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Property Law Act Review
Strategic Policy and Legal Services
Department of Justice and Attorney-General
GPO Box 149
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By email: [redacted]

Dear Review Team

Property Law Bill consultation – public consultation draft released September 2022 – Seller disclosure scheme and flood history information

Thank you for the opportunity to provide feedback on the public consultation draft of the Property Law Bill.

The Queensland Law Society (**QLS**) appreciates being consulted on this important and significant milestone in the review of the *Property Law Act 1974* (**PLA**). QLS has been an active participant in this process since the beginning of the review conducted by the Commercial and Property Law Research Centre of the Queensland University of Technology (**QUT**).

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals and increase community understanding of the law. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Property and Development Law Committee and the Family Law Committee.

QLS also recognises the contribution of the Banking & Financial Services Law Committee, the Succession Law Committee, the Litigation Rules Committee and the Corporations Law Committee to previous QLS submissions responding to QUT discussion papers and associated consultations.

These committees have all provided the benefit of their expertise in considering the breadth of issues addressed in the PLA and recommending improvements for the benefit of the community and the legal profession.

Part 5 – Co-ownership of property

Subdivision 4 – Miscellaneous matters

Section 45 – Adjournment or stay of co-ownership proceeding – family law proceeding

The proposed draft provides that "the court may adjourn or stay a proceeding …if a co-owner of the property *intends* to start a family law proceeding".

QLS is concerned that this wording is quite open ended. A person may have an intention but whether they act on that intention in a timely manner could be an issue.

The equivalent section in Victoria's *Property Law Act 1958* (Victoria's PLA) provides the proceedings can be adjourned "to permit a co-owner of property to commence proceedings in relation to property of the co-owner… under the Family Law Act..."

We suggest the wording in Victoria's PLA provides more certainty. It enables the court when hearing an application to adjourn or stay proceedings to make an order permitting the co-owner to commence proceedings by a specific date, thereby creating a positive onus on the co-owner to actually commence the family law proceedings.

We suggest that the co-owner should be subject to a stipulated time frame in which proceedings must be commenced

Part 6 – Deeds

Section 61 – Protection for third parties

QLS notes that s 61 does not extend to statutory corporations or corporations sole when signing a deed. We reiterate our previous comments about the desirability of this section applying to those entities.

Further we note that section 227 of the current PLA is not included in the Bill.

The effect of omitting s 227 PLA is that the common law rule which requires a corporate entity to give effect to acts under their common seal will be reinstated. This will mean that contracts (not deeds) will be subject to the common law rules unless other legislation alters the rule. In the case of a corporation under the Corporations Act 2001, the rules in s 127 will apply but for all other bodies corporate (including statutory corporations and corporations sole) the common law subject to any specific legislation will apply.

This is a significant change in practice and QLS strongly recommends reinstating s 127 as recommended in the QUT report.

We further note that currently s 11C of the *Public Trustee Act 1978* applies s 227 of the PLA to allow the Public Trustee to sign contracts, not under seal. If an equivalent to s 227 PLA is not reinstated, consideration should be given to amending s 11C to continue to allow the Public Trustee to sign contracts, which are not deeds, without the use of the seal.

There may be other examples where statutory entities or incorporated associations rely on s 227 PLA. These need to be considered to ensure there are no unintended changes to current practice.

Part 7 – Contracts, sales of land and instalment contracts

Section 70 – Contract containing promise for benefit of third party

Section 70(3)

This section says 'the contract may be terminated or modified'. As previously submitted QLS recommends the reference should be 'the promise may be terminated or modified.'

Section 70(8)

QLS reiterates its concerns about defining 'contract' to include a deed for the purpose of this section only.

This may be interpreted to mean a contract in the form of a deed is not a contract elsewhere in the Act which is not correct.

QLS suggests that a definition of contract to include deed should apply throughout the Act.

For example, if this interpretation was raised, then in section 72(1) which applies to 'a contract or other document', it would then be necessary to argue that a deed is an 'other document' rather than a 'contract'.

Section 72 – Effect of conclusive evidence

Section 72 is a redrafted form of s 57. Section 57(2) states that s 57(1) does not apply to a certificate from a person acting judicially, quasi-judicially or as an arbitrator or quasi-arbitrator.

QLS agrees with the retention of this section, as a new s 72, but queries the deletion of quasi-arbitrator from s 72(2)(a). QLS understands that a quasi-arbitrator may still be relevant in some cases.

QLS suggests retaining the reference to quasi-arbitrator in s 72(2)(a) as removing it may have unintended consequences.

Section 78(2) – Implied conditions

QLS suggests that referencing "the land registry office" may no longer be appropriate given recent closures.

"Queensland government service offices" may be an alternative although QLS is not aware of whether these would have facilities suitable to accommodate settlements.

