QUEENSLAND LAW REFORM COMMISSION

A BILL TO AMEND THE PROPERTY LAW ACT 1974 - 1986

REPORT NO 37

17 September 1987

A Report of the Queensland Law Reform Commission

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Q U E E N S L A N D

A REPORT OF THE LAW REFORM COMMISSION

ON A BILL TO AMEND THE PROPERTY LAW ACT 1974 - 1986

Q.L.R.C. R.37

PREFACE

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 G.N. Williams

Mr. R.E. Cooper Q.C.

Mr. F.J. Gaffy Q.C.

Sir John Rowell C.B.E.

Mr. J.R. Nosworthy C.B.E.

Mr. A.A. Preece

OFFICERS:-

Mr. K.J. Dwyer, Principal Legal Officer

Mr. P.M. McDermott, Senior Legal Officer

Mr. L.A.J. Howard, Secretary

The office of the Commission is at the Central Courts Building, 179 North Quay, Brisbane.

The short citation for this Report is Q.L.R.C. R.37.

The Honourable P.J. Clauson, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

Item No.4 of the Third Programme of the Law Reform Commission requires the Commission to review the Property Law Act 1974-1981.

On 18th December, 1986 the Commission published a Working Paper (W.P.30) containing a commentary and a proposed Bill to amend the Property Law Act.

The Working Paper was widely circulated to persons and bodies known to be interested from whom comment and criticism were invited. The Commission now submits its report which has been compiled after consideration of the responses received.

Signed: _____
The Hon. Mr. Justice B.H. McPherson
(Chairman)

Signed: _____
The Hon. Mr. Justice G.N. Williams
(Member)

Signed: _____
Mr. R.E. Cooper, Q.C.
(Member)

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Mr. F.J. Gaffy, Q.C.
(Member)

Signed: _____
Sir John Rowell
(Member)

Signed: _____
Mr. J.R. Nosworthy
(Member)

Signed: _____
Mr. A.A. Preece
(Member)

17th September, 1987

PROPERTY LAW ACT AMENDMENT BILL

General Introduction

Commentators upon the Property Law Act 1974 - 1986 have remarked:

> "In the early 1970's Queensland possessed probably the most antiquated general property law in the English speaking world....Now, by contrast, the State possesses, in the form of the Property Law Act 1974, arguably the most advanced general property statute in a common law jurisdiction. To be sure, the Act is closely modelled on similar statutes elsewhere, but both in its overall drafting and particular reforms, it generally represents an improvement on those statutes". (W.D. Duncan and R.J. Vann, Property Law and Practice in Queensland (1982), Preface, 9.)

The Property Law Act when it was introduced, was innovative legislation. The Commission, therefore, extensively sought submissions from the legal profession on the practical operation of the statute. The Commission wrote to over 500 firms of solicitors, and eleven Government offices seeking submissions on the review. As well, the Commission arranged for appropriate advertisements to be placed in various legal journals.

The Property Law Act has been amended since the review has been placed on the programme of the Commission. The Property Law Act Amendment Act 1985 (No.3 of 1985), which commenced operation on the 18th March, 1985, amended the Property Law Act in various respects. The Commission was consulted by the then Minister for Justice and Attorney-General (the Honourable N.J. Harper M.L.A.), prior to the passage of this legislation. The legislation was mainly introduced to overcome difficulties arising from a number of Supreme Court decisions. Section 57A was inserted into the Act as a consequence of the decision in Chitts v. Allaine [1982] Qd.R. 319. Section 80 was replaced by a provision which expressly provided a remedy for the rights conferred under that provision, cf. Re McDougall [1982] Qd.R. 553. The amending

legislation also enables the registration of a duplicate or attested copy of an instrument that revokes a power of attorney: section 71(1A).

On 18th December, 1986 the Commission circulated its Working Paper No.30 inviting comments and criticism on the proposals for amendment contained therein which had been based on submissions received by the Commission from time to time. In addition to proposals for amendment which it contained, the Working Paper adverted to submissions received upon which the Commission considered action was not required. Similarly, this report adverts to submissions received on which it is considered action is not required.

DRAFT BILL

An Act to amend the Property Law Act 1974-1986 in certain particulars.

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:-

1. Short title and citation. (1) This Act may be cited as the Property Law Amendment Act 198 .

(2) In this Act the Property Law Act 1974-1986 is referred to as the Principal Act.

(3) The Principal Act as amended by this Act may be cited as the Property Law Act 1974-198 .

2. Amendment of s.11. Instruments required to be in writing. Section 11 of the Principal Act is amended in subsection (1) by omitting paragraph (c).

3. Amendment of s.41. Sale or division of chattels. Section 41 of the Principal Act is amended in subsection (3) by omitting the word "or" in the first line of that subsection and substituting the word "and".

4. New s.43A. The principal Act is amended by inserting after section 43 the following section:-

"43A. Liability of co-owner for voluntary waste. [cf. Statute of Westminster II 1285, 13 Edward 1, St.1, c.22]. A co-owner who unlawfully commits voluntary waste is liable in damages to any other co-owner of the property in proportion to the interest of that other co-owner in the property."

5. Amendment of s.47. Delivery of deeds. Section 47 of the Principal Act is amended as follows:-

(a) by omitting in subsection (2) the words "subsection (1)" and inserting in their place the words "this section";

(b) by renumbering subsection (2) and (3) as subsections (6) and (7) respectively;

(c) by inserting the subsections numbered (2), (3), (4), and (5) as follows:

"(2) A deed is delivered if there appears -

(a) in the instrument embodying the deed; or

(b) on the outer sheet (if any) enclosing that instrument -

a statement, authenticated by the signature of the maker of the deed, or of some person having his authority to deliver the deed, that the deed is or has been delivered.

(3) When delivery of a deed is intended to be made subject to fulfilment of a condition, the condition shall not have effect to prevent delivery of the instrument as a deed unless -

(a) a statement of that condition appears -

(i) in the instrument intended to constitute the deed; or

(ii) on the outer sheet (if any) enclosing that instrument; or -

(b) before the instrument embodying the deed comes into the possession of the person in whose favour it is expressed to take effect or of some other person acting on his behalf, reasonably sufficient steps have been taken to communicate a statement of that condition to that person or that other person.

(4) Delivery of a deed may be effected by any person having the authority of the maker to deliver the deed, although such authority is not under seal or is not in writing.

(5) The circumstance that immediately before its delivery as a deed the instrument embodying the deed was, with the consent of the maker, in the possession of the person delivering it is evidence that such person has the authority of the maker to deliver the instrument as a deed."

6. Amendment of s.48. Construction of expressions used in deeds and other instruments. Section 48 of the Principal Act is amended by, in subsection (1) omitting paragraphs (c) and (d) and substituting the following paragraphs -

(c) words importing a gender include every other gender;

(d) words in the singular number include the plural and words in the plural number include the singular.

7. Amendment of s.54. Effect of joint contracts and liabilities. Section 54 of the Principal Act is amended as follows:-

(a) by renumbering paragraph (b) as paragraph (c) and substituting the following paragraph -

"(b) a promise made to two or more persons shall, unless a contrary intention appears, be construed as a promise made jointly and severally to each of those persons.";

(b) by repealing subsection (3) and substituting the following subsection -

"(3) The provisions of -

(a) this section (other than paragraph (b) of subsection (1) of this section) apply only to a promise, liability or cause of action coming into existence after the commencement of this Act;

(b) paragraph (b) of subsection (1) of this section apply only to a promise, liability or cause of action coming into existence after the commencement of the Property Law Act Amendment Act 198 ."

8. Repeal of and new s.63. The Principal Act is amended by repealing section 63 and substituting the following section:-

"63. Postponement of passing of risk to purchaser.

(1) The risk in respect of damage to land shall not pass to the purchaser under a contract for the sale or exchange of the land until -

(a) the completion of the sale or exchange; or

(b) the purchaser enters into, or is entitled to enter into, possession of the land,

whichever first occurs.

(2) The reference in subsection (1) to possession in relation to land includes a reference to -

(a) the occupation of the land (whether pursuant to a license or otherwise) pending completion of the sale or exchange of the land; and

(b) the receipt of income from the land.

(3) Notwithstanding the provisions of this section a purchaser shall, prior to completion of the sale or exchange or prior to entering into possession or being entitled to enter into possession, have an insurable interest in the land.

(4) This section shall apply only to contracts made after the commencement of the Property Law Amendment Act 198 .

(5) This section shall apply to a sale or exchange by an order of Court, as if -

(a) for references to the "vendor" there were substituted references to the "person bound by the order";

(b) for the reference to the completion of the contract there were substituted a reference to the payment of the purchase or equality money (if any) into court.

9. Repeal of and new s.64. The Principal Act is amended by repealing section 64 and substituting the following section.

"64. Power to rescind contract where land substantially damaged.

(1) (a) Where land is substantially damaged after the making of a contract for the sale or exchange of the land and before the risk in respect of the damage passes to the purchaser, the purchaser may, at his option, rescind the contract by notice in writing given to the vendor or his solicitor not later than the date of completion or possession whichever the earlier occurs.

(b) Land damaged after the making of a contract for the sale of the land is substantially damaged if the damage renders the land materially different from that which the purchaser contracted to buy.

(2) Upon rescission of a contract pursuant to this section, any moneys paid by the purchaser shall be refunded to him and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled thereto by virtue of an encumbrance over or in respect of the land.

(3) A purchaser is not entitled to exercise the right conferred by subsection (1) if the damage was caused by a wilful or negligent act or omission on the part of the purchaser.

(4) This section has effect -

(a) in the case of a sale of a single dwelling-house - notwithstanding any stipulation to the contrary; or

(b) in any other case - subject to any stipulation to the contrary.

(5) This section applies only to contracts made after the commencement of the Property Law Act Amendment Act 198 ."

10. New s.64A. The Principal Act is amended by inserting the following section:-

"64A. Interpretation.

In sections sixty-three and sixty-four:

(a) "damage" includes destruction;
"land" includes buildings and other fixtures; and

(b) "dwelling house" means premises (including a lot under the Building Units and Group Titles Act 1980-1984) used, or designed for use, principally as a place of residence, and includes -

(i) outbuildings and other appurtenances to a dwelling-house; and

(ii) a dwelling-house which is in the course of construction.

11. Amendment of s.71. Application of Division. Section 71 of the Principal Act is amended by inserting the following subsection:-

"(6) This Division does not apply to an instalment contract for the sale of land by a vendor who is subject to the Land Sales Act 1984-1985 and who is not eligible to be granted an exemption under that Act".

12. Amendment of s.73. Land not to be mortgaged by vendor. Section 73 of the Principal Act is amended by omitting paragraph (a) of subsection (2) and substituting the following paragraph:-

"(a) the instalment contract shall be voidable by notice given by the purchaser at any time before completion of the contract is due".

