

# Recommendations

## CHAPTER 2—A NEW PROPERTY LAW ACT

1. The *Property Law Act 1958* should be repealed and replaced with a new Act which retains the title 'Property Law Act'.
2. Provisions of the current Act that are retained in the new Property Law Act should be arranged according to subject; renumbered consecutively; and revised to update and simplify the language, clarify meanings that are in doubt and remove references to obsolete practices.
3. A table of correspondences should be included as a schedule to the new Property Law Act. It should indicate which provisions of the current Act have been copied verbatim; which have been retained with the language updated; which have been subject to minor alterations; and which have been subject to alterations that change their effect.
4. Where a provision that abrogates or modifies a common law rule, presumption, or principle of interpretation is itself repealed, a savings provision should be included in order to prevent revival of the rule, presumption or principle.
5. Provisions which apply solely to old system land should be set out in a separate part of the new Property Law Act.
6. The new Property Law Act should specify that all provisions, other than those which are expressed to apply solely to old system land, apply to land under the operation of the *Transfer of Land Act 1958*, but subject to that Act.
8. In order to eliminate ambiguities, overlaps and inconsistencies, section 53 should be amended as follows:
  - (a) Section 53(1)(a) should be amended to provide that no legal or equitable interest in land can be created or disposed of except by writing by the person creating or disposing of the interest or by the person's agent.
  - (b) Section 53(1)(b) should be amended to provide that a declaration of trust respecting any land or a trust consisting partly of land and partly of personal property must be in writing and signed by the person disposing of the land or by the person's agent.
  - (c) Section 53(1)(c) should be repealed, so that no written formalities are required for personal property except as required by section 134 and other legislation.
  - (d) A new subsection should be inserted into section 53 providing that, for the purposes of section 53, an agent of a person creating or disposing of an interest in land must be lawfully authorised in writing or by operation of law.
  - (e) The above provisions should remain subject to the current exceptions in sections 52(2), 54(2) and 55.
  - (f) The above amendments should apply only to conveyances and dispositions created after the commencement of the new provisions.

## CHAPTER 3—CONTRACTS AND COVENANTS

### CREATION AND ASSIGNMENT OF LEGAL AND EQUITABLE INTERESTS

7. A provision setting out the evidentiary requirements for the sale or disposition of an interest in land should be inserted into the new Property Law Act. The provision should be in the same terms as section 126 of the *Instruments Act 1958*, except that the words in subsection (1) relating to guarantees for debts should be omitted. Section 126(1) of the *Instruments Act 1958* should be amended to apply to guarantees only.
9. Sections 76, 77 and Schedule 4 should be retained and amended as follows:
  - (a) The phrase 'who conveys and is expressed to convey' in section 76 and Parts I–VI of Schedule 4 should be omitted and the phrase 'who is expressed to convey' should be substituted.
  - (b) Subsection 76(3) is obsolete and should be repealed.
  - (c) The references to 'committee of a lunatic', in sections 76(1)(f), 76(4) and 77(4), and 'Committee of the Estate of a Lunatic', in Part VI of Schedule 4, should be deleted and replaced with references to an administrator appointed under section 46 of the *Guardianship and Administration Act 1986* or an enduring attorney appointed under Division 2 of Part XIA of the *Instruments Act 1958*.

### THIRD PARTY BENEFICIARIES

10. Section 56(1) should be amended to confirm its meaning as interpreted by the courts, namely that:
  - (a) It does not apply to an interest in personal property.
  - (b) It provides that a covenant under an instrument made *inter partes* may be enforced by a person who, although not named, is a person to whom the conveyance or other instrument purports to grant something, provided that the person was in existence and identifiable at the time the covenant was made.

### RETURN OF DEPOSITS

11. Sections 49(1), (2) and (3) should be revised and consolidated into a single provision.
12. Section 49(2) should be amended to provide that, where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the court may, where it is just and equitable to do so, order the repayment of the whole or any part of the deposit, with or without interest.

## CHAPTER 4—LAND IDENTIFICATION, BOUNDARIES AND ENCROACHMENT

### GUIDELINES FOR BOUNDARY ADJUSTMENT

13. The new Property Law Act should provide that the Minister must, after consultation with the Surveyor-General, publish in the Government Gazette guidelines for the re-establishment, redefinition and adjustment of land boundaries where errors in measurement have occurred in an original survey or in a subdivision.
14. A consequential amendment should be made to section 273 to provide that any guidelines that the Minister issues for the re-establishment, redefinition and adjustment of land boundaries under the new provisions shall:
  - (a) apply to land, whether under the operation of the general law or under the operation of the *Transfer of Land Act 1958*
  - (b) where applicable, be acted upon by the Registrar in exercising the Registrar's powers and functions under section 102 of the *Transfer of Land Act 1958*.

