

10 July 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: [REDACTED]

Dear QUT Research Centre

**Property Law Review – Issues Paper 6 – Property Law Act 1974 (Qld) – PLA Parts 1-4, Part 6 (Deeds) and Part 20 (Notices)**

Thank you for the opportunity to respond to the "*Property Law Review - Issues Paper 6 – Property Law Act 1974 (Qld) – PLA Parts 1-4, Part 6 (Deeds) and Part 20 (Notices)*."

Thank you also for the extension of time to provide the enclosed response. Queensland Law Society appreciates being consulted in this important process.

This response has been compiled with the assistance of the Property and Development Law, Succession Law and Corporations Law Committees who have substantial expertise and practice in this area.

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 [REDACTED] or [REDACTED]

Yours faithfully

[REDACTED]  
Christine Smyth  
President

## **Response to Property Law Review – Issues Paper 6 - *Property Law Act 1974 (Qld)* – Part 1-4, Part 6 (Deeds) and Part 20 (Notices)**

### **1. Part 1 – Preliminary (sections 1-6)**

#### **1.1. Section 4 – Act not to be taken to confer right to register restrictive covenant**

##### **Questions 1 -2**

QLS believes it is appropriate to retain section 4 of the PLA. The repeal of such provisions creates practical issues as some practitioners may not be aware of the reason for the repeal of a provision (that is, at first blush it may seem the intention was to permit restrictive covenants).

A common example is the repeal of the provision abolishing the doctrine of distress for rent. Practitioners who commence practice after the repeal or who do not practice regularly in this area are not aware that distraining for rent is not permitted. The law should be readily ascertainable not contained within a long forgotten reprint.

#### **1.2. Section 5 – Application of Act**

##### **Questions 3 – 9**

The members of the Property and Development Law Committee are not aware of instances where the application or meaning of section 5 has created uncertainty. QLS generally supports the New Zealand approach in that:

- the Act applies to:
  - land in Queensland, whether freehold or leasehold,
  - interests in such land
  - instruments wherever executed (but by implication with the necessary connection to Queensland)
- the Act applies subject to inconsistent provisions in other Acts [and any contrary intention within the Property Law Act].

#### **1.3. Sections 6 – Savings in regard to ss 10-12 and 59**

##### **Questions 10 – 11**

QLS agrees with the preliminary recommendation that section 6 of the PLA be retained but relocated within the sections to which it relates and that section 6(e) of the PLA be repealed.

## **2. Part 2 – General Rules Affecting Property (ss 7-18)**

### **2.1. Section 7 – Effect of repeal of Statue of Uses**

#### **Questions 12 - 14**

QLS agrees that section 7 should be repealed.

### **2.2. Section 8 – Lands lie in grant only**

#### **Questions 15 - 16**

QLS agrees with the recommendation that section 8 should be repealed. On the basis that there are no significant parcels of old system land in Queensland, QLS does not believe it is necessary to abolish the common law rule.

### **2.3. Section 9 – Reservation of easements etc in conveyances of land**

#### **Question 17**

QLS agrees that section 9 should be repealed.

### **2.4. Section 12 – Creation of interests in land by parol**

#### **Questions 18 – 19**

QLS agrees that section 12 is still relevant and should be retained and that the phrase 'taking effect in possession' should be amended for clarity to be consistent with the *Land Title Act 1994*.

### **2.5. Section 13 – Persons taking who are not parties**

#### **Question 20**

QLS considers that section 13 should be retained with an amendment to make the section subject to the provisions of the LTA. It should apply to all covenants contained in the relevant Deed and not just the covenants that run with the land.

Section 55 of the PLA makes it unnecessary to extend the application of section 13 beyond real property.

### **2.6. Section 14 – Conveyances by a person to the person etc**

#### **Question 57**

QLS agrees that section 14 is complicated and lacks clarity. Section 14 should be retained subject to amendments to clarify the section.

