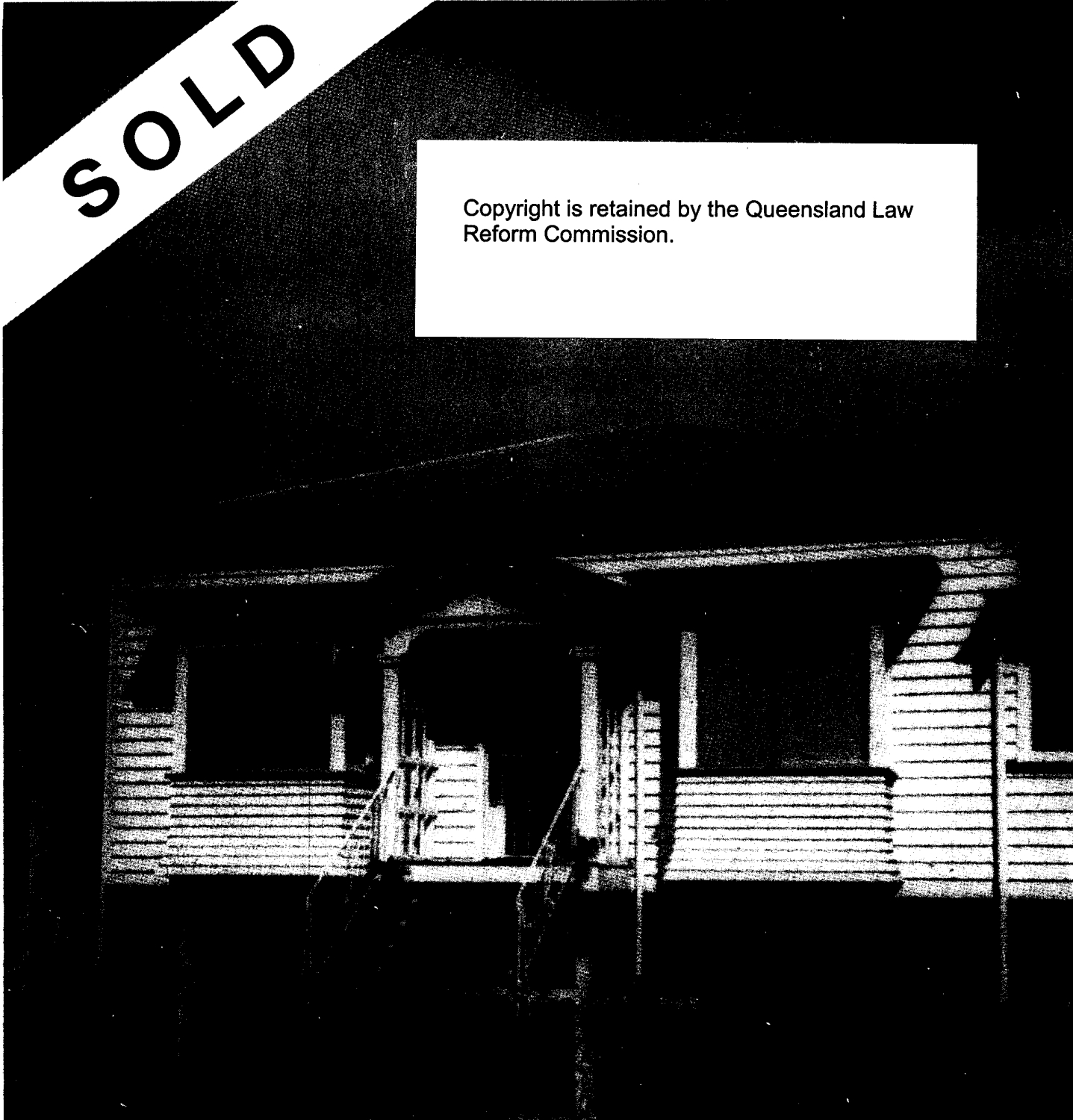


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CONSOLIDATION OF REAL PROPERTY ACTS

REPORT No. 40

QUEENSLAND LAW REFORM COMMISSION

Margaret Schmidt typed the numerous drafts of the report in exemplary fashion. The Queensland Law Reform Commission thanks her sincerely for her tireless persistence.

The Queensland Law Reform Commission would also like to thank John Cridland, Paul Skehan and Arthur Byrne for supplying their expertise on the operation of the Titles Division.

The short citation for this report is Q.L.R.C. R.40
Published by Queensland Law Reform Commission, March 1991
Printed by The Printpeople
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ISBN 0 7242 4326 7

Dear Reader...

The Attorney-General requested the Queensland Law Reform Commission to examine and amend the Real Property Act 1861-1990 and the Real Property Act 1877-1990 "with a view to the consolidation of the law in this area."

This report outlines the Commission's examination. It contains a draft consolidation of Queensland real property legislation.

To achieve its brief, the Commission adopted four principles -

- (i) The primary thrust of the Commission's examination of existing real property law should be the manner in which real property laws can be consolidated.*
- (ii) The Torrens System is currently operating well in Queensland. Amendments made by the Commission to existing legislation should focus upon modernisation, rather than alteration, of the system.*

For instance, the draft updates real property legislation to mirror the changes made to the land registration system following the computerisation of the Department of Lands, Titles Division.

- (iii) The consolidation should be in a simple and accessible form.*

Many of the concepts adopted in real property law are surrounded by centuries of case law. The concepts are well-developed and litigated. The Commission has chosen not to disturb the way in which the central concepts are defined. In adopting this principle, the Commission has drafted legislation which should be easily comprehensible and accessible to the law student, practitioner, and Titles Division employee. The terminology used by the predominant users of real property law has been harnessed. The draft will not, therefore, be easily understood by those unfamiliar with property law.

- (iv) The draft legislation prepared by the Commission should be gender neutral.*

The following report contains two distinct parts.

The first part focuses upon the draft legislation prepared by the Commission. This draft appears on the pages at the right.

The commentary about the structure of the draft Bill appears on the left hand pages. It contains a description of each Part of the Bill and highlights the more important sections.


The commentary about changes to existing real property legislation also appears on the left hand pages. It describes policy changes to existing law that the Commission thought were desirable, as well as additions that needed to be made to existing legislation.

The second part of this report compares the clauses in the draft legislation with the provisions of existing legislation. It is a tool for use by the legal profession and Titles Division staff who will be the primary readers of this report.

Yours faithfully,



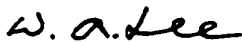
The Hon. Mr. Justice
B.H. McPherson, C.B.E., S.P.J.
Chairman.



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Deputy Chairman.



Ms. R.G. Atkinson
Member.



Mr. W.A. Lee
Member.



Ms. H. O'Sullivan
Member.



Ms. C.H. Richards
Member.



Ms. L. Willmott
Member.

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QUEENSLAND

REAL PROPERTY ACT 1991

No. of 1991

BY AUTHORITY
M.J. RICHARDS, SECRETARY, QUEENSLAND LAW REFORM COMMISSION - 1991

COMMENTS ABOUT PART 1

The "house-keeping" required in drafting legislation is found in part 1.

Repeals and saving of existing real property legislation, the definition of words commonly used in the Bill, tools for the user to interpret the Bill, and the commencement date of the Bill are all found in this part.

Significantly, the part commences by setting out the five purposes served by the Bill.

The regulation-making power of the Governor in Council is linked directly to facilitating these five purposes.

Regulations will assist the administration of the Bill. Some sections of the existing real property legislation have not been included in the Bill. They would more appropriately be included in the regulations. For instance, section 6 of the Real Property Act 1861-1990 (RPA 1861-1990), which sets out the oath that must be taken by the Registrar and Deputy Registrars, should be dealt with in the regulations.

PART I - PRELIMINARY

1. Purposes of this Act.

The primary purposes of this Act are-

- (a) to consolidate and reform the Real Property Acts;
- (b) to define the rights of registered proprietors of land;
- (c) to maintain and improve the system for registering title to and transferring interests in land;
- (d) to define the duties of the Registrar of Titles; and
- (e) to facilitate the maintenance of the Register, using modern technology.

2. Title of this Act. [Qld. s.2.]

This Act may be cited as the Real Property Act 1991.

3. Commencement. [Qld. s.144.]

- (1) Section 2 and this section commence on the day this Act is assented to.
- (2) The remaining provisions of this Act commence on

4. Application.

This Act binds the Crown in right of the State of Queensland and, so far as the legislative power of Parliament permits, the Crown in its other capacities.

5. Regulations. [Qld. s.140.]

The Governor in Council may make regulations to promote the purposes of this Act and its administration.

6. Repeals, amendments, savings and transitional. [Qld. s.1]

With the exception of part II of the first schedule, the Acts listed in part I of that schedule are repealed.

7. Abbreviations and definitions. [Qld. s.3; Qld. 1877, s.3; Qld. 1887, s.2; Qld. 1976, s.3.]

- (1) The abbreviations of other Acts at the beginnings of sections are described in the third schedule.

Practitioners in particular should note the definitions of "deposit", "produced" and "lodged".

When instruments are to be placed in the office for registration, the draft refers to the instrument being "lodged".

When instruments need not be registered but are merely to be shown to Titles Division staff, the draft refers to the instrument being "produced".

When instruments need to be left in the Titles Division, but not registered, the instruments are referred to as being "deposited".

- (2) In this Act and in all instruments made or executed under it, unless a contrary intention appears-

"agent" includes solicitor;

"bankruptcy" includes proceedings under a law concerning bankruptcy, insolvency, or the liquidation of a corporation;

"caveatee" includes-

- (a) a registered proprietor of land over which a caveat has been lodged; and
- (b) a person who has or will have an estate or interest in land, or an interest under an instrument affecting land, who is prejudicially affected by a caveat;

"caveator" means a person in whose favour a caveat is lodged;

"Central district" means the area within the map marked "Central District" held in the Office, a copy of which map appears in the second schedule;

"certificate of title" means an instrument forming part of the Register executed or issued by the Registrar evidencing the estate in fee simple or other estate or interest in land and, where the context implies, includes a grant;

"Court" means the Supreme Court of Queensland or a Judge of the Court;

"court" means court of competent jurisdiction;

"Crown" means the Crown in right of the State of Queensland, and includes a corporation representing the Crown;

"deposit" means produce and leave at the Office;

"grant" means the original grant of land by the Crown;

"grant of representation" means a grant of probate of the will or letters of administration of the estate of a deceased, and includes the grant of an order to administer and the filing of an election to administer the estate by a trust corporation;

"instrument" includes-

- (a) a grant, certificate of title, deed, will, probate or exemplification of will, grant of representation;
- (b) a request, application or any other document that-
 - (i) may be registered under this Act; and
 - (ii) relates to the transfer of or other dealing with land;
- (c) a map or plan that is lodged;

"interest" includes the interest of a mortgagee under a mortgage of land;

"land" means land under and subject to this Act and includes-

- (a) any estate or interest in land;
- (b) unless excepted, all messuages, tenements and hereditaments, corporeal and incorporeal, of every kind and description; and
- (c) a lot within the meaning of the Building Units and Group Titles Act 1980-1990;

"lease" includes a tenancy and a sub-lease;

"local authority" means a local authority and a joint local authority constituted under the Local Government Act 1936-1990, and includes the Brisbane City Council constituted under the City of Brisbane Act 1924-1990;

"Local Registrar" means a Deputy Registrar of Titles for either the Central or Northern districts appointed under section 10;

"lodged" means lodged for registration in the Office;

"mortgage" means a charge on land conforming with this Act, to secure one or more of the following-

- (a) repayment of a loan, or satisfaction of an existing debt;
- (b) repayment of future advances, or payment or satisfaction of a future or unascertained debt or liability, whether or not contingent;
- (c) payment to the holders for the time being of bonds, debentures, bills of exchange, promissory notes or other securities, whether or not negotiable, made or issued before or after the creation of that charge;
- (d) payment to a person by yearly or periodical payments or otherwise of an annuity, rent-charge or sum of money other than a debt;

"Northern district" means the area within the map marked Northern District held in the Office, a copy of which map appears in the second schedule;

The Commission debated whether to use "record" or "register" to describe that process where information is noted in or documents are placed on the Register.

Currently, Titles Division staff refers to this process as either "recording" or "registering", depending on the instrument involved.

However, the process describes actual registration. Accordingly, the Commission preferred "register".

The definition of "registered proprietor" includes a person who has become registered without giving valuable consideration.

"Office" means the office in section 11;

"particulars" means the particulars under section 23;

"personal representative" means -

- (a) the executor, original or by representation;
- (b) the administrator; or
- (c) a trust corporation acting as an executor or administrator - of a deceased person;

"plan of survey" includes -

- (a) a resurvey conducted to define the boundaries of the land;
- (b) a plan of subdivision in section 35;
- (c) a plan for the purposes of a lease;
- (d) an easement plan; and
- (e) a plan of amalgamation;

"produced" means made available to the Registrar for examination or indorsement at the Office;

"proprietor" means a person entitled to an estate or interest in land, whether or not in possession, and includes a mortgagee;

"purchaser" means a person who acquires land, and includes a lessee and mortgagee;

"Register" means the register in section 23;

"register" means record particulars in the Register;

"registered proprietor" means a person registered as proprietor whether or not for valuable consideration;

"Registrar" means the Registrar of Titles appointed under section 10;

"requisition" refers to a requirement given to a person by the Registrar under section 101(4);

"seal" means the seal of office in section 13;

"short lease" includes-

- (a) a lease for a term of three years or less; and
- (b) a tenancy from year to year or shorter period.

"term", when used in relation to a lease, means the period of time beginning when the lessee is first entitled to possession of land under the lease and ending when the lessee is last entitled to possession, although the lease may consist of two or more discontinuous periods;

"transfer" means the passing of an estate or interest in land;

"transmission" means acquiring the title to or interest in land following death or bankruptcy of a proprietor;

"trust corporation" means the Public Trustee of Queensland appointed under the Public Trustee Act 1978-1990 and any corporation authorised by the Trustee Companies Act 1968-1989 to administer the estates of deceased persons and other trust estates;

"will" includes codicil.

8. Interpretation. [Qld. s.3.]

- (1) A reference in this Act or in an instrument under this Act to-
 - (a) a person as proprietor, transferor, transferee, mortgagor, mortgagee, lessor, lessee, or trustee, or as having an estate or interest in land includes the personal representatives and assigns of such person;
 - (b) a request, application, certificate, direction, transfer, consent, notification or other instrument means a request, application, certificate, direction, transfer, consent, notification or other instrument, completed in the form, if any, prescribed; and
 - (c) a duplicate or triplicate of an instrument means a copy of a registered instrument that is delivered to a registered proprietor.
- (2) The doing of an act by or upon a person includes the doing of that act by or upon-
 - (a) a person entrusted by law with the management and care of the estate or interest of a person who is -
 - (i) a minor; or
 - (ii) impaired either intellectually or mentally; or
 - (b) an attorney appointed in accordance with part VII, division 3.
- (3) Where a word or phrase is given a particular meaning, other forms of that word or phrase have corresponding meanings.
- (4) This section does not apply if a contrary intention appears in a provision of this Act or of an instrument.

Clause 9 is a modified version of section 257 of the Property Law Act 1974-1990 (PLA 1974-1990). It was introduced into the draft to facilitate service and delivery of notices under the Bill without the need to refer to other legislation.

The clause also sets out the way in which the Registrar may deliver documents when delivery is required by the Bill. **Subclause (7)** reflects the current practice at the Titles Division.

COMMENTS ABOUT PART II

The duties, powers and functions of the Registrar and the employees of the Titles Division can be found in this part.

The powers given to the Registrar are needed to enable the Registrar and the employees of the Titles Division to maintain the accuracy of the Register. They include the power to -

- maintain the standards of forms used for registering dealings and interests in land, by authorising printing and printers of forms;
- correct or alter the Register;

9. Service and delivery.

- (1) A notice under this Act may, in addition to any other method of service authorised by law, be served upon a person-
 - (a) by serving it on the person;
 - (b) by leaving it at the person's usual or last known home;
 - (c) in the case of a person who is the principal of a business, by leaving it at the usual or last known place of business;
 - (d) in the case of a corporation, by leaving it at the registered office or at the principal place of business in the State; or
 - (e) by posting it by certified mail.
- (2) If the person on whom a notice is to be served is not in the State, the notice may be served on the agent of that person in a manner described in section 9(1).
- (3) A court may order service in any manner if the person on whom the notice is to be served is-
 - (a) not known;
 - (b) not in the State and has no known agent; or
 - (c) deceased and has no personal representative.
- (4) In addition to its powers under section 9(3), a court may make an order for substituted service or dispensing with service of a notice.
- (5) A notice or summons under sections 17 or 18 must be served personally on the person named in the notice or summons.
- (6) If the person in section 9(5) is a corporation, the notice or summons must be served on a principal officer of the corporation.
- (7) When the Registrar is required under this Act to deliver a document or instrument, delivery may be made by leaving the document or instrument at a place in the Office that is accessible to members of the public.

PART II - ADMINISTRATION

10. Registrar of Titles, Deputy Registrar of Titles and Local Registrar of Titles. [Qld. ss.4-5; Qld. 1884, ss.1-3; Qld. 1887, ss.4,6,7,9.]

- (1) The Governor in Council may appoint-
 - (a) a Registrar of Titles, who-
 - (i) has charge and control of the Office;
 - (ii) performs the duties imposed by law; and
 - (iii) gives effect to this Act; and

- *call for and take appropriate evidence to establish whether the Register accurately reflects dealings and interests in land; and*
- *protect certain registered interests by lodging a caveat.*

To assist the Registrar in the exercise of power given under the Bill, the Registrar may seek direction from the Supreme Court.

Accountability structures have been maintained and expanded -

- *The Registrar must advertise before exercising certain powers which could have the effect of jeopardising an interest in land; and*
- *The Registrar is obliged by the Bill to give written reasons explaining the course taken at the Titles Division to a person who is dissatisfied with the exercise of power.*

The Registrar cannot be personally sued if a person suffers loss or damage unless the Registrar has not acted in good faith.

- (b) persons to be Deputy Registrars of Titles, including Local Registrars of Titles for the Central and Northern districts.
 - (2) Other persons may be appointed as officers to assist the Registrar under this Act.
 - (3) Subject to any direction of the Registrar the powers, authorities, functions and duties of the Registrar may be performed by a Deputy Registrar of Titles and, in the Central and Northern districts, by the Local Registrar.
 - (4) The Local Registrars must not exercise a power or duty under part VI, division 6 without the written consent of the Registrar.
11. Office of the Registrar. [Qld. s.4; Qld. 1887, ss.2,4,7,8.]
- (1) Effect is to be given to this Act at the Office of the Registrar in Brisbane.
 - (2) In the Central and Northern districts effect is to be given to this Act at the Offices established at Rockhampton and Townsville respectively.
 - (3) The Governor in Council may, by proclamation, establish sub-branches of the Office at any place in the State to transact any business that may be prescribed.
12. Power to delegate. [Qld. s.11.]
- (1) The Registrar may, in writing, delegate to an officer any functions, powers and duties under this Act.
 - (2) Every delegation under this section-
 - (a) can be given with conditions;
 - (b) is revocable; and
 - (c) does not limit the exercise of any functions or powers by the Registrar.
 - (3) A Local Registrar may, with the consent of the Registrar, exercise the power to delegate conferred by this section.
13. Seals of office. [Qld. s.8; Qld. 1887, s.10; Qld. 1884, s.5.]
- (1) The Registrar is to have and use a seal of office bearing the inscription "Registrar of Titles, Queensland" in its margin and the impression of the Arms of the State of Queensland.

Clause 14(4) of the Bill will give the Registrar power to register an instrument not in the prescribed form. This will provide the Registrar with flexibility to deal with difficult or unusual cases, or cases where there has been only a trivial departure from the prescribed form.

Clause 14(5) alters current legislation. At the moment, instruments lodged for registration must be "certified correct for the purposes of registration" by the person lodging the instrument or that person's solicitor (section 139 RPA 1861-1990).

The certification of a document's correctness does not appear to be working. Presently, the Registrar must requisition a large number of instruments which are lodged but do not conform to the legal requirements. Section 139, therefore, has not been reproduced in this Bill.

Clause 14(5), however, provides for execution of an instrument by a person to whom the estate or interest is transferred or in whose favour the estate or interest is created (or that person's solicitor). This clause is intended to safeguard against covenants being inserted in an instrument without the knowledge of the person executing it.

- (2) Each Local Registrar is to have and use the same seal of office as the Registrar, except that the words "Central District Registry" or "Northern District Registry" are to be inscribed in their respective margins.

