

Chapter 2

A New Property Law Act

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No. 6344.
PROPERTY LAW ACT 1958

to consolidate the Law relating to Conveyancing
and the Law of Property^(a)
[30th September 1958]

the Queen's Most Excellent Majesty
by the consent of the Legislature
of Victoria in this behalf

A New Property Law Act



- 2.1 Victoria needs a new Property Law Act. The current Act is difficult to navigate and harder to interpret. Many provisions need updating and others need repealing. Further piecemeal amendments would only add to the complexity.
- 2.2 This report does not contain draft legislation but we recommend in this Chapter a number of features that we think the new Act should have. In later chapters, we identify sections of the current Act that should be amended and included in the new Act and those that should be repealed.
- 2.3 In addition, the co-ownership provisions should be amended in accordance with the recommendations in Chapters 2 and 3 of the Commission's 2002 report *Disputes between Co-owners*.¹
- 2.4 To underscore the introduction of a new Act to replace the old, we suggested in the Consultation Paper that the new Act could have a different name and we invited suggestions as to what it should be.² The submissions that addressed the question expressed unanimous support for retaining the title 'Property Law Act'. We agree that the title is appropriate for an Act which deals with both real and personal property.

RECOMMENDATION

1. The *Property Law Act 1958* should be repealed and replaced with a new Act which retains the title 'Property Law Act'.

DIFFICULTIES IN USING THE CURRENT ACT

STRUCTURE

- 2.5 The *Property Law Act 1958* (Property Law Act) differs from most Acts in that there is no integrated statutory scheme. Each provision, or set of related provisions, has its own purpose, scope and legislative history. The Act comprises an assortment of provisions enacted at various times, and on diverse subjects.
- 2.6 The ordering of the provisions in the current Act has been constrained by a desire to retain the same section numbers as in the English *Law of Property Act 1925*. This is because the original Victorian legislation was closely based on the English Act. Keeping the same section numbers facilitates reference to English commentaries and cases. Over time, with the repeal of some sections and the addition of others, the retention of the English section numbering has led to an increasingly disjointed arrangement of provisions. The English legislation has also been amended in the meantime, so the extent to which it is replicated in Victoria has diminished.
- 2.7 An example of the difficulty that the current structure creates is the grouping of sections 198–200 under the heading of 'notices'. Each section uses the term 'notice', but in a quite different sense. Section 198 regulates the mode of giving any notice required by a provision of the Act. Section 199 restricts the equitable doctrine of notice, which affects the priority of an interest. Section 200 entitles the purchaser of old system land to require the grantor to provide a memorandum of an easement or restrictive covenant.³
- 2.8 In our Consultation Paper we asked what features should be included in the new Property Law Act in order to make it easier to read, navigate and understand. Most submissions that responded to this question favoured grouping the provisions together in a clear and appropriate manner by topic.

- 2.9 There is nevertheless caution about introducing new legislation that has little or no connection with the old. One submission put forward the view that there is much to be said for maintaining the same general framework as in the current Act, because practitioners are familiar with it.⁴ Two other submissions requested provisions that would make it easier to trace the origin of sections in the new Act to those in the current Property Law Act.⁵
- 2.10 We agree that the provisions in the new Act should be easily traced to earlier legislation and case law. The Chief Parliamentary Counsel suggested that a table of correspondences be added as a note or appendix in the new Act. We prefer this solution because it enables the provisions in the new Act to be easily traced back as well as allowing leeway in determining how they are structured and numbered.

LANGUAGE

- 2.11 Many provisions in the current Act are unintelligible to all but property law specialists. Their mode of drafting assumes specialist knowledge of legal terms and of the background principles of English common law and equity. The purpose, scope and meaning of some of the provisions are obscure or unsettled.
- 2.12 Some provisions have been reformed quite recently, such as Part IV which implements the recommendations in Chapter 4 of the Commission's report *Disputes between Co-owners*.⁶ Other provisions can be traced back, virtually unchanged, nearly 200 years.⁷
- 2.13 The current Act was passed as part of the consolidation of statutory law in 1958 and many of the provisions are from the *Property Law Act 1928* (the 1928 Act). The 1928 Act borrowed extensively from the English *Law of Property Act 1925*. The English legislation, which has been described as 'a vindication of legislative intervention in what was previously a common law field',⁸ was passed following a process of reform in England that spanned several decades.
- 2.14 Scant information exists about the incorporation of the provisions of the English legislation into the 1928 Act. The 1928 Act was 'virtually the single handed and private work'⁹ of Sir Leo Cussen, who warned the Joint Statute Law Revision Committee of the Legislative Council and the Legislative Assembly that the changes were too technical for Parliamentary debate. The Act was not debated in detail during its passage through Parliament.¹⁰
- 2.15 In examining the provisions of the current Act, we found provisions that may never have been suited to Victorian practice, but may have been included out of caution.¹¹ As far back as 1921, Sir Leo Cussen described provisions that became Part III of the current Act as 'difficult of transcription'.¹²
- 2.16 Clearly, the arcane provisions of the Property Law Act should be either repealed if they are obsolete, or updated if they are to be retained.