13. Amendment of s.82. Tacking and further advances. Section 82 of the Principal Act is amended by, in subsection (2) inserting at the end of the subsection, the words: "including any sums paid by way of rates or land tax in respect of the mortgaged property following failure by the mortgagor to pay such rates or land tax when due; and sums representing interest due under the mortgage which have not been paid when due and which in consequence, and pursuant to the terms of the mortgage, have been added to and form part of the principle sum due under the mortgage."

14. Amendment of s.84. Regulation of exercise of power of sale. Section 84 of the Principal Act is amended by, in subsection (5), inserting after the words "Mining Act" the words - "or to an instrument under the Bills of Sale and Other Instruments Act 1915-1981, or to a mortgage debenture issued by a corporation".

15. Section 124. Restriction on and relief against forfeiture. Section 124 of the Principal Act is amended by, in subsection (1) inserting after the word "compensation" where it appears a third time, the words - "(including all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer or otherwise)".

16. Section 126. Costs and expenses. Section 126 of the Principal Act is amended by omitting the second paragraph commencing "The lessor" and concluding with "section 124."

17. Section 129. Abolition of yearly tenancies arising by implication of law. The Principal Act is amended by repealing section 129 and substituting the following section:-

129(1) No periodic tenancy shall, after [insert date of commencement of amendment] be implied by payment of rent;

(2) Where, apart from this section, a periodic tenancy would be implied by payment of rent, there shall arise between the parties a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time;

(3) Nothing in this section affects the express creation of a periodic tenancy.

(4) This section shall not apply where there is a periodic tenancy which has arisen by implication before the [date of amendment] and, in the case of any such tenancy in respect of which the date of its creation is unknown to the lessor or lessee, as the case may be, who is seeking to determine the same, such tenancy shall, subject to any express agreement to the contrary, be determinable by six months' notice in writing expiring on the day immediately before the first anniversary of the coming into operation of this Act, or any date thereafter.

18. Section 168. Application of Part. Section 168 of the Principal Act is amended by inserting the following subsection -

"(3) In this part, "registered" means recorded in the appropriate register kept by the Registrar."

19. Section 170. Form and revocation of power of attorney. Section 170 of the Principal Act is amended by inserting the following subsection -

"(3) A donee who does any act or thing under a power which he knows has been revoked is guilty of an offence and is liable to a penalty not exceeding $1,000."

20. New Division 2 of Part IX of the Act. Enduring Powers of Attorney. The Principal Act is amended by inserting the words "Division 1 - General Rules" beneath "Part IX - Powers of Attorney" and inserting the following Division after section 175 of the Principal Act -

"DIVISION 2 - ENDURING POWERS OF ATTORNEY

175A. Enduring Power of Attorney.
Subject to the provisions of this Part, an enduring power of attorney shall not be revoked by the subsequent legal incapacity of the donor of the power unless the Court in the exercise of any power relating to mental illness expressly revokes it.

175B. Characteristics of an Enduring Power of Attorney.
[cf. Enduring Powers of Attorney Act 1985 (Eng.), s.2]
A power of attorney is an enduring power of attorney if the instrument which creates the power -

(a) is in Form 17A of the Second Schedule;

(b) is executed in the presence of and attested by a witness, who is someone other than the donee of the power; and

(c) is registered.

175C. Revocation. [cf. Instruments (Enduring Powers of Attorney) Act 1981 (Vic.), s.116]

(1) Except as is expressly provided in this Part, an enduring power of attorney may be revoked in the same way as an ordinary power of attorney may be revoked.

(2) An enduring power of attorney is revoked -

(a) if the donor or the donee of the power dies;

(b) if the donee of the power with the leave of the Court retires;

(c) if the donor or the donee becomes bankrupt or compounds with creditors or otherwise takes advantage of the laws in force for the time being relating to bankruptcy.

(d) if the donee being a corporation is wound up or dissolved or suffers the appointment of a receiver or an administrator;

(e) if the donee of the power becomes legally incapable at any time after the execution of the instrument creating the power;

(f) if, under section 175D, the Court makes an order revoking the power, but subject to the provisions of that order.

175D. Duty to maintain records. [cf. Powers of Attorney and Agency Act 1984 (S.A. s.8 and s.11]

(1) The donee of an enduring power of attorney shall keep and preserve accurate records and accounts of all dealings and transactions made in pursuance of the power.

A donee who fails to comply with this provision is guilty of an offence and is liable to a penalty not exceeding $1,000.

(2) The Public Trustee, or any person who in the opinion of the Court has a proper interest in the matter, may, at any time during a period of legal incapacity of the donor of an enduring power of attorney, apply to the Court for an order -

(a) that the donee of the power file in the Court and serve on the applicant a copy of all records and accounts kept by the donee of dealings and transactions made by him in pursuance of the power;

(b) that such records and accounts be audited by an auditor appointed by the Court and that a copy of the report of the auditor be furnished to the Court and the applicant for the order; or

(c) to revoke or vary the terms of the power or remove or appoint a donee of the power including a person to fill a casual vacancy in the office of the attorney.

(3) The donee of an enduring power of attorney may apply to the Court -

(a) for an order referred to in subsection (2)(c);

(b) for advice and direction as to matters connected with the exercise of the power or the construction of its terms.

(4) The Court has, upon an application under this Act, power -

(a) to appoint a donee although the enduring power of attorney has been revoked under the Act;

(b) to make all or any of the orders referred to in subsection (2);

(c) to make such other order as to the exercise of the power, or the construction of its terms, as the Court thinks fit; and

(d) to make an order with respect to the costs of any such audit.

(5) An order under this section may be made subject to such terms and conditions as the Court thinks fit.

175E General duty of donee of an enduring power [cf. Powers of Attorney and Agency Act 1984 (S.A.) s.7]

(1) The donee of an enduring power of attorney shall at all times exercise his powers of attorney honestly and with reasonable diligence to protect the interests of the donor. If the donee fails to do so, he is guilty of an offence and is liable to a penalty not exceeding $10,000.

(2) In addition to any other liability he may incur, the donee may be required by the Court to compensate the donor for a loss occasioned by failing to comply with the provisions of subsection (1)."

175F Power of Court to relieve donee from personal liability. If it appears to the Court that a donee, whether appointed by the Court or otherwise, is, or may be, personally liable for any breach of this Part whether the transaction alleged to be a breach occurred before or after the commencement of this Act, but has acted honestly and reasonably, and ought fairly to be excused for the breach and for omitting to obtain the directions of the Court in the matter in which he committed the breach, then the Court may relieve him either wholly or partly from personal liability for that breach.

21. Amendment of s.180. Imposition of statutory rights of user in respect of land.

Section 180 is amended by -

(a) Repealing subsection (1) and substituting the following subsection -

"(1) Subject to this section, if the Court is satisfied that, in order to facilitate the reasonable user of any land, (in this section referred to as 'the dominant land') for some public or private purpose, a statutory right of user should be created over other land (in this section referred to as 'the servient land') it may order the imposition upon the servient land, or on the owner for the time being thereof, an obligation of user or an obligation to permit the user of that land in accordance with the order.";

(b) in paragraph (a) of subsection (3), omitting the words "consistent" and substituting the words "not inconsistent";

(c) Repealing paragraph (c) of subsection (4) and substituting the following paragraph -

(c) "A statutory right of user imposed under this section may be extinguished or modified by the owners for the time being of the dominant land and servient land;";

(d) In paragraph (e) of subsection (4) omitting the words "when registered as provided in this section" and inserting before the word "binding" the words "unless the Court otherwise orders."

22. Amendment of s.181. Power to modify or extinguish easements and restrictive covenants. Section 181 of the Principal Act is amended by in subsection (1) omitting from paragraph (b) the word "or" where it appears before "that the easement" in the third line and substituting "and".

23. New s.212. Presumptions and evidence as to future parenthood. The Principal Act is amended by repealing section 212 and substituting the following section:-

S. 212 Presumptions and evidence as to future parenthood. [cf. W.A. s.102]

(1) This section applies whenever in determining whether any limitation is invalid as infringing the rule against perpetuities, or the right of any persons to put an end to a trust or accumulation, or generally in the management or administration of any trust, estate or fund, or for any purposes relating to the disposition, transmission or devolution of property, where it becomes relevant to enquire whether any person is or at a relevant date was or will be capable of procreating or bearing a child or whether any person would on or after a relevant date have a child.

(2) Where this section applies, there is a presumption, rebuttable by sufficient evidence to the contrary tendered at the time at which the matter falls for decision (but not subsequently), that -

(a) a woman who has attained the age of fifty-five years is incapable of bearing a child;

(b) a woman will not, after she has attained the age of fifty-five years, have a child by adoption, legitimation or other means; and

(c) a male or female who has not attained the age of twelve years is incapable of procreating or bearing a child.

(3) Where this section applies, medical evidence that a male or female of any age is or at a relevant date was or will be incapable of procreating or bearing a child is admissible in proceedings in order to establish that incapacity, and the Court may accept any such evidence of a high degree of improbability of procreating or child-bearing as it thinks proper as establishing the incapacity.

(4) Where the court treats a person as incapable of having a child at a particular time and he or she does so, the Court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition so far as may be just in the position they would have held if the question had not been so decided.

(5) Subject to subsection (4) where any such question is decided in relation to a disposition by treating a person as capable or incapable of having a child at a particular time then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.

24. Amendment of s.257. Service of Notices. Section 257 of the Principal Act is amended by, in subsection (3) omitting the words:

"notice shall be delivered in such manner as may be directed by an order of the Court", and substituting the words "notice may be delivered in such manner as the Court directs".

25. Amendment of Second Schedule. The Second Schedule to the Principal Act is amended by inserting the following Form in the Schedule -

FORM 17A

ENDURING POWER OF ATTORNEY

Property Law Act 1974, Section 175B

This Enduring Power of Attorney is made on the day of , 19 , by A.B. of in accordance with section 175B of the Property Law Act 1974.

1. I appoint C.D. of (or C.D. of and E.F. of jointly (or jointly and severally) to be my attorney(s).

2. I authorize my attorney(s) to do on my behalf anything that I may lawfully authorise an attorney to do.

3. I declare that this power of attorney shall continue to operate and have full force and effect notwithstanding that I may subsequently become incapable.

Signed Sealed and Delivered by .....

And in the presence of:-

_____

(Signature of Witness)

_____

(Name of Witness)

_____

(Address of Witness)

COMMENTARY

Clause 1 — Short Title and Citation. Clause 1 provides for the short title of the Amending Act and for the citation of the Principal Act as amended.