14. Forms and regulations. [Qld. ss.10, 41, 110, 120, 141; Qld.1978, s.6.]

- (1) The Governor in Council may make regulations prescribing-
- (a) the form of instruments that may be lodged or given to or issued by the Registrar;
 - (b) the manner in which instruments may be lodged;
 - (c) fees, including requisition and assurance fees, to be paid for-
 - (i) the lodgment and registration of instruments under this or any other Act; and
 - (ii) the provision of other services by the Registrar; and
 - (d) the manner of payment and recovery of fees, including the provision of credit facilities to persons approved by the Registrar.
- (2) With the exception of section 14(4), an instrument lodged by a person or issued by the Registrar must be in the prescribed form.
- (3) An instrument is not in the prescribed form unless, at the time of execution of the instrument, it is in the form and is completed in the manner prescribed-
- (a) by regulation; or
 - (b) by or under any other Act.
- (4) The Registrar may register an instrument not in the prescribed form if satisfied that it is not reasonable to require the instrument to be executed in that form.
- (5) The prescribed form of an instrument to transfer or create an estate or interest, other than a total or partial discharge or release of a mortgage, must provide for execution by the person to whom an estate or interest is to be transferred or in whose favour the estate or interest is to be created.
- (6) If the consent or direction of a person is necessary for a sale or other dealing with land, the consent or direction must be indorsed.
- (7) The Registrar may refuse to register an instrument that is not accompanied by the required number of executed copies.
- (8) Regulations prescribing forms of instruments may also prescribe-
- (a) the size, type and quality of paper upon which a form may be printed;
 - (b) the size and nature of the type to be used in both the printing and completion of a form;

Clause 14(8)(e) has been inserted so that regulations which prescribe new forms can also allow existing stocks of current prescribed forms to be used during the transitional period.

Clause 14(8)(g) is drafted widely to allow regulations which prescribe forms to prescribe "any other matter concerning the form". Under this clause, the regulations can require the lodging or other relevant party to produce a statement relating to a particular matter.

For example, the Registrar may require a statement from the transferor or the transferor's solicitor where there is a voluntary transfer of land in order to ensure that the delivery of the certificate of title to the transferee is unconditional.

- (c) the ink or other substance to be used for printing or completing a form;
- (d) additional information to be supplied with a form;
- (e) transitional arrangements where a new form is prescribed;
- (f) execution requirements; and
- (g) any other matter concerning a form.

15. Disposing of money paid. [Qld. ss.42,141; Qld. 1978, s.6.]

All money paid to the Registrar under this or any other Act, including assurance fees, is to be paid to the Treasurer of the State, who must pay it into Consolidated Revenue.

16. Registrar may authorise printing and sale of forms. [Qld. s.9.]

- (1) The Registrar may, upon reasonable terms and conditions, authorise a person to print and sell a prescribed form except a certificate of title.
- (2) A form authorised under section 16(1) having a distinguishing mark approved by the Registrar is a prescribed form unless the contrary is proved.
- (3) A person who prints, sells or uses a form knowing that it is not a prescribed form or a form authorised under section 16(1) is guilty of an offence.
Penalty :

17. Powers of Registrar. [Qld. ss.11,138; Qld. 1929, s.3.]

- (1) The Registrar may-
 - (a) by written notice call for production of a duplicate certificate of title by the registered proprietor or other person having control of it;
 - (b) by written notice call for production by a person of a relevant instrument or document; and
 - (c) summon a person to attend and give evidence about land or an instrument affecting title-
for the purpose of altering or correcting the Register.
- (2) The Registrar may examine a person upon oath or affirmation.
- (3) The Registrar may administer oaths or affirmations when exercising the power under sections 17(2) and 18(2).
- (4) A person summoned under section 17(1) is entitled to be paid reasonable expenses incurred in attending before the Registrar.

Under the current legislation, section 11(5) RPA 1861-1990 allows the Registrar to enter a caveat on behalf of the parties listed, where their rights are likely to be endangered "by any misdescription of land or of its boundaries".

Clause 17(8) reproduces section 11(5) but extends the Registrar's powers to lodge a caveat where the party's rights are endangered by fraud or forgery.

- (5) A person who, after receiving a notice or summons under section 17(1), does not comply with that notice or summons -
 - (a) is liable to a penalty not exceeding penalty units for each noncompliance; and
 - (b) may be ordered by a court to comply.
- (6) If the Registrar is required under this Act to be satisfied of a matter, the Registrar may require evidence of that matter.
- (7) On sufficient evidence, the Registrar may alter or correct the Register and a duplicate certificate of title.
- (8) If satisfied that it is appropriate to do so, the Registrar may upon request register an alteration or correction of the name of a proprietor or other person interested in land and indorse the alteration or correction on the duplicate certificate of title.
- (9) If satisfied that a particular in the Register does not affect the land to which that particular relates, the Registrar may-
 - (a) cancel that particular;
 - (b) call in an instrument; and
 - (c) alter, correct or cancel the instrument- as may be required.
- (10) The Registrar may register a caveat in favour of a proprietor or other person interested in land-
 - (a) to prevent a dealing with land that in the Registrar's opinion belongs to-
 - (i) the Crown;
 - (ii) a person who is a minor or is intellectually or mentally impaired; or
 - (iii) a person who is absent from the State; or
 - (b) whose rights appear to the Registrar to be endangered or prejudiced by-
 - (i) misdescription of land or of its boundaries; or
 - (ii) fraud or forgery.
- (11) The Registrar may simplify descriptions of parcels of land by altering the real property description of a parcel of land contained in the Register to a lot-on-plan description.
- (12) The Registrar must maintain a record of the original state of the Register and of the date and time on which a correction or change is made.
- (13) A correction under this section has, except for an instrument registered before the time of correction, the same validity and effect as if the error or omission had not taken place.

18. Registrar's additional powers over fraud or wrongful dealing. [Qld. ss.130-134.]

- (1) If the Registrar is satisfied that a person has fraudulently or wrongfully-
 - (a) obtained, retained or procured an instrument affecting land ; or
 - (b) procured a particular in the Register or an indorsement on an instrument affecting land-
 the Registrar may summon that person to attend at a stated time and place.
- (2) The Registrar may examine upon oath or affirmation a person who attends in response to the summons and may order that person to deliver any relevant instruments to the Registrar.
- (3) If a person does not comply with a summons or order, the Registrar may apply to a court for a warrant directing that the person be apprehended and brought before a court.
- (4) A court may examine on oath or affirmation a person apprehended by warrant and may order that person to give any relevant instruments to the Registrar.
- (5) If a person does not comply with an order of the Registrar or a court in section 18(2) and (4) respectively, the Registrar may issue to a proprietor of the land a duplicate certificate of title or nomination of trustees.
- (6) If the Registrar issues an instrument under section 18(5), the Registrar must register the date, time and circumstances of its issue.
- (7) If a court is satisfied that a person has absconded or acted so that a summons or warrant cannot be served, a court may order the Registrar to exercise the powers specified in section 18(5).
- (8) In a proceeding under this section the Registrar or court may order that a person attending proceedings receive reasonable expenses incurred, and may direct by whom such expenses are to be paid.
- (9) An order by the Registrar under section 18(8) may be enforced as if it were an order of a court.

19. Registrar may seek directions of Court. [Qld. s.14.]

In any matter arising under this Act, the Registrar may apply to the Court for directions.

Clause 20 will give to a dissatisfied person the right to obtain reasons from the Registrar for the Registrar's action or failure to act.

Clause 20(2) requires the Registrar to give written reasons to the person within 14 days, or to advise that person within the same time that the request made was frivolous or vexatious.

Under current real property legislation, the Registrar must advertise prior to -

- (a) registering a proprietor through a transmission by death (section 33 of the Real Property Act 1877-1990 (RPA 1877-1990) and section 19 RPA 1861-1990);
- (b) dispensing with the production of an instrument (section 95(4) RPA 1861-1990);
- (c) substituting an instrument in place of a lost or destroyed instrument (section 117(4) RPA 1861-1990);
- (d) registering a proprietor through a vesting order, if ordered to do so by the Supreme Court (section 89 RPA 1861-1990);
- (e) registering a remainderman (section 36(3)(a) RPA 1861-1990); and
- (f) registering an applicant claiming through adverse possession (section 55 RPA 1952-1990).

Presently, advertising by the Registrar is mandatory in these situations.

In this Bill the mandatory requirement for the Registrar to advertise has been retained only in the case of an application for adverse possession (**clause 21(2)**).

In **clause 21**, the Registrar will have a discretion whether or not to advertise before dispensing with the production of an instrument, issuing a substitute instrument and transmission by death (**clauses 21(1)(a), (b) and (c)** respectively). The advertising requirement for the registration of a remainderman has been removed (see commentary on the comparative table). The Supreme Court will retain the discretion under **clause 78** to order advertising when an application is made to it that a person interested in a deceased estate or trust be registered as proprietor.

The Bill has also altered the method of advertising required. Currently, a notice must appear in the Queensland Government Gazette, a Brisbane newspaper and, if the Registrar is of the opinion that the land is more than 50 kilometres from Brisbane, in a local newspaper.

Under **clause 21(1)**, the Registrar is required, unless satisfied that it is not necessary, to place an advertisement in the Gazette and in another suitable medium.

The method of advertising an application for adverse possession has not been altered.

Clauses 21(3) and (4) are new provisions. They require the Registrar to keep a record, open to public inspection, of advertisements placed.

20. Registrar to give reasons.

- (1) A person dissatisfied with the exercise of a power by the Registrar or with the Registrar's failure to act may by writing require the Registrar to state reasons for the exercise of the power or failure to act.
- (2) Unless the Registrar considers and advises the dissatisfied person that the request under section 20(1) is frivolous or vexatious, the Registrar must deliver written reasons to the person within 14 days or such time as is reasonable in the circumstances.

21. Advertising. [Qld. ss.89, 95, 117; Qld. 1877, s.33; Qld. 1952, s.55.]

- (1) Unless satisfied that it is not necessary to do so, the Registrar must give 14 days notice of intention to-
 - (a) dispense with the production of an instrument under section 108;
 - (b) issue a substitute instrument under section 105; or
 - (c) register a transmission by death under part VI, division 6- by placing an advertisement in the Gazette and in another suitable medium.
- (2) The Registrar must give notice of intention to register an adverse possessor under part VI, division 5 by placing an advertisement in-
 - (a) the Gazette;
 - (b) a newspaper distributed in the locality of the relevant land; and
 - (c) if the Registrar considers it necessary, any other suitable medium.
- (3) The Governor in Council may make regulations for-
 - (a) the Registrar to keep a record, whether by computer or other appropriate means, of advertisements placed under section 21(1); and
 - (b) periodic exhibition of the record in a prominent position in the Office.
- (4) A record maintained under section 21(3) must be open to public inspection at reasonable times.

22. Indemnity of Registrar. [Qld. s.137.]

- (1) Except where otherwise stated in this Act, the Registrar is to be indemnified out of Consolidated Revenue for a debt or liability incurred in the performance of the Registrar's duties under this Act.

COMMENTS ABOUT PART III

This part sets out the manner in which the Register is maintained.

Clause 23 lists the information about land which must be shown in the Register. Clause 28 requires that this information be reflected in each certificate of title issued for the land.

The certificate of title remains the centre-piece of the registration of land and interests in land.

Now that the Titles Division is computerised, fresh original and duplicate certificates of title will be issued at the time of registration of each transfer or mortgage unless old-style certificates of title are still in existence. At the moment that the computer prints out a certificate of title, the particulars contained in it become registered and form part of the Register. The original certificate of title is retained for the Register. The fresh duplicate of the certificate is given to the person entitled under the Act to receive and keep it.

The accuracy of duplicate certificates of titles can be relied upon by those who hold or are shown them - they are deemed to be conclusive evidence of the information recorded in them except in a few exceptional cases (see clause 31).

Separate lease and powers of attorney registers must be maintained in the Titles Division.

Clause 25 gives flexibility to the Registrar in administering the way in which the Register is to be maintained. The Bill allows the Registrar to maintain records through computer, microfilm or any other appropriate form of information storage and retrieval.

Clause 26 sets out the right of members of the public to search for and obtain a copy of any information registered in the Register. These certified copies can be held out as evidence (though not conclusive) of the information they contain (see clause 27).

In essence, clause 24 reproduces section 32 RPA 1861-1990. Clause 24(4), however, is a new provision which was inserted to reflect current Titles Division practice.

- (2) The Registrar is not entitled to be indemnified under section 22(1) if the indemnity is for an act done or omission made by the Registrar that was not in good faith.

PART III - THE REGISTER

Division 1 - General

23. The Register. [Qld. ss.10A, 32(1)-(2); Qld. 1887, s.6.]

- (1) The Registrar must maintain the Register, and register particulars of-
- (a) every parcel of land brought under this Act;
 - (b) every estate and interest required or permitted by this Act to be registered for each parcel;
 - (c) the name of the person who holds and at any time has held a registered estate or interest in each parcel;
 - (d) all instruments required to be registered under this Act;
 - (e) indorsements of the dates and times of the lodgment and of the registration of these instruments; and
 - (f) any other matter required or permitted by this or any other Act to be registered.
- (2) The Registrar must register an instrument lodged in conformity with this Act unless the instrument is withdrawn by the person who lodged it.
- (3) When registering particulars under section 23(1)(e), the Registrar may determine the date and time of lodgment of an instrument lodged through the post or document exchange service.

24. Form of Register. [Qld. ss.32(3)-(8).]

- (1) A distinguishing reference is to be allocated in the Register to an estate or interest in each parcel of land and indorsed on the certificate of title in respect of that estate or interest.
- (2) The whole or part of the Register may be maintained on paper, microfilm, computer, or other medium or device used for storing information.
- (3) The Registrar may maintain a separate list within the Register of registered leasehold estates, to be called a Lease Register.
- (4) The Registrar must maintain a separate part of the Register for registered powers of attorney.

- (5) The Registrar may copy any part of the Register by microfilm or by other means.
- (6) A microfilm or other copy under section 24(5) forms part of the Register once the Registrar certifies it to be an accurate copy.
- (7) Information recorded in one part of the Register may with the authority of the Registrar be recorded or deleted from other parts of the Register.

25. Other records not part of Register. [Qld. s.32A.]

The Registrar may maintain separately from the Register appropriate indexes and supplementary information for the effective operation of the Register or of the Office.

26. Entitlement to search Register. [Qld. ss.121,122.]

- (1) A person who pays or whose account has been debited with the prescribed fee is entitled, at reasonable times to be appointed by the Registrar, to-
 - (a) have access to information in the Register;
 - (b) a statement of any of the particulars in the Register;
 - (c) a copy of an instrument in the Register;
 - (d) information from lists and records maintained under sections 24 and 25;
 - (e) search and obtain a copy of an instrument which has been lodged, whether or not it has been cancelled, unless the instrument has been destroyed under section 107;
 - (f) a certified copy of a registered instrument, signed and sealed by the Registrar; and
 - (g) a certified statement of particulars, signed and sealed by the Registrar.
- (2) In this section the term "certified copy" includes a photostatic copy, a print reproduced from a microfilm and a computer print-out.

27. Evidentiary effect of documents. [Qld. ss.7,8,122; Qld. 1884, s.6.]

- (1) A certified copy or statement obtained under section 26(1)(f) and (g) is evidence of all matters in the registered instrument and of particulars, respectively.
- (2) A document that appears to have been issued or written by the Registrar or Deputy Registrar of Titles and signed or sealed by the Registrar or Deputy Registrar of Titles is without further proof to be taken to have been issued or written or signed or sealed by or with the authority of the Registrar.

Clause 29 reflects current Titles Division procedures concerning the issue of certificates of title.

Clause 29(4)(a) sets out what happens to a certificate of title if it is issued to a minor. This codifies the current practice by clarifying the ambit of existing legislation (section 33(3) RPA 1861-1990).

Clause 29(4)(b) is a new provision. It empowers any court of competent jurisdiction to order the Registrar to deal in a particular manner with a certificate of title issued to a minor.

- (3) A document or indorsement is sealed if it bears the impression of the signature and seal of the Registrar, which may be affixed, impressed or imprinted in any form of substance and by any means.

Division 2 - Certificate of Title

28. Form of certificate of title. [Qld. s.33.]

- (1) At the time of its issue, a certificate of title relating to land must reflect the particulars relevant to that land.
- (2) A certificate of title must contain particulars of all subsisting registered estates or interests in order of priority.
- (3) If an estate or interest of a minor is registered, the Registrar must indorse the minor's date of birth on the certificate of title.

29. Issuing of certificates of title generally. [Qld. ss.10A,49,94.]

- (1) The Registrar must register land by-
- (a) registering particulars of that land; and
 - (b) issuing, signing and sealing a certificate of title for the land.
- (2) The Registrar may issue a certificate of title at any time whether or not a request to do so has been made.
- (3) On issuing a certificate of title, the Registrar must also issue a duplicate certificate of title and deliver it to the person entitled to it.
- (4) If the person entitled to the duplicate certificate of title at the time the duplicate is issued is a minor, the Registrar must-
- (a)
 - (i) hold the duplicate certificate of title on the minor's behalf until the minor reaches eighteen years of age; and
 - (ii) on the request of the person in section 29(4)(a)(i), deliver the duplicate certificate of title to that person as soon as possible after that person's eighteenth birthday; or
 - (b) deal with it as a court may order.

- (5) The Registrar must not issue a new certificate of title for all or part of land until -
- (a) the existing duplicate certificate of title has been deposited and cancelled; or
 - (b) the Registrar has dispensed with the deposit of the existing duplicate certificate of title under section 108.
- (6) Where two or more instruments have been lodged, the Registrar may decline to issue a new certificate of title until all those instruments have been registered.
- (7) If separate parcels of land are in the name of the same proprietor and the parcels-
- (a) share a common boundary; or
 - (b) have a boundary which abuts the same part of a road or watercourse-
- the Registrar may at the request of the proprietor issue-
- (i) one certificate of title containing all the parcels; or
 - (ii) more than one certificate of title containing parcels selected by the Registrar.
- (8) Section 29(7) also applies to land that is not registered but is in the course of being brought under the Act.
30. Certificate of title after registering instrument. [Qld. ss.49,50; Qld. 1877, s.17.]
- (1) When registering any of the following instruments dealing with the whole of the fee simple in land-
- (a) a transfer;
 - (b) a mortgage; or
 - (c) a transfer of a registered mortgage -
- the Registrar must-
- (i) cancel the existing certificate of title and issue a new certificate of title; or
 - (ii) indorse particulars of the transfer or mortgage on the existing certificate of title and duplicate certificate of title and deliver the duplicate to the person entitled to it.
- (2) If the Registrar registers a transfer of land forming only part of the land in a certificate of title or grant, the Registrar must-
- (a) cancel the existing certificate of title;
 - (b) issue a new certificate of title for the part of the land transferred, and deliver the duplicate certificate of title to the transferee; and
 - (c) issue another new certificate of title for the part of the land not transferred, and deliver the duplicate certificate of title to the transferor.

COMMENTS ABOUT PART IV

This part describes the manner by which land is brought under the Torrens system.

Alienated Crown land is brought under the Torrens system through the registration of a grant by the Crown (clause 33).

Unregistered land belonging to the Commonwealth or a Commonwealth instrumentality can be brought under the Torrens system through the process outlined in clause 34.

This part also describes the subdivision of registered land through the registration of a plan of subdivision (clause 35).

31. Evidentiary effect of duplicate certificate of title. [Qld. ss.33(4),96.]

A duplicate certificate of title is conclusive evidence of the particulars it contains-

- (a) except in the circumstances described in section 115(1)(ii) and 115(3)(c) to (g); or
- (b) unless the particulars differ from those in the Register or a certified copy of the Register.

PART IV - REGISTRATION OF LAND

32. Registering land. [Qld. s.34(1).]

Land is under the Act and registered when particulars are registered.

33. Alienated Crown land to be registered. [Qld. s.15.]

- (1) All land in Queensland that is not registered remaining unalienated in fee simple from the Crown is, when alienated in fee simple, subject to the provisions of this Act.
- (2) The Registrar must register a grant that is lodged.

34. Registering Commonwealth land. [Qld. 1924, ss. 3-4, 6; Qld. 1929, ss.2-4,6.]

- (1) In this section -
 - (a) "Commonwealth land" means land that is not registered which is vested in the Commonwealth or in a Commonwealth instrumentality; and
 - (b) "Commonwealth Attorney-General" means the Attorney-General of the Commonwealth, or a person authorised to exercise the powers and functions of that Attorney-General.
- (2) The Commonwealth Attorney-General or a Commonwealth instrumentality may lodge an application requesting -
 - (a) that Commonwealth land be registered;
 - (b) that the Commonwealth or a Commonwealth instrumentality respectively be registered as the registered proprietor of land.
- (3) An application under section 34(2) must be accompanied by-
 - (a) a certified statement of the manner and circumstances of vesting, if the land became vested under the Commonwealth Constitution; and

- (b) in other cases, a certified copy of the notification of acquisition, vesting order, or other instrument or notice by which the land became vested -
together with such other evidence or information that the Registrar may require.
- (4) In section 34(3), "certified" means-
 - (a) if the land is vested in the Commonwealth, certified under the hand of the Commonwealth Attorney-General; or
 - (b) if the land is vested in a Commonwealth instrumentality, certified under the seal of that instrumentality.
- (5) If an estate in fee simple in Commonwealth land is transferred, the transferee may lodge an application requesting -
 - (a) that land be registered; and
 - (b) that the transferee be registered as proprietor of that land.
- (6) An application under section 34(5) must be accompanied by any evidence or information that the Registrar may require.
- (7) If satisfied that an applicant under sections 34(2) and 34(5) is the proprietor of the land described in the application, the Registrar must -
 - (a) register the land under section 32 if the application is made under section 34(2) or 34(5);
 - (b) register the application; and
 - (c) issue a certificate of title to the applicant.
- (8) When Commonwealth land is registered no assurance fee is payable.
- (9) The Registrar may note in the Register details of any matter under a Commonwealth Act that affects land.