- 1 Victorian Law Reform Commission, *Disputes between Co-owners: Final Report* (2002).
- 2 Victorian Law Reform Commission, *Review of the Property Law Act 1958 Consultation Paper* (2010) [2.7].
- 3 We recommend that this section be repealed. See Appendix C.
- 4 Mr Michael Macnamara, Submission 2, 1.
- 5 Law Institute of Victoria, Submission 13, 8; Associate Professor Maureen Tehan et al, Submission 9, 9–10.
- 6 Victorian Law Reform Commission (2002), above n 1.
- 7 For example, s 214 is a 42-line sentence that can be traced back to the *New South Wales (Debts) Act 1813*.
- 8 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 5.
- 9 *Ibid* 10.
- 10 *Ibid*.
- 11 For example, the provision in s 153 for enlargement of 300 years leases.
- 12 Gretchen Kewley, *Report on the Imperial Acts Application Act 1922* (Government Printer, Melbourne, 1975) 71 citing statement by Sir Leo Cussen, *Imperial Acts Application Act 1922*, 79.

RECOMMENDATIONS

2. Provisions of the current Act that are retained in the new Property Law Act should be arranged according to subject; renumbered consecutively; and revised to update and simplify the language, clarify meanings that are in doubt and remove references to obsolete practices.
3. A table of correspondences should be included as a schedule to the new Property Law Act. It should indicate which provisions of the current Act have been copied verbatim; which have been retained with the language updated; which have been subject to minor alterations; and which have been subject to alterations that change their effect.



TRANSITIONAL AND SAVINGS PROVISIONS

- 2.17 When reforming property law, it is important not to upset existing arrangements made in reliance on the current law. With limited exceptions, we recommend that new provisions apply only to transactions and other events that take place after the new Act commences.
- 2.18 In some cases, we recommend specific transitional arrangements for provisions that should be repealed or amended. In most cases it would be sufficient to rely on a broad savings provision in similar (but simpler) terms to section 2(2) of the current Act.
- 2.19 Section 2(2) preserves the continuity of the status, operation and effect of dealings, titles, instruments, declarations, things, rights etc done, created or arising under repealed legislation prior to the commencement of the current Act. A savings provision such as this in the new Act would be complemented by section 14 of the *Interpretation of Legislation Act 1984* which preserves rights and liabilities accrued under a repealed Act or provision.
- 2.20 Some provisions of the current Act carry forward old reform provisions from the 19th and 20th centuries that repeal older statutes. Where we have formed the view that one of these provisions has done its work and can now be repealed, its removal would not revive the older statute.¹³
- 2.21 We take a more cautious approach to provisions which abrogate or modify common law rules or presumptions of interpretation. The common law of property has evolved in the context of changing political, social and economic structures and conditions. A revival of old law could re-create practices that are out of step with contemporary expectations and values. For this reason, we recommend including savings provisions to ensure that common law rules are not revived.

RECOMMENDATION

4. Where a provision that abrogates or modifies a common law rule, presumption, or principle of interpretation is itself repealed, a savings provision should be included in order to prevent revival of the rule, presumption or principle.

APPLICATION OF THE ACT TO REGISTERED LAND

- 2.22 The Property Law Act contains three types of provisions:
- provisions which apply to old system land and conveyancing as well as to registered land
 - provisions which apply solely to old system land and conveyancing
 - provisions which apply to personal property as well as real property.
- 2.23 It is not always clear which type of provision a particular section is intended to be, and particularly whether it applies to registered land. Although some provisions expressly state that they do not apply to land registered under the *Transfer of Land Act 1958* (Transfer of Land Act), the Property Law Act gives no general guidance about how to determine whether other provisions do. Instead, it is necessary to rely on section 3 of the Transfer of Land Act.

