the severance process.
21. That notification be sent to all joint tenants (including the person who proposes to sever the joint tenancy) at their last-known address, as well as to the co-owned property (if practicable).
22. That the fee charged by the Land Registry for lodgement of the relevant transaction should permit cost recovery for notification.
23. That a provision be inserted into the *Property Law Act 1958* specifying that, in the absence of written evidence of a contrary intention, parties who divorce after the creation of a joint tenancy be deemed to have severed the joint tenancy.
24. That a provision be inserted into the *Property Law Act 1958* allowing joint tenancies of goods to be severed by service of a written notice.
25. That the notice be in a prescribed form.
26. That the notice be served upon all other joint tenants at their last-known addresses. Service should either be personal or by registered mail.
27. That in the event of a dispute as to whether severance has taken place, proof should be provided that attempts were made to serve the notice on all other joint tenants.

## Chapter 4

### Ending Co-ownership of Property

#### Which is the most Appropriate Forum to Hear Co-ownership Disputes?

28. That the Victorian Civil and Administrative Tribunal (VCAT) be given jurisdiction in relation to disputes concerning the sale and division of all co-owned land and goods ('co-ownership disputes').
29. That section 187 of the *Property Law Act 1958* be amended to provide that matters cannot be heard under section 187 if they can be heard by VCAT under the provisions relating to co-owned goods.

30. That the Tribunal hearing co-ownership disputes is to be constituted by, or include, a member who, in the opinion of the President of VCAT, has knowledge of, or experience in, property law matters.
31. That the jurisdiction of the Supreme and County Courts to hear co-ownership disputes be limited to matters in which there are special circumstances that justify a hearing by these Courts.
  - The existence of such special circumstances should be determined either by the Supreme or County Courts, or by the Victorian Civil and Administrative Tribunal (VCAT) under section 77 of the *Victorian Civil and Administrative Tribunal Act 1998*.
  - Factors to be taken into account in determining whether there are special circumstances should be whether the matter is complex, or whether there is an interrelationship with matters over which VCAT has no jurisdiction.
32. That appeals to the Supreme Court of decisions made by VCAT in relation to co-ownership disputes should lie on questions of law alone.
33. That in appropriate circumstances, in the initial directions hearing of co-ownership disputes that are heard by VCAT, the parties be advised of the possibility of filing applications for the division of the property in dispute under section 79 of the *Family Law Act 1975* (Cth) or Part IX of the *Property Law Act 1958* ('alternative proceedings').
34. That, on the application of a party, VCAT be given the power to temporarily adjourn proceedings to provide the parties time to initiate alternative proceedings. Such an adjournment should be brief, to avoid unnecessary delay. If alternative proceedings have not been initiated by the end of the adjournment period, VCAT should be at liberty to continue with its proceedings.
35. That VCAT be given the power to adjourn proceedings pending the resolution of any alternative proceedings that have been initiated. If the matter is resolved by the alternative proceedings, the VCAT application should be terminated. If the matter is not resolved, the VCAT application can be reactivated.

### Alternative Dispute Resolution

36. That alternative dispute resolution (ADR) processes be made available to parties in co-ownership disputes.
37. That the use of ADR in a particular matter be determined in a directions hearing. There should be a preference for the use of ADR, but VCAT should, on the application of either party or of its own initiative, be able to determine that ADR is not appropriate in the circumstances. Such circumstances would include a history of violence between the parties.
38. That the type of ADR to be used in a particular matter be determined in a directions hearing, in accordance with the powers of VCAT under the *Victorian Civil and Administrative Tribunal Act 1998* sections 83–93.
39. That the person nominated to mediate co-ownership disputes have some expertise in property law.
40. That VCAT develop a protocol to deal with potential issues of violence.
41. That the application form to VCAT for the hearing of co-ownership disputes note the existence of voluntary alternative dispute resolution services, such as those provided by the Dispute Settlement Centre of Victoria.

### Sale and Division of Co-owned Land

42. That sections 221–32 of the *Property Law Act 1958* be repealed.
43. That a provision be inserted into the *Property Law Act 1958* giving VCAT the power to order sale of co-owned land and the division of the proceeds, or division of the land, or a combination of both sale and division.
44. That the powers of VCAT in relation to co-ownership disputes be broad, and include directly ordering sale or division, or appointing or removing trustees where necessary or desirable. Trustees will be necessary where any of the co-owners are minors or are incapable of looking after their own affairs. Trustees will be desirable where there is a history of violence between the parties.
45. That VCAT be given power to direct any appointed trustees as to the terms and conditions of the sale, and to distribute the proceeds in any manner VCAT sees fit.

