

14 September 2017

Your ref QUT Law PLA Review

Our ref WD PROP 345-15 Review of Property Laws

Property Law Review
c/- Strategic Policy
Department of Justice and Attorney-General
GPO Box 149
BRISBANE QLD 4001

By email: propertylawreview@justice.qld.gov.au

Dear QUT Research Centre

**Property Law Review – Issues Paper 5 - Equitable interests and things in action;
Corporations; Voidable dispositions; Unregistered Land; De facto relationships;
Miscellaneous**

Thank you for the opportunity to respond to the “*Property Law Review - Issues Paper 5 – Part 12 - Equitable interests and things in action; Part 15 - Corporations; Part 16 - Voidable dispositions; Part 18 - Unregistered Land; Part 19 - De facto relationships; Part 20 - Miscellaneous.*” Thank you also for the extension of time to provide the enclosed response.

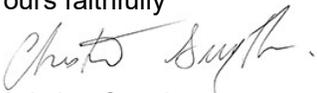
This response has been compiled with the assistance of the Property and Development Law Committee, the Banking and Financial Services Law Committee, the Corporations Law Committee and the Family Law Committee, who have substantial expertise in these areas.

Our policy committees and working groups are the engine rooms for the Society’s policy and advocacy to government. The Society, in carrying out its central ethos of advocating for good law and good lawyers, endeavours to ensure that its committees and working groups comprise members across a range of professional backgrounds and expertise.

In doing so, the Society achieves its objective of proffering views which are truly representative of the legal profession on key issues affecting practitioners in Queensland and the industries in which they practise. The Society assists the public by advising government on improvements to laws affecting Queenslanders.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Wendy Devine on (07) 3842 5896 or w.devine@qls.com.au

Yours faithfully



Christine Smyth
President

Response to Property Law Review – Issues Paper 5 - *Property Law Act 1974 (Qld)* – Parts 12, 15, 16, 18, 19 and 20

1. Part 12 – Equitable interests and things in action (ss 199 – 200)

1.1. Section 199 – Statutory assignments of things in action

Assigning any part of a debt or legal thing in action

Question 1

QLS considers that any part of a debt or legal thing in action should be capable of assignment under section 199 of the PLA, to allow commercial flexibility. To safeguard abuse or confusion, the assignor and assignee of a debt or chose in action should sign the notice to the remaining parties to the debt or chose in action, whether or not the assignment is of all of the debt or part of it.

Equitable thing in action

Question 2

QLS considers that equitable things in action should be capable of assignment under section 199 of the PLA, for the same reasons outlined in the response to Question 1.

Assignment of future interests

Question 3

QLS considers that future things in action should be capable of assignment under section 199 of the PLA, for the same reasons outlined in the response to Question 1.

Options for reform

Question 4

The Committee is not aware of any problems with the operation of section 199 of the PLA.

1.2. Section 200 – Efficacy in equity of voluntary assignments

Question 5

QLS agrees with the preliminary recommendation that section 200 of the PLA be retained.

2. Part 15 – Corporations

2.1. Section 223 – Devolution of property of corporation sole

Question 6

QLS supports the recommendation to retain section 223 of the PLA. Although few corporations sole continue to exist in Queensland, this provision will need to be retained until all existing corporations cease to exist or are otherwise transitioned to a different form of body corporate.

2.2. Section 224 – Vacancy in corporation and section 225 – Transactions with corporations sole

Question 7

QLS is aware that church entities incorporated under letters patent or the *Roman Catholic Church (Incorporation of Church Entities) Act 1994* act as trustee.

QLS also notes that State Executive Australian Christian Churches Queensland Ltd has historically acted as trustee for local unincorporated churches, however the State Executive is working to facilitate a transitional property holding from the State Executive to local churches within their own local church structure.

QLS recommends that attention be given to whether any church related bodies are corporations sole in the course of considering proposed amendments to section 224, including for example, entities constituted under the *Uniting Church in Australia Act 1977*.

Question 8

QLS considers that sections 224 and 225 of the PLA should be amended to ‘modernise’ the drafting and clarify the operation of the sections (for example, should there be restrictions on when the successor can disclaim an interest or charge?).

The reference to corporation sole acting as trustee should be retained, as other corporations sole that hold property on trust may exist or come into existence.

Question 9

QLS considers that sections 224 and 225 of the PLA could be merged into a single provision, provided that the effect of the provisions is not changed.

2.3. Section 226 – Corporation in capable of acting

Question 10

QLS is not aware of how often the process under section 226 of the PLA is used in practice.

Question 11

QLS considers that section 226 of the PLA should be retained as it provides a mechanism to resolve the ‘incapacity’ of a corporation to act. While this may be used rarely, it will need to be retained.

2.4. Section 227 – Corporate contracts and transactions not under seal

Question 12

QLS is not aware of how often this section is relied on for execution by corporations, but expects that it has frequent application to the execution of contracts by incorporated associations.

Questions 13 and 14

This provision needs to be retained to ensure there is a process that applies to any entity that falls outside of other legislation.

3. Part 16 - Voidable dispositions (ss 228-230)

3.1. Section 228 – Voluntary conveyances to defraud creditors voidable

Question 15

QLS considers that there is potential inconsistency between section 228 of the PLA and current concepts of indefeasibility of title under the *Land Title Act 1994 (Qld)*.

Subject to the statutory exceptions, a registered owner of freehold land in Queensland holds that land subject only to registered interests. This is fundamental to ownership of freehold land (and also interests in land).