### BUILDING ENCROACHMENT

15. The new Property Law Act should include provisions empowering the Supreme Court, the County Court and the Magistrates' Court to grant discretionary relief in respect to an encroachment by a building.
16. The new building encroachment provisions should describe a building encroachment in the following terms:
  - (a) An encroachment arises when a building straddles a boundary line and is partly on a lot owned by one party (the 'encroaching owner') and partly on an adjacent lot owned by another party (the 'adjacent owner').
  - (b) A building means a substantial building of permanent character.
  - (c) The encroachment may be by overhang of any part of a building as well as by intrusion of any part of a building in the soil.
  - (d) The portion of the lot over which the encroachment extends is the 'subject land'.
17. The building encroachment provisions in the new Property Law Act should provide the following procedure for relief:
  - (a) Either the encroaching owner or the adjacent owner should be able to apply to a court for relief under the provision.
  - (b) An owner means a person who holds an estate in freehold in possession and includes a mortgagee in possession.
  - (c) The applicant should be required to give notice of the application to a mortgagee, lessee or any other person who has an estate or interest in the subject land, or any other person to whom the court directs that notice should be given.
  - (d) On an application for relief the court should have power to make one or more of the following orders:
    - (i) the payment of compensation by the encroaching owner to the adjacent owner
    - (ii) that the subject land be included in the title to the encroaching owner's lot by amendment of a boundary
    - (iii) that the adjacent owner lease the subject land to the encroaching owner
    - (iv) that the adjacent owner grant to the encroaching owner any easement right or privilege in relation to the subject land specified in the order
    - (v) that the encroaching owner remove the encroachment.

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18. In exercising its discretion under the building encroachment provisions the court should have power to grant or refuse such relief as it thinks just and equitable and to consider:
  - (a) the situation and value of the subject land
  - (b) the nature and extent of the encroachment
  - (c) the character of the encroaching building and the purposes for which it may be used
  - (d) the loss and damage which has been or will be incurred by the adjacent owner
  - (e) the loss and damage which would be incurred by the encroaching owner if he or she is required to remove the encroachment
  - (f) the circumstances in which the encroachment was made.
19. Where, in an application for building encroachment relief, the court makes an order that the subject land is to be included in the title to the encroaching owner's lot, it should have power to direct the Registrar to make all entries on the folio of the register relating to any lot necessary to give effect to the order.
20. In determining the compensation to be paid under the building relief provisions to the adjacent owner in respect of any lease or grant to the encroaching owner or any amendment of a boundary line, the court should have power to determine an amount up to but not exceeding three times the unimproved value of the subject land.
21. In determining whether the compensation for building encroachment should exceed the value of the subject land, the court should have regard to:
  - (a) the value, whether improved or unimproved, of the subject land to the adjacent owner
  - (b) the loss or damage which has been incurred by the adjacent owner by reason of the encroachment
  - (c) the loss or damage which will be incurred by the adjacent owner through the orders which the court proposes to make in favour of the encroaching owner
  - (d) the circumstances in which the encroachment was made.
22. It should be provided that nothing in the building encroachment relief provisions affects the operation of Part 1, Division 3 of the *Limitation of Actions Act 1958*.

### MISTAKEN IMPROVER

23. The new Property Law Act should empower the Supreme Court, the County Court and the Magistrates' Court to grant discretionary relief where a person has made a lasting improvement upon land owned by another in the genuine but mistaken belief that the land is:
  - (a) the person's property, or
  - (b) the property of a person on whose behalf the improvement was made or was intended to be made.
24. An improvement for the purpose of mistaken improver relief should be defined as a fixture on land.
25. An application for mistaken improver relief should be able to be made by:
  - (a) a person by whom or on behalf of whom the improvement was made (the 'mistaken improver')
  - (b) a person who has an estate or interest in the land or part of it on which the improvement or part of it has been made
  - (c) a person upon whose land the improvement was intended to be made, or the person's successor in title, mortgagee or lessee, or
  - (d) a person claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract or other instrument relating to the subject land on which the improvement was intended to be made.
26. The applicant for mistaken improver relief should be required to give notice of the application to any person who has an interest in the subject land or who is likely to be affected by an order that the court may make.
27. In exercising its discretion under the mistaken improver relief provision, the court should have power to grant or refuse relief as it sees fit and be able to consider:
  - (a) the situation and value of the subject land, and the nature and extent of the improvement
  - (b) the character of the improvement and the purposes to which it may be used
  - (c) the loss and damage which would likely be incurred by the mistaken improver if he or she were required to remove the improvement
  - (d) the circumstances in which the improvement was made.

