

Chapter 8

Further Review



CONTENTS

Completion of review of provisions in the Property Law Act.....	114
Mortgages	114
Leases	115
Protection of Beneficiaries of Trusts of Registered Land	115
Land Legislation Amendment Act 2009	117
Implied covenants under the Property Law Act and the Transfer of Land Act.....	117
Boundary Adjustment	118
Part parcel adverse possession	118
Exclusion of new titles	119
Minimum area requirement.....	119
Magistrates' Court jurisdiction.....	120
Reform of the procedures.....	121
Doctrine of privity.....	121
Contracts with minors.....	122



- 8.1 The terms of reference of this review ask the Commission to report on any related issues identified during the course of the review that may warrant further investigation.
- 8.2 We discussed in Chapter 5 the need for a review of trusts of land that encompasses not only the provisions in the *Property Law Act 1958* (Property Law Act) on dispositions on trust for sale but also the *Settled Land Act 1958* and relevant provisions in the *Trustee Act 1958* and the *Administration and Probate Act 1958*.
- 8.3 In this Chapter we discuss the other issues for further review that we have identified or which were raised in submissions during the course of the current review.

COMPLETION OF REVIEW OF PROVISIONS IN THE PROPERTY LAW ACT

- 8.4 Apart from the provisions in the Property Law Act concerning dispositions on trusts for sale, the provisions concerning mortgages and leases also need to be reviewed under terms of reference which encompass other relevant legislation.

MORTGAGES

- 8.5 The provisions regulating mortgages of land under the operation of the *Transfer of Land Act 1958* (Transfer of Land Act) are split between that Act and the Property Law Act.
- 8.6 The Transfer of Land Act sets out statutory terms implied into mortgages of land under the operation of that Act, and gives statutory remedies to mortgagees.¹ These statutory remedies are not available to unregistered mortgagees.² A mortgage of old system title which has prompted the creation of an ordinary or provisional folio for the land is deemed to be a registered mortgage under section 74 of the Transfer of Land Act.³
- 8.7 Division 3 of Part II of the Property Law Act sets out statutory terms for mortgages made by deed.⁴ Section 86 of the Property Law Act specifies that, with some exceptions, Division 3 of Part II does not apply to 'mortgages under the *Transfer of Land Act 1958* effected by instruments of mortgage under that Act'. Commentators have argued that these words establish an exception only for mortgages which are actually registered under the Transfer of Land Act.⁵ On this view, unregistered mortgages of Torrens System land made by deed are subject to all of the provisions in Division 3 of Part II of the Property Law Act.⁶
- 8.8 An equitable mortgage can be created over both old system land and Torrens System land without a deed if there is an agreement for the creation of a mortgage which a court of equity will specifically enforce.⁷ Subject to the Consumer Credit Code,⁸ an equitable mortgage can arise from a purely oral transaction in which old system title deeds or a certificate of title is deposited with a lender and loan monies are advanced.⁹ Where an equitable mortgage is created without a deed, it appears that the statutory terms in Division 3 of Part II of the Property Law Act do not apply.
- 8.9 There are areas of uncertainty in the law arising from the failure of both Acts to provide for unregistered mortgages. It would be desirable to have a single set of provisions dealing systematically with all mortgages, both registered and unregistered, over Torrens System and old system land.¹⁰

- 8.10 Certain provisions of the Act relating to mortgages purport to apply to charges or liens over personal property.¹¹ These provisions need to be reviewed for consistency with the *Personal Property Securities Act 2009* (Cth) (PPSA). By the enactment of the *Personal Property Securities (Commonwealth Powers) Act 2009*, Victoria referred to the Commonwealth powers to legislate with respect to security interests in personal property, subject to specified reservations. The Act did not repeal or modify existing provisions of Victorian statutes dealing with the matters which are the subject of the reference of powers.
- 8.11 The PPSA is not intended to exclude or limit the operation of state law to the extent that it is capable of operating concurrently with the Act.¹² Provisions of the Property Law Act must be individually assessed to ascertain if there is direct inconsistency with the Commonwealth Act.
- 8.12 As so much of the law of mortgages lies outside the Property Law Act, we consider that the subject of mortgages as a whole should be reviewed under broader terms of reference.

