A WORKING PAPER OF THE
LAW REFORM COMMISSION

ON A BILL IN RESPECT OF AN ACT TO
REFORM AND CONSOLIDATE THE
REAL PROPERTY ACTS OF
QUEENSLAND

Q.L.R.C.  W.P.32
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In this working paper references to the 'Act' or to a section or other portion of an Act are, unless the context requires otherwise, to the Real Property Acts 1861-1988 or the relevant portion thereof. References to the 'Act of 1861' are, unless the context requires otherwise, to the Real Property Acts 1861-1988 and references to the 'Act of 1877' are, unless the context requires otherwise, to the Real Property Acts 1877-1988.
LAW REFORM COMMISSION

The Law Reform Commission has been functioning since the 1st March, 1969, and is constituted by the Law Reform Commission Act 1968-1984.

MEMBERS:

The Honourable Mr. Justice B.H. McPherson, Chairman
The Honourable Mr. Justice R.E. Cooper
Mr. F.J. Gaffy Q.C.
Sir John Rowell C.B.E.
Mr. A.A. Preece
Mr. M. Klug

OFFICERS:

Mr. P.M. McDermott, Principal Legal Officer
Mr. L. Howard, Secretary
Miss Margaret Schmidt, Administrative Assistant

The Commission is very grateful for the services of Mr. Arthur Byrne who acted as a consultant in the matter of the Real Property Acts in 1988 and 1989.

The Office of the Commission is on the 13th Floor of the Central Courts Building, 179 North Quay, Brisbane 4000. Mail should be addressed to P.O.Box No.312, Brisbane 4002.

The short citation for this Working Paper is Q.L.R.C. W.P.32.
PREFACE

LAW REFORM COMMISSION

WORKING PAPER ON A BILL TO AMEND AND CONSOLIDATE
THE REAL PROPERTY ACTS
AND ASSOCIATED LEGISLATION


As part of this review this working paper has been prepared which contains a discussion on the law relating to registration of title to land in Queensland, and proposed amending legislation. The working paper is being circulated to persons and bodies from whom comment and criticism are invited.

This working paper is circulated on a confidential basis and recipients are reminded that any recommendations for the reform of the law must have the approval of the Governor-in-Council before being laid before Parliament. No inferences should be drawn as to any Government policy.

It is requested that any observations you may desire to make be forwarded to the Secretary, Law Reform Commission, P.O.Box 312, Brisbane North Quay, Qld. 4002, so as to be received no later than 29 September 1989.

The Hon. Mr. Justice B.H. McPherson,
Chairman.

Brisbane,
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QUEENSLAND

A WORKING PAPER OF THE LAW REFORM COMMISSION

ON A BILL IN RESPECT OF AN ACT TO REFORM AND CONSOLIDATE THE REAL PROPERTY ACTS OF QUEENSLAND

Q. L. R. C. W. P. 32
CHAPTER I

GENERAL INTRODUCTION

This working paper sets out proposals for the consolidation and amendment of the legislation which implements in this State the Torrens system of registration of title.

STRUCTURE OF THIS WORKING PAPER

This paper is structured so as to precede the commentary on the proposed draft legislation to amend and consolidate the Real Property Acts, with an analysis of the major areas of relevant law, and an outline of the legislative history of the Torrens system in Queensland.

The draft legislation is set out in Part 1 of the Appendix to this working paper.

THE APPROACH OF THE COMMISSION IN PROPOSING REFORMS

The Torrens system was introduced into Queensland by the Real Property Act of 1861. That Act, as amended, is still in force. In 1877, there was enacted the Real Property Act of 1877, which was to be read and construed with and as an amendment of the 1861 Act. This Act has also been amended on several occasions.

It seems unarguable that these two Acts should be consolidated, and many submissions made to the Commission have urged that this should be done. It seems clear also that a consolidation should include the Real Property (Local Registries) Act of 1887, the Registrar of Titles Act of 1884 and the various Real Property Acts Amendment Acts so far as their provisions have not already been incorporated into the Real Property Acts of 1861 and 1877. It should also include the Real Property (Commonwealth Titles) Act 1924-1986 and the Real Property (Commonwealth Defence Notification) Act 1929-1986.

This would not make the new Act a code of all matters relating to land registered under the Torrens' title system. There are for example many provisions in the Property Law Act 1974-1986 which apply to all land in the State. In the Commission's Report on the Bill which eventually became that Act, it was recommended that certain provisions in the Real Property Acts should be repealed and re-enacted in the Property Law Act, on the ground that they applied or should apply to land of all kinds. The comment was made that this would leave the Real Property Acts to serve their primary function as a title registration and conveyancing statute concerned with effecting land transfer and registrations.

Even within this restricted sphere the Real Property Acts do not provide comprehensive legislation. For example, the Building Units and Group Titles Act 1980-1988 contains provisions relating to the registration of transfers or leases of common property. This legislation could with some justification
be incorporated into a revised Real Property Act, and that course has been adopted in South Australia, where an extensive Part XIXB, entitled "Division of Land by Strata Plan and Titles to Units Created thereby" was added to the Real Property Act 1896 in 1967. However, it was considered undesirable to follow that course here, since it would lead to the inclusion in the Real Property Act of matters which are essential to the operation of a building units and group titles scheme (such as the duties, powers and administration of a body corporate) but which are remote from the general object of a land registration system.

It is proposed therefore to limit the consolidation to those Acts already referred to as appropriate for inclusion in a new Real Property Act.

The process of amending those Acts has been carried out in a piecemeal fashion for more than a century. In preparing the draft Bill annexed to this working paper, the Acts were examined section by section in order to determine what amendments should be proposed. This examination was not however conducted on the basis that radical reform was necessary to correct a basically defective system. On the contrary, from the evidence presented to the Commission and from its own knowledge, the indications are that on the whole the system works satisfactorily. The criticisms made to the Commission by those who replied to its letter inviting comments and proposals for amendment were directed at certain provisions which were considered to be in need of amendment, but none of these suggested that the main principles embodied in the Acts should be changed. It is noteworthy also that in other States which have amended their Torrens' title legislation extensively in recent years or replaced their earlier legislation on the matter by revised legislation, the amendments have not affected the basic features of the system as set out in the earlier legislation.

The most extensive amendments were made in New South Wales with the enactment of the Real Property (Computer Register) Amendment Act 1979. The advent of computer technology has opened up possibilities for the computerisation of the process of registration which are currently in the gradual process of realisation in Queensland as in most other jurisdictions employing the Torrens system. In order to accommodate the process of computerisation, extensive amendments were made to the Real Property Acts in 1986, which are discussed further below.

Most of the amendments proposed in this working paper are attributable to one or more of three considerations.

First, it was thought important to ascertain the views of those who are most intimately concerned with the functioning of the Torrens Title system as to the matters which they considered to need correction. The preparation of this working paper has involved close consultation in particular with solicitors who have had extensive experience in conveyancing matters and with officers or former officers of the Titles Office. The changes proposed have therefore in the main been to deal with matters which experienced practitioners have considered unsatisfactory. Provisions in the Acts which have not raised difficulties in practice, perhaps because they are seldom used, have generally been left unchanged in substance, even though they might seem capable of improvement.

Secondly, the desirability of uniformity of legislation in this area throughout Australia was kept steadily in mind. Unfortunately the differences in the Torrens Title Acts of the various jurisdictions are substantial, but the formulation of provisions in the annexed draft Bill has
so far as this was feasible followed that used in other jurisdictions. An important consequence of this will be to make the decisions of the Courts of other jurisdictions more directly relevant to the interpretation of the new Act.

Thirdly, it was recognised that there was a need to reconcile the provisions and the language of the Torrens legislation with those in the Property Law Act.

The poor state of the Real Property Acts in terms of form, ought not to be allowed to cloud the fact that, in substantive terms, the need for reform is comparatively minor. The machinery of registration generally works well, and has worked well, in practice, with a few exceptions such as the operation for the assurance provisions. It is the untidy way in which the statutory provisions are currently expressed and strewn among a number of statutes which gives rise to the main imperative for legislative reform rather than numerous or major defects of substance.

ROLE OF THE QUEENSLAND LAW REFORM COMMISSION IN RELATION TO PROPERTY LAW GENERALLY

The Commission began its operations in 1969, and the last fifteen years has seen major work in the field of property law. This has led, successively, to the enactment of the Trusts Act in 1973, the Property Law Act in 1974, and the Succession Act in 1981. Meanwhile, the Public Trustee Act of 1978 was enacted as a Government initiative, replacing the old Public Curator Act dating back to 1915.

This legislation has greatly simplified and improved property law in Queensland, to a point where it can be said to be among the leaders in that part of the world whose legal system derives from English common law. However, one major area of property law remains to be reformed, and that is the legislation dealing with the registration of title to land, with which the Commission is currently concerned.

The Real Property Acts have been the subject of a reference to the Law Reform Commission for some years, but until recently progress has been slow because of the complexity of the matter, and the tendency for any proposal for reform to meet with considerable criticism from numerous viewpoints. An example is the Real Property Act Amendment Act 1985, which may be regarded as a very minor first stage of implementation of the reform of the Real Property Acts, since it adopted some proposals made in the first Law Reform Commission Working Paper issued dealing with the Real Property Acts (L.R.C.W.P.25).

Although the working paper talked of amending the Real Property Acts with respect to those provisions relating to writs of execution, bills of encumbrance, bills of mortgage, and caveat, the lack of any consensus in the legal profession in relation to the proposals relating to writs of execution and caveats, meant that only the proposals concerning mortgages and encumbrances were enacted. Even this was hotly debated, with the debate continuing after the passage of the legislation, and controversy over this and other contents of the legislation meant that it was deferred to the next sittings several times after being introduced to Parliament.
Ultimately, the result in terms of reform and updating of the Real Property Acts was very small, amounting merely to a paving of the way for the eventual abolition of encumbrances, by broadening the definition of 'mortgage' in the Acts sufficiently for the separate category of encumbrances no longer to be needed (Real Property Act Amendment Act 1985, s.2.). Even in relation to this matter caution prevailed to the extent that the provisions concerning to encumbrances were left in the Acts 'to wither on the vine' rather than being removed immediately.

Admittedly, the 1985 Amendments had other purposes, notably the reversal of the decisions in Rock v. Todeschino [1983] Qd.R. 356, and Hutchinson v. Lemon [1983] Qd.R. 369, which had caused considerable concern to conveyancers. The legislation also included some improvements to s.11 of the Real Property Act 1861-1981 (Real Property Act Amendment Act 1985, s.4) which relate to the powers of the Registrar of Titles, to improving the Registrar's powers to inspect documents, to record changes of name, and to simplify the register and remove superfluous registrations. It also included a new power to remove patent errors (Real Property Act Amendment Act 1985, s.7) and to incorporate in instruments covenants and conditions from a previously registered memorandum (Real Property Act Amendment Act 1985, s.6). This last provision allows for general clauses frequently used by a firm of solicitors or corporation in instruments such as leases or mortgages, which they frequently lodge to be incorporated in a particular lease or mortgage by reference to the memorandum without need to set out the clauses in extenso.

Many of these provisions may be regarded as contributing to the reform of the Real Property Acts, although they involve substantive changes, since they make the legislation more efficient in operation. These minor amendments were followed in 1986 by the much more extensive amendments discussed in detail below.

Following concentrated work on this reference in 1986, 1987 and 1988 the Commission has drawn up a draft bill to consolidate and amend the Real Property Acts which is set out in Part 1 of the Appendix to this Working Paper.

ADMINISTRATION OF THE SYSTEM OF REGISTRATION OF TITLE

A number of provisions of the Real Property Acts deal with administrative matters. Some of these deal with such matters as the appointment of the Registrar of Titles and other officers associated with the process of registration, the collection of fees, and other matters with little bearing on the substantive law relating to registration. Most of these provisions require little amendment apart from those necessary to effect consolidation, the removal of duplication of provisions, and of unduly lengthy forms of words, since they have generally been kept reasonably up to date by amendments. Indeed, most of these provisions were overhauled in 1986 since they were affected by computerisation. Appropriate observations are made concerning individual provisions of this nature by way of commentary on the proposed draft legislation.

On the other hand, some provisions, while of a basically administrative nature, have a substantive impact on the system of registration and so must be considered in more detail. A prime example of this is the Registrar's power of correction under s.11.
It has generally been taken for granted that the system of registration of title should be an independent system in that it should be administered by a body which has no other function and which is headed by a Registrar who is completely responsible for the administration of the system, subject only to statute and the overriding responsibility of the Minister to Parliament in relation to matters associated with the registration of title. In the view of the Commission, such organisation is essential to the integrity of a system of registration which is designed to furnish secure title to land. The importance of such secure title is paramount in a society based on the private ownership of land.

The Commission is fortified in this view by its knowledge of the practice of other jurisdictions employing systems of registration of title to land, which almost without exception follow the pattern of having an independent titles office to operate the process of registration.

Before proceeding to a detailed analysis of the law associated with the Real Property Acts it is appropriate to analyse the historical development and main features of the Torrens System in Queensland.
CHAPTER II

LEGISLATIVE HISTORY OF THE REAL PROPERTY ACTS

The history of the law of real property in Queensland, in common with that of the rest of Australia, dates back to the acquisition of title by the British Crown under English law at the time of the arrival of the first fleet on 26 January, 1788. This was pursuant to the principle that any territory acquired by the Crown by annexation was held by the Crown until and unless disposed by grant to a subject.

Until the separation of Queensland from New South Wales, Queensland was administered from Sydney and grants of land were made by the authorities there and governed by the law in force in New South Wales. This law comprised the rules of land law in force in England at the time of first settlement, to the extent appropriate to the condition of the settlers; it being a rule of English law that such law was imported to any settled colonies. The application of English law was made statutory by the Australian Courts Act of 1828 (9 George IV, c.83, s.24) which provided that the law in force in England at that time was to apply in New South Wales. With the gradual introduction of self-government, the law governing real property in Queensland and land grants was affected by legislation made in New South Wales, and this situation appertained at the time of separation and the establishment of Queensland.

At almost exactly the same time as separation the system of registration of title to land which became known as the Torrens system had its genesis in South Australia in 1858.

ADOPTION OF THE TORRENS SYSTEM BY OTHER JURISDICTIONS

The expansion of the Torrens system commenced immediately after its successful implementation in South Australia. Queensland was the first to follow. The Torrens system was also speedily introduced into New Zealand, New South Wales; Western Canada; in a few parts of the United States; in parts of Africa and Asia; in Israel. In virtually all these jurisdictions, except for those of the United States it is fair to say that it has been a resounding success.

In England a Torrens system as such was replaced by one similar to the English system of registered conveyancing, which is not entirely dissimilar to the Torrens System.

In the United States of America it has laboured under constitutional difficulties, and lacked support from title companies and the legal profession, with the result that in the States where it operates it is used rarely. This is largely to the comparatively efficient way in which the systems of deeds registration operate in the United States through the operations of titles companies. These companies, through specialising in investigation of title in particular localities, and combining this with
title insurance are able to eliminate the duplication of work associated with successive investigations of title to a parcel of land under systems based on deeds registrations. Indeed the operations and expertise of these companies is so great that in many cases the system is tantamount to a private enterprise land registry.

ADOPTION OF THE TORRENS SYSTEM BY QUEENSLAND

Queensland quickly adopted this system with the enactment of the Real Property Act 1861. With the enactment of this statute, Queensland was the first other jurisdiction to adopt Sir Robert Torrens wide ranging reforms of conveyancing in South Australia. Indeed it is often argued that Queensland followed too quickly (See Whalan: The Torrens System in Australia, pp.8-9), in that it copied the original South Australian scheme before the amendments consequent upon the South Australian Real Property Commission of 1861 had been enacted. As a result of the deliberations of this Commission the original South Australian statute was overhauled. [See Real Property Act 1861 (S.A.). There had already been amendments in 1858 and 1860 to the original scheme enacted by the Real Property Act 1858 (No.15) by the Real Property Law Amendment Act 1858 (No.16) and the Real Property Act 1860 (No.11)].

Accordingly, some defects in the present law of real property in Queensland may be traced back to this original legislation.

The position of Queensland as the youngest colony combined with the fact that it possessed the second oldest statute providing for registration of title led to a scarcity of land with unregistered title, or 'old system land', compared with the other States. This was because the legislation implementing the Torrens system was structured in such a way that all Crown land grants in fee simple after the commencement of the legislation led to a registered title. In addition to this, Queensland has been more efficient than the other States in converting the small amount of unregistered title to a registered title. The result is that at the time of writing the number of 'old system' parcels in Queensland has reduced to approximately eighty. (The issue of conversion of these remaining parcels is discussed in more detail in Chapter III.)

Defects and inadequacies in the Real Property Act of 1861 led, via a parliamentary investigation, to the enactment of amending legislation. However, this legislation, the Real Property Act of 1877, did not textually amend the 1861 Act with the result that both Acts have stood to this day as integral parts of the Queensland system of registration of title, with no attempt at consolidation. Some of the later South Australian reforms were adopted by the passage of the Real Property Act of 1877. This legislation also dealt with some of the problems which case law had brought to notice in the intervening years. However, since this Act took the form of a separate additional Act rather than textually amending the original legislation, Queensland legislation dealing with the registration of title to land remained in far less than a perfect condition.

The only other major amendments prior to 1986, were the 1952 amendments, whose primary purpose was to make provision for the acquisition of title by adverse possession to land under the Real Property Acts, in consequence of the decision in Miscamble v. Phillips [1936] St.R.Q. 136, which had ruled out such acquisition in respect of such land. This legislation followed the pattern of that of 1877 in that the new substantive provisions were enacted as part of the Real Property Acts Amendment Act 1952, rather
than being inserted into the original 1861 Act by textual amendment. However, there were extensive amendments of other parts of the Acts as well.

Accordingly, since 1877 there has been no thorough overhaul of the Real Property Acts, although there have been frequent amendments. Many of these have operated by the preferable alternative of textual amendment of the 1861 and 1877 Acts but there are a number of examples of legislation which, like the 1877 Act and 1952 Act, stand as separate edifices in the overall structure of the Torrens system in Queensland, in that they contain substantive as opposed to merely amending provisions. These comprise:

Real Property (Commonwealth Defence Notification) Act 1929, dealing with notification of land required for defence purposes;

Real Property (Commonwealth Titles) Act 1924, dealing with the recording in the register of land vested in the Commonwealth;

Real Property (Local Registries) Act 1887, dealing with administrative matters relating to local registries;

Real Property Acts Amendment Act 1956–1974, concerned with leases of extinct corporations;

Real Property Act Amendment Act 1976, validating of certain plans of subdivision;

Real Property Act Amendment Act 1978, dealing with the assurance fund;

Real Property Acts Amendment Act 1979, relating to caveats;

so there is considerable scope for consolidation.

The most extensive reform of the Acts since 1877 took place in 1986 prompted by the need to amend the legislation to cater for computerisation of the Titles Office. This legislation, the Real Property Acts and Other Acts Amendment Act 1986, did attend to a number of other matters, including the repeal of many obsolete provisions, but it was by no means a comprehensive reform. Consequently, the Real Property Acts of Queensland remain in great need of reform, simplification and consolidation.

The Real Property Acts and Other Acts Amendment Bill 1986 was introduced into the Legislative Assembly on March 13, 1986, and passed all remaining stages on March 19. The main thrust of the legislation, as stated by the Minister in his second reading speech, was to make the necessary changes to the Real Property Acts to accommodate the process of computerisation of the Titles Office which is currently taking place over a period of time, and which is expected to be completed by 1994. A subsidiary objective was to achieve a significant second stage in process of reform of the Real Property Acts, following the minor amendments incorporated in the Real Property Acts Amendment Act 1985.

There were several reasons for pursuing the subsidiary objective at this time. The amendments necessary to cater for computerisation were extensive, in that they involved amending a considerable proportion of the sections in the Real Property Acts. However, many of these amendments were of an essentially trivial nature, frequently merely involving the deletion of references in the Acts to 'book' in connection with the register. The combined bulk of such amendments necessitated a large Bill, and so it made
good sense to include other amendments to sections which had to be amended anyway, so as to remove archaic provisions and wording.

In the preparation of the 1986 legislation the Law Reform Commission was represented at all major discussions on the Bill following the drawing up of the original draft by Parliamentary Counsel, and extensive amendments were made during these discussions. The Law Reform Commission was responsible for the initiation of virtually all the provisions which did not relate strictly to computerisation or to the implementation of Government policy in the two areas mentioned below.

The final stage of consultation prior to the presentation of the Bill to Parliament, involved the Law Society being issued with a draft copy in confidence for the consideration of their Conveyancing Committee a few days before publication for representations to be made and incorporated in the final version. This was an exceptional course of action in that the draft is very seldom released before presentation to Parliament. It was felt necessary because of the nearness of the deadline for legislating in the Autumn sittings of Parliament which had to be met so as not to delay the progress of computerisation in the Titles Office.

Unfortunately, the time deadline of July 1, 1986 associated with the legislation, which was required to be met if the Titles Office was not to be delayed in its program of computerisation, meant that the amount of general reform and modernisation which could be achieved in this Bill was limited by the need to prepare the legislation in time for passage during the 1986 Autumn sittings of Parliament.

The smooth passage of the 1986 amendments is in marked contrast to the events surrounding the passage of the minor amendments passed in 1985 (Real Property Act Amendment Act 1985). The original source of this legislation was a working paper issued by the Law Reform Commission in mid 1982. (Law Reform Commission: Working Paper on a Bill to amend the Real Property Acts with respect to those Provisions relating to Writs of Execution, Bills of Encumbrance and Bills of Mortgage, and Caveats. QLRC W.P.25). This made proposals concerning writs of execution, caveats and the assimilation of bills of encumbrance and mortgage. After protracted debate and several abortive bills the legislation eventually passed in 1985 as the Real Property Act Amendment Act 1985, which only dealt with mortgages and bills of encumbrance, although it also contained provisions reversing the effect of certain court decisions relating to easements and other minor matters.

Before proceeding to a detailed discussion of the 1986 legislation it is appropriate to analyse in somewhat greater detail the significant amending legislation passed between 1861 and 1986, and before doing this it is necessary to set out the essential features of the Torrens system of registration.

ORIGINS AND BASIC FEATURES OF TORRENS SYSTEMS OF REGISTRATION OF TITLE TO LAND

The system of registered conveyancing known as the Torrens system has been adopted in various common law jurisdictions since 1857, when it was first established in South Australia, as a result of the efforts of Sir Robert Torrens. The fundamental principle, as with all other systems of registration, is that land ownership is registered in a public register where the proprietorship and encumbrances are recorded.
The Register is designed to secure indefeasibility of title and this means that once registered, fraud and other limited exceptions apart, the title of a registered proprietor suffering loss through its operation, the Torrens system is supposed to provide for compensation out of an assurance fund. The underlying principle is that the Register is everything, and all that a party dealing with registered land need do is search it to discover the rights and burdens attaching to the parcel. The system excludes the registration of equitable interests but some of these usually may be protected, along with others by the lodgment of a caveat, which prevents the registration of any dealing or of any dealing inconsistent with the rights claimed in the caveat.

The structure of the Register is based on parcellation, that is by reference to the parcels of land themselves, which are allocated numbers. Accordingly, it differs from the grantor-grantee system which is the foundation of the records of ownership in under the system of conveyancing operating in common law jurisdictions prior to the establishment of systems of registration of title. These operate upon the basis of documents which transfer the ownership from vendor to purchaser by reference to the named parties dealing and are variously known as 'old system' (in New South Wales), 'general law' (in Victoria) or 'unregistered' (in England) conveyancing. Such procedures may or may not involve some limited forms of registration, but if they do it is usually for the purpose of regulating priorities between the parties claiming inconsistent interests in the same parcel, and is limited to registration of deeds (as under ss.241-249 of the Property Law Act 1974-1986) or to registration of specific interests or claims (as under the Land Charges Act 1972 [U.K.]).

The benefits of the parcel procedure are clear to those who have had to deal with alphabetical indexes, or no indexes at all, in some of the deeds systems. Common names illustrate the difficulty of proving title under systems based on names of proprietors. Any transfer involving such a common name requires an elimination of all similar names from the annual index to find the next step in the particular chain of title. Unless the correct individual's dealing is located, an incorrect title will be examined. Spelling or typing errors can lead to disaster as in Oak Co-operative Building Society v. Blackburn [1968] Ch.730.

Before the implementation of his ideas Torrens had been in contact with Dr. Hubbe, who had written in the press of South Australia on the subject of conveyancing reform and had proposed a system of registration. Hubbe was an eminent South Australian jurist who, while being a native of Hamburg, obtained his doctorate at the Danish University at Kiel. Hubbe was secretary to the Parliamentary Committee of 1847 which inquired into land holding methods and had explained the Hanseatic system of conveyancing, which was based on parcellation, to Torrens. Hubbe was probably influential in implanting and strengthening some of the ideas which later became principles of the Torrens system in the mind of Torrens principles which are largely similar to those which operated in Hamburg and which still operate in the German system of registered conveyancing.

One example is that of the mortgage operating by way of charge over the property and not by way of conveyance; the latter being the operative principle in 'old system' conveyancing. Another is that equitable interests should be excluded from the Register, a principle not to be found in the original Real Property Act of 1858; and that '...no estate or interest on such lands should pass at all by deed or any documentary evidence but exclusively by registration of each special transaction in the public books of the colony'.

Dr. Hubbe had close connections with the German settlers of the Barossa Valley not far from Adelaide. The landowners came from Hamburg, the German States and parts of Austria-Hungary. Hamburg, Austria-Hungary and some of the German states had enjoyed systems of registered title for centuries. This introduction to Germanic conveyancing was the major part played by Dr. Hubbe and the German settlers in the initiation of the Torrens system.

The suggestion that the Torrens system may in part be an offspring of these Hanseatic systems of registration, through the German influence in the early colonial period in South Australia is interesting. However, the inspiration for the Torrens system is more often regarded as being the British system of registration of ownership of ships. [This view has been challenged, see, for example, a paper delivered by R. Stein to the 1981 A.U.L.S.A. (Australasian Universities Law Schools Association) Conference].

The Imperial Merchant Shipping Act of 1854 had set up a system by which a public register of ship ownership was kept. Each ship was the subject of a separate folio of the register and transfers of ownership were recorded against the name of the ship. Of particular interest as a point of comparison with the Torrens system, this Act prohibited the entry of equitable interests on the register, the adjustment of those interests being left for resolution between the trustee and the beneficiaries.

Torrens' scheme as it was finally adopted in South Australia and the other Australasian jurisdictions which quickly followed suit has the following central features:

1. REGISTRATION OF TITLE

It is a system of registration of land and land title rather than instruments. It is not a system of registration of deeds. Each particular deed relating to land under the system is not kept in the register book. Instead each separate parcel of land is the subject of a separate folio in the register book. Each folio shows the name of the registered proprietor of that land and any legal interests affecting the title.

2. INDEFEASIBILITY OF TITLE

Registration is, apart from the very few exceptions expressed in the Acts and even fewer other exceptions evolved by the courts, conclusive of legal title.

3. CONCERNED WITH LEGAL AS OPPOSED TO EQUITABLE TITLE

It is a system of legal title by registration. Equitable title or interests cannot be registered as such. In general, apart from the operation of the caveat system, equitable claims are kept off the register and later purchasers of the legal title who themselves become registered, cannot be affected by prior equities. However, provision is made for the interim protection of equitable interests through the caveat system which is discussed in detail below.

4. COMPULSION

It is compulsory in that land alienated in freehold from the Crown after the introduction of the Torrens system is always alienated as a registered title under the system and any subsequent dealings intended to create legal interests had to be registered to create legal interests (s.43).
5. COMPLETENESS

It was intended to be complete in that provision was made in the Acts for the owners of land alienated before the introduction of the Torrens system to bring their land under the Acts.

In Queensland, the process has been made compulsory (Property Law Act 1974-1986, ss.250-254) and it is expected that shortly all freehold land in Queensland will be within the system.

6. ASSURANCE OF TITLE.

The system aims, through assurance provisions, to provide a government guaranteed fund to compensate owners who lose their title through misfortune such as error in the Titles Office or through fraud or forgery.

7. DEPENDENCE ON SURVEY.

The system depends very heavily for its effective working on thorough and accurate surveys of land. Titles generally describe land by reference to a survey, or are based on surveyed subdivisions. Accordingly accurate surveys are vital for the effect working of the system.

These were the central aspects of the system which Torrens finally saw become law in South Australia in 1858, and which were almost exactly copied in Queensland with the enactment of the Real Property Act of 1861.

AMENDING LEGISLATION BETWEEN 1861 AND 1986

A. REAL PROPERTY ACT 1877

Apart from minor amendment by the Criminal Statutes Repeal Act 1865, the system of registration established by the Real Property Act 1861 remained in its pristine form until the 1877 amendments were enacted.

These were the result of an investigation by a committee of the Legislative Council, which was itself prompted in part by the amendments to the original Torrens system of registration in South Australia. Much of the Act is devoted to filling gaps in the original legislation or supplementing it rather than to amending it substantively or repealing defective provisions. Notable examples of this are:

(a) Adding the exception to indefeasibility for leases for less than three years (s.11), and generally clarifying the position of such leases with regard to registration, (s.18).

(b) Clarifying priorities of registration (ss.12-15).

(c) Making supplementary provision concerning documentation and the issue of certificates of title, particularly in respect of lesser interests than the fee simple, such as mortgages, easements and leases and transfers of the fee simple subject to a lesser interest (ss.16-19, 22-28).

(d) Further provision regarding caveats (ss.30, 36-40).

(e) Provisions in respect of involuntary transmissions (ss.32-35,46,49).
In addition some miscellaneous matters are addressed, such as compensation for improvements by a person ejected (s.47) and search and copy of instruments (s.50).

The most significant provisions of the Act in terms of their substantive effect upon the system of registration are, at least on their face, ss.48 and 51, through their recognition of unregistered instruments in registrable form, and equitable jurisdiction, respectively. Paradoxically, these sections may have had comparatively little effect in practice. Although s.51 would appear to furnish a substantial basis for the in personam exception to indefeasibility, it is clear from the recognition of the exception in other jurisdictions which have no direct counterpart to s.51, that the exception would exist independently. The precise effect of s.48 is still in some doubt, widely different views having been expressed by members of the High Court in Breskvar v. Wall (1971) 126 C.L.R. 376; (1972) 46 A.L.J.R. 68. Although some reliance may have been placed on s.48 in Brunker v. Perpetual Trustee Co. Ltd. (1937) 57 C.L.R. 555, the enactment of s.200 of the Property Law Act 1974-1986, has removed the need to use this provision to assist unregistered volunteers. Furthermore, s.200 may do no more than codify the existing law as laid down in Re Rose [1952] Ch. 499.

B. THE 1952 LEGISLATION

Between 1877 and 1952, there were a number of minor amendments by the Criminal Code Act 1899, the Acts Citation Act 1903, the Land Surveyors Act 1908, the Public Curator Act 1915, the Justices Acts and Real Property Fees Act 1932, Real Property Acts Amendment Act 1942 and the Australian Consular Officers' Notarial Powers and Evidence Act 1946, but no major changes. The main function of the Real Property Acts Amendment Act 1952 was the institution (by Part III) of a procedure for registering, in limited circumstances, titles acquired by possession adverse to that of the registered proprietor. However, there were numerous small amendments of the Real Property Acts in Part II (ss.3-44), of which the most significant was probably the removal of technical rules regarding words of limitation by s.5 which inserted a new s.15A into the 1861 Act. This provision was later subsumed in the Property Law Act of 1974, as s.29.

In Miscamble v. Phillips [1936] St.R.Q. 136, the Full Court held that a title could not be acquired by adverse possession where the land was under the provisions of the Real Property Acts. The 1952 legislation partially alters this outcome.

The provisions dealing with adverse possession do not go as far as to permit automatic acquisition of title where the rights of the registered proprietor rights to recover possession have expired by effluxion of time under the Limitation Acts. Rather they merely provide, in s.50, for application by persons in possession who have attained that status. There is provision for the registered proprietor to block the grant of title by lodging a caveat under s.56. There are various safeguards, such as the need for advertisement under s.55, and the wide discretion of the Registrar of Titles and Master of Titles to reject applications under ss.53 and 54, and the absolute prohibition on acquisition of titles by possession to Crown land (without consent of the Crown or Crown instrumentality) (Real Property Acts Amendment Act 1952, s.48) or to encroachments (Real Property Acts Amendment Act 1952, s.47).
The possibility of an impasse exists where a registered proprietor caveats under s.56, as the applicant will then be unable to obtain a title, while the registered proprietor will be unable to recover possession by action because of the operation of ss.13, 14 of the Limitation of Actions Act 1974-1981, which bars claims after a limitation period of 12 years. This problem is canvassed further below in the section dealing with the adverse possession as an exception to indefeasibility.

C. THE PROPERTY LAW ACT 1974


The object of the enactment of the Property Law Act 1974 was not the reform of the Real Property Acts, but rather the codification and reform of the general law of property. (See the Law Reform Commission Working Paper No.10, (QLRC W.P.10), particularly the General Introduction, pp.2-4.) However, the implementation of this objective necessarily involved considerable amendment of the Real Property Acts, both through express amendments and repeals, and indirectly since most of the land in respect of which the provisions of the Property Law Act 1974 have an impact is under the Real Property Acts. Reference has already been made to the role of s.29 of the Property Law Act 1974-1986 in replacing the provisions of the Real Property Act dealing with words of limitation. Section 21 of the Real Property Act 1861-1988, dealing with service of notices, was also supplemented by s.257 of the Property Law Act. The impact of the general provisions of the Property Law Act 1974-1986 on the Real Property Acts is defined by s.5(1)(b), which provides that they are to 'apply to land under the provisions of the Real Property Acts, including any lease of such land, but subject to the provisions of those Acts'. In addition some portions of the Acts are specifically made applicable to land under the Real Property Act. For example: Part VII dealing with Mortgages, by virtue of s.77(1)(b)(1); Part IX dealing with Powers of Attorney, by virtue of s.168(2) and Part XI dealing with encroachments and improvements under mistake of title, by virtue of ss. 182 and 195. There are also some provisions which it is expressly provided will not apply to land under the Real Property Acts. [For example: s.45, dealing with the formalities of deeds, by virtue of s.45(5); Part XVIII, by virtue of s.234. See also, s.176(2).] A discussion of the detailed impact of the provisions of the Property Law Act 1974-1986 on land under the Real Property Acts is beyond the scope of this Working Paper.

The Property Law Act has itself been amended a number of times since its original enactment and it is now the Property Law Act 1974-1986.

D. LEGISLATION BETWEEN 1974 AND 1986

The Real Property Act Amendment Act 1976 made no amendments of lasting significance, being concerned with administrative matters, changes to the manner of levying fees for assurance and validation of certain established practices. The Real Property Act Amendment Act 1978, involved only some
further tampering with the provisions for levy of fees for assurance of title.

The Real Property Acts Amendment Act 1979, made some significant amendments affecting caveats. A new s.30A was inserted into the Real Property Act of 1977. This, when combined with amendments to s.30, restricted the ability to use the special form of caveat to protect equitable mortgages to those mortgagees holding the documents of title. The main object of this provision appears to have been consumer protection, in that it prevented finance companies acquiring a mortgage over a borrowers house, which could be protected on the register by caveat, merely by including the necessary words of charge in the loan agreement. It had been felt that many borrowers were by this means unwittingly acquiring second mortgages over their houses when they believed they were only undertaking the obligations attaching to a personal loan. The result in terms of real property law is less than entirely satisfactory in that it restricts the ability to use the equitable mortgagees' caveat to that category of equitable mortgagees least likely to need to rely on it, since those maintaining possession of the certificate of title can rely on the decision in Just (J. & H.) (Holdings) Pty. Ltd. v. Bank of New South Wales (1971) 125 C.L.R. 546. to maintain their priority.

The 1979 amendments also added a paragraph (c) to s.101 of the Real Property Act of 1861, which had the effect of allowing a mortgagee's sale to take place unimpeded by a caveat lodged to protect a subsequent equitable mortgage.

The Real Property Act Amendment Act 1981 (No.43) made changes to ss.94 and 119 which deal with the issue of certificates of title. These sections are of largely administrative import. The Real Property Acts Amendment Act 1981 (No.67) was mainly designed to accommodate the changes in succession law made by the Succession Act 1981. The abolition of the former direct devolution of the subject of a devise to the devisee in favour of vesting of all property in the personal representative necessitated changes to s.32 of the Real Property Act of 1877. Section 88 of the 1861 Act was repealed as otiose. However, the Act also excluded the assurance fund from liability for claims in breach of trust by inserting a new s.135 into the 1861 Act, and removed a restriction of s.119(4) to cases of ten or more subdivisions.

The Real Property Act Amendment Act 1985 has already been mentioned. Section 2 inserted the new definition of mortgage into s.3 of the 1861 Act, and s.8 inserted a new s.119A which prevented easements arising from the registration of a plan alone. (See also the amendment of s.35 by s.5). Section 7 amended s.11 in order to allow the Registrar of Titles to correct patent errors in instruments and documents lodged for registration, and s.4, by amending s.11 enlarged the powers of the Registrar to inspect documents, change or correct names, simplify descriptions of parcels and cancel superfluous registrations. Section 3 made provision for the prescription of forms by regulation by inserting a new s.9A, and s.6 made provision, by the insertion of a new s. 76A, for the lodging of memoranda containing standard clause which can then be incorporated in instruments lodged for registration.

Also in 1985, s.24 of the Stamp Act and Other Act Amendment Act 1985 amended s.48 of the 1861 Act. This amendment removed the need for one of the declarations formerly required on a transfer for stamp duty purposes as a result of the previous amendment of this section by the Real Property Act Amendment Act 1980.
THE 1986 LEGISLATION

A. RELATIONSHIP BETWEEN THE LEGISLATION AND GOVERNMENT POLICY

Although the principal objective of this legislation was to amend the existing Real Property Acts to accommodate the process of computerisation of the register, the legislation also gave effect to Government policy in several specific areas, namely:

1. The issue of certificates of title in undivided shares as tenants in common in timeshare arrangements which involve such interests in the name of the developer in order to simplify the process of issuing title in such cases.

This objective was achieved by the amendment of s.40, whose original provisions were recast into subsections, and whose status relative to s.35 of the Property Law Act 1974-1986 was clarified.

The position clearly stated in the legislation now is that s.40 governs whether the legal title to property subject to co-ownership is held on a joint tenancy or a tenancy in common, and s.35 of the Property Law Act 1974-1986 governs the beneficial or equitable interest in such property. This approach conforms to the principles that ownership at law should be discoverable from searching the register and that the law favours a joint tenancy while equity favours a tenancy in common.

2. The return of cancelled deeds.

At the time the legislation was passed the process of computerisation had already resulted in the Titles Office being geared to issuing a new certificate of title at the conclusion of a transfer rather than recording a memorial on the deed and reissuing it. Furthermore, storage difficulties had necessitated the microfilming of documents preparatory to the destruction of the originals. As original deeds might possess historical or sentimental value, provision was being made in s.46A for the return of cancelled deeds, in a suitable perforated form, to their prior owners.

Section 46A also made the necessary provision for the destruction of obsolete parts of the paper register which were to be duplicated in the new computerised register, after appropriate microfilming.

Remaining amendments effected by the 1986 legislation are discussed below. In these comments, no individual reference is made to the numerous amendments of a trivial nature such as those which replaced references to the 'register book' with references to the 'register' and references to 'binding up' and 'entering' with references to 'recording'. The object of these amendments was to replace wording which was not apt to embrace a computerised register with neutral wording apt to cover both computerised and the previous manual systems of registration, since both would have to co-exist during the prolonged transitional stage.

The comments generally follow the chronological order of sections in the Act but are grouped for convenience under a number of headings where appropriate.
B. DETAILS OF THE LEGISLATION

The means by which the principal objective of the legislation was achieved is now analysed in more detail, together with other provisions of the legislation which remove otiose and outdated provisions, and some novel features.

1. COMMENCEMENT

As the Titles Office desired to make the new forms mandatory on July 1, 1986, it was provided that those sections whose entry into force was necessary to the attainment of that objective, namely sections, 8-10, 25, 30, 43 and 81, should come into force on that date, unless their commencement was postponed by a proclamation issued prior to that date. The remaining substantive provisions were to come into force on a date fixed by proclamation, which was in the event June 9, 1986 (Queensland Government Gazette, 7 June 1986, p.1103). As a result of delays the other sections dealing with the mandatory forms were not brought into force until September 1, 1986 (Queensland Government Gazette, 7 June 1986, p.1104).

2. PRESCRIPTION OF FORMS

A cornerstone of the process of computerisation of the Titles Office is the prescription of a form for every transaction, so that the registration process becomes totally ordered and logical. The key section is s.10 which provides for regulations prescribing forms, s.10(1), how they are to be completed, s.10(5), that only such forms may be lodged, s.10(2) and that registration of documents not in such form may be refused, s.10(6). Forms may be required to be submitted in duplicate or triplicate, s.10(3).

There are savings for instruments executed before the commencement of this section.

Provision was made for persons to be licensed to print forms, s.9, with a penalty of $100 for breach of this provision, s.10(7).

The regulations were framed so as not to exclude the possibility of completion of forms in legible handwriting, otherwise the pre-existing right of individuals to conduct their own conveyancing transactions could have been seriously impaired. Also, provision was made for a blank form, in order to accommodate any transaction of a novel or unusual kind not specifically envisaged in the legislation.

A consequence of these changes was that all the Schedules to the Real Property Act 1861-1985 could be repealed, together with a considerable quantity of material which related to the details of forms of instruments (see amendments to ss. 3, 56, 59, 65, 77-78).

Some concern has been expressed that the new provisions were too rigid, following the removal of those words in the definition of 'instrument' in s.3 which permitted variations from prescribed forms which did not affect the 'matter or substance'. It should be observed that s.40 of the Acts Interpretation Act 1954-1977, which permits forms to like effect in place of a prescribed form, has not been expressly excluded.

Section 10(6) has attracted somewhat similar concerns, for it has been argued that the Registrar's discretion should be to register rather than to
refuse registration. Again a provision of the Acts Interpretation Act 1954-1977, this time s.26, appears to resolve the difficulty, since it makes it clear that the use of the word 'may' imports a discretion on the part of the Registrar to exercise or not to exercise the power to refuse registration.

3. COMPUTERISATION OF THE REGISTER

The main changes required to effect this are the amendments of ss.32-35. The changes of wording, though not of substance, were so extensive that they necessitated a virtually complete redrafting.

Of particular importance is the careful definition of the exact time of registration by s.34(2), as the time when registration of the instrument is recorded in the register in the prescribed manner by an authorized person, following earlier recording of the particulars of the instrument and of the day of production. Particular care was needed in drafting this provision, since there would no longer be a physical act of marking in some way the physical certificate of title but merely the pressing of the requisite keys on a computer terminal.

Specific authority to maintain supplementary indices is conferred upon the Registrar of Titles by a new s.32A.

The new s.33(2) authorises the Registrar to retain the certificate of title where the registered proprietor is a minor, while removing references to other disabilities from the section. It is thought that where a person is suffering from a mental disorder it is inappropriate for the Registrar of Titles to be expected to act of his own volition, but rather that the provisions of s.55 and of the Fifth Schedule of the Mental Health Services Act 1974-1987 governing the administration of property of patients should be employed.

4. REMOVAL OF REFERENCES TO ENCUMBRANCES

The expansion of the definition of 'mortgage' in the Real Property Act 1861-1981 in 1985 paved the way for the removal of references to encumbrances throughout the Act. These changes affect ss. 3, 19-20, 37, 46, 48, 52, 54, 56-60, 62-63, 65-66, 68, 89, 101, 107 There is a saving for existing encumbrances in s.5(1). It is believed that any circumstance where an encumbrance has hitherto been employed can be effectively met by employing a mortgage.

Incidentally, a reference to encumbrances in s.18 has escaped repeal.

5. REMOVAL OF OUTDATED TERMS AND PROVISIONS

References to a person being 'seized' in ss. 3 and 34 were removed, and references to registration abstracts in ss.3 and 105-107 were repealed.

In a number of instances, where a section was being amended more modern terms were used. for example, in ss. 79-81,89 references to the Registrar-General were replaced by references to the Registrar of Titles. However, there remain many references to the term Registrar-General in the Act.
Section 86, dealing with transmissions on bankruptcy, was much simplified to take account of modern bankruptcy law.

Section 73, which provided for short forms of documents was repealed, because it was thought that the provision had been overtaken and rendered otiose by s.76A, added in 1985, which provides for the incorporation of provisions contained in a registered memorandum. Section 75 was repealed as probably adding nothing to the Act. Sections 74 and 76, which relate to implied covenants in general, were retained as probably still having some import, but are provisions which would more sensibly be contained in the Property Law Act 1974-1986.

6. SIMPLIFICATION

The introduction of a range of prescribed forms enabled a number of provisions to be simplified by the removal from the Act of detailed stipulations appertaining to the forms of documents. An example of such simplification is the amendment of s.78.

Also, the opportunity afforded by amendment was utilised to recast a number of provisions into numbered subsections. Sections 36, 40, 45, 46A, 56, 63, 83, 95, 108, 117 and 140 were accorded this treatment.

7. POWERS OF ATTORNEY

Apart from a considerable tidying up of ss.104-108 through the repeal of all provisions relating to registration abstracts, there were substantial changes concerning the effect of revocation of powers of attorney.

As a result of the amendments, revocation of a power of attorney has to be recorded in the register before it will prevent registration of an instrument executed pursuant to the power. Furthermore, it will only block registration where the instrument took effect after the revocation was recorded in the register. This provision is designed to protect purchasers dealing with the attorney, since they can only be expected to search the register as close as possible to settlement to confirm that no revocation has been recorded.

The reference in s.108(2) is to the time of an instrument taking effect rather than to the time of execution. This is in order to prevent an instrument gaining registration on the basis of a considerably earlier execution where settlement of a transaction, which is when a transfer, for example, takes effect, occurs after registration of a revocation of a power of attorney. In such a case it is suggested that it is inappropriate for a purchaser to be able to rely upon the validity of the power since a search of the register immediately before settlement would have disclosed the fact of revocation, and there could be a substantial time lag between execution of the relevant document and the time when it took effect.

The provision for recording of powers of attorney in the register under s.104 rendered otiose s.13 of the Real Property Act of 1877, which provided for a separate register of such powers, which was accordingly repealed.
8. MISCELLANEOUS PROVISIONS

Section 10A makes a clear statement of the authority of the Registrar to register transactions, which had previously been absent from the legislation, although such authority was clearly implied by the whole scheme of the Act.

Section 11(4) was amended in order to enable the Registrar of Titles to compel production to him of any certificate of title relating to a correction.

Requirements for advertising were altered slightly to take account of changes in society, in that the limit around Brisbane necessitating advertisement in a local newspaper has been changed to 50km, in ss.19 and 95. Also references to the newspaper being published in the locality have been altered to references to it circulating there.

Section 95 which enables the Registrar of Titles to dispense with production of documents in certain cases was amended. In the review of the Real Property Acts it was an appropriate matter for consideration whether provision should be made for payment of compensation where dispensing with the production of documents causes loss to a former registered proprietor. Section 41(1)(h) of the draft bill would appear to cover this case.

The proviso to s.109 has been deleted. This proviso made reference to a statute of the reign of Elizabeth I which was repealed as part of Queensland law by the Imperial Acts Application Act 1984. The proviso had also lost any purpose since it related to insolvency which is now governed by Commonwealth legislation.

Provisions dealing with the procedure of transfer and charge, ss.24-28 of the Real Property Act of 1877, were repealed since it was thought that transactions which might previously have employed this procedure could be carried out just as effectively and conveniently by employing a mortgage.

9. AMENDMENT OF OTHER ACTS

There were major consequential amendments to the Real Property Act of 1877, and the opportunity was taken to remove many obsolete provisions. These included, ss.19-20, 22 and 29.

There were also consequential amendments of the following Acts:

- Real Property (Commonwealth Defence Notification) Act 1929,
- Real Property (Commonwealth Titles) Act 1924,
- Real Property (Local Registries) Act 1887,
- Real Property Acts Amendment Act 1952,

The Schedule contained the formal consequential amendments of the numerous other Acts which make reference to the Real Property Acts. None of these amendments were of major significance.

In 1988 further minor amendments were effected by the Real Property Acts Amendment Act 1988. The Commission was fully consulted on this brief legislation which as well as making provision for the lodgment of documents by means of a document exchange (s.8), and simplifying the issue of
certificates for subdivision of land in some special cases (s.6),
implemented a proposal emanating from the Commission (discussed fully later
in this paper) in relation to advertising requirements which had an
immediate cost saving (ss.5,9).
CHAPTER III

THE NEED FOR REFORM OF THE REAL PROPERTY ACTS

A. GENERAL CONSIDERATIONS

While the 1986 amendments were a considerable step on the road to the goal of achieving a modern statutory framework for registration of title to land, the great bulk of the work remains. Changes to the Real Property Acts are necessary to remove outdated wording and achieve an efficient arrangement of the statutory provisions, even without making significant changes in the substance of the legislation, as well as the final stage of repealing all outstanding legislation in this area and replacing it by a single statute.

To summarise, three main elements of reform may be identified:

(a) Rearrangement and rewording of existing provisions into a modern form, including the removal of outdated or otiose provisions.

(b) Consideration of any necessary changes in the substance of the legislation.

(c) Enactment of a comprehensive modern statute.

For example, the remaining references to the 'Colony' could be replaced with more appropriate terminology, and those sections of 1861 vintage which currently consist of one long involved paragraph, or a series of unnumbered paragraphs, could be arranged into subsections. Examples of important sections currently of this nature are ss. 44, 123 and 126. Other provisions of this nature are: ss. 60, 84, 89, 104, 116, 124, 127-8, 141. Conversely, there are areas of the Act where a number of short sections can be conveniently combined into one, for example, ss. 130-134.

In addition, there are a number of specific reforms which would greatly simplify and reduce the quantity of legislation in this field, which are now considered in turn.

B. SPECIFIC REFORMS

1. REMOVAL OF OUTDATED PROVISIONS

(a) ELIMINATION OF OLD SYSTEM LAND

Apparently, the process of conversion of 'old system' land to registered title has been so efficient in Queensland that there are currently only approximately eighty remaining 'old system' titles. This does not allow for some 'old system' land vested in the Commonwealth, not having been converted. Such land does not affect the position greatly, since it is in a sense outside the Torrens system anyway in that the primacy of Commonwealth law over State law means that the Commonwealth only observes registration requirements as a matter of courtesy and convenience. Virtually all remaining parcels of old system land seem to involve some peculiarity
leading to the owners not being interested in pursuing an application to
bring the land under the Act.

Considerable inconvenience is caused to the operation of the Titles Office
by the continued existence of this land, and the cluttering of the Act with
many sections which are in practice defunct. Accordingly, it is suggested that
the time has come to take the bold step of putting an end to this nuisance
by vesting all such land in the Public Trustee to hold on trust to give
effect to presently subsisting interests, by appropriate exercise of the
powers of the Registrar of Titles under s.250 of the Property Law Act
1974-1986. It is understood that this process has been underway and was
expected to be largely completed by late 1987, but that budgetary
constraints have delayed this work. In any case the continued existence of
the last vestiges of 'old system' land does not prevent legislation being
enacted, as proclamation of the relevant provisions may be deferred to the
extent necessary, and an appropriate savings clause may be included.

Accordingly, it is suggested that sections 17-29 of the Act be repealed,
once such action has been carried out. There are a number of other
provisions sprinkled through the Real Property Acts which can also be
eliminated once there is no longer any 'old system' land left, for example,
ss.6-10 of the Real Property Act 1877-1988.

There are several reasons why Queensland is so close to the goal of
elimination of Old System land. Queensland was the 'youngest' colony, being
separated from New South Wales in 1859 and, as explained above, has one of
the 'oldest' registration statutes. Since s.15 prevented the creation of
any further 'old system' land by Crown grant, there was never very much in
Queensland. Also, the process of conversion of what there was has proceeded
more efficiently in Queensland. Perhaps, this is because the process was
spurred on by the realisation that the amount to be converted was
manageable.

When this goal is achieved, all land in Queensland will be either:

(i) Under the Torrens system;

(ii) Unalienated Crown land;

(iii) Crown land subject to under either the Land Act 1962-1987, or other
     more specific legislation such as the Miners Homestead Leases Act 1913-1986;

(iv) Vested in the Crown by right of the Commonwealth.

(b) ELIMINATION OF THE OFFICE OF MASTER OF TITLES

Queensland has been in the unusual position, as compared with other
jurisdictions enjoying a Torrens system of title registration by having an
office of Master of Titles. The Master's role has extended mainly to
vetting applications to bring titles under the Real Property Acts,
transmissions by death and applications for titles by adverse possession.
The first role has essentially ended with the completion of the process of
bringing land under the Acts, the last role is small in that there are only
about a dozen such applications a year. The second role is substantial but
to some extent involves a second guessing of the role of the personal
representative, who is subject to the separate supervisory jurisdiction of
the Supreme Court.
In June 1988, as part of a reorganisation of Government departments the new structure in the portfolio of the Minister for Lands, became that of four autonomous departments headed by:

The Director of Freehold Land Titles, a department which included the Titles Office
Chairman of the Land Administration Commission
Valuer-General
Surveyor-General

There were also to be two people in a Land Information Unit to liaise regarding the establishment of an efficient land information system. The Government's main objective in the reorganisation was the establishment of an efficient land information system.

The new department of Freehold Land Titles was made responsible for the Property Law Act and Building Units and Group Titles Act as well as the Real Property Acts.

Since the Master and Deputy Masters remained under the administrative control of the Justice Department, a temporary arrangement was immediately negotiated between acting Director of the new department, the Acting Registrar, the Under Secretary of Justice and the Solicitor-General, whereby the services of the current personnel continued to be made available.

If the role of the Master and Deputy Masters is to remain the same, it could be argued to be appropriate from the administrative point of view for them to be transferred to the new Department of Freehold Land Titles. This view is reinforced by the transfer of responsibility for the Real Property Acts, which define the role of the Master to the Minister of Lands. This would also have the advantages of greater continuity in office, particularly regarding the deputies, leading to greater development of experience. This contrasts with the current system where the post of Deputy Master is a comparatively short term posting, and liable to interruption to meet perceived pressing needs elsewhere in the Department of Justice. The argument against is that it would compromise the independence of the Master, if that were thought desirable of retention, since the Head of the Department of Freehold Land Titles is expected to also become the Registrar of Titles. Thus in case of disagreement between the Registrar and Master, resolved in the past by the Under-Secretary, with possible assistance of a Crown Law opinion, the situation is likely to be changed in that one person is playing the former roles of both the Registrar and Under-Secretary. However, Crown Law opinion can still be sought.

It has also been argued that it is better to keep the Master and Deputies within the Justice Department so that the individuals concerned have an attractive career path. This view assumes that without the possibility of promotion to other parts of the Justice Department, such positions are a 'dead-end job'. This neglects the fact that these positions would be attractive to those lawyers seeking a career in the area of real property, since they could aspire to promotion from Deputy Master to Master and to the position of Registrar or Deputy Registrar.

Retention of the former administrative status of the Master would retain an input from the Justice Department into the Titles system, but this would tend to negate the policy of allocating the Titles system to a different department.
Quite apart for the administrative position of the Master, whose determination does not require legislation, the role of the Master may be questioned. For example, it may be argued that the office of Master has outlived its role, which was once large in relation to bringing land under the Real Property Acts. Accordingly, the office could be abolished, effectively transferring its functions to the Registrar, but ensuring that the Registrar has the benefit of legal advice through the creation of a legal unit in the Department of Freehold Land Titles, staffed by qualified lawyers. This would remedy another current problem, namely the difficulties facing the Registrar in obtaining prompt legal advice. It is understood that the Master and Deputy currently partly fill this role informally, but the situation is unsatisfactory in that they receive no recognition for this in terms of career development. Obtaining a Crown Law opinion takes time and the lack of lawyers working full time on Real Property Acts problems means that there is a lack of accumulation of expertise, or ability to give quick informal advice in this area.

The office of Master does not exist in other comparable jurisdictions. However, it is often justified in Queensland on the basis that the practice is for the Registrar not to be legally qualified. However, it is to be expected that any Registrar who is not legally qualified would be sufficiently experienced in the Public Service to realise the importance of obtaining proper legal advice in appropriate cases even if there was no express obligation in the Real Property Acts to do so. A Registrar could ensure this was done in appropriate categories of instances by administrative direction.

A middle course would be to abolish the Master's current role but impose an obligation on the Registrar to obtain the advice of the principal legal officer in the department, who could well be called Master of Titles, rather than obtain approval as at present. Another middle course is to retain the current position for an interim period until the new departmental structure settles, with a view to making changes at that time.

In considering this matter, apart from the role in relation to land brought under the Act, which is no longer of importance, the Master has to approve transmissions by death to persons other than the personal representatives (s.32 of the 1877 Act). This role has also diminished following the removal of devolution direct to a devisee by the Succession Act 1981. The other areas, are the grant of titles by adverse possession (10-15 a year under 1952 Act) and correction of errors [s.11(4)].

The feeling of the Commission is that the office of Master can no longer be justified, but that the Registrar should have adequate resources in terms of legal advice. How this is furnished is to a large extent an administrative matter, but the appointment of a legal adviser to a senior position on the staff of the Titles Office, as was done in late 1988 (with this officer currently discharging the duties of the Master), who would be assisted by such Deputies as the workload would require, would appear to be a suitable method.

2. INTERPRETATION PROVISIONS

Section 3 of the Real Property Act 1861-1988, which relates to interpretation requires re-enactment as its definitions are currently not even in alphabetical order. Furthermore, the inclusion of some further definitions could shorten the rest of the Act by employing one word instead
of frequently used phrases. For example, 'Registrar' could be used to mean 'Registrar of Titles' and 'office' to mean 'office of the Registrar of Titles'.

3. POSSIBLE SUBSTANTIVE CHANGES

As to the second element of the reform many substantive changes may be proposed. While any fundamental change in the system must be a matter for political debate and resolution, technical changes may be proposed on a number of grounds.

(a) RESOLUTION OF AMBIGUITIES, UNCERTAINTIES AND DEFICIENCIES IN THE CURRENT LEGISLATION

One of these is that ambiguities and uncertainties in the legislation should be resolved. For example, it has always been unclear whether the doctrine of indefeasibility operates in favour of voluntary transferees. This matter is dealt with in Chapter V.

(b) EXCEPTIONS TO INDEFEASIBILITY

The scope of exceptions to indefeasibility, whether explicit in s.44 or implicit, has always been hazy. Is the exception dealing with the wrong description of land or of its boundaries available after a transfer for value? The only reported case dealing with this matter, Overland v. Lenahan (1901) 11 Q.L.J. 59, gives no clear indication. What is the precise scope of the 'in personam' exception to indefeasibility? Are Palais Parking Station v. Shea [1980] 24 S.A.S.R. 425, and Logue v. Shoalhaven Shire Council [1979] 1 N.S.W.L.R. 537, correct interpretations of the law? These questions could be clearly answered by suitably framed statutory provisions, and the in personam exception, clearly recognised by the courts (see Frazer v. Walker [1967] 1 A.C. 569 at 585; [1967] N.Z.L.R. 1069 at 1078) could be given explicit statutory recognition. (There is currently a degree of implied recognition through s.51 of the Real Property Act 1877-1988, although the exception clearly has an independent existence since it is recognised in jurisdictions which have no equivalent of this provision.) Some exceptions require clarification (for example, the exceptions for omitted easements and prior grants). These matters are discussed in Chapter IV.

(c) CAVEATS

A major re-examination is needed in Queensland. The lapsing caveat procedure under s.98 is being abused to put unfair pressure on registered proprietors, and a device is being employed of repeatedly withdrawing a caveat just within the three month period of validity and relodging. The procedure as it currently operates is also wasteful of Titles Office staff time. The onus needs to be placed more firmly on the caveator to commence proceedings to protect the caveat, rather than on the registered proprietor to seek to remove it, which is the current position under s.99. This could be done either by requiring the caveator to commence proceedings within a shorter period than the current three months, or by introducing a procedure whereby the caveatee may serve notice on the caveator requiring cause to be shown why the caveat remain in force within a short period such as 14 days,
after which the caveat would lapse unless court proceedings were commenced within that time. In New South Wales this remedy is adopted, in that lodging for registration of a dealing which the caveat seeks to prohibit results in notice being given to the caveator, leading to lapse of the caveat after 14 days unless a court order is obtained and notifies to the Registrar-General, Real Property Act 1900, s.73.

The issue of caveats is discussed in detail in Chapter XI.

4. NEW PROVISIONS

New provisions may be added to improve the system of registration of title. For example, provision analogous to s.79 of the Property Law Act 1974-1986, which provides for variation of mortgages may be enacted in relation to registered leases.

Loopholes in the system of compensation for loss of an estate should be removed, such as that exposed in Breskvar v. White [1978] Qd.R. 187, where the limitation period was found to operate adversely. Express provision for compensation could be made where the Registrar dispenses with production of a document under s.95, as this may be thought more likely to lead to a possibility of loss than the normal type of transaction. The difficulties associated with the decisions in Mayer v. Coe (1968) 88 W.N.(Pt.1) (N.S.W.) 549, and Armour v. Penrith Projects Pty. Ltd. [1979] 1 N.S.W.L.R. 98, which appear to unduly restrict recovery by persons suffering loss as a result of fraud where the fraudulent party does not become registered personally, could be remedied.

THE NEED FOR CONSOLIDATION

There is an obvious need for consolidation, demonstrated by the existence of ten unrepealed Acts on the Queensland Statute book containing substantive provisions dealing with the registration of title to land other than Crown land in Queensland. As each Act possesses provisions prescribing its short title, commencement, and often interpretation, there is a considerable saving in overall length when the total number of Acts is reduced.

Many provisions of the 1877 Act should logically be combined with provisions of the 1861 Act. For example, s.11 of the 1877 Act may be combined with s.44, as both sections deal with exceptions to the principle of indefeasibility of title. Sections 49,50,94 of the 1861 Act and s.17 of the 1877 Act can be combined into one section, as they all deal with the issue of certificates of title. Sections 30,30A and 36-40 of the 1877 Act relate to caveats, and should be incorporated in ss.98-103 of the 1861 Act. Section 35 of the 1877 Act should be absorbed in s.91 of the 1861 Act because both sections relate to warrants of execution. Section 18 of the 1877 Act relates to leases and so belongs with the lease sections of the 1861 Act.
As ss.1-3 and 52 automatically lose their import once the rest of the Act is repealed, one is left only with the following sections for which an independent place must be reserved in the new legislation:

Section 12 with which may be incorporated ss.14 and 15 in the same section dealing with the effective dates of instruments for purposes of priority;

Section 23 which declares that transfers may be made subject to the grant of a lesser interest by the transferee in favour of the transferor;

Section 32 relating to applications by personal representatives to be registered;

Section 46 dealing with registration of vesting orders made by the Supreme Court;

Section 47 providing for compensation for improvent by registered proprietors subsequently ejected (this provision belongs with the remedies sections 123-126 of the 1861 Act, although it may be felt that it is unnecessary since the Court would have inherent jurisdiction to compensate for such matters);

Sections 48-49 relating to the status of registrable but unregistered documents;

Section 51 preserving equitable jurisdiction.

Similarly, the provisions of the following Acts:

Real Property (Commonwealth Defence Notification) Act 1929,
Real Property (Commonwealth Titles) Act 1924,
Real Property (Local Registries) Act 1887,
Real Property Acts Amendment Act 1952,
Real Property Acts Amendment Act 1956-1974,
Real Property Act Amendment Act 1976,
Real Property Act Amendment Act 1978,
Real Property Acts Amendment Act 1979,

may be absorbed in a single enlarged Real Property Act. Since most of these Acts are comparatively short a high proportion of their total length consists of such matters as commencement, short title etc. sections which disappear on consolidation. They also include a number of outdated provisions.

Consolidation would also greatly reduce the total quantity of such legislation. For example, the Real Property (Commonwealth Titles) Act 1924, may be reduced to one section of the new legislation (see s.30 of the draft bill).

This would not make the new Real Property Act a code of all matters relating to land registered under the Torrens title system. There are, for example, many provisions in the Property Law Act 1974-1986 which apply to all land in the State. In the Report of the Law Reform Commission on the Bill which eventually became that Act, (Law Reform Commission Working Paper No.10, QLRC W.P.10), it was recommended that certain provisions in the Real Property Acts should be repealed and re-enacted in the Property Law Act, on the ground that they applied or should apply to land of all kinds. The comment was made that this would leave the Real Property Acts to serve their primary
function as a title registration and conveyancing statute concerned with effecting land transfer and registrations.

Even within this restricted sphere the Real Property Acts do not provide comprehensive legislation. For example, the Building Units and Group Titles Act 1980–1986 contains provisions governing to the registration of transfers or leases of common property. This legislation could with some justification be incorporated into a revised Real Property Act, and that course has been adopted in South Australia, where an extensive Part XIXB, entitled 'Division of Land by Strata Plan and Titles to Units Created thereby' was added to the Real Property Act of 1886 in 1967. However, it has been considered undesirable to follow that course here, since it would lead to the inclusion in the Real Property Act of matters which are essential to the operation of a building units and group titles scheme (such as the duties, powers and administration of a body corporate) but which are remote from the general object of a land registration system.
CHAPTER IV

INDEFEASIBILITY OF TITLE

In this chapter, all aspects of the concept of indefeasibility of title are examined, with the exception of issues relating to the position of volunteers, which are examined in Chapter V.

In Breskvar v. Wall [1971] 126 C.L.R. 376, Barwick, C.J. referred to the following provisions of the 1861 Act, which are generally regarded as key provisions with regard to the concept of indefeasibility:

s.33: Certificate of Title (not to be impeached or defeasible for want of notice).

s.96: Registered proprietor bringing acting for specific performance.

s.125: Registration as proprietor to be equivalent to possession.

s.123: No action for ejectment except in cases mentioned.

s.44: Estate of registered proprietor paramount.

The Chief Justice then said:

"These sections are to my mind central to the Torrens system of title by registration: they make the certificate conclusive evidence of its particulars and protect the registered proprietor against actions to recover the land, except in the specifically described cases. Section 44 complements these provisions by providing that the registered proprietor holds the land absolutely free from all unregistered interests except (a) 'in the case of fraud' - which means except in the case that the registration as proprietor was obtained by the proprietor's own fraud - see Assets Co. Ltd. v. Mere Roihia, [1905] A.C. 176; (b) in the case of a proprietor claiming the same land under a prior certificate of title or under a certificate of title issued under Pt. III of the amendment of the Act in 1952, i.e., a certificate based on a possessor title, or under a prior registered grant; (c) in the case of right of way or other easement omitted from or misdescribed in the certificate of title and (d) in the case of the wrong description of the land or of its boundaries. The substantial correspondence of these exceptions to the exceptions to s.123 is readily observed, though the correspondence clearly enough is not complete".

He continued (at p.70):

"The opinions held in some places in the past that the conclusive quality of the certificate of title did not ensure for the benefit of a registered proprietor, other than the proprietor firstly registered on the land being brought under the provisions of the Real Property Act seem to me to be more than difficult to maintain in the light of the provisions to which I have referred but, in any case, they were shown to be untenable by the decision of the Privy Council in Assets Co. Ltd. v. Mere Roihia and Frazer v. Walker."
This approach to indefeasibility was applied again by the Full Court in Rockhampton Permanent Building Society v. Petersen (No.2) (1988) Q.L.R. 176 (5 Mar. 1988), where it was held that a mortgage in breach of the Society's powers was nevertheless enforceable against the mortgagor.

Since the principle of indefeasibility derived from these disparate sections of the legislation has assumed cardinal importance in the Torrens system in every jurisdiction in which it was enacted, it is appropriate in any consolidation of the Real Property Acts to reconcile and collect together these provisions into a number of adjacent sections.

A number of submissions have raised issues which relate to the operation of the provisions on indefeasibility of title. None of these have called in question the desirability of continuing to abide by the "immediate indefeasibility" approach as laid down by the Privy Council in Frazer v. Walker [1967] 1 A.C. 569 and adopted by the High Court in Breskvar v. Wall [1971] 126 C.L.R. 376.

The principle laid down by these cases is that a registered proprietor who acquires his interest under a void instrument obtains in the absence of fraud an indefeasible title on registration. The New Zealand Property Law and Equity Reform Committee conducted an inquiry into the question whether the principle of immediate indefeasibility should be retained or the principle of deferred indefeasibility as stated by the majority decision in Clements v. Ellis (1934) 51 C.L.R. 217 should be adopted. It concluded that "no compelling case had been established for changing the law relating to indefeasibility of title as stated in Frazer v. Walker". In Australia, the reasons which led to this conclusion are fortified by the consideration that any change to adopt the principle of deferred defeasibility would introduce a basic departure from the system applied in all the states and territories. Uniformity in this respect should not be sacrificed without strong justification.

EXCEPTIONS TO THE PRINCIPLE OF INDEFEASIBILITY

The structure of this part of the paper is that, after an outline of the general considerations regarding exceptions to the principle of indefeasibility, the existing exceptions, both statutory and non-statutory are analysed. Proposed changes were outlined in a brief Discussion Paper circulated previously. The position of volunteers as a possible exception is not discussed since this has been dealt with in a separate paper.

GENERAL CONSIDERATIONS REGARDING EXCEPTIONS TO INDEFEASIBILITY

The principle of indefeasibility or paramountcy of title is central to the Torrens system of registration of title to land. The measure of indefeasibility is the degree to which exceptions to this principle exist. Any system of registration of title must by its nature provide for the state of the register to be to some extent conclusive as to the entitlement to interests in land. Equally, it is inevitable that there be some exceptions.
Systems of registration in different jurisdictions may be ranked according to the degree to which exceptions to indefeasibility are permitted; in other words, the degree to which the conclusiveness of the state of the register is compromised. Fraud is a universal exception. It exists in the systems of registration of title to land in Germany, which generally provide for very few exceptions to indefeasibility.

Within Australia, the extent to which the principle of indefeasibility is watered down by exceptions varies from state to state. For example, Victoria provides that all easements are exceptions [see Transfer of Land Act 1958 (No.6399), s.42(2)(d)]; a situation not greatly different from that operating under the English system of registration where there are numerous overriding interests.

The extent to which exceptions are permitted is matter of both justice and policy. In determining whether a particular exception should be permitted, one must balance the additional compromise of the integrity of the register and the possible inconvenience to purchasers by admitting the exception against the injustice and loss to the party who forfeits an interest through not admitting it. The weight to be given to purchasers' interests against those of holders of existing interests which may be overridden as a result of the operation of the principle of indefeasibility is a matter whose determination is ultimately a matter of policy.

EXISTING EXCEPTIONS TO INDEFEASIBILITY

EXpressly Contained within the Real Property Acts

Section 44 of the Real Property Act 1861-1988 is the central provision in relation to the system of indefeasibility of title. It makes the estate of the registered proprietor paramount except in the case of fraud over unregistered interests with three other specific exceptions:

(a) the estate or interest of a proprietor claiming the same land under a prior certificate of title or a certificate of title issued under Part III of the Real Property Act Amendment Act 1952, which deals with cases of adverse possession or a prior grant registered under the provisions of the Real Property Acts;

(b) the omission or misdescription of any right of way or other easement created in or existing upon the same land; or

(c) the wrong description of the land or of its boundaries.

This list of exceptions to the paramountcy principle is not exhaustive. Another statutory exception is short term unregistered leases, provided for by s.11 of the Real Property Act 1877-1988.

The statutory exceptions to indefeasibility contained in the Real Property Acts will now be analysed in more detail.
FRAUD

This exception is critical and requires special consideration. The term "fraud" or its derivatives such as "fraudulent" appears in ss. 44, 109, 123, 124 and 126 of the Real Property Act 1861-1988. However, the Acts do not state what fraud is except to show negatively in s.109 that mere notice, actual or constructive, of a trust or unregistered interest is not in itself fraud.

Although the fraud exception has been discussed in a considerable number of cases its precise ambit is still uncertain. The main aspects of this exception which have been settled by case law are illustrated in the following cases.

In Assets Co. Ltd. v. Mere Roahi [1905] A.C. 176, at p.210 the Privy Council took the following view of fraud in the context of the New Zealand Torrens legislation:

"... by fraud in these Acts is meant actual fraud, i.e. dishonesty of some sort, not what is called constructive or equitable fraud. Further it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under an Act be certified under the Native Lands Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon."

"The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shown that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him." (At p.12).

Clearly there is a requirement that the fraud be that of the registered proprietor whose title is sought to be impeached by virtue of the exception or, alternatively, that it be "brought home to him or his agents". Consequently, employing an agent who commits fraud on one's behalf appears to be enough.

The fraud involved may be of any type and is not limited to, for example, a case of misrepresentation. This was made clear in Latec Investments Ltd. v. Hotel Terrigal Pty. Ltd. (1966) 39 A.L.J.R. 110, where Kitto, J. said at p.112:

"... we were invited to hold that nothing is fraud in the sense which is relevant under the Real Property Act unless it includes a fraudulent misrepresentation. The whole course of authority on his branch of the law is to the contrary. Moral turpitude there must be; but a designed cheating of a registered proprietor out of his rights by means of a collusive and
colourable sale by a mortgagee company to a subsidiary is as clearly a fraud as clearly a defrauding of the mortgagor as a cheating by any other means."

The view that fraud by an agent is sufficient is strongly supported by the decision in Australian Guarantee Corporation Ltd. v. De Jager [1984] V.R. 483 where a mortgage document purported to be executed by a husband and wife as joint proprietors but in fact the wife's signature was forged. The mortgagee did not know that the signature was a forgery but one of its employees purported to attest the signature in the absence of the wife. The wife defended an action by the mortgagee for possession and in a concurrent action sought indemnity under the Transfer of Land Act 1958 (Vic.), Pt. VI.

The court held inter alia:

(1) The action of the mortgagee, in allowing the instrument of mortgage to go forward for registration knowing that it had not been signed by an attesting witness who was present when one of the registered proprietors had (apparently) signed the instrument, amounted to fraud within the meaning of s.42 of the Transfer of Land Act 1958. The mortgagee's title, therefore, did not prevail as an encumbrance over the wife's interest as joint proprietor of the land.

(2) The lack of a signature of an attesting witness to an instrument to be registered under the Act is not a mere formal irregularity.


The facts in this case were that E. was the registered proprietor of land in Malaysia.

From 1909, Loke Yew held part of this holding under unregistered documents in the Malay language giving title "for ever". In 1910, G. of the Port Swettenham Rubber Co. negotiated with E. for the purchase of the land held by E. at a price which clearly took account of and excluded the value of Loke Yew's holding. G. assured E. that the company would not disturb Loke Yew in his possession and, on the faith of these assurances, E. agreed to sign a transfer under the Torrens system operating in that jurisdiction of his whole holding, including the part occupied by Loke Yew.

After this was registered the company brought ejectment proceedings against Loke Yew. Loke Yew counterclaimed for a declaration of his interest and a consequential transfer.

It was held that the respondent company had obtained the transfer from E. by fraud and misrepresentation, and accordingly restored the order of the primary judge that the Port Swettenham Rubber Company execute and deliver to Loke Yew a transfer of the land held under his Malay document.

The Privy Council further held that where fraud is proved against the registered proprietor and no third party rights have intervened, the Court has the power and the duty to direct rectification of the register (at pp.504-505).
In Queensland powers equivalent to those canvassed by the Privy Council are expressly given to the Supreme Court by ss.124 of the Real Property Act 1861-1988. However, it is worth noting that the Privy Council preferred to make an order with the effect that Port Swettenham Rubber Co. Ltd. should give a registrable transfer of the relevant land to Loke Yew rather than a simple order to correct the Register.

This leads Baalman to suggest (See "The Torrens System" at p.428) that when the Court finds the registered proprietor is fraudulent an order for execution of appropriate dealings is the correct order when registration is obtained pursuant to a dealing which is voidable rather than void ab initio. However, when the dealing is void ab initio then the appropriate course is to issue an order for rectification of the Register.

The leading authority on the question of fraud in the Full Court, and one which makes a nice contrast with the preceding case is Friedman v. Barrett, ex parte Barrett [1962] Qd.R. 498 (Full Court: Mansfield C.J., Stanley J., Gibbs J.).

The facts were that E. was the registered proprietor of premises at Burleigh Heads which were leased by B. from E. for 3 years under an unregistered lease which contained an option for renewal for a further 3 years. F purchased E.'s interest and became registered proprietor of the fee simple during B.'s first 3 year term.

F. knew of the lease and of the option in it but there were no representations or undertakings between F and E as to B's position under the lease. When the first 3 year term expired B sought to exercise the option as against F, but F refused to recognise the option.

The Supreme Court held:

(a) that ss.11 and 18 of the 1877 Act protect only the actual term of a 3 year lease and not any options contained in the lease;

(b) the option for renewal could not be exercised successfully by Barrett against Friedman unless Friedman had actually acted in fraud of Barrett in obtaining registration. Were knowledge or notice of Barrett's option was insufficient to bring fraud home to Friedman. Accordingly, Barrett could not exercise his option. (See Mansfield C.J. at p.504; Gibbs J. at p.512.

The current position regarding the fraud exception may be summarised as follows:

(a) Notice by itself is not fraud. (s.109 of the 1861 Act, Friedman v. Barrett).

(b) Fraud means actual dishonesty of the registered proprietor or an agent or other person for whose actions the registered proprietor can be held to be responsible. (Assets v. Mere Roihi).

(c) The title of the registered proprietor who is registered through fraud is a legal interest although it is defeasible under the provisions of the Real Property Acts. (Breskvar v. Wall).
The appropriate procedure to divest the fraudulent registered proprietor depends on the circumstances of registration.

(i) If through a voidable instrument, for example a regular but fraudulently obtained transfer, the appropriate order appears to be one directing the fraudulent registered proprietor to execute a transfer in favour of the defrauded party.

(ii) If through a void instrument, for example a forgery, the appropriate procedure is for the court to direct rectification of the register pursuant to s.124. (Loke Yew v. Port Swettenham Rubber Co. Ltd.)

The Commission considered whether greater guidance to the meaning of fraud should be furnished in the legislation and determined that if it was desired to include an inclusive definition that the following provision would be appropriate:

"'fraud' includes proceeding in a transaction with knowledge that it is affected by fraud, but does not include merely proceeding in a transaction with notice of an interest which will be defeated by the registration of an interest pursuant to that transaction."

However, after consultation with practising solicitors the Commission was of the view that it was better to leave the definition of fraud to be a matter for the courts to decide.

ESTATE OR INTEREST OF A PROPRIETOR UNDER PRIOR CERTIFICATE OF TITLE

There are not many cases dealing with this exception.

In Deekers v. Merry (1872) 2 Q.S.C.R. 193, R purchased land, registered the title and obtained a certificate of title. In 1870 M purposed to purchase from the A.M.P. Society a corner piece of this land. R had mortgaged the whole of it to L, who subsequently died, leaving the plaintiff, O, his executor. Default was made in payment of principal and interest. M obtained a certificate of title from the Registrar; he did not ask the A.M.P. Society for a certificate, or for any title at all, as he brought it under the Real Property Act 1861.

Two certificates were, therefore, in existence for the portion of the land in dispute. O brought an action of ejectment against M, claiming as mortgagee under a prior certificate of title issued to R. It was held that if a purchaser bona fide for valuable consideration, as M was found by the jury to have been, purchased from a registered proprietor he would be protected under s.126 against the action, but the title of the A.M.P. Society to this piece of land not having been brought under the Act, and they not having obtained a certificate of title, M was not protected by the proviso.

In Registrar of Titles v. Esperance Land Co. (1899) 1 W.A.L.R. 118, by error in the titles office a certificate of title issued upon a transfer to S, a purchaser of the balance of a block of land, was made to include a portion of the block which had already been transferred to another purchaser, and
which was included in another certificate of title. S, without knowledge of
the error, sold to E Co., which, also without notice, became registered as
proprietor of the whole block. The error being subsequently discovered, the
Registrar of Titles called upon the company to bring in the certificate for
rectification, which the company refused to do.

Application was then made to a judge in Chambers, who referred the
application to the Full Court. There it was held that the Registrar was
entitled under s.76 of the Transfer of Land Act 1893 (W.A.), to have the
certificate delivered up for rectification, and that the company was not
within the protection of s.202 as bona fide purchasers for valuable
consideration.

In Medical Benefits Fund of Australia Limited v. Fisher [1984] 1 Qd.R. 606,
certain land owned by three proprietors as tenants in common was sold to F,
the defendant. In place of the three original certificates of title, the
Deputy Registrar of Titles issued a single fresh certificate to F. This
fresh certificate omitted any record of a registration memorial of a lease
of portion of the property which the previous owners had granted to the
plaintiff, M. The lease had been for three years and gave M three
successive options of renewing the lease each for a further term of three
years, and had been registered and was noted on the original certificates of
title. The lease had expired and been renewed once by M.

An application was made by M for an injunction to restrain F from attempting
to regain possession and from taking proceedings in derogation of M's rights
deriving from the lease which was originally registered.

It was held that, in accordance with s.44 of the Real Property Act
1861-1981, F now held her certificate of title "absolutely free" from all
interests not notified by entry of memorial on that folium of the register
book, which interests included that of M.

The situation in this case is clearly distinguishable from that in the other
two quoted cases dealing with this exception in that there was only one
valid and subsisting certificate of title in existence. McPherson J.
adopted the view (see p.610) that this exception must be confined to
circumstances where the claim is made under a subsisting certificate of
title, so that it is relevant only where there are two certificates of title
extend in respect of the one piece of land. In adopting this approach,
McPherson J. was following the decision in Canadian Pacific Railway Co. Ltd.
v. Turta [1954] S.C.R. 427, where the Supreme Court of Canada had so
pronounced in a case arising in Alberta.