46. That VCAT generally order sale of land and division of the proceeds, unless it would be just and equitable to order division of the land in the circumstances.
47. That in determining whether it is just and equitable to order division of the land in the circumstances, VCAT should take into account matters such as:
- the use being made of the land, such as whether it is being used by one or more of the co-owners for residential or business purposes;
  - the nature of the property, including the practicality of dividing it, and whether such division will reduce its value;
  - whether the property is unique or has special value to one or more of the co-owners.
48. That VCAT be given power to permit other co-owners to buy the land, either at private sale or at auction. In such circumstances, VCAT should be empowered to order the sale to be at a fair market price (as determined by an independent valuer), or to set a reserve price for the auction.
49. That VCAT be given sufficient powers to ensure a fair and proper sale or division of the land takes place. This would include providing VCAT with the power to order an independent valuation of the land, set a reserve price, determine a timeframe for the sale, or order sale or division on any other necessary terms and conditions.
50. That VCAT should be given power to create any other rules necessary to ensure that a just and equitable sale or division of co-owned land takes place.
51. That VCAT's jurisdiction in relation to co-ownership disputes should include the power to:
- divide co-owned land in portions that differ from the co-owners' entitlements; and
  - order the payment of money to compensate for differences in the value of the portions of land received by the co-owner(s) when the land is divided.

52. That when VCAT makes an order for division or sale of co-owned land it may also direct that:
- compensation be paid by a co-owner to other co-owners;
  - one or more co-owners should account to the other co-owners for amounts received;
  - an adjustment be made to a co-owner's interest to take account of amounts payable by co-owners to each other.
53. That in exercising its powers, VCAT should consider whether it would be just and equitable to make an order to:
- reimburse a co-owner proportionately for an amount reasonably expended by the co-owner in improving the land;
  - compensate a co-owner for costs reasonably incurred for the maintenance or insurance of the property;
  - compensate a co-owner who has paid more than his or her proportionate share of mortgage repayments, rates, purchase money instalments or other outgoings for which the co-owners are liable;
  - compensate a co-owner for damage caused by an unreasonable use of the land by another co-owner; or
  - require a co-owner who has occupied the land to pay an amount equivalent to rent, to a co-owner who did not occupy the land.
54. That VCAT should only have power to order payment of occupation rent:
- to offset money received by that co-owner as reimbursement for money expended in relation to the land;
  - where the co-owner claiming occupation rent has been excluded from the property; or
  - where the co-owner claiming occupation rent has suffered detriment because it was impracticable for him or her to co-occupy the property with the other co-owner.
55. That VCAT should have power to order a co-owner who has received more than his or her just share of rents or other payments from a third party to account to the other co-owners.
56. That a co-owner should be able to make an application that another co-owner account for money received without also applying for division or sale of the land.

57. That a provision be inserted into the *Property Law Act 1958* giving the Victorian Civil and Administrative Tribunal the power to order sale of co-owned goods and the division of the proceeds, or division of the goods, or a combination of both sale and division.
58. That co-owners of goods can make an application to the Victorian Civil and Administrative Tribunal for sale or division of the goods regardless of their share in the goods. It should not be necessary for the applicant to own an interest of a half or more in the goods.
59. That Recommendations 46–56 above should, where appropriate, also apply to co-ownership disputes involving goods.

## Appendix 3

# Draft Proposals for a Statute Law Amendment (Co-ownership of Property) Bill

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# Draft Proposals for a Statute Law Amendment (Co-ownership of Property) Bill

## PART 1—PRELIMINARY

### 1. *Purpose*

The main purpose of this Act is to make various amendments to the law relating to co-ownership of property.

### 2. *Commencement*

- (1) Subject to sub-section (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision referred to in sub-section (1) does not come into operation before 1 January 2004, it comes into operation on that day.

## PART 2—TRANSFER OF LAND ACT 1958

### 3. *Repeal of current presumption as to joint tenancy*

See: Act No.  
6399.

Reprint No. 13  
as at 26

August 1999  
and amending

Act Nos  
74/2000,  
11/2001,

44/2001 and  
49/2001.

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(1) Section 30(2) of the **Transfer of Land Act 1958** is repealed.

(2) Section 33 of the **Transfer of Land Act 1958** is repealed.

### 4. *Amendment of references to “joint proprietor”*

In section 38 of the **Transfer of Land Act 1958**—

(a) in sub-sections (2) and (3), for “proprietors” **substitute** “tenants”;

(b) in sub-section (6), for “jointly” **substitute** “as joint tenants”.

### 5. *Applications for survivorship*

(1) In section 50 of the **Transfer of Land Act 1958**, for “joint proprietor” **substitute** “joint tenants”.