35. Subdividing land. [Qld. s.119.]

- (1) In this section-
 - (a) "plan" means "plan of subdivision" ; and
 - (b) "lot" means a separate and distinct part of land subdivided according to a plan.
- (2) Land may be subdivided by registering a plan of the land.
- (3) The Registrar must not register a plan unless it-
 - (a) distinctly delineates all roads;
 - (b) bears the indorsement of the registered proprietor that the registered proprietor agrees to the plan and the registered proprietor dedicates to public use any new roads exhibited in the plan;

- (c) exhibits all lots marked with separate and distinct numbers or symbols;
 - (d) is certified as accurate by a licensed surveyor; and
 - (e) complies with the Surveyors Act 1977-1989.
- (4) If satisfied that a plan complies with section 35(3) and that the requirements of the Local Government Act 1936-1990 or the City of Brisbane Act 1924-1990 have been complied with, the Registrar must register-
- (a) the plan;
 - (b) details of any new road exhibited in the plan that is dedicated to public use; and
 - (c) any easement created under section 64.
- (5) A dedication of land to public use in a plan must-
- (a) be of the whole estate or interest dedicated by the registered proprietor except that part of land reserved below the surface; and
 - (b) vest the land in the Crown.
- (6) Land comprised in a registered plan must be transferred in one or more lots.
- (7) Once the plan is registered, the registered proprietor may apply for a separate certificate of title for one or more lots.
- (8) On application under section 35(7), the Registrar must issue one or more certificates of title for the land to which the application relates.
- (9) If a plan is lodged within the time in section 34 of the Local Government Act 1936-1990 and is withdrawn and relodged under section 103, it must be treated under sections 111(3)(c) and 112 as being lodged at the time and on the date that it was first lodged.
- (10) If a grant excludes a road or watercourse and that land is later subdivided so that part of the road or watercourse lies within a lot, the Registrar may-
- (a) register the plan; and
 - (b) issue a certificate of title for that lot.
- (11) If a grant excludes a road or watercourse and that land is later subdivided so that one or more lots abut the road or watercourse, the Registrar may-
- (a) register the plan; and
 - (b) issue separate certificates of title to lots that abut the road or watercourse.

COMMENTS ABOUT PART V

This part concerns the registration of life interests, remainder interests, joint tenancies and tenancies in common.

The clauses in this part provide for the issuing of certificates of title to the holders of these interests.

PART V - JOINT HOLDERS IN LAND

36. Registering life interests and remainders. [Qld. ss.36-39.]

- (1) On lodgment of an instrument of transfer of an estate or interest in land for life, the Registrar must register the transferee as proprietor of that estate or interest.
- (2) On request by the transferee the Registrar may issue a separate certificate of title for a life estate or interest.
- (3) If a person is registered as the proprietor of a life estate or interest, another person may apply to be registered as the proprietor of an estate or interest in remainder.
- (4) If the Registrar is satisfied that the applicant in section 36(3) is entitled to the estate or interest in remainder, the Registrar must register the applicant as a proprietor of that estate or interest.
- (5) If the application in section 36(4) is accompanied by the existing duplicate certificate of title, the Registrar must cancel that duplicate and issue a new certificate of title.
- (6) If the Registrar is satisfied that-
 - (a) a registered life estate has determined by transfer, death or other means; and
 - (b) a person who is a registered proprietor of an estate or interest in remainder or a purchaser has become entitled to an estate in fee simple in possession-the Registrar must, upon request of the person in paragraph (b), cancel the existing certificate of title and issue a new certificate of title.
- (7) The provisions of this section apply as if the certificate of title had been cancelled following a transfer or transmission.

37. Registering co-proprietors. [Qld. s.40.]

- (1) On registering an instrument transferring an estate or interest to co-proprietors, the Registrar must also register the co-proprietors as holding their estates or interests as tenants in common or as joint tenants.
- (2) Two or more persons holding an estate or interest in land as tenants in common do not receive separate certificates of title unless-
 - (a) the Registrar is requested by all tenants in common to issue separate certificates of title; or
 - (b) section 37(3) applies.

Clause 38 is a new provision which enables one joint tenant to sever a joint tenancy.

Although section 92 RPA 1861-1990 provides for partition of a joint tenancy, an instrument of transfer must be executed by both or all joint tenants. This, of course, is of no assistance if one party is unwilling to sever.

Clause 38 will be particularly useful where a couple, who are registered as joint tenants of property, separate or divorce. Unless the joint tenancy is severed, on the death of one joint tenant the other joint tenant will take by survivorship. The parties may not desire this result.

On separation or divorce (or indeed at any other time), a joint tenant may unilaterally sever the joint tenancy provided that the simple procedure outlined in **clause 38** has been carried out.

COMMENTS ABOUT PART VI

Division I - Transfers

Clause 39 sets out those features which must be present in a transfer for the transfer to be registrable.

The remaining clauses set out the rights of and - in the case of transfers of registered mortgages and leases - the liabilities that are imposed on a transferee once a transfer is registered.

- (3) If a registered proprietor of land subject to a time-sharing scheme proposes to transfer to each participant in that scheme an interest as tenant in common with other participants, the Registrar may issue-
 - (a) separate certificates of title for each interest; or
 - (b) one certificate of title for several interests-
in the name of the registered proprietor.
- (4) In this section "time-sharing scheme" means a scheme under which participants are to have exclusive possession of land for discontinuous periods of time.

38. Severing joint tenancy.

- (1) A joint tenancy of land is severed by registering a request to sever.
- (2) The Registrar must register a request to sever if a registered proprietor of land who is beneficially entitled as a joint tenant -
 - (a) lodges a request to sever; and
 - (b) satisfies the Registrar that the request has been personally served on all other joint tenants.
- (3) When more than two joint tenants are beneficially entitled, a severance by one does not sever the joint tenancy of the others.
- (4) At the time the request to sever is registered, the registered proprietor who lodged the request becomes entitled as a tenant in common.

PART VI - DEALINGS DIRECTLY AFFECTING LAND

Division I - Transfers

39. Registering a transfer. [Qld. ss.48,65.]

- (1) Land may be transferred by registering an instrument of transfer that-
 - (a) is signed and witnessed;
 - (b) refers to the grant or certificate of title of the land;
 - (c) gives a description sufficient to identify the portion of land to be transferred;
 - (d) contains an acknowledgment of the amount or form of consideration and, if in money, whether it has been paid; and
 - (e) contains a description of the estate or interest to be transferred and a memorandum of all mortgages, estates and interests that will subsist after registration of the transfer.

Division 2 - Leases

This division, which deals with the effect of registering a lease and the way in which registered leases can be varied and determined, makes a number of changes to the present law.

Clause 42 of the Bill incorporates concepts dealt with in section 52 RPA 1861-1990 and sections 11 and 18 RPA 1877-1990.

(a) Validity of unregistered long-term lease

Because of the wording used in the first paragraph of section 52 RPA 1861-1990, an unregistered lease that is not short-term will be void (Hill v Cox (1882) 1 Q.L.J. 78).

*This has not been adopted in **clause 42** of the Bill. An unregistered long-term lease will not be void at law. To obtain the protection of indefeasibility, however, the long-term lease must still be registered.*

(b) Consent of mortgagee to lease

The second paragraph of section 52 RPA 1861-1990 says that a lease of land entered into after the land has been mortgaged will not be "valid and binding against the mortgagee" unless the consent of the mortgagee to the lease has been obtained. Although this paragraph does not state whether it applies to both short and long-term leases, it has been held to apply only to long-term leases (The English, Scottish and Australian Bank Ltd v The City National Bank Ltd [1933] St. R. Qd. 81).

In relation to short-term leases also, the consent of a prior registered mortgagee must be obtained for the lease to be binding on the mortgagee (The English, Scottish and Australian Bank Ltd v The City National Bank Ltd (supra)).

- (2) A registered mortgage or a registered lease may be transferred by registering the relevant instrument of transfer.

40. Effect of transfer. [Qld. ss.43,65,66.]

- (1) A registered transfer under section 39 vests in the transferee all rights, powers and privileges of the transferor affecting the land.
- (2) The registered transferee of a registered mortgage is bound by and liable under the mortgage to the same extent as the original mortgagee.
- (3) From the time the transferee of a registered lease is registered, the transferee becomes bound by and liable under the lease to the same extent as the original lessee.
- (4) In this section "rights" includes the right to sue on the covenants and terms in a mortgage or lease and to recover a debt or enforce any liability under the mortgage or lease.

41. Transfer of mortgaged land. [Qld. s.68; Qld. 1877, s.19.]

- (1) If land subject to a registered mortgage is transferred, the transferee is liable-
 - (a) to comply with the covenants conditions and terms-
 - (i) in the mortgage; and
 - (ii) implied by this or any other Act; and
 - (b) to indemnify the transferor against liability under the mortgage or under this or any other Act.
- (2) All or part of the covenants in section 41(1) may be varied or excluded by a term in the instrument of transfer.
- (3) If land is transferred to a mortgagee of the land, the Registrar must issue a certificate of title which is released from that mortgage, on lodgment of a request to do so.

Division 2 - Leases

42. Registering a lease. [Qld. s.52, Qld. 1877, s.18.]

- (1) Land may be leased by registering an instrument of lease.
- (2) An unregistered lease of land is valid to the extent specified in section 115.

Clause 42(3) reflects this Supreme Court decision. Because of the definition of "lease" in **clause 7**, **clause 42(3)** applies to both short and long-term leases.

Clause 43 facilitates the variation of a registered lease. It is based on the equivalent provision for the variation of a registered mortgage (**clause 51** of the Bill and section 79 PLA 1974-1990).

There is no equivalent to this clause in existing legislation. Currently, if the parties want to register a variation of lease, they must terminate the lease and register a new one.

Clause 44 also has no equivalent in the current legislation. It was inserted to simplify the process of recording and searching lease interests where there are a number of leases on land in one certificate of title.

Clauses 45 and 46 allow for the determination of a registered lease when the lessor has re-entered the land or the lessee has surrendered the lease.

- (3) A lease or a variation of a lease executed after registration of a mortgage of the land is not valid against the mortgagee unless-
 - (a) the mortgagee consents unconditionally to the lease or variation; and
 - (b) the consent is indorsed on the lease or variation.

43. Varying a lease.

- (1) In this section, "term" includes any period of possession resulting from the exercise of an option to renew in a registered lease or resulting from a registered variation extending the term of a lease.
- (2) A registered lease may be varied by registering an instrument of variation of lease.
- (3) An instrument of variation may not be lodged after the term of the lease has expired.
- (4) An instrument of variation may not-
 - (a) increase or decrease the area of the leased land; or
 - (b) alter a party to the lease.
- (5) The procedure for variation in this section is in addition to other rights that do not contradict this Act.

44. Lease Register.

- (1) If there are many dealings with registered leases of land comprised in a certificate of title, the Registrar may list those dealings in a Lease Register.
- (2) A reference to a Lease Register must be noted on the certificate of title and the registered lease.
- (3) A Lease Register forms part of the Register.

45. Re-entry by lessor. [Qld. s.72.]

- (1) On lodgment of a request and if satisfied that a lessor has re-entered and taken possession of land under a registered lease, the Registrar must register the re-entry.
- (2) On registration of the re-entry-
 - (a) the interest of the lessee determines; and
 - (b) any duplicate or triplicate lease accompanying the request under section 45(1) must be cancelled.
- (3) Unless otherwise agreed, determination of the lease under this section does not release the lessee from obligations under the covenants in the lease.

Clause 47 expands on the current section 55 RPA 1861-1990: it applies not only where a person is a bankrupt under the Bankruptcy Act 1966 (Cth), but also where a company liquidator disclaims under the Corporations Law (Qld).

Division 3 - Mortgages

This division starts with a list of elements that an instrument must contain to be registrable as a mortgage.

It proceeds to define the effect of registration of a mortgage and the means by which registered mortgages can be varied (in content and priority) and released.

The clauses in this division retain -

- . the statutory power of the mortgagee to foreclose on a defaulting mortgagor;*
- . the way to register a transfer of the mortgaged land;*
- . the statutory right of equitable mortgagees to protect their interests by the lodgment of a caveat.*

46. Surrendering a lease. [Qld. ss.54,55.]

- (1) A registered lease may be wholly or partly surrendered by registering an instrument of surrender of the lease executed by the lessee and lessor.
- (2) If an instrument of surrender of the lease is lodged or the Registrar is satisfied that a lease has been surrendered by operation of law, the Registrar must register the instrument and the date of surrender stated in the instrument and indorse the duplicate certificate of title.
- (3) A lease cannot be surrendered without the written consent of-
 - (a) every mortgagee; and
 - (b) every sub-lessee-
of the lessee.
- (4) Once a surrender of lease is registered, the estate or interest of the lessee vests in the lessor or other person entitled.
- (5) This section does not apply to a surrender or disclaimer under a law concerning bankruptcy.

47. Disclaimer in bankruptcy. [Qld. s.55.]

On lodgment of-

- (a) notification of disclaimer of a lease or other interest in land under a law concerning bankruptcy; and
- (b) a request to register the disclaimer-
the Registrar must, if satisfied of the disclaimer, register it.

Division 3 - Mortgages

48. Registering a mortgage. [Qld. s.56.]

- (1) Land may be mortgaged by registering an instrument of mortgage.
- (2) An instrument of mortgage must-
 - (a) be signed and witnessed;
 - (b) identify the estate or interest to be charged;
 - (c) refer to the description of the land in the certificate of title; and
 - (d) identify any other mortgage affecting the land.

Clause 51 facilitates the variation of a registered mortgage. Although section 79 PLA 1974-1990 also provides for the variation of mortgages, it was considered appropriate to insert the power to vary mortgages over registered land in the Bill.

No alteration to the policy of the current legislation has been made.

In practice, registered mortgagees over the same land may wish to change the order of priority between themselves. For example, there are two mortgagees, A (being first in time), and B. The mortgagor may seek a further advance from B to develop the mortgaged property. B may be willing to make the advance only if he or she is entitled to become the first mortgagee.

A may agree to B's advance and to allow B to become the first mortgagee if the advance by B will enhance the value of the property, and therefore, the value of A's security.

To make a change in priorities of registered mortgagees, the mortgagees can execute a deed of priority. However, current legislation does not allow such a deed to be registered.

Clause 52 of the Bill makes this allowance.

49. Effect of mortgage. [Qld. s.60.]

A registered mortgage operates only as a charge on the land for the debt or liability secured.

50. Equitable mortgage by deposit. [Qld. 1877, ss.30,30A.]

- (1) An equitable mortgage of land may be created by depositing a grant or duplicate certificate of title with the mortgagee.
- (2) A mortgagee under this section may lodge a caveat forbidding registration of an instrument affecting the land other than subject to the equitable mortgage.
- (3) A mortgagee lodging a caveat under section 50(2) must produce the grant or duplicate certificate of title at the time of lodgment.
- (4) The caveat under section 50(3) must state -
 - (a) the nature of the equitable mortgage; and
 - (b) either the amount or a description of the liability that the equitable mortgage secures.

51. Varying a mortgage.

- (1) A registered mortgage may be varied by registering an instrument of variation of mortgage.
- (2) An instrument of variation may not-
 - (a) increase or decrease the area of land encumbered by the mortgage; or
 - (b) alter a party to the mortgage.

52. Varying priority of mortgages.

- (1) The priority of registered mortgages may be varied by registering an instrument of priority.
- (2) The instrument of priority must set out the order in which all registered mortgages are to rank.
- (3) The instrument of priority must be executed by all mortgagees except those whose mortgage is not affected by the variation.
- (4) Once the variation of priority is registered, the mortgages have priority in the order set out in the instrument.

Clause 55 represents a change in policy concerning the liability of a mortgagee in possession of a leasehold interest. It replaces section 62 RPA 1861-1990.

Under section 62 RPA 1861-1990, a mortgagee entering into possession becomes liable to the full extent of the lessee's obligations to the lessor under the lease. Therefore, if the financial obligations of the mortgagee in possession under the lease exceed the rents and profits received while in possession, the mortgagee must pay this difference to the lessor out of its own funds.

Clause 55(2) removes this anomaly. The liability of the mortgagee in possession under the lease will be limited to "benefits receipts and profits received during the period of possession".

On the current wording of section 62, it has been suggested that the liability of the mortgagee in possession may include the liability of the lessee for wrongful acts of the lessee toward the lessor which are unrelated to the lease.

Clause 55 of the Bill removes this doubt. Reference to the liability of the mortgagee is limited by **clause 55(1)** to liability "under the lease".

53. Powers of mortgagee. [Qld. ss.57,60.]

- (1) A mortgagee of registered land has the powers and liabilities of a mortgagee under part VII of the Property Law Act 1974-1990.
- (2) If the mortgagor defaults under a registered mortgage, a mortgagee may -
 - (a) take possession of the mortgaged land in a manner that does not infringe section 70 of the Criminal Code;
 - (b) enter into possession of the mortgaged land by receiving the rents and profits; or
 - (c) by proceedings in a court -
 - (i) obtain possession of the mortgaged land;
 - (ii) foreclose the right of the mortgagor to redeem the mortgaged land;
 - (iii) obtain an order of court for sale of the mortgaged land.
- (3) The powers in this section are in addition to any other powers exercisable by the mortgagee.

54. Effect of transfer after sale by mortgagee. [Qld. s.58.]

Registration of a transfer executed by a registered mortgagee following exercise of power of sale under the mortgage-

- (a) vests in the transferee, freed from liability under that mortgage and any other mortgage registered after it, the estate or interest of the mortgagor that is transferred; and
- (b) entitles the transferee to a certificate of title for the estate or interest transferred.

55. Liability of mortgagee in possession of leased land. [Qld. s.62.]

- (1) A mortgagee of a leasehold interest in registered land who enters into possession of the land, whether by taking the rents or profits or other means, is liable to the same extent as the lessee under the lease before the mortgagee entered into possession.
- (2) The liability of the mortgagee under the lease in section 55(1) is limited to benefits, receipts and profits received during the period of possession.
- (3) Section 55(2) does not affect the duties of a mortgagee in possession.

56. Releasing a mortgage. [Qld. s.63; Qld. 1877, s.19.]

- (1) On production of the duplicate mortgage and lodgment of an instrument releasing-

Division 4 - Easements

Except for a limited class of public utility easements, this division restricts the manner by which easements over registered land can be created.

Clause 57 allows easements to be created through registration of an instrument of easement. With two exceptions, registration of plans upon which easements are designated will not be sufficient to create an easement.

In this draft, a restrictive covenant may not be registered.

The current legislation is silent about the registration of restrictive covenants. The Supreme Court in Norton v Kilduff [1974] Qd R. 47 held that a restrictive covenant was not an easement under section 44 RPA 1861-1990. If "easement" is interpreted in this way throughout the RPA 1861-1990, a restrictive covenant cannot be registered as an easement under the present legislation.

Clause 58 has been inserted to put the matter beyond doubt.

- (a) all or part of the mortgage;
 - (b) all or part of the mortgaged land; or
 - (c) one or more of the mortgagors-
- from the debt or liability secured, the Registrar must register the release to the extent stated in the instrument of release.
- (2) The Registrar must also indorse the release on the duplicate mortgage and certificate of title.
 - (3) Once a release of mortgage is registered-
 - (a) the mortgage is discharged; and
 - (b) the land is released from the mortgage-
 to the extent stated in the instrument of release.

Division 4 - Easements and other incorporeal rights

57. Registering an easement. [Qld. s.119A.]

- (1) In this division "easement"-
 - (a) includes an incorporeal right whether in fee simple or for life or arising under a lease; and
 - (b) does not include a mortgage.
- (2) An easement over land may be created by registering an instrument of easement.
- (3) An instrument of easement in section 57(2) that benefits or burdens land may be registered although it also affects land that is not registered.
- (4) An instrument of easement in favour of-
 - (a) the State or any Crown corporation or instrumentality of the State;
 - (b) the Commonwealth or any Commonwealth instrumentality;
 - (c) a local authority; or
 - (d) a person authorised by any Act-
 may be registered.
- (5) The Registrar must register particulars of-
 - (a) the land burdened by the easement; and
 - (b) the land, if any, benefited by the easement -
 including particulars of any registered lease benefited or burdened.

58. Restrictive covenants. [Qld. s.51.]

A restrictive covenant may not be registered.

As was the case with registered leases and mortgages, it was considered appropriate to insert clauses to enable a registered easement to be both varied and surrendered (clauses 60 and 59 respectively).

There appears to be some doubt whether it is possible for a person to register an easement where that person is the registered proprietor of both the land benefited and burdened by the easement. There is no provision in the RPA of 1861-1990 or 1877-1990 which governs this situation.