Section 79 – Buyer may rescind if residential dwelling unfit

Under s 79(2) a buyer can rescind up until the event in subsection (2)(c) of "the seller restoring the residential dwelling..." .

QLS queries how will a buyer know when the property was restored? Under s 79(3) the seller is required to give notice of the restoration. This creates a definite point in time for the buyer's right to rescind to end.

Section 79(2)(c) should state 'the seller gives notice under (3) of the restoration ..."

We are concerned that there will be uncertainty about whether the seller has restored the property to the condition it was in prior to the damage.

We suggest consideration also be given to adding a provision to the effect that if a seller gives or purports to give a notice of restoration, it is not conclusive evidence that the dwelling has been restored to the condition it was in immediately before it was damaged or destroyed as to be unfit for occupation.

Section 80 – when day of settlement is next business day

It is not clear from the drafting of s 80(2) if the parties can agree on another day for settlement in the terms of the contract.

In the case of electronic settlement there will still be a need for the contract to provide for dates that are not business days in the place for settlement or location of the land in addition to the definition of business days in the *Acts Interpretation Act 1954* (AIA). For example, the Christmas – New Year period which are currently not business days in the REIQ standard contracts or in the case of electronic settlement, any day where the RBA is not open for transactions but it is a usual business day in Queensland.

Section 80(2), which states "Despite the terms of the contract..."suggests that it will not be possible to either include additional business days or contract out of the section. The addition in (2)(a) of 'if the parties to the contract agree to another day of settlement' suggests an agreement outside the terms of the contract.

QLS recommends that s 80 applies 'subject to' the terms of the contract.

It is critical that the parties are able to provide a different definition of business days in the contract, suitable to their situation. The parties need to be able to contract out and reach their own agreement on the calculation of days.

Section 82(9) Effect of adverse event on day of settlement (definition)

QLS suggests that the definition of "adverse event" should also include "imminent threat" of an event in (a) (d) or (e) as a party may be prevented from attending the place of settlement due to closures in anticipation of such an event occurring.

Instalment contracts

Section 93 – Seller cannot sell or mortgage land

QLS notes that the consultation draft includes proposed lots within the application of the instalment contract provisions. This creates practical issues for sellers of off the plan units in particular in relation to s 93.

Under this section a seller must obtain the consent of the buyer to any sale or mortgage. This requires consent to the actual terms of the sale or mortgage. Consent in advance as part of the terms of the contract will not comply with the section.

Given the changes to the definition of instalment contract the situations in which an instalment contract may arise are now limited, but we note that the list of excluded payments does not include payments for fit-out or variations that are required to be paid prior to settlement.

QLS recommends that to minimise the application of the instalment contract provisions to off the plan sales these types of common payments (for fitout/furniture packages or structural variations to the lot during building) should be included as excluded payments for the purpose of creating an instalment contract. The advantage of this approach is that the instalment contract provisions will still apply to an off the plan contract where payments of the price are made by instalments.

QLS also notes that any monies paid by the buyer prior to settlement should be retained in a trust account held by a solicitor or real estate agent until settlement or earlier termination, under BCCMA, ss 218A-218C and LSA, ss 16-18. Provided these provisions clearly apply to any money paid by the buyer toward the purchase of the lot, a buyer should be adequately protected from loss of these funds without receiving the lot.

Part 9 Leases

Section 127 – effect of transfer of reversion of lease by lessor

Section 127(4) provides for the transferee to be bound by obligations and take the benefit of covenants.

Section (4)(b) includes additional paras (i) and (ii) to clarify that the transferee is entitled to the benefit of each term of the lease, to the extent the lessor was entitled to the benefit of the term immediately before the transfer, whether or not the term 'touches and concerns the land' or is 'express or implied'.

QLS submits that these paragraphs (i) and (ii) should apply to s 127(4)(a) and (b) not just (b). The concept of 'touch and concern' the land has been applied to limit the transfer of obligations as well at benefits/rights so the qualifications should apply to both.

Section 129 – Effect of requirement in lease for consent of lessor to assign lease or take other action

Subsection 129(5)

QLS believes subsection (5) is unnecessary. For the purpose of subsection (6) the time to consider the request should run from the time when the lessee has provided the information required under subsection (3).

Subsection 129(6)

In QLS's view, 30 business days after the giving of the proposal notice is an excessive time for the lessor to consider an application for consent (longer than typically allowed in a business sale contract).

We note 30 business days is inconsistent with section 50 of the *Retail Shop Leases Act 1994,* which refers to 1 month after the request and particulars is given. We acknowledge that s 129(6)(b) refers to 1 month after further particulars are requested.

QLS believes 1 month is an adequate timeframe for both (6)(a) and (b).

QLS is also concerned that allowing 30 business days will have the effect of delaying business sales.