Registrar of Titles v. Esperance Land Co. (1899) 1 W.A.L.R. 118, is a
classic illustration of the circumstances in which this exception is
applicable. Interestingly, there is no explicit consideration of s.68 of
the Transfer of Land Act 1893 (W.A.), which is the provision (equivalent to
s.43 of the Real Property Act 1861-1988), which defines the exception for "a
proprietor claiming the same land under a prior registered certificate of
title", since the case centred on the right of the
Registrar-General to require the certificate issued in error to be delivered up for cancellation under s.76. In this connection it may be observed that there is no direct equivalent of s.76 in Queensland, since s.130 of the 1861 Act is limited to cases where the certificate of title is "fraudulently or wrongfully obtained".

Accordingly, it is recommended that s.130 be suitably amended.

The decision in Oelkers v. Merry (1872) 2 Q.S.C.R. 193, indicates that the effect of s.126 may be to deprive a registered proprietor of the benefit of this exception, although the decision may be limited in its import to cases involving the first registered proprietor after the land was brought under the Real Property Acts. It is suggested that this possible effect of s.126 should be eliminated in the consolidation, intimated above, of all the provisions of the Real Property Acts relating to indefeasibility. Cases under this exception almost always involve fault on the part of the Titles Office so the only just solution is for one registered proprietor to keep the land (preferably the one holding under the prior certificate of title, since this is the apparent intention lying behind the exception), and the other to be compensated out of the assurance fund.

The only other matter requiring clarification in the terms of this exception is the question of which of two conflicting certificates of title is to regarded as the "prior" certificate of title. In a simple conflict where a certificate is issued conflicting with an earlier certificate which is still extant, the conflict is easily resolved in favour of the earlier in time. However, the situation may be complicated in that transfers of interests may result in the issue of a fresh certificate of title in place of the original certificate. On one view this would disturb the order of priority, although logic would demand that once a priority between the two conflicting interests is established on the emergence of the conflict it should not be reversed as a result of subsequent transfers.

For example, a certificate of title in respect of land may be issued to A in 1970, a conflicting certificate to B in respect of the same land in 1972. A's interest then has priority by virtue of this exception. However if A transfers in 1974 to C who is registered and issued with a fresh certificate of title it could be argued that B's certificate is then "prior" in time. Similarly, if B transfers to D in 1976, on this view, the priority is reversed again. Logic demands the order of priority established by this exception on the coming into existence of the conflict between two subsisting certificates of title should not alter in this way dependent on nothing but the vagaries of the times at which respective interests come to be transferred, so that A's certificate having originally enjoyed priority, the interests derived out of that certificate should continue to enjoy priority.

Whalan (The Torrens System in Australia, at p.319) after reviewing the case law in respect of this exception, recommends that all other Australasian jurisdictions follow the lead given by Tasmania with the enactment of s.40(3)(b) of the Land Titles Act 1980 in legislation to resolve this doubt. Suitable provisions have been included in s.39 of the draft bill (see Appendix Part 1) to clarify the scope of this exception to indefeasibility.
This achieves the stated objective while making exceptional provision for
the case where there is a failure to appropriately cancel a certificate in
respect of part of the land comprised therein on a transfer of that part.
The reason for this exception is that justice clearly demands that the
registered transferee gain priority in such a case.

It should be borne in mind that the new procedures being adopted at the
Titles Office mean that eventually on every transaction being registered a
fresh certificate of title will issue, as opposed to the previous situation
where a new certificate tended only to be issued where there was a
subdivision or the reverse of the certificate was so cluttered with
memorials and notations that there was no alternative, or the registered
proprietor so requested. This means that the problem of alternation of
priority which this provision is intended to prevent could become more
common.

Cases involving this exception only arise where there has been some error in
the Titles Office or in the Lands Department on the issue of new Crown
grants. Mercifully, such errors are few, and can be expected to diminish in
the future as a result of computerisation and certain of the changes in
practice of the Titles Office associated therewith. The land information
project linking up by computer all land information held by the government
should assist in making the system watertight.

Partial cancellation of deeds, where part of the land comprised in a
certificate of title is sold is the procedure most likely to give rise to
this kind of error (see s.50 of the Real Property Act 1861-1988). The new
procedures being adopted at the Titles Office mean that there will
eventually be no such process, since on every transaction being registered
fresh certificate of title will issue. Since this will involve the
reproduction of stored data from the computer, the scope for errors being
introduced should be much reduced if not eliminated.

The completion of the process of registration will mean that the scope for
error on new registrations will be eliminated, save where there are new
Crown grants. There is another problem in relation to these in that while
there is a provision for claiming compensation (s.128) where loss is
occasioned by error in the Titles Office, there is no equivalent provision
in relation to the Lands Department. Accordingly, it is recommended that
the provisions of s.128 be extended to cover errors by other Government
bodies such as the Lands Department which affect registered title.

Another difficulty in connection with this exception to indefeasibility is
the lack of compensation available to the defeated purchaser. This is a
matter requiring remedy and is discussed in relation to the general question
of assurance below. [See Miller v. Davy (Registrar-General of Land) (1889)
7 N.Z.L.R. 515].

The relationship between this exception and that relating to wrong
description of land or its boundaries should be borne in mind, and so the
comments made in relation to that exception regarding the importance of plan
examination are of equal pertinence in relation to this exception.
WRONG DESCRIPTION OF LAND OR OF ITS BOUNDARIES.

The leading case on this exception in Queensland is Overland v. Lenehan (1901) 11 Q.L.J. 59.

Plaintiff and defendant claimed to be registered as proprietors of the same land.

Griffith, C.J. said:

"It is clear, therefore, that if it is made out that the description of the land or of the boundaries of the land as set out in a certificate of title is erroneous, the erroneous description is not conclusive. This proposition assumes that the identity of the land in question is not necessarily to be determined by a mere literal application of the description contained in the certificate to the locus in dispute. It assumes further that if the identity of the land is clearly ascertained an error in the description of the land or its boundaries may be disregarded. Section 123 of the same Act provides, in effect, that a man deprived of land by a wrong description of the land or of its boundaries is not precluded from asserting his title by action of ejectment and s.124 provides that in such a case the Court may direct the instrument of title to be rectified. It obviously follows, I think, that an error in description of boundaries cannot be relied upon to displace the title, otherwise good, of a person in possession of land erroneously included in the title".

Accordingly, Griffith C.J. had held that extrinsic evidence is admissible to show the identity of land intended to be included in a certificate of title and that s.44 does not operate to confer a right to retain land included by an erroneous description in the certificate of title.

The report of this case is unclear as to whether the exception is operable against a subsequent transferee. Doubts over this are said to arise through the concluding words of s.126 which, it is argued, differentiate this exception from others such as those relating to fraud and to omitted easements. It may be appropriate to resolve this doubt by legislation. To the extent that Overland v. Lenehan can be regarded as an authority on this issue it seems to suggest that the exception is unqualified since there is no reference to a bona fide purchaser for value not being subject to it. One passage (at p.64) seems particularly to support this view: "...I fail to see how this ... could give the mortgagees or the purchaser from them a title to any more land than was comprised in their mortgage."

Other jurisdictions, apart from Tasmania and New Zealand resolve this issue by express provision in the exception itself. There is no authority on this point in Tasmania, where the provisions are similar to Queensland, but in New Zealand the exception was limited so as not to be operate against bona fide purchasers for value in Zachariah v. Morrow and Wilson (1915) 34 N.Z.L.R. 885. Whalan (The Torrens System in Australia, see p.320) favours this view, but recognises the difficulty that it conflicts with the situation under the overlapping exception for prior certificates of grant which has been held to operate against subsequent registered proprietors for value [see Registrar of Titles v. Esperance Land Co. (1899) 1 W.A.L.R. 118, the lack of compensation available to the defeated purchaser is
matter requiring remedy and is discussed in relation to the general question of assurance below, Miller v. Davy (Registrar-General of Land) (1889) 7 N.Z.L.R. 515).

A particular difficulty is that there appear to be no other cases in Queensland dealing with this exception so as to provide elucidation. However, there are cases dealing with the similar exception in other States.

In Marsden v. McAlister (1887) 8 L.R. (N.S.W.) 300, M. obtained a certificate of title to land under the Real Property Act 1862 (N.S.W.). Some years after it was discovered that a portion of the defendants' land was, owing to a mistake made in the survey, included in the certificate issued to M. The defendants claimed the land under Crown grant and various deeds of a date prior to the issue of the certificate to M. The plaintiffs, in an ejectment action, devisees of M., claimed that under the Real Property Act, s.33, the certificate issued to M. was conclusive evidence of his ownership. It was held, that the present case came under s.115(5) of the Real Property Act and the plaintiffs were therefore not entitled to succeed. It should be observed that this was not a case where there had been a transfer for value from M.

As a sequel to this case, in Hamilton v. Iredale (1903) 3 S.R. (N.S.W.) 535, it was held that there is no "wrong description of parcels or of boundaries" within the meaning of s.42(c) of the Real Property Act 1900 (N.S.W.) where the description in the application for the certificate and in the certificate of title includes only the land in respect of which the application was intended to be made.

It was said that a wrong description is where an applicant intending to describe Blackacre, describes Whiteacre, or so describes Blackacre as to make it include Whiteacre. It was not wrong description where the applicant correctly described the land he is applying for, though the land is not his. It was then a case of no title, and the efficacy of the certificate of title depends upon the bona fides of the applicant. The decision in Marsden v. McAlister (1887) (supra) was not to be extended.

In Michael v. Onisiforov (1977) 1 B.P.R. 9356, it was held that:

(1) In the case of a certificate of title issued upon a primary application there is a wrong description of parcels or boundaries within the meaning of s.432(c) of the Real Property Act 1900 (N.S.W.), only if by reason of the description a portion of land is included in the certificate which the applicant did not intend to have included.

(2) (Semble, s.42(c) of the Act applies not only to primary applications but to all cases where land is included in a certificate of title by wrong description of boundaries.

(3) Where inclusion by wrong description has occurred upon transfer of part of the land in a prior certificate of title, s.42(c) only applies if neither the transferor nor the transferee intended that the portion of land in question should be included in the certificate of title.

(4) The court must be satisfied of such lack of intention to the same extent as it would require to be satisfied in a rectification suit.
In Re Mallen (1892) 25 S.A.L.R. 34, M. was the registered proprietor in fee simple of five allotments of land. A public house stood on lot 1. Stables and outbuildings appurtenant were on a portion of lot 2, which was comprised in the certificate of titles of lots 3, 4 and 5 to the defendant, and M.'s agent prepared a transfer of the land including in mistake the portion of lot 2. The transfer was signed and registered. M. discovered the mistake, lodged a caveat, and filed his petition for an order to rectify the mistake. It was held that:

(1) The petitioner was entitled to portion of lot 2 in fee simple free from encumbrances.

(2) It was erroneously included in the transfer.

In National Trustees, Executors Co. v. Hassett and another [1907] V.L.R. 404, A. and B. were adjoining land-owners, a portion of A.'s southern boundary which on the Crown grants was shown as a straight line, forming the northern boundary of B.'s land. A boundary fence was created which was slightly to the north of the straight line between A.'s south-east and south-west corners. A. then applied to have his land brought under the Transfer of Land Act 1958, and, owing to errors in survey and to statements in the application as to the extent of occupation, obtained a certificate of title which showed him to be entitled to portion of the reserve on the south of the boundary fence, which portion B. had occupied originally under his Crown grant, and had continued to occupy for over thirty years.

Subsequently, B. applied to have his land brought under the Act, but owing to errors in survey the certificate issued did not accord with his occupation, though it possibly included the land in dispute in this action, which had previously been included in plaintiff's (A.'s successor in title) certificate. B. applied to have the certificate amended so as to accord with his occupation, and to show that part of his land abutted on the road.

It was held that the land to the south of the boundary fence had been included in A's certificate by a wrong description of parcels or boundaries, and that B. was entitled to have his application granted.

Where by an error in survey, land under the general law owned and occupied by B. is included in a certificate of title issued to A., A. does not thereby acquire any estate or interest in such land.

Where a plaintiff alleges that he is seised in fee simple of certain lands, and uses a certificate of title to prove it, it is open to a defendant who has simply denied the allegation in his defence to show that the certificate is not conclusive, owing to the land in question being included therein by wrong description of boundaries.

Where the same piece of land is included in two certificates of title, ordinarily the prior certificate is conclusive, but this is not so where the land has been included in the prior certificate through a wrong description of boundaries, or where the holder of the subsequent certificate has acquired rights to it by adverse possession before the issue of the prior certificate.
This case illustrates that many of the cases under this exception relate to the bringing of land under the Torrens System, so it could be argued that the exception is now otiose. There is a clear potential overlap with the exception for prior certificates of grant.

However, it is felt to be somewhat risky course to abolish either or both of these exceptions, particularly, given recent expression of concern at the accuracy of boundaries by the Surveyors Board of Queensland. It should be remembered that although the conversion of old system titles is virtually complete, land continues to be brought under the Act through the continual process of grant of Crown land.

It is worth observing that some systems of registration of title, for example, that operating in England, do not guarantee boundaries. In contrast, the Torrens system does guarantee boundaries in the sense that the details contained in the register may be taken to be conclusive in that regard. In this context, this exception from indefeasibility may be seen in as a minor blurring of the guarantee of title as regards boundaries.

A justification for the exception is that in a situation where titles are issued to adjoining landowners A and B and there is an error so that some of the land which should have been included in A's title is included in that of B, until and unless a third party acquires from B in reliance on the state of the register there is no injustice in rectifying the register against B. The exception permits this to be done. In its absence, the assurance fund would be obliged to compensate A, or A's successor in title. It is submitted that it is not in the public interest for compensation to be payable in such a case. Different considerations apply where B has transferred, but even in such a case it is arguable that the rectification of the register should result in payment of compensation only where B's successor in title has relied upon the inclusion of the additional land on the register. For example, where B dies and D inherits, unless D has in some way relied upon the title to the additional land, say in order to build, there is no valid justification for compensation.

It is suggested that this exception should be retained but the remedies against the fund where it operates should be more clearly defined. In this regard, it may be appropriate to order compensation in favour of the party in the position of A in the above example rather than rectify the title in some cases, such as where a successor in title of B has built on the affected land. The draft provisions in relation to compensation will form part of the provisions drafted to deal with the general question of assurance.

NATURE OF GUARANTEE AS TO BOUNDARIES

Problems sometimes arise as a result of destruction of boundary marks. There is some evidence that this is becoming more common, partly as a result of modern agricultural practices. One proposal which has emerged to ameliorate the situation is the enactment of provisions equivalent to ss.308-310b of the Local Government Act 1934-1975 (S.A.), so that a resurvey would no longer require the consent of all affected registered
proprieters. This might be regarded as an erosion of the rights of registered proprietors.

In connection with the general question of retaining the integrity of boundaries it should be borne in mind that the primary concern of the Titles Office in plan examination is to ensure that any plans submitted for registration are consistent with the existing state of the register and the transaction sought to be registered. In other words, that no overlaps, duplications or voids are created, so that the 'jigsaw still fits'. In relation to this concern, plan examination in the Titles Office is essential.

The exceptions to indefeasibility in relation to wrong description of land or of its boundaries and prior certificates are appropriate to deal with such overlaps, where they are created through error in relation to registration and should be limited to such cases. Where a surveyor makes an error so that the plan is drawn incorrectly, but is registered because it is still consistent with the register, it should be a matter of liability of the surveyor to his client and not a matter involving the assurance fund. It may be necessary to rephrase these exceptions to make this matter clear.

Apparently, suggestions have come from surveyors and their organisations to the effect that there should be a time limit of twelve months placed on the validity of plans in connection with registration of title. There appears to be no reason for this from the point of view of preserving the integrity of the register.

OMISSION OR MISDESCRIPTION OF RIGHT OF WAY OR OTHER EASEMENT.

Australian Hi-Fi Publications Pty. Ltd. v. Gehl [1979] 2 N.S.W.L.R. 618, was concerned with the New South Wales equivalent of this exception.

An owner of land under the Real Property Act 1900, subdivided it into two lots. On lot 1 was a block of shops and on lot 2 an office building. The owner sold lot 1. At this time the circumstances of the use of the lots and of the sale were such that at common law an easement in favour of the lot sold over the lot retained by the owner would have been implied as necessary for the reasonable enjoyment of the lot sold under the doctrine that a grantor of part of his land cannot so use land which he retains as to derogate from his grant. Subsequently the owner sold lot 2 to another transferee. No notion of the easement appeared on the certificate of title of either lot. The owner of the lot sold claimed to be entitled to such an easement.

It was Held that:

(1) The easement claimed was not an implied exception to the operation of s.42 and other relevant sections of the Act.

(2) Paras. (a), (b) and (c) of s.43(2) look to some defect in the operation of the system of registration of title under the Act, and, at least primarily, its operation by the Registrar-General. "Omission" in s.42(b) is to be given a corresponding meaning, the meaning which it has
been given in s.127. Accordingly, the easement claimed was not enforceable as against the retained land in the hands of a registered proprietor who had acquired it without fraud.

In a more recent case, Papadopoulos v. Goodwin [1983] 2 N.S.W.L.R. 113, it was held that:

(1) The provisions of the Real Property Act impose a sufficient duty on the Registrar-General to record an easement on the folio of a servient tenement to make his failure to do so an "omission" within s.42(1)(b).

(2) When a transfer, in proper form, of an easement is presented to the Registrar-General and accepted by him, the person lodging the transfer is entitled to assume, without further inquiry or search, that the Registrar-General will carry out his duty under the Act and record the easement on the servient tenement, and failure to inquire in such circumstances should not be regarded as postponing conduct in equity. There was also some discussion of possible postponement of the claim of a person whose easement had been so "omitted" to a bona fide purchaser for value without notice.

(3) Although s.42(1)(b), by its express terms, protects the equitable estate or interest created by a transfer which is not registered in the manner provided by the Act, quere whether under the present legislation (ss. 41, 36 (6A) and 31B (2)) the Registrar-General's notation of an easement on one folio (though not on the folio of the servient tenement) might constitute sufficient registration so as to preclude the operation of the exception in s.42(1)(b).

Probably, the leading case on this issue is James v. Registrar-General (1967) 69 SR (N.S.W.) 361, where in May 1964, by transfer under the Real Property Act 1900 (N.S.W.), a right of way was created, the land transferred being the servient tenement. This easement was noted on the certificate of title of the land transferred. A few weeks later the dominant tenement was transferred. The easement was noted on the certificate of title for the dominant tenement. When a new certificate of title of the servient tenement issued in July 1965, the easement was omitted to be noted.

By transfer dated 7 September 1965, M. transferred the servient tenement to H. Co. By contract dated 19 November 1965, H. Co. sold and J. purchased the servient tenement, and in January 1966, she became the registered proprietor. At this date the easement was still not noted on the certificate of title of the servient tenement and J. was not aware of its existence. She was a bona fide purchaser for value.

The Registrar-General requested J. to produce her certificate of title so that, pursuant to s.12(d) of the Act, he could note the easement on it. On legal advice, J. declined to do so. Subsequently, however, J's mortgagee produced the certificate to enable registration of his mortgage, and in November 1966, the certificate of title was amended by the indorsement of a notification of the easement. J. requested the Registrar-General to cancel this notification. The Registrar-General refused to do so unless she produced authority establishing that she had the superior right. J. issued
a summons under s.121 of the Act calling upon the Registrar-General to substantiate this refusal.

It was held:

(1) The omission of the notification of the easement was within the exception set out in s.42(b) of the Act.

(2) Section 135 of the Act operates subject to the exceptions set out in s.42.

(3) The entry of the notification was authorized by s.12(d).

(4) The summons should be dismissed.

"... in the case of Jobson v. Nankervis (1943) 44 S.R. (N.S.W.) 277, it had been held that the exception to the conclusiveness of a certificate of title contained in s.42(b) of the Real Property Act 1900 (N.S.W.) relates only to rights of way or easements in existence before the land was brought under the Act and omitted from or misdescribed in the certificate (or to the limited class of easements referred to in Dabbs v. Seaman (1952) 36 C.L.R. 538 which arise by implication from the description appearing on the certificate of title or from estoppel).

However, this appeared to be no difficulty to Wallace, P. in James v. Registrar-General (supra), for he said at p.369:

"I have found much difficulty in agreeing with a proposition that an easement which has been duly created in accordance with ss.46 and 47 but which on a subsequent issue of a new certificate of title is omitted thereupon in the office of the Registrar is not included within the express provisions of s.42(b). In my opinion it is." Jacobs, J.A. says (p.3790): "I think that the decision in Jobson v. Nankervis in principle rather supports the view that an easement created in accordance with s.46 would be within the terms of s.42(b)...."

More recently, this approach was underlined in Torrisi and Another v. Magame Pty. Ltd. [1984] 1 N.S.W.L.R. 14, which seems to cast doubt on the previously expressed exceptions for proprietary estoppel and avoids in New South Wales the next mentioned problems arising from the registration of plans in Queensland.

In respect of a plan of subdivision of land under the provisions of the Real Property Act 1900, approved and registered before the insertion in the Conveyancing Act 1919 of ss.88A, 88B, whereby registration could operate of itself to create a right of way, it was held that:

(1) An easement could not be created in any manner other than that prescribed by the Real Property Act 1900, s.46, which prior to amendment in 1970 required execution of a memorandum in the prescribed form, save for limited exceptions, namely easements by implication or estoppel (Jobson v. Nankervis being applied).

(2) Where no memorandum as required by the then s.46 was executed, and the exceptions in Jobson v. Nankervis did not apply, no easement could be
created, still less omitted from the register, and s.42(1)(b) had no application.

(3) Section 42(1) precludes recourse to the doctrine permitting the implication of an easement of necessity.

(4) Even if an easement of necessity is something less than an easement without which the property cannot be used at all and not merely necessary to the reasonable enjoyment of the property, there must be evidence of difficulty of access to the relevant property at the time of acquisition.

(5) Conduct sufficient to give rise to a claim based on "proprietary estoppel" will not amount to "fraud" for the purposes of s.42(1) unless it is actual fraud, or at least involves moral turpitude which is brought home to the person whose title is impeached or his agents.

Accordingly, it seems settled in New South Wales that this exception applies only to easements omitted at the time title is first registered, or later after an easement has been on the register, save for the exceptional cases of easements implied by the description on the certificate of title or arising by estoppel.

The first instance decision of the Supreme Court of New South Wales in Berger Bros. Trading Co. Pty. Ltd. v. Bursill Enterprises Pty. Ltd. (1969) 19 W.N. (N.S.W.) 521, is an example of this last category. There it was held that the exception to the conclusiveness of a certificate of title contained in s.42(b) of the Real Property Act 1900 (N.S.W.), is not confined to rights of way or easements in existence before the land was brought under the Act and omitted from or misdescribed in the certificate of title. James v. Registrar-General (1967) 69 S.R. (N.S.W.) 361, being followed, but Jobson v. Nankervis (1943) 44 S.R. (N.S.W.) 277, not being followed.

On appeal to the High Court (Bursill Enterprises Pty. Ltd. v. Berger Bros. Trading Co. Pty. Ltd. (1971) A.L.J.R. 203) the majority consisting of Barwick, C.J. and Windeyer, J. held that the interest in respect of the buildings was "notified on the folium of the register book constituted by the certificate of title" with the consequence that a person who had become registered proprietor of the land held subject to that interest. Since the basis of the decision was that part of the fee simple (in air space) had been transferred rather than an easement granted the decision was affirmed on other grounds, the issue of whether there was an "omitted" easement within the meaning of the statutory provision being sidestepped.


A somewhat different though related problem arose a few years ago in Queensland, but has been remedied by legislation.

In Rock v. Todeschino [1983] 1 Qd.R. 356, it was held that:

(1) Upon the entry on the relative certificate of title of the memorial as to subdivision of the land by means of plan no. 25249, the easement was
registered for the purposes of the 1861 Act. This was so either because the plan itself was, within s.3 of the 1861 Act, an instrument and had been registered; or because title to the easement depended upon registration by entry in the register of the appropriate memorial, irrespective of the validity or existence of an instrument authorizing the entry.

(2) The omission by the Registrar of Titles or his officers of the easement from the new certificate of title issued in 1972 constituted the same as an omitted easement which, falling within the exception in s.44 of the 1861 Act to the indefeasibility of title of the registered proprietor of land prevailed against the apparently unencumbered certificate of title with respect to lot 1; and this was so even though the easement was not in existence before the land was brought under the Real Property Acts.

(3) As the lines showing the location of the easement on the plan of subdivision extended from the street frontage of lot 1 to its boundary with lot 2, and having regard to the width of the easement area shown on the plan, the intention to be implied or derived from the plan was that there should be an easement of way.

Hutchinson v. Lemon [1983] 1 Qd.R. 369, was in similar vein, where it was held:

(1) Where a certificate of title on its face directed attention to a plan of survey which could only be read as stating the existence of an easement it was immaterial whether the easement appeared on the face of the certificate of title or on the face of an instrument a memorial whereof was entered upon the certificate of title.

(2) There was no distinction between a void instrument and the total absence of an instrument. If the register book discloses an easement over land the state of the title will not be affected even by positive proof that no such easement was granted.

The effect of these two decisions was nullified by the enactment, in 1985, of s.119A of the Real Property Act 1861-1988, which prevents easements from arising through the registration of any plan.

Whalan (in The Torrens System in Australia) comments upon the New South Wales cases and their contribution to the clarification of the exception at p.323, but points out that the case law in other States (apart from South Australia which shares with the Northern Territory somewhat different legislative provisions), leaves open doubts and permits the acquisition of rights by prescription.

The Queensland case of Pryce v. McGuinness [1966] Qd.R. 591, seems to adopt an interpretation which is without endorsement elsewhere.

The owner of land registered under the Real Property Acts sold part of the land having no frontage to a public highway and retained that part fronting the public highway under circumstances in which the land sold would, under the general law, have enjoyed an easement of right of way of necessity over the land retained by the vendor. The land fronting the highway was subsequently acquired by a bona fide purchaser for value who held it under a
certificate of title upon which no notification of any easement appeared. Hanger, J. said (p.606-7):

"Easements of necessity have been for a long time recognised interests in land. The Real Property Act reveals no intention to interface with the existence or creation of such rights. They have been described as conveyancing Acts. That such rights should not continue to exist and be valid does not appear anywhere to have been in the mind of the legislature...I should add that, as to the easements arising by implication of law, I do not think it can be said that they have been omitted from the register or certificate of title within the meaning of s.44 of the Act. He held that bona fide purchaser for value held his land subject to an easement of right of way of necessity and that easements for electricity sewerage and drainage purposes did not arise."

This decision has been widely criticised and the evil which is sought to remedy could in some cases now be circumvented by the operation of s.180 of the Property Law Act 1974-86.

The only apparent attempt to build on this decision was rapidly ended by the Full Court in reversing the first instance decision in Stuy v. B.C. Ronalds Pty. Ltd. [1984] 2 Qd.R. 578.

In that case lots 33 and 34 were adjoining allotments, both being under the Real Property Acts. In 1974 Lot 33 was sold to the respondent R. Pty. Ltd. and the respondents each agreed to execute in favour of the other a grant of easement of right of way with respect to the existing common driveway which had a centre line upon the boundary between the two lots. No cross-easements were in fact granted and registered. In 1975 R. Pty. Ltd. conveyed Lot 34 to A. Pty. Ltd. which in 1977 transferred it to the appellants who were registered as proprietors. The whole width of the common driveway was used by the owner of Lot 33 at all times until April 1983 when the appellants erected a fence along the true boundary line. The Appellants were unaware of the 1974 agreement for cross-easements. The respondent sought specific performance of the agreement for cross-easements.

It was held that:

(1) That, as in relation to land under the Real Property Acts creation of an easement by act of parties can only occur by the registration of an instrument, an agreement inter partes for the grant of an easement or of mutual easements does not mean that an easement has or easements have been created in or exist upon the land within the meaning of s.44 of the Real Property Act 1861-1981.

(2) That, as there had never been any creation of an easement by act of parties, the agreement of 1974 could not be regarded as the creation of an easement which had been "omitted" within the meaning of s.44 of the Real Property Act 1861-1981.

(3) That, while the agreement of August, 1974 created in the respondent an equitable interest enforceable against the registered proprietor who agreed to grant the easement, such equity was a personal liability in that registered proprietor and was not enforceable against its successors in title.
POSSIBLE AMENDMENT OF THIS EXCEPTION

It may be unwise to drastically interrupt the development of the caselaw in defining the extent of this exception, although Queensland does appear to have encountered more difficulties with it than the other jurisdictions, and the 1985 legislation is a precedent for amendment.

Perhaps, it is appropriate to question the existence of the exception so as to seek some justification for it.

Whatever the justification, if any, for special treatment of easements it certainly exists in practically every jurisdiction. The widest is that of Tasmania, which makes practically every unregistered easement an exception [see s.40(3)(e) of the Land Titles Act 1980, as a comparison, the English system does much the same]. The same is true in Victoria [see s.42(2)(d) of the Transfer of Land Act 1958] and Western Australia [see s.68 of the Transfer of Land Act 1893]. New South Wales and the ACT have exceptions basically similar to that in Queensland, as does New Zealand, while those of South Australia and the Northern Territory are somewhat more restricted.

Probably, the reluctance to submit easements to the full rigours of the registration system, stems from a concern that such interests are easily overlooked in compiling a register, coupled with the fact that the loss of the benefit of an easement to the dominant tenement is likely to be far more of a liability than the corresponding gain to the servient tenement of its being relieved from that liability. The case of a landlocked close is a good illustration of this asymmetry of gains and losses.

Accordingly, it is felt that the exception should be retained in basically its presently restricted form since its narrow nature in Queensland in comparison to a State such as Victoria does not appear to have caused difficulty. However, it is suggested that the meaning of the term "omitted" in s.44 could be spelt out so that an easement is "omitted" if and only if it is not recorded in the register, was properly created by agreement or implication of law between the parties thereto, and has not been terminated by the parties or by implication of law, does not arise by prescription and

Either (i) the easement was subsisting at the time the servient tenement was first registered;

Or (ii) the easement has been registered and has since been omitted from the register by reason of error on the part of the Registrar.

It will be observed that the draft is worded so as to remove the possibility of an easement arising by prescription in the future.

Since it is not possible to conceive of an easement being omitted from the Register in this fashion except by virtue of an error on the part of the Titles Office, the exception is so restricted.

This will mean that the net effect of such an omission will be that the owner of the dominant tenement will have the easement maintained, and the owner of the servient tenement will be entitled to compensation, if loss has been suffered, as where a purchaser relies on the state of the register as
being free of the easement at the time of purchase. In contrast, if this exception did not exist, there would be no restoration of the easement, and the registered proprietor of the former dominant tenement would have to seek compensation. The exception may be justified on the basis that the alternative involves the disadvantage of sometimes conferring a windfall profit and that the loss of an easement is likely in the majority of cases to create greater inconvenience to the owner of the dominant tenement (for example, loss of access or services) than its restoration would to the owner of the servient tenement. The latter is, in any case, more easily compensatable in money terms.

It should also be borne in mind that the comparatively recent development of Queensland, much of which post dates the introduction of town planning and subdivision control, has reduced the importance of easements in comparison to other jurisdictions, since subdivision control generally requires direct access for all lots to a road and services otherwise than by way of easement.

RELATED GENERAL LAW EXCEPTION

In Pryce v. McGuinness [1966] Qd.R. 591, Hanger J. asserted that interests in land arising under the general law and not expressly or impliedly defeated by the Real Property Acts continue to subsist against later registered proprietors.

The facts of the case were that S and others were the registered proprietors of land abutting Wharf Road, Southport which they subdivided into three lots. Lot 1 was adjacent to the road, Lot 2 had access to the road by virtue of an easement over Lot 1, but Lot 3 had access only by easement over Lot 2 to the boundary of Lot 1.

At common law where a common vendor created a subdivision scheme such as this the law would imply an easement of right of way called an easement of necessity from Lot 1 in favour of Lot 3.

Hanger J. held that such an easement of necessity was not an "omitted or misdescribed easement" in terms of S.44; but he nevertheless held that:

"Easements of necessity have been for a long time recognized interests in land. The Real Property Acts reveal no intention to interfere with the existence or creation of such rights...That such rights should not continue to exist and be valid and effective does not appear anywhere to have been in the mind of the legislature". (At pp.606-607).

Accordingly, the easement of necessity was implied, and took effect notwithstanding indefeasibility so that, in effect a new "general law" exception to indefeasibility had been created.

On the other hand, Hanger J. held that easements for electricity and drainage, which were not so recognized under the general law, could not be implied against the registered proprietor of Lot 1.

It must be seriously doubted whether this decision is correct. It constitutes a potentially serious attack on the register and it may well be
based on an incorrect construction of s.44 of the 1861 Act. It has not been followed since. In Australian Hi-Fi Publications v. Gehl [1979] 2 N.S.W.L.R. 619, the Court of Appeal refused to extend the recognized exceptions to indefeasibility in that it was not prepared to allow the enforcement of an implied easement arising under the doctrine of Wheelon v. Burrows against a subsequent registered proprietor.

The decision in Pryce v. McGuinness could be explained as being a recognition of one of the inherent limitations in the nature of every fee simple, that under the general law any fee simple adjoining landlocked land, might, in appropriate circumstances, be subjected to an easement of necessity. On that basis it could be said that the Real Property Acts do not expressly or impliedly alter the general law as to the nature of such limitations on fee simple rights. (Although in Nickerson v. Barraclough [1981] Ch. 426 the suggestion that the doctrine of easements of necessity was one of public policy was rejected and it was limited to one of implied intention of the parties.)

It should be noted that the problems which were the subject of litigation in Pryce v. McGuinness can in many cases now be resolved in another way as a result of statutory amendment. Section 180 of the Property Law Act 1974-1986 now allows the Court to impose statutory rights of user on land of the kind which were sought in Pryce v. McGuinness.

It is recommended that the provisions regarding indefeasibility and the creation of easements be so phrased that no easements of the nature permitted in Pryce v. McGuinness can arise as exceptions to indefeasibility.

INTEREST OF A TENANT UNDER A SHORT LEASE OR TENANCY.

Section 11 of the Real Property Act 1877-1988, provides that "the estate of a registered proprietor shall not be paramount or have priority over any tenancy from year to year or for any term not exceeding three years" whenever created.

An exception for short leases exists in virtually every jurisdiction since it is impracticable to require registration of the shortest leases, although this is permitted by s.18 of the 1877 Act. Queensland has one of the more limited exceptions, in common with Tasmania. For example, in Victoria the exception is not limited in duration, in Western Australia the relevant period is 5 years, in England the relevant period is 21 years. In South Australia it is 1 year.

Whalan (The Torrens System in Australia, at p.189) discusses this issue where he points out that there is a choice between suffering the inconvenience of requiring short term tenants to register or lose protection and requiring purchasers to check on occupation of land by tenants. The latter is not normally a difficulty except in the case of acreage, and the potential loss to a purchaser is limited by the comparatively short duration of the protection. However, it should be borne in mind that this loss could be drastically increased if legislation was ever enacted in Queensland restricting rents or the landlord's rights to possession at the end of a
lease as has happened in other jurisdictions (see, for example, the Rent Acts in the United Kingdom).

The exception does not seem to create major problems in practice, the situation with regard to options having been resolved satisfactorily and clearly in Friedman v. Barrett, Ex parte Friedman [1982] Qd.R. 498.

In that case it was held, by the Full Court, that an option for renewal contained in an unregistered lease for a term of 3 years cannot be effectively exercised by the lessee after a purchaser for value of the land has become the registered proprietor without conduct actually fraudulent, even though with notice of the lease and of the option.

Gibbs J pointed out that the word "tenancy" is narrower in meaning than the expression "interest of any tenant", and although the latter might well be wide enough to refer to an option to renew a tenancy, the former is not.

It was held that s.11 of the 1877 Act is intended to protect the tenancy itself, and its protection does not extend to a right of renewal, notwithstanding that such right concerns the tenancy and is one of its incidents; s.11 provides an exception to the fundamental principle, embodied in s.44, that the registered proprietor shall hold his land free from unregistered interests, and should not be given an extended construction, particularly one that would render the title of the registered proprietor subject to rights of renewal that might be perpetual, although those rights were contained in an unregistered lease and were not protected by caveat.

Section 51 of the 1877 Act was not relevant to this situation as it deals with contractual rights and equitable interests, and it is to that section, rather than s.11, that a person who seeks to enforce a right of renewal contained in an unregistered lease must look for assistance.

It was held that under the proviso to s.51 the title of a purchaser for value who becomes registered, prevails over an unregistered equitable estate or interest previously created even though the purchaser had notice of it, except in the case of actual fraud — dishonesty of some sort — not constructive or equitable fraud.

Where there is notice of an unregistered interest and nothing more, it is not a fraud to take a transfer that will defeat the interest. (In this respect the case is an important authority on the meaning of fraud in the context of the Real Property Acts.)

In English, Scottish and Australian Bank Ltd. v. City National Bank Ltd. [1933] St.R.Qd. 81, it was held that s.11 does not destroy the effect otherwise given by Real Property Act 1861 to the prior registration of a bill of mortgage, and that a bill of mortgage is not a certificate of title within the meaning of this section. This means s.11 does not confer any priority over a mortgage registered previously.

In Hermann and Others v. MacKenzie and Others [1965] Qd.R. 235, H., the registered proprietor of certain land, let the plaintiffs into possession of a parcel of ten acres in or about the year 1916. On March 10, 1933 H. and the plaintiffs executed a written document by which H., in consideration of the payment of a nominal yearly rent, granted inter alia to the plaintiffs
an irrevocable licence to occupy the ten acres, and the right to remove or sell any of the improvements thereon.

The instrument was not registered as a lease under the Real Property Acts and was not expressed to bind the assigns of H. H. sold his estate in the land, and the defendants, successors in a chain of title from H., became registered proprietors with notice of the 1933 agreement. Since being given possession the plaintiffs had in each succeeding year paid or tendered rent to a registered proprietor for the time being of the land.

It was held that:

(1) the plaintiffs held the land upon an implied yearly tenancy protected from the operation of s.44 of the Real Property Acts 1861 to 1963 by s.11 of the Real Property Act of 1877.

(2) the term in the agreement conferring the plaintiff's right to remove or sell improvements, not being an incident of a yearly tenancy and one consistent therewith, had not been carried over into the implied yearly tenancy from the agreement.

Friedman v. Barrett, Ex parte Friedman, (1962) Qd.R. 498 was referred to in this case which leaves open the question whether s.11 of the 1877 Act would protect this right if it were an incident of the implied tenancy.

The basis of this exception is practicability. Its absence would, in effect, require the registration by tenants of the shortest of leases in order to protect their position in the event of a transfer of the landlord's interest to an assignee of the reversion who would enjoy the benefits of indefeasibility. The interference with the position of a registered proprietor is limited by the short maximum duration of leases to which it applies.

Accordingly, it is essential that the exception is limited to leases of short duration, since this is the only species of lease in which its operation is justifiable. Consequently, it is important that, as was decided in Friedman v. Barrett (supra), the protection of this exception does not extend to any term in the lease providing for extension beyond this limited period. In Mercantile Credits Ltd. v. Shell Company of Australia Ltd. (1976) 50 A.L.J.R. 487, it was decided, in the context of a registered lease, that an option to renew was an indefeasible right in the sense that it was binding against a subsequent registered proprietor of the reversion. In this case, Gibbs J. (at 494-495) expressly distinguished Friedman v. Barrett, saying that it had "held that although the right to renew was an incident of the tenancy, s.11 protected only the tenancy itself, and not the tenancy with all its incidents".

There are a number of concerns regarding the present position.

Firstly, there is a minor possibility that the doctrine established in Mercantile Credits v. Shell (supra) in relation to registered leases may be extended to unregistered leases.
Secondly, there is no reason why all incidents of a short lease within the exception, apart from those which can have the effect of increasing the duration of the lease, should enjoy the status of indefeasible rights.

Thirdly, the sense of the exception is that all leases of lesser duration than three years should be embraced. This means that periodic tenancies should be included. Any uncertainty as to their position could be resolved by express provision. This best achieved by suitable amendment of the interpretation section to include an appropriate definition of lease.

Fourthly, it is a matter for debate whether options to renew should be recognised to the extent that they permit extension of the term within the overriding three year limit. The advantage of permitting this may be outweighed by the necessary increase in complexity of the provision.

The draft replacement of the existing s.44 seeks to meet these concerns.

A related matter which has been raised in a submission to the Commission is a practical but probably unresolvable problem stemming from the position of options to renew or extend leases within the exception as laid down in Friedman v. Barrett (discussed supra). It arises from the fact that business tenants generally require, for sound business reasons, an option to renew in a lease, but also wish to avail themselves of the short lease exception to avoid the costs associated with meeting the survey etc. requirements associated with registration. Apparently, it has been common to seek to avoid the consequences of the decision in Friedman v. Barrett by including in the lease, as well as the option to renew or extend the term, a covenant by the landlord to the effect that a covenant will be obtained from any assignee of the landlord's interest to the effect that the tenant's entitlement to the option will be respected by the assignee. It has been suggested in a submission that a problem has arisen recently in that landlords are no longer as prepared to enter into such covenants, largely because failure to observe it could occur by simple inadvertence, but nevertheless lead to a hefty liability in damages.

The situation seems to the Commission to represent something of an impasse, in that it is not possible to change the law so as to make such options enforceable against assignees without significantly enlarging the scope of the existing exception to indefeasibility, something which is likely to encounter considerable opposition. It may be argued that the matter is not one which should be tackled by legislation since it is for the parties to negotiate mutually acceptable terms for a lease. However, this argument could be countered by the assertion that it is the duty of a registration system to provide reasonable arrangements for all the usual transactions associated with normal business activity, since it could be maintained that it is unreasonable to force tenants of short leases through the expensive process of survey as a necessary precondition to registration of a lease in order to obtain adequate protection for such an option. Requiring an option to renew is a prudent step for any business tenant, otherwise the tenant's bargaining position is extremely weak on expiry of the term. (Note particularly the problems in the area of retail shop leases which led to the enactment of the Retail Shop Leases Act 1984.) Furthermore, once a tenant has a lease containing such an option, the tenant has the legal right to make the option binding, provided the lease is in registrable form, through registration, so this is not something which the tenant can be said to have
to bargain for by further negotiation. The covenant discussed above is merely a means of circumventing what are argued to be, in the circumstances, the unreasonable costs of registration.

It seems that, consistently with the paramount principle governing the Torrens System, that derogations from the indefeasibility of title of a registered proprietor should be minimised, all that might be considered to alleviate this problem is the following:

1. An increase in the cut-off point for the short lease exemption from three to five years. This would have the advantage of reconciling it with the maximum period for lease of part of a landholding without requiring subdivisional approval under the Local Government Act 1936-87 (see definition of "subdivision" in s.3). Where a lease for part of the land is for longer than five years there is no saving on account of survey through not registering since the survey would be required in connection with subdivision in any case.

2. Treating options in a different way by measuring the cut off point by reference to the period of the original term plus any options. This would have the effect of bringing cases such as a two year lease with an option of a one year renewal within the existing exemption.

It should be borne in mind that the registration process for a lease involves a survey only at the discretion of the Registrar, and it is understood that this discretion is exercised only in exceptional cases, a sketch plan of the part leased normally being sufficient. Accordingly, the Commission is not disposed to recommend amendment of the legislation to deal with this matter, except to the extent that it is appropriate to extend the maximum period of lease covered by the exception from three to five years, and to allow options to be protected within the overriding limit of five years from the start of the lease.

THE NATURE OF THE INTEREST OF A LESSEE UNDER THIS EXCEPTION

A related provision is s.18 of the Real Property Act 1877-1988, which provides that leases for a term not exceeding three years may be registered if in the prescribed form but otherwise are "deemed to...[be]...valid to all intents and purposes".

The comments of Derrington J. in Deventer Pty. Ltd. v. B.P. Australia Ltd. (Unreported, Supreme Court W.262 of 1983), are extremely helpful for the light they cast on the interest of a tenant under such a lease. Derrington J. resolved the long standing academic debate as to whether the interest of such a tenant was capable of being legal without registration in the affirmative. This has the consequence, that the old bona fide purchaser rule as to priority between legal and equitable interest is applicable to such interests, since the effect of s.18, while conferring the ability to acquire a legal interest, does not make that legal interest one enjoying the benefit of indefeasibility of title, since that is a privilege reserved for registered proprietors.

There appears to be no strong reason in favour of altering this provision, although conferring the benefits of indefeasibility on such lessees might be
seen as being advantageous in that it would completely eliminate the
remaining scope for operation of the bona fide purchaser rule.

However, it is appropriate to incorporate s.18 with the indefeasibility
provisions since it is logical that it should apply to those leases and
tenancies, and only those leases and tenancies, within the exception to
indefeasibility.

It should also be remembered the decision in Deventer Pty. Ltd. v. B.P.
Australia Ltd. merely means that such leases are capable of creating a legal
interest. The interest of the tenant will still only be equitable if the
necessary requirements for a legal interest are unfilled, as where the
existence of the interest is dependent on the doctrine of part performance,
the provisions of s.12 of Property Law Act 1974-86 not being satisfied.

RELATIONSHIP WITH SECTION 12 OF THE PROPERTY LAW ACT 1974-1986

Mention of that section, which permits the informal creation of "a lease
taking effect in possession for a term not exceeding three years, with or
without a right for the lessee to extend the term for any period which with
the term would not exceed three years" raises the issue whether it and ss.11
and 18 of the 1877 Act should be reconciled so that they apply to exactly
the same leases. There is logic in this since all three provisions are
designed to exempt from formalities of various kinds short leases. The
upper bound of three years is the prime delimiter of each exception, but
there are differences that s.12 is more stringent in that it requires that
the lease take effect in possession, as opposed to taking effect in the
future, and must not contain an option for renewal for a term which with the
initial term will not exceed three years. Ss. 11 and 18 neither require the
lease to take effect in possession, nor place any limitation on any option
for renewal which it might contain, although the rights under such an option
were held in Friedman v. Barrett (discussed supra) not to fall with the
exception from indefeasibility accorded to a term under such lease, whether
or not the option involved the total duration of lease and option exceeding
three years.

Section 12 derives from earlier English provisions which also require the
lease to be "at the best rent which can reasonably be obtained without
taking a fine" (see Law of Property Act 1925 (U.K.), s.54).

THE PROBLEM OF INTERMITTENT LEASES

It is understood that, mainly under the impact of the development of
timesharing, attempts have been made to lease for intermittent periods such
as a particular date or a particular week in each year. As long as this is
not in perpetuity, in which case it would appear to be void as a lease for
term must have the maximum term fixed, such a lease would appear to be valid
(see Smallwood v. Sheppards [1895] 2 Q.B. 627 where a lease for three
successive bank holidays was upheld).

The only problem with regard to this exception to indefeasibility is that it
might be argued that so long as the sum of the intermittent periods does not
exceed three years the exception is applicable. Acceptance of this argument
would lead to grave hardship to a transferee of the reversion, since the adverse interest would not terminate within three years.

While Smallwood v. Sheppards (supra) appears to proceed on the basis that the classification of such a grant should be a lease for a term encompassing the full period between the beginning of the first and ending of the last periods of possession, insofar as it is possible to classify such a lease in that way, since the grant was held to be one letting rather than three separate lettings. The latter finding was essential to the decision, as a holding that there were separate lettings would have meant that the last two would have been invalid. Since the arrangement was purely oral and could otherwise neither comply with the English equivalent of s.12 of the Property Law Act 1974-1986, because that provision requires a lease to take effect in possession to be valid as an oral lease, nor the part performance exception to the English equivalent of s.59 of the Property Law Act 1974-1986, since that provision requires a valid act of part performance, and the only one available in this case was the original entry.

However, in Cottage Holiday Associates Ltd. v. Customs & Excise Commissioners [1983] 1 Q.B. 735, a lease conferring the right to possession for a week in each of 80 successive years was held not to amount to a lease for a period exceeding 21 years within the meaning of the legislation imposing value added tax (see particularly at 740D, although Woolf J. appears to have accepted that the lease was one for a single discontinuous term (see at 737G-738A), and the decision may prove to have been based on the context of the relevant legislation as taxation legislation (see at 740A-C). Woolf J. also appears to have felt (see 740G) that such a lease would fall within a statutory provision applying to leases for terms of less than seven years [Housing Act 1961 (U.K.), ss.32,33].

It is suggested that the problem could be eliminated by defining the term of a lease to amount to the full period from the start of the first entitlement to possession to the last entitlement, and not merely the sum of the discontinuous periods for which the lessee is entitled to possession. This definition should be added to the Property Law Act 1974-1986 as well since the applicability of several provisions of that Act depend on the term of a lease.

An alternative construction of this kind of grant which is possible, although it does not yet appear to have been adopted in a case (although it was acknowledged as a possibility in Cottage Holiday Associates Ltd. v. Customs & Excise Commissioners [1983] 1 Q.B. 735 at 738A) is as separate grants of separate terms. This would present the difficulty that any grant taking effect in possession more than 21 years from the date of the instrument creating it (save for certain exceptions) is void by virtue of s.102(3) of the Property Law Act 1974-1986. This possibility is also removed by the proposed new definition of lease for the purposes of the Real Property Acts.

MISCELLANEOUS EXCEPTIONS CONCERNING LEASES

A number of further comparatively minor exceptions to the principle of indefeasibility in relation to leases have emerged.
In Travinto Nominees Pty. Ltd. v. Vlattas (1973) 129 C.L.R. 1 it was held that an option to renew in a lease granted in breach of a prohibition in the Industrial Arbitration Act 1940 (N.S.W.), was not validated by the principle of indefeasibility. The reasoning of different members of the High Court varied. Barwick C.J., McTiernan and Stephen JJ. stating that the existence of the statutory prohibition was a bar to specific performance of the option thus invalidating the equitable interest so that there was no interest on which the doctrine of indefeasibility could operate, while Memmies and Gibbs JJ. relied on the later statute as overriding the provisions of the Real Property Acts.

This case was considered in Ex p. Moore [1984] 1 Qd.R. 290, where it was held that under s.39 of the 1861 Act, the interest of a person entitled in remainder prevailed over the interest of a lessee under a registered lease by the tenant for life which did not comply with the statutory provisions (of the Trusts Act 1973-1986) which are a prerequisite for such lease to bind the interest in remainder.

This provision is analogous to that in s.52 which requires the consent of a registered mortgagee is required before a lease executed subsequent to the mortgage is binding on that mortgagee. Such provisions are necessary to determine which of two registered interests in the same property have priority. The only appropriate modifications are to link up these provisions with s.44 in order to make their import clearer, and to alter s.52 so that priority depends on the date of registration rather than execution.

It was also stated by the Full Court in Corozo Ltd. v. Total Australia Ltd. (1988) Q.L.R. 512 (18 Jun. 1988) [1985 No.3078] that the indefeasibility provisions did not have the effect of securing enforcement of the performance by the mortgagor of very covenant contained in a Bill of Mortgage.

ADVERSE POSSESSION

The provisions of Part III of the Real Property Acts Amendment Act 1952, in relation to the conferring of a title by adverse possession involve an exception to the principle of indefeasibility.

Frances: Torrens Title in Australia (1972) points out that under the Queensland Real Property Acts, no exception from paramountcy is made in respect of adverse possession existing when the land was brought under the Act (this a matter which will shortly be irrelevant owing to the disappearance of unregistered land), but registered title may be extinguished by adverse possession upon application being made in accordance with the requirements of the Act.

There were several Queensland cases concerning adverse possession in relation to land under the Torrens system prior to 1952.

Verri and Others v. Holmes and Others [1934] Q.W.N. 9., seems to have established that, despite the lack of any express provisions regarding adverse possession in relation to the Torrens system at that time, a title based on adverse possession against a registered proprietor could lead to registration of the adverse possessor's successors in title under the Real
Property Acts. This case may be regarded as suspect on the grounds that no
defence was filed by the defendant.

In 1893 Holmes had been registered as proprietor as the result of a deed of
grant. From the year 1908, and prior thereto, to 1st March, 1922, the
Pleystowe Land Syndicate Ltd. continuously held exclusive possession of the
land in the assumed character as owner thereof, and peaceably exercised the
ordinary rights of ownership over the same without any notice of any adverse
claim thereto. This company was wound up on 12th March, 1922, and by a deed
of conveyance on 1st March, 1922, in consideration of 630 pounds, conveyed
to the defendant Penny all its rights, title and interest to and in the
land. On 13th March, 1922, Penny conveyed his interest to the defendant
Brown. Brown conveyed to the defendant Camilleri; Camilleri conveyed to the
defendants Ceresa and Fossa and the plaintiffs as joint tenants. On 11th
December, 1926, Ceresa and Fossa conveyed their interest in the lands to the
plaintiffs as joint tenants. In each case the land was conveyed by a deed
of conveyance. Each purchaser in turn, including the plaintiffs,
continuously held exclusive possession of the lands in the assumed character
as owner, and peaceably exercised the ordinary rights of ownership without
any notice of any adverse claim thereto. Since the year 1908, and prior
thereto, the defendant Holmes had not nor had any person on his behalf been
in possession or occupation of the land or any part of it nor made any claim
to or in respect of the land or any part of it.

The plaintiffs claimed against the defendants and each of them -

1. A declaration that the plaintiffs are entitled to an estate in fee
   simple as joint tenants in the land.

2. A declaration that the plaintiffs are entitled to be registered as
   proprietors as joint tenants of the land under the provisions of the Real
   Property Acts.

3. An order that the lands vest in the plaintiffs as joint tenants for an
   estate in fee simple.

No defence was delivered and the plaintiffs proceeded by motion for judgment
in default of pleadings.

Macrossan S.P.J. entered judgment for the plaintiffs in terms of the claim,
subject to the Registrar satisfying himself as to service on each defendant.

The case of Miscambles Pty. Ltd. v. Rae [1935] Q.W.N. 38, established a
similar result, in a case where the defendant had been registered, but this
view was later overruled by the full court in Miscamble v. Phillips [1936]
Sc.R.Qd. 136.

The plaintiff, Miscambles Pty. Ltd., alleged by its statement of claim that
the defendant was, prior to the year 1899, registered as proprietor in fee
simple under the Real Property Acts, and still remained so registered, of
certain land free from any encumbrance; that in the year 1899 one Wilson
Miscamble took possession of the said land and thereafter until 30th July,
1915, continuously held exclusive possession of it in the assumed character
of owner thereof, and peaceably exercised the ordinary rights of ownership
over the same without any notice of adverse claim thereto; and that on 30th
July, 1915, the said Wilson Miscamble in pursuance of a written agreement gave possession of the said land to the plaintiff, who had thereafter until the date of the issue of the writ in this action remained in like possession and exercised the like rights of ownership over the said land.

The plaintiff claimed:-

1. A declaration that the plaintiff is entitled to an estate in fee simple in the land.

2. A declaration that the plaintiff is entitled to be registered under the Real Property Acts of 1861 and 1877 as the proprietor in fee simple of the land free from encumbrances.

3. An order that the land do vest in the plaintiff.

On the application of the plaintiff, Hart A.J. made an order for substituted service of the writ in the action on the defendant, whose whereabouts were sworn to be unknown, by service of the writ and an advertisement settled by the Registrar on the Attorney-General and on the Public Curator of Queensland, and also by the publication of such advertisement in various newspapers in the Northern, Central, and Southern Supreme Court Districts of Queensland.

No appearance having been entered,

A.D. Graham, for the plaintiff, moved for judgment in terms of the relief prayed in the statement of claim: The facts in this case are indistinguishable from those in Verri v. Holmes (supra).


Later, the case of Miscamble v. Phillips [1936] Sc.R.Qd. 136, established that a claim to a title based on adverse possession could not be maintained against a registered proprietor.

Plaintiff by her statement of claim alleged 45 years' exclusive possession in the assumed character of owner of certain lands of which the defendants were at all material times registered as proprietors in fee simple under the Real Property Act of 1861, without notice of any adverse claim by the defendants or otherwise in respect thereof, and she claimed a declaration that she was entitled to the fee simple of the land and to be registered under 1861 Act as the registered proprietor thereof in fee simple from the encumbrance, and a consequent vesting order.

Held, per R.J. Douglas J. and Webb J. (E.A. Douglas J. dissenting,) that the effect of the provisions in s.33 of the 1861 Act, that a certificate of title to land "shall be conclusive evidence that the person named in such certificate of title...is seized or possessed of such land for the estate or interest therein specified", is to create and maintain in the registered proprietor such a constructive possession of the land as would necessarily exclude the possibility of its adverse possession by any other person, and that consequently no title can be made by adverse possession to land under
the Real Property Acts. Verri v. Holmes and Miscambles Pty. Ltd. v. Rae were not followed.

Accordingly, it became established in 1936 that title to land could not be acquired by adverse possession against a registered proprietor. However, there remained some potential difficulties, notably the problem which could arise where a person was in adverse possession and the registered proprietor failed to recover possession by commencing proceedings within the limitation period, where a stalemate appears to have been reached. (For while s.125 deems registration as proprietor to be equivalent to possession, it contains an express reservation in relation to claims of ejectment which are expressly barred, for example under the Limitation Acts). There was also potential injustice where there had been adverse possession for a very long period, in which the adverse possessor or series of adverse possessors had greatly improved the land and paid rates and other taxes associated with the land for many years.

Legislative intervention followed in the form of the provisions of Part III of the Real Property Acts Amendment Act 1952, which provide for the conferring of a title by adverse possession in certain cases and thus involve an exception to the principle of indefeasibility.

Although at first sight the provisions do not seem to totally remove the possibility of the stalemate mentioned above there appear to be no reported cases subsequent to 1952, and the Registrar seems to be satisfied with the operation of these provisions in practice.

The possibility of a stalemate arises in that an adverse possessor may have been in possession long enough to bar the registered proprietor's rights to maintain an action in ejectment through the operation of ss.13, 14 of the Limitation of Actions Act 1974-1981, while an application for title by such adverse possessor appears theoretically capable of being blocked by the lodging of a caveat under s.56(1),(2) of the Real Property Acts Amendment Act 1952. For s.56(2) provides that where the Registrar "... is satisfied that the caveat is the registered proprietor ... the Registrar shall refuse the application". However, it is understood that in practice if a stalemate continues to exist it could usually be resolved by service of notice on the registered proprietor under s.56(4), which enables the caveat to be lapsed if the registered proprietor does not take proceedings.

While this approach for resolving the 'stalemate' never appears to have been put to the test of court proceedings, this situation of 'stalemate' may be argued to be far from totally satisfactory. Neither party's position is clear. While the adverse possessor cannot be ejected by legal process, should the registered proprietor gain possession by other means there is then no way the adverse possessor can regain possession. Another complication is that the Criminal Code renders forcible entry and certain related activities illegal, notwithstanding the existence of a claim of right (see ss.70, 71, note also ss.267, 277, 278). Conversely, on one interpretation of s.56, the adverse possessor may not be granted a title.

It is suggested that the uncertainty could be resolved by providing to the effect that where the Registrar is satisfied that there is no person with a right to eject the adverse possessor by lawful process, that is, the relevant limitation period or periods has expired, a title may issue to the
adverse possessor. Such a provision is the logical consequence of prescribing limitation periods. This may be achieved by suitable amendment of s.56(4). However, this may be thought to be giving adverse possessors greater rights than was intended by the 1952 amendments, which may have quite deliberately intended to allow the registered proprietor to block the application by lodging a caveat.

The alternative way of resolving the impasse by allowing the registered proprietor to recover possession at this point is also unsatisfactory in that it runs counter to the clear policy of the Limitation of Actions Act 1974, s.13. Such a revival of the right of action, since it would be triggered by the adverse possessor's initiation of the procedure under the 1952 Amendments, would be guaranteed to act as a powerful disincentive against use of the provision.

In view of these difficulties and information from the Registrar of Titles that he is entirely happy with the operation of the provisions which lead, on average, to the granting of 15 titles a year, it is recommended that no substantive changes be effected in these provisions. Despite the existence of the theoretical possibility of stalemate (and its actual occurrence in a recent situation where it was resolved by the registered proprietor selling his interest) the section has proved to be a useful means of regularising the position where a person has been in adverse possession for many years and there is no active registered proprietor who wishes to revive the claim.

It should be observed that a number of common law jurisdictions recognise the acquisition of title by adverse possession under systems of registration of title. For example, in the late 1970's New South Wales made provision in this regard for the first time [see Part VIA of the Real Property Act 1900 (ss.45B-K)]. In England, rights arising through the operation of the Limitation Acts are exceptions to indefeasibility [Land Registration Act 1925, s.70(1)(f)].

Until the advent of systems of registration of title, adverse possession operated by extinguishing the claims of previous owners in all common law jurisdictions deriving from England, although it was the creature of statute, there being no such principle at common law. The period of limitation was progressively reduced to 12 years in most jurisdictions.

While Torrens systems generally did not at the outset make provision for the acquisition of title by adverse possession, and a number still do not, there appears to be a tendency to make some provision later, for example, Queensland in 1952, New South Wales in the 1970's. In a way this is not surprising. Since limitation periods are often lengthy and in the past were lengthier, the evils associated with the lack of provision is unlikely to become manifest until significantly longer than these periods. However, after a century or more, problems of disappeared registered proprietors tend to accumulate. Hence, the tendency to legislate later. A justification for the existence of such provisions is furnished in Megarry & Wade's Law of Real Property (5th Edition) at p.1050, where it is stated that:

"... some such principle is necessary to every system of law ... In relation to land ... it is in the public interest that a person who has long been in undisputed possession should be able to deal with the land as owner. It is more important that an established and peaceable possession should be
protected than that the law should assist the agitation of old claims [Cholmondeley v. Lord Clinton (1820) 2 Jac. & W. 1 at p.140]. A statute which effects this purpose is 'an act of peace. Long dormant claims have often more of cruelty than of justice in them.'[A'Court v. Cross (1825) 3 Bing. 329 at p. 332 per Best C.J.]

There is an apparent error in the existing s.59(b)(i) of the Real Property Acts Amendment Act 1952. The reference in that provision to s.52(2) is erroneous, as the relevant notice is provided for in s.54(2). This error has been remedied in the draft, which casts most of these provisions into a schedule.

The only other changes required in the provisions relating to adverse possession are their consolidation with the rest of the Real Property Act 1861 and rephrasing so as to more accurately reflect the true nature of the operative doctrine of extinction of title through the operation of the Limitation Acts. The layout adopted, since these provisions are of a specialised nature, is for the bulk of these provisions to be relegated to a new schedule, controlled by a single operative section, which links the provisions with the other exceptions to indefeasibility.

THE REGISTRAR'S POWERS OF CORRECTION.

Certain powers of correction of the register are conferred upon the Registrar by ss.11(4) and 132. To the extent, if any, that these provisions enable the Registrar to affect the rights of registered proprietors they amount to exceptions to indefeasibility even though they may not be phrased as such.

James v. Registrar-General (1967-68) 69 S.R. (N.S.W.) 361 was a case in which the Registrar exercised powers under the New South Wales equivalent to the Queensland s.11(4) and was held to have acted rightly in so doing. However, in Frazer v. Walker [1967] 1 A.C. at 581 the Privy Council regarded the related N.Z. provision [now s.80 of the Land Transfer Act 1952 (N.Z.) and very similar to s.11(4)] as "little more than a slip section and not of substantive importance". On this interpretation, it appears that the section merely permits correction of clerical and typing errors, for, as McPherson J. pointed out in MBF v. Fisher [1984] 1 Qd.R. at 611, when considering this aspect of the judgment in Frazer v. Walker, there is New Zealand authority to the effect that the provision is not exercisable to the prejudice of a bona fide purchaser (see Assets Co. v. Mere Roihii [1905] A.C.176 at 194-195).

James v. Registrar-General suggests that the equivalent section, at least in Queensland and New South Wales, may have more teeth than the Privy Council's comment suggests since it can enable the registrar to interfere quite significantly with the apparently unencumbered title of a registered proprietor. (See Francis: Torrens Title, Vol.1, pp.60-69). However, it appears that these provisions are parasitic to the other exceptions in that they merely empower the Registrar to give effect to the rights of the parties under other provisions of the Real Property Acts as occurred in James v. Registrar-General.
Section 11(4) is, in any case, subject to the very important safeguard that corrections are not able to operate retrospectively. It should also be observed that the relevant discretion is that of the Registrar and the court may be reluctant to intervene unless the exercise of the discretion "exceeded the limits of the power properly interpreted; or was exercised on some wrong principle; or, perhaps, if the Registrar had wrongly refused to exercise the power" (NBF v. Fisher [1984] 1 Qd.R. 611, per McPherson J.).
CHAPTER V

THE POSITION OF VOLUNTARY PURCHASERS UNDER THE TORRENS SYSTEM

In an article in *The Queensland Lawyer* [1975] Vol.3, at p.83 by Mr. W.D. Duncan, it is suggested that "perhaps it is time that the legislature reviewed the position of a volunteer under the Real Property Act with the purpose of removing the doubts and contradictions that "presently exist". That suggestion was repeated in a submission to the Commission.

A voluntary purchaser or volunteer is one who does not give valuable consideration in return for the acquisition of the interest in land concerned. Volunteers comprise donees and beneficiaries (whether devisees or persons entitled to residue or on intestacy) of estates of deceased persons, as well as beneficiaries under settlements made inter vivos, and also persons in whom property is vested in a representative capacity without consideration being given, for example, where a new trustee is appointed or property vests in a personal capacity. (As in Case No. 486 of 1981 In the matter of The Real Property Act 1861-1980 and In the matter of Caveat No. c416980 and In the matter of an application by Washington Constructions Company Pty. Ltd., judgment delivered on 26th August 1981, discussed further below.) Examples of voluntary transactions are those derived from gifts, settlements inter vivos, appointments of trustees, wills, assents by personal representatives, or appointments under powers without consideration.

Jowitt's *Dictionary of English Law* (1959) contains (at p.1845) the following definition of volunteer:

"In the law of settlement and wills a volunteer is a person who is merely an object of bounty, as opposed to a person who takes an interest for valuable consideration. Thus an ordinary devisee or legatee is a volunteer; if an appointment is made under a general power without consideration the appointee is a volunteer. So in the case of a voluntary settlement or conveyance the person on whom the voluntary settlement is made is called a volunteer."

The provisions in the Real Property Acts which are relevant to the position of volunteers are the following:

(a) Section 109 of the 1861 Act, which provides that a transferee whether voluntary or not of land under the provisions of the Act shall not except in case of fraud be affected by actual or constructive notice of any claims rights titles or interests other than those which have been notified or protected being recorded in the register according to the provisions of the Act, any rule of law or equity to the contrary notwithstanding.
(b) Section 123 of the 1861 Act, which provides that no action of ejectment lies against a registered proprietor for the recovery of land under the provisions of the Act with certain exceptions, of which one is "the case of a person deprived of any land by fraud as against a person registered as proprietor through fraud or against a person deriving otherwise than as a purchaser or mortgagee bona fide for value from or through a person registered as proprietor through fraud".

(c) Section 126 of the 1861 Act, which provides that nothing in the Act is to be interpreted to subject to any action of ejectment or for recovery of damages any purchaser or mortgagee bona fide for valuable consideration of any land under the provisions of the Act.

(d) Section 51 of the 1877 Act, which provides that no unregistered estate interest security contract or agreement is to prevail against the title of any subsequent purchaser for valuable consideration duly registered under the Act.

Two particular questions arise in relation to voluntary purchasers:

1. Are they able to enforce the transaction before registration?

2. Are they protected by the principle of indefeasibility after registration?

These two questions will be considered in turn. Another less important matter arises in relation to voluntary purchasers before registration, namely, the disadvantage such volunteers suffer in any competition with other equitable interests. There appears to be no reason for modifying the equitable rules in this situation.

1. RIGHTS OF VOLUNTARY PURCHASERS BEFORE REGISTRATION

The complicating factor which, before registration, distinguishes the position of a voluntary purchaser from that of a purchaser for value is the rule that equity will not assist a volunteer. This means that the volunteer cannot seek the intervention of equity to assist in completing the transfer of property unless the transferor has done all in the transferor's power to effect the transfer [see Jones v. Lock (1865) L.R. 1 Ch.App.25; Anning v. Anning (1907) 4 C.L.R.1049]. This principle has been confirmed in many cases and was made statutory by the enactment of s.200 of the Property Law Act 1974–1986, and it means that a voluntary transfer of land under the Real Property Acts is effectively complete once:

(a) a transfer in favour of the transferee has been signed;

(b) this transfer together with the certificate of title, if not already under suitable deposit in the Titles Office, has been delivered to the transferee;

for the transferee will then be in a position to obtain legal title by registering the transfer [see Brunker v. Perpetual Trustee Company Ltd. (1937) 57 C.L.R. 555].
This right to obtain registration is the most important right as far as an unregistered transferee is concerned, since registration is both a precondition to any enjoyment of the protection of the doctrine of indefeasibility and necessary to prevent registration of another person. Accordingly the question whether there is a right to registration overshadows the question of the precise status of the transferee in relation to the property before registration. In Brunker v. Perpetual Trustee Company Ltd. (1937) 57 C.L.R. 555 reliance was placed by the High Court on the New South Wales equivalent of s.48 of the Real Property Act 1877-1988 in reaching the conclusion that a voluntary transferee holding both the certificate of title and signed transfer was entitled to registration.

While doubts may be entertained as to the degree of equivalence between s.48 and the corresponding New South Wales section, and the meaning of s.48 is a matter of acute controversy in certain respects [see comments of Duncan in his article The Precarious Estate of a Registered Volunteer under the Real Property Act (Qld.), 3 Queensland Lawyer 83-87 at p.85, and the differing views expressed by the members of the High Court in Breskvar v. Wall (1972) 126 C.L.R. 376], there is no reason to doubt that it confers the right to registration on a voluntary transferee who is equipped with the certificate of title and signed transfer [see O'Regan v. Commissioner of Stamp Dutes (1921) St.R.Qd. 283,294].

Accordingly, there is now reasonable certainty in the law regarding the right of a volunteer to obtain registration and no need for significant amendment of the relevant statutory provisions in this regard.

It is also clear, from the terms of s.200, that a volunteer obtains the relevant equitable interest in the estate which is to be transferred once the volunteer has possession of the signed transfer and, where appropriate, the certificate of title. Accordingly, such a person's interest would appear to be caveatable from this point.

2. ARE VOLUNTARY PURCHASERS PROTECTED BY THE PRINCIPLE OF INDEFEASIBILITY OF TITLE ONCE REGISTERED?

The major issue raised is whether or not the estate of a registered voluntary transferee is subject to prior equities which affected his transferor.

It may be thought that the fact that s.109 applies the same rule to transferees whether voluntary or not indicates an intention that both are equally to be immune from prior interests which have not been notified or protected by entry in the register, and that this conclusion is strengthened by the fact that the paramountcy provision makes no distinction between the estate of a registered volunteer and that of a registered transferee for value.

However, in King v. Smail [1958] V.R. 273, Adam J. held that the Transfer of Land Act did not confer upon a registered proprietor who was a mere volunteer a title free from prior equities. The argument put forward in that case was that the indefeasibility provision (in Queensland, s.44 of the 1861 Act) was the key section of the Act, and that other provisions did not warrant the exclusion of volunteers from its benefits.
In rejecting this, Adam J. referred to the remarks of Lord Watson in *Gibbs v. Messer* [1891] A.C. 248, that "the object of the Act is to save persons dealing with registered proprietors from the trouble and expense of going behind the register in order to investigate the history of their author's title and to satisfy themselves of its validity. That end is accomplished by providing that anyone who purchases in bona fide and for value from a registered proprietor and enters his deed of transfer or mortgage in the register shall thereby acquire an indefeasible right notwithstanding the infinity of his author's title". Adam J. commented that it was apparent that Lord Watson considered "that it was no part of the scheme of the legislation to confer indefeasible and paramount title on mere volunteers who procured registration".

In addition, he thought that the provision corresponding to s.109 confirmed the view that mere volunteers were outside the contemplation of the indefeasibility provision. He said (at pp.277 – 8):

"The protection given by s.43 [Queensland s.109] to a registered proprietor i.e. a legal owner of land, against the consequence of notice actual or constructive of trusts or equities affecting his transferor has point where the legal owner is a purchaser for value. A purchaser for value has by virtue of this section the immunity from prior equities of a bona fide purchaser of the legal estate without notice under the general law. On the other hand, to confer on a mere volunteer immunity from the consequences of notice would be illusory, for as already stated the volunteer was, on well-settled rules of equity, subject to equities which affected his predecessor in title whether with or without notice of such equities."

This conclusion is supported as being applicable under the N.S.W. legislation in Baalman: *The Torrens System in New South Wales*, 2nd ed., at p.195 (now reproduced in Woodman & Nettle on *The Torrens System* at pp.347-348), where it is stated that "on registration of a voluntary transfer, the transferee, as is the case of a volunteer under the general law, occupies no better position than did his transferor. But once registered he occupies a position quite as good; his title is indefeasible against all claims except such as would have prevailed against his immediate predecessor, and he can confer an indefeasible title upon a purchaser for value."

Also, Whalan in: *The Torrens System in Australia*, at 336, while conceding the matter is not free of doubt, and citing a clash of authority in Canada (*Imperial Bank v. Esakin* [1924] 2 D.L.R. 675 supports the view that protection should be withheld from volunteers while in *McKinnon v. Smith* [1925] 4 D.L.R. 262 contrary views were expressed, which are supported in Thom's *Canadian Torrens System*, 2nd edition at p.266, see also commentary by Carter in *Saskatchewan Law Review* 329-355, which discusses additional conflicting cases and recommends a legislative solution in *Saskatchewan as had been effected in Ontario, where voluntary transfers are prevented from conferring indefeasibility by s.90 of the *Land Titles Act*, R.S.O.1980, s.230, s.90), clearly favours the view that a volunteer would be denied the protection of indefeasibility. Whalan further states that the matter is sufficiently uncertain to necessitate legislation which should withhold protection from a volunteer.
A number of other learned authors (for example, Hinde, McMorland & Sim, Introduction to Land Law at p.204) have also pronounced in favour of denying the protection of indefeasibility to volunteers and the relevant passages are quoted, together with some more general pronouncements regarding bona fide purchasers in Appendix I.

However, Duncan, in his article cited above, while inclining towards the opposite point of view as a result of a consideration of the definition of "transfer" in s.3 of the 1861 Act, as including transfers "whether for valuable consideration or otherwise", indicates that there is considerable uncertainty surrounding the position of a volunteer and calls for legislative clarification.

A lack of consistency in wording between the four key sections of the 1861 Act on which the concept of indefeasibility is said to rest, ss.44, 109, 123 and 126, does not help matters, for both ss.123 and 126 distinguish between volunteers and purchasers for value.

There appears to have been no judicial consideration of this issue in Queensland. In Duncombe v. New York Properties Pty. Ltd. [1966] 1 Qd.R. 16, Connolly J., in giving the judgment in a unanimous decision of the Full Court, appears to have taken it virtually for granted (at p.20) that volunteers do not take free of prior equities even when registered. However, there is no argument supporting this view.

It is suggested that the decision in King v. Smail may well be held to correctly state the position in Queensland, that the proviso to s.51 of the 1877 Act may strengthen the conclusion reached in that case, and that it might be held that nothing in Breskvar v. Wall (1972) 126 C.L.R. 376 affects it. The only Queensland decision with a bearing on this matter is an unreported decision by Kelly J. (Case No. 486 of 1981 In the matter of The Real Property Act 1861-1980 and In the matter of Caveat No. C616980 and In the matter of an application by Washington Constructions Company Pty. Ltd., judgment delivered on 26th August 1981). The approach taken in King v. Smail was explicitly approved and applied, removal of a caveat being ordered on the basis that the caveator's rights would be unaffected by a voluntary transfer involving the vesting of trust property in a new trustee. Special reliance was placed on the concluding paragraph of s.51 of the 1877 Act, which is expressly limited to purchasers for valuable consideration in its effects. There was an appeal against removal of the caveat to the Full Court which was allowed on grounds which in no way involved the status of volunteers, and without expressing any opinion on the issue (See Full Court, Douglas, Matthews and Macrossan JJ, decision handed down 29th July 1982).

Indirect support for this view may be derived from the South Australian case of Blacks Ltd. v. Rix [1962] S.A.S.R. 161. The plaintiffs in that case sought a declaration that they were entitled to enforce against the defendants restrictive covenants contained in an encumbrance which was registered upon the title of the covenantors. The defendants were successors in title of the covenantors. They also claimed a declaration that they were entitled to protect their rights or interests by the registration of a caveat forbidding any dealing with the land registered in the names of the defendants, unless such dealing was expressed to be subject to the rights or interests of the plaintiffs. Napier CJ. held that the evidence disclosed the existence of a building scheme, and that the
plaintiffs were entitled to enforce their equitable rights against the defendants unless this was precluded by the provisions of the Real Property Act 1886 relating to indefeasibility of title. The court held this was not so precluded.

S.249 of the Real Property Act 1886-1975 (S.A.) provides that no unregistered estate, interest, contract or agreement shall prevail against the title of any bona fide subsequent transferee for valuable consideration duly registered under the Act. In South Australia, therefore, the position is that an unregistered interest by way of restrictive covenant will not prevail against the title of a registered bona fide subsequent transferee for valuable consideration. The terms of s.249 are similar to those to be found in s.51 of the Queensland 1877 Act. It must be presumed, though it is not stated, that the transferee in Blacks Ltd. v. Rix was not a transferee for value. Accordingly this case is indirect authority for the view that volunteers do not enjoy the benefits of indefeasibility of title. This view was adopted in the face of provisions (see ss.69-71 of the Real Property Act 1886-1975) which expressly distinguish between bona fide purchasers for value and others in relation to several of the specific exceptions to indefeasibility, so that the canons of statutory interpretation militated against it.

In a recent case in the New South Wales Court of Appeal, Koteff v. Bogdanovic (1988) 12 NSWLR 472 (affirming first instance decision No.Eq. 3386 of 1985, decided October 13, 1986), a view much more favourable to the protection of volunteers was taken. The judgment at first instance cited the dissenting view of Edwards J. in In re Mangatainoka (1914) 33 N.Z.L.R. 23 at 65, to the effect that the decision in Assets Co. v. Mere Roiihi [1905] A.C. 176 is explicit authority for the view that a person registered without fraud has an indefeasible title whether or not consideration is given for the transfer. The Court of Appeal chose not to follow King v. Smail [1958] V.R. 273.

It appears on the basis of the decision in Crow v. Campbell (1884) 10 V.L.R. 186, that the consideration must have been given at or before the time of transfer or at which there is a previous legal obligation to transfer in order for the title to be indefeasible. This decision is undoubtedly logically sound, but could give rise to difficulty if the transferee made some kind of payment later wrongly thinking that this would confer indefeasibility.

The question has been raised before the Commission as to whether there is any basis for treating certain species of volunteer differently. It being suggested that beneficiaries of estates should be treated more favourably than volunteers inter vivos. There appears to be no basis in caselaw for such a distinction.

Although the preponderance of caselaw and of judicial and academic comment appears to favour a view that volunteers do not enjoy the benefit of the provisions conferring indefeasibility of title, and the matter is clearly somewhat uncertain, this may not be the situation envisaged by the originators of the Real Property Acts. A number of other jurisdictions expressly preserve the position of bona fide purchasers for value in relation to individual exceptions to indefeasibility.
Most Torrens legislation appears to make some distinction regarding volunteers. For example, many of the South Australian exceptions in ss.69,71 of the Real Property Act 1886-1975 to indefeasibility are hedged around with the qualification that they do not affect a registered proprietor "taking bona fide for valuable consideration" or persons bona fide claiming under such a person. Presumably this means that they apply only to volunteers, since s.72 prevents notice from amounting to lack of bona fide. Queensland has no such provisions and so one falls back on the less than clear final paragraph of s.126 which purports to protect bona fide purchasers for value.

It may be argued that the rule of equity that a volunteer transferee takes subject to equities which affected his transferor, is one which should not be set aside unless its preservation is inconsistent with the proper functioning of the registration system. While it might be thought that there is nothing in the Torrens system that requires that a registered volunteer should be treated in all respects in the same way as a registered transferee for value, protecting volunteers would have the disadvantage of increasing the number of equities defeated by registration. It should be remembered that some of these will be cases involving some kind of fraud, and will be cases involving a payment or potential payment out of the assurance fund. It could be argued that there is no reason not to apply the principles upon which the original equitable rules governing volunteers were based, namely that volunteers should not receive a greater benefit to the detriment of a prior interest.

However, after due deliberation, a strong majority of the Commission are of the view that the original intention of the Torrens system was to minimise exceptions to indefeasibility, and in particular to do away with the need to have regard to equitable criteria in determining the rights of a registered proprietor. In reaching this view the Commission lays great emphasis on the use in s.109 of the words "whether voluntary or not". While the Real Property Acts taken as a whole are ambiguous on this question through the reference to purchasers for value in ss.123 and 126, the Commission is of the view that appropriate amendments should be made to ensure that it is clear that volunteers who become registered are to receive the benefit of the principle of indefeasibility of title.

Treating registered volunteers in the same way as those who become registered as a result of a transaction for value removes the problem of determining the dividing line between a purchaser for value and a voluntary purchaser, at least for the purposes of determining the rights of a registered proprietor. This is a significant advantage for while purchasers for full market value on the one hand, and donees and beneficiaries of estates fall neatly into one or other category, there are ambiguous situations where a sale is at an undervalue. A definition of a voluntary purchaser would be included within the Act in order to resolve these difficulties. For example, it could be provided that a purchaser who is both not at arms length from the vendor in relation to the transaction and who does not give valuable consideration to full market value is a voluntary purchaser. However, this or any other definition of this nature is likely to give rise to the problem that transactions may be impeached years later on the basis of the consideration being less than market value. Valuing is not an exact science, and the only other appropriate criterion for distinguishing voluntary purchasers, namely the lack of a situation where
the parties are at arms length involves similar difficulties in identification.