- 2.24 Section 3 of the Transfer of Land Act provides as follows:
- (1) *Except so far as is expressly enacted to the contrary no Act or rule of law, so far as inconsistent with this Act, shall apply or be deemed to apply to land under the operation of this Act; but save as aforesaid any Act or rule of law relating to land, unless otherwise expressly or by necessary implication provided by this or any other Act, shall apply to land under the operation of this Act whether expressed so to apply or not.*
- (2) *Save as otherwise expressly provided, Part I of the Property Law Act 1958 does not apply to land which is under the operation of this Act.*
- 2.25 This means that an assessment of inconsistency must be made for each provision in the Property Law Act, unless it is expressed not to apply to land under the operation of the Transfer of Land Act. Determining which provisions apply to registered land often requires research beyond the Act itself.
- 2.26 There are provisions of the Property Law Act which are expressed not to apply to registered land; provisions which are expressed to apply; provisions which are generally taken not to apply due to inconsistency with the Transfer of Land Act; provisions which are thought to be consistent with the Transfer of Land Act and to apply; and provisions which are in doubt due to conflicting views about their consistency.¹⁴
- 2.27 Some provisions do not apply to registered dealings because of inconsistency with the ‘indefeasibility’ provisions in sections 40–44 of the Transfer of Land Act, but may apply to unregistered dealings in registered land. For example, the express grant of an easement in registered land is subject to the requirement of a deed in section 52 if the easement is unregistered.¹⁵
- 2.28 The ordering of provisions contributes to difficulties in determining the scope of their application. Sections or subsections which apply to registered land are interspersed with other provisions that apply only to old system land.
- 2.29 Since all registered dealings in land are now under the Transfer of Land Act, provisions relating solely to old system conveyancing may be regarded as transitional. These provisions should be relocated to a special part of the Act, leaving in the remaining body of the Act only those provisions which have at least some application to registered land, or to personal property, or both.
- 2.30 As for the provisions in the remainder of the Act, we consider it sufficient to rely on the inconsistency rule in section 3 of the Transfer of Land Act.
- 2.31 The alternative would be to declare, in relation to each provision, the extent of its application to registered land. To do so might unduly constrain the development of the law. For example, section 199, which limits the doctrine of constructive notice and was assumed not to apply to registered land because of inconsistency with the ‘notice’ provision in section 43 of the Transfer of Land Act,¹⁶ has recently been held to apply to unregistered dealings in registered land.¹⁷
- 2.32 In our Consultation Paper we proposed that the provisions that do not apply to ordinary folio land under the operation of the Transfer of Land Act should be set out in a schedule to the new Property Law Act. This proposal was unanimously supported in submissions, though Land Victoria pointed out that the provisions should not apply to land in provisional folios limited only as to dimensions either.¹⁸ Accordingly, our recommendation refers to provisions that do not apply to registered land.¹⁹ Following consultations with the Office of Parliamentary Counsel, we note that it would be consistent with modern drafting practices to include the provisions in a separate part of the Act, rather than as a schedule.

13 *Interpretation of Legislation Act 1984* (Vic) s 14(1).

14 Wallace (1984), above n 8, 14.

15 An unregistered easement binds subsequent registered owners of the servient land by force of s 42(2)(e) of the Transfer of Land Act, but only if it is validly created. A registered easement does not require a deed: s 72(2)–(2B); but a registered instrument is deemed to have the effect of a deed: s 40(2).

16 Stanley Robinson, *Property Law Act (Victoria)* (Law Book Co, 1992) 440; *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* QLRC Rep No 16 (1973) 117; *contra* Wallace (1984), above n 8, 288–289.

17 *IGA Distribution Pty Ltd v King & Taylor Pty Ltd and Anor* [2002] VSC 440, [224]; *Commonwealth Bank of Australia Ltd v Platzer* [1997] 1 Qd R 266.

18 Land Victoria, Submission 18, 2; see also [1.14]–[1.19] in Chapter 1.

19 See our note on terminology in Chapter 1.



- 2.33 The provisions that we have identified as not applying to registered land are listed in Appendix B. It is not a complete list because some of the provisions on leases and mortgages, which we have not reviewed in the current reference, and provisions on trusts for sale, which require further review, may also fall within this category.

RECOMMENDATIONS

5. Provisions which apply solely to old system land should be set out in a separate part of the new Property Law Act.
6. The new Property Law Act should specify that all provisions, other than those which are expressed to apply solely to old system land, apply to land under the operation of the *Transfer of Land Act 1958*, but subject to that Act.