28. On an application for mistaken improver relief the court should have power to make such order as is just and equitable, and should be able to make one or more of the following orders:
- (a) that a specified person is vested with the whole or any part of the land on which the improvement or any part of the improvement has been made, either with or without any surrounding or adjacent or other land
  - (b) that a specified person shall or may remove the improvement or any part of it from the land or any part of it
  - (c) that a specified person pay compensation to any other person in respect of any land or part of it, any improvement or part of it, or any loss or damage caused or likely to be caused by the improvement or any order that the court proposed to make
  - (d) that any person specified in the order have or give possession of the land or part of it or the improvement or part of it for the period and on the terms that the court specifies.
29. The court should have power under the mistaken improver relief provisions to make orders as follows:
- (a) upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise
  - (b) declaring any estate or interest in the land or any part of the land on which the improvement has been made to be free of any mortgage, lease, easement or other encumbrance, or varying, to such an extent as may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part of the land
  - (c) ordering any person to produce to any person specified in the order any title deed or other instrument or document relating to any land
  - (d) directing a survey to be made of any land and a plan of survey to be prepared.
30. The *Transfer of Land Act 1958* should be amended to provide that, where a vesting order is made on an application for mistaken improver relief and is lodged at the office of the Registrar, the Registrar is required to make all entries on the folios of the affected lots necessary to give effect to the order.
31. The limitation period for bringing actions for relief under the mistaken improver provision should be the same as for an action in detinue.

## CHAPTER 5—REFORM OF LEGAL ESTATES AND TRUSTS OF LAND

### REDUCTION OF LEGAL ESTATES IN FREEHOLD LAND

32. From the commencement of the new Property Law Act, legal life estates and legal future interests should be capable of creation only in equity as beneficial interests under a trust.
33. From the commencement of the new Property Law Act, the number of legal estates should be reduced to two: the fee simple estate and the leasehold estate. The fee simple estate can be absolute or conditional. These should be the only estates that are registrable under the *Transfer of Land Act 1958*.
34. From the commencement of the new Property Law Act, the creation of a determinable fee should operate to create a conditional fee.
35. Successive interests in land should be capable of creation only in equity, as beneficial interests under a trust. (See recommendations 36 and 37.)

### TRUSTS OF LAND

36. All future settlements involving successive interests should be created under a single statutory scheme for a trust of land, replacing both the *Settled Land Act 1958* and the dispositions on trust for sale provisions in Part II Division 1 Subdivision 2 of the *Property Law Act 1958*.
37. All future dispositions of property to minors should be held under the single statutory scheme for a trust of land, instead of under the *Settled Land Act 1958*.

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## CHAPTER 6—AMENDMENTS TO OUTDATED PROVISIONS

### ESTATES TAIL

38. All existing estates tail should be converted by statute to fee simple estates. Section 249 should be retained and amended to provide that:
- From the commencement of the new Property Law Act, any person entitled to an estate tail, whether legal or equitable, in any land shall be deemed to be entitled to an estate in fee simple to the exclusion of any estates or interests limited to take effect after the determination or in defeasance of the estate tail and to the exclusion of all estates or interests in reversion on the estate tail.
  - In the situation where any minor is entitled to an estate tail and any estate or interest would pass to another person on the death of the minor who has not attained full age and has no issue, the minor should be deemed to take an estate in fee simple.
  - The definition of 'estate tail' should include the estate in fee into which an estate tail is converted where the issue in tail is barred but the persons claiming estates by way of remainder are not barred (a 'base fee'), and an estate in fee voidable or determinable by the entry of the issue in tail.
  - The definition of 'estate tail' should exclude the estate of a tenant in tail after possibility of issue extinct.

### SPECIAL RULES OF INHERITANCE

39. The special rules of inheritance in Part V should be replaced with a provision that, subject to contrary intention, a disposition other than a will which confers an estate or interest in land on the 'heir' or 'heirs', or 'next of kin', or 'family' or 'relatives' of a person should be deemed to confer that estate or interest on the person or persons who would be entitled to take beneficially on intestacy under Part 1 Division 6 of the *Administration and Probate Act 1958* and in the same shares.