Clause 2 — Amendment of s.11. Instruments required to be in writing. The decision of the High Court in Adamson v. Hayes (1973) 130 C.L.R. 276 and certain English decisions has promoted further discussion of the scope and extent of s.11 of the Act and in particular s.11(1)(c): see particularly (1974) 48 A.L.J. 322; Meagher Gummow & Lehane: Equity, 2nd ed., para. 701 ff. Sections 10, 11 and 12 of the Act are concerned with the requirements of writing in relation to dispositions and contracts of property. Section 11(1)(a) deals with that requirement in relation to the creation and disposition of interests in land. Section 10(1) deals with assurances (i.e. conveyances and transfers) of land at law, and s.11(1)(b) with declarations of trust of land. There are probably now not many transactions within the ambit of s.11(1)(c) that are not also within either s.10(1) and s.11(1)(b), but we nevertheless consider that it is probably safer to retain s.11(1)(a).

Most of the problems of interpretation revolve around s.11(1)(c) which deals with dispositions of an equitable interest. These problems are to some extent exacerbated by the extended definition of "disposition" in s.4 of the Act, which enlarges the scope of s.11(1)(c) beyond the area of application of the corresponding provisions of the original Statute of Frauds of 1677. The following appear to be probable answers to the various questions raised in relation to s.11(1)(c) -

(a) the provision probably applies to dispositions of equitable interests in personalty as well as land, including therefore an interest in a trust; and also the disclaimer of a gift of an equitable interest and the release of a beneficiary's interest in a trust. It may also extend to a declaration of trust of an equitable interest in personalty.

(b) The provision probably does not extend to a contract for disposition of an equitable interest and it is implicit in what was said by Gibbs J. in Adamson v. Hayes (1973) 130 C.L.R. 276, 304, that it applies to an unconditional contract for the sale of land. Most commentators regard such contracts as within the exception created by s.11(2); and contracts for sale of land are in any event subject to s.59 of the Act.

It would be possible to draft a series of amendments clarifying the scope of s.11(1)(c). However, even if this were done the law on this point would not be thereby made any simpler or readily comprehensible. It is difficult to understand why dispositions of equitable interests in personalty should have been singled out as requiring written proof when this has ceased to be a requirement in relation to dispositions of legal interests. The tendency, which was initiated in Queensland in 1972, is to confine the requirement of writing to dispositions of interests in land: s.11(1)(b); and contracts for the disposition of land: s.59.

Almost all the problems mentioned by Meagher op.cit. can be resolved by repealing s.11(1)(c) of the Act and confining the requirement of writing to

the categories mentioned. The problems created by s.11(1)(c) are not very often encountered in litigation but that is probably because until recently the corresponding provisions of the Statute of Frauds 1677 were not readily accessible. Section 11(1)(c) has given them a modern but extended form as well as greater prominence.

We recommend the repeal of s.11(1)(c).

The decision in Adamson v. Hayes itself raised problems with the meaning of "land" which was specially defined in the Western Australian legislation to include "mines and minerals". Whilst acknowledging that difficulties can arise in peripheral areas of the legislation, we do not think that the decision in that case justifies the re-drawing of s.11(1)(a) or the definition of "land" in s.4 of the Queensland Act.

Clause 3 Amendment of s.41. Sale or division of chattels.

The section was intended to confer general jurisdiction on the Supreme Court to make orders for sale and division of proceeds of chattels jointly owned, and to confer jurisdiction on the District Court in cases where the value of the chattels was relatively small. Unfortunately the use of the word "or" in s.41(3) excludes the jurisdiction of the Supreme Court in smaller cases and so leads to jurisdictional wrangles about the value of the chattel, as occurred in ex p. Lupton Investments Pty. Ltd. [1983] 2 Qd.R. 475.

The problem should be resolved by substituting "and" for "or" in the first line of s.41(3). The Supreme Court can then always remit to the District Court if the value of the chattel is less than $40,000, or retain jurisdiction and make an appropriate award of costs.

Clause 4

New s.43A. Liability of co-owner for voluntary waste. An action for waste by a co-owner would apparently not lie at common law, but was expressly conferred upon a tenant in common by chapter XXII of the Statute of Westminster II 1285, which was later extended to co-tenants (See Wilkinson v. Haygarth (1847) 12 Q.B. 837, 847, 116 E.R. 1085, 1087). The matter has been examined in an article by D. Mendes da Costa; see "Co-ownership under Victorian Land Law", (1961) 3 M.U.L.R. 137, 140.

The Statute of Westminster II, c.XXII was repealed by the Property Law Act 1974 (s.3, Sixth Schedule). It may be arguable that a co-owner may no longer have a right to maintain an action for waste as such an action appears to be statutory in origin. There may be a basis for an action in circumstances where there is an actual ouster of the co-owner: see Wilkinson v. Haygarth, supra; Murray v. Hall (1849) 7 C.B. 441, 137 E.R. 175.

The Commission considers that the Property Law Act should expressly enable a co-owner to maintain an action for waste. The view has been expressed that an action for waste is still available despite the repeal of the Statute of Westminster II, c.22: see W.D. Duncan and R.J. Vann, Property Law and Practice in Queensland (1982), 670/6. However, the Commission considers that the Property Law Act should clarify the position.

The draft provision enables an action to be taken in cases only where voluntary waste is unlawful, as there may be situations where waste would be authorized, e.g. mining lease, timber licence, agreement etc. The provision also ensures that a co-owner can only recover such damages as are proportionate to his interest in the property.

Clause 5 — Amendment of s.47. Delivery of deeds. Section 47 altered the common law rules applicable to the form and delivery of deeds. There is a very useful article on this subject by Dr. A.J. Bradbrook in 55 A.L.J. 267. Dr. Bradbrook commends s.47 but, in company with some other commentators, he remarks that it does not resolve some problems of the common law associated with the delivery of a deed as an escrow, i.e. subject to the fulfilment of a condition, or the problem of authority to deliver deed, which ought ordinarily itself to be given under seal. Ex parte Ryrie [1983] 2 Qd.R. 194 raised some difficult questions about communication of the existence of such a condition and the possible consequences of a failure to communicate an "escrow" condition.

The effect of the accompanying proposed amendments to s.47 will be to ensure that a suspensive or "escrow" condition will have effect as such only if the existence of such a condition is recorded in or on the deed itself, or if reasonable steps are taken to communicate the existence of the condition to the person taking the benefit of the deed or of some person acting on his behalf: sub-cl. (3). In addition sub-cl. (4) will abrogate the rule that authority to deliver must be under seal, while sub-cl. (5) will create an evidentiary presumption that a person who is in possession of the deed with the consent of the maker of the deed has authority to deliver it.

Clause 6 — Amendment of s.48. Construction of expressions used in deeds and other instruments. It was suggested to the Commission that paragraph (d) of subsection (1) be amended to make provision for the neuter gender.

This clause proposes the repeal of both paragraphs (c) and (d) and the substitution of replacement paragraphs which appear in s.23 of the Acts Interpretation Act 1901 (Cth.).

Clause 7 Amendment of s.54. Effect of joint contracts and liabilities. Section 54 deals with the effect of promises made by two or more persons. The section provides that such promises are to be construed as joint and several promises rather than joint promises. The heading to the section refers to s.81 of the English Law of Property Act 1925 and s.81 of the Victorian Property Law Act 1958. In fact those provisions are both concerned with promises to two or more persons whereas s.54 of the Act is concerned with promises by two or more persons.

There is a need to extend s.54 to cover promises to (as well as by) two or more persons. Consistently with s.54, that section should be amended as proposed. The operation of the amendment should be confined to promises made after the amendment comes into force: see proposed amended s.54(3) herewith.

Clause 8 Repeal of and new s.63. Postponement of risk to a purchaser. At common law a purchaser is not entitled to refuse to complete a contract for the sale of land on the ground that improvements, such as a house, had been destroyed by fire. See Zeil Nominees Pty. Ltd. v. V.A.C.C. Insurance Co. Ltd. (1975) 50 A.L.J.R. 106. Nor is a purchaser entitled as against the vendor to the benefit of any insurance which the latter may have effected on the subject property: see Rayner v. Preston (1880) 14 Ch.D. 297.

Section 63 of the Property Law Act 1974, which is derived from section 47 of the Law of Property Act 1925 (Eng.), reverses the principle in Rayner v. Preston (supra) by providing that insurance moneys received by the vendor shall on completion of the contract be held on behalf of the purchaser and paid to him on completion.

The provision expressly provides that the insurer would still be liable even though the risk had passed to the purchaser. The provision, however, differs from the English provision by not providing that the consent of the insurer is a prerequisite.

The New South Wales Law Reform Commission has discussed a number of implications which arise from the decision of the High Court in Zeil Nominees (supra). In that case Barwick C.J. had remarked that "the vendor having an enforceable contract of sale is entitled to the price, notwithstanding the destruction of the improvements on the land": 50 A.L.J.R. 106, 107.

A vendor who is entitled to receive the purchase price under a contract of sale may be unable to make a claim against the insurer. This is because the vendor would not have suffered any loss against which he needs to be indemnified. If this reasoning is correct, section 63 may well be interpreted in a manner which destroys much of its value: see Passing of Risk Between Vendor and Purchaser (L.R.C. 40, (N.S.W.) 1984, 36-37). After that report was made available it has been held that section 63 does not avail a purchaser where a vendor has received payment in full under the contract. It was observed that the provision does not create any equitable interest in the purchaser under the insurance

policy. Nor does it create a liability in an insurer to extend cover to a purchaser without special arrangements in that regard. The rights created under section 63 for the benefit of a purchaser relate only to money paid to the vendor under the policy: see Ex p. State Government Insurance Office (Queensland) [1984] 2 Qd.R. 441.

Clause 8 repeals section 63 of the Property Law Act and replaces it with a provision which provides that the risk in respect of damage to land shall not pass to the purchaser until completion or until when the purchaser enters into, or is entitled to enter into, possession of the land. The provision is derived from the New South Wales report but it applies not only to sales, but also to the case of an exchange of land as is presently provided for in section 63.

It was pointed out to the Commission that the new s.63(1)(a) refers to "completion" whereas in the existing s.57A(2)(a) the word "settlement" is used and in s.57A(2)(b) the expression "entry into possession" is used. It was suggested there should be consistency in the use of terms in the Act. While agreeing with this suggestion, the Commission does not agree that the use of these different expressions constitutes inconsistency.

Subclause 2 is explanatory of the meaning of the expression "possession in relation to land". According to a New Zealand Court of Appeal decision in Doyle v. Lovelock [1931] N.Z.L.R. 808 the date of possession was inferentially the date of completion. Until then the vendor has a right to remain in possession and take rents and profits [Strahorn v. Strahorn (1905) 5 S.R. (N.S.W.) 382 at 386.]

However, there is nothing to prevent the parties providing in the contract that the purchaser can take an earlier possession. It is considered that although the provision may not be absolutely necessary, it could be useful to clarify what constitutes possession in some cases.

