

Chapter 1

Introduction

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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
enacted, that the Law relating to
Conveyancing and the Law of Property
shall be consolidated as follows:

Introduction



- 1.1 In August 2009 the Attorney-General asked the Commission to review Victoria's property laws. The terms of reference contain two components: a review of the *Property Law Act 1958* (Property Law Act) and a review of the law of easements and covenants.
- 1.2 We are undertaking each component separately. This is the final report of the review of the Property Law Act. We will complete our report on the law of easements and covenants later this year.
- 1.3 Later in this Chapter we discuss the way we conducted the review and outline the structure of the report. First of all, we provide a brief overview of Victoria's property law.

VICTORIA'S PROPERTY LAW

- 1.4 Victoria's property law is contained in multiple statutes and fashioned by centuries of case law. The two most important property law statutes of general application are the Property Law Act and the *Transfer of Land Act 1958* (Transfer of Land Act). The Transfer of Land Act provides the rules and machinery for the registered land title system, or Torrens System.
- 1.5 Victoria has two systems of title for land that have been granted by the Crown: the Torrens System and the general law or old system based on registration of deeds. Both systems are superimposed upon the general body of English property law developed over many centuries and received into Australian law. Native title stands outside this body of property law and is not affected by any of the recommendations in this report.¹
- 1.6 The Transfer of Land Act regulates land title and dealings in land under the Torrens System. The Property Law Act is of wider application. It contains some provisions which apply to personal property, and some which apply to all land. It also contains provisions which apply solely to old system land.
- 1.7 The Property Law Act serves a residual function as a property law statute. It deals with basic principles of property law which find no place in other more specialised Acts, such as the *Residential Tenancies Act 1997*, the *Retail Leases Act 2003*, the *Settled Land Act 1958* (Settled Land Act), the *Sale of Land Act 1962*, the *Perpetuities and Accumulations Act 1968*, and the *Landlord and Tenant Act 1958*. This review does not extend to these specialised Acts, except to the extent of any overlap or inconsistency with the Property Law Act.

THE TORRENS SYSTEM

- 1.8 The Torrens System was introduced to Victoria in October 1862.² Each registered parcel of Torrens System land is allocated a unique record or 'folio', on which the Registrar of Titles (Registrar) records the land description, the freehold ownership, leases, mortgages and other interests held in the land.³ Registered interests are said to be 'indefeasible'. This means that registration confers title to the interest and the registered interest is held free of all other interests which are not recorded on the register or listed as exceptions in section 42 of the Transfer of Land Act.⁴
- 1.9 The Torrens System was intended to replace the old system of deeds registration,⁵ in which title to land was proved by showing a series of deeds of conveyance tracing back to the original Crown grant. Deeds could be registered in the office of the Registrar-General, but this simply provided evidence of title. Purchasers had to examine the deeds and obtain a legal opinion as to the quality of the title. Conveyancing transactions under the old system were slow and costly.
- 1.10 Since 1862, the Torrens System and the old system have operated in parallel. All private land granted by the Crown after October 1862 is Torrens title, but private land granted earlier remained under the old system unless converted to Torrens title. The legal rules for old system conveyancing were retained in the Property Law Act, while provisions applying only to land registered under the Torrens System are found in the Transfer of Land Act.

THE 1998 CONVERSION REFORMS

- 1.11 By 1998, all but 35,000 parcels (representing three per cent of private land in Victoria) were held on Torrens title.⁶ To speed up the conversion of the remaining old system land, new measures were introduced by the *Transfer of Land (Single Register) Act 1998*. Since 1 January 1999, conveyances and other instruments affecting old system land can only be registered under the Transfer of Land Act.
- 1.12 Now, once a parcel of old system land is identified, the Registrar is required to create an 'identified folio' for it.⁷ This is effectively a 'tag' for the parcel of land. While interests may be recorded on an identified folio, no person is registered as owner and no certificate of title is issued for the land.⁸ Subsisting interests in the land are not affected, and their effect and priority is determined by the rules of the old system.⁹
- 1.13 The lodgement for registration of a 'specified dealing'¹⁰ such as a conveyance of fee simple, a mortgage, an assignment of a possessory interest, or an application by a person entitled to lodge a specified dealing, will result in the creation of a 'provisional folio'.¹¹
- 1.14 A provisional folio is a transitional folio for bringing old system land under the operation of the Transfer of Land Act without full investigation of the title, subsisting interests and the dimensions of the land.
- 1.15 There are three main types of provisional folio:¹²
- folios that are subject to a qualification in the legal practitioner's certificate
 - folios where the title is based on general law documents which have not been investigated by the Registrar and may be subject to subsisting interests (folios 'provisional as to subsisting interests')
 - folios where the dimensions of the land are not based on survey information which has been investigated by the Registrar (folios 'provisional as to dimensions').¹³

1 See discussion in Chapter 5.

2 *Real Property Act 1862* (Vic).