(2) At the end of section 50 of the **Transfer of Land Act 1958** **insert**—

“(2) The Registrar must not register an applicant under sub-section (1) as the surviving registered proprietor if the applicant and the deceased registered proprietor were divorced from each other after they became joint tenants of the land.

- (3) Sub-section (2) does not apply if the Registrar is satisfied that, not later than 12 months after their divorce from each other, both the applicant and the deceased registered proprietor have expressed an intention in writing that the joint tenancy is not to be severed by the divorce.

Note: See section 224 of the **Property Law Act 1958**.”.

#### 6. *New Divisions 11 and 12 of Part IV inserted*

After Division 10 of Part IV of the **Transfer of Land Act 1958** insert—

##### “Division 11—Co-ownership of land

#### 88A. *Instrument must specify joint tenants or tenants in common*

- (1) The Registrar must not register an instrument in which 2 or more persons are named as transferees, mortgagees, lessees or as taking any estate or interest in land unless that instrument specifies that those persons are to be—
  - (a) joint tenants; or
  - (b) tenants in common.
- (2) An instrument specifying that 2 or more persons are tenants in common must specify the share to which each person is entitled.
- (3) On registration of an instrument which specifies that 2 or more persons are to be joint tenants, those persons are to be recorded in the folio of the Register relating to that land as registered proprietors who are joint tenants.

- (4) On registration of an instrument which specifies that 2 or more persons are to be tenants in common, those persons are to be recorded in the folio of the Register relating to that land as registered proprietors who are tenants in common in the shares specified in the instrument.

**88B. *Presumption that joint tenants take jointly***

- (1) Subject to section 88E, it is to be presumed that—
- (a) 2 or more persons named in an instrument as joint tenants are entitled as joint tenants as between themselves; and
  - (b) 2 or more registered proprietors who are joint tenants are joint tenants as between themselves.
- (2) Sub-section (1) does not apply if, at the time of the execution of the instrument, there is evidence that the persons named as joint tenants intended to be tenants in common as between themselves.

**88C. *Presumption that tenants in common take in shares***

- (1) It is to be presumed that—
- (a) 2 or more persons named in an instrument as tenants in common are entitled as tenants in common as between themselves in the shares specified in the instrument; and
  - (b) 2 or more registered proprietors who are tenants in common are entitled as tenants in common as between themselves in the shares specified in the relevant recording in the Register.

- (2) Sub-section (1) does not apply if, at the time of the execution of the instrument, there is evidence of an intention that the persons named as tenants in common in specified shares should take—
- (a) as joint tenants as between themselves; or
  - (b) as tenants in common in different shares to those specified in the instrument as between themselves.

**88D. *Unequal contributions to purchase price***

For the purposes of section 88B, if, in respect of an estate or interest in land—

- (a) 2 or more persons are—
  - (i) specified in an instrument as joint tenants; or
  - (ii) registered proprietors who are joint tenants; and
- (b) those persons have made an unequal contribution to the purchase price of that estate or interest in land—

the fact of that unequal contribution is not of itself sufficient evidence to displace the intention of those persons to create a joint tenancy.

**88E. *Business partners and mortgagees***

- (1) If, in respect of an estate or interest in land—
- (a) 2 or more persons are—
    - (i) specified in an instrument as joint tenants; or

- (ii) registered proprietors who are joint tenants;  
and
- (b) those persons—
  - (i) have acquired that estate or interest in land  
in their capacity as business partners; or
  - (ii) are mortgagees—

they are presumed to be entitled to that estate or interest in land as tenants in common as between themselves.

- (2) Sub-section (1) does not apply if, at the time of the execution of the instrument, there is evidence that the persons named as joint tenants intended to be joint tenants as between themselves.

**88F. Registrar may create separate folios**

Where the Registrar registers an instrument in which 2 or more persons are named as transferees, mortgagees, lessees or as taking any estate or interest in land, the Registrar—

- (a) may make any necessary recordings in the Register; and
- (b) may create—
  - (i) a single folio for the entirety of the estate or interest in land; or
  - (ii) in the case of tenants in common, separate folios for each of the individual shares; and
- (c) may produce a certificate of title or certificates of title accordingly.

**88G. *Division does not derogate from sections 41 to 44***

Nothing in this Division derogates from the operation of sections 41 to 44.

**Example:**

A and B are registered as joint tenants of a block of land. They own the land in their capacity as business partners so they are presumed to be entitled as tenants in common as between themselves under section 88E.

If A dies leaving all her property to her daughter X, X will be entitled to A's share as against B. If B is registered as the surviving registered proprietor under section 50 of the Act, B will hold A's share on trust for X.

