

27 March 2020

Hon Yvette D'Ath
Attorney-General and Minister for Justice
Leader of the House

Our ref LM:LP

Dear Attorney

Measures to respond to COVID-19

I write further to our previous correspondence of 24 March 2020 dealing the impact of COVID-19 restrictions on the legal profession and the community. There are a number of measures which we would like to raise that may be considered as emergency responses to the issues we see occurring.

A model to permit flexibility

The Society understands the New South Wales Parliament has introduced emergency measures including broad regulation making powers in the *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 (NSW)*. While the Society is generally concerned by measures which ameliorate the oversight of Parliament, in the circumstances of the response to the pandemic it may be appropriate to provide Executive Government with flexibility to respond to issues in a timely way.

From a rule of law perspective, a key feature of any similar response in Queensland must be sun-setting for the new powers and any regulations made under the expanded powers. The sunset should be bound by a fixed time period, such as twelve months, as well as a trigger should the crisis abate sooner than that timeframe.

Whilst we are absolutely cognisant of the need for measures which would otherwise not be appropriate in the ordinary course of events, we would appreciate the opportunity to review any draft bill to ensure that, as far as possible, legal safeguards can be preserved during this time.

Legal Profession Act 2007

The Society submits a regulation making power is required to responsively adjust aspects of the legal profession regulation scheme should urgent extensions of fixed time periods or obligations be required in the case of a significant disruption to the community.

Further, it would be expeditious for the regulatory functions of the Society and related internal functions be considered an essential service in the face of any increasing restriction on business activity for public health purposes. Just as the legal profession fulfils an essential public service in many of its activities, the support and oversight of the legal professional regulation bodies is equally essential.

Execution and witnessing of documents and other face-to-face obligations

The Society has received a number of concerns from members about physical execution requirements for documents during the current social distancing requirements and in anticipation of greater measures being implemented shortly.

Issues have been particularly identified with the execution and witnessing requirements of the following documents:

- Affidavits and Statutory Declarations under the *Oaths Act 1867*;
- Transfer and Land Title Act Instruments under the *Land Titles Act 1994* and the *Land Act 1994*;
- Enduring Powers of Attorney, Advanced Health Directives and General Powers of Attorney under the *Powers of Attorney Act 1998*;
- Deeds under the *Property Law Act 1974*; and
- Wills under the *Succession Act 1981*.

In addition to the potential for a 'lock down' preventing physical attendance in person, some clients may not have access to reliable internet or video-conferencing facilities. These challenges will affect the execution of documents, witnessing of documents and verifying the identity of a person.

The NSW *COVID-19 Legislation Amendment (Emergency Measures) Act 2020* No 1 (taking effect on assent 25 March 2020) altered the *Electronic Transactions Act 2000* (NSW) to introduce a broad ranging regulation making power (see Schedule 2, part 2.7):

The regulations may provide for the following matters to respond to the COVID-19 pandemic —

- (a) altered arrangements for the signature of documents provided for by an Act or another law,
- (b) altered arrangements for witnessing signatures, including requirements for certification of certain matters by witnesses and verification of identity, provided for by an Act or another law,
- (c) altered arrangements for the attestation of documents.

A similar approach may be considered for these classes of documents and the Society would be glad to assist Government to develop appropriate responsive regulations to address the

current uncertainty and issues anticipated to be created with greater social distancing measures.

In particular, consideration must be given to facilitating the electronic signing of documents, including potentially removing (temporarily) the need for witnessing for certain lower-risk classes of documents.

A related transitional issue which needs to be addressed is the enforceability of deeds (or other documents) signed electronically (or otherwise pursuant to such emergency legislation) after the temporary regulation has expired. This will be relevant in terms of enforceability and evidence in the event a dispute.

Notices under contracts, deeds or counterparts

Issues have been reported by members in giving notices under contracts, deeds or counterparts which may require service by personal service or post in hard copy. The *Acts Interpretation Act 1954* and *Property Law Act 1974* may deal with some of the requirements but a regulation may need to be made to specifically permit service via email or other electronic communication method generally.