3 *Transfer of Land Act 1958* (Vic) s 27 (5)–(7).

4 *Transfer of Land Act 1958* (Vic) ss 40–44; James Hogg, *Registration of Title to Land Throughout the Empire* (Law Book Co of Australasia, 1920) 96, explaining that indefeasibility has a dual operation—both conferring title and giving priority over other interests.

5 *Registration of Deeds Act 1843* (NSW) continued to apply in Victoria after separation from NSW in 1850: Brendan Edgeworth, *Sackville & Neave Australian Property Law* (LexisNexis Butterworths, 2008) [5.7].

6 Hansard (Vic), Parliamentary Debates, Assembly, 14 May 1998, 1783 (The Hon M Tehan, Minister for Conservation and Land Management); Land Victoria, Submission 18, 1.

7 *Transfer of Land Act 1958* (Vic) ss 26E, 26W. Note that the Registrar may, if he thinks it appropriate, create a provisional or ordinary folio instead of an identified folio.

8 *Transfer of Land Act 1958* (Vic) ss 26F, 26G.

9 *Transfer of Land Act 1958* (Vic) ss 26G, 26H, 26I.

10 As defined in *Transfer of Land Act 1958* (Vic) s 4(1).

11 *Transfer of Land Act 1958* (Vic) ss 22–24, 4(1).

12 See the definition of 'provisional folio' in section 4(1) of the Transfer of Land Act, and the associated warnings in Parts II–V of the Fifth Schedule.

13 Land Victoria is aware of only one folio that is provisional on account of a qualification in a legal practitioner's certificate and estimates that there are about 200 that are provisional as to subsisting interests and thousands that are provisional as to dimensions: Submission 18, 1–2.



- 1.16 Subsisting interests in land held in folios that are subject to qualification in a legal practitioner's certificate or are provisional as to subsisting interests are enforceable in accordance with the rules of the old system.¹⁴ The provisional folio must contain a warning that the title may be subject to subsisting interests under the general law or to a qualification in a legal practitioner's certificate.¹⁵ After 15 years, the warning is removed and the land ceases to be subject to those subsisting interests and qualifications.¹⁶ At this point the folio is no longer a provisional folio, and the registered interests become indefeasible.¹⁷
- 1.17 An ordinary folio is 'a folio of the Register that is not a provisional folio or an identified folio'.¹⁸ Registered interests in land held in an ordinary folio are indefeasible.¹⁹ The same applies to registered interests in land in a provisional folio which is limited only as to dimensions.²⁰

A NOTE ON TERMINOLOGY

- 1.18 The Property Law Act distinguishes between land registered under the Torrens System and old system land by referring to Torrens System land as land 'under the operation of the Transfer of Land Act', and old system land as land which is not under the operation of that Act.
- 1.19 This distinction is no longer accurate, since old system land is deemed to be under the operation of the Transfer of Land Act once an identified or provisional folio has been created for it.²¹ In this review we use the term 'registered land' to refer to land in ordinary folios and folios that are provisional as to dimensions. We use the term 'old system land' to refer to all other land which has been granted by the Crown, irrespective of whether it is land in an identified or provisional folio.

REVIEW OF THE PROPERTY LAW ACT

GUIDING AIMS AND PRINCIPLES

- 1.20 To assist in developing and assessing proposals for reform of the Property Law Act, we formulated the following aims and principles from our terms of reference:

Aims

- Simplify the law and procedures.
- Modernise and update the law to serve current and emerging needs.
- Remove overlap and inconsistency with other laws.
- Harmonise Victorian law with the law of other Australian jurisdictions.
- Reduce the administrative and compliance burden on business and the not-for-profit sector.
- Improve access to justice and dispute resolution services.