The Property Law Act 1974–1986 also provides in s.4 a definition of valuable consideration which includes marriage consideration but excludes a nominal consideration in money. It should be borne in mind that valuable consideration is generally believed to include both money and money's worth and marriage consideration. [See Pettit: Equity and the Law of Trusts (3rd Edition)]. Since the term "purchaser" is defined in that Act as meaning a purchaser for valuable consideration and it is intended that the terminology used in that Act and the Real Property Acts should, as far as possible, be the same, it is suggested that the appropriate way to given effect to the decision that volunteers are to be treated in the same way as those who give valuable consideration is to employ the terms "transferee" or "registered proprietor" rather than "purchaser" in the relevant provisions of the Real Property Acts.

The only possible problem with this manner of proceeding is that it omits the words "bona fide" which have customarily preceded the phrase "purchaser for value" in the jurisprudence. The precise effect of the words "bona fide" is elusive in the sense that it is unclear what additional meaning, if any, they import by their inclusion. The clearest statement as to their meaning is probably found in the statement of Knox C.J. in Stuart v. Kingston (1923) 32 CLR 309 at 330, where he regards these words as importing an absence of dishonest intention.

These words, or some acceptable substitute such as a reference to good faith, need to be included at appropriate places in any provisions replacing ss.123 and 126 in order to exclude fraudulent parties from benefit. Omission of these words could also result in difficulty in a situation such as that which arose in Registrar of Titles v. Esperance Land Co. (1899) 1 W.A.L.R. 118, where land included in error within a certificate of title was held to be excisable at least partly on the basis of lack of bona fides in relation to the acquisition of the excess portion.

Amendments to achieve these objectives are set out in the draft legislation appended to this paper. The words "whether voluntary or not" have been removed from s.109 as they do not assist the meaning of the provision, since the term "transfer" and corresponding terms such as "transferee" are defined in s.3 so as to include voluntary transfers.
CHAPTER VI

UNREGISTERED INTERESTS

PRIORITY BETWEEN UNREGISTERED INTERESTS

Section 109 of the 1861 Act is designed to protect a bona fide purchaser who relies on the register. It is however the settled interpretation of that section that the protection it affords accrues only upon registration. It does nothing to protect a purchaser of Torrens title land in the period between settlement and registration, or in the period between contract and settlement.

The question of priority between unregistered interests has been raised in many cases over the years, from which has emerged as settled law the basic proposition that priorities between two such competing interests should be resolved according to the rules for resolving priorities between equitable interests evolved by the general law. These cases have also provoked much academic comment including numerous suggestions for reform.

Griffith, C.J. in one of the earliest leading authorities, Butler v. Fairclough (1917) 23 C.L.R. 78 at p.91 said:

"It must now be taken to be well settled that under the Australian system of registration of titles to land the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the Statutes. This recognition is, indeed, the foundation of the scheme of caveats which enabled such rights to be temporarily protected in anticipation of legal proceedings. In dealing with such equitable rights the Courts in general act upon the principles which are applicable to equitable interests in land which is not subject to the Acts. In the case of a contest between two equitable claimants the first in time, all other things being equal, is entitled to priority. But all other things must be equal, and the claimant who is first in time may lose his priority by any act or omission which had or might have had the effect of inducing a claimant later in time to act to his prejudice."

He continued at p.92:

"If a man having a registrable instrument neither lodges it for registration nor lodges a caveat to protect it, it is clear that a registrable instrument later in date, but lodged before his, will have precedence, notwithstanding notice of the earlier instrument received before lodging his own. That is by reason of the express provisions of the Statute."

Messrs Woodman and Nettle in their The Torrens System in New South Wales (1958) at p.366 wrote:

"Under general law in force prior to the Torrens legislative philosophy, much turned on the distinction, recognised by generations of courts, between
the "legal estate" and some competing "equitable interest". Came the Torrens system and the irresistible tendency to equate the title of a proprietor, who had achieved registered status under the Real Property Acts, with that of the holder of a "legal estate", whilst unregistered interest in Torrens title land, for practical purposes, were accorded the same status and incidents as "equitable interests".

That approach was perhaps inevitable in the case of a judiciary nurtured in general law conveyancing practices, but it must be emphasised that, in the Torrens system, the proper distinction is between registered and unregistered interests.

In his article "The Torrens System - Some Thoughts on Indefeasibility and Priorities" (1973) 47 A.L.J. 526-544 at p.540, Professor Sackville wrote:

"The inability of the Torrens system to break away from general law concepts has been most marked in the rule governing priority between unregistered interests. The principles applied by the courts have been tied very closely to the general land doctrines developed by courts of equity often with the consequence that the special requirements of a system of registration have been overlooked. The general principles of equity have been applied despite obvious differences between equitable interests under the old law and registered interests under the Torrens system."

Later, at p.541 he said:

"Because the protection accorded by the section is not available until registration, a purchaser of Torrens system land is actually in a less advantageous position following settlement then a purchaser of old system land receiving a conveyance of the fee simple estate."

Section 34(2) of the Queensland Act provides that any instrument shall be registered as soon as:

(a) particulars thereof are recorded in the register together with particulars of the day of production in the office of the Registrar of Titles for the purpose of registration of the instrument.

However, s.43 states that no instrument shall be effectual to pass any estate or interest in land until the instrument has been registered. In the case of a purchaser who meets with delay in the registration process he could suffer if the holder of a prior equity chooses to assert his rights. In I.A.C. (Finance) Pty. Limited v. Courtenay (1963) 110 C.L.R. 550 the Solicitor for the vendor withdrew a transfer he had lodged for registration and lodged another transfer to another purchaser. The High Court held that the Solicitor had no authority to withdraw the transfer. The original purchasers' rights should not be prejudiced and that they retained their priority over subsequent purchasers.

In this case Kitto, J. said at p.571:

"Until registration a person who has dealt with a registered proprietor cannot have more than an equitable interest for until that event, even a registrable instrument cannot pass the estate or interest which it specified (s.41)." (That section is comparable to s.43 of the Queensland Act.)
He continued at p.572:

"A purchaser, his interest before registration being necessarily equitable only, derives no priority over the holder of a pre-existing registered interest from absence of notice."

Section 43A(1) of the New South Wales Act reads:

"For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable under this Act shall, before registration of that dealing, be deemed to be a legal estate."

Kitto, J. at p.573 said:

"That estate or interest is given by s.43A the same immunity from the effect of notice as s.43 provides for registered estates or interests in virtue of their being legal estates or interests. The result is that (fraud apart) a purchaser may pay his money to the registered proprietor in exchange for a registrable instrument (or one that will be registrable upon his signing it) without troubling about any notice that he may have received of a trust or unregistered interest. Provided that he lodges his instrument for registration before the holder of a competing prior interest renders the purchaser's instrument no longer registrable by lodging a registrable instrument for registration or entering a caveat, s.36(1) will ensure that the purchaser obtains registration and thus obtains the protection of s.43."

In the same case at p.584 Taylor, J. considered a submission that s.43A was intended to advance in point of time the protection afforded by s.43 upon registration, i.e. that the words "legal estate" mean "the estate of a registered proprietor." He said:

"If it was intended so to advance the unqualified protection given by s.43 upon registration it would have been a simple matter to say so. To my mind the expression "a legal estate" was used advisedly and with a view to affording, at the most, the same measure of protection as that given at common law to a person who has acquired a legal estate in land without notice of some prior equitable interest."

The High Court in Meriton Apartments Pty. Ltd. v. McLaurin and Tait (Developments) Pty. Ltd. (1974-75) 133 C.L.R. 671 at p.676 said:

"Indeed, there is an advantage to the purchaser in taking a transfer direct from the registered proprietor - the risk that intervening equitable interests will arise is diminished. And this procedure does not lessen the protection which s.43A of the Real Property Act affords. The limited operation of that section is, we think, correctly explained by Taylor J. in I.A.C. (Finance) Pty. Ltd. v. Courtenay. The reasons given by Taylor J. indicate persuasively that the section confers upon a purchaser who has received a registrable instrument and paid the purchase money the same protection against notice as that achieved by a purchaser who acquires the legal estate at common law, rather than the larger degree of protection the purchaser would achieve if, in accordance with the view expressed by Kitto J.
in the same case, the section advanced in time the protection which ss. 42
and 43 give upon registration."

Knox, C.J. in Templeton v. Leviathan Pty. Ltd. (1921) 30 C.L.R. 34 at p.55
quoted the following statement by Hogg:

"Any question of priority between unregistered interests that depend on the
doctrine of notice will have to be decided on general principles of equity
jurisprudence."

Professor Whalan in his essay "The Position of Purchasers Pending
Registration" in The New Zealand and Torrens System Centennial Essays (ed.
G. W. Hinde, 1971) 120-137 at p.123 wrote that this statement was
unfortunate for two reasons:

First, it is submitted that, had s.182 (cf. N.S.W. s.43 and Qld. s.109) been
given a wider interpretation, the existing exception from its protective
mantle of cases of fraud in the Torrens sense would have provided an
adequate weapon against improper dealing, and would have resulted in a much
fairer line being drawn between competing interests.

Secondly, although notice was one of the prime evils aimed at by Torrens and
the other nineteenth century reforms, the curious result is reached that,
under the almost universal practice in which settlement takes place prior to
registration of the instruments consummating the transaction, a purchaser of
Torrens system land is in a worse position than purchaser of deeds system
land.

Professor Whalan (pp. 132 et seq) canvassed a number of methods that could
be used to confer protection from the inception of a contract of sale and
purchase until consummation of the transaction by notification on the
register.

His first suggestion was to provide that anyone with a valid contract who
suffers loss between the time of contracting and ultimate registration could
claim for his loss against the Assurance Fund. Another of his suggestions
was an amendment to provide that, except in the case of fraud, the entry of
a caveat fixed priority between unregistered instruments. His final
suggestion, and one which he submitted would cover the whole span between
contract and final registration, was for a "Notice of Priority" to be
entered by the purchaser immediately after contract which would protect the
priority of instruments required to consummate the contract, and, unless
removed or withdrawn in the meantime, would protect the priority of the
transaction right up until the final act of registration by, or on behalf of,
the registrar. He concludes by saying (p.137) the use of such a Notice:

"would ensure that innocent parties could not be visited with loss by the
intervention of equitable principles that no longer "do equity" in
circumstances in which sufferers are presently powerless to protect
themselves".

Under the provisions of Part XIA of the New South Wales Real Property Act
1900 the registrar may be required to make a search of the title and to
issue a certificate of the result of that search showing particulars of any
recording that affects the folio of the register. If, in a subsequent
dealing based on the correctness of the certificate, a person suffers loss or damage, he may bring an action against the registrar for damages.

Sections 92 and 93 of the Victorian Transfer of Land Act 1958 and ss. 146-150 of the Western Australian Transfer of Land Act 1893 provided for search certificates and stay orders under which a purchaser is given a period during which he is entitled to priority over other instruments lodged which may be adverse to his interest. However, it is doubtful whether the period of forty-eight hours allowed under these provisions is priority enough.

Section 52 of the Tasmanian Land Titles Act 1980 enables certain persons to lodge Priority Notices which limit a period not exceeding 30 days after lodgment during which priority is reversed by lodging the dealing specified in the notice. This, in effect, prevents registration or recording of any other dealing.

However, as all the foregoing provisions operate against an instrument lodged for registration they would be of no avail against a prior unregistered equitable interest. Use of such a process could entail so much extra work for Solicitors and Titles Office staff that they may be disinclined to use it in routine cases. A practitioner would be aware but if he failed to use this procedure and for some reason his client lost his rights to be registered, an action for negligence could ensue.

Professor Sackville (Op.Cit.) suggests (p.542) that the notice provision be amended to provide that a purchaser receiving a registrable instrument on settlement of a transaction takes free of all earlier unregistered interests unless they are protected by a caveat or a dealing already lodged for registration. This approximates the interpretation of s.43A espoused by Kitto, J. in I.A.C. Finance v. Courtenay (supra.) Professor Sackville says further:

"The protection would apply only in the absence of fraud and would be subject to the express statutory exceptions to indefeasibility. As is the case at present, mere notice or knowledge of an unregistered interest would not amount to fraud. Special provision should be made to ensure that a transferee under a transfer by direction and a purchaser receiving a discharge of his vendor's mortgage are entitled to rely on the protection of the section. The second amendment should take the form of a declaration that, subject to the notice section and in the absence of fraud, priority between unregistered interests should be determined by the date of which caveats are lodged. Such an upgrading of the caveat provisions would create an adequate incentive to lodge caveats and thereby ensure that the register more accurately reflects the state of title to the land."

However, the notice provisions of the Acts of the other States differ from those in s.109 of the Queensland Act which provide that a transfer shall not, except in the case of fraud, be affected by actual or constructive notice of any claims, etc. other than those notified or protected by the register.

It is instructive to conclude this discussion of the caselaw and commentary thereon by focussing upon two recent Queensland cases. In Commonwealth Savings Bank of Australia v. Raymor (Brisbane) Pty. Ltd. (No. 899 of
1981), D.M. Campbell J. held that there was no reason why the Bank's later equitable interest as an unregistered mortgagee should prevail over Raymor's earlier equitable interest.

Raymor's interest arose under a guarantee executed by S whereby the guarantor charged all his property for the amount of his indebtedness, and this included the subject land. S and his wife sold the land to Clark and his wife. The Clarks executed a bill of mortgage in favour of the Bank. At the time of settlement, a real property search by the Bank revealed that the land was free of encumbrance save for a mortgage which was to be discharged. Between the date of settlement and the date of lodgment of the conveyancing documents together with the Bank's bill of mortgage, a caveat was lodged by Raymor. The judgment proceeded upon the basis that both parties were at fault. Raymor had failed to lodge a consent caveat, which would have prevented the possibility of the registered proprietor holding out that his estate was not subject to the prior equitable interest. The Bank had omitted to make any inquiries as to unregistered interests, and had not inquired about the answers to requisitions as to any unregistered documents or dealings.

In these circumstances where the merits were equal, the maxim under which the first in time of creation was considered to be the better equity was applied.

In the other case, Clark and Clark v. Raymor (Brisbane) Pty. Ltd. [1982] Qd.R.479 which arose out of the same facts, Connolly J. held that Raymor's prior equitable charge was postponed to the equity of the plaintiffs to have their transfer registered. The judgment followed the decision of the High Court in Butler v. Fairclough (1917) 23 C.L.R. 78, and concluded that the claimant who was first in time had lost his priority by his failure to lodge a caveat prior to the date of settlement.

An appeal to the Full Court of Queensland in relation to the second of these cases was dismissed. It is not intended here to examine the two decisions. It is however appropriate to comment on the concluding observation by Connolly J. (at p. 486):

"If I should be wrong about this the situation is, in my opinion, highly unsatisfactory. Section 43A of the New South Wales Act was enacted to protect the holder of a registrable instrument without notice of prior equities between settlement and the registration of his instrument. As s.48 of the Act of 1877 does not fill the gap, serious consideration should be given to the enactment of some similar provision".

**NEW SOUTH WALES - Section 43A**

Section 43A was inserted in the N.S.W. Real Property Act 1900 in 1930. As amended in 1970, it provides (omitting sub-sections 2 and 3):

(1) For the purpose only of protection against notice, the estate or interest in land under the provisions of this Act, taken by a person under a dealing registrable, or which when appropriately signed by or on behalf of that person would be registrable, under this Act shall, before registration of that dealing, be deemed to be a legal estate.
The leading decision on this section is I.A.C. (Finance) Pty. Ltd. v. Courtenay (1963) 110 C.L.R. 550, in which two rather different interpretations were placed on it by Kitto J. and Taylor J., the relevant passages having been quoted above in the discussion of that case. The view of Taylor J. has received support in subsequent decisions [see Jonray (Sydney) v. Partridge Bros. (1969) 89 W.N. (Pt.1) (NSW) 568; United Starr-Bowkett Co-operative Building Society (No.1) Ltd. v. Clyne (1967) 68 S.R. (N.S.W.) 331; and Just (Holdings) Pty. Ltd. v. Bank of NSW (1971) 125 C.L.R. 546 (per Barwick C.J.)]. Both judgments started from the assumption that s.43A was intended to deal with the position of the holder of a registrable instrument between the time of its receipt and the time of its registration, and that s.43 (the notice section) did not afford any protection to a purchaser prior to registration. The essential point on which they differed was as to the meaning of the term "legal estate" in s.43 A(1).

Kitto J. thought that the term "legal estate" should be understood to mean "the estate of a registered proprietor", and that s.43A was intended to advance in point of time the protection afforded by s.43 upon registration. A consequence of this view "was that (fraud apart) a purchaser may pay his money to the registered proprietor in exchange for a registrable instrument (or one that will be registrable upon his signing it) without troubling about any notice that he may have received of a trust or unregistered interest. Provided that he lodges his instrument for registration before the holder of a competing prior interest renders the purchaser's instrument no longer registrable by lodging a registrable instrument for registration or entering a caveat, s.36(1) will ensure that the purchaser obtains registration and thus obtains the protection of s.43. (See also s.36(3)). This is so because, by reason of a proviso added to s.74 by the amending Act which inserted s.43A, no caveat subsequently entered can defeat him, and the holder of a competing interest will not be entitled to the intervention of a court of equity on the ground that the purchaser acquired his right to registration with notice of that interest." (110 C.L.R., at p.573).

Taylor J. observed that "a person who has paid his purchase money and who has secured a registrable memorandum of transfer needs no protection against notice received thereafter and a provision which purports, merely, to protect him against the effects of notice will not confirm his title. Does the section then go further than merely to afford a so-called protection against notice and operate to give to the holder of a registrable memorandum of transfer priority over an earlier equitable interest where he has, without notice thereof, paid his purchase money and obtained his registrable instrument? The suggestion that it does is based upon the contention that the holder of a registrable instrument in such circumstances is enabled to assert, as against the prior equitable interest, that he has by virtue of the section a legal estate in the land acquired without notice of the earlier interest and that he is, therefore, entitled to perfect his title by registration. Such a combination, it is said, does some violence to the section but it is, it seems to me, the result which ... the section was intended to produce ... To my mind, the expression 'a legal estate' was used advisedly and with a view to affording, at the most, the same measure of protection as that given at common law to a person who was acquired a legal estate in land without notice of some prior equitable interest." (110 C.L.R. at P.584).
On either interpretation, if a purchaser received a registrable dealing on settlement, and only thereafter received notice of a prior equitable interest, he will not be affected by that interest, because s.43A gives him the same immunity as s.43 provides for registered estates (per Kitto J.) or because s.43A makes him a purchaser of the legal estate who takes for value and without notice (per Taylor J.). On the approach favoured by Taylor J., s.43A does not protect a purchaser who has notice of an equitable interest prior to settlement.

In considering the possible adoption here of a section similar to s.43A, the following points need to be born in mind:

(1) Section 109 of the Queensland Act of 1861 (the notice section) is expressed in terms different from those in s.43 of the NSW Act. However, in Breskvar v. Wall (1972) 126 C.L.R. 376 it was assumed by Walsh J. that this section, like s.43 of the NSW Act, afforded protection only after registration of the interest of the person who claimed protection.

(2) There is no provision in Queensland corresponding to N.S.W. s.74(2), under which the Registrar-General is not restrained from recording a dealing prohibited by a caveat where the dealing had been lodged in registrable form before the caveat was lodged;

(3) Section 43A would not protect a purchaser who had notice of an equitable interest prior to settlement;

(4) The enactment of a section similar to s.43A would give a clear answer to the problem considered in Clark and Clark v. Raynor. It would however apparently have no application to the situation in Commonwealth Savings Bank v. Raynor. The reason given by Taylor J. (110 C.L.R. at p.591) is that s.43A clearly contemplates the position of a person dealing with the registered proprietor, for it speaks of the estate or interest in land taken by a person under an instrument registrable under the Act, and an instrument would only be registrable if executed by the registered proprietor. But the Bank dealt only with the purchaser, and its mortgage would become registrable only upon registration of the purchaser's memorandum of transfer.

The key problem in this area ultimately boils down to the existence of several defined areas of risk which affect a transferee from a registered proprietor. It is convenient for the purposes of analysis to break down these areas of risk into three categories.

One area of risk is the possible lodging of a caveat by another person after lodgment of a registrable transfer. This is what happened in Clark v. Raynor. Unless the caveat represents a caveatable interest it has merely nuisance value. If it does, the underlying interest may have been created at any prior time. However, if it has purportedly been created after settlement in favour of the transferee who is seeking registration, and certainly after lodgment, the courts are almost certain to hold there is no caveatable interest. If the interest was created prior to settlement, the courts, as in Clark v. Raynor (Breskvar v. Wall is another of a number of examples of this situation which have come before the courts, all of which have been resolved in favour of the transferee) are almost certain to
find that the failure to caveat earlier is conduct which renders the equity subject to postponement in priority in favour of the transferee.

One way of eliminating this area of risk is to alter the procedure governing caveats so that it is impossible to hold up registration by lodging a caveat once the transfer has been lodged. It appears the only case where there might be legitimate grounds for holding up registration at this stage, would be where there is some illegal activity such as theft of a certificate of title followed by a forged transfer. In such a case the remedy of an injunction or an approach to the Registrar notifying the facts would be available. In this regard it is recommended that a power for the Register not to Register while fraud is suspected should be included in the Real Property Acts.

This system is clearly workable for the Western Australian Office of Titles avoids some of our problems with caveats, by not allowing them to "jump the queue" as we do. The system would be streamlined if we adopted this practice, so that caveats were registered like normal transactions without any special handling. The introduction of the computerised unregistered dealing system (URDS) means that a prospective caveator can search to check if there any unregistered dealings in the system before lodging. If there is such a dealing under the proposed arrangement the caveator would no longer be able to stop it by lodging but if the matter was urgent could seek an injunction to prevent registration of the earlier dealing, e.g. where it was a forgery following theft of the certificate of title, or could approach the registrar with suitable evidence, e.g. statutory declarations as to loss of certificate of title to persuade the registrar to hold up registration until the matter was resolved.

An alternative course of action would be to divide caveats into two categories, urgent and non-urgent. The urgent category would attract a higher fee (commensurate with the cost of the special handling) and would "jump the queue" as at present. The non-urgent category would be treated as proposed above.

A second area of risk concerns the acquisition of notice of a prior equitable interest before settlement. Although the priorities question in this situation is complex, through the acquisition of an equitable interest on the part of the transferee prior to settlement at the entry into the contract of purchase, there is a great deat of reported cases. This is probably because a purchaser who discovers a prior equitable interest before settlement is almost certain to refuse to settle until the matter is clarified and resolved. Accordingly, irreconcileable conflicts of unregistered interests tend not to arise in these circumstances.

Where the prior equitable interest has been protected by lodging a caveat prior to the entry into the contract of sale, or otherwise by retention of a certificate of title, it is clear that it will bind a purchaser. If lodged between contract and settlement the situation is not so clear. While the general drift of a decision such as Clark v. Raymor seems to indicate that payment of purchase money on settlement in the face of knowledge of the prior equity would be likely to cause postponement of priority, and that an obligation would be implied on the part of a purchaser to search the register as close as reasonably possible to settlement, some argue to the contrary that the priorities question should be resolved at the time the
purchaser acquires an equitable interest at the contract stage. The former view is preferable, as it tends to minimises losses by avoiding the priority dispute becoming irreconcilable, since the matter is resolved before the purchaser pays the purchase price, while it is compatible with a reasonable conveyancing procedure for all parties. It is recommended that the resolution of priorities in this area be left to the courts to decide according to settled principles. The latest word on this issue in the High Court, Head v. Reliance Finance Corporation Pty. Ltd. (1983) 154 C.L.R. 326, which talks in terms of estoppel or creating reasonably foreseeable risks as the criteria for resolving equitable priority disputes, does not detract from this view.

This leaves the only remaining, but in some ways the most intractable area of risk, which is period of time between the final search of the register by the transferee, and the time of lodgment. The priority question is unresolved in this area as there are no reported cases involving the creation of interests by the transferor, or more significantly the lodgment of a caveat during this period. The creation of an interest by the transferor is unlikely to disturb the transferee since the transferee would have priority under equitable principles as the first in time, and there is unlikely to be any reason why the transferor should be postponed. The exercise of the power of sale by a mortgagee would generally take priority, but, the transferee is likely to become aware of this fact through inability on the part of the transferor to produce the certificate of title on settlement and the situation with regard to possession of the land. The only practical way in most cases to minimise the risk, apart from a careful check of the position with regard to possession of the land (this is desirable in any case to guard against such matters as short term tenants or adverse possessors), is the shorten the time interval between these two events by the following steps or a suitable combination thereof:

1. Settle at the Titles Office so as to be able to lodge transfer for registration immediately.

2. Search immediately before settlement.


The introduction of computerised search facilities in respect of unregistered dealings has shortened this interval, since there is now no need to search some hours before settlement or a day before, to surmount the possible problem of the relevant folio not being available for search, so that it can now be reduced to a matter of minutes. Coupled with the protection afforded in practice by obtaining possession of the certificate of title, without which another party will find it virtually impossible to lodge a transaction other than a caveat, the new search procedures virtually eliminate this risk. Ability to search on-line at settlement would have the relevant time interval, but it could not be eliminated altogether by administrative improvements short of permitting the search and settlement to take place at the lodgment desk so that search, settlement and lodgment were effectively simultaneous. It is recommended that this possibility be examined, although it is possible that the additional time required to settle in this way would be seen as more than outweighing, in practical terms, the benefits of eliminating the last vestiges of this area of risk.
Another current method of improving a purchaser's chances of winning a priority dispute with another equitable interest is to caveat to protect the equitable interest under the contract. While, in theory, this only stops adverse registration and does not directly affect priority against an earlier equitable interest, such an interest would be defeated by failure of its owner to caveat before the purchaser contracted, it would secure priority for the purchaser's equitable interest against subsequently created interests, as well as discouraging their creation. However, the cost and cumbersome procedure associated with caveats militates against their wide-scale use, which is an impediment to the adoption of Professor Whalan's suggestion, quoted above, that caveats should fix priority in the absence of fraud. In this context it should be borne in mind that even where a comparatively cheap and easy procedure exists for protecting the purchaser's equitable interest under the contract, as in the case of unregistered land in England, where registration of a land charge is a simple process, it is standard conveyancing practice to take this step only where there are some unusual features in the transaction, such as a long interval between contract and settlement, or the involvement of speculators.

Other methods of countering this problem have been adopted or proposed in other jurisdictions.

**STAY OF REGISTRATION AND PRIORITY NOTICE SYSTEM**

No other Torrens title legislation contains a provision corresponding to s.43A of the N.S.W. Act. However, in the Victorian and Western Australian Acts there are provisions which are designed to prevent a purchaser being defeated between settlement and the lodging of a transfer for registration. A person proposing to deal for value with a proprietor may, with his consent in writing lodge with an application for a search certificate an application for a stay of registration. If the result of the search shows that the proprietor is free to deal with the land, the Registrar signs an order staying registration of any instrument affecting the land to be comprised in the proposed dealing for forty-eight hours. If within that period an instrument affecting the proposed dealing is duly lodged for registration, it has priority over any other instrument lodged for registration after the time mentioned in the search certificate (see Transfer of Land Act 1958 (Vic.), ss.92 and 93.

The effect of this provision is to prevent an instrument lodged after the time mentioned in the search certificate taking priority by reason of its prior presentation for registration. The provision is not directed expressly at the problem of priority between competing equitable interests. The interests in question will be equitable, but they will be equitable interests which are capable of becoming legal interests by registration. The Victorian provision would therefore not seem to be applicable in the kind of situation considered in Clark v. Raynor. But an adaptation of the 'stay of registration' procedure which has been made in Tasmania would be applicable in those circumstances.

Until 1973, the Tasmanian legislation contained provisions similar to those in ss.92 and 93 of the Victorian Act. They were then replaced by a "priority notice" system. The concept of a priority notice is apparently derived from s.4 of the English Law of Property (Amendment) Act 1926, by
which a person intending to register a charge, instrument or matter under the Land Charges Act 1925 may give notice at the Land Registry at least fourteen days before the registration. The effect of the notice is to protect the person intending to register from incumbrances created subsequently to the notice and before the application to register. However, the Tasmanian registration system differs substantially from that which existed under the English Land Charges Act 1925. Section 52 of the Tasmanian Land Titles Act 1980 provides inter alia:

(a) A priority notice limits a period, not exceeding thirty days, after the day on which the notice is lodged with the Recorder during which priority is reserved for lodgment of the dealing specified in the notice;

(b) A priority notice operates a prevent registration or recording of any dealing lodged with, or served on, the Recorder after the lodgment of the priority notice, except as otherwise provided in the section;

(c) If a dealing specified in a priority notice is lodged with the Recorder within the period limited in the priority notice, that dealing is to be registered, notwithstanding the lodgment with the Recorder of any other dealing after the lodgment of the priority notice;

(d) The Recorder is not concerned to satisfy himself that a person lodging a priority notice is entitled or authorised to do so. However, a person who lodges a priority notice and who is not entitled or authorised to do so is liable to any person who may have sustained damage as a result of the priority notice being lodged for such compensation as a judge deems just;

(e) A person having an interest in land to which a priority notice relates may take out a summons requiring the person who lodged the notice to show cause why the priority notice should not be removed.

England also avoids the problem in relation to its system of registered title by attaching a period of priority automatically to any official certificate of search which is issued to an intending transferee. Lodgment during that period from the date of issue of the search will take priority over any other lodgment in that period. This system is facilitated by the fact that the English register can generally be searched only with the consent of the registered proprietor. The possibility of another search being made within the period of priority of an outstanding search is met by recording the fact of the former search on the latter, so that while the latter's priority is subject to that of the former, the holder of the latter is aware of the former search and can take appropriate action.

CAVEATS AND UNREGISTERED INTERESTS

It appears from the above provisions in the Tasmanian legislation that a priority notice operates as a form of caveat which not only temporarily freezes the register but also reserves priority for lodgment to the dealing specified in the notice. In this respect, the Tasmanian legislation is comparable to that in force in some Canadian provinces, which provide that the lodging of a caveat has the same effect as to priority as the registration of an instrument.
It is a tenable view that the Torrens system should give effect to the concept that in the absence of fraud, a person dealing with a registered proprietor should be unaffected by notice of unregistered interests. That principle is presently limited, as a result of an interpretation of s.43 of the N.S.W. and Victorian Acts which two members of the High Court accepted "without much enthusiasm" (See Lapin v. Abigail (1930) 44 C.L.R. at p.196) to the case where the person dealing with the registered proprietor becomes registered. If it was amended so as not to be so limited, the result would be that upon settlement a purchaser would take free of all unregistered interests, whether he had notice of them or not, unless they were protected by a caveat or unless a registrable instrument had already been lodged for registration. Both these matters could readily be ascertained by a search of the register at the time of settlement.

This was perhaps the essential idea underlying the enactment of s.43A of the N.S.W. Act.

It is also a tenable view that as the caveat system exists to protect the holders of unregistered interests, their failure to lodge a caveat should have the consequence that their interests should not prevail when they come into competition with later unregistered interests which are protected by the lodgment of a caveat. A provision which stated that priority between unregistered interests would be determined by the date on which caveats were lodged would give effect to this view, and could be justified on the ground that the holder of a subsequent unregistered interest should be entitled to rely on the register and accordingly should not be affected by the existence of unregistered interests which have not been notified by the lodgment of a caveat.

If amendments were made along either or both of the lines indicated in the two preceding paragraphs, it can be anticipated that parties with caveatable interests would be much more disposed to lodge them promptly than they are at present. The current position as established by J. & H. Just (Holdings) Pty. Ltd. v. Bank of N.S.W. (1970-71) 125 C.L.R. 546 is that failure to lodge a caveat is not necessarily such an act or default as to make it inequitable as between as earlier and a subsequent equitable owner that the earlier owner should retain his initial priority, though, as Barwick C.J. said (at p.554-555), there may be situations in which such a failure may combine with other circumstances to justify the conclusion that the act or omission proved against the possessor of the prior equity has conduct or contributed to a belief on the part of the holder of the subsequent equity at the time when he acquired it that the prior equity was not in existence. Such circumstances were held to be present in Clark v. Raynor, the crucial fact being that the holder of the prior equitable interest who had not lodged a caveat, had left the certificate of title in the possession of the vendor or registered mortgagee.

In Lapin v. Abigail (1930) 44 C.L.R. at p.205, Dixon J. observed that "if it were the settled practice for all owners of equitable interests to lodge caveats, a failure to conform to the practice would naturally lead those who searched to believe that there was no outstanding equity". It is not the settled practice for all owners of equitable interests to lodge caveats. If the legislation were amended to provide that priority amongst unregistered interests would depend on the order in which caveats were lodged, or if an amendment were made to the "notice section" in the way
mentioned above or a priority notice system were introduced, owners of equitable interests would in practice be compelled to lodge protective caveats. The question then arises whether such a major change in conveyancing practice is warranted. It is suggested that it is not.

The existing legislation already provides in the caveat system a means by which the holder of an unregistered interest can prevent it from being defeated through the registration of another interest. He needs no further protection, and it should be left to him to decide whether or not to lodge a caveat to protect his interest. The only amendment which should be made in his favour is one which would remove the necessity for him to register a caveat. In Queensland, a caveat has been held to be an "instrument" and to require registration: In re Scanlan (1887) 3 Q.L.J. 43; Re Cough (1950) Q.W.N.9. Elsewhere, "caveats are lodged, not registered", as Isaacs J. said in Barry v. Heider (1914) 19 C.L.R. 197 at p.219. The position should be made the same here, and the Registrar should simply record the caveat on the relevant folio of the register immediately it is received.

The position of a person who subsequently deals with the registered proprietor is more delicate, since the possibility exists that before he has secured a legal title by registration, and after he has made payment, registration may be prevented or delayed through the lodging of a caveat by a person claiming a prior equitable interest. It is to this situation that the various proposals referred to above are directed. It is however suggested that it is not correct in principle to give the holder of a subsequent equity priority if the prior equity holder fails to lodge a caveat (J. & H. Just (Holdings) Pty. Ltd. v. Bank of N.S.W. (1970-71) 125 C.L.R. 546 supplies an instance of a case where this would be inappropriate). A more satisfactory solution would be to amend the caveat system so as to deprive a caveat of effect in relation to instruments lodged prior to lodgment of the caveat. That solution was put forward in the Working Paper previously issued dealing inter alia with caveats. If that was done, and lodgment was made immediately after settlement, the holder of a registrable instrument would not be affected by unregistered interests which were not protected by a caveat lodged prior to the settlement.

Throughout this section of the report, consideration has been given to various proposals which are designed to give protection to a purchaser who upon settlement hands over the balance of the purchase price but is not immune from equitable claims because, through no fault of his part, he cannot obtain immediate registration of his instrument. It has been suggested in one submission that it would be in keeping with the policy of the Torrens system that protection should be given to the holder of an instrument in registrable form whether he is a volunteer or a purchaser for value, and that this should be accorded by amending s.48 of the 1877 Act by adding at the end of the first paragraph the words "which except in the case of fraud shall prevail over any other estate interest or equity in the land comprised in the instrument".

This proposed amendment is based upon the interpretation given by Walsh J. to s.48 in Breskvar v. Wall (1972) 126 C.L.R. 376. It would seem that the effect of such an amendment would be that interests which were not capable of registration would always be defeated by the execution of an instrument in registrable form. It is questionable whether the need to promote security of conveyancing requires such absolute priority to be given
to the holder of a registrable instrument. It is not obvious as to how questions of priority between competing registrable instruments would be determined. Would it be by date of execution, or by date of lodgment for registration? And what would be the consequence in relation to such competition if the holder of a registrable instrument lodged or failed to lodge a caveat? Moreover, the adoption of such an amendment would do nothing to solve the issue of priority between competing non-registrable interests, which presumably would continue to be determined by the principles laid down in Clark v. Raymor [1982] Qd.R.479.

It is suggested that it would be unsatisfactory to have different rules applicable to situations according as to whether the competition was between:

(a) holders of registrable instruments;

(b) holders of registrable instruments and other persons having an unregistrable interest in the land; and

(c) persons each having an unregistrable interest in the land.

SECTION 48 OF THE REAL PROPERTY ACT 1877-1986

The remaining matter to resolve in relation to the question of priorities of unregistered interests is the future of s.48. The precise ambit of the first paragraph this section is still unclear in view of the differing views of its effect among the members of the High Court in Breskvar v. Wall. The view of Walsh J. has already been discussed, but the view more likely to prevail is that the fact that a party to a priority dispute has the benefit of s.48 is but one factor to be taken into account in resolving that dispute. To that extent there is no harm in leaving the law as it is. Another important aspect of s.48 which has largely been overtaken by s.200 of the Property Law Act 1974-1986 is the assistance it furnishes to a voluntary transferee (see Brunker v. Perpetual Trustee Co., supra).

It had been argued in Breskvar v. Wall that the effect of s.48 was, in the circumstances, to put Alban Pty. Ltd. in a better position than the Breskvars. Alban, it was said, had a special statutory claim to registration which gave it a special equity in the land.

In rejecting this argument, Barwick C.J. said (at p.388).

"I do not think myself that this provision [s.48] adds anything significant to the position of the third respondent [Alban Pty. Ltd.]"

Meanwhile, McTiernan J. limited the effect of s.48 of the Real Property Act 1877-1988 to a mere recognition that unregistered Torrens conveyances create equitable interests. (See p.393).

On the other hand the judgment of Menzies J. attached considerable weight to s.48. Menzies J. remarked that it was a section not generally found in other Torrens system legislation (see p.398). He suggested it clearly overcame the effect of the Stamp Duty legislation in rendering void the
transfer from Breskvars to Wall, which transfer would otherwise operate as "the source" of Alban's equitable right (see pp.398-399).

Of all the judges, Walsh J. seemed to concede the widest scope to s.48. He saw it as founding in Alban a special statutory right superior to the Breskvars' equitable claim (see p.410-411).

As Menzies and Walsh JJ. saw s.48 as creating special statutory rights in respect of unregistered instruments while the remaining five judges appeared not to share this view, the precise effect of s.48 on priorities in equity remains obscure. However, repeal of this provision is impracticable since it could be seen as striking a blow at the status of a transferee under a registrable instrument. Consequently, it is thought best to allow the courts to clarify the meaning of s.48 in the fullness of time, since it is a matter which only affects unregistered interests.

The remaining paragraphs deal with the situation of transfers by direction and should be retained, while s.49 of the 1877 Act can be conveniently amalgamated with these provisions.

Section 43 of the 1861 Act should be amalgamated with s.34 as to collect in as few sections as possible all the provisions dealing with unregistered interests.

THE CONCEPT OF MERE EQUITIES

The leading Australian case involving a discussion of this concept is Latec Investments v. Hotel Terrigal (1965) 113 CLR 265. In the discussion of equitable priorities which became necessary in Breskvar v. Wall, the judges made surprisingly little use of the Latec case. Their approaches varied and some of them introduced an extra dimension to the problem by reference to s.48 of the Real Property Act 1877-1988.

For example, Barwick C.J. either does not distinguish between the two principles which according to Latec might govern the case, or if he does distinguish between the principles then he evidently considers it immaterial which of these principles applies as the facts lead to the same result [(C.L.R.) at pp.387-389], and makes no direct reference to the Latec case.

McTiernan J. treated the matter as a simple competition between full equitable interests, found the disentitling conduct on the part of the Breskvars was the execution of the blank transfer, and failed to refer to the Latec case.

Menzies J., although referring to the Latec case (p.394), ultimately determined the priority question as governed by the Breskvars' conduct in signing the blank transfer and not by the fact that Alban was bona fide purchaser for value (see p.399).

Walsh J. referred to the Latec case and recognised that different principles could apply in consequence, but he was prepared to assume that the Breskvars had an equitable estate. Gibbs J. dealt with the Latec case similarly (see p.413).
It is felt by the Commission that in the light of its recommendations regarding the priority of unregistered interests generally, the existence or otherwise of the category of mere equities and their relationship to other equitable interests, does not give rise to any need for legislative amendment to the Real Property Acts.

SUMMARY OF RECOMMENDATIONS

Although cases involving equitable priorities have frequently appeared in the law reports, it is inevitable that such disputes will arise from time to time, given the discretionary nature of equitable jurisdiction. Accordingly, this fact is not felt to demonstrate an urgent need for drastic reform in the rules governing unregistered interests. Generally speaking, the rules governing priorities of such interests have been developed by the courts in a logical and sensible manner, having due regard to the practicalities of conveyancing. While it is appropriate that unregistered interests be recognised in equity, as to do otherwise would perpetrate manifest injustice, it is advisable they intrude as little as possible upon the legislative scheme of an Act which is directed to registration of title. Provisions of the form of s.43 of the 1861 Act, s.48 of the 1877 Act, a caveat system, and exceptions for short leases and in personam rights are probably about as far as a system of registration of title should proceed in according recognition to unregistered interests.

Criticism of the application by the courts of the established nomenclature of equitable interests evolved in pre-registration conditions to unregistered interests may be countered by pointing out that it is surely better for this established and well understood structure to be applied in determining priorities between unregistered interests than for the courts, in the absence of any clear direction from the legislation, to invent a completely new structure. After all, it is completely logical and in keeping with equitable principles to apply equity in this way since it has traditionally enforced and exercised jurisdiction over rights which fail to attain legal recognition owing to some want of formality. Registration may be regarded as such a formality. The employment of equity also has the advantage that its basis is fairness and good conscience. Furthermore, it need not impugn the efficacy of the system of registration in any real sense, for if the Commission's proposals are adopted, it will only regulate the interests of those who choose not to avail themselves of the benefits of the system of registration by registering their interests, or who hold interests which the legislature has decreed shall not be registrable.

Accordingly, it is felt that enactment of a provision of the nature of s.43A of the Real Property Act 1900 (N.S.W.) would be unhelpful and would add to the complexity of the current situation, as would the introduction of a system of priority notices, and the Commission's scope for making recommendations in this area is limited to:

1. Possible amendment of the caveat system to prevent a caveat lodged after the lodgment of a transfer from affecting that transfer, except in cases of fraud, and to simplify its operation. This is discussed in the later chapter on the caveat system.
2. Administrative changes to reduce, as far as possible, the minimum time interval between final search, settlement and lodgement. While administrative changes are not the responsibility of the Commission, it is appropriate to emphasize that the institution of a procedure, whereby stamping could take place directly at lodgement, perhaps by the Titles Office acting as agents for the collection of stamp duty, would be invaluable in this regard.

3. Redrafting and rearrangement of the provisions of s.43 of the 1861 Act and s.48 of the 1877 Act. These provisions have been redrafted as s.34.
CHAPTER VII

ASSURANCE

There was no detailed analysis of s.126 of the 1861 Act in the chapter of this paper dealing with indefeasibility because the section is so bound up with the question of assurance that it was more appropriate to analyse it in this context.

As the current provisions are complex and generally not completely understood it is appropriate to begin a consideration of this area with a detailed analysis of the existing law. However, there is no doubt that they require considerable amendment since they are widely regarded as defective in several respects. When the Commission publicised its intention to review these Acts some four years ago and called for suggestions regarding areas considered in need of explanation, one response drew attention to these Assurance Fund provisions.

It is common to refer to the assurance fund, although following the enactment of the Real Property Act Amendment Act 1978, there is in strictness no such fund, since it effectively is absorbed in consolidated revenue.

THE EXISTING PROVISIONS

Those parts of the Real Property Act 1861-1988 appertaining to matters of assurance are -

1. s.126
Any person deprived of land in consequence of fraud, the issue of a certificate of title to any other person or any entry in the register etc. may bring an action for damages against the person deriving benefit from the fraud, etc.

There are two (2) provisos. One imposes a limitation period of six years. The other protects a purchaser or mortgagee for valuable consideration.

2. s.127
(a) when the person against whom action for damages is brought is dead, insolvent or has absconded, action for damages can be brought against the registrar as nominal defendant for the purpose of recovering damages and costs from the Assurance Fund.
(b) as in (a) and also where execution against the person deriving benefit from any fraud, etc. is returned nulla bona or the Sheriff certifies the full amount of costs cannot be recovered, a Judge is to issue
a certificate followed by a warrant under the hand of the Governor which directs the Treasurer to pay the amount and charge the Assurance Fund.

3. s.128
Action against the Registrar as nominal defendant for loss or damage occasioned by any omission, mistake or misfeasance of the Registrar or staff. A Judge is to certify the amount to be recovered and the Governor issues his warrants whereupon the Treasurer pays the amount and charges the Assurance Fund.

4. s.137
In an action against the Registrar for any wilful act or default, he is to be indemnified out of the Assurance Fund (or from Revenue if the Fund is insufficient).

REMEDIES UNDER TORRENS SYSTEM FOR DEPRIVATION OF INTEREST

The remedies for a person deprived of an estate or interest under the Torrens system fall into two broad categories:

1. Recovery of possession of that estate or interest.

At common law the remedy for a person deprived of an estate or interest in land was the action of ejectment.

Since the common law almost invariably accorded priority to the holder of the earlier claim to the legal title as against later conflicting claims, ejectment was the key common law remedy for deprivation of an estate or interest in land. The Queensland Real Property Acts retain this remedy; but severely restrict its ambit through the operation of s.123, which appears to be intended to limit it to those cases where one of the statutory exceptions to indefeasibility set out in s.44 applies, and the independent cases involving the rights of the parties to a lease or mortgage against each other. However, inconsistencies of wording, between ss.44 and 123, and the independent and confusing operation of s.128 complicate the situation.

One of the main aims of the Torrens system, probably the primary aim, is that a purchaser acting in good faith should obtain title to the estate or interest in the land as that title appears in the register. Therefore, in the Torrens system, priority usually shifts from the earlier claim to the legal title to the latter. The latter title generally being paramount by virtue of s.44.

The counterpart of this deprivation of priority of the earlier holder of the estate is the provision of compensation to the earlier claimant for deprivation of that interest through the operation of the paramountcy provision in certain circumstances. Accordingly, this is the second category of remedies under the Real Property Acts.
2. Compensation recoverable under the Real Property Acts for the deprivation of an interest in land.

It is appropriate to examine these remedies in more detail:

(a) Recovery of possession - Ejectment.

This remedy is regulated by s.123 of the R.P.A. 1861-1978 which provides that no action for ejectment shall lie against a registered proprietor for the recovery of land under the Acts except in the following cases:

(i) A mortgagee claiming against a mortgagor in default.

(ii) A lessor against a lessee in default.

(iii) A person deprived of land by fraud as against a person registered as proprietor through fraud or as against a person deriving his interest from the fraudulent proprietor otherwise than a bona fide purchaser or mortgagee for value.

(iv) A person deprived of land by reason of wrong description of the land or its boundaries.

(v) A person claiming under a prior Certificate of Title or grant as against a claimant to the same land under a later Certificate of Title or grant.

The section also provides that production of the Certificate of Title or deed of grant in the name of the registered proprietor shall, except in the cases specified above, operate as an absolute bar to ejectment proceedings against the registered proprietor. This part of the section should be related to s.33, which provides in subsection (4) that:

"Every Certificate of Title issued by the Registrar of Titles shall be received in all Courts as evidence of the particulars therein set forth or endorsed thereon and of their being registered and shall be conclusive evidence that the person named in such Certificate of Title as holding or as taking an estate or interest in the land therein described holds or is possessed of that land for the estate or interest therein specified and that the property comprised in the certificate of title has been duly brought under the provisions of this Act".

Section 125 has a somewhat similar effect to that of s.33(4) but operates in favour of a registered proprietor bringing an action of ejectment.

Of the exceptions set out in s.123, the three which tend to arise in practice are:

(i) mortgagee against mortgagor;
(ii) lessor against lessee;
(iii) claim against a fraudulent proprietor, or a volunteer claiming under him.
As to case (iii), an action by a person deprived as against a person registered as proprietor "through fraud", "fraud", in this section, has a similar meaning and effect as "fraud" in s.44, that is, it must be "fraud" brought home to the registered proprietor personally or an agent of the registered proprietor. This is suggested by Mayer v. Coe (1968) 88 W.N. (Pt.1) (N.S.W.) 549 and Franson v. Registrar of Titles (1976) 50 A.L.J.R. 4.

Consequently, ejectment proceedings cannot be brought against an innocent registered proprietor taking for value and who takes under an instrument which is the result of somebody else's fraud; and indeed to hold otherwise would be to attack the whole fabric of indefeasibility. The narrowing of the ejectment remedy is therefore not in itself a cause for concern, but when coupled with the inadequacy of the relevant compensation provisions it gives rise to a very significant problem.

(b) Compensation under the Real Property Acts.

The rights to compensation under the Acts are regulated by ss. 126-128 of the 1861 Act. The structure of these sections is complex and their foundations, since Frazer v. Walker and Breskvar v. Wall, are now suspect in some respects.

It is appropriate to consider first s.126, which provides that:

"Any person deprived of any land or any estate or interest in land in consequence of fraud or in consequence of the issue of a certificate of title to any other person or in consequence of any recording in the register or in consequence of any error or omission in any certificate of title or in any recording in the register may bring and prosecute an action in the Supreme Court for the recovery of damages against the person who derived benefit by such fraud or in consequence of the issue of such certificate of title or by such recording or in consequence of such error or omission."

Provisos to the section set two limits to its scope: requiring the action to be brought within 6 years of date of deprivation, and stating that damages do not lie against a bona fide purchaser or mortgagee for value.

The key concepts in relation to the operation of the section are those of "deprivation" — that which the claimant suffers and "derivation of benefit" — that which the defendant gains.

Australian Guarantee Corporation Ltd. v. De Jager [1984] V.R. 483, is authority for the proposition that where a party is not deprived of an estate there is no liability on the part of the assurance fund.

In Australian Guarantee Corporation Ltd. v. De Jager, a mortgage document purported to be executed by a husband and wife as joint proprietors but in fact the wife's signature was forged. The mortgagee did not know that the signature was a forgery but one of its employees purported to attest the signature in the absence of the wife. The wife defended an action by the mortgagee for possession and in a concurrent action sought indemnity under the Transfer of Land Act 1958 (Vic.), Pt. VI.
The court held that the action of the mortgagee, in allowing the instrument of mortgage to go forward for registration knowing that it had not been signed by an attesting witness who was present when one of the registered proprietors had (apparently) signed the instrument, amounted to fraud within the meaning of s. 42 of the Transfer of Land Act. The mortgagee's title, therefore, did not prevail as an encumbrance over the wife's interest as joint proprietor of the land.

Since the mortgagee had failed in its action against the wife, she had suffered no loss of a kind for which she could obtain indemnity under s. 110 of the Act.

In Hassett v. The Colonial Bank of Australasia (1881) 7 V.L.R. (L) 380, the Plaintiff was registered proprietor. His uncle, bearing the same name was indebted to the defendant bank, and the bank as execution creditor under a writ of fi. fa. directed the sheriff to obtain a description of the land and served the Registrar with a copy of the writ erroneously specifying the plaintiff's name, procured a transfer from the sheriff, was registered as proprietor.

It was held that the plaintiff had been deprived of his land in consequence of the error or misdescription and the case fell within s. 144 of the Transfer of Land Act 1866.

Regarding the meaning of "deprivation", the authorities appear to have established the following basic principles which can be briefly stated:

(i) The section applies to deprivation of an equitable estate as well as a legal one.

This was held to be so by the Privy Council in Williams v. Papworth [1900] A.C. 563 (see p. 569) where the claimants asserted that they had been deprived of an interest in land under circumstances which gave them a right to compensation out of an assurance fund. The Registrar-General, as Nominal Defendant, resisted the claim on the basis that they did not have an interest in land within the meaning of the Act. Lord MacNaughten in delivering their Lordships' judgment said (p. 568):

"It could not, of course, be disputed that the expression "interest in land" unless there was something to restrict the meaning, must include equitable as well as legal interests."

Also, the main reason for having an Assurance Fund was explained by the Judicial Committee of the Privy Council in Williams v. Papworth and Others [1900] A.C. 563 at p. 568 as being to furnish:

"a right of action to any person deprived of an interest in land through the bringing of such land under the provisions of the Act. The remedy is a statutory remedy. It is worked out by an action, not against the individuals competing for possession of the land, but against a fund especially provided by a system of insurance in order to compensate persons who, without any fault of their own, may have been deprived of their property in the course of carrying out a new scheme. There seems to be no reason why the remedy should be denied to persons who are within the very terms of the Act and have actually sustained a loss of property..."
A similar conclusion was reached in *Tolley and Co. Limited v. Byrne* (1902) 28 V.L.R. 95. In this case a woman deposited her certificate of title with the plaintiff as security for payment of a debt. She later, made a declaration that the certificate was lost and that there had been no dealing with her interest in the land. The Registrar issued her with a new certificate and she transferred the land to a purchaser in good faith for valuable consideration who became registered as proprietor. The woman later became insolvent still indebted to the plaintiff company which commenced action against the Registrar for compensation from the assurance fund. A 'Beckett, J at pp. 100-101 said:

"The original certificate was deposited with the plaintiff as security for a mortgage debt which largely exceeded the value of the land; and, on the facts before me, I have no doubt that the plaintiff did lose the value of the land, whatever it was, by the exercise of the Commissioner's power. But it is suggested that the plaintiff cannot recover, because it had no interest in land. It is said that the words 'sustain any loss or damage' must be held to refer to loss or damage arising from an injury to or deprivation of an interest in land under the Act. Well, taking that to be so, I think the plaintiff had an interest in land under the Act. The Act itself seems to recognise, and certainly the Court has in a series of decisions recognised, that a right may be conferred by the deposit of a certificate of title. What is the nature of that right? I cannot conceive of any sound ground for saying that it is not an interest in land. It amounts to a contract between the parties that security shall be given over that land for the debt for which it is deposited. There are various ways by which that right may be enforced; but every mode of enforcement recognises that to be an act, equivalent to a contract, whereby an interest in that land has been acquired by the person who obtains the appropriate or convenient remedy in the circumstances. It is specifically attached to that land, just as, under a contract for the sale of land, an equitable interest is created in the land."

Mr P.B.A. Sim, in his essay, "The Compensation Provisions of the Act" in *The New Zealand Torrens System Centennial Essays*, ed. by G.W. Hinde (1971) pp. 138-161 at p.144 discussed *Williams v. Papworth* (supra). His essay also discussed the effect of s.178(a) of the *New Zealand Act* (the *Transfer of Land Act* 1952) which is comparable to the second proviso to s.42 of the *Queensland Act*. It was therein said:

"With regard to equitable interests, two important qualifications must be noticed. First, by the express provision of s.178(a), the Crown is not liable for compensation for loss, damage or deprivation occasioned by the breach by a registered proprietor of any trust. The purpose of this provision is no doubt to maintain consistency with the general approach of the Act that trusts cannot appear on the register. A beneficiary who is deprived of his equitable interest by reason of breach of trust is therefore to be limited to his rights against his trustee; his loss is not compensable. Secondly, any equitable interest that is capable of being turned into a legal interest by registration will support a caveat. The right to compensation may be lost, however, by reason of contributory negligence, and this would include negligent failure to lodge a caveat to protect an equitable interest. The cases of compensation for loss in respect of equitable interest are few, doubtless for this reason. The question of compensation could only arise where the person suffering loss
was not in a position to protect his interest by lodging a caveat or cannot be regarded as negligent in failing to do so."

There does not appear to be any other case where the finding in Williams v. Papworth (supra) relating to equitable estates has been followed although there have been others such as Registrar-General v. Behn (1981) 55 ALJR 541 which approved Lord MacNaghten's dictum (p.566) that s.126 created a statutory cause of action. Ambiguity seems to reside in the fact that while the final proviso to s.42 prohibits recovery in respect of breaches of trust it is not entirely clear in the light of the above cases whether the courts will hold that this applies to all equitable interests, or may limit it to express trusts. Strictly speaking, wherever there is an equitable interest, some person stands "in the relation of trustee to" the holder of that interest, so it is possible to apply s.42 to exclude all claims based on deprivation of a purely equitable, as opposed to legal, interest.

As it has always clearly been the policy of the Torrens system to exclude trusts from the register and to guarantee what is registered it is submitted that the legislation should continue to prohibit recovery from the assurance fund in respect of deprivation of a purely equitable interest, whether arising under an express, implied or constructive trust. Section 135 currently provides to this effect. It should be made clear that it applies to beneficiaries of estates in the course of administration. [Provisions to this effect have recently been proposed in recent years in Western Australia, Land Titles Bill 1985, s.107(2)(a), repealing Transfer of Land Act 1893, s.196, see also s.73(1)(e) of Land Titles Act 1981 (New Brunswick), notwithstanding the partial recognition of trusts by s.58 of that Act, Real Property Act 1900 (N.S.W.), s.133, Real Property Act 1866-1975 (S.A.), s.211, Land Titles Act 1980 (Tasmania), s.151(1)(a), Land Transfer Act 1952 (NZ), s.178(a), Real Property Ordinance 1925 (ACT), para.147(a)]. However, it needs to be made clear that this exception cannot be applied too widely so as to deprive a registered proprietor dispossessed by fraud of a remedy, or to deprive a beneficiary under a trust whose interest was protected by caveat, or a "no survivorship" provision on the register, where this protection is ineffective through error in the registry or forgery of a release of caveat.

(ii) The section applies to a partial deprivation of interest as well as a total deprivation.

For example, if the land is encumbered by a mortgage this is a partial deprivation which can be compensated by damages if, but only if, it otherwise comes within the section. (Finucane v. Registrar of Titles [1902] St.R.Qd. 75 at p.94).

(iii) Deprivation means deprivation of the right of present enjoyment of that estate or interest.

In Finucane v. Registrar of Titles (supra) the interests were legal contingent remainders following a life estate. Griffith C.J. held that the claimants would not be deprived of their interest until the life tenant died.
(iv) A person is not "deprived" within the meaning of s.126 so long as there is a subsisting right to claim ejectment under s.123.

This has crucial implications when it comes to the application of the limitation period, as became apparent in Breakvar v. White [1978] Qd.R.187, which are discussed below.

The other key concept is "derivation of benefit". According to s.126 this may be through "fraud" or error but, probably as a result of the effects of the concluding paragraph of s.126 which bars claims against bona fide purchasers and equivalent provisions elsewhere, the cases seem to be largely concerned with fraud. Derivation of benefit by fraud was considered in Cox v. Bourne (1897) 8 Q.L.J. 66 where it was said that:

"Section 126 gives a right of action...against the person who derives benefit from the fraud," which, I think must be taken to include any person who derives benefit from the fraud with knowledge of it..." per Griffith C.J. at p.68.

This is consistent with the meaning given to "fraud" in the other sections of the Real Property Acts.

However, two more recent cases from other jurisdictions demonstrate the limits of this kind of compensation provision:

In Mayer v. Coe (1968) 88 W.N. (Pt.1) (N.S.W.) 549, M was the registered proprietor of land who entrusted her Certificate of Title to a solicitor, H. H purported to borrow on the security of this certificate for M and forged a mortgage from M to C and decamped. C, who acted innocently throughout, was registered as mortgagee. M sought damages against C relying on the N.S.W. equivalent to s.126.

Street J. held that C had not acquired his title through "fraud, error, omission or misdescription" within the meaning of the section. The fraud was not that of C and the registration of a document perfectly regular and normal on its face did not involve any "error, omission or misdescription" in the registry.

This meant that M could not sustain the claim for damages against C. C was not in the sense of the section a person who "derived benefit through fraud".

In Registrar of Titles v. Franzon (1975) 132 C.L.R. 611, the facts were very similar and the High Court held that there was no "fraud" or "erroneous registration" on the part of the innocent mortgagee and damages could not be recovered under the relevant Western Australian provision. However, recovery was allowed under a section which has no Queensland equivalent.

The result of these cases and another, Armour v. Penrith Projects Pty. Ltd. [1979] 1 N.S.W.L.R. 98 seems to be that if the fraudulent person is never themselves registered, the only action available against him is in the tort of deceit at common law and not under s.126.

The relevant section in N.S.W. is s.126(2)(b) which provides that the statutory action for damages - must be brought against the person "upon
whose application the erroneous registration was made. Consequently, it may be that the case could be distinguished in Queensland because s.126 says that the action may be brought "against the person who derived benefit from the fraud." As a result of this wording the section may be held to be wider than its counterpart in N.S.W. It could be read to include the derivation of any sort of benefit (monetary or property) or, more narrowly, to mean derivation benefit by acquiring a registered interest in the property. There seems no reason, other than that of consistency with New South Wales, to adopt the narrower approach. In Breskvar v. Wall [1972] Qd.R. 28 (at first instance), s.126 damages were awarded against Petrie and Wall, although Petrie who had perpetrated the fraud, was never registered. However, the above matters do not seem to have been argued.

Another apparent lacuna in the compensation provisions arises in relation to the exception from indefeasibility for prior certificates of grant which has been held to operate against subsequent registered proprietors for value [see Registrar of Titles v. Esperance Land Co. (1899) 1 W.A.L.R. 118. The lack of compensation available to the defeated purchaser is a matter requiring remedy. [See also Miller v. Davy (Registrar-General of Land) (1889) 7 N.Z.L.R. 515].

Section 127 is parasitic to s.126 in that it provides for an action against the Registrar as nominal defendant in certain cases where the remedy cannot be effectively pursued against the defendant on whom s.126 imposes the liability.

Section 127 is in some ways more complex than either s.123 or s.126. It provides that:

(i) An action may be brought against the Registrar as nominal defendant to recover damages and costs against the assurance fund, where the person whom such action for damages lies under s.126 is dead or insolvent or has absconded from the jurisdiction.

(ii) If the person deprived succeeds in obtaining a judgment for damages under s.126 but execution of that judgment is unsuccessful (in the words of the section, if "the Sheriff shall make a return of nulla bona or shall certify that the full amount cannot be recovered") then the person deprived can apply for a certificate of a Supreme Court Judge and a warrant from the Governor. Armed with these documents the claimant may at last obtain payment of the assurance money. The whole process being cumbersome to say the least.

(iii) The section also contains two provisos: a limitation of the claim against the assurance fund to six years "from the time when the cause of action arose", the other, to allow the Registrar to recover as against the absconding party.

The relationship between the first and second limbs of s.127 was initially considered in Cox v. Bourne (1896) Q.L.J. 53. Both limbs were in question, since of the two fraudulent parties, one was insolvent while judgment against the other had been returned nulla bona.
In the action against the Registrar of Titles, Griffith C.J. held that the person deprived could proceed under either limb. He did not have to exhaust his remedies under the second limb before proceeding against the Registrar of Titles (p.69). Accordingly, Cox v. Bourne demonstrates that a claimant can proceed under either limb in an appropriate case.

However, certain surprising aspects of s.127 which were not raised by the facts of Cox v. Bourne. They became apparent in the final chapter of the saga of Breskvar v. Wall, when the effect of the proviso was considered by Connolly J. in Breskvar v. White [1978] Qd.R.187.

In an earlier decision the plaintiff had been awarded judgment against Wall. (See [1972] Qd.R.28). However, the writ of fieri facias for enforcement of the judgment had been returned nulla bona and the Sheriff certified that the full amount of the judgment and costs awarded could not be recovered. In the latter action ([1978] Qd.R.187) the plaintiffs sought a declaration of their rights.

The material facts were that the High Court had held that on 31st October, 1968 when Wall sold to Alban Pty. Ltd. the Breskvars had lost their equity in the land and that after they had exhausted the appeal process the Breskvars had attempted to execute judgment against Wall.

On 8th March, 1977 the Sheriff made the return nulla bona and gave the appropriate certificate. The "Certificate of a Judge of the Supreme Court" mentioned in s.127 of the 1861 Act was issued by Williams J. on 10th March, 1977 and on 14th March, 1977 a petition was presented to the governor for a warrant under his hand in accordance with s.127. White was appointed nominal defendant by the government and the parties sought a declaration as to the rights of the Breskvars against the assurance fund.

The parties agreed that the question for the Court to decide was whether the period of six years mentioned in the proviso to s.127 had run before the governor was asked for his warrant (see [1978] Qd.R.190). On 31st October, 1968 the second defendant sold the land to a bona fide purchaser for value. Connolly J. expressed the view that the Breskvars were deprived of their land then and it was the date "when the cause of action arose" and not 18th March, 1971 when Hart J. gave judgment in Breskvar v. Wall [1972] Qd.R.28. (see [1978] Qd.R.192) This also appears to be the view expressed by Baalman op.cit., at p.416.

Connolly J. held that:

(i) The Breskvars were deprived of their interest within the meaning of s.126 on 31st October, 1968.

(ii) The first limb of s.127 creates a right of action against the Registrar of Titles separate from the right of action under s.126 but conditional upon the existence of the action under s.126 and upon either the death, insolvency or absconding of the s.126 defendant.

(iii) The reference in the 1st proviso of s.127 to a "cause of action" is a reference to the "cause of action" under s.126.
The six year limitation in the proviso in s.127 therefore began to run when the cause of action arose under s.126. Accordingly it was too late in 1977 for the Breskvars to bring their case within the first limb of s.127, even if they had sought to do so. Similarly, the claim for damages which they had actually brought under the second limb was statute barred.

However, the proviso mentions only "damages" not "costs" which are also recoverable under either limb of s.127. Since no time limit is imposed for the recovery of those costs the Breskvars could recover these.

Connolly J. described the situation as anomalous. He pointed out that a litigant may have to go a long way down the road before he knows he can act under s.127 and yet before he knows that time is running against him.

Before damages become payable out of the Assurance Fund under one "limb" of s.127, the person against whom action could have been brought under s.126 must be dead, insolvent or to have absconded and, Connolly J. pointed out ([1978] Qd.R.191) this six year period is in danger of becoming illusory. This, therefore, raises the question should there be any limitation period and if so should it not be increased. There is no limitation provision in the Acts of New South Wales and Victoria. The provision in all the other States, the A.C.T. and New Zealand is for a six year limitation period. In relation to the question, whether there should be an increase, attention is drawn to s.10 of the Limitation of Actions Act 1974-1981 which imposes a general limitation period of six years for most actions and s.13 where the period has been extended to twelve years where recovery of land is in issue.

The plaintiff in Frazer v. Walker [1967] A.C. 569 who had been deprived of his interest in land through the fraud of his wife sought declarations inter alia-

1. That his interest in land was not affected by the purported mortgage or by the auction sale to the first respondent;

2. That the second respondent's mortgage was a nullity;

and applied for an order directing the district land registrar

(i) to cancel the entries or memorials in the register in favour of the respective respondents;

and

(ii) to restore his name and his wife's names to the Register as joint owners of the land.

The Privy Council found these to be actions for recovery of land. (see Breskvar v. Wall (1971) 126 C.L.R. 375 at pp.385 and 386). It is submitted that on this basis, s.13 provides support for extending the period.

In relation to abrogation of the limitation period altogether, it may be recalled that under the provisions of the Public Works Land Resumption Act 1906-1955, a person whose land had been resumed was originally given three years from the date of the proclamation taking the land in which the claim compensation. The period for making the claim was reduced to one year by the 1951 amending Act. However, the Public Works Land Resumption Act
was repealed by the Acquisition of Land Act 1967-1986 and no time limit was imposed by Part IV of that Act which sets out compensation procedures.

It seems from the above analysis of the cases, Mayer v. Coe and Registrar of Titles v. Franzon, and indeed from Frazer v. Walker, that a not uncommon fraud is some kind of forgery of an instrument transferring an interest from a real registered proprietor to an innocent third party. The fraudulent party decamps with the money; but is never registered so it seems an action does not arise under s.126. Consequently there is no action under s.127 either. The innocent third party, once registered, obtains a good title by virtue of the principle of indefeasibility while the prior registered proprietor who has lost an interest may not be able to claim against the assurance fund. Meanwhile, the remedy in tort at common law is almost invariably worthless and being a right in personam is no kind of guarantee or assurance in respect of title.

If this is the effect of the present provisions, as authority here and elsewhere suggests, then it is a critical departure from the principles of state indemnified title and one which calls for amendment.

Another aspect of the relationship between the equivalent of ss.126 and 127 was considered by the High Court in Registrar-General v. Behn (1981) 55 A.L.J.R. 541.

B was registered proprietor of certain land in New South Wales. As a result of a fraud perpetrated by C, B executed a contract to sell the land to C for $50,000 and she executed a transfer in favour of C which led to the registration of C. B had received only a small part of the purchase price, and sued C for the balance obtaining a judgment for a substantial sum which was worthless because of the insolvency of C.

The issue was whether the existence of this judgment at common law precluded an action against the Registrar pursuant to the equivalent of s.127. It was held that the statutory cause of action under s.127 remained available (although the plaintiff would not be able to execute both judgments). It was also said that the plaintiff could have sued C (pursuant to the equivalent of s.126) if she had been so minded. The statutory causes of action are independent of any rights that might exist at common law.

CONTRIBUTORY NEGLIGENCE

An important question is whether contributory negligence or other default on the part of the plaintiff bars recovery under s.127.

In Miller v. Davy (1889) 7 N.Z.L.R. 515 the New Zealand Court of Appeal held that the principle of contributory negligence is applicable to the compensation provisions of the Torrens legislation. However, the issue was expressly left open in Trieste Investments Pty. Ltd. v. Watson (1964) S.R. (N.S.W.) 98 per Herron C.J.

It is suggested that the extent to which contributory negligence reduces the entitlement to indemnity should be spelt out in the legislation.
Section 128 - Actions against Registrar.

The action under this head is against the Registrar of Titles as nominal defendant for damages for any loss or damages occasioned by any omission, mistake or misfeasance of the Registrar or his officers.

In Finucane v. Registrar of Titles (supra) Griffith C.J. expressed the view that this section does not give any remedy for a deprivation of estate or interest in land which is covered by s.126 and to that extent the remedy provided by s.128 covers an area distinct from s.126 (and consequently distinct also from s.127.) However, it is possible for different aspects of the one set of facts to give rise to separate claims under s.126 and s.128 as in Finucane's Case itself where there were two matters of complaint that the:

(i) Registrar had wrongly registered the life tenant as proprietor of a fee simple estate. A matter which appeared to raise a claim under s.128.

(ii) life tenant had wrongly mortgaged the entire fee simple interest, which was a matter within s.126.

The action under s.128 is distinct from that against the Registrar under s.127 in another respect. Section 127 sets up a "parasitic" action against the Registrar; parasitic because the s.127 action is dependant upon an actionable claim under s.126. The aim of this parasitic action is on the face of it to allow resort to assurance monies, but s.128 sets up a straightforward action against the Registrar for breach of statutory duty and the damages are simply payable out of consolidated revenue.

The extent of that statutory duty depends itself upon the meaning of the phrase "omission, mistake or misfeasance" of the Registrar. Clearly deliberate fraud is covered; but, apart from that, the section appears to cover only failures of the Registrar where there are specific obligations under the Real Property Acts, for examples, under s.32 to record instruments. This view is supported by s.137 and by the decision in Trieste v. Watson (supra) where the Registrar failed to note a public road on an affected Certificate of Title. There being no statutory obligation on the Registrar so to do, the N.S.W. Court of Appeal held that there was no "error or omission" on the part of the Registrar within the meaning of the N.S.W. statute.

CONTRIBUTORY NEGLIGENCE UNDER S.128

If contributory negligence is in principle applicable to claims under the compensation provisions then there may be more scope for its operation under s.128.

Contributory negligence has been held to be an available defence in actions for breach of statutory duty (see Fleming: Law of Torts, 5th Edition, pp. 265-266) and this is what the action under s.128 appears to be.
TAMPERING WITH THE REGISTER

A possible species of fraud is tampering with the register. In the absence of authority it is not clear how such circumstances would be resolved in relation to the question of indefeasibility. Error in the Titles Office is covered by s.128, or improper conduct, e.g. fraud by a clerk, since s.128 refers to misfeasance. This leaves only the case where an unauthorised person tampers with the register, say inserting that person's name as registered proprietor. It would be questionable whether liability attaches under s.128, since the unauthorised entry could be said not to be part of the register, but in principle persons losing as a result of dealing on the faith of the register as it appears should be protected.

RECOMMENDATIONS

A number of problems stand out from the above analysis:

1. The unsatisfactory application of the limitation period, as in Breskvar v. White. It is recommended that, in line with the position in Victoria, the limitation period be abolished, since it is possible for a deprivation of title or loss to become apparent a very long time after the occurrence of the events giving it rise.

2. The complexity of the procedure for recovery, involving proceedings against the wrongdoer in the first instance. Some other jurisdictions, for example, Victoria (see Transfer of Land Act 1958, s.110) enable direct recovery against the Registrar as a matter of course, coupled with a right on the part of the Registrar to recover from the wrongdoer. While this is advantageous it is felt more appropriate to make provision for a direct claim against the State rather than against the Registrar, as the latter carries connotations of fault on the part of the Registrar. A direct claim in also in line with the general procedure for recovery against Government Departments.

Provisions in most other States are similar to those in Queensland's s.127 in that the person deprived of land must have pursued his remedies fruitlessly against the wrongdoers before he can bring action against the Registrar as a condition precedent to gaining access to the Fund. Having regard to the provisions of the State Advances, etc. Act of 1931 and s.137 (supra) it seems reasonable to assume that the only source of recoveries is in fact Consolidated Revenue. That being the case, the question arises whether retention of the concept of an Assurance Fund is a viable proposition.

In s.143 of the Australian capital Territory Ordinance it is provided that the action be brought against the Commonwealth. It is recommended that action against the State of Queensland under the Crown Proceedings Act 1980 be substituted for action against the Fund and s.128 and s.137 be amended accordingly.

Having examined the relevant provisions of the 1861 Act, the Commission concludes that the concept of action against the Fund has become anachronistic and should be replaced by some alternative type of action
against the Registrar or the State and that the time limited for bringing this action should be removed or, at least, extended.

3. Doubts, following Mayer v Coe and associated cases, whether the right of recovery extends to cases of forgery of a transfer where the rogue is never registered.

4. The need to protect the assurance fund against extensive fraud. A common fraud which has arisen in other jurisdiction is the forgery by one joint owner of the signature of the other joint owner to a mortgage, followed by the decamping of the fraudulent party, usually leaving the other joint owner in possession of the land. Such cases can arise where there is matrimonial discord, or even by collusion between the parties, which may be difficult to establish, so that the fund may be milked. A high proportion of frauds follow this pattern, since the virtual inability to deal with the land without possession of the certificate of title means that major frauds are in practice limited to cases of a fraudulent joint owner, or professional person or finance institution employee with access to such certificate, or theft. In the second case, the fund can recover from the relevant company or firm.

The occurrence of the first type of fraud and impact on the assurance fund could be minimised by providing that in the case of a mortgage to a corporate body the corporate body be made responsible for ensuring that the identity of the executing persons is correct. This does not in any way diminish the protection of assurance for individuals and is arguably a reasonable imposition on financial institutions since they should not advance funds without implementing reasonable precautions against fraud. However, the current incidence of such fraud is felt not justify such a reduction in the scope of indemnity available to bodies corporate.

New Zealand excludes claims arising out of improper use of the seal of any corporation or company [Land Transfer Act 1952, s.178(c); see also Land Titles Act 1955 (Alberta), s.178(d); Land Registry Act 1960 (British Columbia), s.229(f)]. The basis of this exclusion is presumably that corporations are to be held responsible if the seal is misused. An example, would be the forging of a discharge to a mortgage. It is recommended that this exclusion be adopted.

New Zealand also excludes claims arising from the improper exercise of any power of sale or re-entry [Land Transfer Act 1952, s.178(e), South Australia has a similar exception, see Real Property Act 1886-1975, s.211, as does Western Australia, Transfer of Land Act 1893, s.196]. This exception may be supported on the basis that the guarantee of title should not extend to cases of disputes between parties to a lease or mortgage, where there is the clear opportunity to prevent an impropriety occurring by appropriate action before it occurs. Furthermore, the defaulting party, as mortgagee or lessor is likely to be sufficiently endowed with funds to avoid the wronged party being left with a valueless remedy. However, there is a difficulty in framing this exception since it would have to be limited so as not to apply to a case where the mortgage or lessor's interest was itself obtained in circumstances giving rise to a right to compensation. Consequently, its adoption is not recommended. Such activities are unlikely
to be costly by way of compensation since the State will normally be able to
recoup itself in these cases through its rights of subrogation.

There is also an exclusion in New Zealand for instruments executed by a
person under legal disability unless it is disclosed at the time the person
under disability is registered as proprietor [Land Transfer Act 1952,
s.178(d); see also Land Titles Act 1955 (Alberta), s.178(e)]. It is not
clear that this exclusion would be required here, as, in the absence of
fraud, the title could not be disturbed.

Western Australia also excludes all claims based on unregistered
instruments, equitable mortgages, [see Transfer of Land Act 1893, s.196].
This exclusion appears to be too wide, since one can envisage circumstances
where such a person ought to recover, for example, where a transfer has been
obtained which cannot be registered owing to a fraud.

The concept of "deprivation" seems to be well settled by authorities and so
there is no need to recast the provisions so as to remove this.

THE EXISTENCE OF A SEPARATE ASSURANCE FUND

The existence of a separate fee for assurance is obsolete as the general
level of fees is fixed having regard to the overall cost of operating the
system of registration of title, and it is appropriate to pay indemnities
out of consolidated revenue rather than maintaining a separate fund for the
purpose. Consequently, ss.41 and 42 of the 1861 Act need not be reproduced.

Under the provisions of s.41 an assurance fee is to be paid when land is
first brought under the Act and on each application, dealing, transaction or
instrument lodged with the Registrar on which a fee is payable. Section 42
provides that all sums and any interest accrued were to form the basis of an
Assurance Fund out of which was to be made good the full amount awarded by
the Court to any person deprived of land or an estate or interest in land by
reason of:

(a) the land being brought under the Act;
(b) the issue of a Certificate of Title; or
(c) registration of any transmission, transfer or other dealing

who fails to recover from the person who derived benefit therefrom. Section
42 provides that if the assurance fund is insufficient the amount awarded is
to be made good to the person entitled out of general revenue. The annexed
table shows that each State and New Zealand have provisions which are more
or less similar.

In Baalman - The Torrens System in New South Wales, 2nd edition (1974) at
p.389 two reasons for the fund were advanced:-

"To allay fears which, prior to the introduction of the Torrens Act, hostile
lawyers had engendered in the public; and
To afford to the administration such a measure of latitude in its approach
to conveyancing problems as was considered essential to the smooth and
economic flows of business."
At p.392 of the same work it is stated:

"The general scheme is to confer on a person deprived of land through the operation of the Act a right to pecuniary compensation, in substitution for the right which he would have had under common law to bring an action for recovery of land."

Although the need for some form of protection is unarguable, events which have overtaken the Fund since its establishment seem to indicate some alteration to the concept is warranted.

In 1931 Parliament passed "The State Advances Reserve Fund, The Real Property Acts Assurance Fund, and the Savings Bank Stock Account Transfer Approval Act of 1931" which caused the amount of 221,610 pounds standing to the credit of the Assurance Fund in cash and invested in securities to be transferred to Consolidated Revenue. Section 11 of this Act provided that "all amounts awarded by any verdict, judgment, or decree of the court as is set forth in s.42 [i.e., of the Real Property Act 1861] and lawfully payable from the Assurance Fund shall be defrayed out of Consolidated Revenue."

Apart from the economic recession in 1931, another explanation for the transfer of the amount can be found in s.6 of the State Advances, etc. Act, namely:

"and whereas such amount has been for many years and is considered to be greatly in excess of any amounts likely to be required to meet the amounts lawfully payable from such Fund pursuant to the said Act."

Theodore Ruoff wrote in (1952) 26 A.L.J. at p.194 -

"It is remarkable how seldom claims are made upon any Assurance Fund and, particularly, how seldom any such claims are successful."

Baalman (supra) at p.65 stated that in 1941 when Assurance fees ceased to be levied, 750,000 pounds had been paid into the Fund while payments out had not exceeded 21,000 pounds.

Currently, it is understood that claims average a couple a year.

The question whether a separate fund should exist or claims be met directly out of consolidated revenues has been controversial for over 50 years in virtually every jurisdiction with a system of registration of title, as the following extract from the 1932 Report of the Dormant Funds Committee of the United Kingdom (Cmd 4152) which canvasses the various arguments:

"It has been proposed for our consideration that as the Consolidated Fund is really ultimately responsible for the indemnity payable under the Land Registration Act no useful purpose is served by keeping the Insurance Fund in existence, and that it would effect an economy to abolish it and cancel the stocks which represent it.

Against this proposal three objections are advanced.

It is said, first, that the change (a) might have a psychological effect upon the landowners and make them feel less secure and more reluctant to
utilise the Registry, and (b) would lead to an insistent demand for the reduction of fees; secondly, that (a) the existence of the Insurance Fund enables the staff of the Registry to act with more confidence in accepting titles than they would be able to do if they had to justify to the Treasury every time a claim was made against the Consolidated fund and (b) in any case to have an earmarked fund immediately available to meet claims is a practical administrative convenience which would be lost by the proposed change; and thirdly, that the proviso to Section 75 makes it impossible to get rid of the Fund.

The first branch of the first objection does not seem to us to carry much weight, but with regard to the second branch, unless the fees can be shown to be such as will produce only sufficient in effect to discharge the salaries and other expenses of the Registry, including a reasonable premium in respect of the burden of the indemnity imposed on the Consolidated Fund, a demand for a reduction of fees may be more difficult to repel if there is no insurance fund actually in existence.

The risk undertaken by the Consolidated Fund is one almost impossible of estimation. Indeed, regarded from a commercial point of view, there is no standard by which it can be measured. This necessity makes it more difficult to justify any particular figure as a reasonable premium.