LEASES

- 8.13 Victoria has two Acts which provide in detail for specific categories of leasehold interests: the *Residential Tenancies Act 1997* (Residential Tenancies Act) and the *Retail Leases Act 2003* (Retail Leases Act).
- 8.14 Provisions relating to leases generally are distributed among three Acts: the Transfer of Land Act deals with registered leases in Torrens System land; and the *Landlord and Tenant Act 1958* and Property Law Act each contain provisions of general application, dealing with discrete areas of the law of leases. Common law and equitable doctrines also play a major role.
- 8.15 While many provisions of the Property Law Act dealing with leases need to be amended or repealed, the benefits of piecemeal reform are limited. For this reason, the general law of leases as regulated by the common law, and by legislation other than the Residential Tenancies Act and the Retail Leases Act, should be reviewed under broader terms of reference.

PROTECTION OF BENEFICIARIES OF TRUSTS OF REGISTERED LAND

- 8.16 Where a settlement confers a legal life estate and remainder estate in registered land, the life tenant and remainderman are entitled to be registered as owners of their respective estates in land. As registered proprietors, they take an indefeasible title under section 42(1) of the Transfer of Land Act. Under recommendation 35 in Chapter 5, the holders of successive estates under the settlement will only be able to hold beneficial interests under a trust.
- 8.17 The Transfer of Land Act provides a much lower standard of protection for trust beneficiaries. Neither their interests, nor the trusts themselves, are capable of registration. Section 37 provides that the Registrar 'shall not record any notice of the trust in the register'.
- 8.18 As noted in Chapter 5, Associate Professor Tehan and colleagues submitted that the reduction of legal estates and the introduction of a single statutory trust should be accompanied by measures to improve the protection of the interests of beneficiaries under a trust, and that these interests should be registrable.¹³

- 1 *Transfer of Land Act 1958* (Vic), Part IV, Division 9.
- 2 *Ryan v O'Sullivan* [1956] VLR 99; Edward Sykes and Sally Walker, *The Law of Securities* (Lawbook Co 5th ed, 1993) 317.
- 3 *Transfer of Land Act 1958* (Vic) s 26M.
- 4 *Property Law Act 1958* (Vic), Part II, Division 3.
- 5 Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) [9.170]; Stanley Robinson, *Property Law Act (Victoria)* (Lawbook Co, 1992) 191.
- 6 Bradbrook (2007), *ibid* [9.170], [9.285].
- 7 There must be at least a sufficient written note or memorandum to satisfy the requirements of s 126 of the *Instruments Act 1958* (Vic), or sufficient acts of part performance: *Australian and New Zealand Banking Group Ltd v Widin* (1990) 26 FCR 21.
- 8 The Consumer Credit Code as set out in the appendix to the *Consumer Credit (Queensland) Act 1994* (Qld) still applies in Victoria by force of the *Consumer Credit (Victoria) Act 1995* s 5. Section 38 prescribes writing formalities for the creation of mortgages falling within s 8 of the Code. An equivalent provision is made in paragraph 42 of the National Consumer Code, which is a schedule to the Schedule 1 of the *National Consumer Credit Protection Act 2009* (Cth). Section 20(1) of the *Credit (Commonwealth Powers) Act 2010* (Vic) provides for the repeal of Part 2 of the *Consumer Credit (Victoria) Act 1995* on proclamation.
- 9 See eg, *Ryan v O'Sullivan* [1956] VLR 99; *J & JH Just Holdings Pty Ltd v Bank of New South Wales* (1971) 125 CLR 546.
- 10 Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* 16 (1973) 58.
- 11 See definition of 'mortgage' in s 18(1).
- 12 *Personal Property Securities Act 2009* (Cth) s 254.
- 13 Associate Professor Maureen Tehan et al, Submission 9, 15.