Principles

- Redundant provisions should be repealed.
- Redundant categories of property rights should be abolished. Any subsisting rights should be preserved by a savings provision.
- Reform provisions enacted long ago to abolish discriminatory legal rules should be repealed.
- The relationship between the Property Law Act and other Acts, including the Transfer of Land Act, should be clarified.

SCOPE

- 1.21 The review encompasses all of the provisions of the Property Act except:
- Part IV (sections 221–234), concerning co-owned land and goods, which the Commission reviewed in 2001
 - Division 3 of Part II (sections 86–124), concerning mortgages
 - Division 5 of Part II (sections 136–152), concerning leases and tenancies, and
 - Subdivision 2 of Division 1 of Part II (sections 31–40), concerning dispositions on trust for sale.
- 1.22 As we discuss in Chapter 8, we have not reviewed the law of mortgages and leases because the relevant legislation is not wholly contained in the Property Law Act and the necessary reform should flow from a review that extends beyond our current terms of reference. For this reason, we see a need for a more comprehensive review into these areas of the law.
- 1.23 In Chapter 5, we recommend that new trust of land provisions replace both the Settled Land Act (which should be retained for existing settlements only) and the provisions in the Property Law Act concerning dispositions on trust for sale. We see the need for a review of trusts of land that encompasses the Settled Land Act together with the relevant provisions in the Property Law Act, the *Trustee Act 1958* and the *Administration and Probate Act 1958*.

CONSULTATION PAPER

- 1.24 In April 2010, we released a Consultation Paper and sought submissions in response to the issues that it raised. The closing date for submissions was the end of June 2010. In preparing the paper, we examined each provision of the Act in turn, researching its scope, purpose, legislative history and judicial interpretation. We assigned each provision to one of four action categories: repeal, retain with amendments of substance, retain and redraft for clarity, or retain in its present form. We also considered whether the provision currently applies to registered land and whether it should apply.
- 1.25 We were greatly assisted in our research by the work of Ms Jude Wallace who, in 1984, prepared for the Attorney-General a detailed commentary on the Property Law Act with suggestions for reform.²² This is the only section-by-section review of the Property Law Act or its predecessor Acts undertaken for the Victorian government since 1928.²³
- 1.26 We also considered the results of reviews and reforms adopted in other jurisdictions. Because many provisions of the Property Law Act are faithful to the original text of English legislation, commentaries, case law and law reform reports from England and other jurisdictions that adopted English statutes are highly instructive.²⁴ England and Wales, Ireland, Northern Ireland, Ontario, New Zealand, Queensland, Tasmania, the Northern Territory and the Australian Capital Territory are among the jurisdictions which have recently undertaken major reviews of their property law statutes and implemented significant reforms.
- 1.27 The Consultation Paper focused on major themes and posed questions about possible reform. A section-by-section summary of our proposals was set out in an Appendix.

- 14 *Transfer of Land Act 1958* (Vic) s 25.
- 15 *Transfer of Land Act 1958* (Vic) s 18, 25 and Parts III and V of the Fifth Schedule.
- 16 *Transfer of Land Act 1958* (Vic) ss 20, 21, 26C, 26D.
- 17 *Transfer of Land Act 1958* (Vic) ss 4(1), 42.
- 18 *Transfer of Land Act 1958* (Vic) s 4(1).
- 19 *Transfer of Land Act 1958* (Vic) s 42.
- 20 *Transfer of Land Act 1958* (Vic) s 26.
- 21 *Transfer of Land Act 1958* (Vic) s 9(2).
- 22 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984); see also Jude Wallace, 'Property Law Reform in Australia' (1987) 61 *Australian Law Journal* 174.
- 23 Wallace (1984), *ibid* 3–4.
- 24 Wallace (1987), above n 22.

SUBMISSIONS

- 1.28 In response to the Consultation Paper we received 19 submissions from interested groups and members of the public. They are listed at Appendix D. Some submissions responded to each of the questions asked in the Consultation Paper, while others focused on particular areas of interest to the parties concerned.
- 1.29 The submissions provided useful insights into the original intent and operation of many of the provisions of the Property Law Act and feedback on the proposals outlined in the Consultation Paper. We contacted some of the parties who made submissions for consultations, which yielded further valuable information, particularly about current practices.