However, if C buys the block of land from B and becomes the registered proprietor, sections 41, 42 and 44 of the Act would operate to protect C as the registered proprietor of the land from a claim by X.

**Division 12—Severing Joint Tenancies****88H. *Other forms of severance not affected***

Nothing in this Division affects or prevents the severing of a joint tenancy by any other means that exist under this Act or any other Act or law.

**88I. *Instrument of severance***

- (1) A registered proprietor who is a joint tenant may sever that joint tenancy as between that registered proprietor and the other registered proprietors by lodging an instrument of severance in the appropriate approved form with the Registrar.
- (2) An instrument of severance must be accompanied by the prescribed fee (if any).
- (3) An instrument of severance may be lodged—

- (a) without prior notice to any other joint tenant; and
- (b) without prior notice to, or consent of, any mortgagee or other person having an estate or interest in the land.

**Example:**

A, B and C are registered as joint tenants of land. A lodges an instrument of severance to sever her joint tenancy with B and C. A then has a one-third interest as a tenant in common with B and C. B and C remain joint tenants in relation to the remaining two-thirds. If B dies, C is entitled to the two-thirds share as the survivor of his joint tenancy with B.

If A dies, leaving all her property to her daughter X, X will be entitled to A's one-third share.

**88J. *Production of title not necessary***

- (1) A registered proprietor who lodges an instrument of severance may do so without production of the relevant certificate of title.
- (2) If a registered proprietor who lodges an instrument of severance does not produce the relevant certificate of title, the Registrar may require that proprietor to provide identification acceptable to the Registrar.
- (3) For the purposes of this section, the Registrar may determine what constitutes sufficient and acceptable identification in the absence of production of a certificate of title—
  - (a) generally; or
  - (b) in any particular case.

**88K. *When does an instrument of severance take effect?***

- (1) Despite section 40, an instrument of severance severs the joint tenancy as between the registered proprietor

who lodges the instrument of severance and the other registered proprietors on the date that it is lodged with the Registrar.

- (2) This section applies even if the registered proprietor severing the joint tenancy dies after lodging the instrument of severance but before it is registered.
- (3) Nothing in this section affects the operation of sections 42 and 44(2) in respect of a bona fide purchaser for valuable consideration of the land to which an instrument of severance relates.

**Example:**

A and B are registered as joint tenants of land.

A lodges an instrument of severance and dies soon afterwards, leaving all his property to X. X will be entitled to A's share of the land as against B, even though the instrument of severance was not registered when A died, because the joint tenancy between A and B was severed when A lodged the instrument of severance.

However, if C buys the block of land from B and becomes the registered proprietor before the instrument of severance is registered, sections 42 and 44(2) of the Act would operate to protect C as the purchaser of the land from a claim by X for his interest in the land.

**88L. *Effect of lodging instrument of severance***

On the severing of a joint tenancy of an estate or interest in land by lodging an instrument of severance—

- (a) the registered proprietor who has lodged the instrument of severance becomes a tenant in common in respect of that estate or interest in land; and

- (b) the Registrar must make any necessary recordings in the Register; and
- (c) the Registrar may, if the Registrar considers it appropriate—
  - (i) create a new folio of the Register; and
  - (ii) produce a new certificate of title.

**88M. *Proprietor to provide details to Registrar***

- (1) A registered proprietor who severs a joint tenancy must provide the Registrar with the details of the names and last-known addresses (if known to that registered proprietor) of all the registered proprietors who are joint tenants in respect of the estate or interest in land to which the severance of the joint tenancy relates—
  - (a) at the time of lodging the instrument of severance; or
  - (b) at the time of lodging any other instrument or dealing which has the effect of severing the joint tenancy; or
  - (c) when required by the Registrar.
- (2) A failure to provide names and last-known addresses in accordance with sub-section (1) does not prevent the severance of the joint tenancy as between the registered proprietors.

**88N. *Registrar to notify of any severing of joint tenancy***

- (1) The Registrar must take reasonable steps to send a written notice of the severing of a joint tenancy to all registered proprietors who are joint tenants of an estate

- or interest in land on registration of—
- (a) an instrument of severance of the joint tenancy; or
  - (b) any other instrument or dealing which has the effect of severing the joint tenancy.
- (2) The Registrar must send the written notice under subsection (1)—
- (a) to the last-known addresses of all the registered proprietors who are joint tenants, including the registered proprietor who has severed the joint tenancy; and
  - (b) to the address of the land in respect of which the joint tenancy has been severed.