- 8.19 The Torrens System is premised on the idea that purchasers should be able to deal with the trustees as if they are absolute owners, and not be concerned to enquire whether the trustees are acting in breach of trust.¹⁴ Section 43 of the Transfer of Land Act provides that the purchaser is not affected by notice of a trust or equitable interest. Only the fraud of the purchaser or the purchaser's agent will prevent a purchaser obtaining registered title free of any prior beneficial interest.¹⁵ Beneficiaries who suffer loss will have no claim under the compensation provisions.¹⁶
- 8.20 Although trusts are to be kept off the register and behind a 'curtain',¹⁷ it was never intended that beneficiaries would be left unprotected. The Transfer of Land Act and its predecessors contained a set of provisions which empowered the Registrar to prevent the registration of dealings by trustees acting in breach of trust. Section 37 of the 1958 Act provided that a copy of the trust deed could be deposited with the Registrar, and the Registrar was empowered 'to protect in any way he deems advisable the rights of persons for the time being beneficially interested thereunder'.¹⁸
- 8.21 The Registrar was also empowered by section 106(a) of the Transfer of Land Act to lodge a Queen's caveat on behalf of any minor, person of unsound mind or person absent from Victoria, to prevent any dealing with land belonging to the person or to prevent any fraud or improper dealing.
- 8.22 It was for many years the practice for legal examiners in the Registry to examine dealings by trustees and to refuse to register any that were found to be in breach of trust. In *Templeton v The Leviathan Pty Ltd*¹⁹ the High Court of Australia unanimously held that the Registrar for Victoria was 'thoroughly justified'²⁰ in refusing to register a second mortgage by trustees that was in breach of trust. Knox CJ said that it was the duty of the Registrar not to register a dealing which, to the knowledge of the Registrar, was in breach of trust or in any way improper.²¹
- 8.23 Notwithstanding the benefits of Registry examination as exemplified in *Templeton v The Leviathan Pty Ltd*, leading academic commentators Douglas Whalan and Robert Stein have argued that trust beneficiaries are inadequately protected against being overreached by improper dealings by the trustees.²² In 1974 the Queensland Law Reform Commission noted the limitations of the legislative machinery for protection of trust beneficiaries, while commending the practice of the Queensland Titles Office in having a senior examiner scrutinise trustee dealings when the office is in possession of the trust deed.²³
- 8.24 The Torrens System depends on vigilance by the Registrar rather than inquiries by purchasers to protect trust beneficiaries. In some cases, the impropriety of a dealing will be apparent to an examiner without the need to refer to a trust deed.²⁴ In other cases, the impropriety will be apparent only when the dealing is scrutinised against the terms of the trust deed.

LAND LEGISLATION AMENDMENT ACT 2009

- 8.25 Registry examiners no longer have access to trust deeds when scrutinising dealings by trustees. Section 22(2) of the *Land Legislation Amendment Act 2009*, which came into operation in May 2010, provided that a trust deed may not be deposited with the Registrar.
- 8.26 The 2009 legislation also amended section 106(a) to alter the nature of the interest in land that can be protected by a Queen's caveat lodged on behalf of a minor or person of unsound mind. The amendment provides that the caveat may be lodged in respect of land registered in the name of²⁵ such a person. The previous wording referred more generally to land 'belonging or supposed to belong to such a person'.
- 8.27 In our Consultation Paper, we said that the amendments had further weakened the protections for beneficiaries of trusts, particularly minors and persons of unsound mind. Beneficiaries can lodge a caveat against dealings under section 89 of the Transfer of Land Act, but this requires that they are aware of their interest and have the capacity to lodge a caveat. Whalan comments that:²⁶
- [N]one of the present methods of protecting trusts of Torrens system land is adequate to give full protection to beneficiaries; for instance, it must be a rare beneficiary indeed, who is a minor, who knows of the existence of the caveat system.*
- 8.28 The caveat system also provides inadequate protection for a beneficiary under a discretionary trust, who 'does not have an interest in the land owned by the trust sufficient to found a caveat'.²⁷
- 8.29 Land Victoria submitted that the 2009 amendments to section 37 are not significant as any trust deeds which are lodged are 'rarely cross-referenced to folios in the Register'.²⁸ In their view, the amendment has 'removed any "false comfort" a party may feel by depositing a trust deed with the Registrar'.²⁹
- 8.30 In light of this discussion and the relationship of this issue with our reform recommendations in Chapter 5, we consider that there should be a further review of the protection afforded to beneficiaries of trusts of land under the operation of the Transfer of Land Act.