The draft provision preserves the right of a purchaser to insure the property upon the execution of a contract of sale. The draft provision provides that the purchaser has an insurable interest in the property prior to completion of a contract of sale, or by entry into possession, or any entitlement to enter into possession (3).

The draft provision is expressed to apply when it comes into force (4).

The draft provision will apply to a sale or exchange by an order of court (5). This is presently the case: see s. 63(5).

The Commonwealth Parliament has enacted legislation in respect of insurance contracts. The Insurance Contracts Act 1984 (Cth.) commenced operation on 1st January, 1986: see Gazette 1985, No. S 310, p.1. The Insurance Contracts Act does not have application to State insurance: see s.6(2). The operation of State legislation, except in respect of any express or necessary intendment, is also not affected by the Insurance Contracts Act: see s.7. The Commission considers that the draft clause to replace section 63 of the Property Law Act would co-exist with s.50 of the Insurance Contracts Act. That section provides that a purchaser is deemed to be an insured under a contract of insurance where the purchaser assumes the risk and will conclude when the purchaser completes a sale or

enters possession. These are, of course, the very events when the risk of a purchaser arises under the draft clause to replace s.63.

Clause 9 Repeal of and new s.64. Power to rescind contract where land substantially damaged. This clause repeals section 64 of the Property Law Act which enables a purchaser to rescind a contract of sale where a dwelling-house is destroyed or damaged as to be unfit for occupation as a dwelling-house. The clause enables a purchaser where damage to the property is substantial to rescind before completion, or where a right to possession exists. S.64(1) is a combination of s.66L of the New South Wales Act and s.64(1) of the Property Law Act. The notice provision in the proposed s.64(1) read:

> "by notice in writing given to the vendor or his solicitor within 28 days of his becoming aware of the damage".

Attention was drawn to criticism made of the concept of "awareness" in cases concerned with s.49 of the Building Units and Group Titles Act 1980-1984. The Commission has decided to revert back to the provisions contained in the existing s.64(1) and has amended the proposed section. The New South Wales Act included subsections (2) and (3) which seemed unnecessary in view of s.257 of the Property Law Act.

S.64(2) and s.64(5) are derived from s.64(2) and s.64(4) of the Property Law Act respectively.

S.64(3) is s.66L(5) of the New South Wales Act and seems a useful provision. S.64(4) is s.66 O(2) of the New South Wales Act.

Clause 10 — New s.64A. Interpretation. S.64A is s.66J (N.S.W.) minus the definition of "sale" and paragraphs (3) and (4). Subclause (b) comes from s.66 O(1) (N.S.W.).

The importance to purchasers of these new provisions is underlined by the ineffectiveness of s.58, which confers a right to demand reinstatement on part of "a person interested in or entitled to the building", once completion of a purchase has taken place, since the vendor's insurable interest has then ceased so as to terminate the liability of the insured. (See Kern Corporation Ltd. v. Walter Reid Trading Pty. Ltd. and others (unreported decision of High Court delivered 5 June 1987, F.C. 87/019, confirming view expressed in Duncan & Weld's "The Standard Land Contract" at p.144-145 on the basis of Hirst v. New Zealand Insurance Co. Ltd. [1981] V.R. 571 at 576).

Recommendations of the New South Wales Commission which have not been adopted

Abatement of purchase price

The New South Wales Commission considered there would be cases where a purchaser does not have the right to rescind or where the purchaser preferred to proceed with the contract rather than rescind and has made provision for a reduction in the purchase price. (cl.66M) It said the principles to be considered in such cases are analogous to those in actions for compensation for error or misdescription. (see paragraphs 2.6 to 2.8). The authorities quoted were Beard v. Drummoyne Municipal Council (1969) 71 S.R. N.S.W. 250 and Rutherford v. Acton-Adams [1915] A.C. 866. Those authorities support the principle that compensation is payable in such circumstances.

The relevant principles were discussed by R.M. Stonham in Vendor and Purchaser (1964), 589:

> "The purchaser is entitled, in equity, to compensation for such deterioration by way of abatement of purchase money, and will be entitled to deduct such compensation on completion, in the same manner as he would be allowed in a suit for specific performance".

The Commission considers that it is not necessary to make express provision for the right of a purchaser to obtain an appropriate abatement of the purchase price in cases of destruction of the subject matter of the property.

Refusal to enforce specific performance against the vendor (cl.66N)

The New South Wales Commission recommended that the Court should be empowered to refuse to require the vendor to complete where it would be unjust or inequitable to do so (cl.66N). This Commission does not consider that such a clause should be enacted in this State. It was considered inappropriate to restate by statute the circumstances in which equitable relief will be denied.

A court will always have regard to the circumstances of each individual case in deciding whether to decree specific performance. Such relief will be withheld where a plaintiff is guilty of inequitable conduct or where it would be unfair to enforce a contract: see I.C.F. Spry, Equitable Remedies (2nd ed., 1980) 231-234, 287-289.

The New South Wales Commission also recommended that the court could order rescission of the contract: Passing of Risk Between Vendor and Purchaser (L.R.C. 40, 67). The draft Bill in that report does not expressly confer such jurisdiction, although under the interpretation clause of the Bill it is provided that it is the intention of Parliament that the measure is to give effect to recommendations of the Commission. Under

that Bill the Court is empowered to order the repayment of any money paid by the purchaser as well as make any order that the Court "considers appropriate in the circumstances" (cl.61N). It may be doubted whether such a provision of itself could extinguish settled legal rights. It should be borne in mind that the refusal of a court to decree equitable relief does not operate as a defence to a claim for damages: see Wentworth v. Woollahra Municipal Council (1982) 149 C.L.R. 672, 678. These omitted clauses are included as ss.66L and 66M of the Conveyancing (Passing of Risk) Amendment Act 1986 which has been enacted in New South Wales.

Clause 11 Amendment of s.71. Application of Division. The Commission considers that the instalment sale provisions of the Property Law Act should not apply to a contract which is subject to the Land Sales Act. This recommendation is made because the latter Act provides sufficient protection to a purchaser in that all moneys payable by a purchaser, whether by way of deposit or otherwise, have to be paid into a trust account (s.11), and moneys so paid were to be held in trust pending settlement (s.12). The Commission considers that it is inappropriate for the legislature to provide additional rights to a purchaser when a purchaser's funds are already protected.

It is necessary to consider the case where an exemption can be obtained under the Land Sales Act. Originally where an exemption was previously obtained a vendor still had to comply with the provisions of the Act relating to trust accounts. This was because section 19 of the Act only provided for an exemption from section 8 of the Act: see P. Thomas, "Land Sales Act", The Proctor, Aug. 1985, (Supp.) p.4.

The Land Sales Act Amendment Act 1985 (No.2) amended section 19 to enable an exemption to be given from compliance with all or any of the provisions of Part II of the Act, including the trust account provisions of the Act (ss. 11, 12). Section 19 was also amended to provide that an exemption may only be given to a person by whom or on whose behalf land is to be subdivided into not more than five subdivisional portions. It would not, therefore, be possible for an exemption to be given in respect of a high-rise residential development.. In such circumstances it would not be appropriate to confer upon a purchaser the benefit of the instalment sale provisions.

The Minister, may, of course, give an exemption where land is to be subdivided into no more than five subdivisional units. However, a purchaser of land from such a development would not be able to ascertain whether the vendor has obtained an exemption. This is because the fact as to whether the Minister has given an exemption is not a matter of public record. In such circumstances it would not be prudent to merely provide that the instalment sales provisions not apply to a contract subject to the Land Sales Act, except where an exemption has been given from section 11 and 12 of that Act. It is considered that the instalment contract provisions of the Property Law Act should only apply to a contract which is subject to the Land Sales Act, and where it is possible to obtain an exemption from the Act.

In the commentary (supra) it is said that the recommendation to amend the section was made because under s.11 of the Land Sales Act protection to a purchaser is provided by the requirement that all moneys payable by a purchaser, whether by way of

deposit or otherwise have to be paid into a trust account where they are held pending settlement (s.12).

In one letter which opposes the amendment it is said that unlike a deposit in a normal conveyance which is refundable (subject to a purchaser's default) instalment payments are non-refundable.

It would be incorrect to assume that in the event of the default of a purchaser a deposit is generally subject to forfeiture. The reason why the amount of 10 per centum is the threshold rate of deposit that is prescribed in s.71(2)(a) of the Property Law Act is related to the question of the jurisdiction of a court of equity to grant relief against forfeiture of deposits. Equity has never intervened to relieve against the forfeiture of a deposit that is reasonable in amount, and a deposit of no more than 10% of a purchase price is prima facie reasonable in amount: see Mehmet v. Benson (1963) 81 W.N. (Pt.1) (N.S.W.) 188, 191. Section 71(2)(a) appears to assume that 10 per centum is a proper deposit: see Lexane v. Highfern Pty. Ltd. [1985] 1 Qd.R. 446, 455.

It would be also incorrect to assert that instalment payments made under an instalment contract are non-refundable. To make such an assertion, would be to ignore the established jurisdiction in equity to relieve against such payments. Where a purchaser is ready and willing to carry out a contract at time of an action a court of equity will relieve against the forfeiture of instalments that have been paid: see Kilmer v. British Columbia Orchard Lands [1913] A.C. 319; Mussen v. Van Diemen's Land Co. [1938] Ch.253, 263, 264. Cf. Stockloser v. Johnson [1954] 1 Q.B. 476.

So far as Australia is concerned that issue has been authoritatively settled by the decision of the High Court of Australia in Legione v. Hateley (1983) 152 C.L.R. 406 which held that a court of equity has jurisdiction to relieve a defaulting purchaser against forfeiture of his interest in land even where he has failed to comply with a condition of which time was of the essence. It was also earlier recognised by Jacobs J. in Mehmet v. Benson (supra) that a purchaser will be given relief in equity in respect of the forfeiture of instalments under a contract for the sale of land where such forfeiture is in the nature of a penalty.

The Commission still holds the view that the amendment is required.

The same letter expresses the view that without the protection of section 73 if an instalment purchaser failed to lodge a section 74 caveat and the vendor mortgaged the land the mortgagee could well rank ahead in priority, so that the prior interest of the purchaser would be postponed to the subsequent interest of the mortgagee. This view is contrary to that maintained in texts, e.g.:

> "If a vendor mortgaged the land without consent and the mortgage remained equitable or unregistered then, whether or not the mortgagee lodged a caveat, the purchaser might have some claim to priority and thus be in a position to enforce the contract against the vendor": see W.D. Duncan & R.J. Vann, Property Law and Practice in Queensland (1982), 795 [73.4] [rel.9].