To put the matter beyond doubt, clause 61 of the Bill has been inserted. Clause 61 allows registration of an instrument of easement where the benefit and burden of the easement are held by the same person. Under this clause any rights and obligations contained in the instrument will become enforceable when the registered proprietor of the burden of the easement is a different person to the registered proprietor of the benefit of the easement.

Provision is made for the extinguishment of the easement in the circumstances listed in clause 61(3).

Section 119A RPA 1861 - 1990, in essence, says that the registration of a plan does not create an easement. This is reproduced in clause 62.

59. Surrendering an easement.

A registered easement may be wholly or partly surrendered by registering an instrument of surrender of easement.

60. Varying an easement.

A registered easement may be varied by registering an instrument of variation of easement.

61. Easement benefiting proprietor's land.

- (1) An instrument of easement over land under which the proprietors of the benefit and the burden of the easement are the same person may be registered.
- (2) Rights and obligations under an instrument of easement registered under this section become enforceable when the registered proprietor or proprietors of land having the burden of the easement and the registered proprietor or proprietors of land having the benefit of the easement cease to be the same person or persons.
- (3) A registered easement is not extinguished because the same person becomes registered proprietor of land having the benefit and land having the burden of an easement, unless-
 - (a) the registered proprietor requests its extinguishment; or
 - (b) the land benefited is amalgamated under section 29(7) with land burdened by the easement.

62. Effect on easement of registering plan. [Qld. s.119A(1).]

Registration of a plan cannot create an easement unless it is a plan described in-

- (a) section 64 of this Act; or
- (b) section 119A(5) of the Real Property Act 1861 - 1990.

63. Registering plan showing proposed easement. [Qld. s.119A(2).]

- (1) A plan designating a proposed easement may be registered if-
 - (a) the designation incorporates the words "proposed easement"; and
 - (b) the Registrar, when registering the plan, inserts the word "proposed" before any written reference to the easement.

*The draft Bill does, however, allow for the creation of a limited class of easements through registration of a plan of subdivision. The easements which can be created under this new provision are listed in **clause 64(3)**. They are easements which are necessary to adequately service a subdivided lot.*

*Clause 64 sets out the manner in which such easements are created (**clause 64(4)**) and the registration procedure to be adopted by the Titles Division (**clause 64(5)**).*

*The registered proprietor of the land appropriated for the easement is entitled under **clause 64(6)** to a reasonable contribution for the cost of maintaining the land in a fit condition for the enjoyment of the easement. This contribution, however, may be varied under **clause 64(7)**.*

It should also be noted that the power to modify or extinguish an easement under section 181 PLA 1974-1990 applies to an easement under part VI division 4 of the Bill.

- (2) A designation or reference in section 63(1) -
 - (a) does not create an easement; and
 - (b) is not evidence of a present intention to create an easement.

64. Creating an easement by plan of subdivision.

- (1) In this section, "plan of subdivision" means a plan of subdivision in section 35.
- (2) An easement may be created by registering a plan of subdivision that appropriates land for that purpose.
- (3) If a plan of subdivision is registered after the commencement of this section, a person, including a person or instrumentality under section 57(4), is entitled to the benefit of easements-
 - (a) of way;
 - (b) for drainage;
 - (c) for the supply of water, gas, electricity, sewerage pipes and telephone lines; and
 - (d) for the supply of other identified services to the lot-
on, over or under land appropriated for that purpose on the plan of subdivision.
- (4) Land may be appropriated under section 64(3) by -
 - (a) designating the land burdened by the easement on the plan of subdivision;
 - (b) marking on the designated area the word "easement" (or an abbreviation of "easement") followed by one or more of the purposes listed in section 64(3); and
 - (c) marking the designated area with both the lot number of the land and the name of the person or instrumentality benefited by the easement.
- (5) The Registrar must register a plan creating an easement referred to in section 64(4) on the certificates of title issued for the land benefited and burdened by the easement.
- (6) The registered proprietor of land appropriated for the purpose of an easement under section 64(3) may recover from the person or instrumentality registered as having the benefit of the easement a reasonable contribution to the cost of maintaining the land in a condition fit for enjoyment of that easement.
- (7) Liability to contribute under section 64(6) may be varied or excluded by agreement of those registered as having the burden and the benefit of the easement.
- (8) Section 181 of the Property Law Act 1974-1990 applies to an easement under this Division.

Division 5 - Adverse Possession

Applications by people to become registered as proprietors of any registered or unregistered land held by them through adverse possession are determined by the Titles Division.

*The thrust of **clause 66** is to ensure that the Registrar can require the provision of sufficient evidence to determine whether or not a claimant is an adverse possessor and therefore entitled to be registered as proprietor of land.*

When the Registrar intends to register an adverse possessor, all registered proprietors of and other parties purporting to have an interest in land claimed by an adverse possessor must, of course, be given an opportunity to dispute the claim. The division focuses upon how this challenge can be made.

Division 5 - Application by Adverse Possessor

65. Definitions and application. [Qld. 1952, s.47.]
- (1) In this division-
 - (a) "adverse possessor" means a person-
 - (i) against whom the time for bringing an action to recover land under the Limitation of Actions Act 1974-1981 has expired; and
 - (ii) who, apart from this Act, is entitled to remain in possession of that land;
 - (b) "action to recover land" includes an action to redeem a mortgage of the land; and
 - (c) "applicant" means a person who, in an application under section 66(1), claims to be an adverse possessor.
 - (2) An application may not be made under this division if it concerns land that is an encroachment as defined in section 183 of the Property Law Act 1974-1990.
66. Applying for registration. [Qld. 1952, ss.46,50-53,60.]
- (1) A person may apply to be registered as proprietor of land by lodging an application under this division.
 - (2) An application under section 66(1) cannot be made by a personal representative of a person who could claim to be an adverse possessor.
 - (3) An application under section 66(1) must be accompanied by-
 - (a) any grant, certificate of title or other documents of title relevant to the land that is in the possession or under the control of the applicant; and
 - (b) a plan of a survey of the land if required by the Registrar.
 - (4) The Registrar may require the applicant to supply additional information or documents to support an application under section 66(1).
 - (5) The Registrar may require the additional information or documents in section 66(4) to be verified by oath or statutory declaration.
 - (6) An applicant may withdraw an application at any time before the applicant is registered under this division.
 - (7) If an applicant withdraws an application under section 66(6), the Registrar must, if requested by the applicant, return all documents lodged or deposited in support of the application.

Clause 68 increases the possibility that the claim made by an adverse possessor will come to the attention of the relevant registered proprietors. If the land is registered, the Register will contain the name, (but probably not the current address) of the registered proprietors. In addition to advertising, the Registrar's obligation prior to registering an adverse possessor as proprietor has been extended by requiring the Registrar to serve written notice on the registered proprietor where this is possible.

A registered proprietor and any other interest holder will continue to have the right to protect his or her interest by lodging a caveat. **Clause 69** outlines this right.

If the Registrar is not satisfied that the caveator has an estate or interest in the land, the Registrar cannot register the adverse possessor until the caveator has been given notice that the caveator has six months to bring court proceedings to adjudicate the merit of the caveator's claim to the land (**clause 70**).

67. Refusal of application. [Qld. 1952, s.54.]

The Registrar must refuse to register an applicant as proprietor if the information and documents in support of the application do not establish that the applicant is an adverse possessor.

68. Advertising before registration. [Qld. 1952, s.55.]

- (1) The Registrar must notify an intention to register an adverse possessor as proprietor of land-
 - (a) by advertisements placed under section 21(2); and
 - (b) if possible, by serving written notice on all registered proprietors.
- (2) The advertisements in this section must state that a named adverse possessor will be registered as proprietor of designated land unless a caveat is lodged by a specified date which is not less than two months and not more than six months from the date the last advertisement is published.

69. Objecting by caveat. [Qld. 1952, s.56(1).]

- (1) A person who claims an estate or interest in land to which an application under section 66(1) relates may lodge a caveat at any time before the applicant is registered as proprietor of the land.
- (2) The Registrar may require information and documents in support of the caveat from the caveator.
- (3) The Registrar may require the information or documents under section 69(2) to be verified by oath or statutory declaration.

70. Lapsing of caveat. [Qld. 1952, s.56(3)-(4).]

- (1) If not satisfied-
 - (a) that the caveator has an estate or interest in the land; or
 - (b) that the time in which the caveator is allowed to bring an action to recover the land from the applicant has not expired-
 the Registrar must give notice to the caveator requiring that proceedings to recover the land be brought within six months.
- (2) A caveat under this division lapses unless-
 - (a) within the time allowed under section 72(2)(b), or in the notice under section 70(1) the caveator-
 - (i) commences proceedings to recover the land; and
 - (ii) gives written notice to the Registrar that proceedings have been commenced; and

*Where the Registrar is satisfied that the caveator has an estate or interest in the land, the Registrar must, under **clause 72** take into account the objection made to the claim by the caveator. After hearing the objection, the claim by the adverse possessor can be refused or, with the consent of the caveator, compromised. If the caveator does not consent to the compromise, the caveator must commence proceedings in the manner set out in **clause 72(2)** to prevent the caveat from lapsing (**clause 70(2)**).*

*If the caveator loses the court proceedings under **clauses 70** or **72** or does not start the proceedings by the time stated, under **clause 73** the Registrar has an unfettered discretion to register the adverse possessor as proprietor of all or part of the land.*

- (b) judgment in those proceedings is given in favour of the caveator and any appeal from that judgment is dismissed or withdrawn.

71. Reviving or replacing caveat. [Qld. 1952, s.56(5).]

Except by leave of the Court, a caveator must not revive or replace a caveat that-

- (a) lapses under section 70; or
- (b) is withdrawn, cancelled or removed under part VII, division 2- with another caveat concerning the same or substantially the same estate or interest.

72. Refusing or compromising the application. [Qld. 1952, s.56(2).]

- (1) If satisfied that the caveator has an estate or interest in the land that has not been extinguished under the Limitation of Actions Act 1974-1981, the Registrar may after taking into account any objection by the caveator to registration of the applicant-

- (a) refuse to register the applicant as proprietor of that part of the land in which the caveator has an estate or interest; or
- (b) register the applicant as the holder of a lesser estate or interest in land which, in the opinion of the Registrar, appropriately reflects-
 - (i) the use made of the land by the applicant; and
 - (ii) the period of time during which the applicant has used the land-

provided that the caveator consents to this registration.

- (2) If the caveator does not consent under section 72(1)(b), the caveator must commence proceedings to recover the land within 14 days of receiving written notification of the Registrar's intention to register the applicant as proprietor of the land.

73. Registering adverse possessor as proprietor. [Qld. 1952, s.57.]

- (1) If the Registrar is satisfied that the applicant is an adverse possessor of all or part of the land, and-
 - (a) no caveat has been lodged within the time limit advertised in section 68(2); or

Division 6 - Trusts, deceased estates and bankruptcy

(i) Trusts

There currently appears to be doubt about the status of a trust or a schedule of trust which is lodged in the Titles Division. The Bill attempts to clarify the position.

*A nomination of trustees is retained by **clause 74** to effect either a transfer of the land to a trustee or the declaration by the registered proprietor that the land will be held in trust. This nomination of trustees may be registered.*

The current practice is to give details of the trust to the Registrar in one of following ways -

- (a) Deposit at the Titles Division a copy of the trust deed creating the trust, when lodging the nomination of trustees; or*
- (b) Attach to the nomination of trustees a schedule setting out the details of the trust. If this method is used, a trust deed will not be deposited with the Titles Division.*

Section 79 RPA 1861 - 1990 provides that the Registrar shall not record trusts in the Register.

However, there appears to be some confusion about whether a schedule in alternative (b) forms part of the Register.

It can be argued that the schedule forms part of and is incorporated into the nomination of trustees. It would therefore form part of the Register as soon as the nomination of trustees was registered.

Others believe it has a status independent of the nomination of trustees. It forms the same function as a trust deed by merely notifying the Registrar of the trust in broad terms. The trust deed is recognised as not forming a part of the Register. The schedule, too, should receive this recognition.

***Clause 74(5)** puts this matter beyond doubt. The schedule will be replaced by a document setting out details of the trust. Neither this document nor the trust deed will form part of the Register.*

***Clause 74(4)** represents a change of policy.*

As mentioned, the current practice is for the lodging party to give details of the trust, either through the trust deed itself or a schedule to the nomination of trustees.

*The Commission considers that there is no purpose served by requiring these details to be deposited with the Titles Division. Once a trustee is registered, the protection of indefeasibility is obtained and the trustee may deal with the land (Trusts Act 1973-1988). Accordingly, **clause 74(4)** gives the lodging party a discretion whether or not to deposit the trust deed or a document setting out details of the trust.*

- (b) a caveat was lodged within the time limit advertised in section 68(2) but-
 - (i) has lapsed under section 70; or
 - (ii) has been withdrawn, cancelled or removed under part VII, division 2-
and has not been revived or replaced under section 71-
 the Registrar may register the applicant as proprietor of all or the relevant part of the land.
- (2) If the Registrar registers an applicant as proprietor of land under section 73(1), the Registrar must-
 - (a) cancel the registration of the person previously registered as proprietor of the land; and
 - (b) issue in the name of the applicant a new certificate of title free of all other estates or interests in the land.

Division 6 - Trusts, deceased estates and bankruptcy.

74. Declarations of trust and transfers to trustees. [Qld. ss.77-79.]

- (1) A trust of land may not be registered or recorded except as permitted by this section.
- (2) A registered proprietor may lodge an instrument, called a nomination of trustees, to-
 - (a) transfer an estate or interest in land to a trustee; or
 - (b) declare that the registered proprietor holds the estate or interest in land as trustee.
- (3) The Registrar must register the instrument in section 74(2).
- (4) A document setting out details of the trust, or the document creating the trust, may be deposited with the instrument in section 74(2).
- (5) The documents in section 74(4) do not form part of the Register.

75. Registering personal representative. [Qld. 1877, s.32.]

- (1) On lodgment of an application under section 77, land of a registered proprietor who has died may be registered in the name of the applicant who-
 - (a) has obtained a grant of representation or the resealing of the grant of representation in Queensland; or
 - (b) if no grant has been made, would in the opinion of the Registrar succeed in an application for a grant of representation.

(ii) *Deceased Estates*

Clauses 75,76 and 77 outline the process for registering a personal representative of a registered proprietor who has died or a beneficiary of land under the will of a deceased registered proprietor. They outline the circumstances which must be present to allow the Registrar to register.

Clause 77 sets out the form an application by a personal representative or beneficiary seeking registration must take. There has been no significant alteration to existing legislation in this area.

The following points, however, should be noted in **clause 75**.

(a) *Resealing grant of representation*

Clause 75(1)(a) deals with the application to be registered as proprietor by a person who has obtained a "grant of representation". "Grant of representation" is defined in **clause 7(2)** to mean a grant of probate or letters of administration, including the grant of an order to administer and the filing of an election to administer by a trust corporation.

There is currently some doubt about whether "grant of representation" as used in section 32 RPA 1877-1990 includes the resealing of the grant of representation in Queensland.

The words "or the resealing of the grant of representation in Queensland" have been inserted in **clause 75(1)(a)** to clarify the situation.

(b) *Advertising requirements*

Under the current legislation, the Titles Division is given no discretion about whether advertising is required prior to registering a person as proprietor following the death of the registered proprietor.

If the application to be registered is made by a person who has obtained the grant of probate or grant of administration or other authority of the Supreme Court (section 32(1) RPA 1877-1990), the Registrar may register the applicant without advertising.

In contrast, all applications by a "personal representative" where no grant of probate or administration or other authority of the Supreme Court has been obtained (section 32(2) RPA 1877-1990), or by a beneficiary, must be advertised prior to registration (section 33 RPA 1877-1990).

Clause 21(1)(c) gives the Registrar discretion whether to advertise prior to registering an applicant as proprietor. For example, if there has not been any advertisements to obtain grant of representation, the Registrar may decide that the intention to register the transmission should be advertised.

- (2) The Registrar must not register a person under section 75(1) unless -
 - (a) the grant or resealing of representation or an office copy of that grant is produced;
 - (b) where the person has died without a will -
 - (i) letters of administration of the estate have not been granted in Queensland within six months of the death; and
 - (ii) the gross value of the Queensland estate of the deceased was no more than the prescribed amount at the time of the death; or
 - (c) in any other case, the Registrar is of the opinion that the person would succeed in an application for a grant of representation.
- (3) In section 75(2)(b)(ii), the prescribed amount is the amount fixed by Order in Council.
- (4) A person registered under this section has the same rights, powers and liabilities concerning the land as if a grant of representation had been made to that person.
- (5) The validity of an act done or payment by a person registered under this section is not affected by a subsequent grant of representation.
- (6) If the grantee of a grant of representation is different from the person previously registered under section 75(2)(b) and (c), the person registered under this section must-
 - (a) account to the grantee for all property of the deceased controlled by that person before the grant; and
 - (b) take all action necessary to transfer to the grantee all property of the deceased remaining under the control of that person.

76. Registering beneficiary. [Qld. 1877,s.32.]

- (1) On lodgment of an application the Registrar may register as proprietor a person beneficially entitled under a will to the land of a registered proprietor who has died.
- (2) To be registered under this section a person must -
 - (a) produce the written consent of the person referred to in section 75(1); and
 - (b) satisfy the Registrar of beneficial entitlement to the land.

(c) *Prescribed value of gross estate*

Clause 75(3) has removed the \$50,000 ceiling currently in section 32(2)(a) of the RPA 1877-1990. Presently, the Registrar cannot register a personal representative administering a deceased estate of more than \$50,000. This is unrealistically low. Few homes, for instance, would cost less than \$50,000.

Given the fluctuations in the property market, a set ceiling was not thought desirable. **Clause 75(3)** allows the ceiling to be set and re-set with speed and ease, through an order by the Governor in Council.

Clause 78 basically consolidates sections 89 RPA 1861-1990 and 46 RPA 1877-1990.

Importantly, the Supreme Court continues to retain jurisdiction to supervise claims made under trusts or in cases of land owned by deceased proprietors. Upon application this Court has power to order that a particular person be registered as proprietor.

Under the proposed legislation, the Attorney-General is also entitled to apply to the Court for an order that a named person be registered as proprietor.

(iii) *Bankruptcy*

The law in this area is unchanged.

77. Form of application. [Qld. 1877, s.32.]

An application in sections 75 and 76 must state-

- (a) the estate or interest for which registration is sought;
- (b) the land to which the application refers; and
- (c) the nature of other estates or interests in that land which are known to the applicant.

78. Applying for Court order. [Qld. ss.83,89; Qld. 1877, ss. 32,46.]

- (1) An application to the Court for an order that a named person be registered as proprietor of land may be made by -
 - (a) a trustee or beneficiary under a trust;
 - (b) a personal representative, a devisee, a trust corporation or any other person interested in -
 - (i) land of a deceased registered proprietor;
 - (ii) a trust involving land of a deceased registered proprietor; or
 - (c) the Attorney-General.
- (2) In proceedings under section 78(1), the Court may make any order that is just including an order that-
 - (a) a person be registered as proprietor of land;
 - (b) a person be removed from the Register as the proprietor of land;
 - (c) a caveat be lodged to protect a person's interest in land;
 - (d) a person advertise in a specified form, content or manner; and
 - (e) costs be paid by any person or out of any property.
- (3) The Registrar must register particulars of an order under section 78(2) if-
 - (a) an office copy of the order is produced; and
 - (b) the Registrar receives a request to do so.
- (4) Until an order under section 78(2) is registered, it does not vest an estate or interest in land.

79. Transmission on bankruptcy. [Qld. s.86.]

The Registrar must register a transmission of land resulting from bankruptcy if a request is lodged and the Registrar is satisfied of the transmission.

COMMENTS ABOUT PART VII

Division 1 - Writs of execution

Normally, a transfer of land will not be registrable unless the registered proprietor executes the transfer.

This division allows the Sheriff to transfer registered land when a writ of execution over that land has been registered without any involvement by the registered proprietor. A transferee from the Sheriff can become registered following lodgment of a transfer executed by the sheriff.

There has been very little change to the policy of the legislation about the registration and sale of land under writs of execution.

Clause 80(2) states that "writ of execution" includes a warrant of execution issued out of the District Court and magistrates court (District Court Rules - rr 287-291 and Magistrates Courts Rules - rr 238-240).

Although there is not an equivalent section in the current legislation, writs of execution under section 91 RPA 1861-1990 are presently interpreted as extending to warrants of execution issued out of the District Court and magistrates court.

The only policy change in this area relates to the time within which a sale must be carried out by the Sheriff.

Under section 91 RPA 1861-1990, the Sheriff must sell the land within three months of the date upon which a writ of execution was registered. The writ loses its effect after this time.

Critics say that this period is too short. Accordingly, clause 81(1)(b) of the Bill has extended the period to six months.