Time of the essence contracts

The majority of sale of land contracts in Queensland are expressed to be “time of the essence” contracts so that any failure to settle on the day prescribed results in a breach of contract and potential termination. The *Property Law Act 1974* currently provides for the suspension of time being of the essence if the Titles Office computer system fails (section 70A), which is unlikely to apply in the current pandemic.

The constantly changing situation at this time will likely result, at some point, in a party to a contract being physically unable to attend settlement due to no fault of their own, notwithstanding the party wishing to complete the contract. In the event that our authorities determine that all workplaces must be closed in response to the pandemic, some legislative protection will be needed for innocent parties who are prevented from attending settlement.

Consideration should be given to legislation facilitating the suspension of time being of the essence in such circumstances and what might be a reasonable time for a notice to complete to be issued if such a suspension occurs.

The head of power could be relatively broad but we anticipate that specific issues which perhaps can be dealt with in the regulation include:

- If a person is required to self-isolate or quarantine and cannot leave the property;
- If the Titles Registry closes, not only that the computer system has failed;
- Transfer documents cannot be signed on time.

Any such regulation should apply to all sale of land contracts, not only the contracts published by the Real Estate Institute of Queensland and QLS.

It is noted that the Queensland University of Technology’s Commercial and Property Law Research Centre recently completed a review of Queensland’s property laws for the

Queensland Government, including a complete review of the *Property Law Act 1974*. The Final Report includes a recommendation for a new section under which time of the essence is suspended where a natural disaster or similar event causes a party to be unable to attend settlement.¹ QLS would recommend re-working the drafting, but the example section in the final report may provide a starting point for this consideration.

QLS cautions that any such measure must apply only for the duration of the pandemic. Such a provision would represent a fundamental shift in property law in Queensland and it must be the subject of wide industry consultation, before it forms part of the legislative landscape on a permanent basis.

Inability to attend to or perform other contractual obligations

The current evolving situation is also likely to affect other pre-settlement obligations such as pre-conditions which must be met by a particular date. For the sale of land, typical conditions include obtaining satisfactory finance from the buyer's mortgagee and carrying out a building and pest inspection which is satisfactory to the buyer.

Flexibility is required for these types of obligations and some form of guidance may also be required to help parties negotiate such situations, such as:

- What is "inability" to perform an obligation – we expect that a party or a party's agent not wishing to leave their residence is not a sufficient reason preventing performance, (in the absence of a complete lock down of workplaces);
- Does following advice or recommendations of the government as opposed to strict legal orders or directions amount to grounds for an extension? Governmental advice and directions are changing daily (and sometimes more often) and it may be difficult to resolve this in the "heat of the moment". Some guidance is needed for parties who, in good faith, might seek to rely on governmental advice as grounds for seeking an extension;
- Whether refusal by a party's bank to attend a settlement should be grounds to extend; and
- Potential for a contract with a widely drafted clause to drag on, particularly if one party is in a location that is in lockdown but the other party is in a location that has returned to normal. Consideration needs to be given to parties' rights, including with respect to any purported termination, if settlement is suspended for in excess of a particular period.

Tenancy arrangements – residential and commercial

We are aware that the National Cabinet is consider the difficulties faced by tenants at this time, with the increasing loss of jobs. However, the regulation of leasing is a State matter.

¹ <https://www.justice.qld.gov.au/community-engagement/community-consultation/community-consultation-activities/past-activities/review-of-property-law-in-queensland> (accessed 26 March 2020), see pages 418-422

Any approach excusing or reducing the payment of rent by tenants (whether residential or commercial) must also be balanced with the difficulties faced by their landlords, many of whom are 'mum and dad' investors who are also being challenged financially at this time but are still subject to obligations to pay mortgages, rates and levies.

Radical changes need to be carefully limited in time and the classes to which they apply.

