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**SHORT DISCUSSION PAPER ON REAL  
PROPERTY ACTS**

Miscellaneous Paper  
MP12

Queensland Law Reform Commission

The short citation for this Miscellaneous Paper is Q.L.R.C. M.P. 12  
Published by the Queensland Law Reform Commission  
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ISBN:

Printed by: Queensland Law Reform Commission

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Queensland Law Reform Commission  
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It would be helpful if comments and submissions addressed specific issues or preliminary recommendations in the Paper.

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## **SHORT DISCUSSION PAPER ON REAL PROPERTY ACTS**

This brief paper is issued for the purpose of stimulating discussion only, and does not necessarily reflect the final view of the Commission which will be made known in due course through the medium of a comprehensive working paper on the Real Property Acts.

### **COMMENTARY**

The draft provision is constructed so as to replace s.44 as the key indefeasibility provision, but has been enlarged so as to embrace the provisions of s.109 in s.44(1)(b) and s.123 in s.44(1)(c). The cases of actions for possession by parties to a mortgage or lease are believed to be covered by s.60, s.44(2)(c), by provisions of the Property Law Act and the rights of mortgagees and lessees stemming from their own registration as proprietors of the relevant interest, or by s.44(2)(f) where there is merely an agreement to grant such an interest. Section 18 of the 1877 Act is embraced in s.44(2)(C), and express provision is made for the "in personam" exception which enables the provisions of s.51 of the 1877 Act to be omitted. A number of the established exceptions are clarified, and the mechanics of the exception relating to the grant of titles by adverse possession are relegated to a schedule. The provisions of s.47 of the 1877 Act need not be reproduced, since the question of improvements can now be resolved under ss.184 or 196 of the Property Law Act 1974.

It might not be thought necessary to make any express mention [as in s.44(2)(f)] in relation to the "in personam" exception beyond a reproduction of the provisions of s.51 of the 1877 Act. However, it should be remembered that the existence of the "in personam" exception in jurisdictions which possess no equivalent of s.51 means that the exception enjoys a life independent of that section. The South Australian formulation in s.71 of the Real Property Act 1886-1975 could have been adopted as an alternative.

Provision has been made (modifying the South Australian s.223a of the Real Property Act 1886-1975) for amendment of the certificate of title where the exception for wrong description of land or of its boundaries applies.

Although s.126 is generally regarded as being, together with ss.33, 44, 109 and 123 as one of the "cornerstones" of the principle of indefeasibility most of the provisions of s.126 have not been reproduced among the provisions guaranteeing indefeasibility as they are more concerned with the issue of assurance than indefeasibility. However, one aspect of this section has had an important bearing on the issue of indefeasibility and that is the protection from actions of ejection and damages of bona fide purchases for value. This aspect is covered by the last paragraph of s.44(1).

The general question of compensation or assurance where title is lost will be dealt with in a comprehensive working paper on the reform of the Real Property Acts which will be issued later.

The object of the draft is to codify and clarify the existing law, rather than to change it. In the case of volunteers it was previously uncertain whether they derived benefit from the indefeasibility provisions. This draft is intended to ensure that they do derive the benefit of an indefeasible title.

## DRAFT LEGISLATION

Amendment of s.44. The Principal Act is amended by repealing section 44 and substituting the following section:-

**“44. Estate of Registered Proprietor Paramount.** [Qld. 1861, ss.44, 109, 123, 126; Qld. 1877, ss.11, 50; Qld. 1952].

- (1) A registered proprietor of land or any estate or interest therein shall, except in case of fraud and the exceptions specified in subsection (2) -
- (a) hold the same subject to any estate or interest registered in respect of the land; but absolutely free from all other estates, interests or rights;
  - (b) not be affected by actual or constructive notice of any estates, interests, rights, claims or titles other than those registered in respect of the land;
  - (c) not be liable to proceedings or judgment for the recovery of possession of the land or any estate or interest therein;

“Fraud” in this section means fraud of the registered proprietor and not fraud of a person from or through whom a registered proprietor has in good faith derived his estate or interest in the land.