PART VII - OTHER DEALINGS

Division 1 - Writs of execution

80. Registering a writ of execution. [Qld. s.91.]

- (1) A judgment must not be registered.
- (2) In this division, "writ of execution" means a writ of execution after judgment and includes a warrant of execution after judgment in a District Court or magistrates court.
- (3) A writ of execution must be registered if-
 - (a) a request to register the writ is lodged; and
 - (b) an office copy of the writ of execution is lodged.

81. Effect of registering a writ of execution. [Qld. s.91.]

- (1) As regards purchasers and creditors, a writ of execution-
 - (a) does not until registered bind or affect registered land whether or not there is actual or constructive notice of the writ; and
 - (b) does not bind or affect registered land unless the writ is executed and put in force-
 - (i) within six months from the date of its lodgment; or
 - (ii) within such further time as may be allowed by a Judge and notified to the Registrar.
- (2) The Registrar may cancel registration of a writ of execution after the time in section 81(1)(b) has expired.

82. Discharging or satisfying writ of execution. [Qld. s.91.]

Discharge or satisfaction of a writ of execution may be registered if-

- (a) a request to register it is lodged; and
- (b) the Registrar is satisfied that the writ has been discharged or satisfied.

83. Transfer of land sold in execution. [Qld. 1877, s.35.]

- (1) When land is sold under a registered writ of execution, the Sheriff or the registrar of a District Court must execute an instrument of transfer to the purchaser.

Division 2 - Caveats

The Torrens system confers upon the holders of registered interests virtually complete protection from the holders of unregistered interests.

However, people holding legitimate unregistered interests should not have their rights disregarded, particularly if their interests have arisen through dealings with or actions of a registered proprietor.

A balance is needed between paramountcy of title and fairness. Caveats provide this balance by providing a period of time during which most instruments cannot be registered to allow for competing registered and unregistered interests to be reconciled.

*To be registrable, a caveat must be in the form described in **clause 84**. This clause makes no change to the current format.*

However, most other clauses of the Bill reflect policy change. Some changes result in a re-alignment of the balance between paramountcy of title and fairness. Other changes are procedural.

***Clauses 85 (e) and (f)** have introduced two new classes of people who are entitled to lodge caveats. First, a person to whom a court has ordered that an interest in land be transferred is entitled to caveat. Secondly, a person having the benefit of a subsisting court order preventing a registered proprietor dealing with the land may lodge a caveat.*

These two classes of people have been significantly disadvantaged in the past. After the trouble and expense of taking court proceedings to establish or protect an interest in land, and obtaining a court order against the registered proprietor of that land, these people have been unable to lodge caveats to protect their interests. The consequence has been that the registered proprietor is free to disregard the persons's interest. The registered proprietor may sell the land irrespective of the court order.

This inequitable result discredits both our courts and our legal system. It must not be allowed to continue.

The Commission understands that the practice is prevalent in family law disputes. Therefore, the right to caveat has been extended to enforce both State and Federal court decisions involving registered land in Queensland.

***Clause 85 (d)** has also been inserted to allow a registered proprietor to lodge a caveat. This does not represent a change of policy and merely reflects current practice.*

- (2) When a transfer under section 83(1) is registered, the transferee becomes the registered proprietor of the land subject to-
- (a) registered estates or interests; and
 - (b) equitable mortgages notified by caveat lodged before registration of the writ.

Division 2 - Caveats

84. Form and contents of caveat. [Qld. s.100; Qld. 1877, s.36.]

- (1) A caveat must be signed by the caveator or an agent of the caveator.
- (2) A caveat must state-
- (a) the name of the caveator;
 - (b) an address at which documents can be served on the caveator;
 - (c) unless the Registrar dispenses with it, the name and address of -
 - (i) the registered proprietor of the land affected by the caveat; and
 - (ii) any other person having the right to deal with the land affected by the caveat;
 - (d) the registered estate or interest affected by the caveat;
 - (e) if the caveat relates to only a part of registered land, a description of that affected part;
 - (f) the estate or interest claimed by the caveator; and
 - (g) the grounds on which the estate or interest is claimed.

85. Lodging a caveat. [Qld. s.98; Qld. 1877, s.30A.]

A caveat may be lodged by -

- (a) a person claiming an estate or interest in land;
- (b) an equitable mortgagee under section 50;
- (c) the Registrar under section 17(10);
- (d) the registered proprietor of the land;
- (e) a person to whom a court in Australia has ordered that an estate or interest in land be transferred; or
- (f) a person who has the benefit of a subsisting order of a court in Australia restraining a registered proprietor from dealing with land.

86. Notifying caveat. [Qld s.99.]

The Registrar must send written notification of lodgment of caveat by certified mail to a person whose estate or interest or whose right to registration of an instrument is affected by the caveat.

Clause 87 of the Bill incorporates section 101 RPA 1861-1990 which deals with the effect of lodging a caveat. Both list those instruments which can be registered irrespective of a caveat.

Clause 87(1)(d) introduces a new provision. Under this exception, a mortgagee registered before the lodgment of a caveat will be able to transfer that mortgage notwithstanding the existence of the caveat. This exception could be particularly useful where an instalment purchaser lodges a caveat under section 74 PLA 1974-1990.

Most caveats are presently lodged under section 98 RPA 1861-1990. This section prohibits the Registrar from registering all but those types of instruments listed in section 101, even if the instrument does not affect the particular estate or interest claimed by the caveator.

Clause 87(1)(e) will allow the Registrar to register an instrument if the estate or interest claimed by the caveator is not affected.

In this regard, a caveat will have the same effect as a caveat presently lodged by an equitable mortgagee under section 30A RPA 1877-1990.

Although an instrument may fall within one of the categories which can be registered notwithstanding the caveat, the Registrar presently (see section 101 RPA 1861-1990) retains a discretion not to register the instrument.

It is difficult to justify the exercise of this discretion. The discretion has not been retained in **clause 87**.

Real property legislation is presently silent about whether a caveat can be withdrawn. However, regulation 2 and form 22 currently facilitate the withdrawal of a caveat by the lodging party. This practice is given legislative sanction in **clause 88** of the Bill.

A caveat bars the registration of documents until it lapses.

In Re Ocean Downs Pty Limited (In Liquidation)'s Caveat [1989] 1 Qd R. 648 the Supreme Court held that a caveat lodged by a registered proprietor was not a non-lapsing caveat.

Subsequently, section 39(2) RPA 1877-1990 was enacted. The effect of this section is to make a caveat lodged by a registered proprietor non-lapsing.

Clause 89 (1)(a) of the Bill retains section 39(2) RPA 1877-1990.

Other types of non-lapsing caveats are listed in **clauses 89(1)(b)-(e)**. All other caveats are capable of lapsing.

87. Effect of lodging caveat. [Qld. s.101.]

- (1) Lodgment of a caveat prevents registration of an instrument affecting the land except -
 - (a) an instrument stated in the caveat to be excepted;
 - (b) an instrument to the registration of which the caveator consents in writing;
 - (c) an instrument described in section 87(2);
 - (d) an instrument of transfer of mortgage executed by a mortgagee whose estate or interest was registered before lodgment of the caveat; and
 - (e) any other instrument which, if registered will not affect the estate or interest claimed by the caveator -
until the caveat lapses or is withdrawn or removed or cancelled.
- (2) Section 87(1)(c) refers to an instrument executed by a mortgagee whose estate or interest was registered before the lodgment of the caveat where -
 - (a) the mortgagee has power under the mortgage to execute the instrument; and
 - (b) the caveator claims an estate or interest in the land as security for the payment of money.
- (3) The exceptions in sections 87(1)(c) and (d) do not apply to a caveat by the Registrar.

88. Withdrawing a caveat.

A caveator may withdraw a caveat by lodging a request to do so.

89. Lapsing of caveat. [Qld. 1877, s.39.]

- (1) A caveat lapses unless -
 - (a) it is lodged by the registered proprietor;
 - (b) it is accompanied by the written consent of the registered proprietor at the time it is lodged;
 - (c) it is lodged with an office copy of a court order in sections 85(e) or (f);
 - (d) it is lodged by an equitable mortgagee under section 50(2);
 - (e) it is registered by the Registrar under section 17(10); or
 - (f) the caveator complies with section 89(4) and a court orders that the caveat is not to lapse.
- (2) A caveatee may serve on the caveator a notice requiring court proceedings to establish the estate or interest claimed under the caveat.

Under section 39 RPA 1877-1990, a caveator can prevent a caveat from lapsing if, within three months of lodging the caveat -

- (a) proceedings are commenced to establish title of the caveator; and*
- (b) the Registrar is advised of the commencement of proceedings.*

*Currently a person interested in the land is able to bring proceedings to have the caveat removed (sections 98 RPA 1861-1990 and 38 RPA 1877-1990). **Clause 90** preserves the right of the caveatee to bring these proceedings.*

However, there is no provision for requiring the caveator to commence proceedings to establish title earlier than three months.

Therefore, unless the caveatee is prepared to undertake the expense of court action, an unmeritorious caveator will be able to stop the registration of any dealings in the land conducted by the caveatee for a period of three months.

The onus should be on the caveator to establish a claim. Three months is an unduly long time to allow this claim to be brought.

***Clause 89** of the Bill will enable a caveatee (defined widely in **clause 7**) to require the caveator to commence proceedings within 14 days.*

Under the current legislation, a caveat will not lapse once proceedings have been commenced unless the court orders otherwise. The court will only order the caveat to lapse on the application of one of the parties.

*Under the proposed **clause 89 (1)(f)**, the process is reversed. A caveat will lapse unless the court orders that it is not to lapse.*

A caveat will not lapse if proceedings have been taken by the caveator to establish title prior to the lodgment of the caveat (Re Dallyn Investments Pty Limited [1989] 1 Qd R. 121). In other words, the proceedings do not have to commence in the three months from the date of lodgment of the caveat.

***Clause 89(5)** of the Bill reflects this current case law position.*

- (3) The caveatee must notify the Registrar within 14 days of service of a notice under section 89(2).
- (4) A caveator relying on section 89(1)(4) must-
 - (a) commence proceedings in a court to establish the claim under the caveat-
 - (i) within 14 days of service by the caveatee of a notice under section 89(2); or
 - (ii) if notice under section 89(2) is not served, within 3 months of the date of lodgment of the caveat; and
 - (b) notify the Registrar within that time that proceedings have commenced and identify the proceedings.
- (5) A caveator need not comply with section 89(4)(a) if proceedings in a court to establish the claim under the caveat were commenced before the date of its lodgment.
- (6) The Registrar may remove from the Register a caveat that has lapsed.
- (7) This section does not apply to a caveat lodged under part VI, division 5.

90. Removing a caveat. [Qld. s.99; Qld. 1877, s.38.]

- (1) A caveatee may at any time apply to a Judge for an order that a caveat be removed.
- (2) An order may be made under this section-
 - (a) whether or not the caveator has been served with notice of the application; and
 - (b) on terms that are just.

91. Cancelling a caveat. [Qld. s.102.]

- (1) The Registrar may cancel a caveat if a request is lodged and if satisfied that-
 - (a) the estate or interest claimed by the caveator has ceased or the claim to it has been abandoned or withdrawn;
 - (b) the claim of the caveator has been settled by agreement or otherwise satisfied; or
 - (c) the nature of the estate or interest claimed does not entitle the caveator to prevent registration of an instrument that has been lodged.
- (2) The Registrar must notify the caveator not less than seven days before cancelling a caveat.

Clause 92 incorporates section 40 RPA 1877-1990 by prohibiting the lodgment of a second caveat on the same or substantially the same grounds as the first caveat.

Unlike section 40, however, a second caveat on the same or substantially the same grounds may be lodged with leave of a Judge of the Supreme Court.

In addition, section 40 does not refer to caveats that have been withdrawn or removed. These words have been inserted in the new provision to protect registered proprietors from the possibility of malicious caveators. For instance, a caveator could withdraw, then re-lodge, a caveat every thirteen days without becoming liable to commence proceedings to establish his or her claim. The lodged and re-lodged caveats would bar the registered proprietor from dealing with the land until the registered proprietor could obtain a court order to remove the caveat.

Clause 94 expands on section 37 RPA 1877-1990. **Clauses 94(2)-(4)** have been inserted to assist the Registrar in serving notices on the caveator.

- (3) If a lodged instrument will on registration give full effect to an estate or interest claimed in a caveat, the Registrar may immediately before registering that instrument remove the caveat-
- (a) without a request to do so; and
 - (b) without a fee being paid or debited.

92. Further caveat. [Qld. 1877, s.40.]

Except by leave of a Judge, a person may not lodge a caveat on a ground that is the same or substantially the same as that relied on in a caveat previously lodged by that person which has lapsed or has been withdrawn, or cancelled or removed.

93. Compensation for improper caveat. [Qld. s.103.]

- (1) A person who-
 - (a) lodges; or
 - (b) maintains-
 a caveat without reasonable cause must compensate any other person who sustains loss as a consequence.
- (2) In proceedings for compensation under section 93(1), a court may include in a judgment for compensation a component for exemplary damages.
- (3) In proceedings for compensation under section 93(1), proof that a caveat was not lodged or was not maintained without reasonable cause rests on the person who lodged or maintained the caveat.

94. Notices to the caveator. [Qld. s.100.]

- (1) A notice to a caveator under this division is sufficiently served if left or sent to the address in section 84(2)(b).
- (2) If the Registrar is satisfied that a notice under this division will not reach the caveator if served in the manner described in section 94(1), the notice may be served in a manner specified in a written direction from the Registrar.
- (3) If the Registrar is reliably informed in writing that the name or address of the caveator has changed, the Registrar must note on the caveat details of the new name or address.
- (4) A new name or address noted under section 94(3) becomes the name or address for service of a notice on the caveator.

Division 3 - Powers of attorney and disabilities

This division primarily focuses upon when a power of attorney can be registered, and the benefits flowing from its registration.

Unlike present legislation, this Bill (clause 96) does not require the Registrar to record details of the power of attorney as it affects particular land (see section 104 RPA 1861-1990). This change reflects current Titles Division practice.

Clause 97 was not intended to change existing policy concerning registered powers of attorney. Section 107(ii) and (iii) RPA 1861-1990 talk of the effect of the death and insolvency respectively of the donor of a general power of attorney. Clause 97(4), however, limits these considerations to the effect on the Registrar and on the duty to register a document executed under a power of attorney.

Where an instrument is executed under a registered power of attorney and is lodged for registration, the Registrar may register the instrument without proof that the power of attorney is still current (clause 97(3)). For example, the Registrar does not have to obtain proof that the donor of the power is still alive.

However, if the donor has died and a transmission of death has been registered, the Registrar is not permitted to register an instrument executed after registration of the transmission (clause 97(4)).

In the period between the death of the donor and the registration of the transmission of death, nothing in the Bill prevents the Registrar from registering an instrument executed under power of attorney.

Division 3 - Powers of attorney and disabilities

95. Power of attorney. [Qld. s.104.]

- (1) A registered proprietor of land may by registering a power of attorney authorise a person to deal with that land in any manner permitted by this Act.
- (2) To the extent that it is consistent, part IX of the Property Law Act 1974-1990 applies to powers of attorney in this division.

96. Registering a power of attorney. [Qld. s.104.]

- (1) On lodgment of a request and production of a power of attorney described in section 95(1), the Registrar must register the power of attorney.
- (2) The Registrar must retain a copy of a registered power of attorney, and return the original to the person who produced it.

97. Effect of registering a power of attorney. [Qld. ss.104,107,108.]

- (1) An act done by the donee -
 - (a) under the authority of; and
 - (b) in conformity with the terms of -a registered power of attorney has the same effect as if done or made by the donor of the power.
- (2) A registered power of attorney is evidence that the donee is authorised to perform any act within the terms of the registered power of attorney.
- (3) With the exception of section 97(4), the Registrar may register an instrument executed under a registered power of attorney without being satisfied that the power of attorney has not been revoked.
- (4) The Registrar must not register an instrument executed under a registered power of attorney if the instrument became effective after-
 - (a) registration of an instrument of revocation of the power of attorney; or
 - (b) another person is registered as proprietor under part VI, division 6 following the death or bankruptcy of the donor.

Clause 98 of the Bill enables a donee of the power of attorney to register a disclaimer of the power. A donee is not able to do this under existing legislation.

The only substantive alteration that **clause 99** makes to section 111 RPA 1861 - 1990 is that the authorisation to a person to act on behalf of another may come from any court of competent jurisdiction, not just the Supreme Court.

COMMENTS ABOUT PART VIII

This part deals with all instruments received in the Titles Division; for instances mortgages or leases creating new interests in land, requests to the Registrar to act in a particular way, and plans of surveys of lands.

Division 1 - General

In part III, the powers of the Registrar to maintain the Register were set out.

This division deals primarily with instruments lodged at the Titles Division prior to registration. Most of the clauses concern powers given to the Registrar to ensure that the instruments, once registered, reflect accurately the dealing with or description of land. They are provisions which will assist the Registrar in maintaining the accuracy of the Register.

The division allows the Registrar to-

- . require a certificate of title to be lodged prior to registering a particular instrument (clause 100);*
- . correct instruments (clause 101);*
- . require more information about apparently incomplete or incorrect instruments prior to registration (clause 101);*
- . withdraw instruments temporarily and relodge them in an order which will give effect to the priorities of registration intended by the parties (clause 103);*

98. Revoking or disclaiming a power of attorney. [Qld. s.108.]

- (1) A power of attorney registered before or after the commencement of this section may be revoked by registering an instrument of revocation or disclaimer.
- (2) Section 98(1) applies to enduring powers of attorney to the extent that revocation of the power of attorney is allowed under section 175C of the Property Law Act 1974-1990.

99. Persons under a disability. [Qld. s.111.]

A court may authorise a person to act on behalf of a registered proprietor who, because of-

- (a) age;
- (b) infirmity;
- (c) mental or intellectual impairment; or
- (d) disease-

appears to the court not to be able to administer land.

PART VIII - INSTRUMENTS

Division 1 - General

100. Lodging duplicate certificate of title. [Qld. s.49.]

- (1) An instrument must not be registered until the relevant duplicate certificate of title is lodged.
- (2) A duplicate certificate of title need not be lodged with any of the following-
 - (a) an application that a person be registered as the holder of an estate or interest in remainder under section 36(3);
 - (b) a request to sever a joint tenancy under section 38;
 - (c) a transfer of a registered lease under section 39 that is not accompanied by the lessor's consent;
 - (d) an application to register a person who claims to be an adverse possessor as registered proprietor under section 66;
 - (e) a request to register a transmission or bankruptcy under section 79;
 - (f) a request to register a writ of execution under section 80;
 - (g) a caveat under section 84;
 - (h) a request to register a power of attorney under section 96;
 - (i) an instrument for which the Registrar has dispensed with production of the duplicate certificate of title under section 108.

require plans to be lodged in support of dealings with registered land (**clause 106**);

dispense with the production of certain instruments normally required before registration of certain transactions (**clause 108**).

This division also confers on members of the public who have lodged instruments power to borrow them from the Titles Division (**clause 102**) and to obtain a substitute to replace a lost instrument (**clause 105**).

The manner in which instruments should be executed is set out in **clause 104**.

Clause 100 reflects section 49 RPA 1861 - 1990. Unlike section 49, however, **clause 100** exhaustively lists the instruments which may be lodged for registration unaccompanied by the duplicate certificate of title.

101. Correcting and requisitioning instruments. [Qld. s.112(1)-(2), (4)-(10).]

- (1) The Registrar may correct an obvious error in a lodged plan of survey by-
 - (a) drawing a line through the error without making the original words illegible;
 - (b) writing in the correct information; and
 - (c) dating and initialling the correction.
- (2) The Registrar may correct an obvious error in an instrument other than a plan of survey by noting the correction in the margin of the instrument.
- (3) An instrument corrected by the Registrar under section 101(1) and (2) has the same validity and effect as if the error had not been made.
- (4) A person who has lodged at the Office an instrument may be required, in writing by the Registrar-
 - (a) to arrange for re-execution, completion or correction of an instrument that appears to the Registrar to be wrong, incomplete or defective; or
 - (b) to furnish specified information or documents in support of an application to register an instrument that in the opinion of the Registrar is not correct for registration or for the purpose for which it was lodged.
- (5) A requisition to a person under section 101(4) must be served on that person or the agent of that person.
- (6) In a requisition, the Registrar may fix a time within which the person must comply.
- (7) The Registrar may extend the time fixed under section 101(6).
- (8) If a requisition has been served, the Registrar may refuse to deal with the instrument until the requisition has been complied with.
- (9) If a requisition is not complied with within the time allowed by the Registrar under this section, the Registrar may reject -
 - (a) the instrument to which the requisition relates; and
 - (b) any other instrument that depends on it for registration.
- (10) An instrument rejected under section 101(9) -
 - (a) loses its entitlement to priority under section 112; and
 - (b) must be returned by the Registrar to the person or the agent of that person.

The policy change made to section 113 RPA 1861-1990 is to enable an instrument that was lodged by mistake, rather than simply in the wrong order, to be withdrawn. Where such an instrument is withdrawn, clause 103 says that it does not have to remain in the Titles Division.