However, quite apart from questions relating to priorities between competing equitable interests, it is the Commission's opinion that the caveat procedure would lack efficacy in relation to sales of home units or group title developments that come within the ambit of Division 4 of Part VI of the Property Law Act. That is because it is only upon the actual registration of a plan that a purchaser under an instalment contract may lodge a caveat under s.74 of the Property Law Act. This is because, under s.74 of the Act, a caveat must be in accordance with s.98 of the Real Property Act 1861.

In The Premier Freehold Pty. Ltd.'s Caveat [1981] Qd.R. 547 Kelly J. (as he then was) held that prior to registration of a building units plan a purchaser of a lot did not, under a contract, acquire an equitable interest in the land, and therefore did not possess the requisite interest under s.98. In most cases involving such contracts the time interval between the time of registration and the time for completion is relatively short, i.e. usually 7-14 days.

Clause 12 Amendment of s.73. Land not to be mortgaged by vendor. In Landers v. Schmidt [1983] 1 Qd.R. 188 the Full Court held, by majority, that a defaulting purchaser was entitled to rely on s.73(2) of the Property Law Act, despite the fact that he had never attempted to avoid the contract, and that the vendor had justifiably terminated the contract for breach by the purchaser. The Commission considers that it was not intended that a defaulting purchaser should be entitled to rely upon the provision after he had repudiated the contract. The amendment ensures that

an instalment contract can only be avoided by a notice given by the purchaser at any time before completion of the contract is due.

The question has been raised whether the amendment of s.73 is to be seen as desirable. The reason for the amendment given above was that it had not been intended that a purchaser be entitled to rely on the provision in the Act after repudiating the contract and it would be unsatisfactory if he could. This is so particularly when the party had previously relied on another ground for the avoidance of the contract. With this amendment, a party who seeks to rely on s.73 to avoid a contract should give written notice before the date of completion.

There is a principle that where a party seeks to justify a termination of performance of a contract by reliance on a statutory right to terminate that the election will, generally speaking, only be effective if he has complied with the requirements of termination set out in the statute: see J.W. Carter, Breach of Contract (1984) 337, para. 1019. Clause 13 would amend s.73 of the Property Law Act so that a purchaser could only rely upon the provision, and avoid the contract by giving written notice before the date of completion. This amendment would ensure that a party could not rely on s.73 after that party has repudiated the contract.

Some suggestion was made to the Commission that the draft paragraph could be improved by amendment of the expressions used therein but the Commission is satisfied the new paragraph will achieve the desired effect.

Clause 13 Amendment of s.82. Tacking and Further Advances. There appears to be some basis for concern that section 82, as presently drafted, could lead to the result that a mortgagee loses priority under a registered mortgage for:-

(a) the amount of any overdue interest which is capitalised; and

(b) amounts expended by a mortgagee on Local Authority rates, land tax and other Governmental or semi-Governmental charges unpaid by a mortgagor.

The concern about the loss of priority in respect of capitalised interest arises out of certain obiter dicta of Mr. Justice Dunn in delivering the judgment of the Full Court in the case of General Credits (Finance) Pty. Ltd. v. Grimm (1978) Qd.R. 449 at p.469. In that decision, Mr. Justice Dunn expressed the view that the capitalisation of overdue interest payments would amount to a further advance.

While as a result of the decision of Privy Council in the case of Burnes v. Trade Credits Ltd. (1981) 1 NSWLR 93 there may be some question as to whether or not the automatic capitalisation of overdue interest (as occurs under many standard forms of mortgage) can properly be described as the "making" of a further advance, the view of Mr. Justice Dunn gives rise to concern especially as it appears to have been accepted, without comment, by authors Duncan & Vann in their book Property Law and Practice at paragraph 82.13.

It would therefore seem, if Mr. Justice Dunn's opinion be correct, that the capitalisation of overdue interest would have the result of making interest, in respect of which a mortgagee under a

registered mortgage would in the normal course have priority over subsequent mortgages under s.88(1)(b) lose that priority if the interest was at any time capitalised.

Since interest accruing under a prior mortgage has by virtue of s.88(1)(b) priority over a later mortgagee's interest there is no significant invasion of the rights of subsequent mortgagees involved in the proposed amendment. While the fact that interest can be allowed to accumulate by the prior mortgagee as a form of further advance, in apparent contravention of the spirit of the provisions restricting tacking, it is not practicable to make any changes regarding the priority accorded to interest under a prior mortgage. With high interest rates, currently in the region of 15-20%, the scope for growth in the amount owing on a prior mortgage is considerable. The changes proposed by in this amendment would only add up to about 2% to this possible growth and so do not significantly alter the position. Subsequent mortgagees should safeguard themselves against possible detriment by making due allowance for growth in the amount owing under prior mortgages when assessing the amount it is prudent to advance.

The decision of the Full Court in Landers v. Schmidt [1983] 1 Qd.R.188 (approved in the Privy Council in Coast Securities v. Bondoukou (1986) 69 A.L.R. 385 demonstrates the vigilance of the Courts in construing any variation of a mortgage as a further advance. Accordingly, the Courts may, to some extent, be relied upon to prevent abuse in this area.

It is recommended that section 82 be amended to overcome this problem.

The second area of concern about section 82 arises out of situations where a mortgaged property is at risk as a result of non-payment by a mortgagor of Local Authority rates, land tax or other Governmental or semi-Governmental charges. Where those payments are made by a mortgagee on behalf of the mortgagor, the amount thereof usually immediately becomes part of the principal sum repayable under the mortgage under the terms of the mortgage.

While section 82(2) gives priority to expenses incurred by a mortgagee in preserving the mortgaged property, a provision which appears to be capable of including such payments, the accepted view appears to be that this simply restates the common law which gave priority to amounts expended on repairs to mortgaged property (see Duncan & Vann paragraph 82.29).

As the failure to pay rates and/or land tax gives the relevant Authority power to enforce a statutory charge on the land, it would seem appropriate that a mortgagee be given priority in respect of amount paid to protect or preserve the security against the enforcement of the statutory charge.

It is recommended that section 82(2) should be expanded to encompass such expenditure.

Clause 14 Amendment of s.84. Regulation of exercise of power of sale. It has been suggested to the Commission that this section could be construed as requiring that a mortgagee under a bill of sale or under a mortgage debenture give notice of an intention to exercise the power of sale. Some legislation having

specific provisions relative to notices were exempted from this section by subsection (5). It would be reasonable and would lead to greater clarity if subsection (5) were amended by adding "or to an instrument under the Bills of Sale and Other Instruments Act 1915-1981 or a mortgage debenture issued by a corporation".

Clause 15 Amendment of s.124. Restriction on and relief against forfeiture; and

Clause 16 Costs and Expenses. Duncan and Vann in Property Law and Practice in Queensland (op.cit.) at paragraph 126.2 mention the reference to s.124(2) in the final paragraph of s.126. They wrote:

> "A lessee could only render forfeiture unenforceable against him within the meaning of the section, by compliance with the notice served under s.124(1). Section 124(2), expressly mentioned in the instant section, refers only to the right of the Court to relieve and seems to have little bearing upon the lessor's waiver of forfeiture after service of the notice, without court action."

Reference is also made to Stuckey, The Conveyancing Act, 1919 - 1929 (2nd ed.) Law Book, 1970 at p.266:

> "The second paragraph of this section was taken from the Victorian Act No. 2633, s.23 (Conveyancing Act, 1919). In adapting the Victorian section a mistake has been made by referring to subsection (2) of 129 instead of subsection (1). Forfeiture cannot be rendered unenforceable by the lessee against the lessor under subsection (2) but only by compliance with the requirements of a notice under subsection (1)."

Messrs. Duncan and Vann (op. cit. p.1103) remark:

> "The necessity for this separate provision could have been avoided by the inclusion of the words "all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer or otherwise."

It appears that the analysis of Messrs. Stuckey and Duncan and Vann is correct and that the provision would be improved by deleting the second paragraph of s.126 and inserting the words suggested in s.124(1).

Clause 17 Amendment of s.129. Abolition of yearly tenancies arising by implication of law. The original version of this section is essentially copied from s.127 of the Conveyancing Act of New South Wales, and appears to be designed to prevent yearly tenancies being implied from payment of rent. According to W.D. Duncan & R.J. Vann, op. cit., 1116 the section was directed at one particular circumstance of implication, namely that of a tenant holding over. The particular problem arising from such implication was that six months notice of termination must be given, and the section deals with this problem by reducing the length of notice to one month.

The problem with the original version of the section is that it is not entirely clear whether it applies to the other circumstances in which yearly or indeed other periodic tenancies might be implied from payment of rent. The wording of subsection (1) gives rise to some uncertainty in that the portion after the semicolon does not sit entirely happily with the portion before the semicolon. The section and its New South Wales counterpart has given rise to much debate (see Duncan & Vann) and significant case law, e.g. Dockrill v. Cavanagh (1945) S.R. (N.S.W.) 78.

The proposed amendment removes these uncertainties by making it clear the section applies to all circum stances where a periodic tenancy would otherwise be implied from payment of rent and so brings about a significant simplification of the law.

Clause 18 — Amendment of s.168. Application of Part. The proposed s.175B(c) provides for the registration of an Enduring Power of Attorney but does not specify where it is to be registered. The definition of this word in s.4 makes specific reference to recording a dealing or other transaction with respect to land. It is desired that these documents can be registered with the Registrar of Titles although they may not concern land. A new paragraph has been added to this section to clarify this question.

Clause 19 — Amendment of s.170. Form and revocation of power of attorney. In New South Wales a donee who acts knowing that his authority has been terminated commits a misdemeanour: Conveyancing Act 1919, s.162A. No other jurisdiction prescribes that such conduct is criminal in nature. The Commission considers that such a provision should be enacted. However, a pecuniary penalty has been provided for as a penalty so that summary proceedings may be commenced for an offence.

It has been submitted to the Commission that the provision of a penalty without apparent exculpatory references could have severe consequences for the persons who misjudge the degree to which the capacity of the donor has deteriorated. One method of alleviating those severe consequences would be a provision similar to s.76 of the Trusts Act 1973-1986. The Commission concedes that such a provision could be added. In addition to s.170, penalty provisions are also located in ss.175D and 175E. Provision to relieve the donee from liability has been added in the form of a new s.175F.

Clause 20 New Division 2 of Part IX of the Act. Enduring Powers of Attorney. Part IX of the Property Law Act contains provisions relating to Powers of Attorney. The Commission considers that those existing provisions should become Division 1 of that Part and should deal with general rules in respect of powers of attorney. The Commission proposes that another Division, Division 2, should be inserted into Part IX to deal exclusively with enduring powers of attorney. The proposed sections which, it is proposed, will constitute this Division are discussed in the following part of the commentary.