- (2) The following are the exceptions -
- (a) the estate or interest of a proprietor claiming under a prior certificate of title in respect of the same land or part of it;
  - (b) the estate or interest of a proprietor in respect of land which has been included in a certificate of title in consequence of wrong description of parcels or boundaries;
  - (c) a lease for any term not exceeding three years, or a tenancy from year to year or for any lesser period, in respect of the land; but excluding a right to renew the terms or acquire the fee simple or other interest reversionary, whether or not immediately, upon such lease;
  - (d) any right of way or other easement of which particulars have been omitted from or misdescribed in the register relating to the land;
  - (e) rights under a certificate of title issued pursuant to the provisions of the fourth schedule;

- (f) subject to the provisions of paragraph (b) of subsection (1) interests, equities and other rights of a personal nature created by the proprietor.
- (3) For the purposes of subsection (2) -
- (a) if an inconsistency has arisen through failure to cancel, whether wholly or in part, a certificate of title to land part of which has been transferred after the issue of a certificate of title to that part, the certificate of title to that part shall for the purpose of paragraph (a) of subsection (2) be the prior certificate of title.
- (b) in all other cases the prior certificate of title referred to in paragraph (a) of subsection (2) shall be that deriving from the certificate of title issued before the inconsistency between subsisting certificates of title first arose;
- (c) if the Registrar is satisfied that the case falls within paragraph (b) of subsection (2), he may amend the certificate of title, and in any case shall notify his decision to the persons thereby affected, who may, within one month of such notification, apply to the Court for an order varying or setting aside the decision of the Registrar;
- (d) an easement is not omitted within the meaning of paragraph (d) of subsection (1) unless -
- (i) it was in existence at the time the land over or in respect of which it is claimed to subsist was first registered; or
- (ii) having been registered, it has by error on the part of the Registrar since been omitted.
- (4) Acquisition of title in consequence of adverse possession. [Qld. 1952, ss.45-60.] Subject to the provisions of Par XI of the Property Law Act 1974-1986, a person, who, by reason of possession of any registered land, claims to be registered as proprietor of an estate or interest therein may be registered in accordance with this section and the fourth schedule to this Act but not otherwise."

**New s.44A.** The Principal Act is amended by inserting after section 44 the following section:-

**"44A. Powers of Court to rectify register [Qld. s.124].**

Where judgment for the recovery of any land is given against a registered proprietor the Court may order that the Registrar -

- (a) cancel or alter any certificate of title or other instrument or particulars recorded in the register relating to that land;
- (b) issue any fresh certificate of title or instrument or recording in lieu thereof; and
- (c) carry out such other acts and instruments to be done and executed as the Court shall under the circumstances deem necessary and just."

**PROPOSED DEFINITIONS** (in order to assist the reader those proposed legislative definitions having significant impact on the above provisions are set out below).

“encroachment” shall have the meaning assigned to the term by Part XI of the Property Law Act 1974-1986;

“instrument” means and includes any land grant, certificate of title, conveyance, assurance, deed, will, probate or exemplification of will or any other document in writing relating to the transfer or other dealing with land and any map or plan lodged with or produced to the Registrar of Titles;

“lease” includes demise, tenancy and sub-lease, whether for a term, for a period, or at will, the term of a lease is the period of time from the time at which the lessee is first entitled to enter into possession under the lease, until the time at which the lessee is last entitled to possession under the lease, notwithstanding that the lease may consist of a number of discontinuous periods;

“proprietor” means any person holding or possessed of any freehold or other estate or interest in land at law or in equity in possession in futurity or expectancy and shall include any person possessed of or entitled to any charge upon any land;

“register” when used as a noun means the register maintained by the Registrar in accordance with section 32;

“registered” means registered in accordance with this Act;

“registered land” means land under the provisions of this Act;

“registered proprietor” means a person registered whether or not for value, as proprietor of land or of any estate or interest therein, and, in case where more than one person is registered as proprietor all such proprietors;

“transfer” means the passing of any estate or interest in registered land whether for valuable consideration or otherwise.