The provisions contained in section 56 of the *Property Law Act 2007* (NZ) could be used in this regard.

## **2.7. Section 15 – Rights of husband and wife**

### **Questions 58 – 59**

QLS agrees that section 15 should be repealed. There is no need to enact a specific provision abolishing the common law doctrine of unity as that has been covered by other legislation.

## **2.8. Section 15A – Rights of aliens**

### **Questions 60 – 61**

QLS queries whether, in the absence of any principle or suggestion that as a matter of law foreign persons may not hold interests in land in Australia, it is necessary to retain the section.

If retained the archaic term 'aliens' should be replaced.

## **2.9. Section 16 – Presumption that parties are of full age**

### **Questions 62 – 63**

QLS considers that section 16 can be repealed.

## **2.10. Section 17 – Merger**

**Question 64 – Do you agree with the preliminary recommendation that section 17 of the PLA should be retained?**

QLS agrees that section 17 should be retained but the drafting should be modernised.

## **2.11. Section 18 – Restrictions on operation of conditions of forfeiture**

**Question 65 – Do you agree with the preliminary recommendation that section 18 of the PLA should be retained?**

The QLS Property and Development Law Committee agrees that section 18 should be retained.

**Question 66 – Do you think section 18 of the PLA still serves a purpose?**

The QLS Succession Law Committee has recommended that further consideration be given to how the section interrelates, if at all, with a protective trust established under section 64 of *Trusts Act 1973*.

If there is some interrelation, QLS recommends that a decision on how to proceed with section 18 of the PLA should be made after the Attorney-General's recently announced review of the trust legislation. It may be appropriate for this section to be relocated to the new trust legislation.

### **3. Part 3 Freehold estates (sections 19-29)**

#### **3.1. Overview and purpose**

**Question 67 - Do you agree that section 19 of the PLA should be retained?**

QLS agrees that section 19 of the PLA should be retained.

#### **3.2. Section 20 – Incidents of tenure on grant in fee simple**

**Question 68 - Do you agree with the recommendation that section 20 of the PLA be retained with some amendments to modernise and simplify the provision?**

QLS agrees that section 20 of the PLA should be retained, however, the language should be modernised and simplified.

**Question 69 - Do you agree that section 20(4) of the PLA should expressly provide that it is subject to the *Corporations Act 2001 (Cth)*?**

QLS acknowledges that it is not strictly necessary to state that section 20(4) of the PLA is expressly subject to the *Corporations Act 2001 (Cth)*. However, in the interests of clarity, the QLS suggests that:

- the reference to 'subject to any Act' should be retained; and
- section 20 (4) should provide that it is subject to the *Corporations Act 2001 (Cth)*, as recommended in the paper.

#### **3.3. Section 21 – Alienation in fee simple (pages 71-73 of paper)**

**Questions 70 – 71**

QLS considers that the provisions need to be either retained in the PLA (or inserted into the *Land Act 1994 (Qld)*) which clearly set out the incidents of freehold tenure (similar to the section 57 of the *Property Law Act 2007 (NZ)*).

QLS considers that the language used in the *Property Law Act 2007 (NZ)* is preferable to the current wording of section 21 of the PLA. Accordingly, QLS considers that section 21 should be retained but modernised.

#### **3.4. Section 22 – Abolition of estates tail (pages 74-78 of paper)**

**Questions 58 - 60**

QLS does not consider that section 22 clearly abolishes estates tail.

The wording of the Act should be amended to ensure clarity that these estates are abolished. The wording of section 58 of the *Property Law Act 2007 (NZ)* is preferable to the current Act.

### **3.5. Section 23 – Abolition of quasi-entails**

#### **Question 61 – 62**

QLS agrees that section 23 should be repealed.

If there is any uncertainty about the unintended consequences of the repeal of section 23 of the PLA, then QLS considers that quasi tails should be clearly abolished, with clarification that any attempt since 1 December 1975 to create a quasi tail is deemed to have created either a legal or equitable life estate.