- (11) A memorandum recording the rejection of an instrument under section 101(9) may be indorsed on the rejected instrument or in a separate record kept in the Office.
- (12) A fee paid on lodgment of a subsequently rejected instrument may be forfeited and dealt with by the Registrar under section 15 and the regulations.
- (13) After forfeiture of a fee under section 101(12), a fee amounting to-
 - (a) half the lodgment fee excluding any fee based on the value of the land; and
 - (b) the requisition fee -
 is payable on relodgment of an instrument rejected under section 101(9).
- (14) This section does not prevent relodgment of an instrument after the requisition has been complied with.

102. Borrowing lodged instrument. [Qld. s.112(3).]

- (1) The Registrar may permit-
 - (a) a person who lodged an instrument;
 - (b) a person on whose behalf an instrument was lodged; or
 - (c) an agent of a person in section 102(1)(a) or (b)-
 to borrow the lodged instrument before it is registered unless it is a duplicate certificate of title.
- (2) A person who has borrowed an instrument under section 102(1) must return it to the Office within the time fixed in a demand made by the Registrar orally or in writing.
- (3) A person who without reasonable cause fails to comply with a demand made under section 102(2) is guilty of an offence.
Penalty: units.

103. Withdrawing lodged instrument. [Qld. s.113.]

- (1) If the Registrar is satisfied that an instrument has been lodged in a sequence that will not give effect to the intention expressed in it or a related instrument, or is an instrument that should not have been lodged, the Registrar may-
 - (a) withdraw the instrument; or
 - (b) permit the instrument to be withdrawn.
- (2) An instrument withdrawn under section 103(1), unless the instrument is one that should not have been lodged, remains in the Office but loses priority under section 112 until relodged.

- (3) The Registrar may relodge an instrument withdrawn under section 103(1)(a).
- (4) On receiving a written application, the Registrar may relodge an instrument withdrawn under section 103(1)(b).
- (5) Except for a plan of subdivision in section 35(9), an instrument is to be taken for the purpose of sections 111(3)(c) and 112 to have been lodged at the time and on the date indorsed on it by the Registrar at the time of its relodgment.

104. Execution and proof. [Qld. ss. 114-116; Qld. 1867, s.37.]

- (1) In the case of a corporation, an instrument is validly executed if-
 - (a) it is executed in the prescribed manner; and
 - (b) the common seal of the corporation is affixed in the manner described in section 46 of the Property Law Act 1974-1990.
- (2) In cases other than corporations, an instrument is validly executed if-
 - (a) it is executed in the prescribed manner; and
 - (b) the execution is witnessed by a person in the fourth schedule.
- (3) The witnessing of an instrument may be proved by any means permitted under law.

105. Replacing lost instrument. [Qld. s.117.].

- (1) On lodgment of a request the Registrar may if satisfied that a registered instrument has been lost or destroyed, register and issue a substitute instrument.
- (2) Once a substitute instrument has been issued under section 105(1)-
 - (a) the original instrument ceases to be evidence of the registered particulars;
 - (b) the substitute instrument becomes the registered instrument in place of the original instrument; and
 - (c) the substitute instrument retains the priority to which the original instrument was entitled.
- (3) The Registrar must record in the Register-
 - (a) the fact that the substitute instrument has been issued; and
 - (b) the date that the substitute instrument was issued.
- (4) The Registrar must indorse upon the substitute instrument-
 - (a) that the instrument is a substitute replacing a lost or destroyed instrument;
 - (b) the date that the substitute instrument was issued;
 - (c) the location of the original instrument so far as it is known; and

Clause 106 does not represent a change in policy to section 120 of the RPA 1861-1990. Under **clause 106(3)**, however, there is an additional requirement for a plan lodged to comply with the Surveyors Act 1977-1989.

Although section 95 RPA 1861-1990 and **clause 108** are drafted quite differently, there has been no change in the policy in this area. While section 95 is drafted in very broad terms, it is only used by the Registrar in the circumstances listed in **clause 108**.

Clause 108 has been drafted to clarify section 95 by listing the instances where the Registrar exercises power to dispense with the production of instruments.

- (d) that the substitute is to be used in place of the original instrument.
 - (5) Before issuing a substitute instrument, the Registrar may advertise under section 21.
106. Requiring plan to be deposited. [Qld. s.120.]
- (1) The Registrar may require a registered proprietor of land proposing to transfer, lease or deal with all or part of the land to lodge a plan of the land.
 - (2) A plan required to be lodged under section 106(1), must be certified as accurate by a licensed surveyor under the Surveyors Act 1977-1989.
 - (3) A plan required under this section or section 35 must comply with the provisions of the Surveyors Act 1977-1989.
107. Destroying instrument in certain circumstances. [Qld. s.46A.]
- (1) The Registrar may destroy a part of the Register or an instrument held in the Office that-
 - (a) (i) is not evidence of a subsisting interest; or
 - (ii) is evidence of a subsisting interest of which there is accurate evidence in another part of the Register;
 - (b) will not be required for registering the effect of a transaction; and
 - (c) has been copied by microfilm or other means and certified by the Registrar as an accurate copy under section 24(6).
 - (2) The Registrar may return a suitably perforated cancelled duplicate certificate of title to the person who, immediately before its cancellation, was entitled to it.
 - (3) The Registrar's powers under section 107(1) and (2) may be exercised irrespective of other requirements under this Act.
 - (4) The Registrar's power under section 107(1) must be exercised in conformity with the Libraries and Archives Act 1988-1990.
108. Dispensing with production of instrument. [Qld. s.95.]
- (1) The Registrar may, on lodgment of an application and if satisfied that it is reasonable to do so, dispense with the production of the-
 - (a) duplicate and triplicate leases if registration of a surrender of lease is sought under section 46;

Division 2 - Contents of instruments

This division imposes on a person who is transferring or creating an interest in land, a duty to perform the obligations set out in the transfer or other instrument creating the interest.

*Additional terms or conditions can be implied into the transfer or other instrument creating the interest by **clause 110**.*

***Clause 110** reproduces section 76A RPA 1861 - 1990 with only minor amendments.*

The first amendment arises from the wording of section 76A(1). Section 76A(1) refers to a memorandum setting out provisions which are capable of being "covenants and conditions" in an instrument.

The words "covenants and conditions" were considered by the Supreme Court in Re Westpac Banking Corporation [1987] 1 Qd R. 300. The decision for the Court was whether these words included terms in a memorandum, some of which could not be classed as "covenants and conditions" in the strict sense of the words.

de Jersey J. held that although there were clauses in the memorandum that were not covenants or conditions, the Registrar was entitled to record the memorandum. Section 76A(1) did not provide that "the only provisions of a memorandum which are to be recorded are to be provisions of that character".

*In order to make the section reflect more accurately current practice, **clause 110(1)** uses the words "covenants, conditions or terms".*

*In addition, **clause 110** modifies section 76A by allowing the Registrar to cancel a memorandum (**clause 110(8)**) and by allowing the party who lodged the memorandum to request its withdrawal (**clause 110 (7)**).*

- (b) duplicate mortgage if registration of a variation of mortgage is sought under section 51;
 - (c) duplicate mortgage if a release of mortgage is sought under section 56(1);
 - (d) duplicate certificate of title if the Registrar is satisfied that the duplicate no longer exists; or
 - (e) nomination of trustees if any dealing with land is lodged.
- (2) The Registrar may require evidence that a person seeking to deal with the land is the registered proprietor and that the instrument to which the application relates is not deposited as security or for safe custody.
 - (3) Before dispensing with the production of an instrument, the Registrar may advertise under section 21.
 - (4) The Registrar must record in the Register that production of an instrument has been dispensed with.

Division 2 - Contents of instruments

109. Implied covenants. [Qld. s.67.]

In an instrument transferring or creating an estate or interest in land for valuable consideration, the person transferring or creating the estate or interest is obliged to do everything necessary to give effect to the covenants, conditions, terms and matters expressed in the instrument or implied by this or any other Act.

110. Incorporating provisions from registered document. [Qld. s.76A.]

- (1) In this section, "document" means a document containing provisions that can be construed as covenants, conditions or terms of the instrument to which it is to apply.
- (2) The Registrar or any other person may lodge a document under this section and may amend that document by lodging a further document.
- (3) A document lodged under this section must be given a distinguishing reference and must be registered.
- (4) A document registered under this section forms part of the Register for the purposes only of sections 24(2), 24(5), 24(6), 24(7) and 26.
- (5) All or part of a registered document, or an amended document, forms part of an instrument if the instrument-
 - (a) says so; and

COMMENTS ABOUT PART IX

This part is the cornerstone of real property law.

It describes the benefits and consequences of the registration of estates and interests in land.

Most importantly, it confers on registered proprietors an interest which cannot be topped, unless one of eight exceptions are present.

The following text sets out the Commission's recommendations.

- (b) belongs to a class identified in the document as an instrument to which that document applies.
- (6) In addition to section 110(5), an instrument may include a provision incorporating other covenants and conditions in the instrument.
- (7) The Registrar may withdraw a document registered under section 110(3) if requested to do so by the person who lodged it.
- (8) The Registrar may cancel a document if satisfied that there is good reason for doing so after giving-
 - (a) in the case of a document lodged by the Registrar, 14 days notice in the Gazette; or
 - (b) in any other case, 14 days notice to the person who lodged the document.
- (9) The Registrar must retain and, if requested, produce for inspection a copy of a document cancelled or withdrawn under this section.
- (10) Withdrawal or cancellation of a document does not affect an instrument executed within seven days of its withdrawal or cancellation.

PART IX - REGISTRATION OF INSTRUMENTS AND ITS EFFECT

Division 1 - Registration of instruments

111. Process of registration. [Qld. ss.34(2), 35; Qld. 1877, ss. 12,14,15.]

- (1) When registering an instrument, the Registrar must-
 - (a) indorse the relevant particulars in the Register; and
 - (b) sign and seal the indorsement.
- (2) An instrument is registered as soon as the particulars are registered and indorsed, signed and sealed.
- (3) When registered, an instrument-
 - (a) forms part of the Register;
 - (b) operates as a deed; and
 - (c) operates from the date and time it is lodged.

Clause 114(1) and (2) reflect the first part of section 43 RPA 1861 - 1990.

Clause 114(3) reflects section 48 RPA 1877 - 1990 which confers a right to registration upon a person to whom an estate or interest has been transferred (such as a purchaser), or in whom an estate or interest has been created (such as a mortgagee).

Clause 114(3)(ii) of the Bill was inserted to clarify when the right to registration will arise. No alteration to policy has been made.

Clause 114(4) was inserted to clarify the position concerning volunteers. This subclause confers the benefits of **clause 114** on a volunteer.

- (4) If one or more copies of an instrument must be lodged-
 - (a) when the original is registered, section 111(3)(a) applies; and
 - (b) the remaining copy or copies must be delivered by the Registrar to the person entitled.

112. Priorities of registration. [Qld. 1877, s.12.]

- (1) Except as provided in sections 103 and 105 instruments-
 - (a) must be registered in the sequence in which they are lodged; and
 - (b) have priority according to the date and time each of them was lodged and not according to the dates on which each of them was executed.
- (2) Actual, implied or constructive notice does not affect the operation of this section.

113. Evidentiary effect of indorsement. [Qld. s.45.]

In all proceedings, an instrument indorsed, signed and sealed under section 111(1) is conclusive evidence of -

- (a) registration of the instrument;
- (b) the contents of the instrument;
- (c) all covenants, conditions and terms expressed or implied in it by this or any other Act; and
- (d) the dates and times that the instrument was lodged and registered.

Division 2 - Consequences of registration

114. Effect of registration. [Qld. s.43; Qld. 1877, s.48.]

- (1) An instrument does not transfer or create an estate or interest in land at law or affect the land until it is registered.
- (2) On registration of an instrument, the estate or interest to which the instrument refers -
 - (a) is registered;
 - (b) is transferred or created in conformity with the instrument and this or any other Act; and
 - (c) vests that estate or interest in the person identified in the instrument as the person entitled to it.

Clause 115 is the indefeasibility provision of the Bill. It replaces sections 44, 109 and 123 RPA 1861-1990, and sections 11 and 51 RPA 1877-1990. Together with part VI division 5, it also replaces The Real Property Acts Amendment Act 1952-1990 dealing with adverse possession.

This clause incorporates the sections dealing with indefeasibility into one provision, leaving the substantive effect of the existing legislation unchanged. The doctrine of indefeasibility has not been altered, except to the extent discussed below.

(a) *Application of indefeasibility to volunteers*

The treatment of volunteers in current legislation is confusing. The indefeasibility sections (sections 44, 109, 123 and 126 RPA 1861-1990) do not treat volunteers consistently. Section 51 RPA 1877-1990 also refers to the "purchaser for valuable consideration".

There has been considerable academic speculation on whether a volunteer is protected by the indefeasibility provisions and, if so, whether this is desirable.

But there has been little judicial consideration of this issue, particularly in Queensland.

The Bill has been drafted to remove any ambiguity. **Clause 115(1)(a)-(c)** confers on a "registered proprietor" the benefits of indefeasibility. (In this commentary, a reference to the "indefeasibility" protection or benefits will be a reference to these benefits.)

"Registered proprietor" is defined in **clause 7** to mean a person registered as proprietor "whether or not for valuable consideration".

In line with this approach, there is no particular protection afforded to a "purchaser or mortgagee bona fide for valuable consideration" as was the case, for example, in the proviso to section 126 RPA 1861-1990.

(b) *Exceptions to indefeasibility*

(1) *Fraud*

When a person is registered as proprietor, that person will be entitled to the benefits listed in **clause 115(1)(a)-(c)**. This Bill excepts a registered proprietor who has obtained title through fraud from indefeasibility protection (**clause 115(1)(ii)**).

The terms "fraud" and "fraudulent" also appear in the indefeasibility sections (44, 109, 123, 124 and 126) of the RPA 1861-1990. The Acts do not define "fraud", except that section 109 implies that notice alone is not enough to constitute fraud.

Clause 115(2) spells out the existing law: fraud refers to fraud committed by the registered proprietor, and not fraud committed by a person through whom the registered proprietor has derived the estate or interest (Assets Co Ltd v Mere Roihi [1905] A.C. 176 at 210).

- (3) A person-
- (a) to whom an estate or interest is to be transferred; or
 - (b) in whom an estate or interest has been created-
- has a right to have that estate or interest registered if-
- (i) an instrument transferring or creating the estate or interest in land has been executed; and
 - (ii) the person can lodge any documents required for or by the Registrar to effect registration of the instrument.
- (4) The benefits of this section apply whether or not valuable consideration has been given.

115. Quality of registered estate. [Qld. ss.44,109,123; Qld. 1877, ss.11,51; Qld.1952, ss.45-60.]

- (1) A registered proprietor of an estate or interest in land-
- (a) holds that estate or interest subject to estates or interests affecting the land that are registered, but free from all other estates, interests or rights;
 - (b) is not affected by actual or constructive notice of an unregistered estate, interest, right, claim or title affecting the land; and
 - (c) subject to section 115(1)(a), is not liable to proceedings for possession of land or an estate or interest in the land -
- except-
- (i) against a competing estate or interest listed in section 115(3); and
 - (ii) in the case of fraud.
- (2) Fraud in section 115(1)(ii) means fraud of the registered proprietor but does not mean fraud of a person from or through whom a registered proprietor has in good faith derived the estate or interest in land.
- (3) A registered proprietor of an estate or interest in land does not obtain the benefit of section 115(1) in respect of the following-
- (a) an equity arising from the act of that registered proprietor;
 - (b) the estate or interest of a lessee under a short lease;
 - (c) a person entitled to the benefit of an easement particulars of which have been omitted from or misdescribed in the Register;
 - (d) a person who, upon application, would be entitled to the issue of a certificate of title under part VI, division 5;
 - (e) the estate or interest of another registered proprietor making a valid claim under an earlier subsisting certificate of title relating to all or part of the same land;
 - (f) the estate or interest of another registered proprietor where there are two certificates of title for the same estate or interest in the land and this inconsistency has arisen through failure on transfer to cancel, wholly or in part, the certificate of title of the first registered proprietor;

(2) *Other exceptions to indefeasibility*

Despite the protection offered to a registered proprietor under section 44 RPA 1861-1990, there are circumstances other than fraud where the registered proprietor's paramountcy will not prevail, and that interest will be defeasible. These are listed in **clause 115(3)** and examined below.

(i) *An equity arising from the act of the registered proprietor*

Currently, there is no doubt that even when a person becomes registered as proprietor of land, the proprietor is not immune from claim. For example, if a registered proprietor has granted a long-term lease over land and the lessee has not registered the lease, the registered proprietor will be bound by the lease.

The concept of indefeasibility under the Torrens system does not alter the equitable principle that a person will be bound by interests created by that person.

The defeasibility of a registered proprietor's interest is currently reflected by section 51 RPA 1877-1990. Although the ambit of section 51 is perhaps not clearly defined, the first paragraph appears to preserve the jurisdiction of the courts of law and equity on the ground of actual fraud, over contracts and "over equitable interests generally".

Because the principle contained in section 51 is, in effect, an exception to the indefeasibility concept, it was considered appropriate to place the exception in **clause 115(3)(a)**.

This clause is intended to reflect the current law on the equitable exception to indefeasibility.

(ii) *Estate or interest of lessee under short lease*

With the exception of the matters referred to below, there has not been a change in policy concerning a short lease as an exception to indefeasibility.

"Short lease" is defined in **clause 7**.

Section 11 RPA 1877-1990 currently protects the interest of a lessee of a "tenancy from year to year or for any term not exceeding three years".

As this protection to a lessee amounts to an exception to indefeasibility of the registered proprietor, it is included in the Bill (in **clause 115(3)(b)**) as one of the exceptions to indefeasibility.

The ambit of the protection for a short term lessee is limited by **clause 115(4)**.

A. *Protection of an option to renew in a short lease*

It was decided in Friedman v Barrett [1962] Qd R. 498 that an option to renew a lease contained in an unregistered lease did not obtain the protection of section 11 RPA 1877-1990. That is, although the short lease was binding on a subsequently registered proprietor, the option was not.

- (3) A person-
- (a) to whom an estate or interest is to be transferred; or
 - (b) in whom an estate or interest has been created-
- has a right to have that estate or interest registered if-
- (i) an instrument transferring or creating the estate or interest in land has been executed; and
 - (ii) the person can lodge any documents required for or by the Registrar to effect registration of the instrument.
- (4) The benefits of this section apply whether or not valuable consideration has been given.

115. Quality of registered estate. [Qld. ss.44,109,123; Qld. 1877, ss.11,51; Qld.1952, ss.45-60.]

- (1) A registered proprietor of an estate or interest in land-
- (a) holds that estate or interest subject to estates or interests affecting the land that are registered, but free from all other estates, interests or rights;
 - (b) is not affected by actual or constructive notice of an unregistered estate, interest, right, claim or title affecting the land; and
 - (c) subject to section 115(1)(a), is not liable to proceedings for possession of land or an estate or interest in the land -
- except-
- (i) against a competing estate or interest listed in section 115(3); and
 - (ii) in the case of fraud.
- (2) Fraud in section 115(1)(ii) means fraud of the registered proprietor but does not mean fraud of a person from or through whom a registered proprietor has in good faith derived the estate or interest in land.
- (3) A registered proprietor of an estate or interest in land does not obtain the benefit of section 115(1) in respect of the following-
- (a) an equity arising from the act of that registered proprietor;
 - (b) the estate or interest of a lessee under a short lease;
 - (c) a person entitled to the benefit of an easement particulars of which have been omitted from or misdescribed in the Register;
 - (d) a person who, upon application, would be entitled to the issue of a certificate of title under part VI, division 5;
 - (e) the estate or interest of another registered proprietor making a valid claim under an earlier subsisting certificate of title relating to all or part of the same land;
 - (f) the estate or interest of another registered proprietor where there are two certificates of title for the same estate or interest in the land and this inconsistency has arisen through failure on transfer to cancel, wholly or in part, the certificate of title of the first registered proprietor;

The reasoning of the Full Court was that the "tenancy" that was protected in section 11 was not sufficiently wide to include an option to renew the lease.

Clause 115(4) however, impliedly protects an option to renew which is contained in a short lease. It states that a right to renew the lease beyond the three year term is not protected. In other words, where a short lease contains an option to renew, both the lease and the option are protected for a maximum of three years.

[The effect of registering an option to renew a lease is discussed below (page 65) in the commentary to the comparative table.]

B. Application of the exception to a registered mortgagee

a. prior registered mortgagee/subsequent short lease

Currently, a lessee under a short lease will not have priority over a prior registered mortgagee, unless that mortgagee has given consent to the lease (The English, Scottish and Australian Bank Ltd v The City National Bank Ltd [1933] St. R. Qd. 81).

The current position will not be altered by the Bill. The exception to indefeasibility of a short lease in **clause 115(3)(b)** clearly applies to a registered mortgagee, (see the definition of "registered proprietor" in **clause 7**). **Clause 42(3)**, however, says that a lease executed after the registration of a mortgage is not valid against the mortgagee unless the mortgagee consents to the lease. As this provision is more specific than **clause 115(3)(d)**, it will prevail.

b. prior short lease/subsequently registered mortgage

There is currently doubt whether a prior short lease has priority over a subsequently registered mortgagee.