The second objection also falls into two branches. We think the first branch is founded on a misconception. The control of the Treasury under the present system seems to us to be as close and effective as it would be if the Fund was abolished. The second in our opinion, an administrative convenience in having some earmarked fund immediately available to answer claims, but there seems no reason why it should be of anything like the amount of the present insurance fund."

The Commission feels that as the current absence of a separate fund appears not to causing any significant disadvantages there is no need for any change in the situation. In order to rationalise the procedure for payment of claims, the phraseology employed in the Crown Proceedings Act 1980 has been adopted in the proposed s.41. To this end references to the bodies liable to be sued in respect of assurance in the current legislation have been replaced with references to the "Crown" and the a definition of that term, which is identical to that in s.7 of the Crown Proceedings Act, has been inserted in s.3. This means that s.11 of that Act will operate to ensure that claims are met out of consolidated revenue, without the need to duplicate the bulk of that provision as part of s.41.

There is also a need to provide authority for compromises of claims, and this is contained in the proposed s.41(5), and is based on the equivalent provision relating to trustees in the Trusts Act 1973-1986, s.44.

Ss. 129–134 may also be repealed as such matters are now governed by the general rules governing court procedure.

Most other jurisdictions exclude claims in respect of overlapping grants [see Transfer of Land Act 1893 (W.A.), s.196; Transfer of Land Act 1958 (Vic.) s.109(2)(b) and (c); Real Property Act 1900 (N.S.W.), s.133(b) and (c); Real Property Act 1866-1975 (S.A.), s.212; Land Titles Act 1980 (Tasmania), s.151(1)(b); Land Transfer Act 1952 (NZ), s.178(b); Real
Property Ordinance 1925 (ACT), para.147(b); Land Registry Act 1960 (British Columbia), s.229(c)-(e); Land Titles Act 1955 (Alberta), s.178(a)]. However, since overlapping grants inevitably involve some error in the registration process, since surveyed plans are subject to checking in the Titles Office, there seems no reason, on principle, why they should be excluded.

There are also numerous examples of less favourable treatment being accorded to volunteers [see, for example, Transfer of Land Act 1958 (Victoria), s.110(3)(a)].

There are some interesting exclusions in Canadian jurisdictions apart from those mentioned above:

Owners of under-surface or air space rights [Land Registry Act 1960 (British Columbia), s.229(a)].

Registrar's action of which claimant aware [Land Registry Act 1960 (British Columbia), s.229(g)]. This may be covered by the restrictions on recovery where the claimants neglect or default contributes to the loss. It may also be directed primarily at the bringing of land under the Act [cf. Land Titles Act (Ontario), s.62(1)(c), see also Land Titles Act 1981 (New Brunswick), s.73(1)(d)].

Where Registrar exonerated from inquiring into a matter [Land Registry Act 1960 (British Columbia), s.229(i)].

Registrar's necessary delay in registering [Land Titles Act 1981 (New Brunswick), s.73(1)(f)]

The sections of the Act affected and the effect of the proposals in this paper are set out in the following table:-

<table>
<thead>
<tr>
<th>NO.</th>
<th>SUBJECT MATTER</th>
<th>COMMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>41</td>
<td>Assurance Fee to be paid when land is brought under the Act.</td>
<td>There would be no Fund. Subsequent damages would come out of Revenue. Section could be repealed.</td>
</tr>
<tr>
<td>42</td>
<td>Sums paid to Treasury and invested. Proviso - Revenue makes good insufficiency Proviso - no entitlement to indemnity for breach of trust.</td>
<td>This becomes unnecessary. s.135 would be retained.</td>
</tr>
</tbody>
</table>
126 Action by a person deprived of land
Proviso - limitation of time
Proviso - protection for bona fide purchaser for value

These provisions will be altered to spell out the cases where recovery is possible and to delete time limitation

127 (i) If a person against whom action is brought is dead, insolvent or has absconded action may be brought against Registrar as nominal defendant

Alter procedure to action against State

(ii) If Sheriff makes nulla bona return, Judge issues a Certificate and Governor issues Warrant directed to Treasurer to pay damages and costs from Assurance Fund.

Phrase "cause of action" requires clarification (see Text re limitation)

Proviso - time limited to 6 years from date of cause of action arose

This power to protect Revenue should last

Proviso - person absconding can be sued by Registrar should he return

128 Action for damages occasioned by omission, mistake or misfeasance of Registrar or staff to be brought against Registrar as nominal defendant.
Judge to certify to Treasurer as to amount of judgment and costs. Governor to issue warrant.
Service of notice or process on Attorney-General

Judgments could be satisfied as judgments against nominal defendant or State of Queensland are satisfied s.19 of Crown Proceedings Act provides for service on Crown Solicitor.

129 If plaintiff discontinues or is nonsuited he will be liable for costs as taxed.

This would be normal procedure even if State of Queensland were defendant and section is not really necessary.
These sections are not relevant to the question of Assurance Fund and would not be required any longer in this form but should be present as parts of Regulations general proviso.

Proviso to s.42 (supra) is concerned with breach of trust by trustee of person of unsound mind, executor, etc. This section concerns a breach of trust by a registered proprietor and all other States have similar provisions. The section could be enlarged to include the proviso to s.42 if that is required. If the proposal to substitute action against State of Queensland is acceptable, a suitable substitution could be made.

Previously repealed

This part of the section could be retained in this form, which enables amendment to provide for actions against the Crown.

The reference to "Fund" could be deleted. A more simplified form, eg. s.134 of NSW Real Property Act, could be considered.
1877 In every case where defendant s.47 is entitled to indemnity from the Fund, the Registrar is to be viso joined as defendant. Some like provisions could be included in new draft bill with appropriate substitut ion in lieu of Assurance Fund, or could be left to be governed by Rules of Court

One provision of the South Australian Act which merits consideration is s.210:-

Any person sustaining loss or damage in any case in which he shall be entitled to institute proceedings to recover compensation shall be entitled to institute proceedings to recover compensation against the Registrar-General as nominal defendant, may, before commencing such proceedings, make application in writing to the Registrar-General, for compensation, and such application shall be supported by affidavit or declaration. If the Registrar-General admits the claim, or any part thereof, and certifies accordingly, the Governor may, if he shall think fit, issue a warrant to the Treasurer for payment of the amount so certified out of the Assurance Fund. The Act of Victoria, Western Australia and New Zealand have a similar provision and it could be useful to circumvent unnecessary litigation where the claimant's position is incontestable.

Taking the provisions of the South Australian Real Property Act 1886 - 1975 as the datum point, the comparable provisions in Australia and New Zealand legislation are:-

| S. | South Australia | QLD | ACT | NSW | VIC | TAS | WA | NZ |
|----|----------------|-----|-----|-----|-----|-----|-----|-----|-----|
| 203 | Party deprived of land may sue for compensation. | 126 | 154 | 126 | 110 | 152 | 201 | 172 |
| 204 | Exoneration of proprietor after transfer for value except in certain cases. | 126 | 154 | 126 | - | 152 | 201 | 172 |
| 205 | Proceedings against Registrar-General as nominal defendant. | 127 | 143 | 126 | - | 152 | 201 | - |
| 206 | When compensation awarded in an action cannot be recovered Assurance Fund liable. | 127 | - | - | - | - | - | - |
207 Transferee, mortgagee 126 159 44(2) - - 202 -
encumbrancee or lessee
bona fide for value
not subject to action.

208 Proceedings against 128 155 126 - 153 205 172
the Registrar-General
as nominal defendant
and notice thereof.

209 Value of buildings to 47 - 125 - 153 201 179
be excluded.

of 1877

210 Persons claiming may, - - - 111 155 208 173
before taking
proceedings apply to
the Registrar in
writing for
compensation.

211 Assurance Fund not 135 147 133 109 151 196 178
liable for breach of
trust or improper
exercise of power of
sale.

212 Fund not liable for - 147 133 109 151 196 -
misdescription of
boundaries or parcels
except in certain
cases.

213 Procedure for - - - - - -
enforcing claims
against Fund.

214 Proceedings where same - 154 - 109 151 196 -
land is included in 2
or more grants from the
Crown. Fund not liable.

215 Limitation of Action. 126 157 Rep - 158 211 180

216 If person damaged is 21 157 130 110(3) 158 211 181
guilty of laches
judgment may go
against him.

217 Payment out of Fund  - - 13162 - - - -
deemed on account of
certain persons.
218 Moneys paid out of account may be recovered.

219 Judgment may be entered by Registrar for amount paid on account of absent persons.

South Australia - Real Property Act 1886-1975
Queensland - Real Property Act 1861-1981
A.C.T. - Real Property Ordinance 1925
Victoria - Transfer of Land Act 1958 (6399)
New South Wales - Real Property Act 1900
Tasmania - Land Titles Act 1980
Western Australia - Transfer of Land Act 1893
New Zealand - Land Transfer Act 1952
CHAPTER VIII

MORTGAGES, LEASES, EASEMENTS AND TRUSTS

In considering what provision should be made in the Real Property Acts in relation to mortgages, leases, easements and trusts it should be borne in mind that the appropriate place for the statement of general rules governing interests in land is the Property Law Act 1974-1986, and in the case of trusts the place for the statement of general rules is the Trust Act 1973-1986. Accordingly, the provisions of the Real Property Acts should generally be confined to that necessary to achieve and operate the system of registration of title. A number of current provisions of the Real Property Acts would either be better situated in the Property Law Act, or should at least not unnecessarily duplicate provisions of that Act.

MORTGAGES

It is appropriate to begin the consideration of mortgages with a discussion of the existing position of mortgages under the Real Property Acts.

LEGAL MORTGAGES UNDER THE REAL PROPERTY ACTS

There are pronounced differences between the old system legal mortgage and the legal, that is registered, mortgage under the Real Property Acts. The main ones are:

1. As with other estates and interests under the Real Property Acts, obtaining a legal interest as mortgagee depends upon registration alone, not upon any act of the parties (s.43 of the Real Property Act 1861-1988).

2. The Torrens system defines the nature of the mortgage as a charge or security (s.60 of the Real Property Act 1861-1988), so that, unlike the creation of an old system mortgage, the registration of the mortgage does not operate as a transfer of the mortgagor's estate in the land to the mortgagee. It merely creates against the mortgagor's interest in the land, a charge in favour of the mortgagee.

3. As it is registration which creates a legal mortgage and the mortgage is a charge only, there is no impediment to the creation of two or more legal mortgages of Torrens system land. In such a case, priority as between the successive mortgagees is made by statute to depend on the order of registration (s.56 of the Real Property Act 1861-1988 and s.12 of the Real Property Act 1877-1988.)
4. The Real Property Acts prescribe the form which the legal mortgage must take. The form emphasises the security nature of the transaction. Originally the form was prescribed by s.56 and set out as Schedule "F" of the Real Property Act 1861. However, the Real Property Acts and Other Acts Amendment Act 1986, in the course of the general overhaul of prescribed forms dictated by the computerisation process, removed the text of prescribed forms from the Act so that they are now set out in regulations, although the Act itself, in this case s.56(1) still requires the use of the prescribed form.

As a result of these crucial differences, and in particular the fact that the Torrens system mortgage operates as a "charge" only it might have been thought that there was no longer any place for the terminology of "redemption" and "foreclosure". However, this has never been the case as s.60 of the Real Property Act 1861-1988 expressly recognises the mortgagor's right of "redemption" and the mortgagee's a right of "foreclosure". Furthermore, the mortgagee's right of "foreclosure" is also expressly recognised and preserved by s.89(2) of the Property Law Act 1974-1986.

The use of the expressions, "redemption" and "foreclosure" in the Real Property Acts caused some difficulty in the early decades of the Torrens System. In Trust and Agency Co. v. Markwell (No.2) (1874) 4 QSR 50, Cockle CJ. said:

"The word 'foreclosure', for instance, what application can it have with any estate not passed out of the mortgage? Again, what application has the word 'redemption'? The mortgagor has nothing to redeem, because the whole legal estate is still in him. He has nothing to take out of the mortgagee, for nothing has passed to the mortgagee. Foreclosure and redemption seem to be, therefore, inapplicable."

Despite this it became well established that the Real Property Acts preserve a right of redemption in favour of a registered proprietor of land subject to a registered mortgage and a right of foreclosure in favour of a registered mortgagee.

However, these rights are exercised in a way essentially different from that operating under the old system. Under the Torrens system, redemption becomes a procedure by which the Court compels the mortgagee to execute a registrable discharge of the mortgage (as in Ex parte Tori [1977] Qd. R. 256). In a foreclosure action, a result equivalent to foreclosure of a legal mortgage under the old system is achieved by compelling the mortgagor to execute a registrable transfer in favour of the mortgagee. If the mortgagor fails or refuses to sign the transfer the Court can make the necessary vesting order under s.89 of the Trusts Act 1973-1986 (see also, s.83 of the Real Property Act 1861-1988, and for registration of a vesting order see s.46 of the Real Property Act 1877-1988). The difference is particularly pronounced in the case of foreclosure since under the old system mortgage all foreclosure usually needed to achieve was the extinction of the mortgagor's equity of redemption, that being the only interest retained by the mortgagor in most cases, in contrast to the position of a registeed proprietor who has mortgaged under the Real Property Acts, who retains a legal interest.
EQUITABLE MORTGAGES OF LAND UNDER THE REAL PROPERTY ACTS

The creation of equitable mortgages of Torrens land is possible principally by the operation of ss. 30 and 51 of the Real Property Act 1877-1988, although numerous decisions since the turn of the century have established that attempts to create interests which would have been effective under the old system to create legal or equitable interests, which fail to create legal interests through want of registration are nevertheless generally effective in equity.

S. 30 preserves the right to create an equitable mortgage by deposit of the instrument of title, while s.51 expressly preserves the general equity jurisdiction under which equitable mortgages are created.

The result is that there are several classes of equitable mortgages of land under the Real Property Acts:

1. Registrable but unregistered mortgage instruments;

2. Any other form of instrument which would have been effective under the general law to create an equitable mortgage; and

3. Any other form of instrument or transaction which under the old system would have operated to create an equitable mortgage by deposit of title deeds.

The last form of equitable mortgage under the Torrens System was discussed in J. & H. Just (Holdings) Pty. Ltd. v. Bank of N.S.W. (1971) 125 C.L.R. 546.

Other forms of security over land formerly in use in Queensland, have suffered a demise through the eradication of bills of encumbrance from the Real Property Acts by the 1985 and 1986 amendments.

PROPOSALS FOR REFORM

In its Working Paper number 25, the Commission considered the Bills of Mortgage/Bills of Encumbrance dichotomy as an interim study pending the complete review of the Real Property Acts. (See Q.L.R.C.W.P. 25 at pp. 8-14). It was recommended that the definition of "mortgage" in s.3 of the Real Property Act 1861-1981 be amended by substituting a definition in similar terms to that contained in the New Zealand Land Transfer Act 1959-1981. A new definition was enacted by the Real Property Act Amendment Act 1985, and the ghost of the bill of encumbrance was finally exorcised in the Real Property Acts and Other Acts Amendment Act 1986.

Ss.56-58,60,62,63,65, and 66-68, of the 1861 Act currently deal with mortgages, some of these sections also dealing with leases. Of these provisions only ss.56, part of 58, 60, 63 and 65, relate to matters of registration per se, so that the remaining provisions either duplicate those in Part VII of the Property Law Act 1974-1986, or may be incorporated therein by appropriate amendment. It is also appropriate to supplement these provisions with a provision for variation of priority based on s.75B of the Transfer of Land Act 1958 (Victoria), and extra provision relating
to the discharge of mortgages derived from the Real Property Act 1886-1975 (South Australia).

Apart from these questions of form, and a rejuvenation of the provisions in terms of phraseology, little attention is required since they generally operate satisfactorily in practice. However, two questions must be considered in some depth and those are:

1. Equitable mortgages; and

2. The status of the remedy of foreclosure.

While the position of mortgages in the Real Property Acts may be greatly simplified by amendments along the lines proposed above, drafts of which are set out below, to the extent that substantive change is required in provisions that are to be consigned to the Property Law Act 1974-1986, it would be inappropriate not to deal with it as part of this review. Some other matters raised in submissions must also be considered.

EQUITABLE MORTGAGES

These are very common, because many non-bank financial institutions find it more convenient to lend on the basis of land as security without going through the process of registering a legal mortgage. This practice leads, or has led, to the following problems:

1. Diminution in the comprehensiveness of the register, through the existence of many equitable mortgages. Although most of these are protected by caveat, this has the disadvantage of cluttering the caveat process, and subjecting what is supposed in some ways to be an exceptional step, that is, lodging a caveat without the registered proprietors consent, into a commonplace. This adds to the cost of the registration process, since caveats require special handling procedures which interrupt the smooth flow of work.

2. Consumer protection problems. The common practice of including an equitable charge of the borrower's real property in what the borrower believed to be a simple personal loan agreement, leading to later embarrassment through the lodgment of the caveat led, in 1979, to the restriction of the right to lodge the special form of caveat designed for equitable mortgagees under s.30 of the Real Property Act 1877-1988, to mortgagees who held the certificate of title or land grant (see s.30A, inserted in 1979). While this provision, aimed at second and later mortgagees, blocked the initial problem the current provision is in some ways illogical in that it is the mortgagee without the deeds who appears as a result of the decision in J. & H. Just (Holdings) Pty. Ltd. v. Bank of N.S.W. (1971) 125 C.L.R. 546, to be the only one in need of protection. It is understood that the financial institutions concerned have responded by lodging caveats under s.98 of the Real Property Act 1861-1988, with the consent of the borrowing registered proprietor.

Some aspects of this problem and proposals for reform belong more properly to a discussion of caveats, and are dealt with in the relevant section of this working paper. However, the Commission feels that it is a legitimate
expectation of a system of registration that the vast majority of mortgagees will utilise it fully by procuring registration of their mortgages. However, it is as inappropriate to completely prohibit the creation of equitable mortgages as it is to prohibit the creation of equitable interests in general (see discussion on priorities of unregistered interests). It is suggested that the flood of cavets related to equitable mortgages might be stemmed by excluding them from the category of consent cavets under s.98, although they could still be registered as lapsing cavets.

FORECLOSURE

Section 60 of the Real Property Act 1861-1988, deals, inter alia, with the remedy of foreclosure.

In 32 Halsbury's Laws of England (4th ed.) at paragraph 407 is the statement:

"Incident to any mortgage is the right of the mortgagor to redeem, a right which is called his equity of redemption and which continues notwithstanding that he fails to pay the debt in accordance with the provision for redemption."

Under the provisions of s.60 of the Real Property Act 1861-1988 a mortgagee may be entitled to foreclose the right of the mortgagor to redeem the mortgaged lands. The material part of s.60 reads:

"any registered mortgagee whenever any principal or interest money shall have become in arrears shall be entitled by suit or other proceedings in equity to foreclose the right of the mortgagor to redeem the mortgaged lands."

The provisions of the Queensland Act necessitate that foreclosure of the equity of redemption take place by way of an action: Castlemaine Brewery and Quinlan Gray & Co. v. Spink (1899) 9 Q.L.J. (N.C.) 120 (Griffiths C.J.).

The procedure is as follows:

(1) An order nisi is made:

(a) ordering an account of the money due for principal and interest; and of the rents and profits (if applicable) [Walker & Mackenzie v. Sachs [1902] Q.W.N. 56 (Griffiths C.J.)];

(b) directing the mortgagor to comply with the Registrar's certificate within six months from the date of its making, or to convey the land to the mortgagee [Walker and Mackenzie v Sachs [1902] Q.W.N. 56; Stevens v. Hoberg (No.2) [1952] Q.W.N. 13 (Philip J.)].

(2) In the event of non-compliance, the order nisi is made absolute, and a vesting order is made pursuant to the provisions of the Trusts Act. [Trusts Act 1973-1986, ss. 82, 90, 92; Walker and Mackenzie v Sachs [1902] Q.W.N. 56; Stevens v. Hoberg (No.2) [1952] Q.W.N. 13; Wilson v. Brown (1896) 7 Q.L.J. 16 (Griffiths C.J.).]
(3) It is expected that the Court will further order that the defendant/mortgagor deliver up to the plaintiff/mortgagee possession of the lands. [Stevens v. Hoberg (No.2) [1952] Q.W.N. 13].

Some of the difficulties experienced by our Courts when confronted by such applications are illustrated by the following decisions.

In Trust and Agency Co. v. Markwell (1874) 4 QSR 50 which was an action under s.57 as it then was, Cocker, C.J. at pp. 52-3 said:

"I think we must guard ourselves against attributing the word 'mortgage' in this Act, a meaning identical with its ordinary one. It cannot indeed have such a meaning, for it is the very essence of a mortgage, properly so called, to involve the transfer of an estate from the mortgagor, who loses the legal title, retaining only an equitable one, to the mortgagee, who takes the legal title subject to the rights of the mortgagor against him. But the machinery provided in this Act for carrying out transactions in the nature of loans involve nothing of the kind, and are based upon a conception of an entirely different kind, for it expressly provides that the mortgage under the Act shall not operate or take effect as a transfer of the land, estate, or interest intended there by to be charged. Therefore, we see here something entirely inconsistent with the supposition that the legislature intended the mortgage created by the Act to be a dealing of the same kind as a mortgage under the old law. That being so, we see that, at all events, only under other circumstances pointed out by a subsequent section, certain parts of the old law have no place whatever. The word 'foreclosure', for instance, what application can it have with any estate not passed out of the mortgage? The mortgagor has nothing to redeem, because the whole legal estate is still in him. He has nothing to take out of the mortgagee, for nothing has passed to the mortgagee. Foreclosure and redemption seem to be, therefore, utterly inapplicable in the preliminary stage."

"... I would observe, although it is unnecessary to give an opinion on this point, that although the words foreclosure and redeem occur at the close of s.60 of the Act, yet there is a peculiarity of phraseology. It speaks of proceedings in equity to foreclose the right of the mortgagor or encumberancer, or to redeem the said mortgaged or encumbered lands. The right to foreclose or redeem or some right, if not strictly resembling these rights, analogous to them, would appear not to arise, if it did arise, until an action of ejectment is brought merely creating a title in the mortgagee. That resemblance between the statutory and common law mortgages arises, without which it would be utterly useless to use the words 'foreclose' or 'redeem'. Suffice it to say, that there is no suggestion in these pleadings that there has been any transfer, and we cannot see that there was nothing to transfer legally from the mortgagor to the mortgagee."

Wilson v Brown (1896) 7 Q.LJ 16 was an action by the plaintiffs as mortgagees of certain land to foreclose the rights of the defendant, the mortgagor. The plaintiffs asked for a declaration that after the order for foreclosure they would be entitled to an estate in fee simple free from encumbrances.

The court held that a judgment for foreclosure of land subject to the Act does not authorize the Registrar of Titles to register the mortgagee as
owner of an estate in fee of the mortgaged land without a vesting order or a transfer from the mortgagor.

Griffith, C.J. declined to make the declaration sought. He said he would add a direction such as is commonly inserted in a judgment for foreclosure of an equitable mortgage that in default of payment the mortgagors convey to the mortgagee. If they fail to do so the mortgagees can apply for a vesting order under the Trustees and Incapacitated Persons Act 1867.

In Walker and Mackenzie v Sachs (No. 101 of 1899; unreported) Griffith, C.J. in his judgment on the order for nisi for foreclosure, said, after referring to Wilson v Brown (supra):

"I have in subsequent cases included in the judgment for foreclosure a direction to the mortgagor to transfer the land to the mortgagee and have followed that direction by a vesting order under the authority of s.32 of the Trustees and Executors Act 1897. In these cases the legal estate was still vested in the mortgagor, and there was no difficulty in the way of declaring him a trustee.

The present case differs inasmuch as puisne mortgagees have no legal estate in the land, and it would seem at first sight incongruous to declare that they are trustees of their equitable interests for the plaintiffs. I held however In re Cain ([1893] 5 Q.L.J. 93) that the word 'interest' used in the definition of land in the Trustees and Incapacitated Persons Act 1867, included the interest of a mortgagee under the Real Property Acts. The definition in the Trustees and Executors Act 1897 is identical. I propose to follow that case. And, as the effect of a judgment of foreclosure is to extinguish in favour of the plaintiffs all later charges upon the land, it appears to me to follow that persons in whom they are formally vested must hold them for the benefit of the plaintiffs, and that it is accordingly competent for the court to so declare, and to direct them to convey these interests to the plaintiffs, and then to make an order under s.32, vesting them in the plaintiffs.

Under the existing practice the order absolute for foreclosure is taken out as an order of course. Orders of course are, however, abolished by the new rules, which will come into operation before absolute foreclosure can be obtained in this case. It will therefore be necessary to make an application to the court or a judge in chambers for the final order, and I think it will be convenient practice that the vesting order should be made on that application and not now by way of anticipation."

(See Editor's note after [1952] Q.W.N. 13).

This case came before the court again later and was reported (1902) QW.N 56.

Griffith, C.J. said:

"This Court doth order that all the said defendants do from henceforth stand absolutely barred and foreclosed of and from all right title interest and equity of redemption of in and to the said lands and this Court doth declare that the said defendants are the trustees of their respective estates and interests in the said lands for the plaintiffs within the meaning of the
Trustees and Executors Act 1897 and doth direct that the said lands do vest in the plaintiffs for all the interests of all the defendants."

In Stevens v. Hoberg (1951) QWN 44, the plaintiff as mortgagee instituted proceedings in the Supreme Court against the defendant for foreclosure of a registered mortgage given by the defendant as mortgagor over certain lands held under the Real Property Acts.

On the motion for judgment, Philp J. ordered that the defendant pay the sum owing under the mortgage together with interest and costs. In default of his paying this sum he would be absolutely debarred and foreclosed of and from all right, title, interest and the equity of redemption of in and to the said mortgaged property.

In Stevens v. Hoberg (No.2) (1952) QWN 13, counsel for the plaintiff submitted that the report of the order in Walker and Mackenzie v Sachs (1902) QWN 56 and the reasons of Griffith C.J. in the judgment on the order nisi (No. 101 of 1899 unreported) did not make it clear whether in that case the conveyance was ordered on the judgment nisi, or the judgment absolute, or at all. He said:

"If there is no order for conveyance in the judgment nisi, then an order may be included in the judgment absolute that the mortgagor convey his interest in the lands to the mortgagee. The further order may be included that the lands vest in the mortgagee under s.32 of the Trustees and Executors Acts 1897-1924."

Philp J. said:

"It appears desirable that in general the order for conveyance should be made on the judgment nisi."

His Honour then made an order as follows:

"Order that the defendant do henceforth stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to certain lands situated in Bazaar Street, Maryborough, in the State of Queensland.

Further order that the defendant do transfer and convey to the plaintiff his estate and interest in the said lands.

Declare that the defendant is the trustee of his estate and interest in the said lands for the plaintiff within the meaning of the Trustees and Executors Acts 1897-1924.

Further order that, pursuant to the provisions of s.32 of the said Acts, the said lands vest in the plaintiff for all the estate and interest of the defendant.

Further order that the defendant do forthwith deliver up to the plaintiff possession of the said lands."
Further order that the defendant pay to the plaintiff his costs of and incidental to this application to be taxed."

As well as his entitlement to a suit in equity to foreclose the mortgagor's right to redeem the mortgagor also has the power to sell (s.57), to enter into possession by receiving rents and profits (s.60) and to bring an action of ejectment (s.60). [The power to distrain upon the occupier or tenant originally referred to in s.60 of the Act of 1861 has been abrogated by s.103 of the Property Law Act 1974-1986.]

A mortgagee who wished to foreclose the mortgagor's right to redeem could issue a specially endorsed writ under o.6 r. 11 of the Supreme Court Rules. Prior to its being amended in 1959 the rule was as follows:

"11. In an action by a mortgagee or mortgagor, whether legal or equitable, or by any person who has or is entitled to a legal or equitable charge upon any property, or who has or is entitled to any property subject to a legal or equitable charge, or by any person entitled to foreclose or redeem any mortgage, whether legal or equitable, the writ of summons may be specially indorsed with a claim for such relief of the nature or kind following as may be specified in the indorsement, and as the circumstances of the case may require; that is to say, sale, foreclosure, redemption, reconveyance, or delivery of possession by a mortgagor or mortgagee."

The rule was considered by Philp, J. in Smith v Flippence [1940] Q.W.N. 13 who said:

"Order VI., r. 11, merely allows claims in certain types of action to be specially indorsed. It says in effect that where a plaintiff has by the law a claim to delivery of possession, he may specially indorse that claim instead of proceeding by ordinary writ. I think that rule cannot be held to be intended to alter the substantive law and give a mortgagee a right different from that conferred upon him by s.60 of the Real Property Act 1861-1988 and deprive a mortgagor of his rights as defendant in an action for recovery of land."

The rule after amendment in 1959 now reads:

"11. Special Indorsement in Actions for Foreclosure, etc.

In an action by a mortgagee or mortgagor, whether legal or equitable, or by any person who has or is entitled to a legal or equitable charge upon any property, or who has or is entitled to any property subject to a legal or equitable charge, or by any person entitled to foreclose or redeem any mortgage, whether legal or equitable, the writ of summons may be specially indorsed with a claim for such relief of the nature or kind following as may be specified in the indorsement, and as the circumstances of the case may require; that is to say, payment of moneys secured by the mortgage or charge; sale; foreclosure; delivery of possession (whether before or after foreclosure) to the mortgagor or person entitled to the charge by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property; redemption; reconveyance; delivery of possession by the mortgagee."

In Metropolitan Permanent Building Society v Mclymont [1983] Qd.R.160, McPherson, J. at p.164 said as regards proceedings for delivery of
possession there were two disadvantages in using the rule as it was formerly. One disadvantage was that an order for delivery could be claimed and obtained summarily only in conjunction with proceedings for foreclosure against the mortgagor whereas in most cases all that the mortgagee required was possession with a view to sale.

The order for foreclosure in the case of Torrens land does not itself entitle the mortgagee to be registered as proprietor of the mortgaged estate. There are only two ways of causing the mortgagee to become registered proprietor of the mortgaged estate; by registered transfer from the mortgagor or by registration of a vesting order. Walker's case and Stevens v Hoberg (supra) indicate that an appropriate course is for the order nisi to order a conveyance or transfer of the mortgaged estate to the plaintiff mortgagee and for the judgment absolute to declare that the defendant is trustee for the plaintiff of the mortgaged estate and to include a vesting order under the Trusts Act 1973-1986 vesting in the Plaintiff the estate of the defendant, which vesting order is then registered.

It is now provided by s.99 of the Property Law Act 1974-1986 that any person entitled to redeem mortgaged property may have a judgment or order for sale instead of redemption. This provision replaces s.74 of the Equity Act 1867-1981.

As mentioned above, s.57 of the Real Property Act 1861-1988 refers to the power of sale conferred by the Property Law Act 1974-1986. (See ss. 83-101 of that Act.) Under s.89(2) the power of sale is said not to affect the right of foreclosure.

Professor E.I. Sykes in Law of Securities (2nd ed. IBC 1973) wrote at p.234:

"The existence of a remedy of foreclosure is even more unnecessary to the legal conception of the Torrens title mortgage than it is to that of the old law mortgage. Under the latter security at least the mortgagee has a legal estate and the enlargement of that estate by the removal of the equitable stop constituted by the equity of redemption was a natural step in the circumstances for equity to allow. Under the Torrens Acts, however, the effect of foreclosure is much more startling if one is accustomed to view the security as legal charge and nothing more. The legal charge is made into the full owner. He gets both legal and beneficial ownership conferred upon him. The legislature need not have introduced foreclosure as ... security rights such as sale out of court introduced by the Acts would seem to be greatly in advance of the foreclosure remedy so far as social justice is concerned and at least equal to it so far as remedy and its incorporation into the scheme of the Torrens mortgage has been, however, without doubt to diminish very much the differences between the two types of security."

In its 1987 report on The Law of Mortgages, the Ontario Law Reform Commission wrote (p.137):

"The development in equity of the right to redeem, and the remedies of foreclosure and judicial sale, achieved a fair balancing of the competing interests of lenders and borrowers. However, insofar as these two remedies were concerned, this development also spawned a complex and often time-consuming procedure, fraught with technical traps and procedural
delays. In order to secure a more expeditious disposition of the property and recovery of the debt, lenders began to include in their mortgage contracts a term providing for a private power of sale that was exercisable by the lender upon the borrower's default. This contractual power of sale allowed for a disposition of the property without resort to judicial proceedings."

That commission concluded (p.164) that the extrajudicial sale process, if modified, would operate in the best interest of all parties. The process is more expeditious and less costly than foreclosure and judicial sales, so that the money available after payment of the loan is maximised. It added that there is certainty to the procedure and finality of the sale. It recommended (p.180) that the remedy of foreclosure be retained but in a modified form.

It would seem that the statement of Professor Sykes and that of the Ontario Commission (though to a lesser extent) query the usefulness of foreclosure as a remedy. Furthermore, as there are the above mentioned provisions of the Property Law Act 1974-1986, the provisions of the Real Property Act might be regarded as unnecessary.

Foreclosure as a remedy is infrequently pursued today. There are a number of reasons for this. The procedure is long and tedious compared to the convenience of exercise of the statutory power of sale contained in s.83(1)(a) of the Property Law Act 1974-1986. Pursuance of this remedy is fruitless if there is likely to be a significant positive difference between the net proceeds of sale and the amount of mortgage debt outstanding, since the Court will, in such circumstances, order sale in lieu of foreclosure, on the grounds that the award of a foreclosure order would be inequitable to the mortgagor. On the other hand, if the expected net return from sale of the property is less than the amount owing the remedy is most unlikely to be pursued, since it will probably result in a loss to the mortgagor, which will be irrecoverable since foreclosure bars the right to cover a deficit under the personal covenant. Furthermore, there is the possibility of the foreclosure being reopened, which renders the title of a mortgagee who forecloses somewhat insecure while the property is retained, although this is no barrier to a subsequent sale, as the title of a purchaser in good faith from the foreclosing party, unconnected with that party, will not be subject to reopening. This aspect could be argued to make the remedy somewhat undesirable even in those few cases where it might appear to be advantageous, such as where a mortgagee prefers to take the property rather than have it sold for a sum insufficient to meet the mortgage debt, in circumstances where the right under the personal covenant is likely to be valueless. As most mortgagees are financial institutions it might be expected that they would be uninterested in foreclosure.

Accordingly, there would appear to be a strong case for the abolition of foreclosure as has already happened either through legislation or practice in some other jurisdictions (see [1979] N.L.J. 33-37 H.E. Markson's article "Foreclosure for Closure"). Foreclosure appears to be unknown in practice in Ireland [see Wylie Irish Land Law (1975) at 585]. It has been abolished in New Zealand (see Property Law Act 1952, s.89), and it may have been effectively emasculated in England by a sideblast of the Consumer Credit Act 1974, s.113 [see comment by Prof. J.E. Adams "Mortgages and the Consumer Credit Act 1974" (1975) 39 Conv. (NS) 94]. However, foreclosure
is a remedy which appears to be alive and well in Canada. If such abolition, or other amendment of the procedure, were desired, it should be achieved by appropriate amendment of the Property Law Act 1974-1986.

After due consideration, the Commission is of the view that would be unwise to jettison foreclosure at this stage. Although the remedy appears to be seldom sought today, this was not the case until a few years ago, when it appears that the number of applications for the remedy suddenly reduced markedly, owing to the discovery of a disadvantage with regard to stamp duty. It is felt that the existence of the remedy is a useful safety valve for some cases where the mortgagor is unable to repay the sum outstanding but sale of the mortgaged property is inappropriate, as, for example, where the mortgaged property is for practical purposes unsaleable, perhaps, because of extensive disrepair.

Other suggestions have been made in submissions to the Commission, such as removing the need for judicial proceedings in connection with the remedy, as has happened in other States, or that there be a requirement of an unsuccessful attempt to sell by auction at a reserve which would be sufficient to discharge the debt and costs as a condition precedent to the remedy being pursued. The Commission considered the recent amendments to ss.57, 61 and 62 of the Real Property Act 1900 (NSW). While these amendments are constructive, it was felt that the current procedure works sufficiently adequately in Queensland for there to be no justification for introducing extra provisions along these lines into the legislation.

COMPARISON WITH OTHER JURISDICTIONS

Under the general law a mere charge without an express or implied agreement for a legal mortgage was enforced upon default not by foreclosure but by sale [Tennant v. Trenchard (1869) 4 Ch.App. 537 (Lord Hatherley, L.C.); Re Owen [1894] 3 Ch. 220 (Stirling J.)]. Queensland was, prior to the 1986 amendments, unique in that its Torrens title legislation permitted foreclosure by an encumbrance.

In Tasmania, Western Australia, New South Wales, Victoria and South Australia foreclosure is an administrative and not a curial process. The procedure and requirements are much the same for all of these jurisdictions, and are as follows:

(a) There must have been default in payment of principal or interest under the mortgage for a period of six months.

(b) A notice seeking rectification of the default must have been issued to the mortgagor as required by the legislation.

(c) The land, estate, or interest mortgaged must have been offered for sale by a licensed auctioneer.

(d) The mortgagor must have been served a written notice advising of the intention to seek a foreclosure order.

(e) The amount of the highest bid was not sufficient to satisfy the money secured by the mortgage and the expenses of the sale.
(f) The application to the Registrar-General (or Recorder in Tasmania) must be accompanied by a certificate from the auctioneer by whom the land was put up for sale.

(g) The statements made in the application are to be verified by statutory declaration.

(h) The Registrar-General may require such proof of the matters required to be satisfied before he makes a foreclosure order as he thinks necessary.

(i) The Registrar-General may cause notice to be published once in the Gazette and once in each of 3 successive weeks (or other period prescribed by the legislation), in a specified newspaper not less than one month from the date of first publication, upon or after which the Registrar-General may issue an order for foreclosure to the applicant, unless in the interval a sufficient amount has been realised by the sale of the land to satisfy the moneys secured plus all expenses occasioned by the sale and proceedings.


Professor Sykes has observed that the extra-curial foreclosure procedures are deficient in two respects. Firstly, no machinery is provided for the taking of accounts, so there would have to be recourse to the court for this; secondly, since court proceedings for foreclosure cannot be taken, there can be no judicial sale in lieu thereof. In contrast, s.99 of the Property Law Act 1974-1986 here enables the court to make an order for sale in any action for foreclosure or redemption, and upon the request of either the mortgagee or mortgagor. At page 235 of his book (supra) Professor Sykes says, "the procedure [for non-curial foreclosure] outlined makes it very difficult for the mortgagee to secure foreclosure of a mortgage over a property which is worth substantially more than the mortgage debt and interest and therefore embodies a greater degree of justice than the old court procedure." In Queensland it is unlikely that a Court would order foreclosure where the value of the property, exceeds the mortgage debt because the mortgagor can pray in aid the provisions of s.99 of the Property Law Act 1974-1986 referred to earlier and obtain a sale in lieu of foreclosure.

In cases where the value of the property is significantly less than the mortgage debt there are two considerations which make foreclosure as a remedy upon the mortgagor's default unattractive from the mortgagee's point of view. In Finance Corporation of Australia Limited v. Commissioner of Stamp Duties [1981] Qd.R. 493 the Full Court held that ad valorem duty was payable as for a conveyance on sale on the value of the debt outstanding at the date of the foreclosure. In this case the value of the debt was some $805,000 whereas the land was found by the judge at first instance to be worth only $208,000.
APPLICATION OF FORECLOSURE TO CHARGES IN GENERAL

The change in the definition of mortgage by virtue of the 1985 and 1986 amendments and the consequences have produced a situation where all charges secured on land may be created by an instrument of mortgage. Thus, if foreclosure is to remain a remedy it must continue to apply to all such charges. In New Zealand, from where the definition was largely taken, does not permit mortgagees to foreclose the equity of redemption (Land Transfer Act 1952-1981 (N.Z.), s.89).

In view of the disadvantages accruing to foreclosure as a remedy mentioned above it is sometimes suggested that no disadvantage would be wrought if foreclosure was removed from the remedies available to a mortgagee.

REOPENING FORECLOSURE AND SUBSEQUENT ACTION ON THE PERSONAL COVENANT

Retention of foreclosure leaves some untidy aspects concerning reopening and subsequent actions on the personal covenant.

EFFECT OF FORECLOSURE ON RIGHTS OF ACTION UNDER THE PERSONAL COVENANT

The following passage appears in Vol.32 Halsbury's Laws of England (4th ed.) at paragraph 499:

"The first operative part of a mortgage is usually the covenant by the mortgagor to pay the principal and interest on a day named. If there is no covenant and no accompanying bond, there is still an implied promise to pay."

Section 78 of the Property Law Act 1974-1986 is as follows:

1. In every instrument of mortgage there shall be implied on the part of the mortgagor the following obligations -

   (a) that he will pay the principal money and interest thereby secured according to the rate and at the times therein mentioned without any deduction whatsoever.

   (b) ........................................

The Law Reform Commission at p.60 of Q.L.R.C. 16 which preceded the Act commented:

"Because mortgages are almost invariably executed in formal fashion, usually a standard form, occasions for resorting to the Statutory implied covenants must be rare."
Dealing with the rights of the mortgagee, E.A. Francis in *Mortgages and Securities* (2nd ed. 1975) wrote at p.22:

"If, after foreclosure he finds the security insufficient to discharge the debt, he may sue on the personal covenant. But where he has, after foreclosure, sold the property so that it can no longer be restored to the mortgagor, the right to sue on the personal covenant will be absolutely extinguished. Where it is permitted, the commencement, after foreclosure, of an action on the personal covenant will renew the mortgagor's right to redeem.

After exercise of his power of sale, the mortgagee is at liberty to sue on the personal covenant for any deficiency. This right still remains if, on a sale of property by the court, the mortgagee, bidding with the leave of the court, has bought the property, even if afterwards, he has resold at a profit."

This is seen as setting out four propositions.

1. If the security is insufficient to discharge the debt, the mortgagee may sue on the personal covenant.

No authorities have been cited in support of this proposition but it seems only logical that if the security has decreased in value (by damage, destruction or deterioration) or the amount of the debt has increased (because of interest on the loan or further advances) the mortgagee should be entitled to action on the personal covenant.

The Judgment of the majority of the High Court in *Fink v. Robertson* (1907) 4 C.L.R. 864 at p.883 reads:

It was suggested that it would be a strange consequence if a mortgagee obtaining an order for foreclosure in respect of land of comparatively small value were thereby to debar himself from recovering any part of the mortgage debt, which might be much greater than the value of the land. We agree that it would be a very foolish thing for a mortgagee to obtain an order of foreclosure in such a case unless he was anxious for other reasons to become the owner of the land.

2. If after foreclosure, the mortgagee has sold the property so it can no longer be restored to the mortgagor, the right to sue on the personal covenant will be absolutely extinguished.

The authority cited was *Palmer v. Hendrie* (1859) 27 B.R.A. 349 (54 E.R. 136). This decision was cited without criticism in the judgment of the majority of the High Court in *Fink v. Robertson* (1907) 4 C.L.R. 864 at p.872. The defendant's submission in that case was that the mortgagee had obtained an
order for foreclosure in pursuance of which he became registered proprietor of the land and a Certificate of Title was issued to him whereupon the mortgagor’s obligations under the mortgage were extinguished. Referring to that case in Finance Corporation of Australia Limited v. Commissioner of Stamp Duties [1981] Qd.R. 493 Matthews, J. (who was a member of the Full Court majority) said at p. 506:

"Fink v. Robertson (supra) dealt with and was largely based on the Victorian Transfer of Land Act 1958. At first sight, some difficulties of application of the relevant provisions to the position in Queensland appear. There were, in particular, provisions in the Victorian Act whereby, upon foreclosure, the mortgagee was deemed for the purpose of the Act to be the transferee. The Queensland provisions do not refer to such "deeming" which, of course, suggests that without the relevant provisions the mortgagee would not be a "transferee". However, the majority of the Court dealt with the question generally by saying at pp. 882–883:

‘If, however, there were no more in the Act, then the provisions enabling a mortgagee to obtain an order for foreclosure, we should be strongly disposed to hold that even without the other expressed provisions on which we rest or judgment, the same consequences would follow.’"

3. Action on the personal covenant renews the mortgagor’s right to redeem.

The authority cited was Lockhart v. Hardy (1846) 9 BEAV 349 50 E.R. p. 378. In Volume 32 Halsbury’s Laws of England (4th Edition) at paragraph 903 it is stated in part:

Neither an order for foreclosure nisi nor an order for foreclosure absolute is conclusive as regards the mortgagor’s right to redeem. If there has been foreclosure absolute the mortgagor may apply for and in suitable circumstances and certain conditions obtain an order opening the foreclosure and giving a new right of redemption (Campbell v. Holyland (1877) 7 Ch.D. 166). An enlargement of the time for example can be obtained after an order for foreclosure absolute has been passed and entered but for this a strong case must be made out such that the
value of the estate greatly exceeds the debt and that
delay in getting the money has been accidental.

The High Court said in Fink v. Robertson (supra) at p. 876 that
reopening is inconsistent with the scheme of the Act and the Court has no
jurisdiction to order it. It also said:

"Except so far as regards the exclusion of the
asserted jurisdiction of Courts of Equity to re-
open a foreclosure in any case in which it might be
just to do so, there is no necessary inconsistency
between the old law and the new, so far as regards
the mere effect of the order of foreclosure."

Section 100 of the Conveyancing Act 1919 (N.S.W.) provides that a
foreclosure order operates to extinguish the right of a mortgagee to bring
an action or to take other proceedings for the recovery of mortgage money
from the debtor and to release all collateral securities for debt which have
not previously been released. The Property Law Act 1958 (Vic.) in s. 87 has
a similar provision.

Professor Sykes in The Law of Securities (2nd ed.) is of opinion that
there is no reason for excluding the doctrine of re-opening the foreclosure.
He writes at p. 238:

"The doctrine is not based on any equitable principle, such as that of
relief against forfeiture, which is foreign to the scheme of the Torrens
mortgage as a statutory charge". He referred to a decision of Faucett, J.
in Campbell v. Bank of New South Wales (1883) 16 N.S.W.L.R. (E.) 285 who
said that the doctrine was inapplicable in N.S.W. because of the effect of
vesting in the mortgagee all the estate and interest of the mortgagor ...
free from all right and equity of redemption on the part of the mortgagor." Professor Sykes continued:

"It seems then that on the balance of authority we
must regard the doctrine as being non-applicable in
all areas, save Queensland, where it is submitted
it is applicable by reason of the absence of any
words in the statute such as were relied on in
Campbell's case" (see pp. 238-239).

4. After exercising his power of sale the mortgagor is
at liberty to sue on the personal covenant for any
deficiency.

There has been no authority located in support of this proposition other
than the dicta in Fink v. Robertson (supra) at p. 883 stating that it would
be a very foolish thing for a mortgagee to obtain an order of foreclosure in
a case where an order for foreclosure in respect of land of comparatively
small value were a bar to recovery of any part of the mortgage debt.
However, unlike the case of foreclosure, there are no arguments of principle
why the remedy should be barred by sale.

It seems just that, where a mortgagee sues on the personal covenant after
foreclosure, the foreclosed mortgagor should be entitled as a quid pro quo
to reopen the foreclosure. However, the complexities of the situation, and the undesirable uncertainties existing where there is a possibility of reopening clouding the title of the foreclosing mortgagee, could be avoided without injustice by abolishing both the right to reopen and the right to sue on the personal covenant after foreclosure. A mortgagee wishing to preserve the right to sue for deficit could still do this by exercising the power of sale in preference to foreclosure.

Another proposal, which was received by the Commission by way of submission, was that an unsuccessful attempt to sell by auction with a reserve no greater than the amount outstanding should be made a precondition of foreclosure. This has considerable merit as a filter of undesirable or unjust foreclosures. However, it should be borne in mind that the question of foreclosure does not strictly have other than a marginal bearing on the review of the Real Property Acts, being a matter more properly dealt with under the Property Law Act 1974-1986, although certain of the suggested reforms would assist in the administration of the system of registration of title through affecting some simplification of procedures.

MORTGAGEE'S CONSENT TO LEASES

Representations were received from the Central District Law Association suggesting relaxation of the requirement of mortgagee's consent to leasing.

It is an established principle in the law that any lease by the mortgagor after the creation of the mortgage is generally not binding on the mortgagee without the mortgagee's consent. This follows from the application of the principles of priority to the respective estates of the mortgagee and lessee, just as does the principle that generally a lease granted before the creation of the mortgage is binding on the mortgagee. The principle is reinforced in relation to land under the Real Property Acts by the proviso to s.52 of the 1861 Act.

It is difficult to see how this principle can be completely abandoned, since its abolition would leave the mortgagee at the mercy of the mortgagor who would be able to grant a long lease, possibly at a hefty premium, and dissipate the proceeds.

The minimum necessary for the protection of the mortgagee would be a restriction of the mortgagor's power to lease to a short term, or by hedging it around with the restriction that the lease be at the best rent reasonably obtainable without taking a premium, and that rent not be paid in advance for more than a reasonable period. In such circumstances, the existence of the lease would not materially affect the value of the mortgagee's interest, except to the extent that an irresponsible tenant might damage the security. This latter problem might be remedied by allowing the mortgagee to reject an individual tenant subject to the same safeguards as apply to the grant of the landlord's consent under s.121 of the Property Law Act 1974-1986.

The suggestion in the letter of applying a general test of reasonableness to the lease as a whole appears to be too vague a criterion to be workable in an area such as property law where there is a premium on certainty. Insofar
as the letter appears to raise a genuine problem, some sort of remedy along the lines suggested above may be considered.

Sections 99 and 100 of the Law of Property Act 1925 (U.K.) are an example of an attempt to deal with this problem. Particular attention is drawn to the safeguards inherent in s.99(5)-(8),(11) and (13).

**MORTGAGES OF LEASEHOLDS**

A submission received from the Australian Banker's Association (Queensland) raised some pertinent matters concerning the liability of a mortgagee in possession of leasehold property which is appropriate to examine in detail.

**LIABILITY OF A MORTGAGEE IN POSSESSION OF LEASEHOLD PROPERTY**

1. *Lessee's Obligations in General as they affect the Mortgagee*

As the relevant definition of land is wide enough to cover leasehold interests, mortgages of such interests in registered land are possible. As has already been emphasised, under the Real Property Acts, a mortgage takes effect as a charge on the land, rather than as a transfer of legal title. Consequently, a mortgagee of a leasehold interest is under no obligation to the lessor prior to entering into possession, but, once in possession, is subject and liable to the lessor to the same extent as the mortgagor-lessee was immediately prior to the entry of the mortgagee into possession. This is one of the many reasons why in case of default the mortgagee prefers to enforce by way of receivership rather than by taking possession.

The lessee's obligations to the lessor which are relevant for present purposes are essentially the contractual obligations contained in the lease. The general law liability in torts such as negligence, nuisance, conversion and trespass arise from present occupation of the land, and apply equally to any subsequent occupier, such as a mortgagee in possession or a sub-lessee or assignee (in respect of the tortfeasance of the occupier, not that of the lessee).

The most significant obligation of a lessee under a lease is of course to pay rent. However the extent of further obligations is potentially unlimited the liability for rent is not just for the lessee's period of occupation but for the remainder of the term. Typically there will also be an obligation to keep the premises in good repair and to pay expenses such as electricity, gas and telephone. The lessee may be required to insure the property, pay rates and property taxes, erect and/or maintain fences or construct buildings or make improvements. All of these obligations could affect the mortgagee entering into possession if they are unfulfilled by the lessee. Furthermore, the mortgagee could become liable in damages for a breach of a covenant of the lease, or for wrongful repudiation of the lease.
2. The Obligation at Common Law of a Mortgagee of Leasehold in Possession

Relevant case law is scant as there appear to be no cases which discuss in general the obligations to the lessor under the lease which the common law imposes upon a mortgagee in possession of leasehold.

The Western Australian case of Seabrook v. McMullen (1908) 10 W.A.L.R. 47 (Full Court) held that the entry into possession by a mortgagee of a lease of Torrens system land does not constitute a breach of a covenant by the lessee not to assign or sublet.

In United Hand-in-Hand and Band of Hope Co. v. National Bank of Australasia (1880) 6 V.L.R. 198 a mortgagee of a mining leasehold, in possession, was held bound to pay the rent to save the mortgage leasehold from being forfeited, being entitled to recover such payment from the mortgagor. This dealt with an obligation to the mortgagor-lessee, rather than the lessor.

3. The Present Position in all Other Australian States

The obligation of a mortgagee in possession of leasehold to the lessor is dealt with by statute. The relevant provisions in all other States are virtually identical. Section 64 of the Real Property Act 1900 (NSW) provides:

"Any mortgagee or encumbrancee of leasehold land under the provisions of this Act, or any person claiming the said land as a purchaser or otherwise from or under such mortgagee or encumbrancee, after entering into possession of the said land or the receipt of the rents and profits thereof shall, during such possession or receipt but only to the extent of any benefit rents and profits which may be received by him, become and be subject and liable to the lessor of the said land or the person for the time being entitled to the said lessor's estate or interest in the said land to the same extent as the lessee or tenant was subject to and liable for prior to such mortgagee, encumbrancee or other person entering into possession of the said land or the rents and profits thereof."

The relevant provisions in the remaining States are:

Victoria - Property Law Act 1959  
            (Section 78(2))

South Australia - Law of Property Act 1936-1980  
                  (Section 139)

Western Australia - Property Law Act 1969-1979  
                    (Section 114)

Tasmania - Conveyancing and Law of Property Act (1884)  
           (Section 84)

      (Section 100)
Therefore, whilst liability extends to the entire ambit of the lessee's obligations to the lessor, it is limited in value to the extent of any rents or profits received by the mortgagee in possession. The New South Wales provision is slightly different to the other States in that the word "benefit" was inserted in 1938:

... any benefit rents and profits ...

McFarland J., in Commissioner for Government Transport v. Pacific Acceptance Corporation Ltd. [1964-65] NSW R 1096, held that the word "benefit" involves at least the receipt of "something", and is more than the mere enjoyment of possession. The plaintiff lessor had argued that the intangible value of the benefit of possession should be taken into account when setting the monetary limit of the mortgagee's liability. The argument failed and hence the New South Wales position is in practice interpreted and implemented in line with the other States.

The only other Australian case to deal with this provision was Tooheys Ltd. v. The Municipal Council of Sydney (1946) 71 CLR 407, where Rich J. said (at p.412) that the Section:

"... says that a mortgagee of leasehold land under the Act, after entering into possession or receipt of the rents and profits, shall become and be subject and liable to the lessor to the same extent as the lessee was subject to and liable prior to the mortgage. But there is a qualification to the liability imposed by the section; the liability is limited to the extent of any benefit, rents and profits which may be received by the mortgagee in possession."

In that case, it was held that Section 64 of the Real Property Act 1900 (NSW) did not establish the relationship of lessor and lessee between the lessor and the mortgagee in possession. Specifically therefore the mortgagee in possession was not afforded a benefit conferred on lessees under the Liquor Act 1912 (NSW). Dixon J. commented (at p.419) that the section only imposes burdens on a mortgagee in possession, but confers no rights.

4. Present Position in Queensland

The relevant provision in Queensland is s.62 of the Real Property Act 1861-1988:

"62. Any mortgagee of a leasehold interest in land under the provision of this Act or any person claiming through from or under such mortgagee shall after entering into possession of the said land or the rents and profits thereof become and be subject and liable to the lessor of the said land or the person for the time being entitled to the said lessor's estate or interest in the said land to the same extent as the lessee or tenant was subject to any liable for prior to such mortgagee or other person entering into possession of the said land and the rents and profits thereof."

The fundamental difference is that in Queensland the mortgagee is liable to the full extent of the lessee's obligations, and not limited to rents and profits. A further flaw in the Queensland provision is that it does not
specify that the liability of the mortgagee in possession continues only during possession. This obviously inhibits a mortgagee in the exercise of the right to take possession and it may be argued that, to some extent, it makes Queensland leasehold less marketable as security than equivalent interests in other States.

Finally, it may be said of all the provisions, not just in Queensland, that as they stand, the language is wide enough to be capable of making the mortgagee in possession liable not only for the lessee's obligations under the lease, but for all the lessee's wrongful acts towards the lessor in general. Whilst it is possible to read the section down by implication, it may be argued that if the section is to be amended it would be preferable to make the wording more precise and put the issue beyond doubt.

5. **Steps Necessary for Reform**

The law may be changed to improve the position of a mortgagee of leasehold in possession by amending s.62 RPA (1861). An amended section could achieve the following:

1. **Limit the liability of a mortgagee in possession to the rents and profits obtained while in possession.**

2. **Limit the period of liability to the time of possession.**

3. **Limit liability to the lessee's obligations under the lease.**

The draft bill contains a provision designed to achieve these objectives.

**ATTORNEMENT CLAUSES**

It is usual for professionally drawn mortgages to contain an attornment clause. The effect of this for the purposes of Torrens title land is to constitute the mortgagor a tenant of the mortgagee by estoppel: Re Australasian Catholic Assurance Co. Ltd. (1941) 41 S.R. (N.S.W.) 285 (F.C.). Under a common law mortgage an attornment clause operates to create a true relationship of landlord and tenant, which exists concurrently with the relationship of mortgagee and mortgagor. [See Australian Express Pty. Ltd. v. Pejovic (1963) 80 W.N. (N.S.W.) 427 where Moffitt J. discusses the law applicable to attornment clauses in both common law mortgages and mortgages under the Real Property Acts.]

In the Australian Express case (supra) the question arose as to whether the provisions of the (N.S.W.) Landlord and Tenant Act 1889-1960 operated to preclude an action for ejectment in the Supreme Court for the recovery of land. The Act prohibited such actions in the Supreme or District Court where, inter alia, there was a dwelling house on the land, and rent payable was below a specified level. Possession could only then be recovered in the Magistrates Court. Moffit J. held that it was a question of construction as to whether the relationship of landlord and tenant created by attornment
clauses was within the terms of any particular statute. Although the mortgage before him was a common law one he held that attornment clauses both in such mortgages and Torrens title mortgages operated to produce a situation within the purview of the New South Wales Landlord and Tenant Act. [(1963) 80 W.N. (N.S.W.) 427 at 432.]

In Queensland there are two Acts specifically regulating the relationship of landlord and tenant:– Property Law Act 1974–1986, ss.102–167; Residential Tenancies Act 1975. The latter Act applies to dwelling houses and tenancies of dwelling houses notwithstanding the Property Law Act (s.5). For the purposes of the Act dwelling houses do not mean premises "of which the tenant is mortgagor under a mortgage in favour of ... the landlord in terms of which the mortgagor ... agrees or is required to attorn tenant to the landlord." (s.6). There is nothing, however, in the Property Law Act to suggest that its provisions do not apply to a landlord/tenant relationship constituted by an attornment clause. Both the Property Law Act, and the Residential Tenancies Act provide for the recovery of possession of land in the Magistrate’s Court: see Property Law Act 1974–1986, ss.140–152; Residential Tenancies Act 1975, ss.20–28.

The New Zealand Land Transfer Act 1952 has a provision which takes effect as a statutory attornment clause – see s.108. There is little to be said for having such a section in the new Act as the legislature has only comparatively recently given some guidance on the matter (see above). Moreover, the Rules of the Supreme Court provide a procedure to facilitate recovery – see RSC, 06, rr.7, 11, 11A, 11B; 0.9, r.4. It is of no practical advantage to a mortgagee/landlord to be able to sue for recovery of possession in a Magistrates Court, when he can seek an order for possession as part of his remedy against a defaulting mortgagor in the Supreme Court. So far as non-residential leases are concerned there is no reason to deny a mortgagee recourse to the Magistrates Court as an alternative if he wishes.

The suggested legislation therefore does not make any change in the current procedure in this regard.

LEASES

The general principle that only provisions relating specifically to the registration of leases and its effects should be contained in the Real Property Acts, general principles of the law of leases being situated in the Property Law Act 1974–1986 has already been stated.

The present Real Property Acts contain provisions which relate to the:–

1. The creation and registration of leases for a period exceeding three years: Real Property Act 1861–1988, s.52.

2. The validation and registration of lease of less than three years duration: Real Property Act 1877–1988, ss. 11,18.

3. Covenants giving the lessee the right to purchase the reversion: Real Property Act 1861–1988, s.53.

4. The surrender of leases: Real Property Act 1861–1988, s.54.
5. Re-entry by the lessor, and the noting of same by the Registrar of Titles: Real Property Act 1861-1988, s.72.

6. Bankruptcy of the lessee: Real Property Act 1861-1988, s.55

Those provisions (Real Property Act 1861-1988, ss.65,66,73) relating to the transfer of leases and the rights of the transferee, together with abbreviated forms of covenants to be implied in leases, relate in similar fashion to mortgages and so have been discussed under the commentary relating to mortgages, and amalgamated in the draft legislation with the similar provisions relating to mortgages.

SHORT LEASES

Matters relating to the exception from indefeasibility in respect of short leases, including the position of options under such leases, have already been dealt with in the section of the paper dealing with indefeasibility. Accordingly, only the provisions relevant to the registration of longer leases need be considered in this section of the paper.

LONG LEASES

OPTIONS IN LEASES

INTRODUCTION

In one sense, an option whether it be an option to purchase the freehold, or an option to renew the lease is simply another covenant in a lease. But the reason that options are in a special category is that the effect of a grant of a valid option is that under the general law, the grantee acquires an equitable interest in the land. It will be an equitable fee simple or an equitable lease according to whether the option is to purchase the fee simple or to renew the lease for a further term.

A question that arises is what effect does registration of the lease in which the option is contained in the context of the Torrens system have on that equitable interest? It could be that by virtue of registration of the lease the option thereby becomes in some sense a legal interest. In particular it is an important question whether the option is an indefeasible interest.

The answers to those questions, particularly the latter are most important when the rights of the grantee of the option are to be considered as against a third party who subsequently acquires an interest in the same land, for example a registered mortgagee. As between the immediate parties to the contract, the original lessor and original lessee, options are enforceable on normal contractual principles. If either the lease or the reversion are assigned then the options may be enforceable by or against the assignee by application of the general law relating to the effect of the assignments of such interests (see ss.117,118 of the Property Law Act 1974-1986). The principles of indefeasibility are also potentially relevant in that a purchaser of the reversion may argue that by virtue of those principles the purchaser takes free of any option rights.
When a third party (that is one who is not either an assignee of the lessor or lessee) acquires an interest in the land, the only effective protection that the grantee of an option has against that third party under the Torrens System, is if the option has required the stamp of indefeasibility. It appears from the authorities that there is a distinction between the interest created by the lease, the leasehold interest in the term, and the equitable interest arising by virtue of the option.

A. Options to Purchase the Freehold

Section 53 of the Real Property Act 1861-1988 provides that in any lease of registered land for a term exceeding three years, a right to purchase the fee simple of the demised land may be granted to the lessee by a stipulation to that effect expressed in the lease or a covenant to purchase the fee simple may be entered into by the lessee. In such case, the true amount of the purchase money to be paid, the period within which such right may be exercised or such covenant is to be performed and such other particulars as may be considered necessary for explaining the terms of such right or covenant shall be stated on such lease and in case the lessee shall pay the purchase-money stipulated and otherwise observe his covenants expressed and implied in such lease the lessor shall be bound to execute a memorandum of transfer to such lessee of the said land and the fee simple thereof and to perform all necessary acts by this Act directed to be done for the purpose of transferring to a purchaser any land and the fee simple thereof.

An option to purchase the interest of the landlord in demised premises creates an interest in land which vests on the exercise of it and upon payment of the purchase-money. See Halsbury, 3rd edition, Vol. 23 at p.471. A person who has a right to call for the conveyance of land has an equitable interest or estate in the land: London and Southwestern Rly. Co. v. Gomm (1882) 20 Ch.D.562 at p.581. Such a right is conferred on the lessee by s.53. In Laybutt v. Amoco Australia Pty. Ltd. (1974) 132 C.L.R. 57 at .76, Gibbs J., described an option to purchase as a contract to sell the land upon condition that the grantee gave the notice and did the other things stipulated in the option, and stated that a conditional contract to sell the land would clearly create a contingent equitable interest in the land. The better view appears to be that the option is a conditional contract of sale, rather than an irrevocable offer to sell (Goldsborough Mort & Co. v. Quinn (1910) 10 C.L.R. 674 per Griffith CJ., Laybutt v. Amoco Australia Pty. Ltd. per Gibbs J. supra). therefore in fact, the interest created is a conditional equitable interest.

It may be thought that registration of the lease containing the details required by s.53 to be stated will have the effect that a purchaser of the reversion will be affected by notice of the interests which are contained in the lease, and that the estate of the registered proprietor will be subject to interests notified by registration of the lease. This conclusion is drawn in Francis : Torrens Title in Australia, Vol. 1, p.279, where it is stated that:

"since an option to purchase for valuable consideration, and, a fortiori, a binding agreement to purchase for valuable consideration in futuro, create an equitable interest in the land, and the registration of the lease containing the option or covenant has the effect of imputing notice of the
existence of this outstanding equitable interest, and the even more drastic
effect, no doubt, of notifying this outstanding equitable interest on the
register, it would seem that the "indefeasibility" provisions of the
enactments could not operate to protect a registered proprietor against it."

This was written prior to the decision in Mercantile Credits Ltd. v. Shell
Co.(Aust.) Ltd. (1976) 136 C.L.R. 326 and requires reconsideration in the
light of remarks by members of the Court in that case. The issue in the
Mercantile Credits case related to the nature of an option to renew a lease
and the protection of interests created by such options. The conflicting
claims were those of a mortgagee which had given notice to the registered
proprietor of its intention to sell the land under a power of sale contained
in the mortgage, and the lessee of land in whose favour the registered
proprietor had executed a memorandum of extension of the lease in
registrable form. The lessee (respondent) had lodged a caveat whereby it
claimed to be entitled to registration of the memorandum of extension of the
lease, and forbidding registration of any dealing with the estate of the
registered proprietor except subject to its claims. The mortgagee
(appellant) maintained that it was entitled to sell the land free of the
respondent's leasehold interest. The court decided that the respondent was
entitled to registration of the extension of the lease, and that the
appellant's rights as mortgagee were subject to the respondent's right of
renewal and to the respondent's right under such extension, so that the
appellant was not at liberty, as mortgagee, to sell the land free of the
respondent's estate on interest under the extension.

Section 53 of the Real Property Act 1861-1988 provides that where a right
to purchase the fee simple of the demised land is granted in a lease, and
duly exercised, the lessor is bound to transfer the freehold to the lessee.
Note that the section commences with the words "In any such lease" - those
words refer back to s.52 which deals with leases of land for a period
exceeding three years.

In the judgment of Gibbs J. and of Stephen J., in Mercantile Credits Ltd. v.
Shell Co.(Aust.) Ltd. (supra), a sharp distinction is drawn between options
to purchase and options to renew Stephen J. stated (at p.351):

"Were it not for s.117 (this section of the South Australian Act provides
that a right for or covenant by the lessees to purchase the land may be
specified in the lease and shall be binding) it would be doubtful whether an
option to purchase might properly be included in a registered memorandum of
lease and whether, if included, its registration would confer
indefeasibility upon a renewed term arising from its exercise. Such an
option is of its nature unrelated to the tenant's estate or interest under
the lease; it has no closer connection with that estate or interest than
that the parties to it happen also to be in the relationship of lessor and
lessee of the subject land. With it may be contrasted a right of renewal,
which is intimately concerned with the existing relationship between lessor
and lessee ... Hence, no doubt, the need felt for express reference if an
option to purchase were to be permitted to appear on the register book and
to receive the benefits conferred by registration."
Gibbs J. said (at p.346):

"On behalf of the appellant, reliance was placed on the express provision in s.117 of the Act that a right to purchase contained in a lease shall be binding, and it was submitted that this implies that it was intended that a right to renew should not be binding. However, a covenant giving a right to purchase is essentially different in character from a covenant for renewal. It is not a covenant concerning the tenancy or its terms; it 'does not directly affect or concern the land', and it is 'not a provision for the continuance of the term, like a covenant to renew': Woodal v. Clifton [1905] 2 Ch. 257, at p. 279. It is a separate and independent covenant': Sherwood v. Tricker [1924] 2 Ch. 440 at p.444. Since such a covenant is collateral, and does not affect the estate or interest in land granted by the lease, the registration of the lease, in the absence of a provision such as that contained in s.117, would not (or at least might not) confer any priority or indefeasibility upon the covenant or the right which it creates. The provisions of s.117 were necessary to make it clear that the protection of the Act extends to a right for or covenant to purchase the land described in a lease but the same reason did not exist to make specific provision for the protection of covenants for renewal."

In the absence of a provision corresponding to s.117 of the South Australian Real Property Acts, there would be no protection against a purchaser of the reversion. The question then would seem to be whether s.53 of the Queensland 1861 Act secures the same result as s.117. There is no reason to suppose that it does not. The New Zealand case of Fels v. Knowles (1906) 26 N.Z.L.R. 604 decided that a right to purchase contained in a lease became indefeasible upon the registration of the lease, and it was decided upon a section identical with Queensland s.53. That case is referred to with approval in Mercantile Credits Ltd. v. Shell Co. (Aust.) Ltd. The protection of s.53 is granted "in any such lease", and these words must be understood to mean leases referred to in s.52, that is leases for a life or lives or for any term of years exceeding three years. Leases not exceeding three years are valid and may be registered if executed in form E, but there is no provision which extends the application of s.53 to registered short term leases. It may be possible to extend the proviso to s.52 to all leases which are capable of registration, as was done by the N.S.W. Full Court in Parkinson v. Graham (1962) 62 S.R. (N.S.W.) 663; contra E.S. & A. Bank Ltd. v. The City National Bank Ltd. [1933] St. R. Q.81; but it would not appear possible to read the words "such lease" in any sense other than a lease of the kind referred to in the first clause of s.52. Accordingly, if it is thought proper that the rights for or covenants to purchase land described in a registered short term lease should be protected, it will be necessary to do this by an amendment to the existing legislation.

It is suggested that an appropriate way in which this can be done is by recasting s.53 in a way which makes it applicable to all registered leases.

In New Zealand, it has been held in Ratu Peehi v. Davy (1890) 9 N.Z.L.R. 134, that the effect of the equivalent of s.53 is to give the option the stamp of indefeasibility. "The rights so acquired by the lessee are as much protection as the term granted by the lessor". Thus it appears that an option to purchase, if contained in a registered lease confers upon the lessee an indefeasible right to purchase.
The nature of this right was considered in Fels v. Knowles (1906) 26 N.Z.L.R. 604. In that case, a registered lease containing an option to purchase was granted by certain trustees, who, under the terms of their trust, had no power to grant the option. When the lessee sought to exercise the option, the trustees refused, because of their lack of power. In an action for specific performance, the majority of the court held that the trustees were bound to allow the option to be exercised, because registration and the New Zealand equivalent of s.53 had effectively given the lessee the statutory right to exercise it. However the court said also that it is a precondition to the operation of the provision that the parties have effectively created an option registration will not cure defects such as lack of certainty in the option, although it is clear from the case itself that it can overcome a lack of power in the lessor.

The effect of those decisions is then, that an option to purchase contained in a registered lease is not simply an ordinary equitable interest but has been elevated to the status of a registered interest. However, as a result of the judicial comment of Gibbs J. and Stephen J. in the Mercantile Credits Case cited above, there appears to be some need for legislative authority for the inclusion of such an option in a registered lease.

B. Options to Renew a Lease

The effect of an option to renew contained in a lease is that the grant of the option is an agreement to lease conditional on the exercise of the option and the performance of the conditions of the lease (per Barwick CJ in Travinto Nominees Pty. Ltd. v. Vlattas (1973) 129 C.L.R. 1 at 15-16). Provided, therefore, that specific performance is available, the lessee will be treated in equity as though a second lease had been granted. There is no express provision covering options to renew in the Real Property Acts equivalent to s.53. However, the effect of the cases is that registration of a lease containing a valid option to renew, is effective to make the right to renew indefeasible. That conclusion was reached in Pearson v. Aotea District Maori Land Board [1945] N.Z.L.R. 542.

This decision was approved by the High Court in Mercantile Credits Pty. Ltd. v. Shell Co. of Australia Ltd. (1976) 136 C.L.R. 326, where the lease in question contained two covenants for renewal, the second of which was exercised by the respondents after the appellants had become registered as mortgagees. The renewal was made without the consent of the mortgagee and the memorandum of extension of the mortgage was not registered and the issue was whether the mortgagee could exercise the power of sale to sell the fee simple free from the renewed leasehold interest. The court held unanimously that the effect of the registration of the lease containing the option to renew was to make the right to renew indefeasible and therefore the mortgagee could not sell the land free of the respondent's interest. This is because a covenant giving a right of renewal forms part of the delineation of the lessee's total interest in the land (per Barwick CJ.) or because the right to renewal is so intimately connected with the term that it should be regarded as part of the estate or interest of the lessee (per Gibbs J.). Thus registration of the lease gives indefeasible protection to those covenants in the lease which form part of the estate of the lessee.
Other significant statements were made in the judgments:

1. Gibbs J. was careful to point out that this decision did not conflict with the judgments in *Friedman v. Barrett* [1962] Qd.R. 498 where the Full Court of Queensland held that s.11 of 1877 R.P.A. protected only the term of the lease and not all its incidents of which the right to renew is one. In *Friedmann v. Barrett* [1962] St.R.Qd 498 it was decided that an option for renewal contained in an unregistered lease for a term of three years could not be effectively exercised by the lessee after a purchaser for value of the lease, even with notice of the lease and of the option, had become the registered proprietor. The reasoning in that case is also applicable a fortiori to an option to purchase. As Gibbs J. pointed out in *Friedmann v. Barrett*, s.11 of the Real Property Act 1877-1988 provides an exception to the fundamental principle that the registered proprietor shall hold his land free from unregistered interests, and should not be given an extended construction.

2. Barwick C.J. made it clear that the conclusion reached in *Mercantile Credits Pty. Ltd. v. Shell Co. of Australia Ltd.* (1976) 136 C.L.R. 326 is only possible where the covenant to renew is specifically enforceable. If for any reason that remedy is not available in accordance with equitable principles then the mere fact of registration of the lease does not make the right indefeasible. Thus the effect of registration in this situation is to be distinguished from the case where an interest purportedly transferred by means of a void instrument acquires indefeasibility (as e.g. in *Frazer v. Walker* [1967] A.C. 569).

It is clear that the reason so much emphasis was placed by Barwick C.J. on the need for the covenant to renew to be specifically enforceable was because of the prior decision of the High Court in *Travinto Nominees Pty. Ltd. v. Vlattas* (1973) 129 C.L.R. 1. In that case, one of the grounds for decision was that since the registered lease containing an option to renew had been granted, contrary to the provisions of a statute, the illegality prevented the exercise of the option as specific performance of an illegal contract could not be ordered.

However, it appears that Gibbs J. specifically refrained from giving his assent to these views. His decision in *Travinto Nominees v. Vlattas* was based on the ground that the later statute [the *Industrial Arbitration Act 1940* (N.S.W.)] overrode the provisions of the Real Property Acts; and in *Mercantile Credits v. Shell* he specifically left open the question of whether, by registration, a void lease acquired indefeasibility.

This may be argued to be less that a totally satisfactory situation in that it is not clear from the face of register, including the terms of any lease constructively embodied therein, whether an option to renew contained therein is enforceable. However, little can be done to improve the situation, since it has been arrived at by the courts through the logical application of sound principles. On the one hand it is essential that where an option is enforceable between the original parties to a registered lease, it should enjoy the benefits of being an indefeasible interest. Otherwise, the holder of the option would go unprotected in the event of a third party acquiring an interest, without registering a caveat, which is also not a satisfactory solution. On the other hand, an option clearly is not to be
enforced where the requirements for enforceability between the parties are not fulfilled. At least the present position has the merit that no third party dealing on the faith of the register, which will disclose the existence of any option in a registered lease, will be misled to a possible detriment. Any misleading will be in the nature of an option appearing to be potentially enforceable when it is not, which will not be a problem for any person taking an interest in the reversion. Persons taking an interest in the lease are generally fewer, and are laying out less capital.

The alternative course of requiring separate registration of options is unduly cumbersome, and is still not likely to resolve the remaining uncertainties.

In view of the circumstances it is recommended that s.53 be repealed insofar as it relates to options to purchase the fee simple, since the position arrived at in relation to options to renew the lease may be allowed to extend also to such options, provided that clear legislative authority is retained for the inclusion of options to purchase the reversion in registered leases, through the inclusion of the following subsection at the end of the proposed s.52:

"(9) A registered lease may contain an option on the part of the lessee to renew the term for any further period or to purchase the interest of the lessor, whether leasehold or in fee simple."

THE CREATION AND REGISTRATION OF LEASES FOR A PERIOD EXCEEDING THREE YEARS.

The first part of s.52 can be substantially reproduced as subsection (1), but with the three limit altered to five years for the reasons stated earlier in the working paper. The section currently makes it mandatory for leases greater than three years to be registered. If such leases are not registered they are void at law: Hill v. Cox (1882) 1 Q.L.J. 78 (D.C.); Marshall v. Coupon Furniture Co. Ltd. [1916] St.R. Qd. 120 (Chubb J.), but presumably are capable of taking effect in equity. If the "lessee" enters into possession and pays rent then he would hold the premises at law (see Deventer Pty. Ltd. v. B.P. Australia Ltd. (unreported W.262 of 1983) on a tenancy determinable at the will of either party upon one month's notice in writing expiring at any time: Hill v. Cox (1882) 1 Q.L.J. 78 (D.C.); Marshall v. Coupon Furniture Co. Ltd. [1916] St.R. Qd. 120, Property Law Act 1974–1986.

The balance of this section is relevant to leases of mortgaged land and it has been considered appropriate to include it as subsection (3), with subsection (2) containing the substance of the existing s.18 of the Real Property Act 1877–1988.
RENEWAL AND VARIATION OF LEASES

It has been suggested that amendments or additions should be made to the Real Property Acts:

(a) to provide for registration of renewal of a lease by registration of a standard form memorandum rather than a complete new lease; and

(b) to provide for registration of amendments to covenants in a registered lease by registration of a memorandum of variation.

The Queensland Acts have no such provisions whereas the South Australian Act (Real Property Act 1886-1975, s.153) and the Western Australian Act (Transfer of Land Act 1893, s.105(4)) provide for extension (inter alia) of a mortgage or a lease. Section 116 of the New Zealand Land Transfer Act 1952 has fairly comprehensive provisions and it is recommended that these be adopted here except for the proviso to subsection 5 which is inapplicable and irrelevant in Queensland. It appears appropriate to include these provisions within s.52.

THE SURRENDER OF LEASES

A surrender may be defined "as being the yielding up of the term to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion.": Halsbury's Laws of England, 4th Edition. Vol. 27 paragraph 444 at page 349. A surrender of a lease may be effected either expressly, or by operation of law.

Subject to certain exempting provisions the surrender of a lease is required to be in writing: see Property Law Act 1974-1988, ss. 10, 11. The exceptions are:-

(a) surrenders by operation of law; and

(b) surrender of leases not required to be created by writing, i.e., leases of less than three years : - Property Law Act 1974-1988, s.10(2)(b) and (c).

Section 54 of the Real Property Act 1861 provides that whenever any lease is intended to be surrendered, the word "surrendered" is to be endorsed on the lease (or the counterpart) together with the date of such surrender. The endorsement is to be signed by lessor and lessee and attested by a witness. Upon production of the endorsed lease, the Registrar of Titles enters in the register book a memorandum recording the surrender and the date thereof and he endorses the lease that the register has been noted. The estate or interest in land then revests in the lessor or other person to whom it would have revested had no lease been made.

This mode of surrender applies if the surrender is effected "otherwise than through the operation of a surrender in law or than under the provisions of any law at the time being in force in the said State relating to bankrupt estates."

Unless the surrender is effected through the operation of law or under the provisions of any law at the time being in force relating to bankrupt
estates, no lease subject to a mortgage, encumbrance or sublease can be surrendered without the consent of the mortgagee, encumbrancee or sub-lessee.

A surrender by operation of law occurs when there is delivery of possession by the tenant to the landlord and acceptance of possession by him — as to such surrender, see Halsbury’s Laws of England, 4th Edition, Vol. 27, paragraphs 446-450.

The surrender provisions in s.54 have been appropriately redrafted so as to retain their substance while easing administration, by requiring the counterpart lease to only be produced when it is available.

RE-ENTRY BY THE LESSOR, AND THE NOTING OF SAME BY THE REGISTRAR OF TITLES

This is provided for in s.72 of the Act of 1861. The section is adequate and is reproduced in substance, as s.54A in order to group together the sections dealing with leases.

BANKRUPTCY OF LESSEE

Section 55 was repealed in 1986, the matter being now taken care of by s.86 which deals with transmissions on bankruptcy in respect of any estate or interest.

CERTIFICATES OF LEASE

After discussion with both the Acting Registrar of Titles and the recently retired Registrar of Titles, it has been decided to recommend the introduction of a certificate of lease to facilitate dealings with leasehold interests. The sections of the Real Property Acts dealing with leases have been redrafted to take account of this change.

EASEMENTS

Any discussion of easements in the context of the Real Property Acts at the present time is to some extent overshadowed by the difficulties which arose in 1983, which led to amending legislation. Accordingly, it is felt appropriate to commence the discussion of easements in this paper with an outline of these difficulties, how they arose and how they were resolved.

The only other major issue which the Commission felt it necessary to address in relation to easements was the abolition of certain common law doctrines in relation to easements which it is felt are not compatible with the efficient operation of the Torrens system of registration.
CREATION OF EASEMENTS BY REGISTRATION OF PLAN

1. Registration of plans designating easements.

Both at present and for many years past it has been possible to lodge with the Registrar of Titles plans, including a plan of subdivision. Such plans have often designated a surveyed area of land which it is proposed will be the site of an easement, commonly a right of way, which it is intended to grant at some time in the future. At least since 1952 such a plan has constituted an "instrument" within the meaning of the Real Property Act 1861-1888 and so has been capable of registration. Registration refers to entry in the register of a memorial of the instrument: see s.34 of the Act; and s.32, which requires the Registrar to record in the register "the particulars of all instruments including any plans affecting the land."