Section 175A Enduring Power of Attorney. Provisions similar to this clause are to be found in statutes in other jurisdictions, see, e.g., Enduring Powers of Attorney Act 1985, s.1 (Eng.); Conveyancing Act 1919, s.160 (N.S.W.); Powers of Attorney and Agency Act 1984, s.6 (S.A.); Powers of Attorney Act 1980, s.13 (N.T.); Instruments (Enduring Power of Attorney) Act 1981, s.114 (Vic.). (Subsequent references in this commentary to these jurisdictions will be taken to refer to these statutes). These embody the major purpose of this Division namely that an enduring power of attorney will not be revoked by the donor's subsequent legal incapacity, except as is provided by the Act. However, it can be revoked by the Court exercising its powers under statute, or under its inherent jurisdiction (cf. Re Magavalis [1983] 1 Qd.R. 59).

Section 175B Characteristics of an Enduring Power. There are similar provisions in other jurisdictions, see, e.g. Eng. s.2, N.T. s.14, S.A. s.6 and Vic s.115. The English Act requires that the donee apply for registration if he believes that the donor is

becoming incapable. The donee advises the donor and his relatives of his intention to apply. Such a provision has not been considered necessary for insertion into this Act.

Concern has been expressed that if compliance with Form 17A is considered mandatory any variation would be prohibited. In Wacal Developments Pty. Ltd. v. Realty Developments Pty. Ltd. (1978) 52 A.L.J.R. 615 the High Court held that a form in the Property Law Act which featured in that case "served as a model or precedent to be adapted rather than as a mandatory form to be used".

Section 175C Revocation. A report of the Law Commission entitled "The Incapacitated Principal" (Law Com. No. 122) preceded the Enduring Powers of Attorney Act 1985 (Eng.). Paragraph 218 of that report cited four main situations when a power of attorney is terminated. These were:

1. Effluxion of time (where a power had been granted for a fixed period or a specified purpose).
2. Revocation by donor.
3. Renunciation or disclaimer by attorney.
4. Operation of law (donor dies or there is a loss of mental capacity of the donor).

Under subclause (1) (which is based on Vic. s.116) except as is to be provided by this Act, an enduring power may be revoked in the same way as an ordinary power. A general power of attorney may be revoked pursuant to s.170(2) of the Property Law Act by the execution of an instrument in Form 17 of the Second Schedule to the Act. Section 160 of the Conveyancing Act (N.S.W.) provides that an enduring power remains effective notwithstanding the death of

the principal. This was considered undesirable particularly in view of s.45 of the Succession Act 1981-1984 and s.56 of the Public Trustee Act 1978-1981.

Subclause (2), based on N.T. s.17, sets out the manner in which an enduring power may be revoked. In relation to the retirement of the donee, the Commission considered leave of the Court should be a pre-requisite (see para. (b)). This is the position under S.A. s.9 and N.T. s.15. In England, notice of disclaimer has to be given to the Court (s.4(6) and s.7(1)(b). The States of N.S.W. and Vic. have no particular provisions in this regard.

The use of the expression "legally incapable" in s.175C(2)(e) has been referred to and the question raised whether it is to be limited to mental incapacity or extended to cases where the donee is convicted of an indictable offence with or without imprisonment. The Commission cannot see this as being a problem. It could also be borne in mind that s.174 provides protection for a third party who deals with the donee without knowledge of the power's revocation.

Form 17 in the Second Schedule to the Property Law Act is the instrument for revoking a power. Whether this Form is suitable will depend on the circumstances under which the power is revoked.

Section 175D Duty to Maintain Records. Subclause (1) is based on S.A. s.8 and has been inserted because the Commission felt that the donee should be required to keep records or to suffer a penalty for failing to do so.

Subclauses (2) and (3) have been adopted from S.A. s.11. This provision has been followed rather than Eng. s.8 which is very wide in its operation and quite complex. It has been preferred to N.S.W. s.163G, N.T. s.15(2) and Vic. 118.

The Commission was asked whether provision could be made for an interim appointment in the event that the office of attorney becomes vacant. The Commission considered that 2(c) could be used and that no extension of its provisions was required.

Para. (a) of subclause (4) has been inserted to clarify the Court's position should the authority have been revoked by operation of the Act.

The question of responsibility for costs of the audit has been raised. The Commission considers that whether such costs should be ordered could be left to the discretion of the Court and has added a paragraph (d) to subsection (4) which reads:

"an order with respect to the costs of any such audit".

Section 175E General duty of donee of an Enduring Power. This provision is based on S.A. s.7 and was regarded as a useful provision. An amendment has been made to that provision based on s.229 of the Companies (Queensland) Code which sets out the duties of an officer of a corporation. A pecuniary penalty of $10,000 has been provided for failure to comply. Subclause (2) maintains the common law right or equitable right to damages for the attorney's failure to exercise his authority properly.

Section 175F Power of Court to relieve donee from personal liability. This section is adapted from s.76 of the Trusts Act 1973-1986 and comes in response to a submission that the penalty provisions of the Act could have severe consequences where lay persons are concerned (see s.170 - supra).

Clause 21 Amendment of s.180. Imposition of statutory rights of user in respect of land. Section 180 was at the time of its inclusion in the Property Law Act 1974 a novel provision intended to enable the Court to impose, in return for a money payment, rights of user over privately owned land. The section has proved its general utility and versatility in a series of applications that have come before the Court: see, principally, Re Seaforth Land Sales Pty. Ltd. [1976] Qd.R. 190; affd. [1977] Qd.R. 317; ex p. Edward Street Properties Pty. Ltd. [1977] Qd.R. 86; Tipler v. Fraser [1976] Qd.R. 272, together with several unreported decisions including, in particular, Re Nelson's Application; Nelson v. Freeman (Full Court Appeal No. 16/1985). The section has received favourable comment from textwriters: see Prof. H. Tarlo (1979) 53 A.L.J. 254; and Dr. A.J. Bradbrook (1985) 10 Sydney Law Review 39, where similar legislation in other jurisdictions is also reviewed. The provisions of s.180 have, with some useful drafting modifications, now been adopted in Tasmania by the Conveyancing and Law of Property Act (No.2) 1978, which inserted a new s.84J into the Principal Act of that State. In addition, there is also now similar legislation in New Zealand: see Hutchinson v. Milne [1980] 2 N.Z.L.R. 568; Murray v. Devonport S.C. [1980] 2 N.Z.L.R. 572n. Wilson v. Rush [1980] 2 N.Z.L.R. 577; Mowatt v. Federated Farmers [1980] 2 N.Z.L.R. 585.

At the same time, a number of defects or deficiencies have been exposed in the legislation, which we consider should now be corrected.

In the first place, we regard the drafting of s.84J(1) of the Tasmanian Act as superior in clarity to that of s.180(1) of the Queensland Act. Section 84J(1) is as follows:-

> "84J-(1) Subject to this section, where the Supreme Court is satisfied that to facilitate the reasonable user of any land (in this section referred to as 'the dominant land') for some public or private purpose it is consistent with the public interest that a statutory right of user should be created over other land (in this section referred to as 'the servient land') it may, by order, impose upon the servient land, or on the owner for the time being thereof, an obligation of user or an obligation to permit the user of that land in accordance with the order."

We recommend that s.180(1) be repealed, and that a provision adopted from the Tasmanian subsection be substituted, but with the following modifications:-

(i) the omission of the word "Supreme", the word "Court" being defined in s.4(1) of the Queensland Act to mean "Supreme Court";

(ii) the omission of the phrase "it is consistent with the public interest", which appears in the present s.180(3)(a).

The phrase "it is consistent with the public interest" was held in Tipler v. Fraser, supra, to require some evidence that the proposed user will be positively in the public interest. However, in ex p. Edward Street Properties Pty. Ltd., supra, it was in effect construed to mean "not inconsistent with the public interest". We consider that the latter approach better serves the objects of the section and recommend that in s.180(3)(a) the latter phrase be substituted for the former.

Section 180(4)(c) provides for registration of an order made under the section, and 180(4)(e) also assumes that the Court order may be "registered". This is an error. What may be registered under the Torrens system is an instrument giving effect to the order. Tasmanian s.84J(5) contains, in substantially similar terms, a provision resembling s.180(4)(e) that avoids this error. We think that, subject to a minor alteration, the Tasmanian provision should be substituted for s.180(4)(e) and that s.180(4)(c) should be repealed. The alteration in question concerns the presence in 84J(5) of the words making the order binding "to the extent the order provides". We consider it preferable to reverse the effect of this provision by substituting "unless the order otherwise provides." Once the appropriate instrument is registered giving effect to the order, the instrument will then take effect pursuant to the provisions of the relevant Act (which will ordinarily be the Real Property Acts) but subject to the provisions of those Acts: see s.5(1)(b).

Finally, Tas. s.84J(b) contains a provision expressly enabling the parties to extinguish or modify a statutory right of user created under the section. In Queensland s.180(4)(d) already enables the Court to modify or extinguish the order. Our view is that the parties should also be given such a power, which may conveniently be substituted for s.180(4)(c) which it is proposed to repeal.

Clause 22 Amendment of s.181. Power to modify or extinguish easements. The decision in Re Melvin [1980] Qd.R. 391 showed that the word "or" in the third line of s.181(1)(b) before "that restriction" should read "and". Paragraph (b) should be amended accordingly.

Clause 23 New s.212. Presumptions and evidence as to future parenthood. Section 212 of the Property Law Act refers to presumptions and evidence as future parenthood, including the presumption that a women over fifty-five will not have a child. The provision is indistinguishable from s.2 of the Perpetuities and Accumulations Act 1964 (Eng.), and is only relevant where in any proceedings there arises on the rule against perpetuities a question which turns on the capacity of a person to have a child at some future time.

The provision does not, as in England, apply to the case where beneficiaries who are sui juris can put an end to an accumulation for their benefit under the rule in Saunders v. Vautier (1841) 4 Beav. 115 (49 E.R. 282). Section 14 of the Perpetuities and Accumulations Act applies s.2 of that Act to any question as to the right of beneficiaries to put an end to accumulations of income under a disposition. This provision was enacted pursuant to a recommendation of the Law Reform Committee in their report on the Rule Against Perpetuities (para.14, Cmnd.18, 1956), and was directed against the problem which arose in decisions such as Re Deloitte [1926] Ch.56. It should be observed that this decision has not been invariably followed. Indeed, Lord Maugham L.C. in Berry v. Green [1938] A.C. 575, 584 considered that the decision might require reconsideration.

There is no provision in Queensland which corresponds to section 14 of the Perpetuities and Accumulations Act. Commentators have observed the absence of such a provision in Victoria and Queensland: see I.J. Hardingham and R. Baxt, Discretionary Trusts (2nd ed., 1984), para. 414, 92.