### ENLARGEMENT OF LONG LEASES TO FREEHOLD TITLE

40. The new Property Law Act should contain a sunset provision which provides that the provisions for the enlargement of long leases (in section 153 of the current *Property Law Act 1958*) cease to have effect five years from the commencement of the new Property Law Act.
41. Section 153(7) should be amended to provide that, until the new sunset provisions take effect, a deed of declaration by a lessee shall be registered by the Registrar either:
- under a new Division to be inserted into Part IV of the *Transfer of Land Act 1958*, or
  - in the case of old system land, under section 22 of the *Transfer of Land Act 1958*.
42. The definition of 'specified dealing' in section 4(1) of the *Transfer of Land Act 1958* should be amended to include a lessee's deed of declaration under section 153(6) of the *Property Law Act 1958*.

### MERGER

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

### PRESUMPTIONS OF SURVIVORSHIP

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

### ALIEN FRIENDS

45. Section 27, concerning the property rights of alien friends, should be replaced by a provision in the new Property Law Act which:
- provides that a person is not prevented from acquiring, holding or disposing of real or personal property in Victoria by reason only that the person is not an Australian citizen within the meaning of the *Australian Citizenship Act 2007* (Cth)
  - includes a note stating that investment by foreign persons is regulated by the Commonwealth under the *Foreign Acquisitions and Takeovers Act 1975* (Cth).

## **MARRIED WOMEN**

46. Sections 167, 168 and 170, concerning the property rights of married women, should be replaced in the new Property Law Act by the provisions that currently appear at sections 156 and 157(1) of the *Marriage Act 1958*. Those provisions should be transferred from the *Marriage Act 1958* to the new Property Law Act and updated.
47. Any restraints on anticipation in dispositions created before the commencement of the *Marriage (Property) Act 1956* and still in operation should be made void. The relief provisions in section 169 of the *Property Law Act 1958* would then be redundant and should be repealed.

## **DEBT ENFORCEMENT**

48. Section 208(1) should be redrafted in modern language.
49. Sections 208(2) and (4), 219 and 220, concerning the powers of the sheriff to seize and dispose of a debtor's property in execution of a debt, should be updated and transferred to the *Sheriff Act 2009*.
50. Section 208(3), concerning the procedures for the sale of a debtor's land by the sheriff, should be revised to be consistent with order 69.06 of the *Supreme Court (General Civil Procedure) Rules 2005* and transferred to the *Sheriff Act 2009*.
51. Sections 209, 210, 211, 212, 214 and 215 of the *Property Law Act 1958* should be repealed and section 52 of the *Transfer of Land Act 1958* should be amended to provide that a judgment, decree, order or process of execution recorded under sections 26E or 26F of that Act has the same effect as to priority of the execution as a recording made under section 52(2) of that Act. As a consequential amendment, section 26I of the *Transfer of Land Act 1958* should be amended to exclude an interest recorded under section 26E or 26F.
52. Sections 213, 216, 217 and 218 should be repealed.

## **CHAPTER 7—REPEAL OF OBSOLETE PROVISIONS**

### **RENTCHARGES**

53. Sections 125–129 should be repealed with a savings provision for any existing rentcharges. These provisions should be replaced with a provision that the future creation of legal and equitable rentcharges is prohibited and any such agreement is enforceable only between the original parties as a contract debt.
54. The savings provision, upon the repeal of sections 125–129, should expressly state that the creation of annuities under the *Transfer of Land Act 1958* is not affected.

### **MINORS' CONTRACTS**

55. Section 28B, concerning the validity of contracts with minors, should be repealed. To ensure that a loan contract entered into by a minor member of a co-operative with the co-operative is valid, the *Co-operatives Act 1996* should be amended to provide that section 69(1) of that Act applies notwithstanding anything to the contrary in section 49 of the *Supreme Court Act 1986* or in any rule of common law or equity. If proposed nationally consistent co-operatives legislation is introduced in Victoria, the equivalent provision should carry a similar notation.

### **REPRESENTED PERSONS WITH A MENTAL ILLNESS**

56. Section 30(1), concerning conveyances by an administrator on behalf of a patient within the meaning of the *Mental Health Act 1986*, should be repealed.
57. Section 30(2), concerning land held on trust for sale that is vested in a patient within the meaning of the *Mental Health Act 1986*, should be reviewed in the context of the proposed replacement of the dual trust scheme. (See recommendations 36 and 37.)

### **OTHER PROVISIONS THAT NO LONGER SERVE A PURPOSE**

58. The provisions that are listed at Appendix C, and which are not elsewhere recommended for repeal, are obsolete and should be repealed.