2. Entry in the register of particulars of plan.

It may be open to question whether a plan, called an "easement plan", which does no more than designate the area that is to become the site of an access way or other easement, can properly be described as "affecting the land". The same question arises in the case of a plan of subdivision in so far as such a plan, apart from subdividing the land, simply marks out the easement area. However successive Registrars of Titles, in registering such plans, have followed the practice of including in the registration memorial particulars referring in some way to the easement plan or the easement area. Some variation exists in the form of such particulars but in the case of a plan of subdivision a not uncommon form of indorsement is the formula "The within land is divided into Lots 1 and 2 and Easement A". Frequently a diagram is also indorsed showing the site of the easement as surveyed even though no such easement has yet been created or instrument registered creating it.

3. The formal requirement: a valid instrument.

A registration memorial in the foregoing form is apt to be misleading in that it tends to suggest that an easement has been granted when in fact it has not. Apart, however, from the possibly misleading appearance which this gave to the register, the indorsement of such particulars did not affect the rights of the parties. This was because the prevailing theory of the Torrens system based on the decision in Clements v Ellis (1934) 51 C.L.R. 217, and other decisions that preceded it, was that registration of an interest depended for its efficacy upon the existence of a valid instrument to which the registered particulars owed their existence or presence on the register. If the antecedent instrument did not exist or was invalid (e.g. because it was a forgery), the registration was ineffective and created no rights or interest in the subject land. Hence, in the case of an easement, an indorsement in the form referred to did not, according to that theory of the matter, result in the registration of an easement unless there was also registered a valid instrument creating the easement in accordance with s.51 of the Act.

This view of the registration system was, however, overturned by the Privy Council in Frazer v. Walker [1967] 1 A.C. 569 and by the High Court in Breskvar v. Wall (1971) 126 C.L.R. 376. Those two decisions established that it was registration (i.e. the presence on the register of the relevant memorial recording particulars of the instrument supposed to have been registered) and not the existence of a valid instrument that was critical. It was the registration memorial and not the instrument that determined whether or not rights or interests had arisen or had been created in land under the Act. In Breskvar v. Wall transfer of the land was held to have been effected, even though the instrument of transfer that was registered was void both at common law (because it was a forgery) and by statute [s.53(5) of the Stamp Act 1894-].


The effect of upholding this theory of registration was to give to the registered particulars in respect of an easement plan or plan of subdivision a legal significance which they had not previously possessed. In the particulars recorded of the registration memorial a reference to an easement amounted to registration of an easement even though there was no instrument under s.51 of the Act creating the easement, and even though the registered plan of easement may not have been intended then and there to give rise to such an easement. These consequences of Breskvar v. Wall were recognised and given effect in two decisions of the Supreme Court in Rock v. Todeschino [1983] Qd.R. 356 and Hutchinson v. Lemon [1983] Qd.R. 369. In each case it was held that an easement was registered and effective even though there was no instrument under s.51 creating an easement, but simply a registration memorial recording the easement shown in a registered plan of subdivision.

The effect of s.32 and s.34 of the Real Property Act 1861-1988 was analysed in Rock v. Todeschino [1983] Qd.R. 356. A plan of subdivision had been lodged which divided a block of land into two lots which indicated that an easement had been surveyed across lot 1. The plan was marked "Easement A" and its dimensions, area and location noted but no instrument creating the easement had been executed. At the material time s.119(1) allowed for the lodgment for registration of a plan of survey, and S.119(3) required the Registrar to register the plan in the register book "by recording a memorial thereof on the grant or certificate of title therein relating to the land...".

A memorial was entered by the Registrar on the relevant folium in the following form:

"No. N653825 By Plan Cat.No.25249 the within land is subdivided into Lots 1 and 2 and a survey is made of EAS A in Lot 1..."

The recording of the particulars relating to the easement were held to be authorised by ss. 32 and 34, taking into account the definition of "instrument" in S.3, rather than by S.119. Section 3 defined "instrument" to include "any map or plan lodged with the Registrar". Section 32 required the Registrar to record in the Register... the particulars of all instruments including any plans affecting the land. The easement noted on
the plan was held to affect the land and so was properly registered. The effect of s.34 was that the easement was registered when a memorial thereof was entered in the register book.

An easement is usually created by deed of grant; and s.51 requires an instrument to be executed, lodged and registered to create an easement. McPherson J. held that the plan was an "instrument". Accordingly, the requirements of S.51 had been met. The decision was not well received as it had been thought that without the execution and registration of a deed of grant of easement by the relevant party or parties, no registered easement could come into effect (cf. Boulter v. Jochheim [1921] St.R.Qd. 105).

In order to overcome the problems to which these decisions were regarded as giving rise for the conveyancing process, after considerable debate and discussion legislation was passed in 1985 to reverse their effect. This legislation, the Real Property Act Amendment Act 1985, inserted a new s.119A into the Real Property Act 1861 which prevented the registration of a plan alone from creating an easement in the absence of a separate document creating the easement. The amendment had retrospective effect, except for cases which had already been the subject of determination by a court of competent jurisdiction.

In view of the extensive consideration given to this matter in the 1983-1985 period the Commission does not feel it appropriate to recommend any drastic change in the substance of s.119A. However, the Commission does recommend the inclusion in the legislation of a parallel provision to s.119A which permits the creation of the usual easements required to service adequately a subdivided lot by registration of a plan where it is clear that the parties intend to create an easement as opposed to merely indicating the site of a proposed future easement, which action is prevented by s.119A from having any effect.

ABOLITION OF CERTAIN COMMON LAW DOCTRINES

There are numerous common law doctrines in relation to easements. Many of these relate to the means of creation of easements other than by way of express grant. Examples are the doctrine of prescription, the Rule in Wheeldon v. Burrows (1879) 12 Ch.D. 31, the implication of easements of necessity. Others that present difficulty are the inability to create an easement where the dominant and servient tenements are in common ownership and occupation, the automatic extinguishment of easements when that state of affairs, the potential for extinguishment of easements by abandonment and the inability to create easements without a dominant tenement (the so-called easement "in gross").

STATUTORY INROADS ON THE GENERAL LAW PRINCIPLES

In Queensland, there has already been a measure of statutory modification of these general law principles.

Firstly, the proposition that there cannot be an easement "in gross" is subject to qualification in that a number of Public authorities are expressly permitted to register such easements by s.51. Such authorities
frequently require rights of way and various other rights to use property so as to provide essential services such as electricity and drainage. Often, it would be difficult if not impossible to show that such rights bear any relation to any dominant tenement. Various statutes such as the Local Government Act 1936-1987 and the Electricity Act 1976-1986 accord the taking of such rights the status of "easements". Naturally, the Commission is of the view that this provision should be retained but believes it can be somewhat simplified without altering its effect.

There is a view that the requirement of separate ownership or occupation of dominant and servient tenements has been modified by s.14(3) of the P.L.A. 1974. It is understood that current Titles Office practice permits the registration of easements between dominant and servient land in the one registered proprietorship, although without any ancillary covenants, since these are regarded as being incapable of creation by a sole party. The Commission believes that this matter ought to be put on a sound footing, and that proprietors ought to be able to create easements over part of the land in their ownership in favour of other parts. Such easements should be able to contain covenants, but none of the obligations should become enforceable until ownership, or occupation, of the dominant and servient tenements falls into different hands. In other words, the easement exists but its operation is suspended while the dominant and servient tenements are in common ownership and occupation.

The ability to create easements in this way will assist greatly in the creation of easements during the process of subdivision, since all easements will be able to be created as part of the subdivision process rather than being created separately on the sale of each lot to a purchaser.

In somewhat similar vein it is felt that unity of ownership and occupation of the dominant and servient tenements at a time subsequent to the creation of an easement should not extinguish an easement under the Real Property Acts, as is the case at common law, but should merely suspend the effect of the easement while such unity of ownership and occupation continues.

**CREATION OF EASEMENTS AND REGISTRATION UNDER THE REAL PROPERTY ACTS**

The common law recognised five ways in which an easement might be created. The regular practice in the Titles Office is to register the existence of an easement as an encumbrance on the certificate of title for the servient land and as a benefit on the certificate of title for the dominant land. This practice is supported by s.51 of the Real Property Act 1861-1988, which confers power to register the benefit of an easements on the title of the dominant tenement. The relevant power in respect of the servient land is less precisely defined, but appears to be encompassed within the general registration powers of s.32 (this was the view adopted in Papadopolous v. Goodwin [1983] 2 N.S.W.L.R. 113 in relation to similar legislation).
The five recognised modes of creation of easements at common law were:

1. Express grant.

This is applicable to Torrens system land. Until the 1986 amendments and consequent prescription of forms for all dealings with the Titles Office there was no prescribed form in the schedule to the 1861 Act for the creation of easements. The practice was to create such easements in the form of a deed with the usual formal parts and easements in such form were, prior to the implementation of the 1986 changes, accepted for registration purposes.

2. Express reservation.

This is in a sense a sub-species of express grant, the difference being that on the conveyance of land the grantor would reserve for the benefit of some other land an easement over the land granted. Section 23 of the Real Property Act 1877-1988 expressly allows for such a reservation to accompany a transfer and ss. 24 and 25 formerly governed the form and registration requirements for such a transfer subject to a reservation of easement. However, ss. 24 and 25 became otiose in 1986 with the introduction of a general power to prescribe forms and consequent general prescription of forms by regulation. Section 23 was retained as a declaratory statement of the right to transfer land subject to a lesser interest created at the same time. However, the Commission is of the view that the right to do so exists independently of this provision being one of the fundamental attributes of ownership, namely the right to transfer, subject to any restrictive legislation such as subdivisional control, part of one's interest in property rather than the whole.

In this connection it is appropriate to state that the Commission is aware of recent changes and proposed changes in Victoria which will have the effect of essentially extending controls similar to those applying to rezonings, planning consents and subdivisions to the grant of easements. The Commission does not consider such a development desirable for Queensland, as it would restrict the rights of proprietors, without the justification of being required as a solution to a current problem. It is worth bearing in mind that easements are far less common in Queensland than Victoria, since most residential subdivision here proceeds on the basis of each lot enjoying direct road access, and receiving services directly via this access so that no easements over adjoining lots are required.

3. Implied grant or reservation.

At common law when an owner of land granted some part of it to another, the owner was held to have impliedly granted over his remaining land all those easements which might be necessary for the reasonable enjoyment of the property granted and were consistent with the user which the land had in the grantor's hands.

The doctrine was explained in Wheeldon v. Burrows (1879) 12 Ch. D. 31 (C.A.); where it was emphasised that there is no corresponding implied
reservation of easements in favour of the grantor except as to rights of way of necessity and as to reciprocal easement rights such as a right of support.

"In the case of a grant you may imply a grant of such continuous and apparent easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception ... of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land. Upon the question whether there is any other exception ... It seems to me to be consistent with reason and common sense that these reciprocal easements should be implied". (per Thesiger L.J. at p.58).

For many years the application of the principles to land under the Real Property Acts has been a matter clouded with doubt. In Boulter v. Jochheim [1921] St.R.Qd. 105 Shand J. doubted that such an implied grant or reservation would arise on a transfer of Torrens system land. However, in Australian Hi-Fi Publications Pty. Ltd. v. Gehl [1979] 2 N.S.W.L.R. 618, it was held by the NSW Court of Appeal that a "Wheeldon v. Burrows" type implied easement could arise in relation to land under the Real Property Acts and that, as between the immediate parties to the transaction it would be enforceable. However, such an easement is not enforceable against a subsequent registered proprietor of the servient tenement because such a person has indefeasible title.

In Pryce v. McGuinness [1966] Qd.R. 591 it had been held that there could be an implied grant of easement of right of way of necessity arising from a subdivision and that this way of necessity was binding even against a subsequent registered proprietor of the servient tenement. The reasoning was inconsistent with that in Australian Hi-Fi Publications Pty. Ltd. v. Gehl, and, even before that decision, Pryce v. McGuinness was severely doubted.

The effect of the changes which the Commission proposes to the indefeasibility provisions will be that no easement will be binding on a subsequent registered proprietor, except one duly registered, or omitted on first registration of the land or subsequently through error in the registry. However, the general law principles may still be effective to create equitable easements binding on the grantor.

Without these changes it could have been argued in Queensland on the basis of Pryce v. McGuinness that a Wheeldon v. Burrows easement may be enforceable against a subsequent registered proprietor, as another exception to indefeasibility. However, the decision of the Full Court in Stuy v. B.C.Ronalds Pty.Ltd. [1984] 2 Qld.R. 578 (overruling the decision at first instance), is in accordance with that in Australian Hi-Fi Publications Pty. Ltd. v. Gehl, although it does not expressly overrule Pryce v. McGuinness. New Zealand authority is also to the contrary, for in Sutton v. O'Kane [1973] 2 N.Z.L.R. 305, it was held that an equitable easement was not enforceable against a registered third party.

4. Prescription.

The common law gradually evolved a series of rules which enabled easements (and profits) to be acquired by long user as of right for a period, which
was normally 20 years. This involved the fiction of a lost modern grant and in Delohery v. Permanent Trustee Co. of N.S.W. (1904) 1 C.L.R. 283 the High Court held that this doctrine could be applied in Australia. However, as a result of the decision in Miscamble v. Phillips (1936) St.Rd.Qd. 136, which decided that the doctrine of adverse possession was inapplicable, it is thought that the doctrine would not apply to land under the Real Property Acts, although in Stoneman v. Lyons (1975) 33 L.C.R.A., Stephen J. expressed the view that such rights could be acquired against such land in Victoria. It should be pointed out that there are material differences in the Victorian legislation.

Quite apart from this the applicability of the doctrin has been limited under the general law. Section 178 of the Property Law Act 1974-1986 effectively prevents the future acquisition of prescriptive easement rights to light and air by long user, and in the case of rights of way, a similar result is achieved by s.198A of that Act.

5. Statute.

It is possible for easements to be created by statute. Issues relating to the overriding nature of some such statutes have been discussed in this paper in relation to indefeasibility of title.

CONTRAST BETWEEN EASEMENTS AND GRANTS OF FEE SIMPLE

In Bursill Enterprises Pty.Ltd. v. Berger Bros. Trading Co. (1971) 45 A.L.J.R. 203, an interest described on the relevant certificate of title as a "right of way" proved on examination of the relevant instrument of creation of the interest which had been lodged in the registry, to amount, in part, to a grant of the exclusive right to the use and occupation of the airspace over a laneway. The High Court held that such a right went beyond what could be granted by way of easement, and amounted to a grant of the fee simple in that airspace.

The Commission feels that there will inevitably be a fine dividing line between certain easements of way, and grants of portions of fee simple by way of airspace. It has always been possible at common law to divide land so as to grant or transfer a fee simple in a defined portion of airspace. Certain instances of this, where a building is divided into lots and common property, are governed by the Building Units and Group Titles Act 1980-1988. It is not felt that there is a need to make specific provision for the remaining instances in the Real Property Acts since the general provisions of the Act may be adapted to deal with such instances, with suitable prescription of special forms if required to deal with such transactions.

PROFITS

A profit or a profit a prendre is a right to take something out of another person's land. The rights granted by a profit might relate to something physically attached to the land like minerals or timber or the right might be to remove wild game. In either case a right in the nature of a profit
constitutes an interest in land under the general law, and would fall within
the definition of "land" in s.3 of the Real Property Act 1861-1988 and s.4
the Full Court seems to have treated the timber cutting rights involved as
being in the nature of a profit (see at pp. 79-80). It is understood that
profits have never been registered, as opposed to being protected by caveat,
but the Commission feels that they are capable of registration because of
the reference in s.51 to "any other incorporeal right". Furthermore, the
Commission does not feel justified in recommending the abolition of this
capability since it would mean a reduction in the freedom of choice of
proprietors to create a range of interests in land without any pressing need
for such reduction.

There has never been a clear direction in the Acts as to the form in which
such rights should be created or registered; but Francis suggests that they
should be created by a "transfer in the usual form" (see Francis: Torrens
Title Vol. I at p.545). This is similar to the position in regard to
easements before the 1986 prescription of forms. No form relating to
profits was prescribed at that time, but there is a blank form prescribed
which could be adapted for this purpose. As with easements the registration
of a profit would not require the issue of a separate certificate of title.
(s. 49-50, Real Property Act 1861-1988).

The law relating to profits is generally very similar to that of easements
(see Megarry & Wade: The Law of Real Property, 5th edition, Chapter 15,
pp.850-912).

OTHER INCORPOREAL RIGHTS

There appear to be no other incorporeal rights extant in Queensland, since
such matters as advowsons (the right to appoint to a benefice) and tithes
have never existed here, and registration of restrictive covenants and
rentcharges is not permitted. (For details of incorporeal rights see
Megarry & Wade: The Law of Real Property, 5th edition, Chapter 15,
pp.813-912.) The function of rentcharges and annuities has been overtaken
by the broader definition of mortgage introduced by the Real Property Act

COVENANTS RELATING TO EASEMENTS

The Commission considered the possibility of making statutory provision for
the implication or imposition of standard forms of covenants in relation to
the common forms of easements, or for the implication of standard easements
in common situations such as those arising in residential subdivisions.
Provision of this nature is already made in the Building Units and Group
Titles Act 1980-1988. It was argued that such provision would give rise to
a worthwhile simplification in the process of creating and registering such
interests. However, the Commission decided against including a provision
of this nature in the Real Property Acts for a number of reasons:

1. Provision is already made under the existing s.76A of the Real Property
Act 1861-1988 for the registration of a memorandum containing standard form
provisions, and this provision is recommended to be retained in the new
legislation. As this provision is of fairly recent origin (being inserted in 1985), more time should be allowed for its full effects in possibly resolving this situation if there is, indeed, any significant problem.

2. The situation of land in general, even of low rise residential subdivision, is not akin to that of strata or group titles, so that it is difficult to identify any standard provisions applicable to all or the vast majority of individual circumstances. In any case, it should be remembered that the provisions in the Building Units and Group Titles Act 1980-1988 merely spell out the implied rights of proprietors of units in the nature of easements succinctly and do not make provision for extensive supporting covenants such as are often found in private or local authority documentation relating to easements.

3. Most residential subdivision in Queensland, does not involve much, if any, reliance on the grant of easements. Rather, the pattern is for the road and lot layout to be such that all lots are served directly from a road.

4. Should such provisions be introduced, it is arguable that should be located in the Property Law Act 1974-1986, which also includes the implied covenants relating to such interests as mortgages and leases. If it is desired to do this the provisions of the sixth schedule to the Real Property Act 1886 (S.A.) which were inserted in 1985 by the Real Property Act Amendment Act (No.2) 1985 (S.A.) are a useful model.

TRUSTS

The main provisions in the 1861 Act concerning trusts are Section 77 to 84; Sections 43 and 66 are also of relevance. The present legislation recognises alternative methods of creating a trust in respect of registered land, namely by a Schedule of Trusts to an instrument of nomination or by a separate instrument or deed: see Sections 78 and 79 of the 1861 Act. The draft Bill provides for those alternative methods to be used.

Francis and Whalan refer to Walters v. Eldridge (1892) 4 Q.L.J. 118 and Re Bennett [1951] St.R.Qd. 202 which decided that the Schedule of Trusts is not an "instrument", and suggest that it might be appropriate to amend the law and leave only the one method of creation by separate instrument or deed. [See E.A. Francis, Torrens Title in Australasia, Vol. 2, p.18 (1973); D.A. Whalan, The Torrens System in Australia, p. 120 (1982)].

After the decision in Re Bennett [1951] St. R.Qd.202 the Real Property Acts Amendment Act 1952 was enacted; that Act inserted Section 15A in the 1861 Act. That provision inter alia provided that words of limitation were not required to pass the fee simple when in any instrument land was vested in trustees, a "Nomination of Trustees" being defined as an instrument. Section 15A was repealed by the Property Law Act 1974-1988. Section 29 of this Act provides that a disposition of freehold land to a person without words of limitation shall pass the fee simple unless a
contrary intention appears in the disposition. Section 4 of that Act defines the term "disposition" to include a "nomination of trustees".

It is therefore evident that litigation of the issues raised in Re Bennett will not resurface. Accordingly, the abolition of the method of creating a trust by nomination of trustees as suggested by the learned authors is not necessary. The Commission is concerned that abolition of this method of creation of a trust would increase estate charges as the Commissioner of Stamp Duties assesses the form of duty only under the heading in the Stamp Act 1894-1982 of "Conveyance of Transfer", and not also under the heading of "declaration of trust": see J.G. Mann, The Law of Stamp Duties in Queensland, para. 923 (1981) [cf. Farrar v. G.S.D. (N.S.W.) (1975) 5 A.T.R. 643]. To compel persons intending to create a trust of registered land to not only execute a transfer, but also a separate deed would, of course, render both instruments liable to ad valorem duty.

The form of nomination of trustees has been usefully employed by conveyancers in Queensland, especially in the creation of family trusts, and the Commission believes that no useful purpose would be served by their abolition. There would be a slight simplification in the legislation, but this should not be bought at the price of overly reducing the freedom of choice of settlers and conveyancers in their dispositions and in their chosen method of putting their intentions into effect. An increasing number of "Nomination of Trustees" forms are being registered at the Titles Office. Section 113 of the Trusts Act 1973-1981 provides that where land under the provisions of the Real Property Acts is transferred to a Local Authority as sole transferee the transfer should be way of a Nomination of Trustees in Form 1 of the Schedule to the Real Property Act 1861 (as it then was, this schedule having been repealed in 1986) unless the transfer is accompanied by a statutory declaration declaring that the land is not being transferred to the Local Authority as a Sole Trustee. The use of "Nomination of Trustees" forms may in some circumstances provide a useful safeguard against fraud as the trusts therein declared are a matter of public record.

Section 79 of the 1861 Act provides that whenever any land or any estate or interest in land under the provisions of the Act shall be settled or vested in trustees upon any trust whether expressed, implied or constructive, the Registrar of Titles shall not make any entry of the said trusts in the register book. Whalan has argued that this principle of forbidding the entry of trusts on the register should be reversed to permit, but not require, the registration of trusts: see The Torrens System in Australia, p.122 (1982). The situation in Queensland and elsewhere may be argued to be particularly unsatisfactory for a defrauded beneficiary as Section 135 of the 1861 Act (inserted by Act No. 67 of 1981) provides that the assurance fund shall not under any circumstances for compensation for any loss, damage, or deprivation occasioned by the breach by a registered proprietor of any trust whether express, implied or constructive.

Whalan considers that the present system is at the expense of an innocent beneficiary who, in the classic situation where a man dies leaving a trustee to hold for the benefit of his widow and infant children, is the most vulnerable person to hold an interest in land and is also one of the few losers of an interest in land under the Torrens System who does not get compensation for his loss. Whalan states that the present ways of
protecting an interest under a trust are not only unsatisfactory from the beneficiaries point of view but can prove to be very unsatisfactory for a person dealing with the land who have to decide on inadequate information, the extent of rights claimed. He points out that a dealer can, in theory, still be subject to loss if, prior to registration but after he has paid part or the whole of his money, he is given such full knowledge of beneficial rights as would account to fraud if he proceeded to registration. [See Templeton v. The Leviathan Pty. Ltd. (1921) 30 C.L.R. 34 per Knox C.J at 54-55]. It is pointed out that in this situation the person dealing with registered land is worse off than a person dealing with unregistered land as execution and delivery of the deed of conveyance vests the legal estate in the transferee. He considers that possibly there are some advantages to be gained by the purchaser as well as by a beneficiary from full disclosure on the register. Another alternative proposed is to enable beneficiaries to claim compensation for breach of trust by a registered proprietor: see D.A. Whalan, "Partial Restoration of the Integrity of the Torrens System Register: Notation of Trusts and Land Use Planning and Control" (1970) 4 U.Z.U.L.R. 1, 15-16. Section 78 of the 1861 Act provides that a duplicate or attested copy of an instrument declaring a trust shall be deposited with the Registrar for the purpose of safe custody and reference, but such duplicate or attested copy shall not be registered. The terms of the provision are imperative, yet the provision appears to be a "dead-letter". Whalan considers that the deposit of the instrument does not appear to have any direct legal effect and the trust estate is not protected unless a caveat is lodged: see The Torrens System in Australia, p.121 (1982).

The Registrar of Titles in Queensland is not given any direct responsibility for protecting trusts. He may lodge a caveat under s.11 of the 1861 Act on behalf of a person under disability of infancy or mental sickness. The Registrar of Titles may in some circumstances refuse to register any instrument which is a breach of trust: see Templeton v. Leviathan Pty. Ltd. (1921) 30 C.L.R. 34. The practice of the Titles Office is for a senior examiner to scrutinise transfers by trustees to ensure that the transfer is not a breach of trust, where the Titles Office is in possession of the relevant information, relying on that authority. This is probably prudent despite the immunity from claim of the assurance fund under s.135.

The current form of s.77 in the draft bill seems to be adequate to cover both transfers to trustees and declarations of trust. However, it has been widened to cover expressly the position of a registered proprietor desiring to make a declaration of trust whereby the proprietor would henceforth hold land on trust. Also, ss.77-78 have been amalgamated into one section as they are both very short and deal with related subject matter.

Generally, the current provisions seem to operate with little difficulty, and the salary of one senior examiner in the Titles Office, who spends full time scrutinising matters affecting trusts seems to be a very cheap price for the State to pay for a form of policing of trusts of land which appears to have been very effective. This would counsel tampering with the current provisions as little as possible, unless it is felt that there is a need to respond to criticism, for example, by Whalan (D.A. Whalan, The Torrens System in Australia, p. 122 (1982)) to the effect that there is a need to enhance the protection of beneficiaries.
Concern as to the position of beneficiaries, would militate against abolishing ss.80–81. While this would simplify the Act, and would be in order if the provisions are hardly ever used, it is a useful safeguard for beneficiaries, particularly in view of the lack of other watertight safeguards. [Note especially the view of E.C. Adams in "No Survivorship Titles" (1941) 17 N.Z.L.J. 137, inter alia suggesting that the rationale of the "no survivorship" provisions is: "based on a sound rule of human conduct that, although one trustee may prove unfaithful to his trust, it is less likely that all the trustees will be guilty of such moral turpitude". Indeed, the system of protecting beneficiaries in England since 1925, discussed in more detail below, has been based and has operated largely successfully on this principle.]

Whalan [D.A. Whalan, The Torrens System in Australia, p. 122 (1982)] makes the suggestion that registration of trusts should be permitted, but not required, in order to enhance the protection of beneficiaries and purchasers before registration. This would add little, if any, protection in Queensland, since the existence of the can be made apparent from the register if the appropriate method of creation is selected, as discussed above.

The administrative changes discussed elsewhere which tend to reduce the interregnum between settlement, lodgment and registration will assist purchasers from trustees as they do purchasers in general. However, purchasers from trustees are more vulnerable in one respect than other purchasers. This is because the practical need to produce the certificate of title to settle a transaction tends to eliminate blatant fraud of forgery on purchasers except by that catagory of rogues, such as rogue solicitors or bank staff, who have access in their employment or profession to such documentation. Trustees, also fall into this category, since they normally have custody of the documents of title.

Whalan's criticisms would be partly met by repealing s.135 and making the assurance fund liable for claims by defrauded beneficiaries. However, this would not be attacking the root cause of the alleged problem of lack of safeguards, and might prove unjustifiably expensive to the fund. In any case s.135 is very much in line with the provisions in other jurisdictions.

The South Australian, New South Wales of ACT provisions for special form of caveat by a settlor could be adopted. [See Real Property Act 1900 (NSW) s.82(3); Real Property (Registration of Titles) Act 1945 (S.A), s.20; Real Property (Conversion of Titles) Ordinance 1967 (ACT), s.20]. However, this might not add much protection as it is open to a beneficiary to caveat at present.

It may be possible to learn from the English experience. In the case of registered title, the practice is to register a "restriction" which prohibits the registration of any transfer which is not authorised under the terms of the trust or relevant legislation. [See Land Registration Act 1925 (UK), s.58, and Land Registration Rules 56-59,104,236 and Forms 9,10 of The Schedule. Additionally the ability to register cautions, notices and inhibitions, furnishes a greater degree of protection than the caveat system in Queensland, see ss.48–57 of the Act.] This is coupled with the "overreaching" provisions, whereby a purchaser from trustees is unaffected by the interests of beneficiaries provided any capital moneys arising from
the transaction are paid to or by direction of two or more trustees or a
trust corporation, or into Court. [Law of Property Act 1925 (U.K.), s.27.
For an example of this section in operation see Caunce v. Caunce [1969] 1
W.L.R. 286.]

CONCLUSION

After detailed consideration, the Commission is of the view that despite the
criticism of Whalan of the lack of protection of the rights of
beneficiaries, the current situation seems to operate reasonably
satisfactory. Consequently, a major departure from the traditional approach
of the Torrens system to adopt any of the additional forms of protection
discussed above would not be justified. There appears to be no great
problem of fraud on beneficiaries. Consequently, it is felt that in the
cause of simplification of the legislation, and in view of the very small
use of the provisions, ss.80-81 which provide for "no survivorship"
requirements should be repealed.

It is felt that the traditional prohibition on entry of Trusts on the
Register contained in the first paragraph of s.79 should be retained but
this can be combined into one section with the current ss.77-78. At the
same time the provision should be expanded to cover a declaration of trust
by a registered proprietor not involving a transfer of the legal estate. It
is made clear that the current practice whereby the mechanics of
establishing a trust or vesting the land in trustee leads to the existence
of the trust being known to the Registrar and persons searching the Register
may remain. It is felt that this, and the checking of transfers by Trustees
by a senior examiner for possible breach of trust, should remain as it is a
very cost efficient method of policing trusts.

The remaining parts of s.79 may be repealed. The second paragraph, in
stating that trustees are entitled to act as beneficial owners, adds nothing
to the rights and powers of trustees to sell which are now contained in the
Trusts Act 1973-1986, and gives the unjustified appearance of weakening the
position of beneficiaries. It also includes a statement that Trustees in
whom a fee simple is vested are entitled to receive a certificate of title.
This statement adds nothing in that all registered proprietors, including
trustees, are so entitled. Furthermore, it unnecessarily detracts from the
principle of trusts not being recorded on the register since it singles out
trustees as a special category. The final paragraph duplicates s.43 of the

Section 83 dealing with registration of court orders affecting trust lands
is to be retained, while s.84 regarding actions by beneficiaries in the
names of trustees can be repealed because the matters involved are covered by
general court rules and procedures. A beneficiary seeking redress of this
nature may achieve it by joining a trustee who is unwilling to start
proceedings as a defendant.
CHAPTER IX

RESTRICTIVE COVENANTS

POSITION IN QUEENSLAND

These interests, which date historically from the decision in Tulk v. Moxhay (1848) 2 Ph. 774; 41 E.R. 1143, are currently not recognised explicitly in the Real Property Acts. An attempt to argue that such interests amount to easements within the meaning of s.44 of the 1861 Act so that they are enforceable against registered proprietors as exceptions to the principle of indefeasibility failed in Norton v. Kilduff [1974] Qd.R.47. This was despite the arguments which have been advanced that such interests are negative equitable easements [see D.J. Hayton: Restrictive Covenants as Property Interests (1971) 87 L.Q.R. 539]. There are strong indications from the judgment to the effect that the term easement will be interpreted in the same way throughout the Act so that restrictive covenants will not be registrable as easements under s.51. This case appears to be the only reported decision on the issue in Queensland.

It is worth noting that s.4(2) of the Property Law Act 1974-1986 expressly provides that nothing in that Act is to be construed as conferring on any person a right, in respect of registered land, to registration of a restrictive covenant.

Any argument that a registered proprietor with notice of the covenant is bound appears to be completely untenable in Queensland. (See discussion of position in South Australia and comparison with Queensland below.)

While it is clear that covenants which are restrictive in nature may form part of the terms and conditions of a lease of mortgage which is registered, this does not, as was pointed out in Clem Smith v. Farrelly (1978) 20 S A.S.R. 227 (per Zelling J. at 254 the relevant passage being set out infra) constitute any interest deriving under the restrictive covenant contained in such an encumbrance as a separate registered interest. In all cases except those of covenants contained in leases the covenant will not be binding on a successor in title because, except in the case of leases, the benefit and burden of such a covenant does not run with land. Accordingly, a restrictive covenant can be binding on a successor in title of the interest burdened only in the context of a lease, where, by virtue of the decision in Mercantile Credits Pty. Ltd. v. Shell Co. of Australia Ltd. (1976) 136 C.L.R. 326, it will be an indefeasible interest if it forms part of the delineation of the lessor's or lessee's total interest in the land (per Barwick C.J.) or if it is so intimately connected with the term that it should be regarded as part of the estate of interest of the lessor or lessee (per Gibbs J.). The general drift of the judgment of Barwick C.J. is that rights under any covenant in a registered lease which touches and concerns
land so as to run with assignment of the lease or reversion will enjoy the benefit of the principle of indefeasibility under the Torrens system.

Many mortgage covenants will come under this principle through the device of the attornment clause, frequently included in a mortgage, whereby the mortgagor attorns as tenant of the mortgagee. However, attempts to secure the enforceability of restrictive covenants against successors in title by means of this device are of doubtful efficacy because of the insistence of equity that there be "no clogs on the equity of redemption". The mortgagor would normally merely make an escape from the obligation by redeeming the mortgage. The Australian Encyclopaedia of Forms and Precedents includes a form of mortgage which merely secures the obligation to pay damages under an associated restrictive covenant. While the definition of mortgage in the Real Property Acts (see s.3) is wide enough to cover this, the validity of such a form may be doubted on the grounds that it intrinsically restricts the right to redeem, although reasonable postponements of this right were upheld in Knightsbridge Estates Trust Ltd. v. Byrne [1939] Ch. 441. It is understood that the Registrar of Titles refuses to register such mortgages.

The other question is whether the interest of a person entitled to the benefit of a restrictive covenant is caveatable. On general principles this would appear to be so since equitable interests have been held to be caveatable in general (see Queensland Estates Pty. Ltd. v. Collas [1971] Qd.R. 75, which gives an indication of the the New Zealand case of Staples & Co. (Ltd.) v. Corby and District Land Registrar (1901) 19 N.Z.L.R. 517, which decided that the covenantee under a restrictive covenant does not obtain any interest, will not be followed in Queensland. The New Zealand decision does appear to be completely out of line with the authorities in other jurisdictions which are uniform in the view that the benefit of a restrictive covenant is an equitable interest. See, for example, the attitude of the High Court in Quadramain Pty. Ltd. v. Sevastopol Investments Pty. Ltd. (1976) 133 C.L.R. 390, particularly per Gibbs J. at 403. In Norton v. Kilduff [1974] Qd.R.47, Hart J. appears to have assumed this to be the case although it was not a matter which had to be decided in that case).

There are numerous cases in other jurisdictions in which it is recognised that a restrictive covenant creates an equitable interest in the land. See Halsbury, 3rd ed. Vol.14, p.561. A report of the English Law Commission on Restrictive Covenants (Law Com No.11) points out (at p.8) that:

"although the original basis of the Tulk v. Moxhay rule was that anyone who purchased with notice of a restrictive covenant would be restrained from breaking it, later decisions have established that this applies only where the covenant is imposed for the benefit of other specific land so that an equitable obligation is imposed on one piece of land for the benefit of another. Restrictive covenants, therefore, have become closely analogous to easements and profits-a-pendre, being obligations imposed on a servient tenement for the benefit of a dominant tenement."

This transformation was recognised explicitly in the decision in Re Nisbet and Pott's Contract [1905] 1 Ch.391 at p.398; affd. at [1906] 1 Ch.386. Although there was no discussion of the matter, the judgment of Napier C.J. in Blacks Ltd. v. Rix [1962] S.A.S.R. 161 proceeded on the basis that
the covenantees had a caveatable interest, and on this point it was supported in the passage quoted below from the judgment of Bray C.J. in *Clem Smith v. Farrelly* (1978) 20 S.A.S.R. 227.

If the covenantee has a caveatable interest, he may protect it by lodging a caveat under s.98 of the *Real Property Act* 1861-1988. In States where the caveat lapses upon the expiration of a specified time after notice is given by the Registrar to the covenantor that a dealing has been lodged for registration, the covenantor will be able to protect his right by seeking an injunction to prevent a transfer of the subject land to another person without the execution by the transferee of a similar covenant. Under the South Australian system, the caveat may forbid registration of any dealing with the same unless such dealing is expressed to be subject to the claim of the covenantor and the interest of the covenantor will be protected in subsequent proceedings for removal of the caveat or for its extension. In Queensland, it is suggested that the most effective way to protect the covenantee's interest is through a caveat lodged with the written consent of the registered proprietor of the burdened land.

Apart from the operation of the caveat system, the position in Queensland would seem to be the same as in South Australia, and the remarks by Zelling J. in *Clem Smith v. Farrelly* quoted below seem to be applicable. The practice of noting restrictive covenants on titles has not been adopted in Queensland and it is difficult to see what effect such noting would have even if it was made. It is impossible to construe restrictive covenants as encumbrances with the definition of that term in s.3 of the 1861 Act.

There also appears to be no reason to doubt that a restrictive covenant, in common with other agreements is enforceable between the parties thereto. This means that if A covenants with B that A will not use A's land in a certain way A is bound. Accordingly, use of the land in breach of the covenant can be restrained during A's ownership. However, if A sells and transfers to P, in the absence of fraud P can disregard the covenant, unless the covenant is protected by caveat. B will only hold an equitable interest if all the conditions attaching to restrictive covenants are fulfilled, one of which is that land of B is benefitted. If B transfers this land the benefit of the covenant can run with it by any of the three recognised methods of assignment with the land, annexation to the land or under a scheme of development. This is largely similar to the position arrived at in relation to unregistered easements in the NSW case of *Australian Hi-Fi Publications Pty. Ltd. v. Gehl* [1979] 2 N.S.W.L.R. 618.

**POSSIBLE REFORM OF QUEENSLAND LEGISLATION**

It is well settled that under the Torrens system of registration of titles, the Courts will recognise equitable estates and rights except so far as they are precluded from doing so by the statutes. See *Butler v. Fairclough* (1917) 23 C.L.R. 78 at p.91. The traditional way by which protection is afforded to the holder of an equitable interest is through the machinery of the caveat system. However, in its application to restrictive covenants, that system is cumbersome, particularly in the case of a building scheme where the purchasers of plots seek to enforce against each other restrictions imposed for their mutual benefit.
The caveat system is essentially designed to give protection in respect to equitable estates and interests created by a registered proprietor; its operation is less effective where the rights and liabilities of assignors of the registered proprietor and of the holder of the equitable interest are involved. Moreover, there can be few things more likely to impede transactions in property than the presence on titles of caveats. In the case of a building scheme, the various lots into which the estate is subdivided would all be affected by the presence of caveats, if reliance were placed on that method to protect covenantees.

It is presumably on account of such considerations that the practice developed in Victoria and New South Wales of putting a notification of restrictive covenants on certificates of title. [See Transfer of Land Act 1958 (Victoria) s.88]. That practice is ineffective to protect a covenantee unless the notification is of an interest which binds a subsequent transferee of the property. In Victoria, a subsequent transferee is bound because the restrictive covenant is construed as an encumbrance; in New South Wales, because a restriction recorded in accordance with s.88 of the Conveyancing Act 1919 is an interest within the meaning of s.42 of the Real Property Act 1900 to which the estate of the registered proprietor is subject.

If it is considered desirable to facilitate the enforcement of restrictive covenants between assignors of the original parties, it is suggested that this can most appropriately be done by following the New South Wales model. It can be objected that this will involve the recording on titles of equitable interests which the Torrens system legislation was solicitous to avoid. In answer to this it may be pointed out that the recording of restrictive covenants has not been regarded as immissible to the operation of the Acts in four Australian States, nor in New Zealand, where s.126 of the Property Law Act 1952 provides for the registration of restrictions as to the use of land and for such restriction to be an interest within the meaning of the relevant section of the New Zealand Land Transfer Act 1952 corresponding to s.42 of the New South Wales Act and s.44 of the Queensland 1861 Act.

If an equitable interest should be protected, but cannot be adequately safeguarded by the caveat system, it is proper to protect it in the same way as is used for other interests, namely by making it a registrable interest.

The Commission has, after due consideration, arrived at a decision that the Real Property Acts not be amended so as to accord recognition to restrictive covenants. This is because it is believed that the substantial increase in complexity of the law and the process of registration resulting from such recognition can not be justified by any advantages stemming from such recognition.

Experience in some jurisdictions where such covenants are recognised by the system of registration, such as England, shows that they add greatly to the work of the Land Registry. A particular problem is the lack of any suitable and practical means for removal of covenants from the register or title once they have outlived their usefulness. Statutory provisions exist in almost all jurisdictions for the removal of outdated and obsolete covenants, and of those that impede the public interest. [See, for example, Property Law Act 1974-86, s.181; Conveyancing Act 1919 (NSW) s.89; Transfer of Land Act 1958 (Victoria), s.84; all modelled on the Law of Property Act 1925 (U.K.) s.84].
Unfortunately, in practice, the cost of the necessary court application means such provisions are utilised only where a covenant is impeding a fairly major development. The former Chief Land Registrar in England, Theodore Ruoff, was extremely critical of the recognition of restrictive covenants by registration systems. England and Wales are particularly burdened with widespread covenants of an obscure nature whose origins lay in some particular idiosyncracy or prejudice of the developer. For example, many titles in Cardiff are affected by covenants against various types of dealing in intoxicating liquor originally imposed by the Cory family in the last century.

Historically, restrictive covenants formed a private enterprise precursor of town planning and zoning controls. Consequently, they are extremely common and fully recognised in jurisdictions such as England or those in the United States where industrial/commercial development and settlement substantially predated the introduction of town planning and zoning controls in the early years of this century. In Australia, and particularly in Queensland, restrictive covenants are much less common; largely because town planning and zoning controls largely predated development and settlement. Therefore, it may be argued that restrictive covenants would serve much less purpose in Queensland than elsewhere.

It is understood that developers of residential subdivisions in Queensland have been more inclined to include restrictive covenants in contracts of sale in recent years. These covenants are almost exclusively directed at establishing and maintaining a certain standard of construction and/or landscaping. It seems that in most cases these covenants are reasonably effective during the initial period of development which is the crucial period as far as the establishment of the tone of the neighbourhood is concerned.

The degree of control of the developer is initially absolute but gradually diminishes as an increasing number of initial purchasers, who are bound by the covenants under the above principles, themselves sell to persons who are not so bound unless the initial purchaser inserts a term in the contract of sale securing their compliance. Often the initial purchaser is under an obligation to the developer to do this, but may or may not comply. Frequently, the policy of the developer is to enforce the covenants rigorously for the first few years, since these are the crucial ones as far as establishment of the neighbourhood is concerned. In normal circumstances, a sufficient proportion of the initial purchasers build houses during the period in compliance with the covenants so as to ensure that the general standard of the neighbourhood reflects the intentions of the developer. Accordingly, there is no pressing need to amend the law.

An untried question is whether an obligation of purchasers of blocks in such a development to impose the obligation on subsequent purchasers can be protected by caveat. It is believed that in many cases developers do not seek to lodge a caveat to secure compliance with the covenants. However, since the caveat procedure is not fully equipped to deal adequately with restrictive covenants, except possibly where the caveat is lodged with the consent of the registered proprietor, it is arguable that the caveatability of restrictive covenants should be restricted or terminated. The existing system could give rise to problems if there was any large scale attempt by developers or others to seek to preserve the enforceability of restrictive
covenants by using the caveat procedure. If such clauses are valid there would seem to be no reason why they should not be caveatable. However, they may be invalid as unreasonable restraints on alienation on the authority of Hall v. Busst (1960) 104 C.L.R. 206, or, alternatively, valid only to the extent that they may confer a right to damages only as in Caldy Manor Estates Ltd. v. Farrell (1974) 1 W.L.R. 1303, in which case the lack of the proprietary flavour may mean the covenant does not give rise to a caveatable interest.

There is recent evidence of litigation which may indicate that developers are seeking to enforce such obligations more rigorously, including obligations imposed upon initial purchasers to secure a fresh covenant from any person to whom they sell to as to maintain the enforceability of the covenant. Such obligations may not be valid as interferences with the free alienability of land (cf. Hall v. Busst (1960) 104 C.L.R. 206, but note Caldy Manor Estates Ltd. v. Farrell (1974) 1 W.L.R. 1303). If they are upheld, even to the limited extent of allowing a claim in damages for breach only and no injunctive relief, they can give rise to difficulty with attempts to caveat to protect them and the possibility of a subsequent purchaser being sued for the tort of inducing breach of contract. However, the Commission has taken the view that consideration of the question of restricting the caveatability of restrictive covenants should take place in the context of the examination of the law relating to caveats.

A number of submissions have suggested that consideration should be given to the amendment of the Real Property Acts so as to provide for the registration of restrictive covenants. Acceptance of these arguments would raise fundamental problems in relation to the operation of those Acts. In particular, it would involve consideration of the question whether it is desirable to provide for registration or notation of equitable interests, and in particular an equitable interest which is incapable of becoming a legal interest.

It is convenient to examine how far provision has been made in the other States to protect the interests of covenantees under restrictive covenants.

A. The Position in Victoria

In Re Arcade Hotel Pty. Ltd. [1962] V.R. 274, Scholl J. has recorded in considerable detail the history of the practice of the Victorian Titles Office of noting restrictive covenants as encumbrances upon the title of the burdened land. That practice had been followed since at least 1888-1889. Under the Transfer of Land Act 1958, "encumbrances" were defined as including "all prior estates interests rights claims and demands which can or may be had or set up into upon or in respect of the land". This, in Scholl J's opinion, was wide enough to include restrictive covenants. Section 47 of the Transfer of Land Act 1928 provided that the Registrar was to endorse on each grant and certificate "the particulars of all dealings and matters affecting the land by this Act required to be registered or entered". There was nothing imposing a positive duty of registration of restrictive covenants, but there was also nothing preventing their registration.
In 1954, s.47 was amended so that the Registrar must now register in the register book Crown grants and certificates of title "and register or notify therein such other instruments as are required or permitted by this Act to be registered, notified or entered therein". But before 1954, in Scholl J's opinion, the Registrar was not prevented by the Act from noting restrictive covenants on the titles of burdened land. This constituted them encumbrances, notice of which as an actual limitation of the registered proprietor's title or interest could not be avoided by a person dealing with the registered proprietor of land, and against which the provisions of s.179 of the Transfer of Land Act 1928 could not protect him. [s.179 corresponds to s.109 of the 1861 Act in Queensland, the section which absolves transferees from being affected by notice of prior interests].

The validity of the practice of noting restrictive covenants on the register as encumbrances had long been recognised in Victoria by the Courts. See Mayor of Brunswick v. Dawson (1879) 5 V.L.R. (Eq.) 2. The Victorian Parliament gave recognition to the practice when it provided in 1918 in relation to the new power of the Supreme Court to discharge or modify a restrictive covenant that in the case of registered land "the Registrar shall if the restriction has been noted in the register give effect on the register to the order when made."

The Victorian system was accordingly one under which the practice was sanctioned of noting as encumbrances on the title interests for which no separate certificates of title could be issued, and in particular restrictive covenants affecting the burdened land. The consequence was, as Scholl J. stated, that the indefeasibility of title guaranteed by the Transfer of Land Act did not extend so far as to defeat a notification of an interest as an encumbrance. In the case of a restrictive covenant contained in a registered transfer, and notified as an encumbrance, the owner of the burdened land had notice of and was bound by the covenant to the same extent as he would be under the general law.

In order to ascertain the effect of this practice, it is necessary to examine the three ways in which a person other than the original covenantee can become entitled to the benefit of a restrictive covenant.

First, he may become entitled as the assignee of land to which the benefit of the covenant is annexed. The benefit of a restrictive covenant will pass to successive owners of the dominant land without assignment provided certain conditions are met. In the first place the covenant must touch and concern land of the covenantee that is, it must be imposed for the benefit of or to preserve the value of the covenantee's land, since, as Kitto J. said in Pirie v. Registrar General (1963) 109 C.L.R. 619 at p.628, "it is basic to the doctrine of Tulk v. Moxhay that it applies only to a restriction created to preserve the value of other land, and that the restriction is not enforceable against derivative owners except for the protection of that land". Secondly, the covenant must be expressed to be for the benefit of clearly identifiable land.

In Re Arcade Hotel Pty. Ltd., the question on which members of the Court differed was whether a restrictive covenant expressed to be for the benefit of the registered proprietor or proprietors for the time being of the described land applied only in respect of the whole of such land, or whether the benefit of it passed to transferees of portion only of such land. It is
not necessary to examine at this point the issue involved in that case, but it is clear that under the Victorian practice the notification of a restrictive covenant as an encumbrance on the certificate of title of the burdened land has the effect that the registered proprietor of that land holds it subject to the rights of the assignee of the land to which the benefit of the covenant was annexed.

Those rights were indeed less vulnerable than under the general law, for, as Scholl J. observed ([1962] V.R. at p.279), restrictive covenants contained in registered transfers might be noted as encumbrances on the certificate of title under the Transfer of Land Act 1958 of the lands burdened thereby, and when so noted they operated very much as they did under the general law, save that those entitled to the benefit of them had the added advantage that no difficulty was likely to arise about notice to persons thereafter acquiring interests in the burdened land.

The second method by which a person other than the original covenantee can become entitled to the benefit of the restrictive covenant is as an express assignee of the benefit of the covenant and of some or all of the dominant land. The rule is stated in Halsbury, 4th edition, Vol.16 at p.911 (para.1354) in the following terms:

"Where land capable of being benefited by the covenant is retained by the covenantee, but the benefit of the covenant is not annexed to the land, it is assumed that he has taken the covenant in order to enable him to dispose of such retained land to the best advantage, and accordingly he is permitted to assign the benefit on subsequent sales of the land or parts of it, so as to enable the purchaser to enforce the covenant against assigns of the covenantor taking with notice; but this is subject to the condition that the land which the covenant was to benefit and which is to be conveyed must be ascertainable or certain, and the covenantee can only dispose of the covenant with the land".

There does not appear to be any reported case in Victoria which involved the use of this method or which considered the application of the Torrens system to it.

It is suggested however that the considerations which led Hudson J in In re Dennerstein [1963] V.R. 688 to hold that a successor in title was not bound by a covenant under a building scheme which did not define any land for the benefit of which the covenant was taken would apply in this case also, so that the successors in title of the covenantor would not be bound.

The third method is under a building scheme. The facts which must be proved to establish the existence of a building scheme are stated as follows; in Megarry and Wade: The Law of Real Property, 3rd ed., at p.767:

(i) The plaintiff and defendant must both have derived title from a common vendor.

(ii) Previously to the sale of the plaintiff's and defendant's plots, the common vendor must have laid out the estate in lots subject to restrictions which were intended to be imposed on all of them and were consistent only with some general scheme of development, or in some other way (e.g. from a
deed of mutual covenant) it must appear that the common vendor intended the
restrictions to be enforceable under such a scheme.

(iii) The common vendor must have intended the restrictions to be for the
benefit of all lots sold.

(iv) The plaintiff's and defendant's plots must both have been bought from
the common vendor on the footing that the restrictions were for the benefit
of the other lots.

(v) The area to which the scheme extends must be clearly defined.

The question of the application of the doctrine of building schemes to
registered land was discussed by Sholl J., in *Re Arcade Hotel Pty. Ltd.*
[1962] V.R. at p.287. He said:

"Since in the present case it is common ground that there is no evidence
such as would support the finding of a building scheme in the case of land
under the general law, the question does not here arise, and I refrain from
expressing any opinion about it. I would merely observe that when the
question does arise for decision, it will doubtless be pointed out:

(1) that in many cases the courts here have in fact held building schemes to
be in force in the case of registered land

(2) that nevertheless in many, if not most cases, the evidence relied on to
establish the scheme is evidence in part at least dehors the register - e.g.
of auction conditions - or evidence of the contents of transfers and
certificates of title relating to allotments of land transferred out of the
parent title prior and subsequent to the transfer of the burdened land,
matters which it may well be thought the purchases of the burdened land was
never intended under the Transfer of Land Act to be concerned with; but

(3) that on the other hand, the position may be different if the form of
covenant in the original transfer of the burdened land, whereby it was first
imposed, is itself in a form really appropriate to a building scheme, e.g. a
covenant by the transferee his heirs executors administrators and
transferees, registered proprietor or proprietors for the time being of the
burdened land, with the covenantee, his heirs executors administrators and
transferees, registered proprietor or proprietors for the time being of the
whole of the land comprised in the parent title, other than the burdened
land, and as a separate covenant with the registered proprietor or
proprietors for the time being of every other lot in the parent title,
whether transferred thereout before or after the burdened land, to the
intent that the said covenants may be enforceable by any such persons as
part of and for the purpose of effectuating a general building scheme
affecting the whole of the aforesaid land."

The matter was considered further in *Re Dennerstein* [1963] V.R. 688, where
the question was whether the notification as an encumbrance of a covenant
which contained no identification of the land in favour of which the
restrictions were implied was effective. It was held that it was not.
Hudson J. concluded (at p.696) that even assuming there is power under the
Act to notify as encumbrances on a certificate of title restrictions arising
under a building scheme, such a notification will not be effective to bind
transferees of the land unless not only the existence of the scheme and the nature of the restrictions imposed thereunder, but the lands affected by the scheme (both as to the benefit and the burden of the restriction) are indicated in the notification, either directly or by reference to some instrument or other document to which a person searching the register has access."

The two cases just discussed were decided on legislation which has been re-enacted as s.88 of the Transfer of Land Act 1958 (Victoria).

This provision may be summarised as follows:

(1) The Registrar may enter on the Crown grant or certificate of title of land subject to the burden of a restrictive covenant a memorandum of such covenant and of any instrument purporting to create or affect the operation of such covenant, and when such covenant is released varied or modified by agreement of all interested parties or by order of a competent court may cancel or alter any such memorandum.

(2) Apart from the operation of Part III (which relates to the Register Book, including the effect of registration), a notice in the Register Book of any such restrictive covenant shall not give it any greater operation than it has under the instrument creating it.

The position in Victoria may be stated briefly as follows:

(a) The Registrar may enter on the certificate of title of land subject to the burden of a restrictive covenant a memorandum of such covenant and of any instrument purporting to create or affect the operation of such covenant.

(b) Restrictive covenants so noted are encumbrances upon the title of the burdened land, and by virtue of s.42 of the Transfer of Land Act 1958 the registered proprietor of land holds it subject to such encumbrances as are notified on the certificate of title.

(c) Restrictive covenants will not be enforceable by successors in title of the original covenantor unless the covenant is annexed to Torrens title land or, in the case of a building scheme, unless the conditions stated by Hudson J. in Re Dennerstein are satisfied.

B. The Position in New South Wales.

Section 88 of the Conveyancing Act 1919 as amended provides that a restriction arising under covenant or otherwise as to the user of any land the benefit of which is intended to be annexed to other land, contained in an instrument coming into operation after the commencement of the Conveyancing (Amendment) Act 1930, shall not be enforceable against a person interested in the land claimed to be subject to the restriction, and not being a party to its creation unless the instrument clearly indicates:

(a) the land to which the benefit of the restriction is appurtenant;
(b) the land which is subject to the burden of the restriction;

(c) the persons (if any) having the right to release, vary, or modify the easement or restriction, other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary or modify the restriction; and

(d) the persons (if any) whose consent to a release, variation, or modification of the restriction is stipulated for.

The section applies to land under the provisions of the Real Property Act 1900 and in respect thereof it is provided that:

(a) The Registrar-General shall have and be deemed always to have had power to enter in the appropriate folium of the register book relating to the land subject to the burden of a restriction, a notification of the restriction, and a notification of any instrument purporting to affect the operation of the restriction of which a note has been so entered and when the restriction is released, varied or modified, to cancel or alter the notification thereof.

(b) A notification in the register book of any such restriction shall not give the restriction any greater operation than it has under the instrument creating it.

(c) Every such restriction notified on the appropriate folium of the register book shall be an interest within the meaning of s.42 of the Real Property Act.

Section 42 is the paramountcy provision and in relation to the interpretation of this provision, there have been two leading decisions.

In Pirie v. Registrar General (1962) 109 C.L.R. 619, the appellants contended that a covenant contained in a memorandum of transfer made in 1919 had never bound the land, and hence the Registrar-General was not authorised to allow a notification of it to stand on the register. Kitto J. (at 628 et seq.), after observing that "there are only three kinds of restrictions which burden the land to the use of which they relate - restrictions the benefit of which is by express language annexed to the protected land, restrictions the benefit of which is annexed to the protected land by virtue of a building scheme, and assignable with the protected land", concluded that the restrictions in the present case were not shown to fall within any of them, and hence that the Registrar-General had not shown that his notification on the appellant's certificate of title was one to which the retrospective operation of s.88(3) applied.

He construed s.88(3) as relating "only to a restriction of the same description as that to which subsection (1) of the same section is directed, that is to say a restriction (as to the user of land) the benefit of which is intended to be annexed to other land ...". He considered that the expression "is intended to be annexed to other land" was not satisfied "unless the instrument creating the restriction discloses an intention that by force of its own language the benefit of the restriction shall be annexed to other land. This excludes the case where annexation is not express but is
the result of a building scheme. It excludes also the case where the benefit of a restriction is not annexed to other land and is merely made assignable with other land."

Owen J. (at 647) agreed with Kitto J. The other member of the majority, Windeyer J. said however that he did not agree "that the benefit of a restriction on the user of one lot in a building scheme cannot be said to be intended to be annexed to other land." Taylor and Menzies JJ. dissented.

The second case is Re Martyn (1965) 65 S.R. NSW 387. A notification was entered upon a certificate of title of restrictions imposed by a covenant in an instrument of transfer dated 1913. The covenant did not contain any statement of the land to which the benefit of the covenant was to be appurtenant. There was in operation a common building scheme restricting the use of the land in the manner set out in the covenant. Walsh and Asprey JJ. held (Hardie J. dissenting):

(1) That, prior to the enactment of the Conveyancing Act, the restrictions would not have been enforceable against a purchaser for value whether with or without notice, of land under the Real Property Act because of s.43 of that Act (the notice section).

It should be observed that while in New South Wales, as in Victoria, the Registrar-General had adopted without legislative sanction the practice of putting notifications of restrictive covenants on titles, the Victorian practice had a different consequence, since there the restrictive covenant constituted an encumbrance, whereas this was not so under the definition of "encumbrance" in the New South Wales Real Property Act. In Victoria, therefore, the purchaser was bound though he took without notice, whereas in New South Wales he was not bound even though he took with notice.

(2) That s.88(3) of the Conveyancing Act, in the form amended in 1930, refers only to restrictions of the type mentioned in s.88(1), which expressly requires that the instrument must clearly indicate the land to which the benefit of the restriction is appurtenant.

C. THE POSITION IN SOUTH AUSTRALIA, WESTERN AUSTRALIA AND TASMANIA

There is no statutory provision in South Australia which deals with the matter of restrictive covenants in respect to registered land, but in two decisions the issue has been examined.

The first was Blacks Ltd. v Rix [1962] S.A.S.R. 161. The plaintiffs in that case sought a declaration that they were entitled to enforce against the defendants restrictive covenants contained in an encumbrance which was registered upon the title of the covenants. The defendants were successors in title of the covenants. They also claimed a declaration that they were entitled to protect their rights or interests by the registration of a caveat forbidding any dealing with the land registered in the names of the defendants, unless such dealing was expressed to be subject to the rights or interests of the plaintiffs. Napier CJ. held that the evidence disclosed the existence of a building scheme, and that the plaintiffs were entitled to enforce their equitable rights against the
defendants unless this was precluded by the provisions of the Real Property Act. In this regard, he said (at p.164):

"My attention has been called to the recent decision in Victoria, Re Arcade Hotel Pty. Ltd., where the Full Court refer to what they regard as the accepted practice under the Transfer of Land Act, namely that restrictive covenants contained in registered transfers can be noted as encumbrances on the certificates of title of the lands burdened thereby. I think that much the same might be said of the practice under our Real Property Act. In that connection I refer to the form of "encumbrance" (in the tenth Schedule) which provides for "any special covenants". But, be that as it may, I think that the relevant provision in our statute is s.249 ... It appears that the defendants bought or acquired their registered titles subject to the encumbrance, that is to say, well knowing that the land had been bought on the faith of the restrictive covenants, as covenants running with the land, and ensuring to the benefit of all the purchasers under the building scheme."

The plaintiffs were accordingly held to the entitled to the relief claimed.

It should be noted that s.249 of the Real Property Act provides that no unregistered estate, interest, contract or agreement shall prevail against the title of any bona fide subsequent transferee for valuable consideration duly registered under the Act. Francis: Torrens Title in Australasia, Vol. 1 at 561-2, believes that the use of the words bona fide in this section may result in a more favourable result as far as holders of restrictive covenants are concerned than in Queensland where these words are absent from the relevant provision (s.51 of the Real Property Act 1877-1988) and Francis concedes that notice will not affect a registered purchaser for value. However, Francis' suggestion appears to be strongly contradicted by the Zelling J. in the passage quoted below ([1978] S.A.S.R. 254-5), citing ss.69,72,186 and 247 of the Act in support.

In South Australia, therefore, the position is that an unregistered interest by way of restrictive covenant will not prevail against the title of a registered bona fide subsequent transferee for valuable consideration. With the aforementioned exception, the terms of s.249 are similar to those to be found in s.51 of the Queensland 1877 Act. It must therefore be presumed, though it is not stated, that the transferee in Blacks Ltd. v. Rix was not a transferee for value (See statement of Zelling J. at [1978] S.A.S.R. 255).

In the second case, Clem Smith v. Farrelly (1978) 20 S A.S.R. 227, Bray C.J. said that he accepted the decision in Blacks Ltd. v. Rix as an authority that an equitable interest under the rule in Tulk v. Moxhay will be recognised as an interest capable of protection like other equitable interests under the South Australian Real Property Act, subject to any specific provision of that statute.

In that case, restrictive covenants were contained in a registered encumbrance, which was held to be a valid security for the payment of a rent-charge. The Court decided that the provisions of the restrictive covenant were unenforceable as against a transferee of the encumbrancer, as the benefit of the restrictive covenant was not attached to any land. In
discussion the position of restrictive covenants under the Real Property Act, Zelling J. said (at p.254):

"I am of the opinion that the fact that restrictive covenants can, as a matter of conveyancing, be contained in an encumbrance which is itself registrable under the provisions of the South Australian Real Property Act, does not mean that the interest derived from the restrictive covenant contained in the encumbrance is itself a registered interest registered or noted upon the Certificate of Title ... I do not think that there is any power given under the Real Property Act to register, as a registrable interest in land, a restrictive covenant upon a certificate of title ... That being so, these were unregistered equitable interests in land which were not enforceable against a purchaser for value ..."

because of the provisions of s.249. They were not enforceable merely because the transferee knew of the existence of the restrictive covenant interests when it purchased the land, as they would have been under the general law.

In the other two States, provisions relating to restrictive covenants have been incorporated into the Real Property Acts. The Tasmanian Real Property Act 1886, ss.27B-27E (now re-enacted as ss.102-104 of the Land Titles Act 1980), provided that a vendor who wishes to take a covenant from the purchaser touching and concerning the land and to be enforceable in equity by and against their respective assignees may do so by an instrument in a prescribed form and may lodge the instrument with the transfer giving effect to the sale.

A notification of the instrument is entered in the register book containing the titles of the lands affected by the instrument. Thereupon the covenants contained in the instrument notified may be enforced in equity notwithstanding any provision of the Real Property Act but have no greater operation or effect by reason of the notification than they would if the lands on the title of which they are notified were not under the Act and the registered proprietor were affected in equity by express notice of the covenant.

The Western Australian Transfer of Land Act 1893 contains a provision, s.129A, which states that restrictive covenants may be created and made binding in respect of land under the Act so far as the law permits by instruments in the prescribed form, but no such covenant affecting land subject to a mortgage or charge shall be registered unless the mortgagee or annuitant has consented in writing thereto prior to the same being registered. Upon the registration of any instrument creating a restrictive covenant it shall not be obligatory on the Registrar to make any entry relating thereto on the certificate of title of any person entitled to the benefit thereof.
CHAPTER X

ADVERTISING REQUIREMENTS UNDER THE REAL PROPERTY ACTS

PRESENT SITUATION WITH REGARD TO ADVERTISING REQUIREMENTS

Advertising requirements are prescribed under the Real Property Acts in the following circumstances:

1. TRANSMISSIONS BY DEATH

The Registrar must advertise before registering transmissions consequent on death under s.33 of the Real Property Act 1877-1988. The need to advertise in cases of direct transmission to a personal representative who has obtained a grant was removed by the Real Property Acts Amendment Act 1988, s.9. This was a partial implementation of the recommendations of the Commission in relation to advertising requirements which were set out later in this chapter, which took place after consultation with the Commission in advance of the completion of the review since there were significant savings in cost and administration accruing from this particular reform.

2. DISPENSING WITH PRODUCTION OF INSTRUMENT

The Registrar has a discretion to dispense with production of documents under s.95(1) of the Real Property Act 1861-1988 but on exercising this discretion must advertise before registering the transaction under s.95(4).

3. LOST INSTRUMENTS

The Registrar must advertise before issuing a certificate of title in place of one that is lost under s.117 of the Real Property Act 1861-1988.

4. APPLICATIONS FOR TITLE BY ADVERSE POSSESSION

The Registrar must advertise before registering an application for title by adverse possession under s.55 of the Real Property Acts Amendment Act 1952.

5. VESTING ORDERS

The Court has a discretion under s.89 of the Real Property Act 1861-1988 to direct advertisement when making a vesting order in respect of land of a deceased proprietor.
In addition, applications to bring land under the Real Property Acts have had to be advertised under ss.19-21 of the Real Property Act 1861-1988. The need to advertise such applications is no longer of major importance in view of the small number of unregistered parcels remaining. It will cease with the completion of the process of bringing land under the Acts. In somewhat similar vein the need to advertise applications by remaindermen under s.36 of the Real Property Act 1861-1988 is not of significant practical importance, and is intended to be eliminated by the simplification of procedures governing interests in remainder.

There has been some variation in the precise form of advertising required in the different instances, but there was some standardisation as a result of the 1986 Amendments to the Real Property Acts.

Generally, 14 days notice of the Registrar's intention to execute the act concerned is required to be furnished by notice in the Gazette and in a newspaper published in Brisbane. If the land is situated more than 50km from Brisbane there must also be an advertisement in a newspaper circulating in the neighbourhood of the land [see ss.19,95(4),117(4)]. Exceptionally, under s.55 of the Real Property Acts Amendment Act 1952, a time of at least two months but not more than three years is prescribed, and there are some further requirements in this case.

PROPOSALS WITH REGARD TO ADVERTISING REQUIREMENTS

It is appropriate to consider whether any or all of these requirements continue to fulfil any useful function. In this connection it may be observed at the outset that requirements to advertise involve considerable expense for the applicant and also involve a certain amount of delay and extra work for both the applicant and the Titles Office. This expense must be justified in terms of protection of the public generally or of holders of affected interests in land conferred by advertisement.

If advertising is held not to be justified at the present level it might be abolished wholly or partly in any of the above cases, or might be restricted to the Gazette, since this involves much less expense and work than advertisement in a newspaper (current charges for advertisements in the Gazette are attached, Queensland Government Gazette 28th March 1987).

The prime candidate for abolition in terms of advertising requirements is the requirement to advertise in respect of a transmission by death. In cases where a grant of representation is made the public generally and holders of adverse interests appear to gain any protection that advertising might confer through the advertisement of the application for the grant, which is mandatory in every case. Clearly, little if any purpose is served by requiring a further advertisement of any transmission by death pursuant to a grant of representation. Although there is no reference to any specific land in such advertisements, it is impracticable to require details of land owned by the deceased to be included in such advertisements, since the extent of the deceased's landholdings will not always be known at the time at which application is made for the grant.
There remain the cases where transmissions of death can take place without any grant of representation being made. Under s.32(2) of the Real Property Act 1877-1988 such transmissions can take place. There is the safeguard that the Master of Titles must be satisfied that the applicant is a person to whom a grant would issue, and that, in the case of intestacy, the gross estate does not exceed $50,000. While the case for abolition of the advertising requirements is not quite as strong in these instances, it should be remembered that the ability to proceed without a grant of administration in these cases is the result of a definite policy of allowing informal administration of smaller and less complicated estates which was implemented in 1981 through the enactment of the Succession Act of that year and associated amendments to the Real Property Acts (see Real Property Acts Amendment Act 1981).

Accordingly, the Commission considers that little is served by the continuation of the obligation to advertise in these cases, but believes that the Registrar should retain a discretion to advertise in such cases which it considers should be exercised sparingly.

In the cases of instruments whose production is dispensed with under s.95 or which are lost and in respect of which a new title is to be issued under s.117 the individual circumstances vary so much from case to case that instead of abolishing the advertising requirement it might be considered preferable to grant the Registrar a discretion to advertise in a particular case. The same applies to applications for a title by adverse possession. In the case of vesting orders it is a matter of court discretion and the only appropriate change would be to rephrase s.89 of the Real Property Act 1861-1988 so as indicate that there should be no virtually automatic advertising but rather an order requiring advertising only where the circumstances were such as to require it.

Alternatives or supplements to the above proposals, would be:

(a) confining advertisements to all or particular instances to the Gazette

(b) providing that, instead of advertising, the Registrar should keep a journal type record of each or some of the individual activities for which advertising is currently required (the Registrar already has power to do this under s.32A of the Real Property Act 1861-1988), which journal should be capable of search and which should be posted periodically in the Titles Office. Persons and organisations with a particular interest in these matters, such as large lending institutions, might be permitted to subscribe for copies.

The Commission favours the keeping of such a journal and the taking of appropriate steps to bring its contents to the knowledge of those interested therein, coupled with the grant to the Registrar of a right to require appropriate advertisement in particular cases.

In terms of legislation, the best way of dealing with advertising may be to incorporate all the provisions which relate thereto into one section which is incorporated in the draft legislation set out in the Appendix. References to advertising in ss.95,117 and other sections would be deleted.
Alternatively, advertising could be defined in the interpretation section so as to avoid the need to reproduce details of the process several times in the Act. The Commission favours the former course.

COMPARABILITY WITH OTHER STATES

The addendum contains a table of comparison with the provisions of the other States.

Virtually all other States require advertising of applications for title by adverse possession, and virtually none impose such a requirement in terms of vesting orders. S.A. and W.A. require advertisement in most of the other instances discussed in this paper but the other three States generally either confer a discretion whether to advertise on the Registrar or require no advertisement as in the case of transmission by death in Victoria and S.A. and the replacement of lost instruments in Victoria.

Accordingly, what is proposed above is reasonably in line with practice in the other States, whereas the present requirements in Queensland are more stringent than in any other State.

COMPARISON WITH SEVERAL OF THE PRINCIPAL CANADIAN JURISDICTIONS

The addendum contains a table of comparison with Ontario, Alberta and British Columbia.

Again it will be noted that the advertising requirements are less extensive than those of Queensland. No advertising is required of transmissions by death or vesting orders; only British Columbia and makes a provision for notice in respect of dispensing with production of an instrument by the Registrar. Ontario does not appear to require advertising in respect of lost instruments.

DRAFT LEGISLATION

This is set out in s.18 of the draft bill.

In connection with the draft bill, attention is drawn to the following cases dealing with ss. 83 and 89 of the Real Property Act 1861-1988.

CASELAW RELATING TO SECTION 83 AND 89 OF THE REAL PROPERTY ACT 1861-1988


One of the cases listed, In re King [1949] Q.W.N. 21, deals with s.83, while the rest concern s.89.
S.89 seems to be a useful safety valve in cases of difficulty (for example, Re Middleton [1974] Qd.R. 211, where the jurisdiction was exercised to avoid inordinate conveyancing costs). However, the court is vigilant to prevent unreasonable use of the section to avoid other procedures (note Andrews J.'s statement in Re Matthews [1972] Q.W.N. 8 to the effect that it is desirable that it is not, in the great majority of cases, to be a way of obviating the need for a grant of representation). Accordingly, the case law does not appear to demonstrate any need for amendment of the provision.

CONSULTATION WITH THE LAW SOCIETY

In relation to advertising there was basic agreement with our approach, particularly in the context of the current attitude of the Titles Office (in mid 1987), but concern that a future Registrar might be too anxious to require advertising. The only way to meet this objection would be to indicate in the legislation that advertising was intended for exceptional cases only. Following very significant changes of personnel at the Titles Office in 1987 and 1988, the Commission is unaware of any furhter expression of this concern.

Accordingly, the phrase in our original draft "if he thinks fit" was replaced with the phrase "if he considers that there is a special reason for doing so".
CHAPTER XI

CAVEATS

A. BACKGROUND TO THE CURRENT RECOMMENDATIONS

The Queensland Torrens System legislation currently employs the caveat procedure in relation to the bringing of land under the system, dealings with land under the system, and the acquisition of title by possession.

In 1982 the Commission circulated its working paper no. 25 which made recommendations, inter alia, in relation to the operation of Caveats against dealings with land under the Real Property Acts. Following the reception given to that paper, the Commission has reconsidered the whole subject of caveats, and the results of that reconsideration are contained in this Chapter. At p.14 of that paper it was stated that the maintenance of an effective system of caveats against dealings is essential to the operation of the Torrens system. Means must be provided to protect unregistered interests. This is achieved under the caveat system by warning persons who are minded to deal with the registered land of the existence of interests asserted by the caveator, and by ensuring that the caveator is notified of any dealings lodged for registration which are inconsistent with the interest he claims.

The areas in relation to caveats dealt with in that working paper were as follows:

(a) Non-lapse of Caveats when proceedings have not resulted in Trial.

(b) The discretion given to the Registrar to refuse to register an instrument while a caveat remains in force, though the caveat expressly states that its registration is not forbidden.

(c) Establishment of a Caveatable Interest.

B. NON-LAPSE OF CAVEATS WHEN PROCEEDINGS HAVE NOT RESULTED IN TRIAL.

Section 98 of the Real Property Act 1861 provides that any person claiming an estate or interest in any land may by a caveat in the prescribed form forbid the registration of any instrument affecting such land estate or interest.
If the person by whom or on whose behalf the caveat was lodged takes proceedings within three months from the date of lodgment in any court of competent jurisdiction to establish his title to the estate or interest specified in the caveat and gives written notice to the Registrar-General, the caveat will not lapse: s.39 of Real Property Act 1877.

Submissions were made to the Reform Commission that in several instances caveats have been lodged and actions taken in the appropriate court, but that these actions have not resulted in a trial for various reasons. The caveator may not be willing to sign a request to remove the caveat, or it may not be possible to trace him or she may have died, or he may take no steps to proceed with the action he has instituted. In these circumstances the authority given to the Registrar by s.102 of the Real Property Act 1861 to cancel a caveat may not be exercisable, because it will not be possible to prove to his satisfaction that the caveator's estate interest or claim has ceased, been abandoned or withdrawn, or that the rights of the persons on whose behalf the caveat was lodged are satisfied or arranged. The caveatee will be able in these circumstances to apply to the Court for an order for removal of the caveat under s.99 of the 1861 Act. It has however been proposed that provision should be made whereby a certificate by the Registrar of the appropriate Court that the action has been finalised or discontinued or no step in the action has been taken for upwards of one year shall be deemed sufficient evidence to satisfy the Registrar-General as required under s.102, and thus enable him to remove a caveat at the request of the registered proprietor.

However, it is felt to be administratively unwieldy to provide for lapse on failure to proceed in an action for a specified time. Such a provision could also be unfair to a party in view of the degree of control of the Court itself of the pace and procedure in an action. It is felt that the problem can be met by the proposal outlined below to enable removal of a caveat on conclusion of such action. This means that a person affected by a caveat can seek to dismiss the action for want of prosecution and, if successful, have the caveat removed in this manner. The rights of any affected third party are felt to be adequately protected by the ability of that party to be joined in the proceedings.

It seems that the problem arises in Queensland because of the different procedure adopted here in relation to the lapse of caveats from that adopted in other States. In New South Wales, caveats (other than those lodged by a settlor, or by or on behalf of a beneficiary under a will or settlement or by the Registrar-General) lapse upon the expiration of fourteen days after notice is given to the caveator that application has been made for registration of a dealing, unless an order to the contrary is made by the Supreme Court (Real Property Act 1900, s.73). It will be observed that in Queensland the caveat will lapse after the specified period unless the caveator takes proceedings, whereas in New South Wales it will lapse fourteen days after notice to the caveator of an application for registration unless the caveator obtains a court order within that period.

In Victoria, caveats other than those lodged by the Registrar, lapse as to any land affected by any transfer or other dealing, with certain specified exceptions, upon the expiration of thirty days after notice given by the
Registrar to the caveator that a transfer or dealing has been lodged for registration. Section 90(2) of the [Transfer of Land Act 1958 provides:

"If before the expiration of the said period of thirty days or such further period as is specified in any order made under this sub-section the caveator or his agent appears before the Court and gives such undertaking or security or lodges such sum as the Court considers sufficient to indemnify every person against any damage that may be sustained by reason of any disposal of the property being delayed, the Court may direct the Registrar to delay registering any dealing with the land for a further period specified in the order or may make such other order (and in either case such order as to costs) as is just."

It appears from a note in Butterworth's Annotations to the New South Wales Statutes that a Practice Note was issued by Street C.J. in 1975 which requires any party (apart from the Crown suing by the Attorney-General) obtaining the benefit of an order under s.73 of the Real Property Act which has the effect of extending a caveat to give to the Court an undertaking as to damages.

The effect of the procedure laid down in the N.S.W. and Victorian Acts is that the caveat will lapse at the end of the specified time unless the caveator applies for an order extending the time; and any such order may be made on terms of an undertaking as to damages. It is suggested that this is preferable to the Queensland procedure, under which the caveat will not lapse if the caveator takes proceedings within the period to establish his title. The Queensland system provides an opportunity for dilatoriness by a caveator which is not available to him in the other States.

The proper function of a caveat is, as Kitto J. remarked in Lams Hed v. Lams Hed (1967) 109 C.L.R. 440 at p.451, to act as 'a statutory injunction which continues in force until the caveat is removed or lapses'. In J. & H. Just (Holdings) Pty. Ltd. v. Bank of New South Wales (1973) 125 C.L.R. 546 at p.552, Barwick C.J. said, in relation to the New South Wales Act, that the purpose of a caveat "is to act as an injunction to the Registrar-General to prevent registration of dealings with the land until notice has been given to the caveator. This enables the caveator to pursue such remedies as he may have against the person lodging the dealings for registration." A caveat is "nothing more than a statutory injunction to keep the property in status quo until the Court has an opportunity of discovering what are the rights of the parties", as Owen J. observed in Re Hitchcock (1900) 17 W.N. N.S.W. 62, at p.63. If a caveat is to act as a statutory injunction, it should be continued only on the terms which are imposed when injunctions are issued.

The caveatee has under the Queensland Act and under the other Acts mentioned a right to apply to the Court to have the caveat removed. For example, the N.S.W. Real Property Act s.97 provides that a person who claims an estate or interest in land described in a caveat may apply to the Supreme Court for an order that the caveat be withdrawn. The Court may make an order for the caveat to be withdrawn within a specified time, and may make such other or further order as it thinks fit. It has been held that the Court has no power, on an application to remove a caveat against dealings, to determine the rights of the parties: Ex parte Muston (1903) 3 S.R. N.S.W. 663. In that case, the order made was that the caveat be removed unless within one
calendar month the caveator served upon the applicants a statement of claim, with leave to the applicants to apply if the caveator did not prosecute such suit. It should be borne in mind that this procedure is a potentially speedy one. Only one clear day is required between the issue of proceedings and the hearing of the application at which the Court may order removal of the caveat forthwith.

It has been held in numerous cases during this decade that an application to remove a caveat s.99 of the Real Property Act of 1861 authorises a requirement that a caveator give an undertaking as to damages as a condition of the continuance of a caveat. For example, in *Re South Brisbane Motors Pty. Ltd.'s Caveat* [1981] Qd.R. 416, Dunn J. ordered that a caveat be removed unless the caveator filed an undertaking as to damages before a specified date, and that if the undertaking was filed, the caveat was not to be removed until the determination of litigation commenced by the caveator. It follows from this decision that if a caveatee acts under s.99 for removal of a caveat, an order may be made requiring an undertaking in damages from the caveator. The Court will also be able to certify the action by the caveator for speedy trial and to order the parties thereto to take all necessary steps in the action as speedily as is reasonably practicable, as was done in *Re South Brisbane Motors Pty. Ltd.'s Caveat*.

However, it does not appear possible in Queensland, as it is in the other States, for such orders to be made unless the caveatee summons the caveator to show cause why the caveat should not be removed. It is suggested that this is an unsatisfactory position. The caveator who has acted to forbid registration of an instrument should be required as a condition for an extension of the non-lapsing period to give an undertaking in damages and to proceed expeditiously with his action to establish his title. It should not be necessary for the caveatee to be put to the trouble and expense of taking proceedings for removal of the caveat to enable such orders to be made.

An amendment to s.39 of the Real Property Act 1877-1988 along the lines of the corresponding legislation in the other States would remove the problem referred to in the submissions. The proposal for removal by the Registrar of Titles upon certification by the Registrar of the appropriate Court would still permit a caveat to prolong the proceedings unduly and thereby hold up the registration of instruments relating to the land, with the consequential possibility of considerable loss to the caveatee. The provision in s.103 of the Real Property Act 1861 whereby compensation may be recoverable for lodging a caveat without reasonable cause has proved not to be a sufficient substitute for an undertaking by the caveator to pay damages sustained by the caveatee.