IMPLIED COVENANTS UNDER THE PROPERTY LAW ACT AND THE TRANSFER OF LAND ACT

- 8.31 Following our discussion in Chapter 3 about implied covenants, the application of implied covenants for title under the Property Law Act to registered land requires clarification. We see a need for review of the consistency in the content of all covenants implied in instruments relating to transactions in old system land, and in both registered and unregistered dealings in registered land.
- 8.32 This review could be undertaken as part of the second stage of the Commission's review of Victoria's property laws, which is to encompass aspects of the Transfer of Land Act.

- 14 Douglas Whalan, *The Torrens System in Australia* (Lawbook Co, 1982) 210–11.
- 15 *Transfer of Land Act 1958* (Vic) ss 42–43.
- 16 *Transfer of Land Act 1958* (Vic) s 109(2)(a).
- 17 *Transfer of Land Act 1958* (Vic) s 37 provides that the Registrar shall not record trusts in the Register. Ruoff called this 'the curtain principle': Theodore Ruoff, *An Englishman looks at the Torrens System* (1957) 11.
- 18 The *Land Legislation Amendment Act 2009* (Vic) s 22(2) inserted s 37(2), which provides that from the commencement of that Act, a trust may not be deposited with the Registrar.
- 19 (1921) 30 CLR 34.
- 20 *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34, 75 Starke J.
- 21 *Templeton v The Leviathan Pty Ltd* (1921) 30 CLR 34, 53.
- 22 Douglas Whalan, 'Partial Restoration of the integrity of the Torrens System Register: Notation of Trusts and Land Use Planning and Control' (1970) 4 *New Zealand Universities Law Review* 1; Robert Stein, 'Torrens Title: A Case for the Registration of Trusts in New South Wales' (1980–82) 9 *Sydney Law Review* 605.
- 23 Queensland Law Reform Commission, *Working Paper of the Queensland Law Reform Commission on a Bill in Respect of an Act to Reform and Consolidate the Real Property Acts of Queensland* W/P 32 (1989) 158.
- 24 This was the case in *Templeton v The Leviathan Pty Ltd*, where the trustees were purporting to grant a second mortgage which was also a contributory mortgage.
- 25 Inserted by *Land Legislation Amendment Act 2009* (Vic) s 59(1), emphasis added.
- 26 Land Victoria, Submission 18, 4–5.
- 27 *Walter v Registrar of Titles* [2003] VSCA 122, [15]; *R & I Bank of Western Australia v Anchorage Investments Pty Ltd* (1992) 10 WAR 59 (WASC Full Cr).t.
- 28 Land Victoria, Submission 18, 4–5.
- 29 Land Victoria, Submission 18, 5.



BOUNDARY ADJUSTMENT

- 8.33 In Chapter 4 we noted that submissions had raised a problem with shortages in measurement in Crown surveys and private subdivisions. We explained that there was a need to expressly authorise the Registrar to distribute shortages among lots in a subdivision and amend the recordings in the folios accordingly. The power to distribute shortages and make amendments should be exercised in accordance with guidelines issued by the Minister in consultation with the Surveyor-General.
- 8.34 Any deprivation of property rights to an area of land resulting from amendment of the land description to distribute a shortage raises an issue of compensation, which should be examined as part of a review of the Transfer of Land Act.