OTHER CONSULTATIONS

- 1.30 In addition to seeking submissions in response to the Consultation Paper, we consulted throughout the review with legal practitioners, judges, academics, surveyors, government officials, VCAT members and other key stakeholders involved with property law in Victoria.
- 1.31 We were also assisted by a consultative committee which comprised prominent property law academics and practitioners, including from Land Victoria and the Department of Planning and Community Development, and senior judges. The committee assisted the Commission from a very early stage of the review, providing feedback and guidance in relation to the more complex provisions contained in the Act and proposed reforms. The committee was able to share its expert knowledge and practical experience in property law to help frame the review and to clarify the different issues that were addressed.

OUTLINE OF THIS REPORT

- 1.32 Discussing the Property Law Act section by section would have provided a disjointed and laborious account of the law. Instead, this report focuses on issues that require complex analysis or about which we recommend substantial reform. Our recommendations for each section of the Act are set out in a table at Appendix A.
- 1.33 In Chapter 2 we recommend a new Property Law Act. The current Act is an unwieldy document that is due for replacement. Its structure makes it difficult to navigate, its language is hard to understand and its interaction with other legislation is unclear. Almost every provision needs to be overhauled or repealed.
- 1.34 In Chapters 3–6 we discuss reforms that the new Act would introduce. We recommend in Chapter 3 a number of changes to the formalities for creating and assigning property interests. Our recommendations would simplify procedures, clarify the law and reduce the risk of fraud.
- 1.35 We then turn to issues concerning the identification and enforcement of rights and obligations under contracts. We recommend clarifying how implied statutory covenants apply to dealings of registered and unregistered interests and when a third party can enforce a covenant made between two other parties for his or her benefit. We also recommend that the circumstances when a court can exercise its discretion to provide relief against forfeiture of a deposit should be clarified. A number of the recommendations that the Commission made in its 2002 report concerning the rights of co-owners have not been implemented. We affirm these recommendations, some of which could be implemented under the new Property Law Act.

- 1.36 In Chapter 4 we discuss reforms relating to the identification of land and the implications of discrepancies in land boundaries arising from errors in early surveys. We examine section 270, which deals with discrepancies between the original Crown survey boundaries as marked out on the ground and the corresponding area described in title documents. We received submissions from Land Victoria and surveyors indicating a need for additional principles and guidelines for resolving discrepancies and amending boundaries. We recommend the insertion of a new provision in the Property Law Act empowering the Minister to publish guidelines for this purpose after consulting the Surveyor-General.
- 1.37 We then discuss two new provisions which we recommend be included in the new Property Law Act. The first is a building encroachment relief provision, which would enable a court to provide compensation or another form of relief when a building straddles a boundary line. The second is a mistaken improver relief provision, which would enable a court to grant relief where a person has made a lasting improvement on the property of another because of a mistake about either the identity of the land or who owns it. Provisions of this type are found in property legislation of other States and the Territories.
- 1.38 The introduction of the two new provisions does not require changing the rule under which a landowner who has been in adverse possession of adjacent land for the limitation period (usually 15 years) becomes the owner of it. We recommend no change to the rule, although in Chapter 8 we identify issues with its operation which require separate review.
- 1.39 In Chapter 5 we examine the provisions for the creation of life estates, future interests and trusts of land. We conclude that it should no longer be possible to create legal life estates and legal future interests. Life estates and future interests should be able to be created only in equity, as beneficial interests under a trust.
- 1.40 We also conclude that the law would be significantly modernised and simplified if the current dual trust system, split between the trust for sale provisions of the Property Law Act and the Settled Land Act, were replaced by a single statutory trust system. This is an area which should also be the subject of further review.
- 1.41 In Chapter 6 we discuss a variety of archaic provisions in the Property Law Act which we recommend be repealed or updated because they reflect discontinued practices. In Chapter 7 we recommend the repeal of obsolete and redundant provisions as discussed in the chapter and otherwise listed in Appendix C.
- 1.42 In Chapter 8 we identify the need for the law of mortgages to be reviewed as a whole under broader terms of reference. Although the Property Law Act contains some provisions concerning mortgages, a great deal of the law of mortgages lies in other legislation and our current terms of reference do not extend to a wider examination. For similar reasons, the law of leases also needs to be reviewed as a whole. A number of other issues requiring review have been identified, either by us or in submissions, and we canvass these in Chapter 8 as well.