### **3.6. Section 24 – Liability of life tenant for voluntary waste and Section 25 – Equitable Waste**

#### **Question 68 and 69**

QLS agrees that sections 24 and 25 should be retained but the language modernised and simplified, including combining the sections into a single provision.

The New Zealand approach should be adopted. In addition, in the case of an equitable life interest, it should be made clear that the claim for damages may be maintained on behalf of the remaindermen by the trustee. In the case of a legal life interest, it should be made clear that the remaindermen can enter upon the property upon giving reasonable notice, for the purposes of determining whether any waste has been committed.

Any new section should also address the issue of permissive waste (allowing a house to fall for want of necessary repairs) in the same way.

### **3.7. Section 26 – Recovery of property on determination of a life or lives**

#### **Question 70 - Do you agree with the recommendation that section 26 of the PLA should be retained but simplified? If not, why?**

QLS agrees that section 26 should be retained but simplified.

### **3.8. Section 27 – Penalty for holding over by life tenant**

#### **Question 71**

Section 27 should be retained. If "wilfulness" is to be retained as a necessary element, than at the least, the re-drafting can contain examples of the more simple instances of wilfulness, such as:-

- (a) Holding over after proof of the production to the life tenant of a certified copy of the certificate of death, or of the order of a court presuming against the continuation of life, of the cestui que vie (or, if the old language is to be avoided, the person whose life measures the duration of the life interest);
- (b) The calculation of "double the yearly value of the land" seems arbitrary and may be unjust. In the QLS's opinion an assessment of compensation based on loss or detriment would be more appropriate.

### **3.9. Section 28 – Abolition of the rule in Shelley’s Case**

#### **Questions 72 – 74**

QLS considers section 28 effectively abolishes the rule in Shelley’s case. However, the approach taken in section 58(3) of the *Property Law Act 2007* (NZ) is preferable to the current Act and the New Zealand approach should be adopted.

### **3.10. Section 29 – Words of limitation**

#### **Questions 75 - 76**

QLS agrees that section 29 has no application to registered land. Further, the potential application to old system land is remote and the QLS considers the section may be repealed.

## **4. Part 4 – Future Interests (ss 30-32)**

### **4.1. Section 30 – Creation of future interests in land**

#### **Question 77**

QLS agrees with the preliminary recommendation that section 30 of the PLA be retained.

### **4.2. Section 31 – Power to dispose of all rights and interests in land**

#### **Question 78 - 79**

Section 31(1) of the PLA has current relevance, however QLS is not aware of a situation where section 31(2) would still be relevant.

QLS agrees with the preliminary recommendation that section 31 of the PLA be retained.

### **4.3. Section 32 – Restriction on executory limitations**

#### **Question 80**

QLS agrees with the preliminary recommendation that section 32 of the PLA be retained. The section may benefit from some amendment for clarity, depending on the form of the amendment.

## **5. Part 6 – Division 1 – Deeds, covenants, instruments and contracts (sections 44-52)**

### **5.1. Deeds and electronic commerce**

#### **Question 81 - Should deeds be abolished?**

QLS does not consider that deeds should be abolished. Deeds continue to have a useful role to play, particularly to create legally binding obligations where there may not be consideration passing from one party to another.

#### **Question 82 - If not, should the formal requirements for deeds be modified to allow the creation of electronic deeds?**

QLS considers that there is considerable merit in allowing for the electronic creation of a deed.

#### **Question 83 - If yes, should the legislation modify the formal requirements for all deeds or create a sui generis category of electronic deeds?**

QLS considers that it would be appropriate to permit the electronic creation of a deed as an additional mechanism for creation of a deed.

#### **Question 84 - Should deeds continue to have the longer limitation period of 12 years?**

QLS considers that it would be appropriate for the limitation period for deeds to be consistent with the limitation period for contracts.