However, given the current extraordinary circumstances, we recommend that any legislative changes provide flexibility to deal with issues as they arise, such as:

- **For residential tenancies:**
 - prohibiting the recovery of possession of premises by a landlord, owner or proprietor of premises from a tenant or resident of the premises under the relevant Act in particular circumstances,
 - prohibiting the termination of a residential tenancy agreement, occupancy agreement or site agreement by a landlord, proprietor of premises or operator of a community under the relevant Act in particular circumstances,
 - regulating or preventing the exercise or enforcement of another right of a landlord, proprietor of premises or operator of a community by the landlord, proprietor or operator under the relevant Act or an agreement relating to the premises,
 - exempting a tenant, resident or home owner, or a class of tenants, residents or home owners, from the operation of a provision of the relevant Act or any agreement relating to premises.
- **For commercial/retail tenancies**
 - Consider similar prohibitions on termination or recovery of possession by a lessor in particular circumstances, noting that in many cases a lease will not be frustrated if a tenant is unable to open even if its closure is ordered by a government authority. The tenant will still have to pay rent under the lease.
 - This could perhaps be achieved by a moratorium or rent relief of some kind where a business is forced to close under a health order.

Community titles schemes

The *Body Corporate and Community Management Act 1997* sets out a range of compliance obligations for body corporate management committees. Flexibility is needed in the current circumstances to confer a right to:

- Extend AGM dates and facilitate holding video meetings;
- Committees to close common area facilities. The current requirement to act reasonably makes it difficult (unless there is access to a medical expert) to determine whether areas like pools and gyms should remain open.

Service of documents

Members have identified the existing service of documents requirement as a potential impediment to effecting the service of a court proceeding in the absence of a specific order of the court. Some consideration may need to be given to whether alternate methods of service are permissible for the duration of the pandemic.

Limitation Periods

A regulation making power may also be required for the general suspension of statutory limitation periods should court registries be prevented from operating and should electronic or email lodgement facilities at the courts prove unable to be progressed. The coordinated handling of limitations is an important issue given the potential for loss of rights to the public.

Sections 651 and 652 of the Criminal Code and section 159A of the *Penalties and Sentences Act 1994* (Qld)

Finally, we refer to our correspondence of 24 March 2020 in which we sought that the amendments contained in Clauses 53, 54 and 164 of the Justice and Other Legislation Amendment Bill 2019 (**JOLA Bill**) be urgently passed into law.

The Supreme Court and the District Court are encouraging the listing of sentences where there is a likelihood that the prisoner will be released from custody. One difficulty in listing sentences, when negotiations reach the stage that a sentence can be listed at short notice, is arranging for the transfer of summary offences from the Magistrates Court to the superior courts. It is generally preferable for the summary and indictable offences to be dealt with in the one sentencing hearing. Declarations of pre-sentence custody may not otherwise be available.

In order to transfer a summary charge to a superior court, sections 651 and 652 of the *Criminal Code Act 1899* (**the Criminal Code**) require that the defendant personally sign a section 651 application, including an *Oaths Act 1867* declaration. This means that solicitors need to personally attend at prisons or send section 651 applications by post for their clients' signatures.

The proposed amendments in the JOLA Bill seek to dispense with the requirement for client signatures on these applications and enable judges to declare pre-sentence custody as time already served under a sentence even if associated summary charges were not, for whatever reason, being dealt with at the same time. We would be grateful if the afore-mentioned provisions in the JOLA Bill be passed as a matter of urgency.

Youth Justice Act 1992

Section 46 of the *Youth Justice Act 1992* deals with proceedings in relation to simple offences in the absence of a child. We propose amendment of section 46 to allow ex parte pleas for children for simple offences where the only penalty to be imposed is a caution or reprimand.

We also propose that the Department of Youth Justice release any detainee on a supervised release order if they have less than three months to serve.

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I would like to again reiterate the Society's willingness to engage with your officers and to assist in any way we can during these unprecedented times.

Yours faithfully

Luke Murphy
President