It is suggested that the problem has arisen basically because in Queensland the provisions relating to the lapse of caveats against dealings have been modelled on those relating to the lapse of caveats against bringing land under the Act, though they serve rather different purposes in the two cases. In the latter case, the function of a caveat is to set a period within which proceedings to establish the caveator's claim must be commenced; it enables him to assert a claim which otherwise would be extinguished when a certificate of title is issued upon bringing land under the Act (unless it is maintained by the indefeasibility provisions of the Act), but restricts the time within which the claim must be pursued. In the former case, its function is to enable the caveator to establish an interest he has claimed
which would be defeated if dealings were lodged for registration which were inconsistent with his interest.

The lodging of a caveat may be destructive of any possibility which the registered proprietor may have of dealing with his land. Nothing operates as effectively as the presence of a caveat in warning off prospective purchasers. The inference might be drawn from this that to allow a caveat to continue, as in New South Wales and Victoria, until a dealing is lodged may be prejudicial to the registered proprietor. It is true that the registered proprietor can act to procure the removal of the caveat under s.99 of the 1861 Act without delay, or he can seek its cancellation by the Registrar of Titles under s.102 of that Act. It is questionable whether that affords sufficient protection to the registered proprietor.

It is suggested that a caveator should not be able to lodge a caveat which will remain, in the absence of court proceedings to have it removed or cancelled, until dealings are lodged which are inconsistent with it. Instead, it could be argued that the caveator should be required to obtain an order from the Court extending the caveat after a short period, unless the caveat is lodged with the consent of the registered proprietor. This is in effect the system applied under the South Australian legislation. However, for the practical reason of eliminating as far as possible the need for court proceedings, it is felt better to deal with this problem by enabling a person prejudicially affected by the caveat, who is dissatisfied with its presence, to serve notice on the caveator requiring court proceedings to maintain it within a short period such as 14 days. This would mean that once such a notice was served the caveator would not have the usual three month period in which to start proceedings.

C. STATUS OF CAVEAT AFTER TRIAL

A related problem is that, as the caveat is preserved from lapse once proceedings have started, it is not automatically removed when proceedings end unless the Court so orders, and it normally does so only on application of one of the parties. This matter is proposed to be dealt with by the inclusion of a provisions in the draft bill to the effect that such a caveat will lapse on the conclusion of proceedings unless the Court otherwise orders.

It should also be borne in mind that currently a caveat is protected from lapse not only where relevant proceedings are commenced in the three months subsequent to lodgment but also where proceedings have been previously commenced, even if they have terminated in establishment of the interest claimed as in Re Dallyn Investments Pty.Ltd. (1987) [O.S. 1024/1987 Townsville]. It was also held in this case that a written letter to the Titles Office which showed that a proceeding to establish the caveator's interest had previously been taken was sufficient to comply with the requirement of written notice in s.39 of the 1877 Act.
D. THE DISCRETION GIVEN TO THE REGISTRAR TO REFUSE TO REGISTER AN INSTRUMENT WHILE A CAVEAT REMAINS IN FORCE, ALTHOUGH THE CAVEAT EXPRESSLY STATES THAT ITS REGISTRATION IS NOT FORBIDDEN.

Section 101 of the 1861 Act provides that so long as any caveat remains in force the Registrar of Titles is not to register any instrument purporting to transfer or otherwise deal with or affect any land estate or interest to which the caveat relates, unless -

(a) in the case of an instrument lodged in the office of the Registrar prior to the date of lodgment of that caveat, that caveat expressly states that registration of that instrument is not forbidden; or

(b) in the case of an instrument lodged with prior or subsequent to the date of lodgment of that caveat, the caveator's consent in writing to the registration of that instrument is lodged with the Registrar; or

(c) in the case of an instrument executed by a mortgagee whose bill of mortgage has been registered prior to the date of lodgment of that caveat, the caveat has been lodged by a person claiming an estate or interest in the land as security for the payment of a loan an annuity or sum of money.

To this there is, however, a proviso, under which, notwithstanding sub-paragraphs (a), (b) and (c), the Registrar may in his discretion refuse to register any instrument referred to in any of those sub-paragraphs so long as that caveat remains in force.

The provision in para.(c) is amply justified in that where a mortgagee exercises the power of sale under the Property Law Act, the rights of the mortgagee are such that the only possible valid claims to hold up the sale by way of caveat would be in respect:

EITHER of allegations that the sale itself was improper in some way;

OR interests having priority to the mortgage.

Accordingly, no caveat lodged in respect of any other interest should be capable of affecting or delaying the sale in any way, for example, a caveat lodged by a purchaser from the mortgagor.

The main objection which has been expressed to the terms of this section is that the existence of the discretion given to the Registrar has the effect that no-one is able to say with certainty whether any instrument to which a caveat relates will be registered if lodged for registration, although the caveat expressly states that its registration is not forbidden. It is said that this has the consequence that dealings which are not within the scope of the caveat will be impeded, since there can be no assurance that the Registrar will register them. A caveator may not wish to impede transactions which will not affect his interests, but the lodgment of the caveat will necessarily have that effect since parties to such transactions will not be prepared to hand over money in exchange for an instrument which the Registrar may in his discretion refuse to register.
In considering this objection, certain matters must be borne in mind. In the first place, the effect of a caveat in the prescribed form lodged under s.98 of the 1861 Act is to forbid the registration of an instrument affecting the land. In this respect, strong contrast is provided by the terms of s.30A of the 1877 Act, where the caveat is against a dealing with the land except subject to an equitable mortgage. (See Bell v. Custom Credit Corporation Ltd. [1976] Qd.R. 57). A caveat lodged under s.30A does not prevent the registration of any instrument, and reciprocally a caveat lodged under s.98 does not merely operate as an encumbrance notified upon the register.

Secondly, the terms of a caveat in the prescribed form under s.98 are to forbid the registration of any instrument affecting "the said estate or interest" described in the caveat (except instruments the registration of which is not forbidden by the caveat). The terms of s.98 are slightly different. What is forbidden is the registration of any instrument affecting "such land, estate or interest". The caveat must state the nature of the estate or interest claimed, and the grounds on which the claim is founded. If the caveat fails to state these matters accurately it is defective and may be removed (In re Powells' Caveat [1966] Q.W.N. 9). In Queensland Estates Pty. Ltd. v. Co-Ownership Land Development Pty. Ltd. [1969] Qd.R. 150 at p.155, the Full Court stated that "a person is given a right to caveat to protect his interest in the land, and the registered proprietor is to be left to deal freely with the remaining interest in the land". On this interpretation, the prohibitory effect of a caveat is limited to instruments which affect the estate or interest claimed by the caveator. This is clearly the position under the N.S.W. provision (s.72(1) of the Real Property Act 1900) which forbids the recording in the register of any dealing affecting the estate or interest specified in the caveat. It is suggested that in any amendment to the provisions relating to the system the opportunity should be taken to make the terms of the Schedule correspond with these in s.98, and to make both of them reflect the intention of the legislation as expressed by the Full Court.

Thirdly, the prohibitory effect of a caveat extends in Queensland to instruments lodged before as well as after the lodgment of the caveat. In this respect, the position in Queensland differs radically from that in the other States. See for example the Victorian Transfer of Land Act 1958 s.91(2): no instrument lodged for registration shall be in any way affected by an caveat lodged at a time later than the lodgment of such instrument : N.S.W. Real Property Act 1900, s.74(2): The provision prohibiting the recording of dealings while a caveat is in force shall not operate to prevent the recording of a dealing which, when the caveat was lodged, has previously been so lodged in registrable form : S.A. Real Property Act 1886-1975, s.191(III): Notwithstanding the receipt of a caveat the Registrar-General shall proceed with and complete the registration of any instrument affecting the said land, which instrument is produced for registration before the receipt of the caveat by the Registrar-General.

In Queensland, where an instrument is lodged prior to the date of lodgment of the caveat, the Registrar must not register it if it purports to deal with or affects an estate or interest to which the caveat relates, unless the caveat expressly states that registration of that instrument is not forbidden, or the caveator's consent in writing to the registration of that instrument is lodged with the Registrar; and in those cases where the
Registrar is not prohibited from registering the instrument, he is given a discretion to refuse to do so.

Before discussing the issue raised by the submission, it is necessary to refer to the more fundamental question as to whether a caveat should have effect in relation to instruments lodged prior to the lodgment of the caveat. The great defect of a system which permits registration to be held up through the lodging of a caveat after the instrument of transfer in registrable form is lodged is that a purchaser who has made payment at the time when the instrument of transfer is handed to him, will find himself in a position where registration of his interest is delayed, and where he may not be able to recover his purchase money from the transferor. It may be argued that it should be the position here, as it is in other States, that if a purchaser makes proper search, received in exchange for the purchase money an instrument in registrable form and lodges it for registration without delay, he should not be affected by caveats lodged thereafter.

In the form in which it stood prior to 1952, s.98 permitted a person claiming an estate or interest in any land by a caveat in Form K to forbid the registration of any instrument affecting such land estate or interest either absolutely or until after notice of intention to register the interest had or until after notice of intention to register had been served. In 1952, s.98 was amended by excepting an instrument the registration of which was stated in the caveat to be thereby not forbidden. At the same time, s.101 was amended by excluding from the prohibition on entering in the register book any instrument purporting to deal with or affect the land estate or interest in respect of which a caveat had been lodged, an instrument the registration of which the caveat expressly stated was thereby not forbidden, but conferring a discretion on the Registrar to refuse to register that instrument so long as the caveat remained in force.

In 1973, the exception in s.98 of an instrument where registration was stated in the caveat to be not forbidden was limited to such an instrument which had been lodged in the office of the Registrar of Titles prior to the caveat, and a new s.101 was inserted. This prohibited registration while a caveat remained in force, with two exceptions: first, in the case of an instrument lodged prior to the date of lodgment of the caveat, the caveat expressly stated that registration of the instrument was not forbidden; or in the case of an instrument lodged prior or subsequent to the date of lodgment of the caveat, the caveator lodged his consent to the registration of the instrument. However, in both these cases, the Registrar was given a discretion to refuse to register an instrument so long as the caveat remained in force. In 1974 s.98 and Form K were amended by omitting the words "either absolutely or until notice of intention to register the instrument had been served". Finally, s.101 was amended in 1979 by adding a third exception, and extending to it the Registrar's discretion to refuse to register an instrument so long as the caveat remained in force.

This record of amendments indicates a progressive refinement of the circumstances in which the Registrar is permitted to register instruments despite the subsistence of a caveat, but discloses at the same time an intention that the Registrar should have a discretion to refuse registration.
In so far as other States do not prohibit the registration of instruments which are lodged for registration before the lodging of a caveat, there is naturally no corresponding discretion accorded to the Registrar. However, in relation to instruments lodged after the caveat, no discretion is accorded in other States to the Registrar. In South Australia, the Registrar is not to register any dealing with the land in respect of which a caveat has been lodged contrary to the requirements of the caveat, but the caveat may forbid registration "either absolutely or unless such dealing shall be expressed to be subject to the claim of the caveator or to any conditions conformable to the law expressed therein." In New South Wales, the Registrar is not to record in the Register any dealing the recording of which is prohibited by the caveat, except with the written consent of a person entitled to withdraw the caveat. In Victoria, the Registrar shall not register any dealing purporting to affect the estate or interest in respect of which the caveat is lodged, except in accordance with some provision of the caveat or with the consent in writing of the caveator.

It is difficult to see any justification for according a discretion to the Registrar to refuse registration where the caveat allows it or the caveator consents to it. The whole point behind a caveat system is to give interim protection to the caveator to prevent his rights being prejudiced by the registration of an instrument until he has been able to invoke the aid of the Court. It seems pointless to give the Registrar an authority in effect to extend that protection beyond the limits required by the caveator himself.

Under the present legislation, if a caveator lodges a caveat, but excepts from it dealings which are not opposed to his interest, there can be no certainty that such dealings will be registered while the caveat remains in force. Moreover, such an exception may be made only in the case of an instrument lodged in the office of the Registrar prior to the date of lodgment of the caveat. It is suggested that, even if Queensland continues to extend the prohibitory effect of a caveat to instruments lodged before the lodging of the caveat, there is no good reason why it should limit the power of a caveator to except dealings to the situation where an instrument has been lodged prior to the date of lodgment of the caveat, or why it should accord to the Registrar any discretion to refuse to register such an instrument while the caveat remains in force.

The Commission feels that it is necessary to retain the ability to caveat so as to prevent registration of an instrument already lodged, in order to cater for cases such as theft of the certificate of title followed by the forgery and lodgment of a transfer.

E. ESTABLISHMENT OF A CAVEATABLE INTEREST

It has been stated in submissions that it is the practice of some purchasers to lodge a caveat although they have no caveatable interest. Where a contract is made subject to finance or to local government approval, the purchaser may have no caveatable interest until the condition of the contract is fulfilled. See, for example, Re Bosca Land Pty. Ltd.'s Caveat [1976] Qd.R. 119; followed in Re C.M. Group Pty. Ltd.'s Caveat [1986] 1 Qd.R. 381 and Re Dimbury Pty. Ltd.'s Caveat [1986] 2 Qd.R. 348, but compare Gasuinas v. Meinhold (1964) 6 F.L.R. 182. It is further stated
that the purpose for which a caveat is lodged by a person without a caveatable interest may be to prevent the vendor from forfeiting the deposit paid under the contract and to operate as a means for obtaining repayment of the deposit or most of it to the caveator. It is then proposed that the caveator should be required to file with the caveat a copy of the contract and other evidence to establish the caveatability of the interest which the caveator has in the land.

Submissions have been received suggesting that the decision in Re Bosca, be reversed, i.e. that conditional contracts be made caveatable. Also, Duncan has argued in an article (The Queensland Lawyer: Vol.9 pp.3-15 Mere Equities, Caveats and Injunctions - A Plea for Rationalisation) that caveatability should be extended to these interests, as well as certain other interests in the nature of 'mere equities'. For the reason stated below in the conclusion, the Commission is most reluctant to tamper with the longstanding definition of a caveatable interest. There is, in any case, a major difficulty in framing legislative provisions to govern a concept as nebulous in some respects as the 'mere equity', which encourages the Commission to the view that the Courts ought to be allowed to develop the law further in these areas.

It is enough under the terms of s.98 of the 1861 Act for the caveator to claim an estate or interest in the land; he does not have to establish that claim. However, s.102 currently authorises the Registrar to cancel a caveat in case he and the Master of Titles shall be satisfied that the nature of the estate interest or claim of the person by whom or on whose behalf the caveat is lodged is not such as to entitle him to prohibit the sale or mortgage or other dealing with the land estate or interest referred to in such caveat. At least seven days before cancelling the caveat, the Registrar must serve notice on the caveator.

The effect of the proposal would be to require the Registrar to make a judgment in every case where a caveat was lodged upon the basis of the supporting documentation as to whether the caveator had a sufficient caveatable interest to support the lodging of the caveat. This would impose a much heavier burden on him than under the present provision. The caveatee may take proceedings under s.99 of the 1861 Act for removal of the caveat. However the Court will not in such summary proceedings decide questions of title to the land or determine the rights of the parties, but it may order removal of the caveat unless the caveator takes action to establish his claim. (See Re Oil Tool Sales Pty. Ltd.; Classified Pre-Mixed Concrete Pty. Ltd.'s Caveat [1966] Q.W.N. 11).

It is not appropriate to invest the Registrar of Titles with power to cancel a caveat except in a case where there is no doubt that the caveator has no right to maintain it.

If a caveator lodges a caveat without reasonable cause, he becomes liable to an action under s.103 of the 1861 Act. There is somewhat of a dearth of reported cases dealing with the question of damages for lodging a caveat without reasonable cause.

In Kahu Valley Railway Co. v. Kauri Timber Co. (1889) 11 N.Z.L.R. 403, the basis of the decision seems to be that there was an onus on the plaintiff, which had not been discharged, even though the court separately
ordered removal of the caveat. As the judgment of Connolly J. is short, nothing further can be divined from it. However, the decision does prompt the thought that the position of those afflicted by caveats would possibly be fundamentally improved by the simple step of reversing the onus of proof, so that damages would be awarded unless the caveator, could establish reasonable grounds for lodging the caveat.

There was a similar outcome in Whawhara Haimona v. Casey [1922] 41 N.Z.L.R. 455. Here it was understandable in that the caveator has succeeded in an action for specific performance of a contract at first instance and lost on appeal only on the grounds of delay in bringing the action.

Whalan also cites Lachagne v. Broughton (1903) 3 S.R. (N.S.W.) 475 on this issue, but it is a case on the slightly different question of damages for wrongfully seeking to bring land under the Real Property Acts, and the plaintiff was again unsuccessful for failing to adequately establish the claim, so that the case does not cast much light on this question.

The plaintiff did succeed in Young v. Rydalmere Credits Pty.Ltd. (1964) 80 W.N. (N.S.W.) 1463, where it was held that merely holding a caveatable interest was not conclusive in defeating a claim for damages (at p.1472). It was held that the determination of whether there was "reasonable cause" required an examination of the circumstances, both at and before the time of lodging (at p. 1473). The court did not determine whether "maintaining" a caveat on the register without reasonable cause was sufficient (at p.1473). The Court also took a wide view of the class of persons who could be compensated under this provision (at p.1472). The Court found (see p.1471) that the defendant had lodged the caveat in order to bring about a situation where greater profit would accrue to it, feeling that this was not a reasonable cause, particularly as no consideration had been given to the position of the plaintiff (see p. 1470). The case is bedevilled by difficulty owing to counsel for one of the parties being a potential witness, the court commenting unfavourably on his continuance as counsel in these circumstances and his failure to be called as a witness (see pp. 1469-70).

In Hamburger v. Chappelow (1886) 2 W.N. (N.S.W.) 56, a jury had awarded nominal damages, the appellate tribunal refused to interfere with this on general principles.

In Bedford Properties Pty.Ltd. v. Surgo Pty.Ltd. [1981] 1 N.S.W.L.R. 106 it was held that failure to establish a caveatable interest did not automatically mean the caveat was lodged without reasonable cause. An honest belief on reasonable grounds that the caveator has such an interest could be sufficient.

The common belief that success under s.103 is very difficult, appears to have led to claims being rare, even though applications to remove caveats are common, see for example Re Stewart Fitzsimmons Projects Pty.Ltd's Caveat [1976] Qd.R. 187. Accordingly the Commission recommends the strengthening of s.103, by reversing the onus of proof, this being more comparable with the usual situation where an interlocutory injunction is granted, the plaintiff becoming liable on an undertaking in damages if ultimate success in the action is not achieved. The Commission also
believes that liability should equally attach to unreasonable failure to withdraw a caveat as to unreasonable lodgment.

If the caveat is not defective on its face, or otherwise plainly insupportable, it is suggested that the caveator's claim should be determined in proceedings to remove the caveat or in proceedings to establish the caveator's title, and that it should not be determined by the Registrar. It is appropriate in this regard to refer to s.89A of the Victorian Transfer of Land Act 1958, inserted by the Transfer of Land (Removal of Caveats) Act 1965. This provides:

"(1) Any person interested in land affected by a caveat not being a caveat lodged by the Registrar may make application in writing to the Registrar to cancel the memorandum of such caveat ...

(2) Every such application shall be accompanied by a certificate signed by a person for the time being practising as a barrister or a solicitor, or as a barrister and solicitor, of the Supreme Court of Victoria referring to the caveat and stating his belief that the caveator never had an enforceable right to the estate or interest claimed in the caveat or that the estate or interest so claimed has ceased to exist.

(3) Upon receiving any such application and certificate the Registrar shall forthwith give notice to the caveator requiring that the caveat be withdrawn or that proceedings be commenced in the court to substantiate the claim of the caveator.

(4) If within thirty days after the date of the notice given by Registrar under the last preceding sub-section the caveat has not been withdrawn or notice in writing has not been given to the Registrar that proceedings have been commenced in the court as aforesaid, the Registrar shall cancel the said memorandum."

This is a preferable procedure in some respects to that proposed in the submission or contained in s.102 of the Queensland Act. It relieves the Registrar of the burden of checking the relevant documentation whenever a caveat is lodged, and does not confer upon him any authority to decide whether or not a caveat has the estate or interest claimed. It may, however, be a costly procedure for the caveatee to follow. This is an important consideration in deciding on a summary procedure to be followed where what is in issue essentially is the cancellation of caveats which lack any justification.

Section 73A of the N.S.W. Real Property Act 1900 provides that where it appears to the Registrar-General that the estate or interest claimed by any caveator does not exist he may, on the application of any person interested in the land, estate or interest in respect to which the caveat is lodged, serve notice on the caveator requiring him within fourteen days from the date of service of the notice to show cause to the Registrar-General why the caveat should not be removed. Unless within that time the caveator so shows cause to the satisfaction of the Registrar-General, the caveat shall be deemed to have lapsed. This is similar to s.102 of the Queensland Real Property Act 1861-1888, though the latter gives a wider power to the Registrar to cancel a caveat.
A different procedure is contained in s.191 (v), (vi) and (vii) of the South Australian Real Property Act 1886-1975. Except where the caveat is lodged by a settlor, or by a beneficiary under a will or settlement or by the Registrar, the caveatee may apply in writing to the Registrar to remove the caveat. The Registrar is thereupon required to give 21 days notice in writing to the caveator, requiring the caveat to be withdrawn. The Registrar is required to remove the caveat after the lapse of 21 days, or such extended time as may be ordered by the Court. Under this procedure, a caveat (with the three exceptions mentioned) will lapse within a short period if the caveatee applies for its removal, unless the Court extends the time. In addition, the caveatee may apply to the Court at any time to have the caveat removed, and the Court may make such order as shall seem just: s.191(iv). The South Australian System ensures removal of the caveat within a short period on the application of the caveatee unless the caveator obtains an extension from the Court, and permits its removal without delay if the Court so orders on the application of the caveatee.

In New South Wales and Victoria, a caveat lapses after a specified time after notice has been served on the caveator that a dealing prohibited by the caveat has been lodged for registration, unless the Court makes an order to the contrary. The caveat may be removed by order of the Court, or it may be removed by the Registrar in New South Wales in the circumstances set out in s.73A, or cancelled by the Registrar in the circumstances set out in Vic. s.89A. In South Australia, the caveat does not lapse but it may be removed after the expiration of 21 days whether or not any dealings have been lodged for registration, unless the Court extends the time. The proposals made here for amendment of s.39 of the Real Property Act of 1877 are modelled on those in the South Australian Act, but are simplified.

It is suggested that the authority accorded to the Registrar of Titles is valuable as a means to enable stale caveats to be cancelled, as well as caveats where there is no doubt that no valid ground existed for the lodging of a caveat or where the caveator's interest has ceased or been satisfied. It is in effect a summary jurisdiction to be exercised only in a clear case, which otherwise might require the caveatee to go to the trouble and expense of proceedings for removal of the caveat. In its present form, s.102 of the 1861 Act seems essentially satisfactory, and the only recommendations made for its amendment, are those necessary to accord with the changes to the other provisions. It is anticipated that if the amendment which it is suggested should be made to s.39 of the Real Property Act of 1877 is implemented, little use will need to be made of s.102 of the 1861 Act. However, it is understood that Registrar have hitherto been reluctant to make much use of s.102.

These recommendations are given effect in the accompanying draft bill.

F. OTHER MATTERS RAISED IN SUBMISSIONS

A number of other matters relating to caveats have been raised with the Commission either by way of formal submission or informally. Of these, the main issue not addressed by our proposals is the suggestion that there should be a special form of caveat for purchasers, which would be easier and less expensive to lodge and remove than the normal form of caveat against dealings. The possibilities range from a provision analogous to s.74 of the
Property Law Act 1974-1988 to a simple procedure of formally advising of settlement of a purchase, so as to protect the purchaser during the interim period between settlement and lodging of the transfer or registration of the purchaser. The Commission felt unable to accede to this form of proposal, on the grounds that it would significantly complicate the procedure of registration, without furnishing sufficient compensation by way of benefit. It is felt that the potential for problems arising between settlement and registration is being greatly diminished by the institution of the unregistered dealings system (URDS) and concomitant ability to obtain an up to the minute check search shortly before settlement.

There appears to be some dissatisfaction with the procedures for removal of spent caveats. The need for a lapsing fee to be paid can give rise to friction over such matters as to who is to meet the payment in a conveying transaction. Also, the concern mentioned above as to whether the Registrar will be prepared to allow a caveat to lapse, for a minor fee, may result in a party having to procure withdrawal of a caveat at much greater expense. In view of the undoubted fact that virtually all caveats are ultimately withdrawn, ordered to be removed or lapse, the procedure might be more efficient if the fees for this were withdrawn. If it were desired to recoup the consequent loss of revenue this could be done by suitable adjustment of the fee payable on lodging of a caveat. In order to try and alleviate this problem the Commission proposes a new subsection, s.88(4), removing the need for a request to lapse as a prerequisite to action by the Registrar.

A submission was also made that where a proprietor's title is subject to a registered mortgage, the mortgagee should also have to consent to the lodging of a caveat which is to be lodged with the registered proprietor's consent. It was alleged that without this amendment, scope existed for collusion between the proprietor and a caveator in delaying the mortgagees exercise of the power of sale. While there is an argument for a mortgagee to have to consent to a step of this nature since it affects the mortgagee's rights, although the new formulation, that a caveat is not to prevent registration of a transfer which does not affect the interest held by the caveator may alleviate this problem to some extent. There is no real guidance in this matter form the provisions of other States, since they do not employ the three month lapsing arrangement in respect of caveats against dealings. In view of the major invasion of the rights of the mortgagor involved in such a change, the speed with which an unmeritorious caveat may be removed, and the proposed facilitation of recovery of damages for the lodging of a caveat, the Commission is not disposed to endorse this proposal.

G. CONCLUSION

There have for a considerable time been two main areas which give rise to a large amount of litigation concerning caveats, namely, the question of what is a caveatable interest (see, for example, Ex p. Goodlet & Smith Investments Pty.Ltd. [1983] 2 Qd.R. 792; Ex p. Lord [1985] 2 Qd.R. 198; Re Dimbury Pty.Ltd.'s Caveat [1986] 2 Qd.R. 348), and attempts to remove caveats. The two areas are linked in that demonstrating the lack of a caveatable interest will result in success in an action for removal of a caveat.
The large amount of litigation in the former area is probably inevitable, since whatever the definition of a caveatable interest there will always be the possibility of cases falling close to the borderline. As the current definition of a caveatable interest is logical and succinct, the Commission does not believe that any improvement can be made. One factor in reinforcing this view is that no amendment can be made to the current definition without making it much more complex. It is best to allow the courts to continue their work of interpreting this longstanding definition.

With regard to the latter area, it is believed that implementation of the Commission's recommendations will greatly reduce the number of "nuisance" caveats lodged and thus greatly reduce the need for litigation in this area. The Commission also feels that the Courts approach to such actions has been logical and appropriate, so that there is no need to seek to modify it by legislation.

The Commission considered stipulating in the legislation that an undertaking in damages should be required of a caveator as a condition of allowing it to continue on the register at the expiration of the lapsing periods. However, it was ultimately felt unnecessary to include such a provision as the Court has inherent jurisdiction to require such an undertaking which it regularly exercises as in *Re South Brisbane Motors Pty. Ltd.'s Caveat [1981] Qd.R.416*. In *Re Jorss' Caveat [1982] Qd.R.458*, the considerations governing removal of a caveat on application were equated to those governing the grant of interlocutory injunctions, where undertakings as to damages are a concomitant.

One matter that should be borne in mind is that lodgment of a caveat is by no means the only method of "freezing" real property. (See paper by M.P. Newell: "Freezing" of Real Property delivered to Qld. Law. Soc. CLE seminar 18 April 1988).
CHAPTER XII

WRITS OF EXECUTION

A. BACKGROUND TO THE CURRENT RECOMMENDATIONS

The Queensland Torrens System legislation currently employs a procedure whereby a writ of execution issued in pursuance of a judgment may be produced to the Registrar for its particulars to be recorded in the Register. Until this is done it has no effect to bind or affect the land of the judgment debtor. All this is governed by s.91 of the Real Property Act 1861-1988.

In 1982 the Commission circulated its Working Paper no. 25 which made recommendations, inter alia, in relation to the operation of writs of execution against land under the Real Property Acts. Following the reception given to that paper, the Commission has reconsidered the whole subject of writs of execution, and the results of that reconsideration are contained in this Chapter.

A consideration of this matter inevitably tends to open up for discussion wider questions as to the most desirable method of providing for the enforcement of a judgment against the land of a judgment debtor. For example, in England enforcement of judgments against land, apart from cases of bankruptcy, is by way of registration of a charging order, there being no provision for a Sheriff's sale of real property. [For the details of this procedure see Halsbury's Laws of England, Vol.17, Paras.547-554, and Administration of Justice Act 1956 (U.K.) s.35]. However, the Commission has been mindful of the fact that another of the subjects included in its Third Programme is the general subject of execution of judgments. Consequently, it has confined its deliberations and recommendations to matters strictly relating to the accommodation of the current system of enforcement of judgments against land within the Real Property Acts.

The leading Queensland case dealing with s.91 is Day v. General Credits Ltd. [1981] Qd.R.115. This case and the other relevant cases was analysed in detail in the Commission's 1982 Working Paper. As there appear to have been no significant developments since that time, the Commission has approached this matter on the basis of a reconsideration of the recommendations contained in that paper in the light of its reception, and does not reproduce the detailed analysis of the 1982 Working Paper in this Chapter.

The principal difficulty in the current operation of these provisions is that the period of three months is too short for a Sheriff's sale to be effected in most cases. After consideration of information received from the Sheriff's office, it is proposed that the period be extended from three months to six months.
Another difficulty, alluded to in the earlier paper is that the requirement that the writ be "executed and put in force" is unsatisfactory in that it has been held to mean merely that the sale be effected in that time, and not that it be registered. This would give rise to difficulty where the sale took place within the period (of three months) but registration did not. Accordingly, it is recommended that the requirement be replaced by a requirement that the transfer by the Sheriff be lodged for registration within that time. Also the Court should have power to extend the time limit on application, in order to be able to deal satisfactorily with any unusual delays in a particular case.

Another problem is that Sheriff's sale have to be "kerbside" sales, without vacant possession, since the Sheriff has no power to obtain possession of the property or to enter it to enable purchasers to inspect. Consequently, effective sale is rare, and the main effect of a writ of execution is a coercive one, in that the debtor will pay to debt so as to remove the obstacle that a writ of execution presents to the debtor's ability to deal with the property. This problem could be rectified by conferring on the Sheriff some or all of the powers of sale of a mortgagee under the Property Law Act. (Attention has been drawn to these problems in a recent paper of the Law Reform Commission of Victoria.)

The former uncertainty as to the date at which a writ of execution began to bind the land has been resolved by the amendment of s.91 in 1986 (by the Real Property Acts and Other Acts Amendment Act 1986).

It is necessary in the consolidation to incorporate the provisions of s.35 of the 1877 Act with those of s.91 of the 1861 Act. Section 35 was inserted in the 1877 Act because the 1861 Act originally "provided no means by which the sheriff, on a sale of land under a fi fa, could execute an effectual transfer to the purchaser from him". (See Bond v. McClay [1903] St.R.Qd.1 at p.9). The section provided accordingly that whenever land under the Act is sold under a writ of execution registered under s.91 of the 1861 Act, the sheriff was to execute a transfer to the purchaser in form 1 of the schedule. The section provided further that "such transfer shall be subject to equitable mortgages and liens notified by any caveat lodged with the Registrar prior to the date of the registration of the writ of execution and to all other encumbrances liens and interests notified by memorandum entered on the register and the Registrar should on receiving such transfer make an entry thereof in the register book and on the making of such entry the purchaser should subject as aforesaid be deemed the transferee or owner of such land estate interest or security.

One submission suggested that this provision should be amended so as to clarify the position in relation to the priority to be accorded to equitable mortgages notified by a later caveat and to other unregistered dealings created prior to the lodging of the writ. In Bond v. McClay, the Court observed (at p.11) that "the sheriff has not by virtue of s.35 any greater power than the execution debtor would, but for the writ, have had at the same moment. It follows that if there are two instruments in existence, one executed by the debtor before the registration of the writ, and the other executed by the Sheriff during the prescribed period, these instruments are entitled to registration according to the dates of their production as prescribed by s.14 of the Act of 1877".
The effect of s.91 of the Act of 1861 is to make defeasible dealings by the judgment debtor during the prescribed period following lodgment of the writ of execution. It does not affect in any way the validity or effectiveness of dealings he may have made before lodgment of the writ of execution. Accordingly, unregistered dealings created prior to the lodgment of the writ will, in any competition with unregistered dealings created by a sale by the Sheriff, be in no different position from such dealings in competition with subsequent unregistered dealings created by the judgment debtor himself. It is suggested that the position is the same in relation to equitable mortgages created pursuant to s.30 of the Act of 1877 where no caveat is lodged. The only peculiarity in relation to equitable mortgages is that the mortgagee may lodge a caveat under s.30A against any dealing with the land except subject to his equitable mortgage. In Bond v. McClay the Court expressed no opinion on the effect of equitable mortgages not notified by caveat lodged before the entry of the memorial of the writ of fi fa; nor did it refer to the effect of lodgment of a caveat after that date. There does not appear to be any solid reason why the mortgagee should not be able to lodge such a caveat after lodgment of a writ of execution.

Section 91 of the Act of 1861 does not operate to make defeasible any actions by the mortgagee, and his rights should be exercisable whether a dealing is made by the judgment debtor or the Sheriff. But the terms of s.35 of the Act of 1877 suggest that the purchaser under a transfer from the Sheriff is subject to an equitable mortgage only if notified by a caveat lodged prior to the date of registration of the writ of execution. It has been suggested that the second clause of s.35 should be deleted. The consequences of a transfer by the Sheriff would then be the same as where the transfer is made by the judgment debtor. Section 35 would then operate to empower the Sheriff to execute a transfer. The effect of lodging a writ of execution and the period for which the land is bound would be specified as in s.91 of the 1861 Act. The provisions relating to unregistered interests, caveats by equitable mortgagees and interests notified in the register book which affect transfereses will apply equally whether a transfer is made by the sheriff or by the registered proprietor.

However, the Commission has taken the view that in consolidating these provisions in the new s.82, it is preferable to adopt a clear statement in s.82(8) as to which interests bind a purchaser from the Sheriff, in order to facilitate such sales.
CHAPTER XIII

COMPUTERISATION

This is apparently proceeding reasonably smoothly, with the Unregistered Dealings System (URDS), in operation since March 1987, subject to difficulties arising from staff shortages caused by the budgetary situation. This system retains records of any unrecorded transactions lodged within the previous ninety days, and is up to the minute in accuracy since a transaction is entered on the system by the receiving clerk when the relevant documents are lodged. It enables the original search on behalf of a purchaser to be updated just before settlement by a check search at the modest fee of $1, provided a full search, for which the fee is $5, has been carried out earlier.

This substantially reduces the risk element in conveyancing, although it does not entirely eliminate it as do the Tasmanian and English systems of priority notices and priority searches respectively. There is a risk, as with all computer systems, of the check search facility being unavailable through computer malfunction. While the reliability of the system means that this is rare, there is an element of back-up in that 24 hours after data relating to unrecorded transactions is captured in the system at lodgement of the relevant documents, it appears in the form of an entry in a journal which the computer produces in printed form.

The replacement of the system of bound folios by the a loose leaf system combined with the issue of a copy of the relevant entries as a certificate of title on the registration of every transfer, microfilming of documents and the computerisation of the index of proprietors is proceeding apace.

On the more general issue of land information systems the situation is more ambivalent. Major progress to date has been the general adoption of a lot on plan identifier of general government purposes, and increasing co-operation between the Titles Office and the Valuer-General's Department. On the other hand the Land Information System Steering Committee was recommended for abolition in the Public Sector Review which recently took place. In the background there is competition between the surveyors and Titles Office for the right to the last word on the accuracy and acceptability of plans submitted for registration.

Since the 1986 amendments paved the way for computerisation in the legislative sense, there remains no significant need to amend the Real Property Acts on account of computerisation.
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FIRST SCHEDULE
SECOND SCHEDULE
THIRD SCHEDULE
FOURTH SCHEDULE
A BILL To consolidate and amend the Real Property Act 1861-1988, the Real Property Act 1877-1988 and other specified Acts to make other amendments and for related purposes

BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled and by the authority of the same as follows:-

PART I - PRELIMINARY

1. Short title. [Qld. s.2.]

This Act may be cited as the Real Property Act 19.

2. Commencement. [Qld. s.2.]

(1) Part I shall commence on the day this Act is assented to for and on behalf of Her Majesty.

(2) Except as provided by subsection (1), provisions of this Act shall commence on such date or dates appointed in respect of particular provisions by Proclamation.

3. Application.

Subject to the provisions of this Act and the Crown Proceedings Act 1980, this Act binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.


(1) This Act is divided into Parts as follows:-

   PART I - PRELIMINARY (ss.1-7);
   PART II - ADMINISTRATION (ss.8-21);
   PART III - THE REGISTER (ss.22-27)
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SCHEDULE 1

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SCHEDULE 3

SCHEDULE 4

(2) In this Act the abbreviations used in references to other Acts in the notes to sections appearing at the beginning of sections have the following meanings:

Cth. - Acts Interpretation Act 1901 (Commonwealth);

PLA - Property Law Act 1974-1986;

Qld. - Real Property Act 1861-1988;

Qld. 1877 - Real Property Act 1877-1988;

Qld. 1884 - Registrar of Titles Act of 1884;

Qld. 1887 - Real Property (Local Registries) Act 1887-1986;

Qld. 1924 - Real Property (Commonwealth Titles) Act 1924-1986;

Qld. 1929 - Real Property (Commonwealth Defence Notification) Act 1929-1986;

Qld. 1976 - Real Property Act Amendment Act 1976;

ACT - Australian Capital Territory

NSW - Real Property Act 1900 (New South Wales)

S.A. - Real Property Act 1886-1975 (South Australia)

Tas. C&LA - Conveyancing and Law of Property Act 1884 (Tasmania)


W.A. - Property Law Act 1969 (Western Australia).

5. Repeals, amendments, savings and transitional.

(1) Subject to the savings and transitional provisions in Part III of the First Schedule, the Acts specified in Part I of the First Schedule are repealed to the extent therein specified.
(2) The Acts specified in Part II of the First Schedule are amended to the extent therein specified.

(3) An Act specified in the First Schedule and so amended may be cited as indicated in the First Schedule.

6. Definitions. [Qld. s.3; Qld. 1877, s.3; Qld. 1887, s.2; Qld. 1924, s.2; Qld. 1929, s.2; Qld. 1976, s.3; Land Act 1962-1988, s.6(1); Cth.]

(1) In this Act, including this section, and in all instruments purporting to be made or executed thereunder, unless the contrary intention appears-

"attorney" means the donee of a power of attorney of which particulars are registered;

"bankruptcy" includes any act or proceeding in law having under any Act or Commonwealth Act effects or results similar to those of bankruptcy, and includes the winding up of an insolvent company; and "bankrupt" has a meaning corresponding to that of bankruptcy;

"bill of mortgage" means an instrument in the prescribed form executed by an intending mortgagor with a view to creating a mortgage;

"caveatee" includes-

(a) a registered proprietor of land in respect of which a caveat is registered;

(b) a person interested presently or prospectively in land, or in or under any instrument affecting land-
   (i) whose right to deal with that interest or to have any entry registered in respect of it is forbidden by a caveat; or
   (ii) who is otherwise prejudicially affected by a caveat.

"caveator" means the person lodging or on whose behalf there is lodged for registration a caveat pursuant to this or any other Act;

"central district" means that part of the State of Queensland comprised within the boundaries described in Part I of the Second Schedule to this Act;

"certificate of title" means an instrument evidencing the estate in fee simple or other estate or interest in any land executed by or on behalf of the Registrar;

"Commonwealth land" means any land which, having, whether before or after the passing of this Act, become vested-
   (a) in the Commonwealth, pursuant to the Constitution; or
   (b) in the Commonwealth or in any Commonwealth authority by, or by virtue of a law of the Commonwealth;
is for the time being vested in the Commonwealth or a Commonwealth authority;

"Commonwealth Attorney-General" means the Attorney-General of the Commonwealth, or any person duly exercising the powers and functions of the Attorney-General of the Commonwealth;

"Commonwealth authority" means any authority established by or under a law of the Commonwealth;

"Constitution" means the Constitution of the Commonwealth;

"conveyance" includes a transfer, and any assignment, appointment, lease, settlement, or other assurance in writing of land;

"Court" means the Supreme Court of Queensland or a Judge of the Court;

"Crown" means the Crown in right of the State of Queensland, and includes a corporation representing the Crown;

"deed" includes an instrument having under this or any other Act the effect of a deed;

"Defence Proclamation" means any Proclamation or like instrument made or purporting to be made under the provisions of section one hundred and twenty-four of the Defence Act 1903-1927 of the Commonwealth and any Act in amendment or substitution therefor;

"Deputy Registrar" means a Deputy Registrar of Titles appointed under this Act;

"disability" means infancy and disability arising by reason of mental disorder

"disposition" includes a conveyance, vesting instrument, declaration of trust, nomination of trustees, disclaimer, release and every other assurance of property by an instrument except a will, but including a release, devise, bequest, or an appointment of property contained in a will;

"encroachment" has the meaning assigned to it by Part XI of the Property Law Act 1974-1986;

"grant" means the original grant of land of the Crown;

"grant of representation" means a grant of probate of the will or letters of administration of the estate of a deceased person and includes the grant of an order to administer and the filing of an election to administer such estate by a trust corporation;

"instrument" includes any grant, certificate of title, conveyance, assurance, deed, will, probate or exemplification of will, grant of representation or any other document in writing relating to the transfer or other dealing with land and any map or plan produced to the Registrar;
"interest" includes the interest of a mortgagee under a mortgage of registered land;

"land" (a) includes any estate or interest in land; and
(b) unless excepted-
(i) extends to messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description; and
(ii) all paths, passages, ways, waters, water courses, liberties, privileges, easements, plantations, gardens, mines, minerals and quarries, trees and timber, in on or under land; and
(c) includes a lot within the meaning of the Building Units and Group Titles Act 1980-1988;

"lease" includes demise, tenancy and sub-lease, whether for a term, for a period, or at will;

"local authority" means a local authority and a joint local authority constituted under the Local Government Act 1936-1987, and includes the Brisbane City Council constituted under the City of Brisbane Act 1924-1987;

"Local Registrar" means a Local Deputy Registrar of Titles appointed under this Act;

"lodged" means lodged in the office or produced to the Registrar;

"mentally disordered person" means a person who is a patient within the meaning of the Mental Health Services Act 1974-84;

"minor" means a person not of full age;

"mortgage" means any charge on land created under or in accordance with the provisions of this Act for securing:-
(a) the repayment of a loan or the satisfaction of an existing debt;
(b) the repayment of future advances or the payment or satisfaction of any future or unascertained debt or liability contingent or otherwise;
(c) the payment to the holders for the time being of any bonds, debentures, bills of exchange, promissory notes or other securities, negotiable or otherwise, made or issued before or after the creation of that charge;
(d) the payment to any person or persons by yearly or periodical payments or otherwise of any annuity, rent-charge or sum of money other than a debt;

"mortgagee" means the person having or intended to have the benefit of a mortgage;

"mortgagor" means the proprietor, other than a mortgagee, of land that is or is intended to be made the subject of a mortgage;

"nomination of trustees" means an instrument executed pursuant to this Act nominating any persons to be trustees of land;
"northern district" means that part of the State of Queensland comprised within the boundaries described in Part II of the Second Schedule to this Act;

"office" means office of the Registrar as defined by section 9;

"order" means a judgment or order of a court;

"personal representative" means the executor, original or by representation, or administrator of a deceased person, or trust corporation acting as such;

"possession" in relation to land, includes the receipt of income from the land;

"produced" includes lodged and means produced to the office of the Registrar;

"proprietor" means a person entitled to an estate or interest in land whether in possession or otherwise and includes any person entitled to a mortgage;

"Public Trustee" means the Public Trustee of Queensland constituted by the Public Trustee Act 1978-1988;

"purchaser" includes a lessee, mortgagee, or other person who acquires an interest in land;

"Register" means the Register maintained by the Registrar in accordance with this Act;

"register" means recording, by or with the authority of the Registrar, in the Register, particulars of land, an instrument or other matter provided for by this or any other Act;

"registered land" means land under the provisions of this Act;

"registered proprietor" means a person registered, whether or not for value, as proprietor of land, and, where more than one person is registered as proprietor, all such proprietors;

"Registrar" means the Registrar of Titles appointed under this Act;

"sale" means only a sale properly so called;

"term" when used in relation to a lease means the period of time from the moment at which the lessee is first entitled to enter into possession under the lease until the moment at which the lessee is last entitled to possession under the lease, notwithstanding that the lease may consist of two or more discontinuous periods;

"timesharing scheme" means a scheme under which participants are intended to have exclusive possession or occupation of land for one or more discontinuous periods of time;
"transfer" means the passing of any estate or interest in registered land, including the creation of an estate or interest, whether or not for valuable consideration;

"transmission" means the acquisition of title to or an interest in land consequent on the death, insolvency or bankruptcy of a proprietor;

"trust corporation" means the Public Trustee and any corporation authorized by the Trustee Companies Act 1968-1984 to administer the estates of deceased persons and other trust estates;

"will" includes codicil.

7. **Interpretation and Notices.** [Qld. s.3; PLA s.257.]

(1) Unless the contrary intention appears, a reference in this Act or in the regulations or in any instrument made or purporting to be made under or with reference to this Act to-

(a) a person as proprietor, transferor, transferee, mortgagor, mortgagee, lessor, lessee, or trustee, or as having any estate or interest in any land includes the heirs, personal representatives and assigns of such person;

(b) a term of years less than or not exceeding any specific number of years includes references to lesser leasehold estates of periodic tenancies for any recognised period, and tenancies at will.

(c) a request, application, certificate, direction, memorandum of transfer or other instrument means a request, application, certificate, direction or other instrument, in the form prescribed.

(d) a duplicate of a document means a reference to a copy of a document forming part of the Register, that is delivered or intended to be delivered to a registered proprietor of the estate or interest to which the document relates.

(2) Unless the contrary intention appears, a reference in this Act to the doing of an act by, the imposition of a requirement upon, or service of any document upon, by any person includes the doing of that act by, the imposition of the requirement or the service of the notice upon-

(a) where that person is dead, his personal representative, or where the estate or interest was held by a joint tenant, the surviving joint tenant or the personal representative of the last surviving joint tenant;

(b) a person in whom the estate or interest involved has vested under a law relating to bankruptcy or to companies;

(c) the person by law entrusted with the management and care of the estate or interest of a mentally disordered person;

(d) his attorney appointed in accordance with Part XIV;

(e) excepting the case of the execution of a transfer, his solicitor.

(3) For the purposes of this Act, in addition to any other method of service stipulated, a notice may be effected by complying with the provisions of s.257 of the Property Law Act 1974-1986.
(4) In this Act and in the regulations, unless a contrary intention appears, where a word or phrase is given a particular meaning, other parts of speech and grammatical forms of that word or phrase have corresponding meanings.

PART II - ADMINISTRATION

8. Registrar of Titles. [Qld. ss.4,5; Registrar of Titles Act of 1884; Vic. s.5.]

(1) The Governor in Council may by commission appoint—
   (a) a Registrar of Titles who shall—
       (i) have charge and control of the office; and
       (ii) perform the duties imposed by or under this or any other Act; and
       (iii) give effect to the provisions of this Act;
   (b) one or more persons to be Deputy Registrar of Titles, and, if more than one a Senior Deputy Registrar of Titles;
   (c) such other persons to such positions as may be required for the efficient discharge of the functions and duties of the office and of the Registrar.

(2) The powers, authorities, functions and duties of the Registrar may be exercised and performed by a Deputy Registrar.

9. Office of the Registrar. [Qld. s.4; Qld. 1887.]

(1) The office of the Registrar at Brisbane shall be the office authorized to give effect to the provisions of this Act.

(2) The branches of the office established at Rockhampton and Townsville shall be offices authorized to give effect to the provisions of this Act so far as they relate to land within the Central District and the Northern District respectively.

(3) The Governor in Council may by regulation establish sub-branches of the office at any place in the State to transact such classes of business as may be prescribed by such regulation.
10. **Deputy Registrars.** [Qld. 1887.]

(1) The Governor in Council may by commission appoint one or more person or persons to be—
   (a) Deputy Registrar of Titles;
   (b) Deputy Registrar of Titles for the Central District; and
   (c) Deputy Registrar of Titles for the Northern District.

(2) The powers, authorities, duties and functions of the Registrar may—
   (a) so far as they relate to land within the Central District and the Northern District; and
   (b) subject to any direction of the Registrar—

be exercised and performed by the Local Deputy Registrars for such Districts respectively.

11. **Power to delegate.** [Qld. s.11.]

(1) The Registrar may—
   (a) in relation to any particular matter or class of matters; or
   (b) to any particular district—

by writing under his seal, delegate to an officer employed in the office any functions, powers and duties under this Act, including the power of delegation conferred by this subsection.

(2) Every delegation under this section may be—
   (a) subject to conditions;
   (b) shall be revocable at will; and
   (c) shall not affect the exercise of any power by the Registrar.

12. **Oaths of office.** [Qld. s.6.]

Before entering upon his duties, the following oath shall be taken before by every Registrar, Deputy Registrar and Local Deputy Registrar.

I A.B. do solemnly swear that I will faithfully and to the best of my ability execute and perform the office and duties of Registrar of Titles [or Deputy Registrar of Titles or Local Deputy Registrar of Titles] for the State of Queensland according to the provisions of the *Real Property Act 19* as amended from time to time. So help me God.

13. **Seals of office.** [Qld. s.8; Qld. 1887.]

(1) The Registrar shall have and use a seal of office bearing the impression of the Arms of the State of Queensland and having inscribed in the margin thereof the words "Registrar of Titles, Queensland".

(2) Each Local Registrar shall have and use a seal of office, which shall be the same as that of the Registrar except that the words "Central District
Registry" or "Northern District Registry", as the case may be, shall also be inscribed in their respective margins.

(3) The imprint of the seal shall be valid whether made in wax, ink or other substance.

14. Prescribed forms of instruments, etc. [Qld. s.10, s.110, s.120.]

(1) The Governor in Council may from time to time make regulations prescribing the forms of instruments, plans or other documents that may be lodged or issued by the Registrar, and the manner of their lodgment.

(2) An instrument lodged by any person or issued by the Registrar shall be in the prescribed form but the Registrar may register an instrument not in the prescribed form.

(3) The prescribed form of an instrument, other than a form of discharge or release wholly or in part of a mortgage, which purports to transfer an interest, shall provide for execution by-
   (a) any party to whom an interest is to be transferred; or
   (b) the solicitor of that party.

(4) Where the consent or direction of any person is necessary upon a sale or other disposition of registered land, such consent or direction may be indorsed upon the instrument effecting the disposition.

(5) Where by this or any other Act an instrument is required to be in duplicate or triplicate, the Registrar may refuse to register any instrument lodged that is not accompanied by the required number of executed copies.

(6) For the purposes of this Act, an instrument is not in the prescribed form unless, at the time of execution of the instrument, it is in the form and is made and completed in the manner prescribed-
   (a) by regulation; or
   (b) by or under any other Act.

(7) Regulations prescribing forms of instruments pursuant to subsection (1) may also prescribe-
   (a) the size, type and quality of paper upon which a form may be printed;
   (b) the size and nature of the type to be used in the printing and completion of a form;
   (c) the ink or other substance with which a form shall or may be printed or completed;
   (d) for the purpose of facilitating the registration of an instrument, any other matter or thing in respect of a form, including additional information, not forming part of the form, which is to be supplied with a form; and
   (e) in the case where a new form is prescribed to take the place of an existing prescribed form, the transitional arrangements which are to apply in respect of the use of the existing prescribed form.
(8) Forms of instruments prescribed by regulations may require execution, or include provision for certification of any appropriate facts by one or more of the parties thereto.

(9) A person shall not print, sell or use a form purporting to be a prescribed form knowing that it is not a prescribed form or that its printing or sale is or was without the authority of the Registrar.

Penalty: $ .

15. **Registrar of Titles may license person to print and sell forms.** [Qld. s.9.]

(1) The Registrar may, upon such terms and conditions as he thinks fit, license any person to print and sell any of the several forms of instruments, other than the form of a certificate of title prescribed by this Act.

(2) Such form, if it purports to be a proper form and marked with some other distinguishing mark determined by the Registrar, shall, unless the contrary is proved, be taken to be made in the prescribed form.

16. **Powers of Registrar.** [Qld. s.11; Qld. 1929, s.3.]

(1) The Registrar may-

   (a) for the purpose of registration of any matter, or the alteration of any particulars contained in the Register, by written notice-

      (i) call for and enforce the production by the registered proprietor or other person having control thereof of any certificate of title;

      (ii) call for and enforce the production by any person interested in the matter of any relevant instrument or document; or

      (iii) summon any person to give evidence respecting land or any instrument affecting the title thereto;

   (b) administer oaths or require any person examined to make and subscribe a declaration of the truth of the statements made in the examination.

(2) Any person who, having received notice from the Registrar, neglects or fails to produce to the Registrar the certificate of title concerned or to appear in response to a summons to give evidence-

   (a) shall be liable to a penalty not exceeding $ , for each separate occasion on which such default occurs; and

   (b) may be ordered by the Court to comply with such notice or summons.

(3) The Registrar may upon sufficient evidence correct errors in certificates of title, or in the Register or in entries made in the Register and may supply entries omitted to be made under the provisions of this Act:
(4) The Registrar may upon application accompanied by the relevant certificate of title, and upon sufficient evidence, register any change or correction in the name of a proprietor or other person interested in registered land appearing in the Register, whether the change or correction is consequent upon marriage or upon any other act or circumstance.

(5) The Registrar may register a caveat on behalf of the proprietor or other person interested in any registered land-
   (a) to prohibit the transfer or dealing with any land belonging to or supposed to belong to-
      (i) the Crown;
      (ii) any person who is under a disability or who may be absent from the State;
   (b) whose rights appear to the Registrar to be endangered or compromised by any -
      (i) misdescription of land or of its boundaries
      (ii) fraud or forgery.

(6) The Registrar may simplify descriptions of parcels of land by altering the real property description of any parcel of land contained in a certificate of title to a lot-on-plan description related to the plan by which that parcel of land was created.

(7) If the Registrar is satisfied that a registration in the Register does not affect the land to which the registration relate, he may cancel the registration in such manner as he considers to be appropriate and for that purpose may call in any instrument and correct or cancel the instrument as the case requires.

(8) (a) A record shall be maintained in the Register of the original state of the Register and of the date on which a correction or change is made.
    (b) A certificate of title or entry corrected under the section shall, except as regards any transfer or instrument entered in the Register before the time of correction, have the like validity and effect as if the error or omission had not taken place.

17. Registrar's additional powers in case of fraud, etc. [Qld. ss.130-134.]

(1) If a certificate of title or other instrument affecting registered land or a particular in the Register or memorandum or indorsement in or upon any such instrument is:-
   (a) fraudulently or wrongfully obtained from or procured to be made or issued by the Registrar; or
   (b) wrongfully retained by any person-the Registrar may summon the person who shall have so fraudulently or wrongfully obtained or retained the same, or procured the same to be made or issued to appear at the office or other suitable place and may require such person to deliver up such grant, certificate of title or other such instrument.
(2) In default in complying with the summons the Registrar may apply to
the Court for a warrant authorising the apprehension of the person summoned
to bring him before the Court for examination.

(3) The Court may in accordance with the provisions of the Rules of the
Supreme Court order substituted service of the summons.

(4) Upon the appearance before the Registrar or Court of any person summoned
or brought up by virtue of a warrant under this section, the Registrar or
Court may examine him upon oath and order him to deliver up such grant,
certificate of title or other instrument.

(5) Upon refusal or neglect by such person to deliver up such grant,
certificate of title, or other such instrument within the time specified in
the order, the Registrar may issue to the proprietor of the said land a
certificate of title or other instrument under Section 45 and shall record
in the Register notice of the issuing and the circumstances under which the
same was issued and such other particulars as may be necessary.

(6) If any person is proved to the satisfaction of the Registrar or Court to
have absconded so that the warrant or summons cannot be served upon him,
proceedings may be taken as if he had been duly summoned or brought up by
virtue of a warrant under this section and had refused or neglected to
deliver up the grant, certificate of title or other instrument.

(7) In a proceeding under this section the Registrar or Court may give to or
withhold from a person attending the proceeding his reasonable costs and
expenses, and direct by whom such costs and expenses are to be borne and
paid.

18. Advertising. [Qld. ss.19,89,95,117.; Qld. 1877, s.33; Qld. 1952,
s.55.]

(1) Before:
   (a) dispensing with the production of any instrument under section 37;
or
   (b) issuing a substitute instrument under section 45; or
   (c) registering a transmission by death by virtue of the provisions of
       Part XII in a case where no grant of representation has issued;

the Registrar may, if he considers that there is special reason for doing
so, give fourteen days notice of his intention in that behalf to do so, and
in a case falling within paragraph (d) shall give appropriate notice in
accordance with the Fourth Schedule, by an advertisement published in the
Gazette, or by such other means as he may determine.

(2) Before granting a title by adverse possession under section 39(4) and
the Fourth Schedule, the Registrar may, by advertisement published in the
Gazette or by other means determined by him, give notice of his intention in
that behalf.
(3) Provision shall be made by regulation made by the Governor in Council for-
(a) recording by the Registrar in an appropriate journal, whether maintained by means of a computer or otherwise, of any action taken under subsection (1); and
(b) periodic exhibition of entries in the journal in a prominent position in the office.

(4) The journal shall be open to inspection at all reasonable times.

19. Indemnity of Registrar. [Qld. s.137.]

(1) Except as provided in this Act or in the case of wilful act or default—
(a) the Registrar shall not be liable to any person; and
(b) the goods or lands of the Registrar shall not be liable to execution of legal process by reason of any act or default made or done in the capacity of Registrar.

(2) The Registrar shall be indemnified out of Consolidated Revenue in respect of all losses, costs or damages which may be incurred or recovered by any person in proceedings brought under this Act concerning any matter or thing relating to the execution of this Act and the powers hereby granted.

20. Fees and penalties. [Qld.1861, ss.41,42,140,141; Qld.1978.]

(1) The Governor in Council may make regulations, not inconsistent with this Act, prescribing the fees, and assurance fees, to be paid in respect of the—
(a) lodgment and registration of instruments whether pursuant to this Act or any other Act; and
(b) provision of other services by the Registrar.

(2) The Registrar may charge and recover fees prescribed pursuant to this section.

(3) All sums of money payable to the Registrar pursuant to—
(a) any provision of this Act; or
(b) any provision of any other Act or law requiring payments to be made to the assurance fund;

and paid to the Treasurer of the State shall be paid by the Treasurer into and shall form part of Consolidated Revenue.

(4) The Registrar shall keep a correct account of all sums of money received by him in accordance with this Act and shall pay the same to the Treasurer.

(5) Regulations may prescribe the persons to whom and the manner in which accounts shall be rendered and payments made by the Registrar.

(6) The Registrar shall address to the Treasurer requisitions to pay moneys received by him or by the Treasurer in trust or otherwise on account of
absent mortgagees or other persons entitled in accordance with this Act, and
the Treasurer shall be bound to obey all such requisitions when proved and
audited in manner directed by any such regulations and accompanied by
warrant for payment of the same under the hand of the Governor.

(7) All fines received under this Act shall be paid into Consolidated
Revenue.

21. Opinion of Court may be obtained. [Qld. s.14, Qld. Companies Code,
s.379(3).]

(1) The Registrar may in any matter arising under this Act apply to the
Court for directions.

(2) (a) Any person who is dissatisfied with the exercise by the Registrar of
his powers under this Act or with the Registrar's failure to act may in
writing require the Registrar to state the reasons for the exercise of the
power or failure to act.

(b) The Registrar shall thereupon state and within 7 days, or such
further time as is reasonable in the circumstances, deliver the reasons in
writing to that person.

PART III - THE REGISTER

22. The Register. [Qld. ss.10A, 32(1), 32(2) and 32(9); Qld.1887, s.6;
N.S.W. s.5.]

(1) The Registrar shall maintain a Register and register in it particulars of:-

(a) every parcel of land under this Act;
(b) all estates and interests required or permitted by this Act to be
registered in each such parcel;
(c) the names of the persons who hold or at any time have held a
registered estate or interest in such parcel;
(d) all instruments required to be registered under this Act;
(e) indorsements of the dates of production of instruments for
registration and of registration of such instruments;
(f) any other matter required or permitted by this or any other Act to
be registered.

(2) The Register kept by the Registrar before the commencement of this Act
shall, subject to the provisions of this Act, form part of the Register.

(3) In the case of land in the Central District or the Northern District the
duties imposed by this section shall be performed by the Local Deputy
Registrar for that District.
23. **Form of Register.** [Qld. ss.32(3)-(8).]

(1) A distinctive reference shall be allocated in the Register to an estate or interest in each parcel of land corresponding to the reference upon the current certificate of title or deed of grant issued in respect of that estate or interest.

(2) The Register may, as the Registrar from time to time considers appropriate, be maintained wholly or partly—
   (a) on paper, or microfilm or in or on some other medium;
   (b) in a device for storing or processing information.

(3) The Registrar may, if he considers it appropriate, maintain within the Register a record of leasehold estates created by leases recorded in the Register.

(4) The Registrar may cause a microfilm or such other copy to be made by means approved by the Minister of any part of the Register, including any instrument.

(5) Upon the Registrar certifying that the microfilm or other copy is an accurate copy of that part, it shall form part of the Register.

(6) The Registrar may cause information recorded in one part of the Register to be recorded in another part of the Register.

(7) The Registrar may cause to be deleted from a part of the Register particulars that he is satisfied have been accurately recorded in another part of the Register.

24. **Other records.** [Qld. s.32A.]

The Registrar may maintain, but not as part of the Register, such indexes and supplementary information as he considers appropriate for the effective operation of the Register or of the office.

25. **Certificate of title.** [Qld. s.10A, s.33, ss.49,50,94,119; Qld. 1877, s.17; Qld. 1976.]

(1) The Registrar shall in respect of registered land issue certificates of title.

(2) A certificate of title shall contain—
   (a) the particulars provided for in the form prescribed; and
   (b) in a manner designed to record their priority, all registered particulars.

(3) If a certificate of title is issued to a minor the Registrar shall record on the certificate of title the age of the minor.
(4) A certificate of title issued under this section shall be delivered to the person entitled thereto unless that person is a minor.

(5) The provisions of the Third Schedule shall have effect in relation to the issue of certificates of title by the Registrar.

26. Certificates and other documents as evidence. [Qld. ss.7,33(3)-(5), 96,122; Qld. 1884, s.6.]

(1) A certificate of title shall be received in all proceedings as evidence of the particulars it contains and of their registration.

(2) Subject to this Act, and unless the contrary is proved by production of the Register or a certified copy thereof, a certificate of title shall be received as conclusive evidence that—
   (a) the land comprised in the certificate of title has been duly brought under the provisions of this Act;
   (b) the person named in the certificate of title as registered proprietor holds or has taken the estate or interest described or is possessed of the land for the estate or interest specified;
   (c) a registered proprietor has good and valid title to the estate or interest described.

(3) All documents purporting to be issued or written by or under the directions of the Registrar and purporting to be sealed with his seal of office or signed by him shall—
   (a) until the contrary be shown, be deemed without further proof to be issued or written by or under the direction of the Registrar; and
   (b) be evidence in any court, or before any person having by law or by consent of parties authority to receive evidence, of all the matters contained or recited in or indorsed on the original instrument and of the particulars recorded in the Register.

27. Search and copy allowed. [Qld. ss.121,122.]

(1) At a reasonable time during the hours and upon days appointed for search, a person shall, upon payment of the prescribed fee, be entitled to—
   (a) have access to information recorded in the Register;
   (b) be provided with a statement of any particulars recorded in the Register;
   (c) be provided with a copy of any instrument recorded in the Register (whether taken directly from the instrument or from a microfilm or any other part of the Register);
   (d) be provided with information stored in indices or by other means;
   (e) search and obtain a copy of an instrument, whether or not that instrument has been cancelled, lodged or deposited in the office, except an instrument destroyed pursuant to section 47.
   (f) be provided with a certified copy of any registered instrument affecting registered land or a certified statement of registered particulars of such land signed and sealed by the Registrar.
(2) In this section the term "certified copy" includes a photostatic copy, a print taken from a microfilm, or other copy of a registered instrument where the microfilm or other copy is part of the Register.

PART IV - REGISTRATION OF LAND AND INSTRUMENTS

28. Registration of land. [Qld. s.34(1).]

Land is under the Act and registered when particulars of the land are registered.

29. Alienated Crown Land to be Registered. [Qld. s.15.]

(1) All land in Queensland remaining unalienated in fee simple from the Crown, whether as Crown land or otherwise, shall when alienated in fee simple by the Crown be subject to the provisions of this Act.

(2) On receipt of a grant by the Crown of an estate in fee simple in land the Registrar shall register the land the subject of the grant.

(3) In this section "Crown land" has the meaning ascribed to it in section 5 of the Land Act 1962-1988.

30. Provision for registering Commonwealth land. [Qld. 1924, ss. 3-4, 6; Qld. 1929, s.3.]

(1) If Commonwealth land is vested in the Commonwealth, the Commonwealth Attorney-General, or if the land is vested in a Commonwealth authority, then such authority, may apply to the Registrar to register the Commonwealth or the Commonwealth authority as the proprietor of the land.

(2) If the Commonwealth land became vested in the Commonwealth pursuant to the Constitution, the Commonwealth Attorney-General or the Commonwealth authority making the application shall furnish the Registrar with a certificate under the hand of the Commonwealth Attorney-General, or the seal of such authority, certifying that the aforesaid land became so vested, and setting out any other facts relevant to the title of the Commonwealth or Commonwealth authority as the Registrar may require.

(3) In all other cases the Registrar shall be furnished with a copy, certified under the hand of the Commonwealth Attorney-General or the seal of the Commonwealth authority making the application, of the notification of acquisition, vesting order, or other instrument or notice (if any) in pursuance of which the Commonwealth land is vested in the Commonwealth or such authority, together with such other evidence of title as the Registrar may require.
(4) If satisfied that the Commonwealth or the Commonwealth authority, is the
proprietor of the land, the Registrar may give effect to the application as
if it were a duly executed and stamped memorandum of transfer of the land to
the Commonwealth or Commonwealth authority lodged on the day on which
the application was received by the Registrar.

(5) If the Registrar is satisfied on information received from any source
that the whole or any part of any land included in a grant or certificate of
title is Commonwealth land, or is land subject to an interest in favour of
the Commonwealth or a Commonwealth authority for a registrable estate or
interest less than an estate in fee simple, he may, notwithstanding that
there has been no application pursuant to this Act, register such estate or
interest by recording that it has been acquired by the Commonwealth or such
authority.

(6) The Registrar may register particulars of any Defence Proclamation or
like instrument affecting land.

(7) The provisions of this section apply whether or not the land in question
is registered land; but where the land is not so registered:-
(a) no certificate of title shall issue in respect of that land in
favour of the Commonwealth or Commonwealth authority until the
Registrar is satisfied of the title of the Commonwealth or such
authority to the land in respect of which the application is made;
(b) the Registrar may bring the land under the provisions of this Act by
issuing a certificate of title for the land to the Commonwealth or
Commonwealth authority in whom the land is vested; and
(c) no contribution to assurance under this Act shall be payable.

(8) Where land, whether or not registered, vested in the Commonwealth or in
a Commonwealth Authority, is transferred to another person, the Registrar
shall, if satisfied of the title of that person, register that interest and
issue a certificate of title to that person.

31. Registration of life interests and remainders. [Qld. ss.36-39.]

(1) The Registrar may upon application register as proprietor of a life
estate in registered land, a tenant for life, whether simple or pur autre
vie, and whether absolute, determinable or conditional in registered land
resulting from the transfer of a life estate by instrument inter vivos or by
will which do not direct that the estate in fee simple in such land is to be
vested in or held by trustees for that person.

(2) Upon request by the life tenant the Registrar may issue and deliver to
him a separate certificate of title in respect of that life estate.

(3) Whenever a person is registered in respect of a life estate, any other
person entitled in that land to-
(a) a vested interest in remainder; or
(b) a contingent interest in remainder created before the Property Law
Act 1974-1986—
may apply to be registered as a person entitled to the interest in
remainder, and the Registrar shall, if satisfied—
(i) with the title of the applicant, Register the applicant as a person entitled in remainder to the estate or interest to which he appears to be entitled; or
(ii) that there is no such person register appropriate particulars of the manner in which the estate in fee simple in remainder is held.

(4) The Registrar shall, if the certificate of title of the relevant land is produced to him for the purpose, cancel the certificate of title and issue a fresh certificate of title that includes particulars that a person has been registered under the preceding subsection, together with the date and hour of registration.

(5) Upon proof to the satisfaction of the Registrar that—
(a) a registered life estate has in any manner determined or has vested in another person pursuant to a transfer or otherwise; or
(b) that the person to which such certificate has been issued or a purchaser from him is absolutely entitled to the land for an estate in fee simple in possession—
the Registrar may cancel the existing certificate of title of such land, including any certificate issued in respect of that life estate, and issue such new certificate of title as the nature of the case may require.

(6) The provisions of this section shall apply as if the certificate of title had been cancelled in consequence of a transfer or transmission.

32. Registration of co-owners. [Qld. s.40.]

(1) Two or more persons registered jointly as proprietors of land shall, in the absence of indication in the Register that they hold as tenants in common, be entitled as joint tenants at law.

(2) Subject to subsection (4), where two or more persons are entitled at law as tenants in common to any estate or interest in land, they shall not receive separate and distinct certificates of title unless all tenants in common request the Registrar to issue separate and distinct certificates of title or other instruments evidencing their title as tenants in common to the relevant estate or interest.


(4) Where, under a time-sharing scheme a registered proprietor transfers or proposes to transfer to each participant in the scheme an estate or interest in the land the subject of the scheme as a tenant in common of an undivided share with other participants, the Registrar may issue in the name of the registered proprietor separate certificates of title for each such estate or interest in that land.

(5) The Registrar may issue one certificate of title in respect of several such estates or interests in the name of the same registered proprietor.
33. **Partition.** [Qld. s.92.]

Joint tenants or tenants in common intending to effect a partition of registered land may execute a memorandum of transfer, lease or other such instrument of transfer in such prescribed form as the nature of the estate or interest may require.

34. **Effect on land of registration of instrument.** [Qld. ss.32(2),43; Qld. 1877, s.48.]

(1) No instrument shall be effectual to transfer any estate or interest at law in any registered land or to affect such land at law until that instrument is registered.

(2) Upon registration of an instrument—
   (a) the estate or interest intended to be thereby transferred or created shall pass or be created in the manner and subject to the covenants and conditions set forth in that instrument or by this or any other Act declared to be implied in instruments of a like nature;
   (b) the person described in the instrument shall be the registered proprietor of the estate or interest in the land that he is described as holding or taking.

(3) Subject to this section, an instrument executed by a proprietor or by a person claiming through or under him, purporting to transfer an estate or interest in land shall until registered be deemed to confer upon the person intended to take under such instrument, or a person claiming through or under him, a right or claim to the registration of such estate or interest.

35. **Registration of instruments.** [Qld. ss.34(2), 35; Qld. 1877, ss. 12,14,15.]

(1) An instrument purporting to transfer or in any way to affect land is registered as soon as—
   (a) particulars of the instrument are registered in the prescribed manner; and
   (b) particulars of the date of—
      (i) production of the instrument in the office for the purpose of its registration; and
      (ii) registration of the instrument—are registered.

(2) Upon registration an instrument shall—
   (a) be taken to be embodied in the Register as part thereof;
   (b) create and impose the like obligations on the persons signing the same and for a like period of time as if the instrument had been sealed and delivered;
   (c) take effect from the date of its production to the Registrar for the purpose of registration.
(3) An instrument shall be lodged in duplicate or triplicate as prescribed by or under this or any other Act, and upon its registration the provisions of subsection (2) shall apply to one, and the Registrar shall deliver the other instrument or instruments to the person entitled thereto.

(4) Every grant, certificate of title, transfer and other instrument that, pursuant to section 34 of the Real Property Act 1861-1988, was before the commencement of this section registered or deemed to have been registered shall be taken to have been registered with effect accordingly.

36. Indorsement and evidentiary effect. [Qld. s.45]

(1) The Registrar shall indorse on an instrument a memorandum of the day and hour on which an instrument is produced for the purposes of registration and of the day and hour on which particulars of the instrument are recorded in the Register and shall authenticate the indorsement by affixing his signature and seal thereto.

(2) An instrument or other document which, for the purpose of being lodged is sent to the Registrar through the post or by way of a document exchange service shall be deemed to be lodged on the day and at the hour as may be fixed by the Registrar, and shall be indorsed and authenticated accordingly.

(3) An instrument indorsed and authenticated as provided in this section shall be received in all proceedings as conclusive evidence of-
   (a) due registration of the instrument;
   (b) the particulars therein set forth;
   (c) all covenants, conditions and matters therein expressed or by this or any other Act declared to be implied;
   (d) the date and hour of the production of the instrument to the Registrar for the purpose of its registration and the date and hour of the registration.

37. Registrar may dispense with production of instruments. [Qld. s.95]

(1) The Registrar may, where he considers there is reasonable cause for doing so, on application in that behalf but subject to compliance with subsection (4), dispense with the production of any instrument or duplicate otherwise required to be produced for the purpose of recording particulars under this Act.

(2) The Registrar may require proof by declaration or otherwise, and may require such further evidence as appears to him in a particular case to be appropriate, that a person purporting to deal with the land is the registered proprietor of that land and that the instrument is not deposited with any person as security for any purpose or for safe custody.

(3) After dispensing with the production of any instrument under this section, the Registrar shall record in the Register that the instrument was not produced and a statement of the reason why he dispensed with production of the instrument.
(4) Before dispensing with the production of an instrument, the Registrar may advertise his intention to do so in accordance with section 18.

PART V - EFFECT OF REGISTRATION AND PRIORITIES

38. Priorities of registration. [Qld. s.43, Qld. 1877, ss.12,14.]

(1) Where two or more instruments affecting the same estate or interest in land are produced for registration, the Registrar shall first register, and in accordance with section 36, indorse that instrument produced to him which is accompanied by the certificate of title in respect of the land.

(2) Subject to subsection (1), instruments shall—
(a) be registered in the order in which they are produced to the Registrar for that purpose;
(b) notwithstanding any express, implied or constructive notice, be entitled to priority according to the respective dates of production of those instruments to the Registrar for the purpose of registration, and not according to the dates of such instruments.

39. Estate of registered proprietor paramount. [Qld. s.44,109,123,126; Qld. 1877, ss.11,51, Qld.1952, ss.45-60.]

(1) A registered proprietor of land or any estate or interest therein shall, except in case of fraud and the exceptions specified in subsection (2)—
(a) hold the same subject to any estate or interest registered in respect of the land; but absolutely free from all other estates, interests or rights;
(b) not be affected by actual or constructive notice of any estates, interests, rights, claims or titles other than those registered in respect of the land;
(c) not be liable to proceedings or judgment for the recovery of damages for or possession of the land or any estate or interest therein;

Fraud in this section means fraud of the registered proprietor and not fraud of a person from or through whom a registered proprietor has in good faith derived his estate or interest in the land.

(2) The exceptions referred to in subsection (1) are—
(a) the estate or interest of a proprietor claiming under a prior certificate of title in respect of the same land or part of it;
(b) the estate or interest of a proprietor of land which has been included in a certificate of title in consequence of wrong description of parcels or boundaries;
(c) a lease taking effect after the commencement of this Act for any term not exceeding five years or a tenancy from year to year or for any lesser period of land; but excluding a right to acquire the fee simple or other interest reversionary, whether or not immediately, upon such lease, or to renew or extend the term, or any renewal or
extension of the term beyond the period of five years from the 
commencement of the original term of the lease;
(d) any right of way or other easement of which particulars have been 
omitted from or misdescribed in the Register relating to the land;
(e) rights under a certificate of title issued pursuant to the 
provisions of the Fourth Schedule;
(f) subject to the provisions of paragraph (b) of subsection (1), 
interests, equities and other rights of a personal nature created by 
the proprietor.

(3) For the purposes of subsection (2)--
(a) if an inconsistency has arisen through failure to cancel, whether 
wholly or in part, a certificate of title to land of which part has 
been transferred after the issue of a certificate of title to that 
part, the certificate of title to that part shall for the purpose of 
paragraph (a) of subsection (2) be the prior certificate of title.
(b) in all other cases the prior certificate of title referred to in 
paragraph (a) of subsection (2) shall be that deriving from the 
certificate of title issued before the inconsistency between 
subsisting certificates of title first arose;
(c) if the Registrar is satisfied that the case falls within paragraph 
(b) of subsection (2), he may amend the certificate of title, and in 
any such case shall notify his decision to the persons thereby 
affected, who may, within one month of such notification, apply to 
the Court for an order varying or setting aside the decision of the 
Registrar;
(d) an easement is not omitted within the meaning of paragraph (d) of 
subsection (1) unless:-
(i) it was in existence at the time the land over or in respect of 
which it is claimed to subsist was first registered; or
(ii) having been registered, it has by error on the part of the 
Registrar since been omitted.

(4) Subject to the provisions of Part XI of the Property Law Act 1974-1986, 
a person, who, by reason of possession of any registered land, claims to be 
registered as proprietor of an estate or interest therein may be registered 
in accordance with this section and the Fourth Schedule to this Act but not 
otherwise.

40. Powers of Court to rectify Register. [Qld. s.124].

Where judgment for the recovery of any land is given against a registered 
proprietor the Court may order that the Registrar--
(a) cancel or alter any certificate of title or other instrument or 
particulars recorded in the Register relating to that land;
(b) issue any fresh certificate of title or instrument or recording in 
liue thereof; and
(c) carry out and execute such other acts and instruments to be done as 
may be just.

(1) Subject to this Act a person sustaining loss or damage, whether by deprivation of land or any estate or interest in land or otherwise, in consequence of-

(a) fraud;
(b) the issue of a certificate of title to another person or a recording in the Register;
(c) any error or omission or misdescription in any certificate of title or in any recording in the Register;
(d) any unauthorised tampering with the Register;
(e) any payment or consideration given to any other person on the faith of any recording in the Register;
(f) the loss or destruction or improper use of any document lodged for inspection or safe custody or any error in any official search;
(g) any omission, mistake, breach of duty, negligence or misfeasance of the Registrar or any of the staff of the office in the execution of their duties or in relation to the Register; or
(h) the exercise by the Registrar of a power in any case where the person sustaining loss or damage has not been a party or privy to the application or dealing in connection with which such power was exercised;

shall be entitled to be indemnified and may bring an action for compensation and costs against the State.

(2) On payment of compensation in settlement in whole or in part of any claim under this section the Crown shall, to the extent of such payment, be subrogated to all rights and remedies of the claimant against the person responsible for the deprivation or loss sustained by the claimant, and any moneys recovered shall be paid into Consolidated Revenue.

(3) For the purposes of-

(a) recovering possession from a person against whom such action is not expressly barred; or
(b) claiming compensation under this section;

the registration as proprietor of the person against whom such action is brought is equivalent to possession by that person of the land in respect of which such action is brought.

(4) Except in the case of a loss falling within paragraph (g) of subsection (1), no person shall be entitled to be indemnified for any loss—

(a) occasioned by any breach of a trust, whether express, implied, or constructive, including any breach of duty owed in or in connection with the administration of the estate of a deceased person;
(b) if he or his solicitor or agent caused or substantially contributed to the loss by fraud, neglect or wilful default including failing to take reasonable steps in response to notice that the Registrar was about to issue a new certificate of title in respect of the land;
(c) suffered by a corporate body through improper use of its seal;
(d) resulting from the deprivation of land erroneously included in a certificate of title through rectification of the Register to correct
such error, where the person so deprived did not rely on the
incorrect state of the Register.

(5) Subject to subsection (6) the Registrar may compromise, compound,
abandon, submit to arbitration or otherwise settle any debt or claim arising
under this section, and may do so by total or partial remission of fees or
by ex gratia payment or otherwise.

(6) The power of the Registrar pursuant to subsection (5) shall be limited
to such sum as may—
(a) in the particular case be authorised by the Treasurer; and, in any
other case
(b) be prescribed by regulation made by the Governor in Council.

PART VI - INSTRUMENTS, PLANS AND REGISTRATION GENERALLY

42. Requisitions. [Qld. s.112.]

(1) If any instrument lodged for registration or in connection with
registered land is—
(a) in the opinion of the Registrar erroneous, incomplete, or defective
in any particular, the Registrar may by requisition in writing
require the lodger to re-execute, complete or correct the instrument
or procure its re-execution, completion or correctness in such
manner as may be specified in the requisition; or
(b) if the Registrar is not satisfied that any such instrument is
correct for registration, or for the purpose for which it was
lodged, he may by requisition in writing require the lodger to
furnish the information specified in the requisition.

(2) Notwithstanding subsection (1), the Registrar may correct a patent error
in any instrument lodged for registration—
(a) where the instrument is a plan of survey, by striking through the
error in such manner as not to erase or render illegible the
original words or expressions, supplying the correct information in
red ink next to the error, and noting the date on which the

(b) in any other case, by notation in the margin of the instrument;
An instrument or document corrected by the Registrar shall have the same
validity and effect as if the error so corrected had not been made.