For instance, legal commentators point to section 11 RPA 1877-1990 as the section which protects an unregistered short lease from a subsequently registered mortgagee (Sykes E.I., *The Law of Securities*, 4th ed, Law Book Company at 252).

However, the Supreme Court, when interpreting this section, has said that it does not apply to mortgages (The English, Scottish and Australian Bank Ltd v The City National Bank Ltd (supra), in particular, at page 91).

In practice, it appears that mortgagees do not foreclose where a short lease has been entered into before the registration of the mortgage.

By inserting the short lease exception in the indefeasibility clause, the Bill removes these doubts. As a registered mortgagee is a "registered proprietor of an estate or interest in land" within **clause 115(3)**, the registered mortgagee will not obtain the benefits of indefeasibility against a lessee under a short lease.

This reflects present commercial and legal practice.

- (3) A person-
- (a) to whom an estate or interest is to be transferred; or
 - (b) in whom an estate or interest has been created-
- has a right to have that estate or interest registered if-
- (i) an instrument transferring or creating the estate or interest in land has been executed; and
 - (ii) the person can lodge any documents required for or by the Registrar to effect registration of the instrument.
- (4) The benefits of this section apply whether or not valuable consideration has been given.
115. Quality of registered estate. [Qld. ss.44,109,123; Qld. 1877, ss.11,51; Qld.1952, ss.45-60.]
- (1) A registered proprietor of an estate or interest in land-
- (a) holds that estate or interest subject to estates or interests affecting the land that are registered, but free from all other estates, interests or rights;
 - (b) is not affected by actual or constructive notice of an unregistered estate, interest, right, claim or title affecting the land; and
 - (c) subject to section 115(1)(a), is not liable to proceedings for possession of land or an estate or interest in the land -
- except-
- (i) against a competing estate or interest listed in section 115(3); and
 - (ii) in the case of fraud.
- (2) Fraud in section 115(1)(ii) means fraud of the registered proprietor but does not mean fraud of a person from or through whom a registered proprietor has in good faith derived the estate or interest in land.
- (3) A registered proprietor of an estate or interest in land does not obtain the benefit of section 115(1) in respect of the following-
- (a) an equity arising from the act of that registered proprietor;
 - (b) the estate or interest of a lessee under a short lease;
 - (c) a person entitled to the benefit of an easement particulars of which have been omitted from or misdescribed in the Register;
 - (d) a person who, upon application, would be entitled to the issue of a certificate of title under part VI, division 5;
 - (e) the estate or interest of another registered proprietor making a valid claim under an earlier subsisting certificate of title relating to all or part of the same land;
 - (f) the estate or interest of another registered proprietor where there are two certificates of title for the same estate or interest in the land and this inconsistency has arisen through failure on transfer to cancel, wholly or in part, the certificate of title of the first registered proprietor;

(iii) Omission or misdescription of easement

*This exception to indefeasibility has been retained in **clause 115(3)(c)**.*

*Section 44 RPA 1861-1990 excepts "any right of way or other easement". An easement includes a right of way. Therefore, the words "any right of way" have not been included in **clause 115(3)(e)**.*

***Clause 115(5)** has been inserted, however, to clarify the meaning of "omitted" as reflected in the case law. (For examples, see Stuy v B C Ronalds Pty Ltd [1984] 2 Qd R. 578 and Connellan Nominees Pty Ltd v Camerer [1988] 2 Qd R. 248.)*

(iv) Adverse possession

The registration of an adverse possessor as proprietor of land under the RPA is currently governed by The Real Property Acts Amendment Act 1952-1990. Although the RPA 1952 has been incorporated into part VI division 5 of the Bill, no policy changes have been made to the legislation.

*In contrast to section 44 RPA 1861-1990, the right of an adverse possessor to registration as proprietor is included in the Bill (**clause 115(3)(d)**) as an exception to indefeasibility.*

(v) Claim under a prior certificate of title

*This exception to indefeasibility has been repeated in the Bill in **clause 115(3)(e) and (f)**. Under the RPA 1861-1990, this exception is couched in terms of "a person claiming the same land under a prior certificate of title". There has been no alteration to the extent of this exception, only the wording.*

(vi) Wrong description of land

*This exception to indefeasibility has been retained in **clause 115(3)(g)**.*

Clause 116 reflects section 124 RPA 1861-1990. There are two changes.

*First, where there is a wrong description within the meaning of **clause 115(3)(g)**, the Registrar is empowered to correct the certificate of title. A person affected by the Registrar's action is entitled to appeal to the Supreme Court under **clause 116(2)**.*

*The second alteration appears in **clause 116(4)**. Both under section 124 RPA 1861-1990 and **clause 116(3)**, the Court may order the cancelling or altering of any recording in the Register and the substituting of a fresh certificate of title or instrument.*

*Although section 124 provides that the Court can order other acts to be done and instruments to be executed as the Court considers necessary, the section is silent as to who should execute the instruments. To overcome this difficulty, **clause 116(4)** allows the Registrar of the Court to perform such duties.*

- (g) the estate or interest of another registered proprietor where the land described in the certificate of title wrongly includes all or part of the land in which that other registered proprietor has an estate or interest.
- (4) The estate or interest of the lessee in section 115(3)(b) does not include-
 - (a) a right to acquire the fee simple or other reversionary interest on or after termination of the short lease; or
 - (b) a right to renew or extend the term of the short lease beyond three years from the commencement of the original term.
 - (5) To be "omitted" within section 115(3)(c), an easement must have been-
 - (a) in existence when the land burdened by it was first registered; or
 - (b) registered but later omitted by an error of the Registrar.
116. Power to rectify Register. [Qld. s.124].
- (1) If satisfied that a certificate of title is within section 115(3)(g), the Registrar may amend the certificate of title.
 - (2) A person affected by an amendment made under section 116(1) may within one month of receiving notification of the amendment apply to the Court for an order that the amendment be varied or set aside.
 - (3) In a case within section 115(1)(ii) or (115)(3)(c) to (g), the Court may order that the Registrar-
 - (a) cancel or alter a certificate of title or other instrument or particulars in the Register relating to that land; and
 - (b)
 - (i) register an instrument;
 - (ii) issue a new certificate of title or instrument; or
 - (iii) register particulars.
 - (4) For the purpose of section 116(3), the Court may direct the Registrar of the Court to do an act and execute an instrument.
117. Compensation for loss of title. [Qld. ss.42,126-129,135.]
- (1) In this section, a claimant means a person who is deprived of an estate or interest in land or suffers loss or damage under section 117(2).
 - (2) A person who is deprived of an estate or interest in land or suffers loss or damage because of-
 - (a) fraud of another person;
 - (b) incorrect issue of a certificate of title to another person;
 - (c) incorrect registration;

Clause 117 allows a person who is "deprived of an estate or interest in land or suffers loss or damage" to be compensated. The clause represents a shift in policy from the current legislation.

(a) Replacement of sections 126 and 127

Sections 126-129 and 135 RPA 1861-1990 currently deal with compensation. A person deprived of an estate or interest in land in the circumstances set out in section 126 may bring an action for damages against the person deriving the benefit.

If damages have been awarded against a person under section 126, but cannot be recovered, section 127 allows damages and costs to be paid out of the assurance fund.

If the person against whom an action could normally be brought under section 126 is dead, insolvent or has left the jurisdiction, an action may be brought against the Registrar. Any damages and costs awarded in this action would also be paid out of the assurance fund (section 127).

Clause 117 short cuts these procedures. It allows all people deprived of estates or interests in land in defined circumstances to recover directly against the State. On payment of compensation by the State, the State becomes subrogated to the rights of the person compensated, against the person responsible for the deprivation, loss or damage (**clause 117(5)**).

If the State recovers more than an amount paid to the claimant in exercising its right of subrogation, **clause 117(7)** requires that the excess be paid to the claimant.

Sections 126 and 127 also contain a 6 year limitation period from the date of the deprivation.

Clause 117 does not contain a limitation period. There is often a delay in discovering that there has been a deprivation, loss or damage. A limitation period was therefore thought to be inappropriate.

(b) Replacement of section 128

Where deprivation, loss or damage is caused by the Titles Division itself, action must currently be brought against the Registrar as the nominal defendant (section 128).

Clause 117 of the Bill also deals with these kinds of claims. Although action will be against the State (**clause 117(4)**), the Registrar is given power (**clause 117(3)**) to settle the claim. The monetary limit to the Registrar's power to settle is governed by **clause 117(10)**.

Clause 117(2) lists the possible causes of the deprivation, loss or damage in more detail than its predecessor, section 128.

The insertion of **clause 117(2)(e)** which refers to the "unauthorised tampering with the Register" should be noted. There is no equivalent to this in section 128.

- (d) error, omission or misdescription in a certificate of title or in the Register;
 - (e) unauthorised tampering with the Register;
 - (f) reliance on the incorrect state of the Register;
 - (g) loss or destruction or improper use of a document produced at the Office for inspection or held by the Office for safe custody;
 - (h) an error in a search by the Registrar or a member of the staff of the Office, undertaken at the request of any other person;
 - (i) omission, mistake, breach of duty, negligence or misfeasance of the Registrar or a member of the staff of the Office; or
 - (j) the exercise by the Registrar of a power concerning an application or dealing with which the person had no connection-
- is entitled to be indemnified by the State.
- (3) Whether or not court proceedings have commenced under this section, the Registrar may agree to settle a debt or claim under this section by total or partial remission of fees, by ex gratia payment, or in any other manner.
 - (4) A claimant may by proceedings in a court have judgment for compensation and costs against the State.
 - (5) On payment of any compensation under this section, the State is subrogated to the rights of the claimant against the person responsible for the deprivation, loss or damage under section 117(2).
 - (6) In section 117(5), if the person responsible for the deprivation, loss or damage is the Registrar or a member of the staff of the Office, then no claim can be made against that person if the act or omission causing the deprivation, loss or damage was done or made in good faith.
 - (7) If the State, in exercising its rights under section 117(5), receives an amount in excess of the amount it paid to the claimant, the State must pay the claimant that excess after deduction of costs.
 - (8) With the exception of any payment made under section 117(7), money recovered under section 117(5) is to be paid into Consolidated Revenue.
 - (9) Except in the case of a loss falling within section 117(2)(j), no person is entitled to be indemnified for any deprivation, loss or damage -
 - (a) resulting from a breach of a trust or fiduciary duty, whether express, implied, or constructive, including a breach of duty arising in the administration of the estate of a deceased person;

As previously discussed, the State may, after paying compensation, claim against the person who caused the deprivation, loss or damage. Theoretically, the State could take action against the employee of the Titles Division who, by error, caused the loss. To avoid this, **clause 117(6)** provides protection where the relevant act or omission was done or made in good faith.

(c) Assurance fund

Sections 127 and 128 RPA 1861-1990 contemplate payment of sums recoverable against the Registrar out of the "assurance fund". The assurance fund was abolished by the Real Property Act Amendment Act 1978. Payment by the State is and will be from consolidated revenue (**clause 117(8)**).

Clause 117(11) and (12) govern the timing of payments by the Treasurer out of consolidated revenue.

(d) Exceptions to compensation

In the circumstances listed in **clause 117(9)**, a claimant will not be entitled to compensation.

Clause 117(9)(a), which deals with deprivation arising from breach of trust, does not represent a shift in policy (compare the proviso to section 42 RPA 1861-1990).

Clause 117(9)(b) prevents recovery where there has been contributory negligence by the claimant or the claimant's agent. This provision resolves current uncertainty about whether contributory negligence applies to sections 127 and 128.

A corporate body is not entitled to compensation if the deprivation, loss or damage was caused by the improper use of its seal (**clause 117(9)(c)**). This paragraph was inserted to place the onus on the corporation to ensure the proper use of its seal. The corporation, rather than consolidated revenue, will bear the financial consequences of failure to do so.

Clause 117(9)(d) represents a shift of policy. It deals with the situation where the Registrar corrects a certificate of title by taking out land mistakenly included in the certificate. Compensation will only be recoverable where the claimant has relied on the correct state of the Register. (An example of reliance would be where a search was conducted by the claimant prior to the purchase of the property.)

(e) Protection of bona fide purchaser or mortgagee for value

Under section 126 RPA 1861-1990, a bona fide purchaser or mortgagee for valuable consideration who obtained their interest from a proprietor registered through fraud or error is protected. No claim can be made against the purchaser or mortgagee by a person deprived of an estate or interest because of the previously registered proprietor's fraud or the previous error. This protection is not in the Bill.

Following a successful claim against them, the bona fide purchaser or mortgagee must now look to **clause 117**, for compensation.

- (b) if the person, or an agent acting for that person, caused or substantially contributed to the loss by fraud, neglect or wilful default, including failure to take reasonable steps in response to notice that the Registrar intended to issue a new certificate of title for the land;
 - (c) suffered by a corporate body through improper use of its seal; or
 - (d) caused when the Register corrected a certificate of title which mistakenly included that land, unless the person was deprived under section 117(2)(f).
- (10) The power of the Registrar under section 117(3) is limited to the amount-
- (a) authorised by the Treasurer; or
 - (b) in any other case prescribed by regulation made by the Governor in Council.
- (11) The Treasurer must pay to a claimant the amount-
- (a) agreed under section 117(3) as limited by section 117(10);
 - (b) adjudged under section 117(4).

PART X - LIENS

118. Vendor to have no equitable lien. [Qld. s.97.]

A vendor of land has no equitable lien on the land because of failure to pay all or part of the purchase money.

FIRST SCHEDULE

[section 6]

PART I - REPEALS

The following Acts are repealed -

Real Property Act 1861-1990
Real Property Act 1877-1990
Real Property Acts Amendment Act 1952-1990
Real Property Acts Amendment Act 1956-1986
Real Property Acts Amendment Act 1973
Real Property Acts Amendment Act 1974
Real Property Act Amendment Act 1976
Real Property Act Amendment Act 1978
Real Property Acts Amendment Act 1979
Real Property Act Amendment Act 1980
Real Property Act Amendment Act 1981
Real Property Acts Amendment Act 1981
Real Property Act Amendment Act 1985
Real Property Acts and Other Acts Amendment Act 1986-1989
Real Property Acts Amendment Act 1988
Real Property (Commonwealth Titles) Act 1924-1986
Real Property (Commonwealth Defence Notification) Act 1929-1986
Real Property (Local Registries) Act 1887-1986
Registrar of Titles Act 1884

PART II - SAVINGS AND TRANSITIONAL PROVISIONS

The following rules apply -

1. In this part "done or made" includes issued, recorded, entered, maintained, granted, declared, registered, lodged, deposited, produced, transferred, created, served, given, acquired, required, executed, removed, noted, sealed, imprinted, witnessed and advertised.
2. Everything done or made in accordance with the provisions of any Act repealed or amended by this Act, is-
 - (a) deemed to be done or made in accordance with this Act; and
 - (b) valid and effectual as if done or made under this Act.
3. The repeal or amendment by this Act of a provision of any other Act does not affect the operation of that provision before the commencement of this Act.

4. The repeal of the following sections is limited in the manner described below-
 - (a) section 11 of the Real Property Act 1877-1990 continues to apply to a lease granted before this Act commenced;
 - (b) section 5 of the Real Property Acts and Other Acts Amendment Act 1986-1989 continues to apply to a bill of encumbrance and memoranda of transfer-and-charge registered or executed before this Act commenced;
 - (c) sections 126-129 and section 135 of the Real Property Act 1861-1990 continue to apply to claims for compensation for-
 - (a) deprivation of an estate or interest in land; and
 - (b) loss or damage caused by an omission, mistake, breach of duty or wrong-doing by the Registrar-
that occurred before this Act commenced;
 - (d) section 119A of the Real Property Act 1861-1990 continues to apply to plans described in section 63 of this Act that were lodged or registered before this Act commenced;
 - (e) sections 16-31 and 46 of the Real Property Act 1861-1990 and sections 8-10 of the Real Property Act 1877-1990 continue to apply to land that has not been registered and has been alienated in fee simple from the Crown.
5.
 - (1) If an instrument is lodged before this Act commences and the Registrar had power to register it at the time it was lodged, the Registrar may register the instrument after this Act commences.
 - (2) When registering an instrument in Rule 5(1), the Registrar must exercise the powers applicable to the office of the Registrar at the time the instrument was lodged.
6. The persons appointed before the commencement of this Act to hold the offices of Registrar, Deputy Registrar of Titles and Local Registrar continue to hold these offices after this Act commences.
7. Any reference to the Registrar-General, Registrar of Titles or Master of Titles, whether in an Act or elsewhere, is a reference to the Registrar.
8. Despite any legislation passed before 22nd April, 1976, if a plan relates to land that does not fall within the boundaries of a local authority at the time of lodgment, the Registrar may register the plan, even though the approval of a local authority has not been given to the plan.
9.
 - (1) A reference to an Act repealed by this Act in any other Act is to be read as a reference to this Act.
 - (2) Rule 9(1) does not apply to a reference in an Act repealed by this Act.

The Commission recommends the insertion of maps into parts I and II of this schedule so that the "Central District" and "Northern District" can be identified more comprehensively.

SECOND SCHEDULE

[section 7]

PART I - CENTRAL DISTRICT

PART II - NORTHERN DISTRICT

THIRD SCHEDULE

[section 7(1)]

PLA	-	Property Law Act 1974-1990
Qld.	-	Real Property Act 1861-1990
Qld. 1867	-	The Evidence and Discovery Act 1867-1977
Qld. 1877	-	Real Property Act 1877-1990
Qld. 1884	-	Registrar of Titles Act of 1884
Qld. 1887	-	Real Property (Local Registries) Act 1887-1986
Qld. 1924	-	Real Property (Commonwealth Titles) Act 1924-1986
Qld. 1929	-	Real Property (Commonwealth Defence Notification) Act 1929-1986
Qld. 1937	-	Evidence (Attestation of Documents) Acts 1937 to 1950
Qld. 1952	-	Real Property Acts Amendment Act 1952-1990
Qld. 1976	-	Real Property Act Amendment Act 1976
Qld. 1978	-	Real Property Act Amendment Act 1978

FOURTH SCHEDULE

[section 104]

Place of execution of instrument	Witness capable of attesting an instrument
(i) In a state or Territory of the Commonwealth	A. A notary public; B. A justice of the peace; C. A commissioner for taking affidavits; D. A barrister; E. A solicitor; F. A conveyancer; or G. Any other person approved by the Registrar.
(ii) In a part of the Commonwealth	A. A judge of a superior court having jurisdiction in the Commonwealth of Nations; or B. A notary public, barrister, solicitor or a justice of the peace for the Commonwealth of Nations.
(iii) In a country to which The Evidence (Attestation of Documents) Act 1937 to 1950 applies	A person holding a Government office of that country, if the office has been proclaimed to be equivalent to the office of a justice of the peace for this State.
(iv) At any place	A person who holds one of the following offices at a consulate of a country which is a member of the Commonwealth of Nations- A. Ambassador; B. High Commissioner; C. Minister; D. Head of Mission; E. Commissioner; F. Charge d'Affaires; G. Counsellor or Secretary at an Embassy, High Commissioner's Office, Legation or other post; H. Consul-General; I. Consul; J. Vice-Consul; K. Pro-Consul; L. Trade Commissioner; or M. Consular Agent.
(v) At any place outside Queensland	A person holding an office approved by the Registrar.

COMPARATIVE TABLE		
Real Property Act - 1861		Draft Bill
1	.....	6
2	.....	2
3	.....	7,8
4	.....	10 - 12
5	.....	10
* 6		
7	.....	27
8	.....	13, 27
9	.....	16
10	.....	14
10A	.....	23, 29
11	.....	17
* 12		
* 13		
* 13A		
14	.....	19
15	.....	33
* 16		
* 17		
* 18		
* 19		
* 20		
* 21		
* 22		
* 23		
* 24		
* 25		
* 26		
* 27		
* 28		
* 29		
* 30		
* 31		

first schedule
part II, rule 4(e)

* Where a section is starred, the entire section, a part of the section or a subsection does not have an equivalent in the draft Bill. An explanation for the deletion is given in the comparative table below.