### **5.2. Section 44 – Description and form of deeds**

#### **Question 85 - Are there any reasons to retain section 44(1) of the PLA?**

Section 44(1) of the PLA could be repealed as it has no modern utility.

#### **Question 86 - Are there any reasons to retain section 44(2) of the PLA?**

The Property Committee considers that section 44(2) has utility and should be retained, but recommends the words "whether or not being an indenture" be removed.

#### **Question 87 - If section 44 of PLA is removed, is there a need to include a provision about the form or description of a deed?**

If section 44(2) is retained as recommended in the response to Question 86, no further description is required.

### **5.3. Section 45 – Execution of deeds by individuals**

#### **Question 88 - Should the PLA be amended to remove the requirement for deeds to be written on paper?**

The requirements for deeds to be written on paper should be removed and replaced with an obligation that a deed must be in writing, either on paper or created electronically in accordance with the requirements for electronic creation of a deed.

**Question 89 - Should the PLA be amended to say that a document expressed to be sealed or expressed to be legally binding on the parties is sufficient for valid creation of a deed, without the need for actual or deemed sealing? If so, what form of words should be used in the deed?**

QLS considers that the PLA should be amended so that a document expressed to be sealed or expressed to be executed as a deed is sufficient for valid creation of a deed, without the need for actual or deemed sealing.

If the document is either expressed to be sealed or expressed to be executed as a deed, that should be sufficient to create a deed.

**Question 90 - If a modified approach is adopted to the execution of deeds by individuals, should the approach apply to all deeds or just to deeds where the parties specifically desire or intend to create an electronic deed?**

A modified approach should be adopted for parties which specifically desire or intend to create an electronic deed. In other words, there should be an additional mechanism for the creation of deeds electronically.

#### **5.4. Section 46 – Execution of deeds by corporations**

**Question 91 - Should the PLA be amended to simplify the requirements for a valid execution of a deed by a corporation? If yes what should the requirements be?**

QLS supports simplifying the requirements for the valid execution of a deed by a corporation and considers the New Zealand model should be favoured.

**Question 92 - Is section 46(6) of the PLA sufficient to allow the execution of instruments by corporations which are not “companies” under the *Corporations Act 2001* (Cth) and foreign corporations?**

QLS considers section 46(6) is not sufficient. See comments under Question 93.

**Question 93 - Should the PLA expressly provide for execution of deeds by foreign corporations or by corporations that are not companies under the *Corporations Act 2001* (Cth)? If yes what should be the approach?**

QLS considers that yes, the PLA should expressly provide for execution of deeds by foreign corporations or by corporations that are not companies under the *Corporations Act 2001* (Cth).

Other than legislating that execution should occur in accordance with the entity's constitution or governing document, it is difficult to comment on what the approach should be. However, it is noted that if legislation permitted execution in accordance with the entity's constitution or governing document, such a provision will defeat the purpose of the section, namely to provide an assumption of valid execution.

#### **5.5. Section 47 – Delivery of deeds**

**Question 94 - Are there any issues with section 47 that have arisen in practice?**

The Property and Development Law and Corporations Law Committees are not aware of any issues with section 47 that have arisen in practice.

**Question 95 - Should the Queensland legislation include a provision similar to Tasmania and South Australia that take a deed as valid if there is evidence external to the deed that the parties intended that the agreement is to take effect as a deed (even if the formal requirements have not been satisfied)?**

QLS submits that if the common experience of practitioners is that there are no issues with section 47 in practice, no amendment is required.

**5.6. Section 48 – Construction of expressions**

**Question 96 - Are there any issues with section 48 of PLA that should be addressed?**

The Property and Development Law and Corporations Law Committees are not aware of any issues with section 48 that have arisen in practice. However, it should be made clear that this section prevails over the *Acts Interpretation Act 1954* to the extent of any inconsistency.

**5.7. Section 49 – Implied covenants may be negatives**

**Question 97 - Are there any issues with the operation of section 49 of the PLA that have arisen in practice? If so, how should those issues be addressed?**

The Property and Development Law Committee are not aware of any issues with section 49 that have arisen in practice.