PART PARCEL ADVERSE POSSESSION

- 8.35 The rule of part parcel adverse possession is explained in Chapter 4.³⁰
- 8.36 Although the rule of adverse possession can be used to acquire titles to whole lots as well as parts of lots, whole parcel adverse possession is generally directed to solving a different problem.
- 8.37 Most Australian jurisdictions and New Zealand allow whole parcel adverse possession in order to update the register in cases of missing owners. The problem often arises when land is sold or inherited but no dealing is lodged with the Registrar. The registered title may remain in the name of the seller or deceased former owner after someone else has taken possession as owner. Once a lot has been sold off-register, subsequent sales are also likely to be off-register, as owners buy and sell possessory titles using deeds of conveyance. Allowing the owner in possession to upgrade their possessory title to registered title 'aligns possession to proprietorship and regularises the register'.³¹
- 8.38 Part parcel adverse possession is used to resolve problems resulting from mistakes about the location of boundaries and the placement of improvements.³² As the submission from the Surveying and Spatial Sciences Institute said:³³
- The reality is that occupation seldom accords with title dimensions and it is essential to have a mechanism to deal with boundary repair issues.*
- 8.39 The adverse possession rule also tends to reduce conveyancing costs. It enables purchasers to some extent to assume that they will acquire title to the land as physically enclosed and occupied, provided that fences and other physical boundaries have been in place for the limitation period.³⁴ The expectation that 'what you see is what you get' enables purchasers and their mortgagees in most cases to dispense with a re-survey,³⁵ thereby saving around \$900–\$1000³⁶ and avoiding the disputes between vendors and purchasers which a re-survey would tend to stir up if it reveals boundary discrepancies.³⁷
- 8.40 In Chapter 4, we noted that several jurisdictions either do not allow part parcel adverse possession at all, allow it only subject to a right of veto by the registered owner of the subject land, or impose restrictions as to the size of the area that can be claimed. Victoria imposes restrictions as to the ownership by excluding land owned by certain public authorities from the operation of the rule.³⁸ Based on the different approaches, we identified several options for the relationship between the proposed building encroachment relief provision and adverse possession.
- 8.41 As we noted in Chapter 4, most submissions supported the retention of the adverse possession rule. Accordingly we make no recommendation for modification of the rule for the purposes of introduction of the building encroachment relief provision.

8.42 The submissions raised various issues and reform proposals relating to the operation of the rule, which could be the subject of a further review. The proposals relate to:

- the possible exclusion of the rule in relation to newly issued titles
- the introduction of a minimum area for claims
- the vesting of jurisdiction in the Magistrates' Court to hear disputed claims
- prevention of deliberate encroachment and enclosing of portions of adjacent land
- reform of procedures to comply with human rights norms.

EXCLUSION OF NEW TITLES

8.43 In the submissions, the most commonly cited reason for retention of part parcel adverse possession was to resolve boundary errors and discrepancies arising from deficiencies in early Crown surveys and past subdivisions. Several submissions pointed out that surveying is now highly accurate, and newly created lots are unlikely to suffer the defects of the past. The Association of Consulting Surveyors submitted:³⁹

Considering that the current reliability of boundary definition ... is high and current building construction methodologies and practices generally require survey definition of boundaries prior to construction, the Association believes it would be appropriate to consider removal of some adverse possession in relation to newly issued titles.

8.44 This amounts to a proposal for phasing out part parcel adverse possession by disapplying it to lots created after a specified date.

MINIMUM AREA REQUIREMENT

8.45 The Surveying and Spatial Sciences Institute, while supporting the retention of the rule of adverse possession, saw a need to exclude claims to very small portions of land. They cited an example of a claim to a 50–80 mm strip of land along a side fence which abutted a number of other lots and required amendment of multiple titles.⁴⁰

8.46 Their submission also anticipates a spate of claims to small slivers of land resulting from Clause 54.04 of the Victorian Planning Principles, which provides that buildings constructed within 150mm of a boundary are accepted as 'practically' on the boundary for town planning purposes. The submission states:⁴¹

The legacy of this will be to create a further number of small strips which under the Statute of Limitations Act fifteen years later, can provide common law possessory rights to the adjoining owner of a small strip of land which is unviable to register, causing further inconsistencies to the State Cadastre.