#### 88O. *Mortgages and charges not affected*

Despite anything to the contrary in any instrument of mortgage or charge, the severing of a joint tenancy by an instrument of severance in accordance with this Division—

- (a) does not constitute a breach of the covenants or terms of that instrument of mortgage or charge; and
- (b) does not affect any existing powers, rights or interests of a mortgagee or annuitant in respect of the estate or interest in the land to which the instrument of severance relates.”.

#### 7. *Consequential amendment to section 120*

In section 120(3) of the **Transfer of Land Act 1958**, after paragraph (a) insert—

“(ab) in the case of a prescribed fee under section 88I, include an amount that reflects the costs to the Registrar of sending written notice to registered proprietors in accordance with Division 12 of Part IV; and”.

#### 8. *New Part VIII inserted*

After Part VII of the **Transfer of Land Act 1958** insert—

“PART VIII—SAVINGS AND APPLICATION PROVISIONS—STATUTE LAW AMENDMENT (CO-OWNERSHIP OF PROPERTY) ACT 2002

##### 127. *Presumption as to joint tenancy*

Despite the repeal of sections 30(2) and 33 by the **Statute Law Amendment (Co-ownership of Property) Act 2002**, those sections, as in force immediately before their repeal, continue to apply to any estate or interest in existence immediately before their repeal.

##### 128. *Divorce*

The amendment of section 50 by section 5(2) of the **Statute Law Amendment (Co-ownership of Property) Act 2002** applies in respect of any divorce of registered proprietors who are joint tenants occurring on and after the commencement of section 5(2) of that Act, whether or not the estate or interest in the land in respect of which they are registered proprietors came into existence before or after that commencement.

##### 129. *New presumptions*

Division 11 of Part IV applies only in respect of an instrument in which 2 or more persons are named as transferees, mortgagees, lessees or as taking any estate or

interest in land created after the commencement of section 6 of the **Statute Law Amendment (Co-ownership of Property) Act 2002**.

130. *Instruments of severance*

Division 12 of Part IV applies to any estate or interest in land in respect of which the registered proprietors are joint tenants, whether or not that estate or interest came into existence before or after the commencement of section 6 of the **Statute Law Amendment (Co-ownership of Property) Act 2002**.”

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## PART 3—PROPERTY LAW ACT 1958

9. *Application of section 187 limited*

See:  
Act No. 6344.  
Reprint No. 10  
as at 12  
August 1999  
and  
amending  
Act Nos 74/  
2000, 11/2001,  
27/2001  
(as amended  
by No. 72/  
2001)  
and 44/2001.  
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At the end of section 187 of the **Property Law Act 1958**,  
**insert—**

- “(2) Despite sub-section (1), if the chattels in relation to which the application could be made are goods within the meaning of Part IV, a person must make an application under Division 3 of Part IV, not an application under sub-section (1).
- (3) It is the intention of sub-section (2) to alter or vary section 85 of the **Constitution Act 1975**.”

10. *New Part IV inserted*

For Part IV of the **Property Law Act 1958** substitute—

## ‘PART IV—CO-OWNED LAND AND GOODS

## Division 1—Preliminary

221. *Application of Part to land*

This Part applies to all land in Victoria, whether or not the land is registered under the **Transfer of Land Act 1958**.

222. *Definitions*

In this Part—

“**co-owner**” means a person who has an interest in land or goods with one or more other persons as—

- (a) joint tenants; or
- (b) tenants in common;

“**divorce**” means the ending of a marriage by—

- (a) a decree of dissolution of the marriage becoming absolute under the Family Law Act 1975 of the Commonwealth; or
- (b) the granting of a decree of nullity in respect of the marriage by the Family Court of Australia; or
- (c) the dissolution or annulment of the marriage in accordance with the law of a place outside Australia, if that dissolution or annulment is recognised in Australia under the Family Law Act 1975 of the Commonwealth;

“**goods**” means—

- (a) chattels personal; or
- (b) fixtures severable from land—

but does not include—

- (c) things in action; or
- (d) money;

“**property**” means—

- (a) real and personal property, including any estate or interest in real or personal property;  
or
- (b) money; or
- (c) a debt; or
- (d) a thing in action; or
- (e) a right with respect to property;

“**security interest**” means an interest in or power over property by way of security for the payment of a debt or other pecuniary obligation and includes, in relation to land, a mortgage, charge or lien, whether or not registered under the **Transfer of Land Act 1958**;

“**Tribunal**” means Victorian Civil and Administrative Tribunal established by the **Victorian Civil and Administrative Tribunal Act 1998**.

#### Division 2—Severance of Joint Tenancies

##### 223. *Other forms of severance not affected*

Nothing in this Division affects or prevents the severing of a joint tenancy by any other means that exist under this Act or any other Act or law.