**5.8. Section 50 – Covenants entered into by a person with self and other(s)**

QLS support the retention of the provision, with modernised language, as has been recommended in the Issues Paper at page 140.

**5.9. Sections 51 and 52 – Receipt in instrument**

**Question 98 - Are there any reasons to retain sections 51 and 52?**

QLS considers that the answer to Question 98 is likely to be no. However, QLS is not aware of compelling reasons to remove the sections. There may be circumstances in which they will have utility.

**6. Part 20 Miscellaneous (section 347)**

**6.1. Section 347 – Service of notices**

**Question 99 - Should section 347 of the PLA be repealed? If so, why?**

Section 347 should not be repealed, as the service provisions are relied upon in practice.

If section 347 is retained, the legislation should still permit contracting parties to determine their own rules for service of notices, which would apply in place of the provisions of the PLA.

**Question 100 - If section 347 is retained, should it be amended to allow the service of notices by electronic means? Should section 347 apply to all other provisions in the PLA where a notice is required to be given? If not, what sections should be excluded and why?**

**Question 101 - Should the PLA set a time period (e.g. one business day) for deemed delivery of email or continue to rely on the ETA provisions?**

Section 347 should be amended to deal with the service of notices by electronic means.

However, QLS acknowledges that there are a number of challenges with taking this approach, including.

- There are often times when email delivery is delayed and we would be concerned about the section being amended to become a "deeming" provision. A deeming provision is a rebuttable presumption, which can be difficult to rebut when the evidence of non-delivery can take some time to arrive. For example, often the "bounce back" notification email often arrives back with the sender several hours (and sometimes the next day) after the original email has been sent.
- Some aspects of *the Electronic Transactions (Queensland) Act 2001* are concerning, including that if, for whatever reason, the email address is not a designated address, the notice is not taken to be given until the person has actually seen the communication.

On balance, QLS considers that the PLA should provide that email receipt is generally taken to be instantaneous.

The most common reason for email not being delivered is due to the size of electronic attachments. If the email is a small size, then generally the experience of the Property and Development Law Committee is that emails are received safely.

One option for further consideration is whether the legislation could refer to an electronic size limit for "deemed receipt", depending on the usual standard of common or industry standard email services. This option will require some detailed analysis of whether this is practical and how often such a provision might need to be reviewed, given the rapid pace of change in standards of electronic communication. This could perhaps be dealt with in a regulation so it can be more readily updated as technology changes.

QLS also notes that there was discussion in the paper about whether there needs to be a separate consent of the recipient to the use of email. There is no similar requirement for the use of facsimile and QLS questions why such a rule should apply to email.

QLS considers that if a party includes an email address in a document as part of its contact details, then the email address should be able to be used as a method of service of notices without the need for a separate consent to the use of email.

Additionally, if a party later uses email as a method of communication during the transaction, this should be taken to be consent to service of notices via email.

**Question 102 - Should the provisions that relate to the deemed service by post be amended to specify a set time period, (e.g. four business days) after which the notice is deemed to be served if the document has been sent by Australia Post?**

QLS does not support a deeming provision for delivery by Australia Post.

The most recent experience of members of the Property and Development Law Committee is that the postal service timing is now unreliable and there is a wide variation of times when notices could be delivered by post.

In practice, communication is generally instantaneous with fax or email. In today's practice, the Committee was of the view that it would not be prudent to give a formal, time sensitive notice by post.

**Question 103 - Should the PLA include provision for a notice or document to be served by 'making the document available' electronically (e.g. on a website)? What conditions should attach to this provision?**

QLS is broadly supportive of this concept, however, there are a number of questions which need to be resolved when determining the form of such a provision, including:

- how to prove what document was made available when clicking on the link;
- version control of the relevant document;
- how to prove that the link was made available to the relevant person.