8.47 The Institute suggests that consideration be given to excluding adverse possession claims to strips of land not exceeding 150 mm, perhaps by amending section 272 of the Property Law Act.⁴²

8.48 Section 272 of the Property Law Act provides for a margin of error in the description of boundaries. Under section 272 the boundaries of any parcel of land, as stated in any document of title or on any plan, are construed as though the phrase 'a little more or less' immediately followed the dimensions. The phrase itself is deemed to cover any discrepancy that does not exceed 50 millimetres where the boundary line is less than 40.30 metres and 1/500 of the boundary line where it exceeds 40.30 metres. Section 272 further provides that:

No action shall be brought by reason or in respect of such difference (whether excess or deficit) where it does not exceed the aforesaid limits.

30 See [4.47]–[4.50].

31 Land Victoria, Submission 18, 4.

32 See [4.47]–[4.50] in Chapter 4.

33 Surveying and Spatial Sciences Institute, Submission 11, 2.

34 Malcolm Park and Ian Williamson, 'The Need to Provide for Boundary Adjustments in a Registered Title Land System' (2003) 48 *Australian Surveyor* 50–51.

35 In NSW, where there is no part parcel adverse possession, surveys are routinely conducted prior to the sale of land, often at the requirement of the mortgagee.

36 Lindsay Perry, a consulting surveyor, estimates the average cost of a re-establishment survey at \$800–\$900 plus GST: oral communication, 14 July 2010.

37 Under the standard form contract of sale, an omission or mistake in the description, measurements or area of the land does not invalidate the sale, and the purchaser is not entitled to make any objection or claim for compensation for any alleged misdescription or deficiency in area or measurements: *Estate Agents (Contracts) Regulations 2008* (Vic), Form 2, Clauses 3.1, 3.2.

38 *Limitation of Actions Act 1958* (Vic) ss 7, 7A, 7AB, 7B.

39 Association of Consulting Surveyors, Submission 15, 4.

40 Surveying and Spatial Sciences Institute, Submission 11, 2.

41 Surveying and Spatial Sciences Institute, Submission 11, 2.

42 Surveying and Spatial Sciences Institute, Submission 11, 1–2.



- 8.49 The section was judicially interpreted in *PCH Melbourne Pty Ltd v Break Fast Investments*.⁴³ Smith J held that section 272 would not provide a defence to a claim in trespass by building encroachment. In particular Smith J held that section 272 introduces a margin of error for the dimensions appearing on title documents, but does not introduce a margin of error as to the actual title boundary 'as found by admeasurement on the ground'.⁴⁴
- 8.50 It would therefore appear that the legal effect of section 272 is to limit claims related to small boundary discrepancies in sales of land,⁴⁵ but not to limit claims of adverse possession and trespass arising from boundary discrepancies.⁴⁶
- 8.51 Therefore, any minimum area requirement for adverse possession claims would be a new provision and not an amendment to section 272.