##### 224. *Divorce severs joint tenancy in property*

- (1) If 2 persons are married to each other and have an interest in property as joint tenants, on the divorce of those 2 persons each of those persons becomes entitled to his or her interest in that property as a tenant in common.
- (2) This section does not apply if both persons, not later than 12 months after their divorce from each other, express an intention in writing that the joint tenancy is not to be severed by the divorce.

##### 225. *Notice severing joint tenancy in goods*

- (1) A co-owner of goods as a joint tenant may sever that joint tenancy as between the co-owner and the other co-owners by serving a notice on all the other co-owners who are joint tenants of those goods stating that

person's intention to sever that joint tenancy.

- (2) A notice under sub-section (1) must be in the prescribed form.
- (3) For the purposes of this section, service of a notice under sub-section (1) may be effected by—
  - (a) sending it by registered post to the last-known residential or business address of each of the other co-owners; or
  - (b) serving it personally on each of the other co-owners; or
  - (c) a combination of the methods specified in paragraphs (a) and (b).

**Example:**

A, B and C are joint tenants of a boat.

A serves a notice of severance on B and C stating her intention to sever her joint tenancy with B and C. A then has a one-third share as tenant in common with B and C. B and C remain joint tenants in relation to the remaining two-thirds.

If B dies, C is entitled to the two-thirds share as the survivor of his joint tenancy with B.

If A dies, leaving all her property to her daughter X, X will be entitled to the one-third share of the boat.

**226. *Security interests not affected***

Despite anything to the contrary in any instrument creating a security interest, the severing of a joint tenancy in accordance with this Division—

- (a) does not constitute a breach of the covenants or terms of that instrument; and

- (b) does not affect any existing powers, rights or interests of the holder of a security interest over the property to which that severance relates.

### Division 3—Co-ownership Disputes—Sale and Division

#### 227. *Application for Tribunal order for sale or division of co-owned land or goods*

- (1) A co-owner of land or goods may apply to the Tribunal for an order or orders under this Division to be made in respect of that land or those goods.
- (2) An application under this section may request—
  - (a) the sale of the land or goods and the division of the proceeds among the co-owners; or
  - (b) the physical division of the land or goods among the co-owners; or
  - (c) a combination of the matters specified in paragraphs (a) and (b).

#### 228. *Who are parties to a proceeding?*

In addition to any other parties, all co-owners of the land or goods to which the proceeding relates are parties to a proceeding in the Tribunal under this Division.

Note: Sections 59 and 60 of the **Victorian Civil and Administrative Tribunal Act 1998** also deal with parties to a proceeding.

#### 229. *Adjournment of hearings—spouses or domestic partners*

- (1) The Tribunal may adjourn its hearing at any time before the Tribunal has made a final order under this Division

or Division 4 if proceedings in relation to property of a co-owner who has made an application under this Division or Division 4 are commenced—

- (a) in the Family Court of Australia; or
  - (b) under Part IX of this Act.
- (2) The Tribunal may adjourn its hearing at any time before the Tribunal has made a final order under this Division or Division 4 to permit a co-owner who has made an application under this Division or Division 4 to commence proceedings in relation to property of a co-owner—
- (a) in the Family Court of Australia; or
  - (b) under Part IX of this Act.
- (3) If the hearing of an application under this Division or Division 4 has been adjourned, the applicant for the order under this Division or Division 4 may apply to the Tribunal for the hearing to proceed if the proceedings in the Family Court or under Part IX of this Act are delayed.
- (4) Nothing in this section limits the power of the Tribunal to grant or refuse an adjournment in relation to any proceeding before it.

**230. *What can the Tribunal order?***

- (1) In any proceeding under this Division, the Tribunal may make any order it thinks fit to ensure that a just and fair sale or division of land or goods occurs.
- (2) Without limiting the Tribunal's powers, the Tribunal may order—

- (a) the sale of the land or goods and the division of the proceeds of sale among the co-owners; or
- (b) the physical division of the land or goods among the co-owners; or
- (c) that a combination of the matters specified in paragraphs (a) and (b) occurs.

**231. *Sale and division of proceeds to be preferred***

- (1) In any proceeding under this Division, the Tribunal must make an order under section 230(2)(a) unless, in the particular circumstances, the Tribunal considers that it would be more just and fair to make an order under section 230(2)(b) or (c).
- (2) Without limiting any matter which the Tribunal may consider, in determining whether an order under section 230(2)(b) or (c) would be more just and fair, the Tribunal must take into account the following—
  - (a) the use being made of the land or goods, including any use of the land or goods for residential or business purposes;
  - (b) the ability or practicality of physically dividing the land or goods;
  - (c) any particular links with or attachment to the land or goods, including whether the land or the goods are unique or have a special value to one or more of the co-owners.