COMPARATIVE TABLE		
Real Property Act - 1861		Draft Bill
32	.....	23 - 24
32A	.....	25
33	.....	28, 31
34	.....	32, 111
35	.....	111
* 36	.....	36
37	.....	36
38	.....	36
39	.....	36
40	.....	37
41	.....	14
* 42	.....	15, 117
* 43	.....	40, 114
44	.....	115
45	.....	113
46	first schedule, part II, rule 4(e)	
46A	.....	107
* 47	.....
48	.....	39
49	.....	29 - 30, 100
50	.....	30
51	.....	57 - 58
52	.....	42
* 53	.....
54	.....	46
55	.....	46 - 47
56	.....	48
57	.....	53
58	.....	54
60	.....	49, 53
62	.....	55
63	.....	56
65	.....	39 - 40

COMPARATIVE TABLE		
Real Property Act - 1861		Draft Bill
66	.....	40
67	.....	109
68	.....	41
72	.....	45
* 74		
* 76		
76A	.....	110
77	.....	74
78	.....	74
* 79	.....	74
* 80		
* 81		
83	.....	78
* 84		
86	.....	79
89	.....	21, 78
91	.....	80 - 82
* 92	.....	37
* 93		
94	.....	29
95	.....	21, 108
96	.....	31
97	.....	118
98	.....	85
99	.....	86, 90
100	.....	84, 94
101	.....	87
102	.....	91
103	.....	93
104	.....	95 - 97
107	.....	97
108	.....	97 - 98
109	.....	115

COMPARATIVE TABLE		
Real Property Act - 1861		Draft Bill
110	.....	14
111	.....	99
112	.....	101 - 102
113	.....	103
114	.....	104
115	.....	104
116	.....	104
117	.....	21, 105
119	.....	35
119A	.....	62 - 63
120	.....	14, 106
121	.....	26
122	.....	26 - 27
123	.....	115
124	.....	116
* 125		
* 126	.....	117
127	.....	117
128	.....	117
129	.....	117
130	.....	18
131	.....	18
132	.....	18
133	.....	18
134	.....	18
135	.....	117
137	.....	22
138	.....	17
* 139		
140	.....	5, 14
141	.....	15, 117
* 143		
144	.....	3

COMPARATIVE TABLE - COMMENTARY

REAL PROPERTY ACT - 1861

Section 6 - Oaths of office.

This section sets out the wording of the oath taken before a judge of the Supreme Court by the Registrar and Deputy Registrar on appointment. This section has been deleted, **clause 10** merely providing for the Governor in Council to appoint a Registrar of Titles and Deputy Registrar of Titles.

The form of the oath and before whom it should be taken is a matter more properly dealt with in the regulations.

Section 12 - Appointment of Master of Titles.

Section 13 - Master of Titles shall be a barrister-at-law or a solicitor of the Supreme Court.

Section 13A - Appointment of Deputy Masters of Titles.

The role of the Master of Titles is threefold. A Master is responsible for processing applications to bring land under the real property legislation, applications to register a person as proprietor following a registered proprietor's death and applications for title by adverse possession.

Working paper 32 at pages 23-25 analysed the desirability of removing the office of Master of Titles. It was concluded that the office can no longer be justified, but that the Registrar should have adequate resources in terms of legal advice. It was recommended that this could be achieved by the appointment of a legal adviser to a senior position on the staff in the Titles Division who could be assisted by such deputies as the workload requires. This position has now been filled.

To facilitate this reform, sections 12, 13 and 13A can now be repealed.

Sections 16-31 - Bringing old system land under the Real Property Act.

As virtually all of the old system land has been brought under the RPA, it was considered appropriate to delete the sections dealing with bringing the land under the provisions of the Act from the body of the legislation. These sections, however, have been preserved in part II of the first schedule - Savings and Transitional Provisions, **rule 4(e)**.

Section 36 - Registration of remainderman.

Section 36(3)(a) requires the Registrar of Titles to advertise prior to registering a person as a remainderman. As this requirement is of little practical significance, it has not been reproduced in the Bill.

Section 42 - Assurance fund to be invested in government securities.

As the assurance fund has been abolished and any compensation paid by the Treasurer is out of consolidated revenue, the second paragraph of section 42 is no longer relevant.

Section 43 - Instruments not effectual until recording in Register.

The last part of section 43 determines which instrument should be registered first where two or more instruments purporting to transfer the same estate or interest in the land are presented to the Registrar at the same time.

Given the current procedure for lodging instruments in the Titles Division, it is no longer possible for this fact situation to occur. Accordingly, this part of section 43 has not been reproduced.

Section 47 - Reversioner's right preserved.

This section deals with the interest of a lessor where the subject land is being brought under the RPA. It was not reproduced in the Bill as it was considered to be an unnecessary restatement of the existing rights of a lessor.

Section 53 - Right of purchase may be granted or covenant stipulated.

(i) Options to purchase the reversion

Section 53 provides that a lease may contain a clause giving the lessee an option to purchase the fee simple. It further provides that if the lessee complies with the terms of the lease and pays the stated purchase price, the lessor must execute a transfer to the lessee.

Section 53 has not been reproduced in the Bill. A lessor and lessee may insert in a lease any clause desired, including an option to purchase the reversion (Woodall v. Clifton [1905] 2 Ch 257). Provided the lease complies with the real property legislation, that lease can be registered. There is no need for a section to facilitate the inclusion in a lease of an option to purchase the reversion.

If the option to purchase the reversion forms part of a registered lease, the option does not obtain the indefeasibility protection. For the option to get such protection, section 53 would have to state that the option forms part of the Register and that the option itself receives the benefits conferred by registration. (See the dicta of Stephen and Gibbs J.J. in Mercantile Credits Limited v. The Shell Company of Australia (1976) 136 C.L.R. 326 at pages 341 and 346 respectively. See also the discussion in working paper 32 at pages 140-143.)

The Commission considered it inappropriate to recast section 53 RPA 1861-1990 so that the option to purchase the reversion in a registered lease obtains the indefeasibility protection. As an option to purchase the reversion is not an option that "touches and concerns" the land (Mercantile Credits Limited v. The Shell Company of Australia (supra per Gibbs J. at page 346)), it is not the kind of clause in a lease that should receive the benefit of indefeasibility upon registration.

(ii) Option to renew a lease

The current legislation is silent on whether an option to renew a lease which is contained in a registered lease will obtain the indefeasibility protection.

The Full Court in Re Eastdoro Pty. Ltd. (No. 2) [1990] 1 Qd. R. 424, however, recently clarified the position. The Court held that the registration of a lease containing options to renew the lease makes those options binding on a subsequent registered proprietor.

The Commission considered that the common law should continue to govern whether clauses touch and concern the land and, therefore, whether they should obtain the indefeasibility protection on registration. Accordingly, the Bill is silent on the effect of registration on an option to renew a lease.

Section 74 - Implied covenants may be set forth in declaration in actions for breach.

Originally, this section had a number of purposes. Firstly, it provides that where an instrument is executed by more than one party, the covenants implied by the RPA will be construed to be several and not to bind the parties jointly.

The current regime on promises made by two or more persons is governed by section 54(1) PLA 1974-1990. Under that section, unless a contrary intention appears, such a promise is construed as having been made jointly and severally by each person.

The Commission considers that it is more appropriate for section 54(1) PLA 1974-1990 to govern the situation rather than the older, pre-Judicature Act provision of section 74.

Secondly, the section provides that in a declaration in an action for a breach of an implied covenant, that covenant may be set forth and the covenant shall be deemed to have been expressly agreed to by the relevant party. This is an example of pre-Judicature Act reform.

This provision was necessary because in 1861 before the Judicature Act 1876-1974 was passed, a person would not otherwise be able to plead the facts.

As a person is able today to plead such matters, section 74 is no longer required.

Section 76 - Covenants declared to be implied may be negated or modified.

This section has not been reproduced in the Bill as it merely restates what is already provided for in section 49(2)PLA 1974-1990.

Section 79 - No entry of trusts to be made in Register.

Second Paragraph

The first part of this paragraph is unnecessary as it merely restates equitable principles that a trustee is entitled to perform certain acts as the beneficial owner of the property. These powers are also given to a trustee under the Trusts Act 1973-1988.

The second part of the paragraph which provides for the issue of a certificate of title to the trustee is also unnecessary. Because the trustee is registered as proprietor, the trustee will be entitled to receive a certificate of title under the provisions dealing generally with the issue of certificates of titles to registered proprietors.

Third Paragraph

This paragraph, which provides that the receipt of a trustee constitutes a good discharge to a purchaser or mortgagee paying the trustee money, is not required as it is dealt with in section 43 of the Trusts Act 1973-1988.

Section 80 - The words "no survivorship" in any instrument of appointment shall operate to prevent a less number of trustees than are named in such instrument dealing with the land.

This section is designed to give protection to a beneficiary by providing that there should always be a stated number of trustees administering the trust. This protection is currently obtained by the registered proprietor who creates the trust inserting the words "no survivorship" in the nomination of trustees.

As this form of protection of the beneficiary is rarely utilised, and we are not aware of any evidence of fraud on beneficiaries, section 80 RPA 1861-1990 has not been reproduced in the Bill.

Section 81 - The words "no survivorship" to be written on certificate of title if on instrument of nomination.

As section 80 RPA 1861-1990 has not been re-enacted in the Bill (see above), section 81 which is complementary to section 80 also will not be reproduced in the Bill.

Section 84 - Action may be brought by person claiming beneficiary interest in name of trustee.

Section 84 facilitates the bringing of an action for recovery of land by a beneficiary in the name of a trustee. This section was designed to assist the beneficiary if the trustee were unwilling to bring such an action on behalf of the beneficiary.

This section has not been reproduced in the Bill as the same result can be achieved under general court rules and procedures. For example, a beneficiary may institute proceedings against a party and join a trustee as defendant if the trustee is unwilling to bring such proceedings on behalf of the beneficiary.

Section 92 - Partition of coparcenership* or joint tenancy or tenancy in common.

Section 92 explains how land which is held in joint tenancy, in coparcenary, or in common is partitioned. Under section 92, the subject land may be divided by executing an instrument of transfer (or other relevant instrument), so that each party will have an undivided share.

Section 92 has not been reproduced in the Bill because partition can be effected in the manner described above without a specific facilitating section. (Note, however, **clause 37** which facilitates the unilateral severance of a joint tenancy.)

* Coparcenary occurred where lands descended from an ancestor to two or more persons possessing an equal title to it.

Section 93 - Agent holding power of attorney to sell or dispose of the fee may apply to bring land under Act and receive certificate of title in the name of his principal.

This section relates to an application to bring land under the RPA made by an attorney or agent of the applicant. As mentioned, the procedure for bringing old system land under the RPA outlined in sections 16-31 has been deleted from the Act and included in transitional provisions.

Given the small number of holdings of old system land, it was considered appropriate to repeal section 93. Any application to bring old system land under the RPA should be made under sections 16-31 RPA 1861-1990.

Section 125 - Registration as proprietor to be equivalent to possession.

Section 125 RPA 1861-1990 in effect is a deeming provision and defines the parties against whom an action of ejectment may be brought. It states that if a person is registered as proprietor, that shall be equivalent to possession of the land, and an action of ejectment may be brought.

It is considered by the Commission that under the proposed indefeasibility provision (clause 115), the deeming provision of section 125 is no longer necessary.

Section 126 - Persons defrauded may bring action against fraudulent proprietor for damages.

Saving the case of a purchaser or mortgagee for valuable consideration

The protection of an estate or interest afforded to a bona fide purchaser or mortgagee for valuable consideration in section 126 RPA 1861-1990 has not been inserted in the Bill. This is discussed at the back of page 52 of the commentary.

A purchaser or mortgagee must now look to **clause 117** for compensation if deprived of an estate or interest in land, or suffers loss or damage under **clause 117(2)**.

Section 139 - Authority to register.

As mentioned under the commentary to **clause 14** of the Bill, section 139 RPA 1861-1990 has not been reproduced in the Bill. Section 139 requires an instrument lodged for registration to be endorsed by the lodging party or agent as being correct for the purposes of the Act.

As many instruments lodged which contain this endorsement are not, in fact, correct for the purpose of the RPA, it is doubtful whether section 139 achieves its original objectives.

Section 143 - Penalties to be recovered in name of Attorney-General or Registrar-General.

Although there is no direct equivalent to this section in the Bill, the Registrar or Attorney-General may proceed against a person to recover a penalty under section 42 Acts Interpretation Act 1954-1989.

COMPARATIVE TABLE		
Real Property Act - 1877		Draft Bill
* 1		
* 2		
3	7
* 6		
* 7		
8		
9	part II, rule 4(e)	
10		
11	115
12	23, 111-112
14	111
15	111
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* 20		
* 23		
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* 32	75-78
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35	83
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37	94
38	90
39	89
40	92
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* 47		
* 48	114
* 49		
51	115
* 52		

COMPARATIVE TABLE - COMMENTARY**REAL PROPERTY ACT - 1877****Section 1 - Act to be read as part of the Real Property Act of 1861.****Section 2 - Short title.**

On the commencement of the Bill and the repeal of the RPA 1877-1990, these sections automatically lose their import.

Section 6 - Sworn appraisers to be appointed.**Section 7 - Oath of sworn appraiser.**

Sections 6 and 7 RPA 1877-1990 deal with the appointment of appraisers. The duties of the appraiser included valuing land, assessing appropriate compensation for the purposes of the Act and investigating title on applications to bring land under the Act.

The office of appraiser no longer exists, so sections 6 and 7 RPA 1877-1990 have not been reproduced in the Bill.

Section 20 - Application of proceeds of sale under mortgage.

This section deals with the application of proceeds where the mortgagee has exercised power of sale upon default of the mortgagor.

It has not been reproduced in the Bill because section 88 PLA 1974-1990 deals with the application of proceeds of sale in these circumstances.

Section 23 - Land to be transferable subject to a charge or easement.

No equivalent of section 23 appears in the Bill.

There are two aspects to section 23 that need to be addressed.

The first aspect is the provision for the transfer of land which is subject to a charge. As the instrument of mortgage may be used to secure the payment of money, however the obligation to pay arose, and land may be transferred subject to a mortgage, section 23 is not required to facilitate the transfer of land subject to a charge. It is a double up on current provisions.

The other situation covered by section 23 is the transfer of land subject to an easement. This transaction is effected by the standard transfer form. Once again, the retention of section 23 is unnecessary.

Section 32 - Application by personal representative to be registered as proprietor upon death of registered proprietor.

Section 32(4) - Person giving consent deemed proprietor

Section 32 allows a beneficiary of the estate of a deceased person to be registered, provided the consent of the personal representative is given.

Section 135 RPA 1861-1990 provides that the assurance fund will not be liable for compensation resulting from a breach of trust by the registered proprietor.

Section 32(4) deems the personal representative who consents to registration of a beneficiary to be registered proprietor of the land for the purposes of section 135.

The reason for the deeming provision is so that if the personal representative has acted in breach of trust, under section 135 the assurance fund will not be liable for compensation.

Section 32(4) has not been reproduced in the Bill because consolidated revenue will not be liable for compensation in these circumstances as **clause 117** is currently drafted.

Section 32(5) - Held in trust

The first part of this subsection has not been reproduced in the Bill as it is merely a reflection of the general law situation that a personal representative holds the estate of a deceased person as trustee. (A "trustee" is defined to include a "personal representative" under section 5 of the Trusts Act 1973-1988.)

The second part of section 32(5) provides that for the purposes of dealing with the land, the personal representative who is registered as proprietor is deemed to be the absolute proprietor. It was considered unnecessary to reproduce this statement because dealing with the land is a natural consequence of registration as proprietor under the scheme of the legislation.

Section 47 - In case of ejectment of defendant who has made improvements their value may be assessed.

Section 47 deals with the case of an action brought against a registered proprietor for ejectment. If that registered proprietor has made improvements on the land, section 47 provides for payment to that registered proprietor for the value of the improvements made. Section 47 has not been reproduced in the Bill because a

registered proprietor against whom an action for possession is brought would be entitled in these circumstances to claim compensation under **clause 117** of the Bill.

Section 48 - Unregistered instrument to confer claim to registration.

The first paragraph of section 48 confers on a person in whose favour a transfer or other instrument is executed, a right to register that estate or interest. The thrust of this provision is reproduced in **clause 114(3)** of the Bill.

The remaining paragraphs of section 48 relate to the registration of a person where that person is not claiming immediately under an instrument executed by the proprietor. (These instruments are sometimes called "transfers by direction".)

Because of the interpretation given in **clause 8(1)(a)** of the Bill, there is no need to specifically state the position in relation to assignees of a proprietor.

Section 49 - Provision for transmission of land of deceased proprietor and dealing with unregistered instruments and other documents.

Section 49 deals with the situation where a person is entitled to be registered as proprietor of land because of possession of the required unregistered instruments, but dies before obtaining registration.

Section 49 (first paragraph) provides that in these circumstances, the interest of the deceased shall be transmitted as if the deceased had actually been registered as proprietor.

Section 49 (second paragraph) allows the Registrar, upon application, to register the applicant as proprietor.

Section 49 has not been reproduced in the Bill. The reason is that under the proposed legislation, a personal representative will be entitled to registration as proprietor (**clauses 8(1)(a)** and **114(3)**). Once the personal representative is registered as proprietor, transmission of the estate of the deceased person may proceed in the usual fashion.

Section 52 - Commencement of Act.

With the repeal of the RPA 1877-1990, clearly this provision is not required.

OTHER LEGISLATION REPEALED BY THE BILL

In addition to the Real Property Acts of 1861-1990 and 1877-1990, 17 other pieces of legislation will be repealed by the Bill once it is enacted. While most of these Acts merely amend the RPA 1861-1990 and 1877-1990 and are consolidated into those Acts, the Acts discussed below stand on their own. The following commentary outlines the destiny of this legislation.

Registrar of Titles Act 1884

The 1884 Act provides for the appointment of a Registrar of Titles and Deputy Registrars. Sections 1 to 3 give the power to appoint the Registrar and outlines the Registrar's powers. These matters are dealt with in **clause 10**. Section 4 which substitutes "Registrar of Titles" for "Registrar-General" is covered by the savings and transitional provisions (**rule 7**). Section 5 provides for the Registrar's seal and is now in **clause 13**. Section 6 deals with the evidentiary effect of documents and is reproduced in **clause 27**.

Real Property (Local Registries) Act 1887-1986

The 1887 Act establishes the Central and Northern district offices. Sections 2, 4, 7 and 9 deal with the appointment of Local Registrars, the registration of transactions at the relevant office, and the application of the Registrar's powers to the Local Registrars. These sections are covered by **clauses 10 and 11**, either expressly or by implication. Section 10 which provides for the Local Registrars' seal of office is in **clause 13**. The first and second schedules of the Act, describing the Central and Northern districts respectively, will become the second schedule to the Bill. Section 5 has not been repeated as there is now no need to create register books for the Central and Northern districts that duplicate those in the Brisbane Titles Division.

Real Property (Commonwealth Titles) Act 1924-1986

Sections 2, 3 and 4 of the 1924 Act are in **clause 34** which describes how Commonwealth land is brought under the Act and how the Commonwealth is registered as proprietor. Section 5 validates transfers made and certificates issued to the Commonwealth and is saved by the savings and transitional provisions of the Bill.

Real Property (Commonwealth Defence Notification) Act 1929-1986

The 1929 Act provides for the registration of notifications of Defence Proclamations. The Registrar's powers in section 5 to register and call for the production of a relevant instrument are dealt with in **clauses 34(9) and 17** respectively.

Real Property Acts Amendment Act 1952-1990

The 1952 Act (sections 45-60) sets out a procedure for claiming adverse possession. These claims are governed by part VI division 5 (**clauses 65-73**) of the Bill. Sections 48, 49 and 50 have not been reproduced in the Bill. Section 48 prevents an application for adverse possession being made against the Crown. This has not been reproduced in the Bill as it is governed by section 6(4) of the Limitation of Actions Act 1974-1981. Section 49 merely repeals an earlier statute, so is not reproduced in the Bill.

Section 59 deals with the rights of a person who acquired a future interest in the land before a certificate of title issued to the adverse possessor. The section applies where the person with a future interest has not taken any steps to protect that title.

Section 59 provides that in an action by that person against the adverse possessor to recover land, the person is deemed to be entitled to an estate in possession when the original proprietor was first dispossessed.

Given the small number of applications for adverse possession processed by the Titles Division each year and the rarity of a future interest in land, the Commission considered it extremely unlikely that the fact situation contemplated by section 59 could arise. Therefore, this section has not been incorporated in the Bill.

If this fact situation did occur, however, the person dispossessed of a future interest in land may be entitled to compensation under **clause 117(2)(j)**.

Real Property Acts Amendment Act 1956-1986

Section 2 of this Act allows the Crown Solicitor to apply for the cancellation of a registered lease where the lessee is an "extinct corporation". If the Registrar is satisfied that the corporation is extinct, the registration of lease is cancelled.

The Corporations Law (sections 576, 577, 588 and 1336) provides a process for vesting a dissolved corporation's outstanding property in the Australian Securities Commission, for the Commission to dispose of as it sees fit. Accordingly, section 2 may be repealed.

Real Property Act Amendment Act 1976

Sections 4 and 5 of the 1976 Act authorise the registration of plans without local authority approval and is saved in **rule 8** of the savings and transitional provisions.

Real Property Act Amendment Act 1978

Section 6 of the 1978 Act alters the real property legislation so that payments under the RPA 1861-1990 and 1877-1990 made by the Registrar are into consolidated revenue rather than the assurance fund. **Clauses 14 and 15** now govern this matter. Section 6 validates payments previously made and is saved by **rules 1, 2 and 3** of the savings and transitional provisions.

Real Property Acts Amendments Act 1979

This Act amends the RPA 1861-1990 and 1877-1990 in relation to caveats. Sections 6 and 11 of the 1979 Act are transitional sections and their effect is saved by the savings and transitional provisions of the Bill.