MAGISTRATES' COURT JURISDICTION

- 8.52 A person who claims to have acquired title to the whole or part of a registered lot by adverse possession may apply to the Registrar under section 60 of the Transfer of Land Act for an order vesting in him or her a registered title to the relevant land. If a person lodges a caveat under section 61, the Registrar must not make a vesting order until the caveat has been withdrawn or has lapsed or a judgment or order is obtained from a court.⁴⁷
- 8.53 The Law Institute of Victoria said in its submission that, while it supports the retention of part parcel adverse possession, 'such disputes are very expensive to resolve in the Supreme Court of Victoria'.⁴⁸ It proposes that a Court similar to the New South Wales Land and Environment Court be established, or alternatively that a specialist division of the Magistrates' Court with expertise in property law be established and given jurisdiction to determine disputes where the land in question is adjacent to a property boundary and does not exceed 30 square metres.
- 8.54 Recent amendments to the Transfer of Land Act appear to have given the Magistrates' Court jurisdiction to hear and determine matters under that Act concurrently with the Supreme and County Courts,⁴⁹ but it is unclear what the scope of the jurisdiction conferred on the Magistrates' Court is. The amended definition now provides that "'a court" means a court of competent jurisdiction'. On one view, the amendment, read in conjunction with various provisions in the Transfer of Land Act which confer jurisdiction on 'a court', gives the Magistrates' Court unlimited jurisdiction in statutory causes of action.⁵⁰ On a narrower reading, the Court is given jurisdiction only in matters to which its jurisdictional limit can apply,⁵¹ such as an action against the Registrar for damages under section 110 of the Transfer of Land Act.
- 8.55 We consider that the Court's jurisdiction in adverse possession matters under the Transfer of Land Act should be defined consistently with its jurisdiction under the building encroachment relief provision.⁵²
- 8.56 The question of whether a Land and Environment Court or a specialist property law division of the Magistrates' Court should be established warrants further consideration.

REFORM OF THE PROCEDURES

- 8.57 If part parcel adverse possession is retained, we suggest that it be reviewed to address two major problems with the current law in Victoria.⁵³
- 8.58 The first is the need for additional measures to control the incentives that the rule creates for deliberate encroachment.⁵⁴ Mr Leitch submits that prevention of encroachment and building overlaps should be considered.⁵⁵
- 8.59 The second is the lack of due process for landowners before extinguishment of their title. A rule under which a landowner's property right is automatically extinguished by operation of statute without notice or hearing process is arguably inconsistent with the protection of landowner's human right not to be arbitrarily deprived of their property.⁵⁶
- 8.60 Other jurisdictions, such as England, have taken steps to address these problems by adjusting their provisions for part parcel adverse possession.⁵⁷

DOCTRINE OF PRIVACY

- 8.61 In discussing section 56 in our Consultation Paper, we noted that it was once interpreted as modifying the doctrine of privity but has since been found to serve a much narrower purpose. We briefly discussed reforms to the doctrine in other jurisdictions and concluded that any need for change in Victoria requires separate examination and possibly comprehensive legislation setting out the circumstances in which a third party can enforce a contractual term and the remedies available for a breach.
- 8.62 The comments we received on section 56 indicate that the operation of the doctrine of privity is a live issue and one on which there is no consensus.⁵⁸ The Queensland Law Reform Commission examined in detail the effect of the doctrine in its 1973 report on property law.⁵⁹ It observed that:⁶⁰
- 8.63 While conceding that the doctrine occasionally appears to produce a beneficial or just result, the Queensland Law Reform Commission concluded that it is a source of serious injustice:⁶¹

[T]here is little doubt that in general the rule is highly inconvenient and that it defeats the reasonable and justifiable expectations of the parties, enabling persons to escape from obligations which they have, often for value, deliberately undertaken.

[h]ence, a promise given for consideration to discharge the debt of another is unenforceable by the latter ... as is a promise by a man to pay his future son-in-law a sum of money given in consideration of a like promise by another person: ... to a husband to pay his widow an annuity after his death ... ; or by a partner to pay an annuity to his partner's daughter: ... ; a promise by an insurer to pay policy moneys to a relative of the insured ... ; and a promise by a father to a mother to pay weekly maintenance to his epileptic son. [references omitted]

- 8.64 The retention of the doctrine of privity in Australia is out of step with other legal systems and increasingly differs from other common law jurisdictions. The Queensland Law Reform Commission observed in 1973 that France, Germany and South Africa have no such rule, and nor do the common law jurisdictions of the United States.⁶² More recently, New Zealand and England have significantly modified the doctrine.
- 8.65 Reform in Australia has been piecemeal and less extensive. Western Australia, Queensland and the Northern Territory have enacted property legislation that abrogates the doctrine of privity of contract but the other jurisdictions have not passed legislation that extends the rights of third party beneficiaries generally.

43 [2007] VSC 87.