Section 130 Effect of assignment of lease by lessee to assignee

In relation to section 130(2)(a) and (b), we make the same comments as above regarding section 127: (2)(b)(i) and (ii) should apply also to (2)(a).

Section 130(3)(c) replicates s 127(5)(c). This should not apply where there is an assignment of the lease. A lessee should not be able to agree with the assignee of the lease for the ongoing benefit of a term of the lease to remain with the assignor, without the agreement of the lessor.

QLS strongly recommends removing (3)(c) or alternatively limiting application of (3)(c) to a benefit that has accrued prior to assignment of the lease.

151 When lessor may refuse to renew, or extend term of, or sell reversion of, lease

This introduces a significant change to the existing law insofar as, where a lessee does not exercise an option (to renew or purchase) within the timeframes prescribed in the lease, the lessor has to give a notice advising the lessor of the ability to apply to the court for relief and the option only lapses 1 month after that notice is given if the lessee does not commence proceedings seeking relief. The existing provisions (s 128) only apply where there is a breach of the lease by the lessee.

This was not discussed in the QUT report but it was in the draft sections (taken from the NZ PLA) within the recommendations.

The effect of 151(2)(b) seems to be the right to relief continues until 1 month after the notice is given. It is not even clear that the right would end on expiry of the lease. At the very least this should cease to apply once the lease ends. The purpose of a timeframe for exercise of an option to renew is to enable the landlord to advertise and relet the premises which QLS believes is reasonable. QLS is therefore opposed to extending the section to non-breach situations (although we acknowledge this is a relevant consideration for the court under 154(2)(b) and (c)).

In the case of an option to purchase, QLS is of the view the time for exercise is a commercial matter (eg if the parties agreed the right had to be exercised within the first 12 months of the lease, we cannot see any policy rationale for overriding that in this way).

Sections 161-163 termination of particular leases

These provisions deal with tenancies at will and other periodic tenancies.

We recommend that the term "tenancy", particularly in light of the use of the word in s 163 be defined in the legislation.

For example, s 163 applies to a 'tenancy, other than periodic tenancy or a tenancy for which a period of notice has expressly or impliedly been agreed to by the parties …'

It should be clear that the term "tenancy" applies to a periodic tenancy of some description and not a fixed term lease.

Section 165 Limitation on award of damages for breach of obligation

QLS considers that section 165(3) should only apply to breach of a make good obligation (at the end of the lease) (see existing s 112(1) - "to put premises in repair at the end of a lease").

QLS also recommends the inclusion of a provision to the effect that despite any other provisions, the onus to prove that the premises will not be demolished lies on the landlord. This section will arise in relatively rare circumstances and will be relevant only when the premises are still standing at the time of court.

Part 10 Neighbouring land

Section 169 Power of court to modify or extinguish easement or covenant

Section 169(3)(c) and (7) – use of phrase "restriction imposed under a BMS"

The term ***covenant*** is defined in subsection 169(7) to include "*a restriction imposed under a building management statement.*"

QLS queries what the phrase "restriction imposed under a BMS" is referring to.

QLS recommends this be clarified by replacing the words "*a restriction imposed*" with "*a covenant*" under a BMS.

This is particularly relevant to the operation of subsection 169(3)(c) to ensure that the amendment power is available for all aspects of a BMS, not only the 'restrictions' in the BMS.

The power to modify a BMS should extend to various aspects of the BMS, eg:

- Rights (in the nature of easements) for access and services
- Management and administration arrangements
- Cost sharing arrangement and method of apportionment
- Architectural code provisions

These are matters which it may be necessary to have reviewed over the life of a building due to changes of use, changes to the building, adoption of new technologies and so on. The term "restriction" does not adequately cover these concepts.

It is necessary for the court to hold the scope of powers necessary to make orders consequential upon modifying or extinguishing the easement or covenant.

Section 174 Minimum compensation (encroachment)

QLS strongly disagrees with the approach taken in this section.

Subsection (1) imposes the burden of proof on the encroaching owner, which may be difficult to discharge if the encroachment has existed for many years and was built by a predecessor.

This drafting reflects the existing s 186 of the PLA. However in QLS's view, the compensation should only be 3 times the market value if the encroaching owner does not satisfy the court that the encroaching owner (not a predecessor) did not encroach deliberately or was not negligent.

As the court may make an order providing for reasonable access to the encroachment or curtilage (s173(5)), we suggest that "land affected by the encroachment" should be amended to refer to "land the subject of the order"'.

Part 15 General

Section 215 General requirements for service

Post

QLS notes that the deeming provision for receipt of post in subsection (2) is 7 business days.

QLS recommends this be amended to 5 business days.

QLS is of the view that 5 business days is appropriate for a deeming provision which can be overridden by evidence to the contrary, noting the later words in subsection 215(2).