**232. *Tribunal may make order varying entitlements to land or goods***

When making an order under section 230 in any proceeding under this Division, the Tribunal, if it considers it just and fair, may order—

- (a) that the land or goods be physically divided into parcels or shares that differ from the entitlements of each of the co-owners; and
- (b) that compensation be paid by specified co-owners to compensate for any differences in the value of the parcels or shares when the land or the goods are divided in accordance with an order under paragraph (a).

**233. *Tribunal may order appointment of trustees***

- (1) In any proceeding under this Division, if the Tribunal thinks that the appointment or removal of trustees is necessary or desirable, the Tribunal may order—
  - (a) the appointment of trustees; or
  - (b) the removal of trustees.
- (2) In an order appointing trustees for the purposes of the sale of land or goods, the Tribunal may—
  - (a) direct the trustees as to the terms and conditions on which any sale is to be carried out;
  - (b) direct the distribution of any proceeds of the sale in any manner specified by the Tribunal.

- (3) In an order appointing trustees for the purposes of a physical division of land or goods, the Tribunal may direct the trustees as to the manner in which the division is to be carried out.

**234. *Other matters in Tribunal orders***

In any proceeding under this Division, the Tribunal may order that—

- (a) the land or goods be sold by private sale or at auction;
- (b) the co-owners may purchase the land or goods at that sale or auction;
- (c) in the case of a private sale, the sale be at fair market price as determined by an independent valuer;
- (d) in the case of an auction, the reserve price is the reserve price set by the Tribunal;
- (e) an independent valuation of the land or goods take place;
- (f) a sale is to be completed within a specified time;
- (g) the costs of the sale be met—
  - (i) by one or more of the co-owners; or
  - (ii) from the proceeds of the sale;
- (h) the sale and division of the proceeds of sale or the physical division of the land or goods is subject to any terms and conditions which the Tribunal considers necessary or desirable in any particular case;

- (i) in the case of land, any necessary deed or instrument be executed and documents of title be produced or other things be done that are necessary to enable an order to be carried out effectively.

**234A. *Tribunal orders as to compensation and accounting***

- (1) In any proceeding under this Division, the Tribunal may order—
  - (a) that compensation or reimbursement be paid or made by a co-owner to another co-owner or other co-owners;
  - (b) that one or more co-owners account to the other co-owners in accordance with section 28A;
  - (c) that an adjustment be made to a co-owner's interest in the land or goods to take account of amounts payable by co-owners to each other during the period of the co-ownership.
- (2) In determining whether to make an order under subsection (1), the Tribunal must take into account the following—
  - (a) any amount that a co-owner has reasonably spent in improving the land or goods;
  - (b) any costs reasonably incurred by a co-owner in the maintenance or insurance of the land or goods;
  - (c) the payment by a co-owner of more than that co-owner's proportionate share of rates (in the case of land), mortgage repayments, purchase money, instalments or other outgoings in respect of that land or goods for which all the co-owners are liable;

- (d) damage caused by the unreasonable use of the land or goods by a co-owner;
  - (e) in the case of land, whether or not a co-owner who has occupied the land should pay an amount equivalent to rent to a co-owner who did not occupy the land;
  - (f) in the case of goods, whether or not a co-owner who has used the goods should pay an amount equivalent to rent to a co-owner who did not use the goods.
- (3) The Tribunal must not make an order requiring a co-owner who has occupied the land to pay an amount equivalent to rent to a co-owner who did not occupy the land unless—
- (a) the co-owner who has occupied the land is seeking compensation, reimbursement or an accounting for money expended by that co-owner in relation to the land; or
  - (b) the co-owner claiming an amount equivalent to rent has been excluded from occupation of the land; or
  - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to occupy the land with the other co-owner.
- (4) The Tribunal must not make an order requiring a co-owner who has used goods to pay an amount equivalent to rent to a co-owner who did not use the goods unless—

- (a) the co-owner who has used the goods is seeking compensation, reimbursement or an accounting for money expended by that co-owner in relation to the goods; or
  - (b) the co-owner claiming an amount equivalent to rent has been excluded from using the goods; or
  - (c) the co-owner claiming an amount equivalent to rent has suffered a detriment because it was not practicable for that co-owner to use the goods with the other co-owner.
- (5) This section applies despite any law or rule to the contrary.

#### Division 4—Co-ownership Disputes—Accounting

##### 234B. *Application for Tribunal order*

- (1) A co-owner of land or goods may apply to the Tribunal for an order under this Division to be made for an accounting in accordance with section 28A.
- (2) An application under this section may be made whether or not an application is made under Division 3.