However, this is also the situation in New South Wales. The Perpetuities Act 1984 (N.S.W.) contains evidentiary presumptions as to parenthood, but these are confined, as in Queensland, to where there would be an infringement of the rule against perpetuities (s.9). The Law Reform Commission of New South Wales, which had drafted this legislation, had recommended that the Conveyancing Act 1919 (N.S.W.) be concurrently amended to insert a general provision as to presumptions of parenthood: see Report on Perpetuities and Accumulations (para. 10.9, 35, L.R.C. 26, 1976). However, the Conveyancing Act was not amended in accordance with this recommendation.

It has been suggested that the conclusive presumption that a woman was never past child-bearing as applied in relation to the rule against remoteness of vesting in another context. In particular it is considered that the rule did not apply where trustees wished to distribute trust property among beneficiaries of full age who would be absolutely entitled but for the possibility of further children being born to a woman who was past child-bearing: see P.W. Hogg and H.A.J. Ford, Victorian Perpetuities in a Nutshell (1969) 7 Melb. Uni. L.R. 155, 163 (n.14).

It would seem that a trustee may distribute trust property to beneficiaries who are sui juris if it is unlikely that there would be another contingent beneficiary. Lee has commented that "trustees may decide to take the risk of ignoring the possible claims of the contingent beneficiaries and distributing the fund to the existing beneficiaries, all being of full age and capacity, but it is, as

the law at present stands in most States, advisable to seek the advice of the Court": see H.A.J. Ford and W.A. Lee, Principles of the Law of Trusts (1983, para. 1612, 682). There are cases where a court has, upon evidence, been willing to make a presumption that a woman is past the age of child-bearing: see Macrae v. Walsh (1927) 27 S.R. (N.S.W.) 290.

There is, of course, legislation in Queensland which is based upon the Variation of Trusts Act 1958: see Trusts Act 1973, s.95. Under the jurisdiction to vary trusts the court can order that a trust be determined: see H.A.J. Ford and W.A. Lee, op. cit., para. 1513, 664-665. It is unnecessary to make an application under this jurisdiction on behalf of a beneficiary who cannot possibly come into existence: see J.W. Harris, Variation of Trusts (1975), 82; Pettifor's Will Trusts [1966] Ch. 257, 261. However, the court will decline to consent to an arrangement which does not provide a benefit for any possible unborn beneficiary: see Re Christmas' Settlement Trusts [1986] 1 Qd.R. 372.

The Commission considers that to preclude uncertainty there is a case for amendment. The English provision provides for a "deemed fiction" in applying the relevant provision to where an accumulation is sought to be determined, as it applies to a proceeding concerning the rule against perpetuities. The Commission considers that the matter is better dealt with (as in Western Australia) by making the evidentiary provision apply not only to the rule against perpetuities, but also to the right of beneficiaries to determine an

accumulation and for other purposes: vide Property Law Act 1969 (W.A.), s.102. It is considered that the court should retain the jurisdiction to make an order for disposition of property in the event that a person has a child (cf. s.212(2)). Similarly, any determination that is made in relation to the rule against perpetuities should still be res judicata (cf. s.212(3)).

A submission has been received concerning the proposed amendment of subsection (3) of s.212, in which it was said that the subsection was unnecessary and its inclusion might give rise to uncertainty. The submission continued that with the inclusion of the words "a high degree of improbability" it might be thought that the standard of proof is changed from the "balance of probabilities" to a higher standard requiring a greater imbalance of probabilities.

This amendment has been based on s.102 of the Western Australian Property Law Act 1969 and it is not known to be causing any difficulty in that State. It is pointed out that the expression "high degree of improbability" used in subsection (3) does not mean "a high degree of high improbability". The qualification is on the degree, not on the standard of proving it.

Clause 24 — Amendment of s.257. Services of Notices. It was submitted that the requirement in subsection (3) that "the notice shall be delivered" etc. is open to an interpretation that it is mandatory to apply to the Court when serving a person who is interstate although his address is known and service could be effected quite easily. The Commission accepts this submission and proposes that the section be amended accordingly.

Clause 25 Amendment of Second Schedule. The clause inserts Form 17A into the Second Schedule of the Principal Act which is the form of an enduring power of attorney. This form referred to in the draft section 175B contained in this paper: see clause 19 of the draft Bill.

The form is adopted from the form in the Schedule to the Victorian Act. The form requires that the donor sign in the presence of a witness.

This section of the commentary refers to submissions received but the Commission is not prepared to propose any amendment to existing legislation at this stage as a consequence of these submissions.

Section 35 Construction of dispositions of property. Dispositions of property to two or more persons together are construed as being made to them as tenants in common, not joint tenants. Section 93 provides that mortgages by more than two or more persons makes them joint mortgagees. The reason for this provision is discussed in the commission's report at pp. 72-73 and in Duncan and Vann (op.cit.) at pp. 974-976.

There does not appear to be any reason for considering s.35 and s.93 incompatible. Section 35 was intended to reverse the common law presumption in favour of a joint tenancy. Section 35(2) is said not to be applicable to executors, administrators, trustees or mortgagees so that, in the case of a mortgage by more than one mortgagees, they are regarded as joint mortgagees. If this is a correct interpretation, no alteration is required.

Section 46 Execution of instruments by or on behalf of Corporations. One correspondent has pointed out that the provisions of s.46 creating a presumption as to the due execution of an instrument by a corporation have been supplanted by s.68A(3)(e) of the Companies (Queensland) Code. This may be so in relation to companies within the meaning of the Code but the Code does not deal with every type of corporation, as to which s.46 of the Act continues to be the applicable provision. Conflict between the two provisions will be prevented from arising by s.46(6) which preserves the efficacy of execution by any other method authorized by law.

In New South Wales, an Act entitled the Conveyancing (Passing of Risk) Amendment Act 1986 was assented to on 24th April, 1986. The Act embodies the recommendations of the Law Reform Commission in that State in its report no.40. The Queensland Law Reform Commission has adopted many of the New South Wales recommendations in the proposals contained herein. However, it has omitted the following sections:

S.66M which allows for an abatement of purchase price where land is damaged before the risk has passed to the purchaser; and

S.66N which gives a Court discretion as regards an order for specific performance of a contract for sale of land which has been substantially damaged after the making of the contract and before the risk has passed to the purchaser.

In relation to s.66M, the New South Wales Law Reform Commission when making its recommendations said there would be cases where a purchaser does not have the right to rescind or where the purchaser preferred to proceed with the contract rather than rescind and make provision for a reduction in the purchase price. The Commission did not support the inclusion of such a provision in this Bill because it adverted to matters not raised previously and was contrary to existing legal principles.

In its recommendations for inclusion of a provision such as s.66N, in its report the New South Wales Commission considered the Court should have a discretion to refuse to require the vendor to complete where it would be unjust or inequitable to do so. The provision was omitted from this Bill because it was considered that a Court would

approach an action for specific performance in this way.

However, the Commission would not offer any strenuous opposition to the inclusion of provisions of this nature in any Bill drafted to formulate the recommendations in this report.

Section 61

Several submissions have been received suggesting that s.61(2)(a) should be amended so as to permit cheques drawn by bodies or persons other than Banks to be used in payment of sums due under contracts for the sale of registered land. In particular, it has been suggested that cheques drawn by building societies or drawn on solicitors trust accounts should be included within this paragraph. In relation to s.61, it is worth bearing in mind the definition of "bank" in s.4(1). It has been argued that the phrase "banking business" in that definition could be taken to include activities of building societies, (the enactment by the Federal Parliament of the Cheque and Payment Orders Act 1986 which places cheques drawn on building societies on the same footing as cheques drawn on banks in some respects may indirectly lend some support to this view) although the courts would probably limit this provision to the holders of banking licences issued by the Commonwealth. If it were desired to extend the scope of s.61, this could be done most simply by amending this definition.

There are significant difficulties in such an amendment.

The party drawing the cheque could stop payment after settlement and before the cheque had been paid. While this is possible even in the case of a bank cheque (see Commonwealth Trading Bank v. Sidney

Raper Pty. Ltd. [1975] 25 F.L.R. 217, the ability to dishonour appears to be limited to cases of total failure of the consideration given to the bank for the issue of the cheque) a practice has been built up over a long period of time whereby this is most unlikely to happen except where this is a clear case of fraud or theft. Furthermore, the acceptance of bank cheques on settlement is a long established practice, so that until and unless such a practice were to develop in relation to other financial instruments, such as building society cheques, it would be inappropriate for s.61 to be broadened to include them. Remembering that s.61 merely implies terms into a contract for sale of land in the absence of any express provision to the contrary, it is less than totally certain that an amendment in the form requested would greatly increase the acceptability of such methods of payment.

Banks are respected financial institutions in Australia, subject to federal regulation through licensing of bankers and enjoying the benefit of lender of last resort facilities under the auspices of the Reserve Bank so the risk of loss through insolvency is minimised by retaining the present form of s.61. While Building Societies are undoubtedly developing as financial institutions, and probably, in practice enjoy the equivalent of banks in terms of supervision and lender of last resort facilities through State legislation and practice, it is felt that without the equivalent practice of long use of building society cheques in settlements it is not appropriate at this stage to amend s.61. Furthermore, the degree of security which banks maintain over cheque forms is

significantly greater than that operated by other persons, notably solicitors in private practice, so that the danger of fraud being perpetrated through an unauthorised person coming into possession of the blank cheque forms is minimised by maintaining s.61 in its present form. Banks also tend to be more independent of the purchaser in relation to the issuing of the cheque than would be the purchaser's solicitor and so are better able to resist unjustified requests to stop payment.

It is observed that this is not a matter that has been taken up by the Law Society in its submission, and the Commission is unconvinced that this submission would enjoy the support of the bulk of the legal profession. The ability of a receiver, the Law Society or the solicitor's bank, in appropriate circumstances, to freeze a solicitor's bank account militate strongly against an extended s.61 to cover cheques drawn on a solicitor's trust account.

The operation of the doctrine of indefeasibility of title under the Real Property Acts and the importance attaching to possession of the certificate of title means that it is essential to maintain maximum safeguards for a vendor who releases such certificate in return for payment. Although fraud is an exception to indefeasibility, there is no guarantee that a fraud associated with the means of payment would in all cases be capable of being brought home to the party who would become registered, for example, in cases of transfer by direction.

Accordingly, and in view of the fact that the parties to a contract for the sale of registered land may by virtue of s.61(4) vary the effect of s.61(2)(b) in relation to the contract, the Commission is unable to recommend any amendment of s.61.

Section 79 Variations which may be made to a mortgage. One letter to the Commission suggests that provision should be made for allowing parties to alter the relative priority between registered mortgages by postponement. The present procedure has been described as expensive and time consuming. The Commission is preparing a draft Real Property Bill the provisions of which may be sufficient to achieve the effect required by the writer of the letter referred to.