44 *PCH Melbourne Pty Ltd v Break Fast* [2007] VSC 87 [31].

45 See Robinson (1992), above n 5, 504, citing *Monaghan v Gleeson* (1887) 13 VLR 384.

46 The Surveying and Spatial Sciences Institute put forward the position that it does prevent such claims; Submission 11, 1.

47 *Transfer of Land Act 1958* (Vic) ss 61, 26R(3).

48 Law Institute of Victoria, Submission 13, 15.

49 See definition of 'court' inserted into s 4(1) of the *Transfer of Land Act* by s 3 of the *Land Law Legislation Amendment Act* (Vic) 2009, which commenced 1 May 2010.

50 See *Magistrates' Court Act 1989* (Vic) s 100(d).

51 The civil jurisdictional limit of the Court applies only in actions for debt, damages and liquidated demands and in claims for equitable relief, but not in statutory causes of action vested in the Court by other Acts: *Magistrates Court Act 1989* (Vic) s 100(1).

52 See Chapter 4.

53 Associate Professor Maureen Tehan et al, Submission 9.

54 See eg, *Monash City Council v Melville* [2000] VSC 55 where landowners acquired title to a 20 foot strip of council reserve land which they had enclosed with their own land with the intention (as Eames J inferred at [30]) of acquiring title by adverse possession.

55 Mr Peter Leitch, Submission 10.

56 Brendan Edgeworth, 'Adverse Possession, Prescription and their Reform in Australian Law' (2007) 15 *Australian Property Law Journal* 1. United Nations Declaration on Human Rights, art 17(2) provides 'No one shall be arbitrarily deprived of their property'. See also the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 20. Victoria's provisions are similar to the provisions of the (repealed) *Land Registration Act 1925* (UK) which were challenged in *J A Pye (Oxford) Land Ltd v the United Kingdom* [2005] ECHR 44302/02. The Court held by a majority that the English provisions breached Article 1 of Protocol 1 of the European Charter of Human Rights. On appeal, the Grand Chamber held by a vote of 10 to 7 that the provisions did not breach Article 1.

57 See eg, Pamela O'Connor, 'The Private Taking of Land: Adverse Possession, Encroachment by Buildings and Improvement Under a Mistake' (2006) 33 (1) *The University of Western Australia Law Review* 31 44.

58 Mr Michael Macnamara, Submission 2; Mr James Hope and Dr Paul Vout, Submission 6; Associate Professor Maureen Tehan et al, Submission 9; Law Institute of Victoria, Submission 13.

59 Queensland Law Reform Commission (1973), above n 10, 37–41.

60 *Ibid* 38.

61 *Ibid*.

62 *Ibid* 37.



- 8.66 The fact that other Australian jurisdictions have not introduced similar reforms does not necessarily mean that they should. Mr Hope and Dr Vout pointed out in their submission that, despite the occasional harsh outcome, privity gives a degree of economic and legal certainty and that ‘restriction (or, at the extreme end, removal) of privity of contract would almost undoubtedly result in increased litigation’.⁶³
- 8.67 We remain of the view that this issue requires separate review.

CONTRACTS WITH MINORS

- 8.68 When consulting with consumer affairs experts about section 28B, concerning contracts with minors, our attention was drawn to the fact that the general provisions in the *Supreme Court Act 1986* that determine the validity of contracts with minors are substantially unchanged since the 19th century.
- 8.69 The law in Victoria, which generally makes minors’ contracts void, has not kept pace with developments in other jurisdictions in Australia. Those that had similar provisions have since replaced them with legislation which takes greater account of the maturity of the minor.
- 8.70 The Victorian law was reviewed in 1970 by the Chief Justice’s Law Reform Committee⁶⁴ but the recommendations were not implemented.
- 8.71 There may be scope for reform in this area.

⁶³ Mr James Hope and Dr Paul Vout, Submission 6, 4.

⁶⁴ Chief Justice’s Law Reform Committee Report *Infancy in Relation to Contracts and Property*, Report No 3 (1970).