##### 234C. *Who are parties to a proceeding?*

In addition to any other parties, all co-owners of the land or goods to which the proceeding relates are parties to a proceeding in the Tribunal under this Division.

Note: Sections 59 and 60 of the **Victorian Civil and Administrative Tribunal Act 1998** also deal with parties to a proceeding.

234D. *What can the Tribunal order?*

- (1) In any proceeding under this Division, the Tribunal may make any order it thinks fit to ensure that a just and fair accounting of amounts received by co-owners in respect of the land or goods occurs.
- (2) Without limiting the Tribunal's powers, the Tribunal may—
  - (a) order a co-owner who has received more than the share of rent or other payments from a third party in respect of the land or goods to which that co-owner is entitled to account for that rent or other payments to the other co-owners; and
  - (b) make any order the Tribunal considers just and fair for the purposes of a co-owner who has received more than that co-owner's just and proportionate share accounting to the other co-owners of the land or goods.

Division 5—Jurisdiction of Tribunal

234E. *Jurisdiction of Tribunal*

- (1) The Supreme Court and the County Court do not have jurisdiction to hear an application under this Part unless, in the opinion of the Supreme Court or the County Court (as the case may be), special circumstances exist which justify the Supreme Court or the County Court hearing the application.

- (2) For the purposes of sub-section (1), “**special circumstances**” means circumstances in which—
- (a) the matter which is the subject of the application is complex; or
  - (b) the matter which is the subject of the application, or a substantial part of that matter, does not fall within the jurisdiction of the Tribunal; or
  - (c) the matter which is the subject of the application arises out of another matter which is pending in the Supreme Court or the County Court and it is more appropriate that the matter which is the subject of the application be determined by the Supreme Court or the County Court.
- (3) Nothing in this Division prevents the Tribunal from referring a matter to the Supreme Court or the County Court under section 77 of the **Victorian Civil and Administrative Tribunal Act 1998**.

**234F.** *Appeals on questions of law not affected*

Nothing in this Division affects the operation of Part 5 of the **Victorian Civil and Administrative Tribunal Act 1998**.

**234G.** *Supreme Court—limitation of jurisdiction*

It is the intention of section 234E to alter or vary section 85 of the **Constitution Act 1975**.

## Division 6—General

### 234H. *Regulations*

The Governor in Council may make regulations for or with respect to any matter or thing that is required or permitted by this Part to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Part.

## Division 7—Saving and Application Provisions

### 234I. *Severance by divorce*

Section 224 as substituted by the **Statute Law Amendment (Co-ownership of Property) Act 2002** applies in respect of any divorce of co-owners who are joint tenants occurring on and after the commencement of section 10 of that Act, whether or not the co-ownership of the land or goods in respect of which they are joint tenants came into existence before or after that commencement.

### 234J. *Notice of severance*

Section 225 as substituted by the **Statute Law Amendment (Co-ownership of Property) Act 2002** applies in respect of any co-owned goods owned as joint tenants, whether that co-ownership came into existence before or after the commencement of section 10 of the **Statute Law Amendment (Co-ownership of Property) Act 2002**.

11. *Consequential amendment of Schedule 1 to the Victorian Civil and Administrative Tribunal Act 1998*

In Schedule 1 to the **Victorian Civil and Administrative Tribunal Act 1998**, after Part 16 insert—

“PART 16A—PROPERTY LAW ACT 1958

See:  
Act No.  
53/1998.  
Reprint No.  
2 as at  
15 July  
2001  
and  
amending  
Act Nos  
98/2000, 2/  
2001, 44/  
2001 and  
68/2001.  
LawToday:  
www.dms.  
dpc.vic.  
gov.au

**66A. *Constitution of Tribunal***

In a proceeding under Part IV of the **Property Law Act 1958**, the Tribunal is to be constituted by or is to include a member who, in the opinion of the President, has knowledge of or experience in property law matters.”.

## Bibliography

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## Index

**Note:** References in this index are generally to paragraph numbers in the main text. References in *italics* are to the draft Bill (Appendix 3). These may contain, in square brackets, a further reference to the Act proposed for amendment. For example, 6 [TLA 88J] refers to the part of section 6 of the draft Bill dealing with section 88J of the *Transfer of Land Act 1958*. Similarly, [PLA 234A] refers to section 234A of the *Property Law Act 1958*.

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## Other Publications

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*Privacy Law: Options for Reform—Information Paper* (July 2001)

*Sexual Offences: Law and Procedure—Discussion Paper* (September 2001)

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