Section 82 Tacking and further advances. The area of concern raised in an article on tacking which appeared in (1977) 5 Qd.L. at p.103-111 is what is understood in s.82(3) as constituting notice. The author of the article observes at pp. 105-106:

> "S.82(3) when read with s.82(1)(b) creates certain difficulties. The words "a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered" appear to imply an assumption that registration of a mortgage normally constitutes notice to a subsequent encumbrancer. Therefore, since s.82(3) only applies "where the prior mortgage was made expressly for securing.... further advances" then the assumption expressed above will mean that in a mortgage without a compulsory further advances clause a mortgagee can lose priority for further advances to a subsequent registered mortgagee. It is with this assumption that registration equals notice that issue is taken".

The author expresses the opinion at p.110 that the English case law cited remains good in Queensland and that the law is that notice is not constituted

by registration and that for the purposes of s.82(1)(b) a mortgagee may tack further advances unless he had actual notice or "true" constructive notice of a subsequent mortgage.

In Property Law and Practice by Duncan and Vann, (op.cit.), paragraph 82.21 discusses the limitation offered by the wording of s.82(3) and concludes the exact limit of the protection is not unambiguous. The paragraph continues:

> "It is clear that the provision overcomes any constructive notice that might arise by virtue of the Real Property Acts themselves but it is not certain whether s.256(1)(a) referring to searches, etc. "as ought reasonably to have been made" is affected by subsection 3; it could be argued that such notice does not arise "merely by reason that (the mortgage) was registered" and that certain mortgagees reasonably ought indeed to search before making a further advance under the express provision in their mortgage."

S.82(3) is necessary to permit mortgages to be employed to secure liabilities such as bank overdrafts. In such cases each cheque drawn while there is an outstanding indebtedness represents a further advance for the purposes of s.82, and it is clearly impracticable for the mortgagee in such circumstances to be expected to make a search before meeting each cheque. It is also unreasonable for searches to be expected to be made in such circumstances so s.256(1) cannot be expected to affect the situation. Since such mortgages are important in commerce the protection conferred by s.82(3) is vital. S.82(3) is in substantially identical terms to s.94(2) of the Law of Property Act 1925 (United Kingdom) which appears to have stood the test of time.

> The only matter of ambiguity is the precise scope of the phrase: "mortgage...made expressly for securing a current account or other further advances". It clearly covers the overdraft situation mentioned above, or other cases where it is anticipated at the time of the mortgage that further advances will be numerous or frequent. If the mortgage, like most forms, merely provides that it is for securing any further advance as well as the original sum, its applicability is dubious. In such a case the mortgagee would be well advised to search before making a further advance, but there is no impracticability in so doing. Accordingly, the subsection clearly achieves its objective of protecting mortgagees in circumstances where searching before making a further advance is impracticable. Since it is probably not able to devise a more precise form of words to cover this situation without a great increase in loquacity, no amendment is recommended.

Leases

The Commission has also received a representation concerning the rights of landlords and tenants as applied to caravans.

The resident of a caravan park is in the unique position of owning his home while he rents the land on which it is placed. The park owner is in the dominant position and has usually promulgated rules and regulations which the tenant must observe if he wishes to remain as a tenant. The only relevant legislation in this State are the Camp Regulations under the Health Act 1930-1980 and Local Authority bylaws which will be referred to later.

In the United Kingdom the Mobile Homes Act 1983 has been enacted. The first section introduced a new procedure which requires the park proprietor to supply his tenants with a written

statement relevant to their occupation. This agreement is binding on and inures for the benefit of any successor in title of the owner of the site and any dispute arising is to be determined by the County Court for the district.

The following is a fairly typical extract from the Bylaws of one of Queensland's Local Authorities:-

(i) A person (other than the owner or manager of a caravan park) shall not occupy a caravan parking bay or bays within such caravan park for a greater total period than three (3) months in any period of four (4) consecutive months, unless the occupancy thereof has been approved by the Council.

(ii) The owner or manager of a caravan park shall not permit or suffer any person to occupy a caravan parking bay or bays within a caravan park for a greater period than that stated in clause (i) of this by-law unless the occupancy thereof has been approved by the Council.

(iii) A person shall not use a Council camping area for a greater total period than three (3) months in any period of four (4) consecutive months, unless the use thereof has been approved by the Council.

Given that the tenant faces possible expulsion for non-observance of park rules, or the likelihood of limited tenure under the above by-law, it is difficult to see how any protective provisions can be drawn in general legislation of the nature of the Property Law Act.

In September, 1986 the Queensland Department of Justice published a Green Paper on Mobile Homes. This Paper outlined the legal position of Queensland mobile home dwellers. Included in the Paper were a number of strategies that may be adopted to improve the position not only of mobile home dwellers but also the mobile home industry

Section 115 When reversion of a lease is surrendered, etc. the next estate is deemed the reversion. The Commission's report (no.16) at p.84 states:

> "This clause makes provision ancillary to that in the previous clause by ensuring that, upon surrender or merger of a head lease, the covenants of the underlease will be preserved for the benefit of the reversioner or his grantee".

One correspondent has suggested that the Titles Office interpretation largely defeats the purpose of the subsection. In Gollin Co. Ltd. v. Consolidated Fertilizer Sales Pty. Ltd. (1982) Qd.R. 435 at p.438 D.M. Campbell, J. said:

> "The practice of the Titles Office, as I understand, is to have the parties surrender the lease and execute another lease. It possibly points to a defect in the system of registration in cases where the variation is not substantial."

Amendment of s.54 of the Real Property Act is again suggested to circumvent the difficulty.

Gollin's case (supra) has also been quoted as indicative of the need that parties should be able to vary a lease by memorandum in the same way as a mortgage can be varied under s.79 of the Property Law Act. Whilst agreeing with this view, we consider that the appropriate place for both these provisions is the Real Property Act, where the matter will be taken up in the course of the impending revision of that Act.

Section 121 Provisions as to covenants not to assign, etc. without licence or consent. This section provides that a covenant in a lease against assigning will be deemed subject to a proviso that the consent will not be unreasonably withheld. However, the area where difficulty is seen to arise is that the original lessee remains responsible to his lessor for observing covenants in the lease even though he has assigned the lease to a sublessee and is still responsible if that sublessee makes a further assignment.

The law as stated in Moule v. Garrett (1872) 7 L.R. Ex. 101 is:

> "An assignee of a lease by mesne assignments is under an obligation to indemnify the original lessee against breaches of covenant in the lease, committed during the continuance of his own tenancy, and the obligation is not affected by the covenants which the assignee may have had with his immediate assignor."

In Murphy v. Harris [1924] St. R.Q. 187 the Court held:

> "In the absence of an express agreement an original lessee of land has the right to be indemnified by an assignee from him of the lease for any debt paid or obligation discharged by him during the currency of the assignee's tenancy."

The Commission has been asked to consider adopting some provision similar to s.77(1)(c) of the Victorian Property Law Act, s.95 of the Transfer of Land Act (W.A.) and s.152 of the Real Property Act (S.A.). The common feature of these provisions is that in every transfer of a lease there shall be implied a covenant by the transferee with the transferor to perform and observe all covenants in the lease contained or implied and to indemnify and keep harmless the transferor against all actions arising out of non-observance of the covenants. This gives statutory effect to the principle in Moule v. Garrett (supra). At present, we see no need to include such a provision in the Property Law Act. Once again, the acceptance of a statutory form of indemnity will be considered in the course of revision of the Real Property Act.

Section 124 Restriction on and relief against forfeiture

The first subsection provides the lessee with a reasonable time to remedy a breach of covenant, etc. One correspondent considers that the words "reasonable time" give rise to difficulties. A

similar expression occurs in the English Law of Property Act and the N.S.W. Conveyancing Act, but, so far as can be ascertained, there has been no judicial comment about it. In volume 27 of Halsburys Laws of England (3rd ed.) at p.102 it is said that what is a reasonable time must necessarily depend on the circumstances of the particular case, and is therefore a question of fact.

Lord Watson in Hick v. Raymond [1893] A.C. 22 at p.32 said:

> "In the case of other contracts the condition of reasonable time has frequently been interpreted, and has invariably been held to mean that the party upon whom it is incumbent duly fulfils this obligation notwithstanding protracted delay so long as such delay is attributable to causes beyond his control and he has neither acted negligently nor unreasonably."

In West Layton Ltd. v. Ford [1979] Q.B. 593 at p.605 Roskill L.J. said:

> "I think that the right approach, as Lord Denning M.R. suggested in the Bickel Case [1977] Q.B. 517 is to look first of all at the covenant and construe that covenant in order to see what its purpose was when the parties entered into it; what each party, one the holder of the reversion, the other the assignee of the benefit of the relevant term, must be taken to have understood when they acquired the relevant interest on either sides".

The Commission considers that if a specific time were mentioned the consequent inflexibility of the provision would be likely to cause prejudice to one party or the other. Therefore it is not proposed to alter the existing provision.

Attention has been drawn to subsection (8) which requires that the notice mentioned in s.124 be Form 10 of the second schedule. It is suggested that the operation of the subsection would be improved if the words "to the like effect" were inserted. However,

s.40 of the Acts Interpretation Act, 1954-1977, already permits the use of forms which are "to the like effect" and we do not think it desirable to adopt this suggestion.

Section 128 Relief against lessee's loss of option. It has been represented to the Commission that the section implies that where property has been sold by the lessor to a third party the lessee may have relief if either the lease is registered or the lease contains a Friedman v. Barrett clause.

In Duncan and Vann (op. cit.), at p.1111, the position is said to be:

> "a. options to renew contained in unregistered leases would not be protected against bona fide purchasers (or third parties) for value, who became registered in the absence of fraud;
>
> b. options to renew contained in registered leases may now well be protected against such bona fide purchasers (or third parties) for value who became registered in the absence of fraud. This may, however, depend upon the enforceability of the covenant".

In the Volume 14 Queensland Law Society Journal, at p.236-4, Dr. S. Robinson wrote:-

> "A proper application of the principles of Frazer v. Walker [1967] 1 A.C. 569 should have brought about the result in Friedman v. Barrett that the right to renew the lease was binding on the buyer of the registered freehold subject to the lease. Obviously that result will be more readily achieved if the written contract of sale of the freehold reversion contains an express provision that the sale is subject to the rights of the tenant including the right to renew. For added protection the written contract should contain an express provision for covenant of indemnity. Those provisions can be resorted to when the conveyancer is consulted when a sale of freehold reversion is in the offing and the lease (and option to renew) has been granted."

The principal purpose of the section was to protect leases from the existing rule that options in a lease will be strictly construed and will be lost to a lessee by reason of even the most trivial breach on his part (e.g. a single late payment of rent). It would therefore appear doubtful whether this section is the appropriate place for insertion of a provision to protect third parties. We consider that the rights of third parties should be left to depend on the provisions of other legislation, such as the Real Property Act.