(3) A requisition referred to in subsection (1) shall be served upon the
person to whom it is directed, and shall be sufficiently served if delivered
or forwarded by post to such person.
(4) The Registrar may permit any instrument to be borrowed out of the office other than—
   (a) a certificate of title; or
   (b) an instrument which has been registered; or
   (c) any instrument by any person except by or on behalf of the person by whom that instrument was lodged.

(5) The person borrowing out an instrument shall, on demand made by the Registrar orally or in writing, return the same to the office within the time specified by the Registrar.

(6) Any person who fails, without reasonable excuse, to comply with such a demand shall be guilty of an offence and liable to a penalty not exceeding $ .

(7) The Registrar may specify a time, which shall be stated in the requisition, within which the person to whom a requisition is directed shall comply with it, and may extend any such time.

(8) The Registrar may refuse to deal with any instrument subject to a requisition until compliance with the requirements of the requisition.

(9) Where any requisition issued by the Registrar under this section and duly served pursuant to subsection (3) is not complied with within the time specified by the Registrar, the Registrar may reject the instrument that has been so requisitioned, and any instrument consequent or upon which it depends for the purpose of registration, and notwithstanding any provision of this Act, an instrument so rejected shall lose its priority or entitlement to priority under this Act.

(10) Where an instrument is rejected under the preceding subsection, a memorandum of that rejection may be indorsed upon that instrument, or if that instrument has been borrowed out under subsection (4), a record of that rejection may be made and kept in the office.

(11) The Registrar may return an instrument rejected under subsection (9) to the person on whose behalf it was lodged, or to any other person who may, in the opinion of the Registrar, be entitled to receive that instrument.

(12) Nothing in this section shall prohibit a subsequent lodgment of an instrument where the requisition previously issued that relates to that instrument has been complied with.

(13) Where any instrument is rejected under subsection (9) it shall be deemed not to have been produced to the Registrar for registration.

(14) Any fee paid for the purposes of this Act in respect of an instrument rejected pursuant to subsection (9), shall be forfeited and shall be dealt with by the Registrar in accordance with section 20 and regulations made thereunder.

(15) Where any fee paid in respect of an instrument is forfeited under subsection (15), one half only of the fee prescribed for the time being shall be charged by the Registrar in respect of any subsequent lodgment of that instrument, if the requisition previously issued that relates to that
instrument has been complied with and the prescribed fee chargeable on the
original lodgment of that instrument has been paid to the Registrar.

(16) Notwithstanding any provision of this Act, the Registrar may refuse to
receive and shall not register any instrument that on its face is not
capable of registration.

43. Withdrawal of instrument from registration. [Qld. s.113; Qld. 1877,
s.9.]

(1) The Registrar may-
   (a) withdraw an instrument from registration to enable it to be produced
       for registration in an order that in his opinion gives effect to the
       intention of the parties as expressed in that instrument or in any
       other instrument that relates to it; or
   (b) permit that instrument to be withdrawn from registration.

(2) An instrument withdrawn from registration under this section shall
remain in the office but, by virtue of that withdrawal, loses priority of
registration unless and until it is again produced for registration as
provided by subsection (3).

(3) The Registrar may on a day and at a time fixed by him-
   (a) without an application in that behalf produce an instrument
       withdrawn from registration under paragraph (a) of subsection (1);
   (b) upon application in writing in that behalf, permit an instrument
       withdrawn from registration under subparagraph (b) of subsection (1)
       to be again produced for registration.

(4) A memorandum of a production or of permission and of the day and time
fixed by the Registrar in relation to such production or permission shall be
endorsed upon the instrument which shall be deemed to have been first
produced for registration on the day and at the time so endorsed.

(5) A person shall not be permitted to withdraw or materially alter an
application for registration without the consent of every person who would
be entitled to a certificate of title if such application were granted.

44. Execution, attestation and proof of instruments. [Qld. ss. 114-116.]

(1) An instrument in respect of registered land is validly executed if
executed in the manner prescribed by regulation and-
   (a) in the case of a corporation, the common seal of such corporation is
       affixed thereto and a certificate that such seal was affixed by the
       proper officer and verified by that officer's signature is indorsed
       thereon; and
   (b) in all cases, the execution is attested by a witness, who in the
       case of a person resident-
       (i) in any State or Territory of the Commonwealth, before the
           Registrar, a notary public, justice of the peace, commissioner
           for taking affidavits, barrister, solicitor, conveyancer or
bank officer authorised under the corporate seal; or
(ii) in any part of the Commonwealth of Nations - before
any Judge of any superior court having jurisdiction therein,
a notary public, barrister or solicitor or a justice of the
peace therefor; or
(iii) in any country in respect whereof The Evidence (Attestation
of Documents) Acts 1937-1950, apply by virtue of a
Proclamation under those Acts continuing the application in
respect of that country of those Acts - before any person
holding an office under the Government of that country
declared under that Proclamation to be equivalent to the
office of a justice of the peace for this State; or
(iv) at any place - before an Australian Consular Officer, British
Consular Officer or any other person who is a consular officer
within the meaning of section 37A of The Evidence and
Discovery Acts 1867-1977, including any Consul-General,
Consul and Vice-Consul and any person for the time being
discharging the duties of Consul-General, Consul or
Vice-Consul;
(v) at any place outside this State where it is proved to the
satisfaction of the Registrar that the execution thereof
cannot be proved before any of the aforesaid persons - before
a person holding under the law in force at that place an
office or qualification specified or approved by the
Registrar.

(2) The attestation of any instrument relating to registered land may be
proved by any means now permitted by law.

45. Lost instruments. [Qld. s.117.]

(1) Upon request and satisfactory proof that a registered instrument has
been lost or destroyed, the Registrar may issue a substitute instrument in
place of the lost or destroyed instrument and thereafter the-
(a) substitute instrument shall be used for all purposes in place of the
original instrument; and
(b) original instrument shall no longer be evidence of the state of the
Registrar.

(2) The Registrar shall record in the Register -
(a) the fact of the issue of the substitute instrument; and
(b) the date of issue of the substitute instrument.

(3) The Registrar shall indorse upon the substitute instrument-
(a) that the instrument is a substitute instrument replacing a lost or
destroyed instrument;
(b) the date of issue of the substitute instrument;
(c) what has become of the original instrument so far as is known; and
(d) that the substitute instrument is to be used for all purposes in
place of the original instrument.

(4) Before issuing a substitute instrument, the Registrar shall comply with
the provisions of s.18 regarding advertisement.
46. Registrar may require plan to be deposited. [Qld. s.120.]

(1) The Registrar may require the registered proprietor of any registered land desiring to transfer, lease or otherwise to deal with the same or any portion thereof to lodge for registration a plan of such land.

(2) If any person is required to lodge a plan, the plan shall be certified as accurate by a licensed surveyor.

(3) A plan required under this section or under the provisions of the Third Schedule shall comply with the provisions of the Surveyors Act 1977-87.

47. Destruction of instruments, etc. in certain circumstances. [Qld. s.46A.]

(1) Notwithstanding any provisions of this Act, but subject to the Libraries Acts 1943-1979, the Registrar may destroy any part of the Register or any instrument that is held in the office, that in his opinion -
   (a)(i) does not evidence a subsisting interest; or
   (ii) does evidence a subsisting interest which is also accurately evidenced in another part of the Register;
   (b) will not be required for the purpose of recording the effect of any transaction; and
   (c) has been accurately copied by microfilm or other means and the copy so made forms part of the Register.

(2) Notwithstanding the provisions of the Third Schedule, the Registrar may return a suitably perforated cancelled certificate of title to the person who before to its final delivery to the Registrar for cancellation was entitled to that certificate.

PART VII - TRANSFERS

48. Transfer. [Qld. ss.43,48,65,66.]

(1) A person intending to transfer any estate or interest in registered land shall execute a memorandum of transfer in the prescribed form, which shall-
   (a) be attested by a witness;
   (b) refer to the grant or certificate of title of such land and give a description sufficient to identify the particular portion of land intended to be transferred;
   (c) if a monetary consideration is expressed to have been paid or advanced, contain an acknowledgment of the receipt of the relevant sum;
   (d) contain an accurate statement of the estate or interest intended to be transferred and a memorandum of all mortgages, liens and interests affecting the same.

(2) Upon but not before registration of a memorandum of transfer, the estate or interest of the transferor as set forth in the instrument passes to the transferee together with all appurtenant rights, powers and privileges.
(3) Upon registration of an instrument of transfer of mortgage or lease—
   (a) the interest of the transferor together with all rights, powers and
       privileges relating thereto passes to the transferee;
   (b) the transferee becomes subject to and liable for all
       liabilities of the transferor as if he had been originally named
       as mortgagee in the bill of mortgage or as lessee in the lease.

(4) In this section "rights" includes the right to sue upon a bill of
mortgage and to recover any debt or enforce any liability thereunder.

49. **Transfer of mortgaged land.** [Qld. s.68.]

(1) In an instrument transferring land subject to a registered bill of
mortgage there is implied a covenant on the part of the transferee that he
will—
   (a) in accordance with the provisions of the bill of mortgage duly pay
       any interest and other sums secured by the bill of mortgage;
   (b) indemnify and keep harmless the transferor against all liability in
       respect of any of the covenants contained in the bill of mortgage as
       declared by this Act or any other Act to be implied on the part of
       the transferee.

(2) The covenant implied by subsection (1) may by written agreement of the
parties be varied, modified or excluded wholly or in part.

(3) When land subject to a registered bill of mortgage is transferred to a
person entitled to such mortgage the transferee shall upon request to the
Registrar be entitled to receive a certificate of title to the land released
from the mortgage.

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**PART VIII - LEASES**

50. **Leases of registered land.** [Qld. s.52, Qld. 1877, s.18., NZ s.116.]

(1) A registered proprietor intending to lease registered land for—
   (a) a life or lives; or
   (b) any term exceeding five years
       shall execute a lease and produce it for registration.

(2) A lease of registered land for a term not exceeding five years is not
required to be registered; but—

   (a) may be registered if executed in the prescribed form;

   (b) if not registered, shall be valid only to the extent specified in
section 39
(3) A lease or any variation of a lease executed after registration of a mortgage of the land shall not be valid against the mortgagee unless he unconditionally consents to the lease or variation and his consent is indorsed on the lease or variation.

51. Variation of lease. [cf. Qld. PLA, s.79.]

(1) A registered lease may be varied by registering a memorandum of variation of lease which, subject to subsection (2), may—
  (a) vary the duration of the lease, whether pursuant to an option to extend or renew the term of the lease or otherwise;
  (b) vary the rent reserved under the lease;
  (c) grant to the lessee an option to extend the term, or to purchase the interest of the lessor or to require a new lease;
  (d) modify or delete any existing condition, covenant or provision of the lease; or
  (e) add any new condition, covenant or other provision.

(2) A memorandum of variation—
  (a) shall be lodged for registration before the expiry of the term of the lease including any extension or renewal thereof taking effect pursuant to a registered memorandum of variation of the lease;
  (b) may not—
      (i) increase or diminish the area or quantity of the leased land;
      (ii) alter a party to the lease.

(3) The power of and procedure for variation provided by this section shall, subject to the provisions of this Act, be in addition to any other such power existing at law or in equity.

52. Lease Register. [Qld. s.34.]

(1) Where the number of dealings with registered leases of land comprised in a certificate of title is likely to be such as to make it expedient to do so, the Registrar may register such dealings in a lease register.

(2) A lease register shall form part of the Register for all purposes and a reference to it shall be recorded in the Register in relation to the title of the lessor and on the certificate of title of the lessor.

53. Surrender of lease. [Qld. ss.54,55.]

(1) When a registered lease is intended to be surrendered, otherwise than by operation of law, the lessee shall execute and lodge for registration an instrument of surrender of the lease which shall be—
  (a) signed by the lessor as evidence of the acceptance thereof; and
  (b) attested by a witness.
(2) Upon lodgment of the instrument of surrender of the lease, or proof that a lease has been surrendered by operation of law, together with the lease and the certificate of title of the land, the Registrar shall -

(a) register the fact of the surrender and its date; and

(b) indorse upon the lease a memorandum of such registration.

(3) A lease may not be surrendered without the written consent of -

(a) any mortgagee of the leased land;

(b) any sub-lessee.

(4) Upon registration in accordance with this section, the estate or interest of the lessee in the land shall vest in the lessor or other person entitled thereto.

(5) This section does not apply to a surrender taking effect under the provisions of a law relating to bankruptcy or to companies.

54. Re-entry by lessor. [Qld. s.72.]

(1) Upon proof that a lessor has re-entered and taken possession of land under a registered lease, the Registrar shall, upon lodgment of a request, register such re-entry.

(2) Upon registration in accordance with this section -

(a) the interest of the lessee shall determine;

(b) the Registrar shall cancel any lease delivered to him for that purpose.

(3) Subject to any agreement to the contrary, determination of the lease in accordance with this section does not release the lessee from liability in respect of any obligation expressed or implied in the lease.

55. Bankruptcy. [Qld. s.55.]

Upon receipt of -

(a) notification pursuant to the provisions of a law relating to bankruptcy or companies of the disclaimer of a lease or other interest in land; and

(b) a request -

the Registrar shall, if satisfied of the disclaimer register particulars of the disclaimer.
PART IX - MORTGAGES

56. **Form of Mortgage.** [Qld. s.56.]

(1) A proprietor intending to charge registered land shall execute a bill of mortgage.

(2) A bill of mortgage shall—

(a) contain an accurate statement of the estate or interest intended to be charged;
(b) refer to the description given in the certificate of title of the land;
(c) contain a statement of any mortgage affecting the land; and
(d) be attested by a witness.

57. **Effect of mortgage.** [Qld. s.60.]

A bill of mortgage shall upon registration have effect only as a charge on the land for the sum of money or other liability intended to be secured, and, except to the extent of the interest created by the charge, shall not operate or take effect as a transfer of the land.

58. **Equitable mortgage by deposit.** [Qld. 1877, ss.30,30A.]

(1) An equitable mortgage of registered land may be created by deposit of the instrument of title to the land.

(2) A deposit referred to in subsection (1) shall, subject to the provisions of this Act, have the same effect on the land, or estate, interest or security in or upon such land as a deposit of title deeds would have in relation to land that is not registered land.

(3) Such mortgagee may lodge a caveat forbidding the registration otherwise than subject to the mortgage of any instrument affecting the land upon which the equitable mortgage has been created.

(4) The caveat shall state the amount and nature of the equitable mortgage, and the instrument of title deposited shall be produced with the caveat.

59. **Variation of Mortgage.** [PLA. s.79.]

(1) A registered bill of mortgage may be varied by the registration of an instrument of variation.

(2) An instrument of variation of mortgage may—

(a) increase or reduce the rate of interest payable in respect of the debt or obligation secured by the mortgage;
(b) increase or reduce the amount secured by the mortgage;
(c) shorten, extend or renew the term or currency of the mortgage;
(d) vary any condition, covenant or other provision of the instrument
   of mortgage; or
(e) provide for any one or more of the foregoing.

60. Variation of priority of mortgages. [Vic. s.75B]

(1) In respect of land for which a separate certificate of title has been
issued priority between or among registered mortgages may be varied by an
instrument of priority,

(2) The instrument shall set out in the order in which all registered
mortgages are to rank in priority in relation to the land comprised in each
certificate of title affected and shall be executed by each registered
mortgagee under a mortgage intended to be postponed to a mortgage over which
it previously had priority.

(3) Upon registration of the instrument, the mortgages shall have priority
between or among themselves in the order set out in the instrument.

61. Powers of mortgagee. [Qld. ss.57,60.]

(1) Subject to this Act, a mortgagee of registered land shall have and may
exercise the powers conferred on a mortgagee by Part VII of the Property Law
Act 1974-1986, and shall be subject to the liabilities imposed by that Part.

(2) In the event of default under a registered bill of mortgage, a mortgagee
may—
   (a) subject to the provisions of section 70 of the Criminal Code, take
       possession of the mortgaged land;
   (b) enter into possession of the mortgaged land by receiving the rents
       and profits thereof;
   (c) by proceedings in a court of competent jurisdiction—
       (i) recover possession of the mortgaged land;
       (ii) foreclose the right of the mortgagor to redeem the mortgaged
           land.
   (d) exercise any other power conferred by the bill of mortgage.

62. Transfer upon sale by mortgagee. [Qld. s.58.]

Upon registration of an instrument of transfer executed by a registered
mortgagee exercising a power of sale—
   (a) the estate or interest of the mortgagor described in the instrument
as being transferred shall pass to and vest in the purchaser freed
and discharged from all liability on account of the said mortgage
and any subsequent registered mortgage;
(b) the purchaser shall, according as the instrument of transfer purports to transfer an estate in fee simple or a registered lease, be entitled to a certificate of title or a certificate of lease.

63. Liability of mortgagee in possession of leasehold interest. [Qld. s.62; NSW, s.64; Vic. PLA 1958, s.78(2); S.A. LPA 1936, s.139, W.A. PLA 1969, s.114; Tas. G&LP 1881, s.84; ACT Law of Property (Misc. Provisions) Ordinance 1958, s.100.]

(1) A mortgagee of a leasehold interest in registered land who enters into possession of the land or the rents and profits thereof shall, subject to this section, be liable under the provisions of the lease to the same extent as the lessee was liable before the mortgagee entered into possession.

(2) The liability of the mortgagee under subsection (1) shall be limited to the benefits, receipts and profits received by him during the period of his possession.

(3) Subsection (2) shall not affect a liability of the mortgagee to the mortgagor arising apart from the lease.

64. Release of mortgages. [Qld. s.63, Qld. 1877, s.19., S.A, ss.143,145,148a.]

(1) Upon production of:-

(a) a duplicate bill of mortgage together with a memorandum releasing the land the subject of the mortgage from the sum of money or other obligation thereby secured; and

(b) the certificate of title to the land;

the Registrar shall register the mortgage as released and indorse the bill of mortgage accordingly.

(2) Upon registration of a memorandum of release of mortgage-

(a) the mortgage shall be discharged;

(b) the land shall be released from the mortgage.

(3) Where the memorandum referred to in subsection (1) is expressed to-

(a) discharge the mortgage only in part; or

(b) release only part of the land the subject of the mortgage-

the Registrar shall register the same and indorse the bill of mortgage accordingly, and the mortgage shall be discharged or the land released only to the extent specified.
65. **Other forms of release.** [Qld. s.63, Qld. 1877, s.19.]

(1) Upon the proof that under the provisions of any mortgage the liability secured has ceased or has ceased to be enforceable, the Registrar shall, upon receipt of a request in that behalf, register the mortgage as released, and indorse the bill of mortgage accordingly.

(2) Registration in accordance with subsection (1) shall have the effect of registration of a memorandum of release of mortgage as provided in the last preceding section.

(3) The Registrar may exercise the powers conferred by this section although the certificate of title to the land the subject of the mortgage is not produced to him upon or after receipt of a request under subsection (1), and may issue a substitute instrument in accordance with the provisions of section 45.

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**PART X - EASEMENTS AND OTHER INCORPOREAL RIGHTS**

66. **Interpretation.** [Qld. s.51; N.S.W. s.47.]

(1) In this Part "easement" includes any incorporeal right in land, granted whether in fee simple or for life or by way of lease, but does not include a mortgage.

(2) Nothing in this Act shall be construed as conferring on any person a right, in respect of registered land, to registration of a restrictive covenant.

67. **Creation of easements.** [Qld. s.119A.]

(1) A registered proprietor intending to create an easement shall execute an instrument of easement and produce it for registration.

(2) Subject to this and any other Act, an easement does not arise from or subsist or determine in consequence of the registration, lodgment or deposit after the commencement of this section of any plan.

68. **Easements and incorporeal rights to be registered.** [Qld. s.51; N.S.W. s.47.]

(1) An easement by which registered land is either burdened or benefited, whether or not it affects other land that is not registered, may be created by registered instrument.
(2) An instrument providing for the creation of an easement for the purpose of being used and enjoyed by—
   (a) the State or any Crown corporation or instrumentality of the State;
   (b) the Commonwealth or any Commonwealth authority;
   (c) any local authority; or
   (d) any person or authority authorised by or pursuant to any Act;
shall be registered notwithstanding that the easement is not to be annexed to or used and enjoyed together with any other land.

(3) Particulars of registration of an instrument creating an easement shall show—
   (a) the land, if any, benefited by the easement; and
   (b) the land burdened by the easement;
including particulars of any registered lease so benefited or burdened.

69. Surrender of easements.

A registered easement may be extinguished by registration of a surrender executed by the proprietor of the benefit of the easement.

70. Variation of Easement. [S.A., s.2231n(6).]

A registered easement may, with consent of the registered proprietor of the land burdened by the easement, be varied by the registration of an instrument of variation, executed by the proprietor for the time being having the benefit of the easement.

71. Easements in favour of proprietor's land.

(1) (a) An instrument may create an easement over or in respect of a lot or an identified part of a lot of registered land for the benefit of a lot or an identified part held by the same proprietor.

(b) A registered easement shall not, except upon the request of the proprietor of the benefit of the easement, be extinguished by reason that the same person has become proprietor of both the land burdened and the land benefited.

(2) Rights and obligations under an instrument creating an easement to which subsection (1) is applicable are enforceable when the land or part intended to be benefited or to be burdened is transferred to some person other than the same proprietor or to some person together with the same proprietor.
72. **Effect of plan showing proposed easement.** [Qld. s.119A.]

(1) A plan may be registered designating the site of an easement intended to be created by an instrument to be registered thereafter; but-
   (a) in any such plan the designation of that site shall incorporate the word "proposed";
   (b) any written reference to the intended easement in the Register or in any certificate of title in respect of the land recording particulars of registration of the plan shall be preceded by the word "proposed".

(2) A designation or reference in accordance with subsection (1) shall not be regarded as indicating a present intention to create an easement.

73. **Easements arising from plan of subdivision.**

(1) The proprietor of a lot shown on a plan of subdivision registered after the commencement of this section shall be entitled to the benefit of the following easements, which shall be appurtenant to the lot, namely -

All such easements of way and drainage and for the supply of water, gas, electricity, sewerage and telephone and other services to the lot on or over or under the land appropriated or set apart for those purposes respectively as may be necessary for the reasonable use and enjoyment of the lot and of any building or part of a building at any time thereon - in all respects as if such easements had been expressly granted and registered.

(2) Land may be appropriated or set apart within the meaning of subsection (1) by -
   (a) designating on the plan of subdivision the site of such easement;
   (b) identifying the site so designated by the word "easement" or an abbreviation thereof followed by a statement of one or more of the purposes specified in subsection (1) or an abbreviation thereof.

(3) The Register and any grant or certificate of title recording particulars of registration of a plan of subdivision mentioned in sub-section (2) shall refer to the existence of an easement so designated and identified, or an abbreviation thereof.

(4) The proprietor of any land so appropriated or set apart may in a court of competent jurisdiction recover from the proprietor of any land having the benefit of any such easement such amount by way of contribution to the cost of maintaining the land so appropriated or set apart in a condition fit for enjoyment of the easement as may be reasonable, having regard to the period of enjoyment of the easement by that proprietor.

(5) The provisions of subsection (4) may, by written agreement of those proprietors for the time being, be varied, modified or excluded wholly or in part.
(6) In this section—
(a) "plan of subdivision" means a plan of subdivision referred to in the Third Schedule; and
(b) references to the proprietor of a lot include references to any other person referred to in section 68(2).

(7) The provisions of section 181 of the Property Law Act 1974-1986 apply to an easement under this Part.

PART XI - COVENANTS

74. Implied covenants. [Qld. ss.74, 76, cf. PLA, s.49.]
In an instrument transferring any interest in registered land for valuable consideration there shall be implied an obligation on the part of the transferor to do at the cost of that person all such acts and execute all such instruments as, in accordance with the provisions of this Act, may be necessary to give effect to the covenants, conditions and purposes expressly set forth or by this Act implied in such instrument.

75. Incorporation of provisions contained in memorandum. [Qld. s.76A.]

(1) In this section, "memorandum" means a memorandum recorded by the Registrar containing provisions capable of constituting covenants and conditions in an instrument of a class specified in the memorandum.

(2) The Registrar
(a) shall number and record any memorandum delivered to him;

and

(b) may distinctively number and record a memorandum on his own behalf.

(3) A memorandum recorded under subsection (2) shall be retained by the Registrar and shall, for the purposes only of sections 23(2), 23(4)-(7), and 27, be deemed to be part of the Register.

(4) Where an instrument is of a class specified in a memorandum recorded by the Registrar and contains a provision incorporating, with or without amendment, all or any of the provisions contained in that memorandum, those provisions, or those provisions as amended, are deemed to be set out at length in the instrument.

(5) Nothing in subsection (4) shall be construed as limiting the effect, if any, of a provision in an instrument that incorporates in the instrument covenants or conditions or other provisions not referred to in that subsection.
(6) The Registrar—
(a) may withdraw a memorandum lodged under subsection (2) on production of a request by the person who lodged the memorandum;
(b) may for good reason and after giving 14 days notice to the person who lodged the memorandum, cancel a memorandum;
(c) shall retain and if requested produce for inspection a copy of a memorandum cancelled or withdrawn under this subsection.

(7) Withdrawal or cancellation of a memorandum does not affect any instrument lodged at any time before seven days after such withdrawal or cancellation.

PART XII - TRUSTS, DECEASED ESTATES, BANKRUPTCY

76. Declaration of Trusts and Transfers to trustees. [Qld. ss.77-79.]

(1) Subject to the provisions of this Part trusts shall not be registered and no schedule or declaration of trust shall form part of the Register.

(2) A registered proprietor of may transfer any estate or interest in land to trustees or may declare a trust of any estate or interest in land by instrument.

(3) The trusts upon which land vested in trustees is held may be declared by a schedule to the instrument by which the trustees are nominated, or by a separate instrument, which may be deposited with the Registrar.

77. Registration of personal representative. [Qld. 1877, s.32(a).]

(1) Land of a deceased proprietor may be registered in the name of a person who in relation to that land—
(a) has obtained a grant of representation in Queensland; or if no grant has been made—
(b) would in the opinion of the Registrar be entitled to succeed in an application for a grant of representation.

(2) An applicant for registration under this section shall not be registered unless—
(a) he produces the grant of representation or an office copy; or
(b) in a case where the registered proprietor has died intestate, he satisfies the Registrar that—
(i) letters of administration of the estate have not been granted or resealed in Queensland within six months after his death;
(ii) the value of the gross estate in Queensland of the deceased does not exceed $100,000 at the date of death or such other amount as may be determined by regulation made by the Governor in Council.
(3) A person registered under this section shall have the same rights, powers and liabilities in respect of the land as if a grant of representation had been granted him.

(4) A grant of representation in relation to land that is made after registration under this section-
(a) shall not affect the validity of any act done or payment before the date of the grant; but
(b) a person registered under this section shall—
   (i) render to the grantee an account of all property forming part of the estate of the deceased that came under his control before the date of the grant;
   (ii) do all that is necessary to transfer to the grantee such of that property as remains under his control.

78. Registration of devisee. [Qld. 1877, s.32(b).]

(1) Land of a deceased proprietor may be registered in the name of a person beneficially entitled under a devisee of that land made by the deceased proprietor.

(2) A person applying to be registered under this section shall not be registered unless he—
   (a) produces the written consent of the person referred to in subsection (1) of the last preceding section; and
   (b) satisfies the Registrar that he is so beneficially entitled.

79. Applications to the Court. [Qld. ss.83,89, Qld. 1877, ss. 32,46.]

(1) A person interested, whether as personal representative, devisee, Public Trustee or otherwise, in land or under any trust of land of a deceased proprietor, or as trustee or beneficiary under a trust may apply to the Court for an order that the applicant or some other person be registered as proprietor of the land.

(2) Upon application under this section, the Court may—
   (a) make the order sought;
   (b) order that a caveat be lodged for the protection of the interest in the land of any person;
   (c) direct that advertisements be made and notices given to such persons and in such manner as may be proper;
   (d) order that costs of and incidental to the application be paid out of the estate of a deceased proprietor, out of trust assets, or by any person
   (e) make such further or other order as may be just.

(3) An order under this section shall—
   (a) upon request and production to the Registrar of the order or an office copy be given effect by registration of particulars of the order;
(b) but not before registration be effective to vest the land in the
person to be registered as proprietor.

80. Evidence.

An application for registration under this Part shall—
(a) be by application stating the estate or interest in respect of
which registration is sought and the nature of every estate or
interest held at law or in equity by other persons insofar as the
same is known to the applicant;
(b) be supported by such evidence and verified by such oath or
statutory declaration of the applicant and any other person as the
Registrar may require; and
(c) unless the Registrar dispenses with its production, be accompanied
by the certificate of title to the land.

81. Transmission on bankruptcy. [Qld. s.86.]

Subject to any Commonwealth Act, a request, together with such other
evidence as the Registrar shall require, shall be lodged before registration
of transmission of land consequent upon bankruptcy.

PART XIII—WRITS OF EXECUTION, LIENS AND CAVEATS

82. Writs of execution. [Qld. s.91, Qld. 1877, s.35.]

(1) No judgment shall be capable of registration.

(2) A writ of execution may be registered by production of a request and an
office copy of the writ.

(3) As regards purchasers or creditors, a writ of execution shall,
notwithstanding that a purchaser or creditor may have actual or constructive
notice thereof, not bind or affect or be effectual against any registered
land until registration of the writ.

(4) Discharge or satisfaction of a writ of execution may be registered by
production of a request and proof that the writ has been discharged or
satisfied.

(5) As regards purchasers or creditors a writ of execution shall not affect
any registered land unless the writ is executed and put in force—
(a) within six months from the date of the production of the writ
for registration; or
(b) within such extended period as a Judge may allow and is notified
to the Registrar.
(6) The Registrar may, at any time after the expiration of the time specified in subsection (5), cancel registration of the writ.

(7) When registered land is sold under any registered writ of execution, the Sheriff or, as the case may be, the registrar of the District Court shall execute a transfer to the purchaser.

(8) Upon registration of the transfer, the transferee shall be the registered proprietor of the land subject to-
   (a) registered interests; and
   (b) equitable mortgages notified by caveat.

83. Vendor to have no equitable lien. [Qld. s.97.]

A vendor of registered land shall not have any equitable lien on the land by reason of non-payment of all or part of the purchase money.

84. Lodgment and effect of caveat. [Qld. ss.98,101; Qld. 1877, s.30A; NSW ss.74F(1)-(4),74H.]

(1) A caveat may be lodged by-
   (a) any person claiming an estate or interest in any registered land;
   (b) an equitable mortgagee in accordance with section 58;
   (c) the Registrar acting under section 16(5).

(2) Until the caveat is withdrawn or lapses or is removed or cancelled no instrument affecting the land shall be registered other than-
   (a) an instrument expressly stated in the caveat to be excepted;
   (b) an instrument to the registration of which the caveator has consented in writing;
   (c) an instrument executed by a mortgagee registered before lodgment of the caveat by a person claiming to be a mortgagee; or
   (d) any other instrument the registration of which will not affect the estate or interest claimed by the caveator;

85. Compensation for improper caveat. [Qld. s.103; NSW s.74P.]

(1) A person who without reasonable cause-
   (a) lodges;
   (b) fails to withdraw; or
   (c) fails to bring about the lapsing of a caveat-
shall be liable in damages, which may include exemplary damages, to any person who in consequence sustains loss.

(2) Proof that the caveat was not, without reasonable cause, lodged, maintained or lapsed shall rest upon the caveator, or person entitled to withdraw or bring about the lapsing of the caveat.
86. **Form and contents.** [Qld. ss.99,100; Qld. 1877, ss.36,37; NSW ss.74F(5)-(9),74N.]

(1) A caveat shall—
   (a) state—
       (i) the name and address of the caveator and, unless the Registrar dispenses therewith, of the registered proprietor of the land affected by the caveat;
       (ii) the estate or interest claimed by the caveator;
       (iii) the registered estate or interest affected by the caveat, and in the case where the caveat relates to part only of the land, such further description as may be necessary to identify the land affected; and
       (iv) all the grounds on which the estate or interest is claimed;
   and
   (b) be signed by the caveator.

(2) Notification of lodgment of the caveat shall be given by the Registrar by certified mail to the person to whom the caveat is addressed at the address shown on the caveat.

(3) A notice relating to a caveat, or to any proceedings in respect thereof, is sufficiently served if served at the address given in or recorded on the caveat or, where the caveat was signed by a solicitor or other proper agent, at the office of that solicitor or other proper agent.

(4) Where a person entitled to withdraw a caveat lodges a notice that the name of the caveator or the address for service of notice on the caveator has been changed from the name or address previously stated in the caveat, the Registrar shall record on the caveat the name or address so notified and the name and address so recorded shall be the name or address for service of notice on the caveat.

(5) Service of a notice in accordance with subsection (3) may be dispensed with if the Registrar is satisfied that the notice cannot be so served and that notice has been served in accordance with the written direction of the Register with respect to service.

87. **Withdrawal of caveat.** [NSW s.74M.]

A caveat may be withdrawn by the caveator[ by lodging a request].

88. **Lapsing of caveat.** [Qld. 1877, s.39; NSW ss.74I-K.]

(1) A caveat lapses unless—
   (a) lodged with the written consent of the registered proprietor of the land affected by the caveat, or by an equitable mortgagee in accordance with section 58, or by the Registrar acting under section 16(5); or
   (b) the caveator
       (i) before or within the time specified in subsection (2) takes
proceedings before a Judge to establish title to the estate or
interest claimed in the caveat; and
(ii) within such time gives to the Registrar notice of having taken
those proceedings; or
(c) at the conclusion of the proceedings in (b) a Judge otherwise
orders.

(2) Proceedings shall be taken within the following times -
(a) within 14 days from service on the caveator by the caveatee of
notice requiring that such proceedings be taken; or if no such
notice is served
(b) within three months from the date of lodging of the caveat.

(3) A caveatee serving a notice in accordance with subsection (2) shall
within the same time also notify the Registrar thereof.

(4) A caveat which has lapsed may be removed from the Register without any
request in that behalf.

89. Removal of caveat. [Qld. ss.99,102; Qld. 1877, ss.38; NSW ss.74I-K.]
(1) A caveatee may at any time apply to a Judge for an order that a caveat
be removed.

(2) Upon an application under this section a Judge may make such order,
whether ex parte or otherwise, and on such terms as may be just.

90. Cancellation of caveat. [Qld. s.102.]
(1) A caveat may be cancelled by the Registrar upon request and proof to
his satisfaction that -

(a) the estate, interest or claim of the person by or on whose behalf the
caveat was lodged has ceased or been abandoned or withdrawn;
(b) the rights of the caveator have been satisfied or or disposed of
by agreement or arrangement; or
(c) the nature of the estate, interest or claim of the caveator is not
such as to entitle him to prevent registration of an instrument
produced for registration.

(2) Before cancelling a caveat the Registrar shall notify the caveator in
the manner provided in section 86.

(3) Where an instrument is lodged whose registration would give full effect
to an interest claimed by a caveat, the caveat shall be removed immediately
prior to registration of the instrument without any request being necessary
or fee payable.
91. **Further caveat.** [Qld.1877, s.40; NSW s.740.]

A caveat shall not be lodged by a person on any ground which is the same or substantially the same as that of a caveat previously lodged by that person that has lapsed or been withdrawn, cancelled or removed.

**PART XIV - POWERS OF ATTORNEY, DISABILITIES**

92. **Powers of attorney.** [Qld. s.104.]

(1) A registered proprietor may by a power of attorney authorise and appoint any person to act for him in respect of the disposition of registered land or to deal with the land in accordance with the provisions of this Act.

(2) Upon production of a request together with the power of attorney, the Registrar shall register the power in the appropriate part of the Register including particulars in respect of any land to which the power applies that is specified in the request.

(3) All acts lawfully done or performed by the person so appointed—
   (a) under the authority of; and
   (b) within the limits prescribed by; and
   (c) in conformity with the directions contained in the power of attorney shall have the same force and effect and be binding on such proprietor as if the acts had been done or performed by the donor of the power.

(4) A registered power of attorney shall be received as evidence that the person to whom such power has been granted is duly authorised to make contracts, to sign instruments, and to perform all other acts in accordance with the terms of the power.

(5) The Registrar shall retain a copy of the power of attorney.

(6) It shall not be necessary for the Registrar to require proof that at the time of execution of any instrument executed under a registered power of attorney that the power was unrevoked.

93. **Revocation of power of attorney.** [Qld. ss.107,108.]

(1) A revocable power of attorney registered, whether before or after the commencement of this section, may be revoked by an instrument of revocation.

(2) The Registrar shall not register any instrument executed pursuant to a power of attorney where that instrument took effect between the parties after registration of—
   (a) the instrument of revocation of the power of attorney; or
   (b) the death or insolvency of the donor of the power.
94. **Persons under disability.** [Qld. s.111.]

Where a person interested in registered land is incapable by reason of disability of doing anything required or permitted by this or any other Act to be done in relation to registered land, then:

(a) in the case of a mentally disordered person, the person or committee empowered to act on behalf of the person under the Mental Health Services Act 1974-1987 in relation to matters involving property may act on behalf of the person under disability; and

(b) in the case of an infant, the Court may empower the parent or guardian or other suitable person to act on behalf of the infant.

FIRST SCHEDULE (s.5)

PART I

Repeals

The following Acts are completely repealed

Real Property Act 1861-1988
Real Property Act 1877-1988
Real Property Acts Amendment Act 1952-1986
Real Property Acts Amendment Act 1956-1986
Real Property Acts Amendment Act 1973
Real Property Acts Amendment Act 1974
Real Property Act Amendment Act 1976
Real Property Act Amendment Act 1978
Real Property Acts Amendment Act 1979
Real Property Act Amendment Act 1980
Real Property Acts Amendment Act 1981
Real Property Act Amendment Act 1985
Real Property Acts and Other Acts Amendment Act 1986
Real Property Acts Amendment Act 1988
Real Property (Commonwealth Titles) Act 1924-1986
Real Property (Commonwealth Defence Notification) Act 1929-1986
Real Property (Local Registries) Act 1887-1988
Registrar of Titles Act 1884

PART II

Amendments

[Consequential amendments will be added before any bill is submitted to Parliament, but are not included in this version as they are routine and would not assist discussion of the working paper]
PART III

Savings and Transitional Provisions

1. Notwithstanding the repeal of the Real Property Act 1861-1986 by this Act, the provisions of section 5 of the Real Property Acts and Other Acts Amendment Act 1986 shall continue to apply in respect of any bill of encumbrance registered or executed before the commencement of that Act as if this Act (other than this subsection) had not been enacted.

2(1) Nothing in this Act prevents the registration of an instrument, executed before the commencement of this Act and lodged with the Registrar for registration, which the Registrar would have been empowered to register had this Act not been enacted and the Registrar shall in respect of such an instrument continue to have all the powers that he had in respect to instruments lodged for registration prior to the commencement of this Act.

(2) The Registrar may register a plan of subdivision of land that at the time it is produced is not in the area of a local authority notwithstanding—
   (a) that the approval of a Local Authority has not been given to the plan;
   (b) any provision to the contrary contained in any Act passed before 22nd April 1976.

3. All books, registers, certificates and certified copies of entries in any register kept and maintained or issued by the Registrar and any Local Deputy Registrar under any Act or provision of an Act repealed or amended by this Act shall be deemed to be so kept and maintained or issued, and all entries therein shall be deemed to have been made under this Act.

4. Any appointment, grant or declaration made, any registration effected, any notice or certificate given, any memorandum entered, any caveat lodged or any title, estate interest, claim, right or power of attorney existing or acquired or any other act done under provisions repealed or amended by this Act or any of them beyond the commencement of this Act shall not be affected by the repeal or amendment of those provisions, and shall be deemed to exist or to be made, effected, given, entered, lodged or acquired under this Act.

5. A persons who immediately before the commencement of this Act held any of the following offices, namely—
   (a) Registrar of Titles;
   (b) Deputy Registrar of Titles;
   (c) Local Deputy Registrar of Titles
   shall, without further or other appointment, continue to hold such offices.

6. Any reference to the Registrar-General or Registrar of Titles in any Act, Order in Council, Regulation, instrument or document relating to the registration of title to land or the registration of deeds shall be deemed to be a reference to the Registrar of Titles appointed, or deemed to be appointed under this Act.
7. Any recording made in the Register or on any certificate or instrument before the passing of this Act, for the purpose of registering under the provisions of any Act repealed by this Act the Commonwealth or any Commonwealth authority as the proprietor of any Commonwealth land, shall be deemed to have been and to be lawfully and validly made; and any certificate or instrument issued before the passing of this Act by the Registrar to the Commonwealth or any Commonwealth authority relating to any Commonwealth land shall be deemed to have been and to be at all times valid and effectual in all respects.

8. The repeal or amendment by this Act of any provision of any Act shall not—
(a) affect the operation of any such repealed or amended provision prior to the commencement of this Act;
(b) either before or after the commencement of this Act disturb the operation of such repealed or amended provision insofar as it amended any other Act;
(c) prevent the registration of title to any land not under the provisions of this Act, not being land in respect of which provision is made under sections 29 or 30, in like manner to that in which such title might have been registered immediately before the repeal of such provision;
(d) affect the operation of section 11 of the Real Property Act 1877–1988 in relation to a lease granted before the commencement of this Act.

9. The provisions in force prior to the commencement of this Act in relation to plans to which section 72 applies shall continue to apply in respect of all plans which have been lodged, registered or deposited before the commencement of this section.

SECOND SCHEDULE
(s.6)

PART I

CENTRAL DISTRICT

Commencing on the east coast at the mouth of the Kolan River, and bounded thence on the south by the northern watershed of that river westerly to Dawes Range; by that range and the range forming the northern and western watersheds of the Rawbelle River and its tributaries westerly and southerly to their junction with the southern watershed of Ross and Cracow Creeks; by that watershed westerly to the Dawson River; by that river downwards to Bigge's Range; by that range westerly to Carnarvon Range; by that range westerly to the Great Dividing Range; by that range westerly to the Warrego Range; by that range westerly to the Cheviot Range; by that range north-westerly and westerly to the confluence of the Thomson and Barcoo Rivers; by a line due west to the western boundary of the Colony; on the west by that boundary north to the twenty-fourth parallel of south latitude; on the north by that parallel easterly to its intersection with the east
boundary of Ingledown No.3 Block; by part of the east boundary of that block; by the northern boundaries of Ingledoun No.1 and Walla Munda; by parts of the west and the north boundaries of Diamantina Lakes No.3; by part of the west and the south boundaries of Diamantina Lakes No.2; by the south boundary of Diamantina Plains; by the south and part of the east boundaries of Mayne Downs No.4 to the twenty-fourth parallel of latitude; again by that parallel easterly to the range forming the eastern watershed of the Diamantina River and its tributaries; by that range northerly to the ranges forming the southern watershed of the Flinders River and its tributaries; by that range north-easterly to the twenty-first parallel of latitude; by that parallel easterly to the Great Dividing Range; by that range southerly to its junction with the southern watershed of the Cape River; by that watershed easterly to the confluence of the Belyando and Sutton Rivers; thence by the Sutton River upwards to its head in the Leichhardt Range; thence by that range and the northern watershed of Funnel Creek and its tributaries easterly and southerly to a spur forming the watershed separating the waters of Marion and Rocky Dam Creeks; thence by that watershed north-easterly to Cape Palmerston on the east coast of the Colony; thence by a line eastward to the eastern boundary of the Colony; thence on the east by that boundary southerly to Sandy Cape; and again on the south by a line westerly to the point of commencement; inclusive of all islands adjacent thereto south of the latitude of Cape Palmerston and north of the latitude of Sandy Cape.

PART II

NORTHERN DISTRICT

Commencing on the east coast at Cape Palmerston, and bounded thence on the south by a line east to the eastern boundary of the Colony; thence on the east, north-east, north, and west by that boundary to the twenty-fourth parallel of south latitude; on the south by that parallel easterly to its intersection with the east boundary of Ingledoun No.3 Block; by part of the east boundary of that block; by the northern boundary of Ingledoun No.1 and Walla Munda; by parts of the west and north boundaries of Diamantina Lakes No.3; by part of the west and the south boundaries of Diamantina Lakes No.2; by the south boundary of Diamantina Plains; by the south and part of the east boundaries of Mayne Downs No.4 to the twenty-fourth parallel of latitude; again by that parallel easterly to the range forming the eastern watershed of the Diamantina River and its tributaries; by that range northerly to the range forming the southern watershed of the Flinders River and its tributaries; by that range north-easterly to the twenty-first parallel of latitude; by that parallel easterly to the Great Dividing Range; by that range southerly to its junction with the southern watershed of the Cape River; by that watershed easterly to the confluence of the Belyando and Sutton Rivers; thence by the Sutton River upwards to its head in the Leichhardt Range; thence by that range and the northern watershed of Funnel Creek and its tributaries easterly and southerly to its junction with a spur forming the watershed separating the waters of Marion and Rocky Dam Creeks; and thence by that watershed north-easterly to the point of commencement; inclusive of all islands adjacent thereto north of the latitude of Cape Palmerston.
THIRD SCHEDULE

(Section 25)

Part I

1. Save where this Act otherwise provides, an instrument shall not be registered until the current grant or certificate of title in respect of the land which is wholly or partly affected by the instrument is delivered up to the Registrar who, upon registration of that instrument, may cancel the grant or certificate of title.

2. Following the registration of any dealing with land the Registrar—
   (a) in the case where the land is held under one grant or certificate of title, and all the land comprised in that grant or certificate of title is transferred by the instrument, may either—
      (i) issue a single new certificate of title in favour of the transferee, after cancelling the original grant or certificate of title; or
      (ii) suitably indorse the original grant or certificate of title of the transferor in order to record the fact of the transfer of the land comprised therein.
   (b) in the case where the land is held under one grant or certificate of title, and part of the land comprised therein is being transferred to a transferee and part retained by the transferor, shall—
      (i) issue a new certificate of title in favour of the transferee in respect of the part transferred; and
      (ii) issue a new certificate of title in favour of the transferor in respect of the part of the land retained, after cancelling the original grant or certificate of title.

3. Where a grant or certificate of title is indorsed pursuant to paragraph 2(b)(ii) it shall be retained in the office and in such a case or in any other case where a partly cancelled grant or certificate of title is retained in the office a certificate of title in respect of the untransferred portion of the land comprised in such partly cancelled grant or certificate of title shall be issued to the transferee on request.

4. Where the land comprises separate parcels of land that—
   (i) are contiguous;
   (ii) have separate descriptions—
upon the request of a registered proprietor of land and upon delivery up of the grant or grants, certificate or certificates of title for the land the Registrar may issue to such proprietor—
   (a) where the land is held under separate grants or certificates of title,
      EITHER a single certificate of title containing all those parcels; OR certificates of title each containing such number of those parcels as the Registrar thinks fit; or
   (b) where the land comprises separate parcels of land that are held under one grant or certificate of title, certificates of title each containing such number of those parcels as the Registrar thinks fit.
5. The Registrar may, at any time, and from time to time, whether or not upon the request of the registered proprietor, issue a certificate of title in relation to registered land:

Provided that where a current grant or certificate of title in respect of that land is not held by the Registrar, a certificate of title shall not be issued in respect of that land or any part of that land until the current grant or certificate of title is produced to and cancelled by the Registrar or, pursuant to this or any other Act, the Registrar dispenses with the production of the current grant or, as the case may be, certificate of title.

6. (a) Where the Registrar issues a certificate of title pursuant to paragraphs 4 or 5 he shall have regard to the descriptions and plans of the parcels of land; and

(b) upon the issue of the certificate the Registrar shall cancel the grant or previous certificate of title delivered up, either wholly or in part.

7. Every certificate of title issued pursuant to this section shall disclose the current state of the Register in relation to the land to which that certificate of title relates.

8. Where several dealings are to be registered the Registrar need only issue a fresh certificate of title upon the registration of the last dealing.

Part II

1. A person subdividing registered land shall produce for registration a plan of the land.

2. The plan shall-
   (a) exhibit distinctly delineated all roads, streets, thoroughfares, lanes or pathways dedicated for public use;
   (b) exhibit all separate and distinct parts into which the land may be divided marked with separate and distinct numbers or symbols;
   (c) be certified as accurate by a licensed surveyor;
   (d) be indorsed by the registered proprietor that he agrees to the plan of subdivision and dedicates to public use any new roads, streets, thoroughfares, lanes or pathways so exhibited.

3. If satisfied that the plan is correct and that the requirements of the Local Government Act 1936-1987 or the City of Brisbane Act 1924-1987, have been complied with, the Registrar shall register-
   (a) the plan of subdivision;
   (b) particulars of any dedication to public use of land comprised in the plan.
4. Upon registration of a plan of subdivision—
   (a) the land comprised in the plan shall be dealt with under this Act in accordance with that plan and not otherwise.
   (b) the registered proprietor shall apply forthwith to take out and receive in his own name a certificate of title for each subdivision of the land so subdivided as, having regard to the number of subdivisions, the Registrar shall consider necessary or expedient for the orderly registration of instruments affecting the land.

5. A dedication to public use of land comprised in the plan shall—
   (a) subject to any other Act, be of all the estate or interest of the registered proprietor in the land so dedicated unless and to the extent only he expressly reserved any part of the land below the surface;
   (b) vest the land so dedicated in the Crown.

6(1) Notwithstanding any other provision of the Act, the Registrar may regard a plan of subdivision that is—
   (a) produced for registration within the time prescribed by section 34 of the Local Government Act 1936-1987, but withdrawn from registration; and
   (b) reproduced for registration to secure the proper order of priority of that plan of subdivision in relation to other instruments produced or to be produced for registration—
   as having been produced within the time so prescribed.

(2) The time of production of a plan referred to in sub-paragraph (1) shall be the time of its initial production.

7. Where in alienating any land—
   (a) the Crown excludes from such alienation any road or watercourse that is within the boundaries of the land; and
   (b) the land is subsequently subdivided so that the road or watercourse is contained within the boundaries of a part into which the land is subdivided—
   the Registrar may register the plan of subdivision and—
   (i) exhibit distinctly delineated all roads, streets, thoroughfares, lanes or pathways dedicated for public use;
   (ii) exhibit all separate and distinct parts into which the land may be divided marked with separate and distinct numbers or symbols;
   (a) issue a certificate of title for that part notwithstanding that the separate and distinct parts of the land on either side of the road or watercourse have not been marked with a separate number or symbol;

8. Where in alienating any land—
   (a) the Crown excludes from such alienation any road or watercourse that is within the boundaries of the land; and
   (b) the land is later subdivided so that a part into which the land is subdivided is contiguous to the road or watercourse—
   the Registrar may—
   (i) register the plan of subdivision; and
(ii) issue a separate certificate of title for each certificate of title for each separate and distinct part of the land on either side of the road or watercourse.

FOURTH SCHEDULE
[Section 39(4)]

1. Delegation by Registrar. [Qld. 1952, s.51.]

In relation to this schedule a Local Deputy Registrar shall only perform such duties and powers imposed and conferred upon the Registrar by this Act as the Registrar shall in writing direct.

2. Who may apply for title. [Qld. 1952, s.50.]

(1) Subject to the provisions of this Act and of this schedule, any person who apart from this Act would be entitled, by reason of the operation of any Act limiting the time within which action to recover land may be commenced, to continue in possession of that land, may apply to the Registrar for the issue to him of a certificate of title to that land.

(2) The following persons shall be entitled to so apply, namely:-

(a) Any person claiming to be entitled to an estate in fee simple in possession either at law or in equity;

(b) Any guardian of any minor claiming to be entitled to an estate of freehold in possession in the name of such minor;

(c) the committee or administrator of the estate of any mentally sick person claiming to be entitled to an estate of freehold in possession in the name of such mentally sick person.

(3) Nothing in this schedule shall enable a person to obtain registration as proprietor by reason of an encroachment upon registered land or to any estate or interest therein save and except under Part XI of the Property Law Act 1974-1986.

3. Form of application. [Qld. 1952, s.52.]

The applicant shall lodge with his application all documents of title affecting the land in his possession or under his control and shall, if required by the Registrar, furnish a plan of survey of the land in respect of which the application is made.
4. Registrar may require additional information and documents. [Qld. 1952, s.53.]

(1) The Registrar may require an applicant to furnish him with all such additional information, verified by oath or statutory declaration, and documents relating to his application as the Registrar deems fit.

(2) The Registrar shall consider each application including all information and documents furnished therewith and any additional information and documents furnished pursuant to a requisition by the Registrar.

5. Rejection or withdrawal of application. [Qld. 1952, ss.54,60.]

(1) The applicant may withdraw his application at any time before a certificate of title is issued and the Registrar shall in such case upon request in writing signed by such applicant return to him all documents deposited by him for the purpose of supporting his application.

(2) If the Registrar is not satisfied that the evidence establishes:
   (a) that all rights of recovery of possession of the land by any other persons, including persons entitled to an interest in remainder or reversion in the land have been barred by the operation of any Act limiting the time within which action to recover land may be commenced; and
   (b) the continued possession of the land by the applicant—
the Registrar shall reject the application.

6. Advertisement of application in some cases. [Qld. 1952, s.55.]

(1) If an application is not rejected, the Registrar shall cause a notice of the application in a form determined by him to be:-
   (a) Advertised at the discretion of the Registrar in accordance with section 18;
   (b) Given by registered post to any person who has given the Registrar the written notice mentioned in sub-paragraph 3 of paragraph 5 at the last address notified pursuant to that subparagraph;
   (c) Given by advertisement or otherwise in such manner as the Registrar shall think fit to any person who, in the opinion of the Registrar has or may have any estate or interest in the land; and

(2) The notice shall fix a time not less than two months nor more than six months from the later of the times of any advertisement under section 18 or other notification under subparagraph (1) after the expiration of which the Registrar may, unless a caveat is lodged, grant the application.

7. Objection to application to be by caveat. [Qld. 1952, s.56.]

(1) A person claiming an estate or interest in the land to which an application under this Part of this Act relates may, at any time before the application is granted, lodge with the Registrar a caveat forbidding the issue of a certificate of title by possession under this Act.
(2) Such caveat shall state:-
   (a) the nature of the estate or interest claimed by the person lodging
       it, including the ground upon which it is founded; and
   (b) an address at which notices and proceedings relating to the caveat
       may be served.

(3) The Registrar may require a caveator to furnish him with all such
    additional information verified by oath or statutory declaration and
    documents relating to his caveat as the Registrar deems fit.

(4) If the Registrar is satisfied that the caveat is either-
    (a) the registered proprietor of the land to which the application
        relates; or
    (b) has an estate or interest in that land in reversion or remainder or
        derived through, under or from the registered proprietor and whose
        entitlement to recover possession is not barred or extinguished by
        the operation of law-
        the Registrar shall refuse the application-

Provided that, if any person is proved to the satisfaction of the Registrar
    to be entitled to an estate or interest in or over the said land less than
    an estate in fee simple, the Registrar may, instead of refusing the
    application solely on that ground, with the consent of the applicant, make a
    recording in the Register and indorse on any certificate of title issued to
    the applicant that the land is subject to such estate or interest.

(5) If the Registrar is not satisfied that the caveator is the registered
    proprietor of the land or has an estate or interest therein derived through,
    under or from the registered proprietor, the Registrar shall give, notice to
    the caveator that the caveator is required to take proceedings in the Court
    to establish his title to the estate or interest claimed by him within a
    time specified in the notice being not less than six months after the giving
    thereof.

(6) If a caveator who has received such a notice from the Registrar does
    not, within the time mentioned in the notice, bring an action in the Court
    to obtain a declaration that he is entitled to the estate or interest
    claimed by him and give written notice thereof to the Registrar or obtain
    from the Court an order or injunction restraining the Registrar from issuing
    a certificate of title by possession to the applicant under this Act, the
    caveat shall lapse.

(7) The lapsed caveat shall not, save by leave of the Court, be renewed by
    or on behalf of the same person in respect of the same estate or interest.

(8) In any proceedings to establish the title of the caveator the issue for
    the Court to decide shall be whether the caveator is the registered
    proprietor of the land or is entitled to an estate or interest therein
    derived through, under or from the registered proprietor or the applicant.

8. Issue of certificate of title. [Qld. 1952, ss.57,58,59.]

(1) After the expiration of the time fixed by the notice under paragraph 6,
    if the Registrar is satisfied as to the-
(a) continued possession of the land by the applicant; and
(b) absence of any subsisting right of recovery of the land on the part of any other person;
the Registrar may, subject to subparagraph (2), record in the Register the applicant as proprietor for an estate in fee simple or for any other estate acquired by the applicant, free from all estates, interests, claims or appearing by the Register to affect the existing title, excepting-
(i) those specified in the proviso to subparagraph (4) of paragraph 7; and
(ii) any estate, interest, claim or notice, so registered in favour of the Crown, any Crown corporation or instrumentality, or corporation or instrumentality representing the Crown or any Local Authority and shall issue to the applicant a certificate of title in accordance with the Register.

(2) Where a caveat has been lodged against the granting of an application the Registrar shall not (except under and subject to the proviso to subparagraph (4) of paragraph 7) grant the application unless the caveat has lapsed, or proceedings taken by the caveator to establish his title have been finally disposed of, and in those proceedings the caveator has failed to establish his title or to obtain from the Court an injunction restraining the Registrar from issuing a certificate of title to the applicant.

(3) Where a certificate of title is issued pursuant to subparagraph (1), the Registrar shall cancel the existing grant or certificate of title for that land and any recording in the Register altogether or to such extent as is necessary to give effect to the certificate of title issued.

(4) Upon the registration of the applicant's estate or interest, the prior estate or interest evidenced in the Register shall cease and determine.
APPENDIX - Part 2

GENERAL COMMENTARY ON DRAFT AMENDING LEGISLATION

A draft bill to replace the existing Real Property Acts and to achieve the objectives set out earlier in this paper is included in this paper as Part 1 of the Appendix preceding this commentary. This commentary is numbered according to the section numbers of the bill. The sections are cross referenced to some of the equivalent provisions in other jurisdictions. The commentary is followed by a list of the repealed provisions of the Real Property Acts which are not proposed to be reproduced in any form in the new bill as they are no longer required. A list of the proposed destinations of the currently extant provisions of the 1877 Act is also included.

The draft bill has been closely compared with the Real Property Act 1886-1975 of South Australia, and cross references to the relevant South Australian legislation are shown in relation to each section of the bill. At the end of this Appendix there is a comparison with South Australia and Victoria, which in the case of South Australian lists the provisions of their legislation which has no parallel in the draft bill together with a brief explanation of the reason for this. South Australia was chosen as a sample for comparison as it is the original home of the Torrens system, the Real Property Act 1861 of Queensland being closely modelled on Torrens original Act of 1958, and the 1877 amendments on subsequent South Australian amendments, and because its current legislation is in a reasonably tidy form. Victoria was selected for a more limited comparison because it is the other State in which there is most current law reform activity in this area of the law. Following publication of this working paper, and during the period set aside for submissions in respect thereof, the Commission will be comparing the draft bill with the current legislation in other jurisdictions possessing the Torrens system, but did not wish the completion of this final stage of the Commission's research in this area to delay publication of this working paper.

In drafting the bill regard has been had to the provisions of the Acts Interpretation Act 1954-1977, and in particular to s.26, so that all references to the discretion of the Registrar or Court have been eliminated in favour of the simple use of the term "may" without more.

PART I - PRELIMINARY

1. Short title. [Qld. s.2; S.A. s.1.]

There is considerable diversity in the titles used in the Australian States for the Acts relating to the registration of title to land. The most recent legislation on this subject is the Land Titles Act 1980 of Tasmania. In Victoria and Western Australia, the term "Transfer of Land Act" is employed
in New South Wales, South Australia and Queensland the term "Real Property Act" is employed. There seems to be no substantial reason to depart from the present title.

2. Commencement. [Qld. s.2; S.A. s.9.]

Provision is made for different commencement dates for different sections. The same justification exists for permitting the postponement of the operation of this Act as applied in the case of the Property Law Act, namely to allow a period of time during which practitioners may become familiar with its provisions and to provide an opportunity for the redrafting of standard documents.

3. Application.

The suggested formulation of the provision to ensure that the Crown is bound by the Real Property Act follows that contained in the working paper on the Supreme Court. This provides that the Real Property Act is to bind the Crown so far as the legislative power of Parliament permits.

4. Arrangement of Act. [S.A. s.2.]

As a result of the proposed amendments the Real Property Act would be divided into Parts, and have four Schedules. The first deals with repeals, amendments, savings and transitional. The second provides for the division of the State into Districts as in the Real Property (Local Registries) Act of 1887. The third encompasses the detailed provisions governing the issue of certificates of title. The fourth consists of details of the procedure for obtaining a title by adverse possession under s.39(4).

The Real Property Act is to be rearranged to some extent so as to make the arrangement of the Act and its division into Parts more logical.

After the general provisions dealing with short title, commencement, application, arrangement, repeals, amendments, savings and transitional and interpretation, administration and the special cases of Crown and Commonwealth land are dealt with first, followed by the definition of the register. Particular interests: life interests and remainders, co-ownership, and then the effect of registration is treated, including remedies for loss occasioned by reliance on the register and provisions governing adverse possession. Provisions dealing with specific interests in land: easements, leases, mortgages, covenants and trusts follow. The special cases of transmissions, writs of execution, caveats and powers of attorney are next in that order, followed by general provisions relating to searching of the register.

This section also defines the abbreviations used in references to other Acts in the notes to sections appearing at the beginning of sections. This relates to the cross references to replaced provisions and parallel
provisions in England, New Zealand and the other Australian Jurisdictions, and occasionally Canadian jurisdictions which are included where appropriate.

5. Repeals, amendments, savings and transitional. [S.A. ss.4,5,158.]

The primary function of this Bill is to replace the Real Property Acts and the new provisions form the substantive part of this Bill. Consequential amendments and repeals are consigned to Schedules.

Section 20 of the Acts Interpretation Act provides for the saving of the operation of repealed Acts as regards rights and liabilities thereunder, and for the conclusion of matters in progress under repealed enactments.

This needs to be supplemented by provisions relating to the following matters:

(a) The continuing validity and effectiveness of registers, certificates and other documents issued under the repealed Acts.

(b) The continuing validity and effectiveness of acts done and transactions effected under the repealed Acts.

(c) The continuance in office of certain officers appointed under the repealed Acts.

(d) the effect of references in other Acts to the Registrar-General.

There are savings in respect of:

(a) any bill of encumbrance registered or executed before the commencement of the Real Property Acts and Other Acts Amendment Act 1986, which abolished encumbrances subject to a saving for existing encumbrances;

(b) any instrument, executed before the commencement of this Act and lodged with the Registrar for registration, which the Registrar would have been empowered to register had this Act not been enacted and the Registrar's powers in respect of such instruments lodged for registration prior to the commencement of this Act;

(c) all existing books, registers, certificates and certified copies etc. which are to be deemed to be kept and maintained or issued, and all entries therein, to have been made under the Principal Act as amended by this Bill;

(d) any appointment, grant or declaration made, any registration effected, any notice or certificate given, any memorandum entered, any caveat lodged or any title, estate interest, claim, right or power of attorney existing or acquired or any other act done under provisions repealed or amended by this Bill or any of them beyond the commencement of this Bill and shall be deemed to exist or to be made, effected, given, entered, lodged or acquired under the Principal Act as amended by this Bill;
(e) the current occupancy of the following offices provided for under the Real Property Acts: Registrar, Deputy Registrars (including Local Deputy Registrars), Master and Deputy Masters of Titles, for all purposes connected with the Acts;

(f) any registration etc. of the Commonwealth or any Commonwealth authority as the proprietor of any Commonwealth land;

(g) repeals are not to:

(i) affect the operation of any such repealed provision prior to the commencement of this Bill; and

(ii) either before or after the commencement of this Bill disturb the operation of such repealed provision insofar as it amended any other Act;

(iii) prevent the registration of title to any land not under the provisions of the Real Property Acts, not being land in respect of which provision is made under section 15 of the Real Property Act 1861, in like manner to that in which such title might have been registered immediately before the repeal of such provision.

As far as possible the reproduction of provisions appearing in the current legislation which relate to a change in the law on a particular date are avoided by means of suitable provisions by way of savings and transition provisions. [For example, s.34(3).]

6. Definition. [Qld. s.3; Qld. 1877, s.3; Qld. 1887, s.2; Qld. 1924, s.2; Qld. 1929, s.2; Qld. 1976, s.3; Land Act 1962-1988, s.6(1); Cth.; S.A. ss.3,68.]

The interpretation provisions have been divided into two sections, the first setting out definitions of terms and the other dealing with other matter sof interpretation and notices.

Definition of terms is be derived from existing legislation as follows:-

Attorney (new)
Bankruptcy (Property Law Act 1974-1986, s.4 [PLA])
Bill or Mortgage (s.3 1861)
Caveatee (new)
Caveator (new)
Central District (s.3 1877)
Certificate of Title (s.3 1861)
Commonwealth Land (see Real Property (Commonwealth Titles) Act 1924)
Commonwealth Attorney-General (see Real Property (Commonwealth Titles) Act 1924)
Commonwealth authority (see Real Property (Commonwealth Titles) Act 1924)
Conveyance (PLA)
Court (PLA)
Crown (new)
Deed (PLA)
Defence Proclamation [see Real Property (Commonwealth Defence Notification) Act 1929-1974]
Deputy Registrar (new)
Disability (new)
Disposition (PLA)
Encroachment (PLA, Part XI)
Grant (s.3 1861)
Grant of representation (Succession Act 1981-1986, s.5)
Instrument (s.3 1861 and PLA)
Interest (new)
Land (s.3 1861 and PLA—It was pointed out that this term was defined in varying ways in the Real Property Act 1861, the Acts Interpretation Act 1954 and the Property Law Act 1974 and that some attempt should be made to convert these into one. However, after due consideration, the Commission decided that there was no evidence of confusion arising out of having one definition of "land" for the purpose of the Real Property Acts and instruments under the Torrens system, and another for instruments relating to unregistered land and a third for other Acts. However, there was a possibility confusion could result from any attempt at common definition).
Lease (PLA and see discussion in Chapter IV)
Local authority (PLA)
Local Registrar (new)
Lodged (new)
Mentally disordered person (modification of that in s.3 1861)
Minor (new)
Mortgage; Mortgagor; Mortgagor (These definitions were recommended by the Commission in its working paper no.25 which concerned some parts of the Real Property Acts. Legislation was passed in 1985 based on those recommendations.)
Nomination of Trustees (PLA)
Northern District (s.3 1877)
Office (new)
Order (PLA)
Personal Representative (Succession Act 1981-1986, s.5)
Possession (PLA)
Produced (new)
Proprietor (s.3 1861 and s.3 1877)
Public Trustee (PLA)
Purchaser (PLA)
Register, register (new) the initial capital letter is used where the word is used as the noun.
Registered land (PLA)
Registered proprietor (new)
Registrar (s.3 1976), embracing the Deputy Registrar and Local Registrar of Titles (s.3 1877)
Sale (PLA)
Term (new) this definition is designed to avoid circumventions of limitations to short leases by timeshares.
Timesharing scheme (s.3 1861, added in 1986)
Transfer (s.3 1861, this definition has been extended to include the act of creating an interest so as to avoid the need for separate provision for or reference to the creation of interests in the Act)
Transmission (s.3 1861)
Trust corporation (PLA)
Will (PLA)

The reason for most of the new definitions is to shorten the text of the legislation.

THERE IS NO LONGER ANY NEED FOR THE FOLLOWING DEFINITIONS PREVIOUSLY APPEARING IN THE LEGISLATION

Consular Officer (s.3 1861)
The only references to consular officers are in s.44, and in view of the wording of this section the definition appears to be unnecessary.

Memorandum of Transfer (s.3 1861)
The new structure of the Act and prescribed forms means that this definition is no longer necessary.

Local Registry (s.3 1877)

Section 3 of the 1861 Act, which relates to interpretation requires re-enactment as its definitions are currently not even in alphabetical order. Furthermore, the inclusion of some further definitions shortens the rest of the Act by employing one word instead of frequently used phrases. For example, "Registrar" is used to mean "Registrar of Titles" and "office" to mean "office of the Registrar of Titles".

There is also a considerable rationalisation through employing the same terms and definitions of terms as those used in the Property Law Act 1974-1986 and other property legislation such as the Succession Act 1981-1986.

Some terms, for example, "caveatee", "caveator", "Commonwealth" have been defined so as to considerably shorten certain portions of the Act which employ the defined term. Others such as "Defence Proclamation" are acquired from the other Acts whose provisions are being incorporated within the Real Property Act 1861.

A few of the new terms deserve special comment. The term "grant of representation" is a general term meaning a grant of probate of the will or letters of administration of the estate of a deceased person and includes the grant of an Order to Administer and the filing of an Election to Administer such an estate by the Public Trustee. There is no purpose in separate references to different types of grant in the Real Property Acts since all grants have the same effect for the purposes of these Acts. Similar comments apply to the use of the term "personal representative".

The definition of "lease" has been enlarged to avoid problems arising from intermittent leases, since these are now more common through being employed in some of the expanding number of timeshare schemes. This problem is discussed in more detail in the section of the working paper dealing with the short leasors exception from indefeasibility.
The term "registered land" is being employed to avoid numerous uses of the phrase land under the provisions of the Act.

THE EFFECT OF THE ACTS INTERPRETATION ACT 1954-1977

The Commission would have been inclined to include the following definitions, but for the appearance of an essentially similar definition in the Acts Interpretation Act 1954-1977.

"Judge" means a Judge of the Court;

"Minister" means the Minister for Land Management or other Minister of the Crown for the time being charged with the administration of this Act;

"prescribed" in relation to a form, means prescribed under this Act;

7. Interpretation and Notices. [Qld. s.3; PLA, s.257; S.A. ss.180,276.]

Subsection (1) as well as making appropriate provision for other parts of speech and grammatical forms of defined words provides that references to certain terms in the Act are to have specified meanings.

References to parties to transactions are to include their successors in title.

References to a term of years less than or not exceeding any specific number of years are to include references to the lesser leasehold estates of periodic tenancies for any recognised period and tenancies at will.

References to a request, application, certificate, direction or other instrument which is to be lodged or produced in the office or addressed to the Registrar are to mean a request, application, certificate, direction or other instrument, as the case may be, which is in the form prescribed, if any, for the particular purpose pursuant to section 14.

PART II - ADMINISTRATION

The provisions contained in the draft Bill are intended to reproduce the substance of the existing provisions relating to:

(a) The appointment, powers and functions of the Registrar of Titles and Deputy Registrars of Titles.
(b) The appointment, powers and functions of Local Deputy Registrars of Titles.
(c) The Office of the Registrar of Titles.
(d) The seals of office of the Registrar of Titles and of the Local Deputy Registrars of Titles.
In s.6 of the Real Property Act 1877, provision is made for the appointment of appraisers to value land under the Act. The need for this provision has disappeared with the enactment of the Valuers Registration Act 1965 - 1979.

8. Registrar of Titles. [Qld. 1861, ss.4,5; Registrar of Titles Act of 1884; Vic. s.5.]

This section re-enacts and consolidates ss.4,5 of the Real Property Act 1861 and the Registrar of Titles Act of 1884.

9. Office of the Registrar. [Qld. 1861, s.4; Qld. 1887; S.A. s.12.]

This section re-enacts and consolidates s.4 of the Real Property Act 1861 and portions of the Real Property (Local Registries Act) 1887. Additionally, it permits the establishment of sub-branches at any place in the State to transact such categories of business as are prescribed by regulation.

It was felt appropriate to copy the South Australian example in stipulating the location of Titles Office as Brisbane.

10. Deputy Registrars. [Qld. 1887.]

This section re-enacts and consolidates portions of the Real Property (Local Registries Act) 1887.

DISTRICT REGISTRIES UNDER THE REAL PROPERTY ACT 1861-1988

When the Real Property Act of 1861 came into effect, all Old System records relating to land grants in the new State of Queensland had been forwarded to Brisbane from Sydney, New South Wales, and these formed the basis for applications for the first issue of Certificates of Title issued under the Act. Communications at that time were primitive and slow and coupled with the vastness of the State, caused long delays in registering dealings with Torrens title, and a continuation of the Old System practice of a purchaser holding the grant or title with his Memorandum of Transfer and not seeking registration.

By the Real Property (Local Registries) Act of 1887 (later amended by the Central and Northern Districts Boundaries Act of 1900), branches of the Office of the Registrar of Titles were established in the Central and Northern Districts of the Colony at Townsville and Rockhampton respectively. To establish these Registries, duplicates of the register books in Brisbane containing grants and titles relating to land within the Districts had to be prepared and forwarded to the Branch Offices. The amount of work that this entailed must have been enormous for the relatively small office in Brisbane to undertake at the time. Although the Act was assented to on the 30th September 1887, both District Offices did not open their doors until January 1889.
District Offices are of great benefit in the orderly and expeditious registration of land transactions in their localities and suffer less from cyclical land booms than does the large Brisbane Office which, because of its sheer size, is less responsive to overloads and accumulates greater numbers of arrears of work. This is reflected by the persistent pressure from localities such as Toowoomba, the Gold Coast and Cairns for the establishment of District Titles Offices in those areas. However, given the size of the State today, the sheer size and cost of the task of identifying each and every freehold parcel of land within a given area and duplicating the relevant titles by manual methods, is such that it has not been possible to open any further branches since 1889.

The decision by Cabinet to computerise the records and procedures of the Titles Office has resulted in a strategic plan that has, as its foundation, a centralised, computer record of all freehold land in Queensland. Though each parcel of land, when converted to the automatic data record, will be preceded by an identifier which locates the District Registry in which registrations regarding it are presently made, the ultimate thinking is that, with a unified register of all land in Queensland, the searching and registration process can also be unified and the need for District Registries, as independent Registries, will cease. In their place will be "satellite" offices of the Brisbane Office, from which searches of any parcel of land in Queensland, in person or remotely via appropriately connected terminals, can be made and documents for registration lodged, irrespective of where in the State the land is situated.

The present offices at Townsville and Rockhampton will remain, but will be augmented by other offices at Cairns, Mackay, Bundaberg, Maryborough, Nambour, Toowoomba, Ipswich, the Gold Coast and other centres which can mount a justifiable case of the need for such a facility.

When the Titles Office Registry is fully automated each registration, or series of related registrations, will result in the issue of a new certificate of title automatically produced by the computer from data relevant to the transaction. Coincidentally, this was the original concept of the Torrens System and was only abandoned in 1877, by s.17 of the Real Property Act of that year, because the growing number of transactions received made it a cumbersome and slow procedure.

Only the more complicated or important dealings, such as caveats, warrants, easements, new survey plans, trust instruments, transmissions by death, need be referred to Brisbane, and then via facsimile machines to avoid delays in transit. However, this is not capable of implementation until all title data has been captured and held in the data base - originally expected to be 1992, but now somewhat uncertain due to financial restrictions on further development of the computerisation programme.

The review and consolidation of the Real Property Acts can realistically be expected to be completed and effective as law sometime in 1990 or 1991 - well ahead of the finalisation of computerisation of the Titles Office - and therefore the question of abolition of District Offices does not, at this time, arise.
11. Power to delegate. [Qld. s.11.]

It was found appropriate, both in terms of simplicity and clarity in the legislation, and in the interests of good administration in a greatly expanded titles office to frame a new more flexible and wide-ranging power to delegate as a separate section.

12. Oaths of office. [Qld. s.6.]

This section re-enacts with updated wording s.6 of the Real Property Act 1861.

[NOTE: if the recommendations in the Commission's Working Paper on Oaths are implemented this section can be simplified to a provision merely stipulating that the Registrar take an oath of office.]

13. Seals of Office. [Qld. s.8; Qld. 1887.]

This section re-enacts and consolidates s.8 of the Real Property Act 1861 and portions of the Real Property (Local Registries) Act 1887.

14. Prescribed forms of instruments, etc. [Qld. 1861, ss.9A,110,120,139; S.A. ss.54(1),55,2476,248,273.]

This section has been amended by the insertion of a power for the Registrar to permit registration of an instrument not in the prescribed form, in order to permit flexibility in dealing with difficult or unusual cases, or in cases of trivial departure from the prescribed form.

A new subsection (3) has been inserted to provide for execution by the transferee or other grantee of an interest in place of the certificate of correctness which has been abolished (see commentary in relation to repeal of s.139). This is a safeguard designed to prevent liabilities such as onerous covenants being foisted on a person against their will. A discharge of mortgage is exempted from this requirement since it would be inconvenient to fulfil in this particular case, and there is no danger of abuse.

A new paragraph (e) has been added to s.10(5) to ensure that, where forms prescribed under the Act are changed, appropriate transitional provisions can be made to enable existing stocks of old forms to be used in an appropriate manner.

The section has also been amended by the insertion of the new sub-section (8), coupled with appropriate renumbering of the subsections. This provision is designed to allay doubts that the existing power to prescribe forms might not be capable of being construed to extend to the inclusion of a certificate by the lodger or other appropriate party as to a relevant matter.
An example of a requirement for such a certificate is the current practice, in cases of voluntary transfers, to seek a certificate from the transferor or his solicitor to the effect that the delivery of the certificate of title to the transferee (necessary to comply with s.200 of the Property Law Act 1974 and the pre-existing principle that equity will not assist a volunteer) is unconditional. This procedure is a useful safeguard in a case where the transferee gains possession of the certificate of title without the full consent of the transferor, and tends to avoid awkward cases coming before the courts.

Furthermore, our proposal to guarantee indefeasible title to volunteers would seem to make it more important than ever for improper transactions to be nipped in the bud. The inconvenience of a separate certificate could be avoided by prescribing a separate form of transfer for use in voluntary transactions which would include the appropriate certificate.

15. Registrar of Titles may license person to print and sell forms. [Qld. 1861, s.9.] No comment is required as this provision is unchanged from that inserted in 1986.

16. Powers of Registrar. [Qld. 1861, s.11; Qld.1929, s.3; S.A. ss.54(3),220,2231,227.] General Powers of the Registrar of Titles. It is common practice in the various Torrens Title statutes to set out a list of general powers of the Registrar of Titles which are additional to specific powers conferred in relation to particular matters regulated by the Acts. The list varies somewhat in the different jurisdictions, but generally it includes powers to require production of documents, to summon and examine witnesses, to administer oaths, to correct errors, to enter caveats, to amend prescribed forms and to state a case. These last two matters are considered later in this working paper.

The general powers of the Registrar of Titles are set out in s.11 of The Real Property Act 1861. They are:

(a) The power to require production of documents. The section in its present form empowers the Registrar to require production in two situations. One is where a proprietor or other person makes application to have land brought under the provisions of the Act. In this case, it is unnecessary to confer any power on the Registrar, since as Baalman points out (The Torrens system in New South Wales, p.23) "an applicant who neglects to produce essential documents which are under his control, simply does not get a certificate of title. The Registrar-General will not coerce an applicant who is indifferent to the success of his application." Accordingly, in its revised form, the corresponding section of the New South Wales Real Property Act (s.12(1) omits any reference to production in applications to bring land under the Act. The other situation is where the instrument relates to land which is the subject of a dealing, or the title to such land. In that case,
the Registrar is empowered to require production from the person interested in the land.

In the draft Bill, the power to require production of documents in the case of an application to bring land under the Act is deleted as superfluous. It is also largely otiose in that there is so little old system land left. It should be observed that the draft Bill provides that such an applicant must produce such documents of title as the Registrar may require.

(b) The power to summon and examine witnesses. The draft Bill substantially reproduces the terms of s.11(2) of the Real Property Act 1861.

(c) The power to administer oaths. This is also substantially reproduced.

(d) The power to correct errors. The terms of the draft Bill make no substantial change to the operative provision of s.11(4) of the Real Property Act 1861.

(e) The power to enter caveats. The formulation of this power in the Queensland 1861 Act omits any reference to a power in the Registrar to enter a caveat for the prevention of any fraud or improper dealing. Such a power is to be found in all other Torrens Title statutes and is included in the draft Bill in respect of fraud and forgery.

(g) The power to delegate powers. The existing power conferred by s.11(6) of the Real Property Act 1861 is reproduced, apart from the removal of the inconsistency in (5) which deals with delegation in that the concluding phrase of (5)(a) eliminates subdelegation, while (5)(c) seems to envisage it. This inconsistency could be addressed by either dropping (5)(c) [totally prohibiting subdelegation] or dropping both 5(c) and the last phrase of (5)(a) [permitting subdelegation] or amending both these prohibitions so as to maintain the general prohibition on subdelegation while making the necessary provision for the operation of district registries, or dropping (5)(c) while amending the concluding phrase of (5)(c) so as to permit subdelegation where expressly authorised by the Registrar.

This last course has been adopted, as it is believed that the Titles Office is of such a size that subdelegation is necessary, particularly in view of recent reorganisation which has led to the Registrar also having administrative responsibilities as Director of the Department of Freehold Land Titles.

17. Registrar's additional powers in case of fraud etc. [Qld. 1861, ss.130-134; S.A. ss.60-63.]

This section reproduces in more convenient form and location the existing ss.130-134.
18. Advertising. [Qld. 1861, ss.19,89,95,117.; Qld. 1877, s.33; Qld. 1952, s.55.]

This provision is the outcome of detailed deliberations which are set out in Chapter X.

19. Indemnity of Registrar. [Qld. 1861, s.137.]

This section reproduces s.137.

20. Fees and assurance. [Qld.1861, ss.41,42,140,141; Qld.1978; S.A. ss.232,235-236.]

This is a consolidation of ss.41,42,140,141 and the Real Property Act Amendment Act 1978.

In view of the reformulation of the provisions governing claims for compensation (see s.41), there is no longer need for an express provision authorising payments out of consolidated revenue to meet the amounts awarded by any verdict, judgment or decree of the court.