Section 228 is inconsistent with this approach to titling, as it potentially makes a registered owner of land subject to forfeiture, if the original transfer was done with intent to defraud and the current owner did not pay valuable consideration.

There is potential for the current section to operate inequitably, where a current innocent recipient of the land has made improvements to that land or relies upon it as its place of residence or support. However, the members of the QLS Property and Development Law Committee has also discussed this provision with members of the QLS Banking and Finance Law Committee and both committees appreciate the importance of the provision in ensuring financiers have adequate protection.

The section refers to an alienation of property being ‘voidable’. QLS considers this would permit a Court discretion in applying the provision, in circumstances where the provision could be applied unjustly or harshly.

Other provisions of the PLA set out factors the Court may take into account in exercising a discretionary power (eg section 128(7)). QLS has not undertaken a broader review of

legislation but there is precedent for legislation setting out similar lists of factors for consideration.

QLS considers that section 228 would benefit from similar provisions. For example, factors a Court may take into account could include:

- whether the creditor could have reasonably taken steps to protect their interest (eg by registration of a security interest on a statutory register);
- whether there has been delay by the creditor in bringing the proceedings; or
- whether the current owner has invested in the land or would otherwise be unjustly prejudiced.

Further, section 228 does not expressly provide the Court with any scope of remedy other than making the alienation of the property void. Similar provisions in section 588FF of the *Corporations Act 2001* (Cth) set out a range of orders that the court may make. Section 228 may benefit from a similar approach (eg compensation to the innocent owner, general power to make orders that the Court considers fit for the relief sought).

While QLS considers the section would benefit from some clarifications, QLS also considers the provision should be retained.

Question 16

The relevance of this section should be considered in the context of the protections available to registered proprietors and creditors under the *Land Title Act 1994* (including indefeasibility of title), the *Personal Property Securities Act 2009* (Cth) (as to the priority and take free provisions) and the bankruptcy and insolvency laws.

Question 17

QLS is not aware of confusion between the operation of this section and section 121 of the *Bankruptcy Act 1966* (Cth).

3.2. Section 229 – Voluntary disposition of land how far voidable as against purchasers

Question 18

QLS has sought the advice of its Property & Development Law Committee and the Banking & Financial Services Law Committee.

The Property & Development Law Committee considers that on balance, this section could be repealed, for the following reasons:

- Section 229 concerns alienation of land to defraud a purchaser. The commentary by the NZ Law Reform Commission on this section identifies the limited use (if any) of retaining this section. The equivalent section has been abolished by New Zealand.
- Retaining the section is inconsistent with the general concepts of indefeasibility of title.

However, the Banking & Financial Services Committee considers that section 229 continues to serve a purpose for practice in Queensland and should be retained given:

- (a) The other states and various countries have not removed the equivalent provision in their jurisdictions, and the need for consistency in the law of credit in the modern world of commerce and location of property to satisfy debtors' obligations;
- (b) The "gaps" in suitable remedies for insolvency appointees and/ or creditors which are likely to arise if section 229 of the PLA was removed;
- (c) Section 229 of the PLA may have application in circumstances where remedies under the *Corporations Act 2001* and the *Bankruptcy Act 1966* may not be available;
- (d) There is no apparent "mischief" or duplication with the insolvency laws which its removal would seek to achieve, and
- (e) Whilst it might not be used as often by insolvency appointees as the voidable transaction provisions of the insolvency laws, it still maintains a high relevance to creditors and insolvency appointees of local and foreign debtors.

In light of these differing opinions, QLS recommends that careful consideration be given to these sections, particularly in relation to the potential interaction of these provisions with Commonwealth corporations and bankruptcy legislation.

3.3. Section 230 – Acquisitions of reversions at an under value

Question 19

QLS has sought the advice of its Property & Development Law Committee and the Banking & Financial Services Law Committee.

As for section 229, the two Committees have highlighted different concerns:

- The Property & Development Law Committee considers that on balance, this section could be repealed, in light of the recommendations of both the Victorian and Ireland Law Reform Commissions to repeal the equivalent to this section;
- The Banking & Financial Services Law Committee have concerns similar to the issues highlighted under Question 18 above.

In light of these differing opinions, QLS recommends that careful consideration be given to these sections, particularly in relation to the potential interaction of these provisions with Commonwealth corporations and bankruptcy legislation.

4. Unregistered Land

Questions 20-24

QLS supports the simplification of the process to convert old system land to registered land. The broad framework set out in Part 11.3 of the Issues Paper seems to be an appropriate starting point for a new process.

Questions 25-26

QLS supports the preliminary recommendation that Division 3 of the PLA be repealed.

5. Part 19 – Property (de facto relationships ss 255 – 344)

Response to recommendation

QLS supports the recommendation that Part 19 of the PLA should be reconsidered in 5 years, with a view to repealing the Part.

6. Part 20 Miscellaneous

6.1. Section 345 – Protection of solicitors and others adopting this Act

Question 30

QLS anticipates providing a separate response to this question.

6.2. Section 346 - Restriction on constructive notice

Question 31

QLS agrees with the recommendation that the provision should be removed. This provision is no longer consistent with the legal framework for purchase of property in Queensland.

6.3. Section 348 – Payments into and applications to court

Questions 32 and 33

QLS agrees with the recommendation that sections 348(1) and 348(2)-(6) of the PLA should be removed. These processes should be regulated by the UCPR.

6.4. Section 349 – Forms

Question 34

QLS agrees that there is no current utility in this section, as registration is now regulated by the *Land Title Act 1994* (Qld) and the *Land Act 1994* (Qld).