The current delivery times for ordinary post on the Australia Post website are:

Regular letters:

a. Same state - up to 4 business days

b. Interstate - 3-6 business days depending on origin and destination.

We note that this change is inconsistent with the current deeming provision for service by post in the REIQ Standard Contracts for the giving of notices under those contracts and will potentially create confusion and inconsistent practices.

We consider there is no rationale for a time period longer than the delivery times stated on the Australia Post website.

Email

QLS notes that sending a notice by email is not included in the list of permitted service methods.

As recommended below, s 215 should include electronic communication as a permitted delivery method for the following reasons:

1. Section 214 acknowledges that the sections of the PLA may be inconsistent with the *Electronic Transactions (Queensland) Act 2001* (**ETQA**). This assumes but does not expressly provide for the application of the ETQA to the giving of notices under contracts or documents under the PLA. To arrive at this conclusion a party will need to consider the application of s 11 and 12 ETQA in each particular situation and whether it will applies to either a contractual notice or PLA notice. QLS considers a better approach is to expressly provide for the giving of documents using electronic communication in the PLA similar to the approach in s 9 of the proposed seller disclosure provisions.
2. Section 215 should permit the giving of notices in accordance with the ETQA as well as the giving of documents using a link (as described in s 217(3)(c).

   Section 217 is currently limited to the situation where an email address is designated by the recipient. This is too narrow.

Section 217 Electronic communication

QLS considers the following issues arise with the section as drafted:

1. Application of section 217 is currently limited to the situation where a person has designated an electronic address for receiving documents. There is no proposed definition of 'designated' in s 217 or the Dictionary so a similar meaning to the ETQA is likely to be attributed.

   This means that the section has application only where a recipient specifically requests that notices or documents be sent to a specific electronic address. If an address is not designated by the recipient, the sender of an electronic document will not be able to rely upon s 217 for the sending of notices under a contract or for notices or disclosure documents allowed to be given under the PLA. Instead the sender will need to ascertain if the ETQA applies to the sending of the document to permit it to be served electronically.

   This creates the potential for confusion about which rules apply to the sending of documents electronically.

2. Further if the ETQA, s 24 applies the consequences are:
    a. the notice will be delivered at the time the recipient becomes aware of the email; and
    b. unless there is a provision in the contract, a notice given by email with a link in the email will not comply with a statutory or contractual provision to 'give' a notice. See *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2015] 1 Qd R 265. This is overcome if a broad permission to give a document using this type of electronic communication is permitted.
3. If the notice is one that is required to be given under the PLA, then unless the notice relates to an existing contractual arrangement, there is unlikely to be an express designation of an email address for the service of notices. This will mean that unless the sender first seeks the recipient's authorisation of the email address for service, a notice under the PLA may not fall within s 217 and will instead need to rely on the ETQA to be given by electronic means. The impact will be the same as under 2 above.
4. Section 217 is inconsistent with proposed s 9 of the Seller Disclosure provisions which allows a disclosure statement to be given by an electronic communication under the ETQA or if the buyer consents by other means. It is not clear how this section interacts with s 217?
5. The deeming provision in s 217(4) which is subject to s 217(5) creates uncertainty for senders of electronic documents as the deeming rules can be excluded by evidence to the contrary. A party who sends an email prior to 5pm should be able to rely upon the deeming provision for valid service, but under s 217(5) valid service prior to 5pm can be disputed if the other party produces a computer log that records the document being received at 5.05pm which may mean the document is served late.

    Parties should have certainty and the provisions should be drafted to minimise, not increase, disputes. We acknowledge that the removal of a 'unless the contrary is shown' provision may be perceived to cause unfairness to the receiving party but if it remains it creates too much uncertainty for the sending party.
6. Section 217(4) may have the perverse outcome of deeming a party to have given a document later than it was actually received. For example, if a seller provides a disclosure statement on a Saturday by sending a link to a buyer at the open home. According to s 217(4) this is deemed delivered on Monday at 9am. To prove otherwise would require the seller to have evidence from the agent's email to show the time of actual receipt. This has the potential to cause a significant number of disputes.
7. There is no provision to provide for the order of deemed receipt where more than one document is given after 5pm on a business day. Provision for the documents to be deemed received at 9am in accordance with the respective times the documents were sent should be included.

Recommendation:

In summary QLS recommends that:

1. Section 215 should permit the giving of documents under agreements or as required by the PLA using electronic communication. We suggest that s 217(2)-(3) should be included in s 220;
2. Section 217 becomes a deeming provision for electronic communication which applies if the person designates an electronic address for the service of documents; and
3. Section 217 should apply unless there is agreement to the contrary. Section 217(5)(b) should be omitted.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

Kara Thomson
President