21. Opinion of Court may be obtained. [Qld. s.14, Qld. Companies Code, s.379(3); S.A. ss.221-223.]

Amendment of s.14.

This section has been and modernised in order to spell out a right on the part of the Registrar or Master to apply to the Court for directions and on the part of an aggrieved party to seek the reasons for an adverse decision of the Registrar. It is not felt appropriate to stipulate for a specific right of appeal to the Courts by such a party, since the inherent right to seek a declaration or an injunction exists. The duty to supply reasons on the part of the Registrar is felt to be adequate since it will act make it easier for an aggrieved party to establish the right to an injunction in an appropriate case, and correspondingly will encourage the maintenance of a high standard of decision making in the Titles Office.

The Commission would particularly welcome submissions as to the appropriate period to be stipulated for reply. The period of 7 days for reply may be inconveniently short for administrative convenience in the Titles Office and so could be extended to 14 days. However, it may be argued that it is important to be able to secure a prompt reply in the course of conveyancing transactions.
PART III - THE REGISTER

22. The Register. [Qld. 1861, ss.10A, 32(1), 32(2) and 32(9); Qld. 1887, s.6; N.S.W. s.5.]

The Torrens system is a system of title by registration. The title of a registered proprietor comes from the fact of registration; it is, as was said in the Privy Council in Frazer v. Walker [1967] 1 A.C. 509 at p.585, the registration and not its antecedents which vests and divests title.

By S.34 of the Real Property Act 1861-1988, as extensively amended in 1986 in preparation for the computerisation of the register, a grant or instrument is registered when it is recorded in the prescribed manner in the register under the authority of the Registrar of Titles. The register comprises Crown grants, certificates of title, and all instruments affecting the land comprised in a grant or certificate of title which are deemed to be constructively embodied in it once particulars of the instrument are recorded in the register. See s.35 of the 1861 Act.

It is important to appreciate that the Torrens system is based on registration of instruments purporting to transfer or create interests in land rather than registration of interests in land directly. This point was emphasised in relation to the South Australian legislation in Mercantile Credits Ltd. v. Shell (1976) 50 A.L.J.R. 487 at 490, where Barwick C.J. pointed out that:

"The Act does not prescribe what interests in land may be the subject of registration. It defines land very widely and provides for the registration of instruments affecting land. Consequently, rather than registrable interests in land, there are registrable instruments purporting to deal with any estate or interest in land."

There are two matters relating to the register which require detailed consideration. The first is the question of the content of the register. Instruments which are deemed to be embodied in it once a memorial is entered are defined in the interpretation section of the Act. This definition is similar to that contained in other Torrens title statutes [see, for example, s.3 of the Real Property Act 1900 (NSW)]. It has been suggested that Queensland is unique in including plans in the register. See s.119 of the 1861 Act and Francis: Torrens Title in Australasia, Vol. 1, p.18. However, provision is made for the registration of plans in s.196 of the Conveyancing Act 1919 (NSW). Note that this section combined with ss.22,29,35 and 46, requires the Registrar to enter in the register particulars of all instruments including any plans affecting the land.

It seems to be desirable to continue the practice whereby plans may be constructively embodied in the register, and no change is proposed in this regard.

The other matter is the form of the register. The 1861 Act, like the corresponding Torrens title statutes, required the Registrar General to keep a register book and to register certain instruments or memorials of instruments therein. At present the register consists of many hundreds of thousands of volumes and instruments which are deemed to be embodied in it,
together with the part of the register in loose leaf form as it is in the process of conversion to a loose-leaf system preparatory to the ultimate computerisation of the register. The problems posed by storage of this vast mass of material are being met by microfilming.

Subsection (3) makes provision for the administration of the register in relation to the Central and Northern Districts. This replaces s.6 of the Local Registries Act of 1887.

23. Form of Register. [Qld. 1861, ss.32(3)-(8).]

Although s.32, on this is based was re-enacted in 1986, it was felt that a further improvement in the text of this and related provisions could be made as part of the overall review. However, there are no changes of substance.

24. Other records. [Qld.1861, s.32A.]

This re-enacts s.32A. Such a provision is particularly important because of the ability of a computerised system to furnish additional information. An example of this is the tagging of titles to 90 parcels affected by radioactive sand announced on 26 January 1989.

25. Certificate of title. [Qld. 1861, s.10A, s.33, ss.49,50,94,119; Qld. 1877, s.17; Qld. 1976; S.A. ss.77,78,98-100.]

Prior to the 1986 amendments there was inconsistency in usage in the 1861 Act in relation to the "original" and "duplicate" certificate of title. Section 32 required the Registrar to enter in the register book the duplicates of all certificates of title, while s.45 required him, whenever a memorial of any instrument has been entered in the register book, to record the like memorial on the duplicate certificate of title. Much of this inconsistency was removed in 1986. The draft Bill is framed on the basis that ultimately the register will be computerised, although it permits the maintenance of the register either in computerised or documentary form, but it retains the concept of a certificate of title which is to be issued in the usual case to the proprietor, and will contain a copy of the information contained in the register relating to that particular lot. Consequently, the terminology of 'original' and 'duplicate' certificates of title is no longer required. Where the proprietor is a minor, the provision allows the certificate to be retained in the Titles Office as is the current practice.

It was felt better to relegate the details regarding the issue of certificates of title to a schedule, and they are set out in the Third Schedule.

This provision requires the Registrar of Titles to record on a certificate of title in such manner as to preserve their priority the particulars of all registered interests. It replaces the original s.33 which was initially devised to cover the case where a certificate of title issued when land was
brought under the Act following an application for that purpose. Upon issuing a certificate of title to the applicant or other person entitled to it, the Registrar must note particulars of subsisting mortgages, encumbrances, leases etc., both on the register and on the certificate which is delivered to the person entitled to the land described in the certificate. In the New Zealand Land Transfer Act 1952, the provision (s.58) corresponding to s.33 of the Queensland 1861 Act states that:

"Leases, mortgages, encumbrances or other estates or interests affecting the estate of the proprietor at the time of bringing land under the Act (hereinafter called outstanding interests) shall, so far as the same are disclosed in the application or can otherwise be ascertained, be notified on the register in such manner as to preserve their priority, and shall thereafter, notwithstanding variation in form, be dealt with as if the same or corresponding interests had been originally created under the Act, and every dealing therewith shall imply all powers, conditions and covenants incident to dealings in the like form with land under the Act."

The section has always also been relevant where a fresh certificate of title is issued, since this should contain a notation of outstanding interests. It may be thought to be desirable to distinguish between notations made when a certificate of title is issued when land is brought under the Act, and notations made when an existing certificate is replaced, since in the former case the outstanding interests affecting the land will not have previously been registered, whereas they will have been created in the forms required for registration under the Act. To meet this problem, a provision similar to s.58 of the New Zealand Act could be included. However, the virtual disappearance of old system land in Queensland, means that the much simpler formulation in para. 25(2)(b) is adequate.

26. Certificate and other documents as evidence. [Qld. ss.7,33(3)-(5), 96,122; Qld. 1884, s.6; S.A. ss.21,80.]

Section 33 of the 1861 Act has been redrafted building on the 1986 amendment so as to remove some uncertainties. One is whether it applies only to certificates of title, as it did according to its terms. Another is whether its conclusive effect was restricted to courts. A third, and the most important, is whether its conclusive effect extended to duplicate grants and certificates of title. The certificate of title held by the registered proprietor may not reflect all the interests affecting the land, and it is useful to make it clear that it is only to the original certificate of title which forms part of the register that the consequences specified in s.33 apply. The terminology of original and duplicate certificates of title is avoided in this bill, references instead being to the register and certificate of title, respectively.

The provisions replaced by this section made express references to deputy and local registrars. In view of the new s.8(2) there is no need for an express mention of Deputy Registrars in this section.

All the provisions relating to evidentiary matters have been amalgamated into this section. So this section re-enacts and consolidates the relevant
parts of s.7 of the Real Property Act 1861-1988 and s.6 of the Registrar of Titles Act of 1884.

The provisions in s.42 of the Evidence Act 1977 relating to judicial notice of the signature of the Registrar of Titles and Deputy Registrars of Titles and of their official seals, and in s.44 relating to the admission in evidence of certain documents, do not cover the same ground as s.7 of the Real Property Act 1861, which is accordingly reproduced in this section.

27. Search and copy allowed. [Qld. s.121; S.A. s.65.]

This provision re-enacts, with minor simplifications of wording, s.121, which was extensively amended in 1986.

PART IV - REGISTRATION OF LAND AND INSTRUMENTS

As these provisions which are replaced by the provisions in Part IV were extensively amended in 1986, generally only minor amendments are proposed, to take account of such matters as the new structure of definitions, and rearrangement of the provisions. The existing provisions in the Real Property Acts relating to the registration of instruments have been amalgamated and reproduced in this Part of the draft Bill.

28. Registration of land. [Qld. 1861, s.34(1).]

29. Alienated Crown Land to be Registered. [Qld. 1861, s.15.]

This section re-enacts s.15 of the Real Property Act 1861-1988 in a more modern form. The section continues the provision whereby land alienated by the Crown in fee simple becomes subject to the system of registration of title under the Real Property Acts.

30. Provision for registering Commonwealth land. [Qld. 1924, ss. 3-4, 6; Qld. 1929, s.3.]

This section replaces the provisions of the Real Property (Commonwealth Titles) Act 1924-1986 and of the Real Property (Commonwealth Defence Notification) Act 1929-1986, which are repealed by the Schedule.
31. Registration of Life Interests and Remainders. [Qld. 1861, ss.36-39; S.A. s.75.]

This section recasts in a more modern and simplified form the provisions of sections 36-39 relating to interests in reversion and remainder.

32. Registration of co-owners. [Qld. 1861, s.40; S.A. s.74.]

This provision merely clarifies the existing s.40.

The Commission is aware of a recent report on co-ownership issued by the Law Reform Commission of British Columbia ("LRC 100" ISBN 0-7718-8725-6, issued Nov.1988). Of the matters canvassed in that report only the need for registration of a severance is relevant to this review. Despite the concern expressed in the report concerning severance taking effect outside of the register, the Commission does not feel that the present situation whereby severance can be effected at law only by registration, but in equity by any recognized method should be altered. This rule both preserves the integrity of the register and enables a joint tenant to take speedy action to sever in equity which will immediately affect the destination of the beneficial interest in the property on death of a joint tenant.

The immediate severance in equity, which always occurs under the present regime also avoids the problem of a time delay between the intiation of the procedure for severance and its taking effect by registration. This waiting period always exists where severance is dependent on registration. It does not matter where, as in our system, it only affects severance at law, since this, as far as entitlement to beneficial interests is concerned only confirms the situation which will have been reached earlier in equity. However, where it affects severance in equity it can, in certain circumstances, result in exploitation of the waiting period to 'wait and see' which joint tenant will enjoy the benefits of the right of survivorship.

33. Partition. [Qld. 1861, s.92.]

This provision merely replaces the existing s.92.

34. Effect on land registration of instrument. [Qld. 1861, s.32(2); Qld. 1861, s. 43; Qld. 1877, s.48; S.A. ss.67,246.]

This provision absorbs those parts of s.43 of the 1861 Act and of ss.48,49 of the 1877 Act, which must be maintained in the legislation.

All Torrens title statutes contain a provision in terms corresponding to s.43 of the Queensland 1861 Act, whereby no instrument is effectual to pass any estate or interest in lands under the provisions of the Act until it has been registered. The existence of this section had given rise to some difference of views as to the nature of the rights (if any) which could be
acquired in Torrens title prior to registration. The matter has been settled by the approval given in Breskvar v. Wall (1971) 126 C.L.R. 576 and Great West Permanent Loan Co. v. Friesen [1925] A.C. 208 to the view expressed by Isaacs J. in Barry v. Heider (1914) 19 C.L.R. 197 at p.216, that "section [43], denying effect to an instrument until registration, does not touch whatever rights are behind it. Parties may have a right to have such an instrument executed and registered; and that right, according to accepted rules of equity, is an estate or interest in the land.

Independently of s.48 of the Queensland 1877 Act, it seems that a transferee who presented a memorandum of transfer with a duplicate certificate of title would be entitled to registration: See Breskvar v. Wall (1971) 126 C.L.R. at p.388 (per Barwick C.J.). There has been considerable difference of opinion as to the effect of s.48. McTernan J. thought that the section constituted a recognition of equitable interests in land (126 C.L.R. at p.393), but s.51 of the 1877 Act gives explicit recognition to such interests. Walsh J. went further in suggesting that the statutory right or claim to registration conferred by s.48 prevailed over a competing equitable claim (126 C.L.R. at p.411). Griffith C.J. in Barry v. Heider (1914) 19 C.L.R. 197 at p.207 and supported by Gibbs J. in Breskvar v. Wall (1971) 126 C.L.R. at p.413 thought that s.48 merely affirmed the law as laid down in a number of decisions that an unregistered instrument might create an equitable interest in land and a right to the registration of that interest.

It is considered appropriate to retain the provisions of both s.43 of the 1861 Act and part of s.48 of the 1877 Act in the legislation, though reference to s.48 may no longer be necessary to settle the controversy which led to its inclusion in the 1877 Act. However, the inclusion of the second clause and proviso of s.48 seems unnecessary.

35. Registration of instruments. [Qld. 1861, ss.34(2), 35; Qld. 1877, ss. 12,14,15; S.A. s.50.]

This provision reproduces the present law in relation to the process of registration of instruments.

The operation of the register and the effect of registration of instruments was considered in Bursill Enterprises Pty. Ltd. v. Berger Bros. Trading Co. Pty. Ltd. (1971) 124 C.L.R. 73. In 1872, an instrument described on the certificate of title as a memorandum of transfer, was registered. In fact, the instrument did two things — it extended an existing right of way and transferred a building (over the way) in fee simple. However, the notation on the certificate of title also described the effect of the memorandum of transfer as creating an extension of the right of way and made no reference to the transfer of the fee simple.

The question arose as to whether the misdescription meant that the transfer of the fee simple was not effectively notified on the register for the purpose of giving the transferee indefeasibility of title. It was held that while the misdescription might, per se, be misleading, the nature of the instrument was sufficiently described as a memorandum of transfer because the dealings once registered became themselves part of the register book or because the effect of the notation was to "notify" to a prospective
purchaser everything that would have come to his knowledge if such searches as ought reasonably to have been made had been carried out, i.e. the contents of the instrument itself had been inspected. This conclusion was reached on general principle, although the case was decided on N.S.W. legislation. Accordingly, it has been expected to be followed, in Queensland, because of the current provisions of s.35. The re-enactment of the substance of s.35 by this provision is not expected to affect the position.

This approach was adopted by Connolly J. in Ex parte Property Unit Nominees (No.2) Pty. Ltd. [1981] Qd.R. 178, where, by relying on previous authorities, it was held that it was the instrument (not the interest) which is registered when the memorial is entered on the certificate of title; then by virtue of s.35 the contents of that instrument are constructively embodied into the register. (See also Merchantile Credits Ltd. v. Shell Co. of Australia Ltd. (1976) 136 C.L.R. 326).

Similarly in Hutchinson v. Lemon [1983] Qd.R. 369, Connolly J. applied the same principle. A memorial endorsed on the relevant certificate of title indicated that an easement had been surveyed. The memorial referred expressly to the relevant survey plan, and Connolly J. held, on the authority of Bursill's case that it was necessary to go to that plan to identify the interest. "The certificate of title is its fact directs attention to a plan which can only be read as stating the existence of the easement". The effects of the actual decision in this case in allowing easements to arise automatically through registration of a plan was nullified by the 1985 amendments to the Real Property Acts, whose effect is maintained by the provisions of this draft bill in relation to easements.

The provisions relating to the method by which transfers are carried out and the effect of a transfer are followed in most Torrens title statutes by provisions which deal with the question whether new certificates of title are to be issued if the portion of the land described in a certificate is transferred and whether existing certificates are to be cancelled. It is considered preferable however to regulate these matters in a part of the Bill which deals generally with documentation relating to the register and instruments generally (including certificates of title). It is also common to find inserted at this stage provisions relating to implied covenants in transfers of land subject to a mortgagee or in transfers of leases. It is suggested that it is better to group together the provisions relating to implied covenants in a special part or division of the Bill.

36. Indorsement and evidentiary effect. [Qld. 1861, s.45; S.A. ss.51,52.]

This replaces the existing s.45.

37. Registrar may dispense with production of instruments. [Qld. 1861, s.95]

This replaces the existing s.95.
PART V - EFFECT OF REGISTRATION AND PRIORITIES

38. Priorities of registration. [Qld. s.43; Qld. 1877, ss.12; S.A. ss.56,58.]

This new provision combines the effect of s.43 of the 1861 Act and s.12 of the 1877 Act which currently deal with this matter. A great simplification in wording was possible without losing any of the substantive effect of these provisions. General issues concerning unregistered interests are discussed in Chapter VI.

39. Estate of Registered Proprietor Paramount. [Qld. s.44,109,123,126; Qld. 1877, ss.11,51, Qld.1952, ss.45-60; S.A. ss.69-72,80a-80i,186-187,234,249.]

The issue of indefeasibility is discussed in detail in Chapter IV of the paper, and the specific issue of volunteers is discussed in Chapter V.

The draft is constructed so as to replace s.44 as the key indefeasibility provision, but has been enlarged so as to embrace the provisions of s.109 in s.39(1)(b) and of s.123 in s.39(1)(c). The cases of actions for possession by parties to a mortgage or lease are believed to be adequately covered by s.61, ss.39(2)(c), by provisions of the Property Law Act 1974-1988 and the rights of mortgagees and lessees stemming from their own registration as proprietors of the relevant interest, or by s.39(2)(c) where there is merely an agreement to grant such and interest. Section 18 of the 1877 Act is embraced in s.39(2)(c), and express provision is made for the 'in personam' exception which enables the provisions of s.51 of the 1877 Act to be dropped. A number of the established exceptions are clarified, and the mechanics of the exception relating to the grant of titles by adverse possession are relegated to a schedule. It is felt that the provisions of s.47 of the 1877 Act need not be reproduced, since the question of improvements can now be resolved under ss.184 or 196 of the Property Law Act 1974-1986.

It might not be thought necessary to make any express mention [as in s.39(2)(f)] in relation to the in personam exception beyond a reproduction of the provisions of s.51 of the 1877 Act. However, it should be remembered that the existence of the "in personam" exception in jurisdictions which possess no equivalent of s.51 means that the exception enjoys a life independent of that section. The South Australian formulation in s.71 of the Real Property Act 1886-1975 could have been adopted as an alternative.

Provision has been made (modifying the South Australian s.223a of the Real Property Act 1886-1975) for amendment of the certificate of title where the exception for wrong description of land or of its boundaries applies.

Although s.126 is generally regarded as being, together with ss.33,44,109 and 123 as one of the 'cornerstones' of the principle of indefeasibility most of the provisions of s.126 have not been reproduced among the provisions guaranteeing indefeasibility as they are more concerned with the
issue of assurance than indefeasibility. However, one aspect of this
section has had an important bearing on the issue of indefeasibility and
that is the protection from actions of ejectment and damages of bona fide
purchasers for value. This aspect is covered by the last paragraph of
s.39(1).

The object of the draft is to codify and clarify the existing law, rather
than to change it. In the case of volunteers it was previously uncertain
whether they derived benefit from the indefeasibility provisions. This
draft is intended to ensure that they do derive the benefit of an
indefeasible title.

40. Powers of Court to rectify register. [Qld. s.124; S.A.
ss.64,223a-2231.]

This provision is a modernisation of s.124.

41. Compensation for loss of title. [Qld. ss.125-135, Auctioneers and
Agents Act 1971, s.103; Cf. Qld. Crown Proceedings Act 1980, s.11, Trusts
Act 1973-1979, s.44; S.A. ss.203-219; Vic. ss.109-110.]

This section implements considerable reforms regarding claims for assurance
which are discussed in Chapter VII.

PART VI - INSTRUMENTS, PLANS, TRANSFERS AND REGISTRATION GENERALLY

42. Requisitions. [Qld. s.112.]

This replaces, with some simplification s.112.

43. Withdrawal of instrument or document from registration. [Qld. s.113;
Qld. 1877, s.9.]

This replaces, with some simplification, and combines s.113 of the 1861 Act
and s.9 of the 1877 Act.

44. Execution, attestation and proof of instruments. [Qld. ss. 114-116;
S.A. ss.56,267,268,270.]

This replaces, with some simplification, and combines ss.114-116.

The reference to "within the meaning of The Australian Consular Officers'
Notarial Powers and Evidence Acts, 1946 to 1949" has been removed as that
Act has been repealed.
45. Lost instruments. [Qld. s.117; S.A. s.79.]

This replaces, with some simplification s.117. Note that the requirement for advertising is now prescribed by s.18.

46. Registrar may require plan to be deposited. [Qld. s.120; S.A. s.101.]

This replaces, with considerable simplification s.120. Section 120 prescribed the scale required for plans in detail but the need for such a stipulation has been eliminated by simply requiring compliance with the relevant regulations made under the Surveyors Act 1977-87.

47. Destruction of instruments, etc. in certain circumstances. [Qld. s.46A.]

The draft Bill reproduces the provision contained in s.46A of the 1861 Act.

PART VII - TRANSFERS

48. Transfer. [Qld. ss.43,48,65,66; S.A. ss.96-97,150-152.]

This replaces with amendment section 48 of the Real Property Act 1861-1988 which prior to 1986 provided that a memorial of a transfer of land under the provisions of the Act is not to be entered in the register book by the Registrar of Titles unless:

(a) the transferor executed a memorandum of transfer in form W of the Schedule; and

(b) there was presented to the Registrar of Titles with or in conjunction with the memorandum of transfer a declaration made by the transferor in which he declares that the transfer is not intended to operate as security for any obligation, and that the consideration expressed in the memorandum is the true and sole consideration for the transfer.

The requirement for the making of a declaration was inserted by an amendment made to the section in 1980 in consequence of the decision in Wright v. Registrar of Titles [1979] St.R.Qld.523. In that case, Connolly J. held that the Registrar of Titles was not entitled to decline to register a memorandum of transfer in Form W, on the ground that it was intended to be a transfer by way of security only. A transferee who lodged an instrument in registrable form for the purpose of effecting a lawful transaction was entitled to have that instrument registered. Accordingly, as a valid mortgage could be created by way of absolute transfer coupled with a covenant in a separate instrument for reconveyance on repayment of the moneys received, it was lawful to create it in that way. It was not
necessary to proceed by way of execution of a bill of mortgage in the
prescribed form F or a bill of encumbrance in form G.

The effect of the amendment is to prevent the use of a transfer in Form W as
a means for creating a security. The policy behind the amendment apart from
stamp duty considerations seems to have been that transactions should be
effected only through instruments in a prescribed form. This policy is
given explicit formulation in some Torrens title statutes. For example,
s.42 of the New Zealand Land Transfer Act 1952 and s.54(1) of the South
Australian Real Property Act 1886-1975 provide that the Registrar shall not
register any instrument purporting to transfer or otherwise to deal with or
any estate or interest in land under the provisions of the Act except in the
manner therein provided, nor unless that instrument is in accordance with
the provisions thereof.

This policy was made uniform in the Queensland legislation as a result of
the 1986 amendments.

Objection to the amendment which was expressed to the Commission by several
solicitors does not challenge this policy. It went only to the issue of the
extra cost and trouble involved in the preparation of two documents instead of
one to give effect to a transfer. The suggestion was therefore been that
form W should be amended to incorporate the declaration into the transfer
document.

This suggestion was largely implemented as a result of the 1985 amendments
to s.48, achieved by amendments to the Stamp Acts. Further simplification
to the documentation on transfer could be achieved by appropriate amendment
to the prescribed form of transfer, following the replacement of scheduled
forms by prescribed forms in 1986. The Commission has been anxious to
ensure that the power to prescribe forms is sufficiently wide to enable
sufficient flexibility in the drafting of such forms to achieve the greatest
possible efficiency.

It has been suggested that the section could be amended so as to achieve
this object by adding the following paragraph (e) to subsection (1):

"(e) contain a declaration by the transferor in which the transferor
solemnly and sincerely declares that the transfer is not intended to operate
as security for any obligation whether existing or to be created and that
the consideration expressed in the memorandum is the true and sole
consideration for the transfer."

However, this object could now be more simply achieved merely by appropriate
amendment of the prescribed form.

This section is applicable to the transfer of an estate in fee simple in the
land or in respect of a lesser interest such as a mortgage. An alternative
form was formerly provided in the case of a transfer subject to a charge or
security or an easement (see s.24 of the 1877 Act). It was felt more
appropriate to expand this section to expressly cover transfers subject to
lesser interests than to preserve this provision.

It was felt that the provision which specifies the way in which land under
the Act may be transferred should be followed by a provision [subsection
(2) which deals with the transfer to the transferee of the rights and liabilities of the transferor. A provision of this nature is found in some other Torrens title legislation. It is one whereby upon the registration of a transfer the estate or interest of the proprietor as set out in the memorandum of transfer, with all rights, powers and privileges thereto belonging or appertaining, shall pass to the transferee. There is currently no such provision in Queensland, though s.43 of the 1861 Act provides that upon registration the estate or interest intended to be granted or conveyed should pass; and the definition of "land" in s.3 is sufficiently extensive to pass to the transferee all rights and privileges appertaining to the land. [See Dabbs v. Seaman (1925) 36 C.L.R. 538 at p.574 (per Starke J.)]

There is however a clause in s.65 of the 1861 Act, relating to the transfer of registered mortgages, encumbrances and leases which states that upon registration the estate or interest of the transferor as set forth in the instrument with all rights powers and privileges thereto belonging or appertaining shall pass to the transferee. It is suggested that, as in other jurisdictions, this clause should be made applicable generally upon the registration of a transfer.

In the Victorian Transfer of Land Act 1958, the section setting out the form of transfer is followed by one (s.46(1)) which corresponds to s.65 of the Queensland 1861 Act. Similarly s.52 of the New South Wales Real Property Act 1900, which is in the same terms, follows the section which deals with the effect of registration of a transfer. The Queensland section is placed in the context of the provisions on mortgages, encumbrances and leases. It is suggested that it should be located immediately following the provision which specifies how transfers are to be effected.

As a consequence of registration of a grant certificate of title or other instrument, the person named in it as seized of or taking any estate or interest is deemed to be the registered proprietor thereof. This rule is expressed in s.34 of the 1861 Act, and a corresponding provision is contained in other Torrens title statutes. It is considered more appropriate to include this provision in the part of the Act relating to the effect of registration than in the part relating to the register or in the definition clause of the draft Bill. The formulation in subsection (2) makes it clear that the registered proprietor holds his interest as a result of registration. It leaves open the question whether his interest is a special kind of statutory interest or a legal interest acquired by registration. [See I.A.C. (Finance) Pty. Ltd. v. Courtenay (1963) 110 C.L.R. 550 at p.572; cf. Hogg: Australian Torrens System, p.927.]

This provision has also been broadened to incorporate the substance of the former provisions relating to transfers of leases and mortgages.

49. Transfer of mortgaged land. [Qld. s.68.]

This provision has been grouped with the preceding section governing transfers in general in preference to being grouped with the provisions on mortgages on logical grounds.
PART VIII - LEASES

There is a detailed discussion of leases in Chapter VIII of this paper, which should be read in conjunction with the comments set out below in relation to the individual provisions of the draft bill dealing with leases.

50. Leases of registered land. [Qld 1861, s.52; Qld. 1877, s.18; S.A. ss. 116-119; Tas. s.65; NZ ss.115-116.]

Recasts the existing s.52, at the same time incorporating the provisions of s.18 of the 1877 Act.

It is appropriate to compare this provision with those in other jurisdictions regarding the validation and registration of leases of short duration. Tasmania prohibits the registration of leases of less than three years (Land Titles Act 1980, s.65). The legislation in Victoria, Western Australia and New South Wales is silent about short-term leases. New Zealand permits the registration of leases for less than three years if in prescribed form: Land Transfer Act 1952, s.115(2). Although the New South Wales Act is silent about the fate of leases for less than three years, it has been held that such leases may in fact be registered: Dockrell v. Cavanagh (1944) 45 S.R. (M.S.W.) 78; Parkinson v. Braham (1961) 79 W.N. (N.S.W.) 176. South Australian legislation requires leases exceeding one year to be registered in prescribed form, and leases for less than one year may be registered if in the prescribed form (Real Property Act 1886-1975, ss.116, 119). The Queensland Act of 1877 states that leases for a term not exceeding three years are valid, and may be registered in the prescribed form, s.18.

In the Full Court decision in Kirby v. Caruso [1976] Qd.R. 164 it was held by Kneipp J. that the words "for a term not exceeding three years" in s.18 of the Act of 1877 were to be construed as including a periodic tenancy as well as a tenancy for a fixed term not exceeding three years (at p.172).

51. Variation of lease. [cf. Qld. FLA, s.79.]

This provision introduces a straightforward procedure for variation of leases modelled on the equivalent provision in respect of mortgages, s.79 of the Property Law Act 1974-1986.

52. Lease Register. [Qld. s.34.]

This is a new provision which is intended to facilitate the registration and searching process where there are numerous leases or dealings with leases of the land comprised within one certificate of title.
53. Surrender of lease. [Qld. s.54; S.A. ss.120-123.]

This replaces, with considerable simplification s.54.

Although it seems to arise by implication that leases under the Acts may be surrendered by operation of law (see Whalan, supra, at p.198), no machinery exists to deal with such a surrender. The new provision specifies that surrender by operation of law may occur, and that such a surrender may be registered when the Registrar of Titles is satisfied that such a surrender has occurred.

54. Re-entry by lessor. [Qld. s.72; S.A. s.126.]

There is a section (s.121) in the South Australian Real Property Act 1886-1975 that it has been suggested could be usefully enacted here (with one suggested change). That section reads as follows:

"Where a lessee shall have delivered to the lessor, or his agent, the duplicate of the lease, accompanied by some writing signed by the lessee evidencing his intention to give up possession of the land comprised in such lease, the Registrar-General may, upon application by the lessor, and production of such evidence as he may require that the lessee has abandoned the occupation of the land comprised in the lease, make and entry in the register book of the surrender of such lease, and also endorse on the lease a memorandum recording the fact of such entry having been so made in the register book."

There seems no reason why the lessee should be required to deliver a duplicate of the lease to the lessor. It should instead be sufficient that the lessor produces a copy of the lease to the Registrar of Titles.

If it is thought desirable to have such a provision as just discussed, then it would be necessary to state the effects of surrender in the register. However, it is felt that the provision dealing with re-entry by the lessor is adequate to deal with the situation covered by the South Australian provision so it need not be adopted.

55. Bankruptcy. [Qld. s.55; S.A. ss.173-174.]

Section 133 of the Commonwealth Bankruptcy Act 1966 allows the trustee of the estate of a bankrupt to disclaim onerous property, which includes leases. However a trustee cannot disclaim a lease without the leave of the Court unless he has given 28 days notice of his intention to disclaim to the lessor and any mortgagee or sub-lessee; and no person who has received notice has, within 28 days after receiving such notice, given notice to the trustee requiring him to apply to the Court for leave to disclaim the lease: Bankruptcy Act 1966, s.133 (4)(a) and (b). Similar requirements exist in the case of a company liquidator [see Companies Code (Queensland) 1981, s.454(6)(a) and (b)].

Under both the law relating to bankruptcy and the law relating to companies, where a disclaimer in respect of any property is filed with the Registrar in
Bankruptcy or made by a company liquidator, and the property is such as to require registration of the transmission of some by a law of the Commonwealth, of a State, or of a Territory of the Commonwealth, the Registrar in Bankruptcy or the company liquidator is required to give notice of the disclaimer to the Registrar of Titles or other officer who has the function of registering the transmission of the property: see Bankruptcy Act 1966, s.133(3); Companies Code (Queensland) 1981, s.454(5)(b). Section 55 of the Act of 1861 purports to deal with the situation when an official assignee of a bankrupt estate has declined to accept a lease. As Professor Whalan wrote in The Torrens System in Australia (at pp.216-7):-

"...in Queensland the Torrens Statute provision still refers specifically to the old Queensland Insolvent Act and this would seem to make it very difficult to apply it at all in present circumstances. Perhaps the provision could be read down now that the Queensland Act has been overtaken by the Commonwealth Bankruptcy Act but this seems a fairly forlorn hope."

These comments seem well founded, and the suggested provisions (cl.55) are intended to overcome this difficulty. Moreover, no mention whatsoever has been made as to the situation where a company liquidator may disclaim but this deficiency has also been rectified by the new provision.

PART IX - MORTGAGES

There is a detailed discussion of mortgages in Chapter VIII of this paper, which should be read in conjunction with the comments set out below in relation to the individual provisions of the draft bill dealing with mortgages.

56. Form of Mortgage. [Qld. s.56; S.A. ss.128-129.]

57. Effect of mortgage. [Qld. s.60; S.A. s.132.]

58. Equitable mortgage by deposit. [Qld. 1877, ss.30,30A; S.A. s.149.]

59. Variation of Mortgage. [PLA. s.79.]

60. Variation of priority of mortgages. [Vic. s.75B]
61. Powers of mortgagee. [Qld. s.60; S.A. ss.130-135, 137, 140-142, 146-147.]

It is desirable to relate the provisions of the Real Property Acts dealing with mortgages to the provisions of the Property Law Act 1974-1986 governing the same.

In a sense this provision corresponds to s.77(1)(b)(i) of the Property Law Act 1974-1986 and, by making it clear that the provisions of that Act relating to the powers and liabilities of mortgagees apply to those under the Real Property Acts, enables provisions of the Real Property Acts which currently duplicate those of Part VII of the Property Law Act in relation to mortgages to be dropped.

62. Transfer upon sale by mortgagee. [Qld. s.58; S.A. s.136.]

63. Liability of mortgagee in possession of leasehold interest. [Qld. s.62; NSW, s.64; Vic. PLA 1958, s.78(2); S.A. LPA 1936, s.139, W.A. PL 1969, s.114; Tas. C&LPA 1881, s.84; ACT Law of Property (Misc. Provisions) Ordinance 1958, s.100.]

64. Release of mortgages. [Qld. s.63, Qld. 1877, s.19., S.A., ss.143,145,148a.]

65. Other forms of release. [Qld. s.63, Qld. 1877, s.19; S.A. ss.147-148a.]

PART X - EASEMENTS AND OTHER INCORPOREAL RIGHTS

There is a detailed discussion of easements in Chapter VII of this paper, which should be read in conjunction with the comments set out below in relation to the individual provisions of the draft bill dealing with easements.

66. Interpretation. [Qld. s.51; N.S.W. s.47.]

It was felt desirable to place completely beyond doubt the non-registrability of restrictive covenants. This question is discussed in detail in Chapter IX.
67. Creation of easements. [Qld. 119A.]

As well as incorporating the provisions of s.119A, this provision makes it clear that the lodgement of a plan, except in accordance with s.73, will not in any way create or affect the status of an easement.

68. Easements and incorporeal rights to be registered. [Qld. s.51; N.S.W. s.47.]

69. Surrender of Easements.

This provision is required to enable the surrender of easements in view of the provisions of s.67.

70. Variation of Easement. [S.A., s.223ln.]

It was felt appropriate to provide for variation of easements in view of the success of equivalent provisions in relation to mortgages. (See s.79 of the Property Law Act 1974-86.)

71. Easements in favour of proprietor's land.

72. Effect of plan showing proposed easement. [Qld. s.119A.]

73. Easements arising from plan of subdivision.

This provision statutorily creates easements in favour of a registered proprietor of a lot on a plan of subdivision for the following purposes:

- easements of way
- drainage
- water supply
- gas supply
- electricity supply
- sewerage service
- telephone
- other services

The manner in which such easements are created is by
(a) designating on the plan of subdivision the site of the easement
(b) identifying the site of the easement by the word "easement" followed by a statement of the purpose of the easement
The entry in the register by which the plan of subdivision is registered is to refer to the existence of an easement designated and described as above. To implement this legislation it would be necessary for the signing clause of the Plan to show, in the hypothetical example attached, the following:-

"I/We ........ as proprietor/s of this land agree to this plan, dedicate the new road/s shown hereon to public use and create easements in terms of s.73 of the Real Property Act 1990 in favour of the Brisbane City Council (Easements A and C), Lot 11 (Easement B) and the South East Queensland Electricity Board (Easement D)"

The registration entry would read along these lines:-

"J123456K - By Plan No. 333333 the within land is subdivided into Lots 1 to 11 and Easements A, (drainage and sewerage), B (right of way), C (draining and sewerage) and D (electricity supply). By s.73 of the Real Property Act 1990 statutory easements are created in respect of Lots 1-5 (Easement A) in favour of Brisbane City Council, Lot 10 (Easement B) in favour of the proprietor of Lot 11, Lots 6-10 (Easement C) in favour of the Brisbane City Council and Lots 1 and 6 (Easement D) in favour of the South East Queensland Electricity Board."

Each of the titles issuing from the registration of the plan would bear an entry such as:-

J123456K. By Plan 333333 Easement A in Lot 1 (drainage and sewerage) is created in favour of the Brisbane City Council.

J123456K. By Plan 333333 Easement B in Lot 10 (right of way) is created in favour of Lot 11.

However, the covenants relating to such easements could present a problem. There are two ways in which this could be approached. Firstly there could be statutory covenants implied in respect of such easements; secondly there could be the employment of memorandum registered under s.79.

If the first course was adopted, the covenants would be known to all without any further documentation, but the drafting of statutory covenants to cover each possible case of an easement would be difficult, and there is no guarantee that parties would choose to use them. Generally, statutory covenants such as the short forms of lease covenants under the Property Law Act 1974-1986 are little employed. If such covenants are to be implied, the Property Law Act 1974-1986 would be a more suitable legislative location.

In the second case, a further document would be necessary to identify the covenants and this would tend to defeat the operation of the legislation, i.e. that an easement is statutorily created on registration of the plan without further documentation.

It would also mean that a further paragraph would have to be added to the signing clause to acknowledge the covenants somewhat like

"I/We ........ as proprietor/s of this land agree to this plan, dedicate the new road/s shown hereon to public use and create easements in terms of s.73 of the Real Property Act 1990 in favour of the Brisbane City Council"
(Easements A and C), Lot 11 (Easement B) and the South East Queensland Electricity Board (Easement D) and agree to the covenants and conditions contained in Memorandum Nos. J123457L, J123458P, and J123459H respectively."

PART XI - COVENANTS

74. Implied covenants. [Qld. ss.74,76, cf. PLA, s.49; S.A. s.261.]

It was felt that of the current provisions relating to implied covenants in ss.74,76 these provisions needed retention

75. Incorporation of provisions contained in memorandum. [Qld. s.76A.]

Section 76A requires amendment, through the addition of subsection (6) in order to provide for the withdrawal of memoranda. A period of grace must be allowed so that the potential users are not prejudicially affected.

There was widespread concern following the first instance decision in the New South Wales case of Macintosh v. Council of the City of Goulburn that the phrase "provisions which are capable of being covenants and conditions" might be held to be inadequate to embrace some of the provisions which had been accepted by the Registrar of Titles and which many solicitors and others were relying upon as being incorporated in documents. Following the reversal of this decision by the New South Wales Full Court [reported at (1987) N.S.W. Conv.R. 55-326] there appeared to be no pressing need to amend the section.

PART XII - TRUSTS, DECEASED ESTATES, BANKRUPTCY

There is a detailed discussion of trusts in Chapter VIII of this paper, which should be read in conjunction with the comments set out below in relation to the individual provisions of the draft bill dealing with trusts.

76. Declaration of trusts and transfers to trustees. [Qld. ss.77-79; S.A. ss.162.]

77. Registration of Personal representative. [Qld. 1877, s.32(a); S.A. ss.175-179.]

The former s.32 of the 1877 Act was unwieldy and unnecessarily long so it has been broken up into several sections and simplified.

This section replaces, with as much simplification as possible ss. 83 and 89 of the 1861 Act, and ss.32 and 46 of the 1877 Act.
It is appropriate to increase the limit of $50,000 to some suitable figure, such as $100,000, to compensate for inflation since the figure was fixed in 1981, and to provide conformity between this legislation and parallel provisions of the Land Act 1962-1988.

78. Registration of devisee. [Qld. 1877, s.32(a).]

79. Applications to the Court. [Qld. ss. 83, 89, Qld. 1877, ss. 32; S.A. ss.181-185.]

The provisions relating to transmission by death and on bankruptcy have been more conveniently and logically located in a Part of the Act also dealing with trusts, this enables the provisions governing applications to court in relation to trusts and deceased estates to to governed by a common provision.

Section 83 of the Real Property Act 1861-1988 is also concerned in a limited way with the Court's jurisdiction in relation to land subject to a trust and it is thought appropriate to combine its provisions with those of s.89.

80. Evidence.

81. Transmission on bankruptcy. [Qld. s.86; S.A. ss.170-172.]

This replaces, with considerable simplification, s.86.

PART XIII - WRITS OF EXECUTION, LIENS AND CAVEATS

82. Writs of execution. [Qld. s.91, Qld. s.35; S.A. ss.105-110.]

This matter is discussed in detail in Chapter XII.

83. Vendor to have no equitable lien by reason of balance of purchase money unpaid. [Qld. s.97.]

This replaces, with some simplification s.97.
84. Lodgment and effect of caveat. [Qld. ss.98, 101; Qld. 1877, s.30A; NSW ss.74F(1)-(4), 74H; S.A. s.191.]

This and the succeeding provisions governing caveats have been extensively revised, the relevant matters being discussed in detail in Chapter XI.

85. Compensation for improper caveat. [Qld. s.103; NSW s.74P; S.A. s.191.]

See Chapter XI.

86. Form and contents. [Qld. ss.99, 100; Qld. ss.36, 37; NSW ss.74F(5)-(9), 74N; S.A. s.191.]

See Chapter XI.

87. Withdrawal of caveat. [NSW s.74M; S.A. s.191.]

See Chapter XI.

88. Lapsing of caveat. [Qld. 1877, s.39; NSW ss.74I-K; S.A. s.191.]

See Chapter XI.

89. Removal of caveat. [Qld. ss.99, 102; Qld. 1877, ss.38; NSW ss.74I-K; S.A. s.191.]

See Chapter XI.

90. Cancellation of caveat [Qld. s.102.]

See Chapter XI.

91. Further caveat. [Qld. 1877, s.40; NSW s.74O; S.A. s.191.]

See Chapter XI.
PART XIV - POWERS OF ATTORNEY, DISABILITIES

92. Powers of attorney. [Qld. s.104; S.A. ss.155-156.]

This provision re-enacts, with minor simplifications of wording, s.104, which was extensively amended in 1986. Section 104 was extensively refurbished in 1986 and the only changes are those required to set out its provisions in subsections and conform with the new definition section.

The Commission considered a problem outlined in a letter received from the Registrar of Titles. This was the need for Titles Office staff to scrutinise carefully all powers of attorney submitted for registration for any limits on the powers in the case of general powers. They must perform this time-consuming chore to protect the Registrar from possible liability for wrongful registration of an instrument executed by an attorney in excess of limited powers.

The Commission considered but rejected a solution of the problem based on the assumption that a substantial proportion of powers lodged for registration are general in scope, so that there would be a considerable saving in time by dispensing with the need for their detailed examination. This could have been done by requiring lodgers by regulation to state the nature of the power on registration, and in particular to state whether or not the power is general. General powers would not then require scrutiny.

Ultimately, it is understood that the intention is that the register of powers of attorney will be computerised. It may be appropriate for that register to be capable of being searched by the public and for its existence to be enshrined in the legislation.

93. Revocation of power of attorney. [Qld. s.108; S.A. ss.157,159,160.]

This provision re-enacts, with minor simplifications of wording, s.108, which was extensively amended in 1986.

94. Persons under disability. [Qld. s.111; S.A. ss.244,245.]

This replaces, with some simplification s.111.
PROPOSED FIRST, SECOND, THIRD, AND FOURTH SCHEDULES TO THE REAL PROPERTY ACT 1989.

FIRST SCHEDULE (s.5)

PART I

Repeals

All existing Real Property Acts are to be repealed as all provisions still required have been replaced by provisions of the draft bill.

PART II

Amendments

PART III

Savings and Transitional Provisions

SECOND SCHEDULE (s.6)

PART I

CENTRAL DISTRICT

PART II

NORTHERN DISTRICT

This merely reproduces the existing definition of these districts. The Commission was reluctant to advise that these definitions be deleted from the Bill and prescribed instead by regulation for the reason that they are the same as those in the Second Schedule to the Supreme Court Act of 1895, which determines the division for the purposes of Supreme Court business. It is undesirable on constitutional grounds stemming from the separation of powers for a matter relating to the despatch of Supreme Court business to be dependent on regulation rather than Statute. Granted the existence of this division in the Supreme Court Act it would be undesirable for the division for registration of title purposes to be different, and untidy if it were prescribed by reference to the Supreme Court Act. However, the progress of computerisation described above in relation to the section governing this schedule is likely to lead to the abolition of districts as such at some time in the forthcoming decade.

THIRD SCHEDULE (s.26)

This contains the provisions governing the issue of certificates of titles, as their volume and technicality was felt to be more suited to a Schedule than to the text of an Act.
The schedule is divided into two parts. Part I deals with issue of certificates of title in general, while Part II deals with the special case of when new certificates of title are to issue in respect of subdivisions of land. The provisions relating to subdivision were originally contained in s.119 of the 1861 Act and the 1976 amending Act.

FOURTH SCHEDULE [s.39(4)]

See discussion of adverse possession in Chapter IV.

The provisions relating to interests in reversion and remainder have been much simplified.

It has been provided in para. 1 that any directions by the Registrar to Local Registrars as to the powers they shall exercise in relation to application for title by adverse possession should be in writing, in order that there be a permanent record of such directions.
APPENDIX - Part 3

DESTINATION OF FORMER PROVISIONS

REAL PROPERTY ACT 1861-1988 and other legislation proposed to be repealed.

The destination of the provisions of the Real Property Act 1861-1988 which were still in force after the amendments effected by the Real Property Acts and Other Acts Amendment Act 1986 is set out below, together with explanations of repeals. It should be borne in mind that a number of provisions of the Act were repealed in 1986 or previously.

This list is followed an by analogous list in the respect of the Real Property Act 1877-1988 and other legislation relating to Real Property proposed tro be repealed.

s.1 - The Real Property Act 1861 provides (s.1) that from and after the commencement of the Act, all Laws, Statutes, Acts, Ordinances, Rules, Regulations and Practices whatsoever relating to freehold and other interests in land so far as they may be inconsistent with the provisions of the Act and so far as regards their application to land under the provisions of the Act or the bringing of land under the provision of the Act shall be repealed. The section has been referred to in a number of cases, including Fink v. Robertson (1907) 4 CLR 864, Holt v. D.F.C.T. (1914) 17 CLR 720 and Barry v. Heider (1914) 19 CLR 197. The same or a similar provision is contained in other Torrens Title Statutes, see for example New South Wales Real Property Act 1900, s.2(4), Victoria Transfer of Land Act 1958, s.3(1), and the Western Australian Transfer of Land Act 1893, s.3. It might be considered prudent to reproduce it in the new Act since it is relevant in determining, inter alia, how far common law and equitable principles are applicable to land under the provisions of the Act. See Trust and Agency Co. v. Markwell (No. 2) (1874) 45 S.C.R. 50. However, the Commission decided against this in that since there is a system of registration in force, there is no longer the need that existed in 1861 to positively sweep away all inconsistent laws, but rather to maintain the structure of registration already in existence with suitable amendments. It is felt that this is adequately achieved by the provisions of the draft bill.

s.2 - new s.1.

s.3 - new ss.6,7.

ss.4,5 - new ss.8,9.

s.6 - new s.12.

s.7 - new s.26

s.8 - new s.13.

s.9 - new s.15.
s.10 - new s.14.

s.10A - new ss.22,25.

s.11 - new s.16.

ss.12,13,13A - repealed in accordance with recommendation to remove position of Master of Titles.

s.14 - new s.21.

s.15 - new s.29.

ss.16-31 - no longer required because of virtual disappearance of old system land. The savings provisions maintain the effect of these provisions in respect of any extant old system land.

s.19 - the present relevance of this section is essentially limited to the advertising requirements which are incorporated in the new s.18.

s.32 - new ss.22,23,34.

s.32A - new s.24.

s.33 - new ss.25,26.

s.34 - new ss.28,35,52.

s.35 - new s.35.

ss.36-39. - new s.31.

s.40 - new s.32.

ss.41,42 - incorporated with ss.140,141 and Real Property Act Amendment Act 1978 in new s.20.

s.43 - new ss.34,38,48.

s.44 - new s.39.

s.45 - new s.36.

s.46 - Surrendered deeds and instruments dated prior to existing certificates of title not to be produced. This has been repealed as it is felt to be a matter now governed generally by contracts of sale, and largely irrelevant as for all practical purposes old system land has ceased to exist.

s.46A - new s.47.

s.47 - repealed as thought to be a unnecessary restatement of the existing rights of the lessor.

s.48 - new s.48.
ss.49,50 - new s.25.

s.51 - new Part X, ss.66-73.

s.52 - new s.50.

s.53 - repealed as it was felt to be unnecessary in the light of court decisions, see Chapter VIII, section on leases.

s.54 - new s.53,54.

s.55 - new s.55.

s.56 - new s.56.

s.57 - new s.61.

s.58 - new s.62.

s.60 - new ss.57,61.

s.62 - new s.63.

s.63 - new ss.64,65.

s.65,66 - new s.48.

ss. 67-76 - new s.74, and explanation of the repeal of most of the provisions relating to covenants is set out below.

s.67 - General covenants to be implied in instruments

Like provisions are present in corresponding Acts of New South Wales (s.75), South Australia (s.261) and New Zealand (s.154) but they are not in the Victorian and Western Australian Acts nor the Tasmanian Land Titles Act 1980.

It seems however these provisions could be reproduced in a slightly altered form (cf. New South Wales s.75). The method selected has been to consolidate the parts of ss.67,74 and 76 required to be retained in a new s.74.

s.68 - Transferee of land subject to mortgage or encumbrance to indemnify transferor. This section has particular application to mortgages and therefore could more properly be included in the Part of the Bill dealing with mortgages. This has been done and the provisions of this section are reproduced in the new s.49.

In effect the section provides that in every instrument transferring an estate, etc., subject to a mortgage the following covenants are implied; Transferee will -

1. Pay interest or annuity secured by mortgage;
2. Indemnify and keep harmless the transferor from - a. the principal sum secured by the mortgage; and
b. all liability in respect of covenants contained therein by the Real Property Act or by the Property Law Act declared to be implied on the part of the transferor.

In *The Torrens System in Australia* (Law Book Co., 1982), D.J. Whalan at p.159 writes:

"Although the clash of authority remains, it is suggested that, on reading the provisions, there do appear to be two distinct covenants - a promise to pay and a promise to indemnify - and thus it is submitted that the Queensland interpretation (Stanley v. Wiseman (1894) 6 Q.L.J. 84) and the New Zealand interpretation (Rowe v. Willcocks [1923] N.Z.L.R.574) are to be preferred."

The new s.49 makes this explicit.

s.72 - new s.56.

s.73 - Abbreviated form of words for expressing covenants to be as effectual as if such covenants were set forth in words at length. This was repealed in 1986.

Section 109(1) of the Property Law Act 1974-1986 provides that when the words in column 1 of schedule 3 and distinguished by number are used in a lease, those words imply an obligation between lessee and lessor in the terms contained in column 2 of the schedule. The covenants in schedule 3 have many points of similarity to those in the former s.73 but these are applicable only to leases.

It would have been possible to include in the Bill a provision which makes s.109(1) and the Third Schedule of the Property Law Act 1974-1986 applicable to mortgages. However, in view of the unpopularity of such provisions, in the sense that they are little used, the Commission prefers to recommend reliance on the provisions enabling registration of memoranda containing standard clauses under the former s.76A (to be re-enacted as the new s.75).

s.74. Such covenants may be set forth in declaration in actions for breach. There is no good reason for retaining this provision.

s.75. Covenants declared to be implied to have the same force as if the same has been expressed.

This section was repealed in 1986 as it was felt to be meaningless, and in any case would not be required in the light of the provisions of s.49(1) of the Property Law Act 1974-1986.

s.76. Covenants declared to be implied may be negativated or modified - There is no good reason for retaining this provision as Section 49(2) of the Property Law Act 1974-1986 states that any covenant or power may, unless otherwise provided in this or any other Act, be negativated, varied or extended, unless it is felt convenient for the rule to be stated in the Real Property Act as well.

s.76A - new s.75.
ss.77-79 - new s.76.

ss.80,81 - repealed, see discussion in Chapter VIII on trusts.

s.83 - new s.79.

s.84 - repealed as superfluous in the light of the provisions of the Trusts Act 1973-1986.

s.86 - new s.81.

s.89 - incorporated in new s.18, insofar as advertising requirement is concerned, otherwise comprised in new s.79.

s.91 - new s.82.

s.92 - new s.33.

s.93 - repealed as relates to the bringing of old system land under the Act.

s.94 - new s.25.

s.95 - incorporated in new s.18, insofar as advertising requirement is concerned, otherwise comprised in new s.37.

s.96 - new s.26.

s.97 - new s.83.

ss.98-103 - new ss.84-91.

s.104 - new s.92.

ss.107,108 - new s.93.

s.109 - new s.39.

s.110 - repealed as felt unnecessary as a result of the advent of prescribed forms, for which see s.14.

s.111 - new s.94.

s.112 - new s.42.

s.113 - new s.43.

ss.114-116 - new s.44.

s.117 - incorporated in new s.18, insofar as advertising requirement is concerned, otherwise comprised in new s.45.

s.119 - new Third Schedule.

s.119A - new ss.67,72.
s.120 - new ss.14,46.
s.121 - new s.27
s.122 - new ss.26,27.
s.123 - new s.39.
s.124 - new s.40.
s.125 - incorporated in new s.41.
s.126 - incorporated in new ss.39,41.
ss.127-129 - replaced by new s.41.
ss.130-134 - replaced by new ss.17,41.
ss.135 - replaced by new s.41.
s.137 - new s.19.
s.138 - repealed as unnecessary
s.139 - Authority to Register.

This section has been repealed because it is widely accepted that the requirement of a certificate of correctness has ceased to be relevant in its original form. However, there is a need for a transferee or grantee of an interest to signify acceptance of the the transaction either personally or through a solicitor. This is now to be achieved by appropriate drafting of prescribed forms which is required by the proposed terms of s.14.

ss.140,141 - incorporated with the relevant parts of ss.41,42 and Real Property Act Amendment Act 1978 in new s.20.

s.143 - new s.20.
s.144 - new s.2.

REAL PROPERTY ACT 1877-1988

The destination of the provisions of the Real Property Act 1877-1988 which were still in force after the extensive repeals effected by the Real Property Acts and Other Acts Amendment Act 1986 is set out below. Those sections not listed were repealed in 1986 or earlier.

ss.1-3 and 52 automatically lose their import once the rest of Act is repealed, or in the case of s.3 all of the defined terms in the 1877 Act with any continuing significance are incorporated in the new s.6.

ss.6,7 - repealed as no longer relevant.
s.8 - repealed as realting only to old system land.

s.9 - relates to withdrawal of applications and has been incorporated in the new s.43.

s.10 - repealed as no longer of practical significance.

s.11 - combined with s.44 of the 1861 Act into the new s.39, as both sections deal with exceptions to the principle of indefeasibility of title.

s.12,14,15 - have been incorporated partly in the new section 35 dealing with the effective dates of instruments for purposes of priority and partly in the new s.38 dealing with priorities of registration.

s.17 - combined with sections 49,50,94 into s.25 and the third Schedule, as they all deal with the issue of certificates of title.

s.18 - relates to leases and so belongs with the lease sections of the 1861 Act. Incorporated in new s.50.

s.19 - incorporated in new ss.66,67.

s.20 - repealed as its provisions are no longer required in the light of the new s.61 and the provisions of the Property Law Act 1974-1986.

s.23 - This provision declared that transfers might be made subject to the grant of a lesser interest by the transferee in favour of the transferor. Sections 23-28 of the Act of 1877 dealt with transfers subject to a charge of an easement. These provisions were unique to Queensland, and the question arises as to their utility and need for continuation. All save s.23 were repealed in 1986, as the existence of the new structure of prescribed forms was felt to render the provisions otiose, while s.23 was retained merely as a declaration of principle.

Professor Sykes had this to say:

"In Queensland an additional instrument by which a mortgage, using that phrase widely, may be created is provided by s.24 of the Real Property Act 1877. This is a memorandum of transfer and charge and is appropriate when land is to be transferred subject to a security. Two forms are provided, one for a charge in favour of the person who executes the transfer and the other for a charge in favour of a third person who has advanced money, the first form being apt when the security is given to secure balance purchase money and the second when the transaction involves a loan by a third person to complete the transaction. The memorandum when registered has, so far as the charge or security is concerned, the effect of a bill of mortgage [R.P.A. 1877, s.26], though the instrument is not technically a mortgage as it is not limited merely to the case of money lent. Both forms in the Schedule to the Act are under seal."


At page 181 of his book he says, "[i]t seems to have been contemplated by the legislature originally that, where the debt arose other than by loan of money, that either a bill of encumbrance or the form of transfer combined
with creation of charge under s.24 of the Real Property Act of 1877 should be used. Of course it might be argued that a vendor who allows a balance of purchase money to remain outstanding is really lending it to the purchaser but such an argument would convert almost any debt into a 'loan'".

It is not clear why the Parliament in 1877 saw the need to introduce another means of securing the payment of money upon land, and the Parliamentary Debates at the time do not provide an answer. It would be appropriate to use a bill of mortgage (or, prior to their abolition in 1986, a bill of encumbrance) in any situation where a transfer subject to a charge could be used. The argument could be mooted that a transfer subject to a charge has the advantage of both effecting a change in the registered proprietorship of land and simultaneously creating a registered security by means of the one instrument. In practice, however, both the memorandum of transfer and the bill of mortgage would usually be produced together for registration, and this occasions no particular hardship or disadvantage.

As Professor Sykes has noted (see above) a transfer subject to a charge or a bill of encumbrance was not likely envisaged as the appropriate means of securing the balance of unpaid purchase monies. The Commission in its Working Paper No. 25 observed that the now repealed Contracts of Sale of Land Act 1933 provided legislative recognition of the use of a bill of mortgage to secure the balance of unpaid purchase monies (see generally at p.10). The practice has continued notwithstanding that since the 1st of December 1975 (the date of repeal of the Contracts of Sale of Land Act 1933) it would be open to the Registrar of Titles to refuse registration of a bill of mortgage if a bill of encumbrance or transfer subject to a charge should have been used.

Even prior to the abolition of encumbrances in 1986, so far as practical considerations are concerned it mattered not in recent years whether a mortgage or an encumbrance was taken since the remedies provided for default under the registered instrument were the same. Moreover, a transfer subject to a charge took effect as if it were a bill of mortgage : s.26, Real Property Act 1877-1979. The changes recommended by the Commission in its Working Paper 25 and implemented in 1985 and 1986 resulted in a bill of mortgage being legitimately used in any situation where it is sought to secure the payment of a monetary obligation however described. Bills of encumbrance no longer exist. Transfers subject to a charge would represent a duplicity in the law for which there is no cogent reason.

Section 23 of the 1877 Act provides that land under the provisions of the Act may be transferred subject to an easement (as well as to a charge or security). Prior to the advent of prescribed forms in 1986, easements which might be registered under the Acts could be created in one of three ways:-

(1) Memorandum of Transfer in the Form W: ss.48,51 of Real Property Act 1861-1981;
(2) Transfer subject to an easement in the Form T: s.24 of Real Property Act 1877-1979;
(3) Deed of Grant: ss.3,51 of Real Property Act 1861-1981.

Methods (1) and (2) above were clearly only applicable if the registered proprietor/vendor wished to create an easement in favour of other land retained. There was no compelling reason why two forms should exist. The
relevant 1877 provisions should be repealed, and not re-enacted in substance either in whole or in part.

Section 28 of the Act of 1877 used, prior to its repeal in 1986, to provide that "[w]henever an easement is created by a Memorandum of Transfer and Charge or otherwise it shall be lawful for the Registrar-General at any time upon the application of the transferor or other person in whose favour the land shall be charged with such easement to deliver to him a certificate of title for such easement". There are good reasons why the dominant tenement holder would wish to be able to produce documentary evidence of the easement. Prior to 1986 this could be done in one of two ways. Firstly, the registered proprietor of the dominant tenement could obtain a certificate of title pursuant to s.28 of the 1877 Act evidencing the existence of the easement; secondly, the registered proprietor of the dominant tenement could produce the certificate of title to his own land, or a photocopy thereof, upon which is noted the existence of the easement in his favour pursuant to s.51 of the Act of 1861. Following the passage of the 1986 amendments, only the latter method is available. However, the new formulation of the provisions governing certificates of title (s.26 and the definition in s.6) would enable the Registrar to issue a certificate of title in respect of an easement if desired.

ss.30,30A – new ss.58,84.

s.32 – relating to applications by personal representatives to be registered, comprised in new ss.77-80.

s.33 – of the former requirements to be observed in relation to the bringing of land under the Act it is felt that only the advertising requirement, as limited to cases where no grant has issued in 1988, merits retention in relation to transmissions by death. This matter is specifically addressed in the new s.18, and so s.33 may be repealed.

s.35 – has been absorbed with s.91 of the 1861 Act in new s.82 because both sections relate to warrants of execution.

ss.36-40 of the 1877 Act relate to caveats, and have been incorporated with ss.96-103 of the 1861 Act, in the new ss.84-91.

s.46 – dealing with registration of vesting orders made by the Supreme Court, comprised in new s.79.

s.47 – providing for compensation for improvement by registered proprietors subsequently ejected (this provision would belong with the remedies sections 123-126 of the 1861 Act, however, it is felt to be an unnecessary restatement of the inherent right of such a person to claim compensation and so is recommended for repeal).

s.48 – relating to the status of registrable but unregistered documents, incorporated in new s.34.

s.49 – relating to the status of registrable but unregistered documents, felt to be unnecessary, particularly in the light of the new s.7.

s.51 – preserving equitable jurisdiction, incorporated in new s.39.
OTHER LEGISLATION

Registrar of Titles Act of 1884 - new s.8.

Real Property (Local Registries) Act 1887-1986:

s.2 - new s.6.
s.4 - new s.10.
s.6 - new s.22.
ss.7-10 - new s.10.
Schedules - new second schedule.

Real Property (Commonwealth Titles) Act 1924-1986:

s.2 - new s.6.
ss.3,4,6 - new s.30.
s.5 - effect preserved by savings provisions.

Real Property (Commonwealth Defence Notification) Act 1929-1986:

s.2 - new s.6
s.3 - new s.30.
s.4 - new s.20.

Real Property Acts Amendment Act 1952, ss.45-60 - incorporated in new s.39 and fourth schedule.


Real Property Act Amendment Act 1978 - Incorporated with the relevant parts of ss.41,42,140,141 of the 1861 Act in new s.20.


REPEAL OF PROVISIONS RELATING TO OLD SYSTEM LAND

In the Commissions's report (Q.L.R.C. 16) on property law reform the view was expressed (para 249) that "legislative steps should now be taken to compel unregistered land to be brought under the Real Property Acts with as little further delay as is possible." The particular method recommended at that time was not implemented, but Part XVIII, ss. 250-254 of the Property Law Act 1974 introduced a procedure whereby the Registrar of Titles may issue a notice directing that unless an application is made within a specified time to bring land under the Real Property Acts the land is liable to be brought under the Acts and a certificate of title issued in the name of the Public Trustee.
Procedures for the compulsory registration of titles are a common feature in other torrens Title Statutes and different techniques are used to effect the bringing of land under the Acts in default of an application by the person entitled to make it. It is not intended to reconsider the question in Queensland, since the current legislation was introduced only recently after extensive discussion, and the amount of remaining old system land is extremely small. Though it is arguable that the relevant provisions should be incorporated into the Real Property Acts, it is not proposed to do this, since the Property Law Act applies both to unregistered land and to land under the provisions of the Real Property Acts and it would be undesirable to remove from it all provisions which relate exclusively to land under the Real Property Acts, since this would militate against the policy of confined the scope of the Real Property Act to provisions relating directly to the operation of the system of registration of title.

The general policy of the Torrens Title Acts has been to require all land alienated from the Crown in fee to be subject to the provisions of the Act. That policy is expressed in s.15 of the Queensland 1861 Act, which is reproduced in clause 29 of the draft Bill except that the expression "alienated in fee" has been changed to "alienated in fee simple", in consequence of the abolition of all estates in freehold other than estates in fee simple and life estates by s.19 of the Property Law Act. The policy has also been to permit land not subject to the provisions of the Act to be brought under it. That policy is expressed in s.16 of the 1861 Act, but is no longer to be expressed directly in the new legislation except in relation to crown grants, since the existence of old system parcels has declined to the point where it was felt worthy of attention by way of savings provisions only.
APPENDIX - Part 4 - Selected Comparisons with other States

In the course of this review, examinations were conducted of the equivalent legislation in a number of other jurisdictions which employ the Torrens system of registration of title to land. This resulted in the incorporation in the draft bill of a number of provisions existing in those jurisdictions which had no counterpart in Queensland, and these have been discussed earlier in this paper. Other such provisions were not adopted and it is felt appropriate in the case of South Australia, in whose case a particularly detailed comparison was made, to state below the reasons why the principal provisions of this nature were felt not to be worthwhile enacting. South Australia was selected for a particularly detailed comparison both because it was the original Torrens jurisdiction, and because the original Queensland legislation was modelled closely on this original Torrens statute.

COMPARISON WITH EXISTING SOUTH AUSTRALIAN LEGISLATION [by section number of Real Property Act 1886-1975]

s.6 - Laws inconsistent not to apply - in view of the principle that one parliament cannot bind its successors, this provision was felt to be insufficiently effective to justify its adoption.

s.7 - Lands under previous Acts to be under this Act - this is essentially similar to s.1 of the 1861 Act, and the matter is, in any case, covered by the savings provision.

s.8 - Land not to be withdrawn - this was felt to be unnecessary as the structure of the Bill implies this.

ss.10,11 - Objects of the Act - provisions of this nature would be inappropriate in Queensland in view of its adherence to the traditional principles governing statutory interpretation.

ss.14-17,19 - Removal of officers, misconduct, acting officers etc. - these provisions are unnecessary in Queensland, as the matter is governed by the general legislation relating to the public service.

ss.25-46 - deal with the bringing of land under the Act, which has been dealt with in the Bill by the savings clause.

ss.47-49,53 - Register Book and duplicate certificates - Queensland already has more modern versions of these provisions.

s.54 - Instruments to be in accordance with the Act, correction of patent errors - it is felt that s.14 achieves the objective of s.54(1) through the prescription of forms, s.54(2) is unnecessary in the light of the principle of indefeasibility laid down by the High Court and s.54(3) is equivalent to s.16(3) of the Bill.
s.59 - Death of transferor - This provision, equivalent to the former s.49 of the 1877 Act, is felt to be unnecessary in the light of s.7 of the Bill.

s.66 - Conflict between Register Book and duplicate - this does not arise under the the form of the provisions in Queensland.

s.73 - Certificates of title - the need for this provision does not arise under the form of the Bill.

s.76 - Successors in title - this provision is not needed in the light of s.7 of the Bill.

ss.81-90 - Easements - the provisions of the Bill are phrased and constructed differently but achieve all the necessary objectives.

ss.91-95 - Crown leases - the equivalent matters are dealt with under the Land Act in Queensland.

ss.102-105 - Sale of land for non-payment of rates - there is currently no procedure for recording this type of proceeding on the Register in Queensland, but conveyancing appears to proceed satisfactorily on the basis of rates searches which have to be made in any case to check on the apportionment of rates.

s.111 - Proprietor may vest estate jointly with himself etc. - no express provision is felt to be necessary to enable this.

s.112 - Dealings prior to crown grant may be registered - the Commission has considered this matter, but feels that the inclusion of an equivalent provision in the Bill is not justified.

ss.113-115a - deal with acquisition of land by authorities and related matters and are matters not required to be dealt with in our Bill.

ss.124-125 - Implied covenants in leases - these matters are dealt with in the Property Law Act 1974-1986 (see Part VIII) and other legislation in Queensland.

ss.130-146 - Implied covenants in mortgages - these matters are dealt with in the Property Law Act 1974-1986 (see Part VII) in Queensland.

ss.130a,135a,138,145 - are not required because encumbrances and annuities are not registrable in Queensland, and distress for rent has been abolished.

ss.153-154 - Extensions - Queensland has never had this provision for extension and the Commission sees no pressing need to introduce it. If desired, it is conceivable that such a matter could be addressed by suitable amendment of the relevant prescribed forms by regulation.

s.161 - Trusts in grants by the Crown - these are dealt with by separate legislation in Queensland.

ss.163-168 - these provisions deal with "no survivorship" requirements which the Commission has recommended be repealed for lack of use.
s.169 - Disclaimers - no equivalent provision is necessary in Queensland because it should not be possible for a person to be registered without his consent in view of the need for the transferee or his solicitor to sign the transfer.

s.188 - Survivorship - the addition of a further subsection to this effect to s.32. could be considered.

ss.189-190 - Married women etc. - such provisions are no longer required.

ss.192-200 - Ejectment - the details of actions for possession are governed by Rules of Court in Queensland.

ss.223m-223nr - Strata titles - these matters are governed by the Building Units and Group Titles Act 1980-1988 in Queensland.

ss.224-226,228-231,233 - Court procedure and fees - these are governed by the general Rules of Court in Queensland, or the general law, including the Criminal Code.

ss.240 - Conviction not to affect civil remedy - not required here because there are no criminal provisions in Bill.

ss.241-242a - Maps, measurements etc. - these matters are addressed in the Surveyors Acts in Queensland.

s.250 - Lis pendens not to be registered - this matter does not arise in Queensland as lis pendens have never been registrable.

s.251 - No adverse possession - Queensland has different provisions regarding adverse possession (see Fourth Schedule to Bill).

ss.252-254 - New streets - The Real Property Acts have always operated satisfactorily without such provisions in Queensland.

s.257 - Women - This is irrelevant after the abolition of all disabilities of woman with regard to property ownership.

ss.258-260 - These deal with matters of interpretation relevant only to South Australia.

ss.262 - Implied covenants may be negatived etc.- Property Law Act 1974-1988, s.49 addressed this matter.

s.264 - Implied covenant to be joint and several - The Commission feels that this provision is unnecessary.

ss.265-266 - Short forms of covenants - There is a provision in respect of leases in the Property Law Act 1974-1988, but it is little used, and in the light of the provision for registration of memoranda in s.75 of the Bill, the Commission feels that it is unnecessary to include such a provision.

s.269 - Registrar may dispense with proof of attestation - It is a matter for consideration whether such a rider should be added to s.44 of the Bill.
s.274 – Solicitors etc. monopoly in conveyancing – This matter is dealt with under other legislation in Queensland.


s.277 – Regulations – There is no general regulation making power in the Bill but there are specific powers to make regulations dealing with particular matters, see ss.9,14,20,41.

1985 Real Property Act Amendment Act (No. 2), 1985 (S.A.) No. 51

THE SIXTH SCHEDULE

<table>
<thead>
<tr>
<th>Short form</th>
<th>Long form</th>
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<tbody>
<tr>
<td>an easement for water supply purposes.</td>
<td>the right for him, his agents, servants and workmen at any time to break the surface of, dig, open up and use the land (described for that purpose in this instrument) for the purpose of laying down, fixing, taking up, repairing, re-laying or examining pipes and of using and maintaining those pipes for water supply purposes and to enter the land at any time (if necessary with vehicles and equipment) for any of those purposes.</td>
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<tr>
<td>an easement for sewage purposes.</td>
<td>the right for him, his agents, servants and workmen at any time to break the surface of, dig, open up and use the land (described for that purpose in this instrument) for the purpose of laying down, fixing, taking up, repairing, re-laying or examining pipes and of using and maintaining those pipes for sewage purposes and to enter the land (if necessary with vehicles and equipment) for any of those purposes.</td>
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<tr>
<td>an easement for drainage purposes.</td>
<td>the right for him, his agents, servants and workmen at any time to break the surface of, dig, open up and use the land (described for that purpose in this instrument) for the purpose of laying down, fixing, taking up, repairing, re-laying or examining drains or drainage pipes and of using and maintaining those drains and pipes for drainage purposes and to enter the land at any time (if necessary with vehicles and equipment) for any of those purposes.</td>
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<tr>
<td>an easement for gas supply purposes.</td>
<td>the right for him, his agents, servants and workmen at any time to break the surface of, dig, open up and use the land (described for that purpose in this instrument) for the purpose of laying down, fixing, taking up, repairing, re-laying or examining pipes and of using and maintaining those pipes for the purpose of supplying gas and to enter the land at any time (if necessary with vehicles and equipment) for any of those purposes.</td>
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<tr>
<td>an easement for the transmission of electricity by overhead cable.</td>
<td>the right for him, his agents, servants and workmen at any time—&lt;br&gt;(a) to suspend cables across the land (described for that purpose in this instrument) and construct supports for those cables;&lt;br&gt;(b) to inspect, alter, maintain, repair and replace those cables and supports;&lt;br&gt;(c) to use the cables for the purpose of transmitting electricity;&lt;br&gt;(d) to break the surface of, dig, open up and use the land for any of those purposes; and&lt;br&gt;(e) to enter the land at any time (if necessary with vehicles and equipment) for any of those purposes.</td>
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<tr>
<td>an easement for the transmission of electricity by underground cable.</td>
<td>the right for him, his agents, servants and workmen at any time—&lt;br&gt;(a) to lay under the surface of the land (described for that purpose in this instrument) ducts, pipes and cables;&lt;br&gt;(b) to inspect, alter, maintain, repair and replace those ducts, pipes and cables;&lt;br&gt;(c) to use the cables for the purpose of transmitting electricity;&lt;br&gt;(d) to break the surface of, dig, open up and use the land for any of those purposes; and&lt;br&gt;(e) to enter the land at any time (if necessary with vehicles and equipment) for any of those purposes.</td>
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<tr>
<td>an easement for the transmission of television signals by underground cable.</td>
<td>the right for him, his agents, servants and workmen at any time—&lt;br&gt;(a) to lay under the surface of the land (described for that purpose in this instrument) ducts, pipes and cables;&lt;br&gt;(b) to inspect, alter, maintain, repair and replace those ducts, pipes and cables;&lt;br&gt;(c) to use the cables for the purpose of transmitting television signals;&lt;br&gt;(d) to break the surface of, dig, open up and use the land for any of those purposes; and&lt;br&gt;(e) to enter the land at any time (if necessary with vehicles and equipment) for any of those purposes.</td>
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<tr>
<td>party wall rights.</td>
<td>the right to use the party wall (described for that purpose in this instrument) for the support of the walls, floors, ceilings, roofs or other parts of any building built or placed on the adjacent land.</td>
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<tr>
<td>an easement for eaves and gutters.</td>
<td>the right for him, his agents, servants and workmen at any time to construct, inspect, alter, maintain, repair, replace and use eaves, gutters and downpipes over the land (described for that purpose in this instrument) and to enter the land (described for that purpose in this instrument) at any time for those purposes.</td>
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VICTORIA

Many of the amendments made or proposed in other jurisdictions are not appropriate in the particular circumstances of Queensland. A particularly fruitful area for comparison at the present time is Victoria, since the Victorian Law Reform Commission is currently conducting a review of this area of the law. For example, wide ranging reforms to the mode of creation of easements and covenants have been proposed by that Commission. These would involve the abolition of all current methods of creation of such interests apart from creation by lodging a plan incorporating such interests for registration. It is appropriate to analyse the status of such interests under the Torrens system in more detail.

EASEMENTS AND RESTRICTIVE COVENANTS

There are many problems in Victoria stemming from extensive general law land which, fortunately, we do not experience in Queensland since restrictive covenants are rare and have never been explicitly recognised by the Real Property Acts. Wide ranging changes were recently proposed in Victoria which in effect remove the ability to create such an interest other than by registration of a plan of subdivision. There appears to be no reason to alter the current Queensland approach. Easements are also far less common in Queensland since far more of the development follows modern town planning schemes which generally ensure direct access for each lot to roads and services. In the event of difficulty, s.180 of the Property Law Act 1974-1986 is an avenue for resolving problems which require the grant of an easement or similar right for their resolution.

SURVEY AND BOUNDARY PROBLEMS

Victoria suffers from extensive survey problems stemming from inaccuracy of early surveys. Boundaries are not fixed in the Queensland sense, since title can be acquired by adverse possession if a fence is wrongly sited. As survey problems of this nature do not exist in Queensland, and boundaries are fixed in the sense that the certificate of title is conclusive as to the location of the boundary on the ground, subject only to the statutory exception to indefeasibility in respect of wrong description, and it is impossible to gain title by possession to an encroachment, there is again no cause for Queensland to adopt any of the measures which may be contemplated in Victoria to remedy the problems existing in that State.

The only minor amendments for which there could be argued to be justification in Queensland are:

(a) Provision for the issue of a title qualified in respect of boundaries, after a less rigorous than usual survey. This would meet the problem of large parcels of low value land, particularly in Western Queensland, where the imposition of the normal survey requirements can render registration of title uneconomic. It is suggested that such title should be capable of being upgraded to an unqualified title at any time on performance of the appropriate survey requirements.
The qualification could operate by excluding from the benefit of the assurance provisions any claims arising out of boundary errors.

(b) Amendment of the Limitation of Actions Act 1974-1981 in order to make its provisions governing the running of time conform to the principle that the right to possession of an encroachment cannot be acquired in this way. This is appropriate since encroachment seems to be dealt with satisfactorily by the provisions of the Property Law Act 1974-1986, ss.182-198.

ASSURANCE

Queensland is able to learn from the Victorian provisions governing claims on the assurance fund. S.110 of the Transfer of Land Act 1958 furnishes a much more concise formulation of the circumstances when claims may be made than does s.126 of the Real Property Act 1861-1988. The provision, s.110(2), whereby the Registrar may be made nominal defendant is also far superior to the current Queensland provisions. The proposals in Chapter VII owe much to the Victorian formulation.

LEASES

The Victorian exception from indefeasibility in respect of leases extends to all tenants in possession. As the more limited Queensland exception is operating reasonably, there is no reason to alter it in any major way.

SALES BY SHERIFF

The Victorian proposals are in essence the assimilation of sale by the sheriff with sales by a mortgagee in that all the statutory powers of sale of a mortgagee would be conferred on the sheriff once the warrant of execution had been entered. This overcomes the problems of 'kerbside' sales, stemming from the lack of powers on the part of the sheriff to inspect the property and allow prospective purchasers to do so. Queensland has problems inherent in the short time limit of three months within which the Sheriff may effectively sell which are discussed in Chapter XIII.

MORTGAGES

It is believed that the Victorian thinking is that mortgagees should be further encouraged to register, because there are currently too many unregistered equitable mortgages. It might be thought appropriate to achieve this objective in Queensland by restricting further the ability of equitable mortgagees to caveat.

FLEXIBILITY OF THE REGISTER

This is a significant issue in the era of new developments such as timeshares. The Building Units and Group Titles Act 1980-198* has generally, been equal to the situation once the ghost of s.49 was exorcised, but a minor amendment to s.40 of the Real Property Act of 1861 was recently
necessary for practical reasons in dealing with timeshares constructed on the basis of a tenancy in common. Provisions are included in the draft bill to ensure that the special provisions for leases not exceeding three years cannot be subverted into a charter for timesharing (that is, leases for a week in each of 80 successive years).
APPENDIX – Part 5 – Impact on other legislation

Enactment of the draft Bill will, as with the 1986 legislation require considerable consequential amendments of other legislation which refers to the Real Property Acts. The Commission has not drafted these provisions as it is impracticable to do so at the stage of issuing the working paper. As these amendments are almost exclusively of a trivial nature and will tend to be of a simplifying nature owing to the consolidation of all provisions relating to the Torrens system into one Act, it was felt that little would be achieved by performing this exercise at this stage of the review.

Immediately after the issue of this paper, the Commission will be examining legislation, in particular the Property Law Act 1974-1986, in order to ascertain whether any significant changes would be desirable in conjunction with the enactment of the draft Bill.
APPENDIX - Part 6 - Brief Summary of Main Recommendations


2. Remaining old system land to be provided for in the savings provisions and to be brought under the Real Property Acts by use of the powers contained in s.250 of the Property Law Act 1974-1986.

3. Simplification of the legislation through much more extensive use of appropriate defined terms, and reconciliation of this terminology with that employed in, on the one hand, the Acts Interpretation Act 1954-1977, and on the other, property legislation, such as the Property Law Act 1974-1986, and the Succession Act 1981-1986.


5. Repeal of otiose provisions.

6. Consolidation of disparate provisions in the Real Property Acts relating to the same or related subject matter. For example, all provisions relating to indefeasibility are collected in s.39.

7. Clarification of the existing exceptions to indefeasibility (s.39).

8. Overhaul of the procedures regarding compensation for loss of title (s.41).

9. Abolition of the separate position of Master of Titles.

10. Simplification of the advertising requirements (s.18).

11. Provision for variation of registered leases, and for a lease register where needed on account of complexity of dealings.

12. Overhaul of the provisions relating to mortgages, including the limitation of liability of a mortgagee in possession of a leasehold interest (s.63), and provision for variation of priority (s.60), and reconciliation with the provisions of the Property Law Act 1974-1986.

13. Overhaul of provisions relating to easements, including provision for implication of easements from plan of subdivision in limited cases (s.73).

14. Provision for withdrawal of a memorandum (s.75).

15. Increase in maximum amount for transfer of land of deceased without a grant, and provision for variation by regulation (s.77).

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