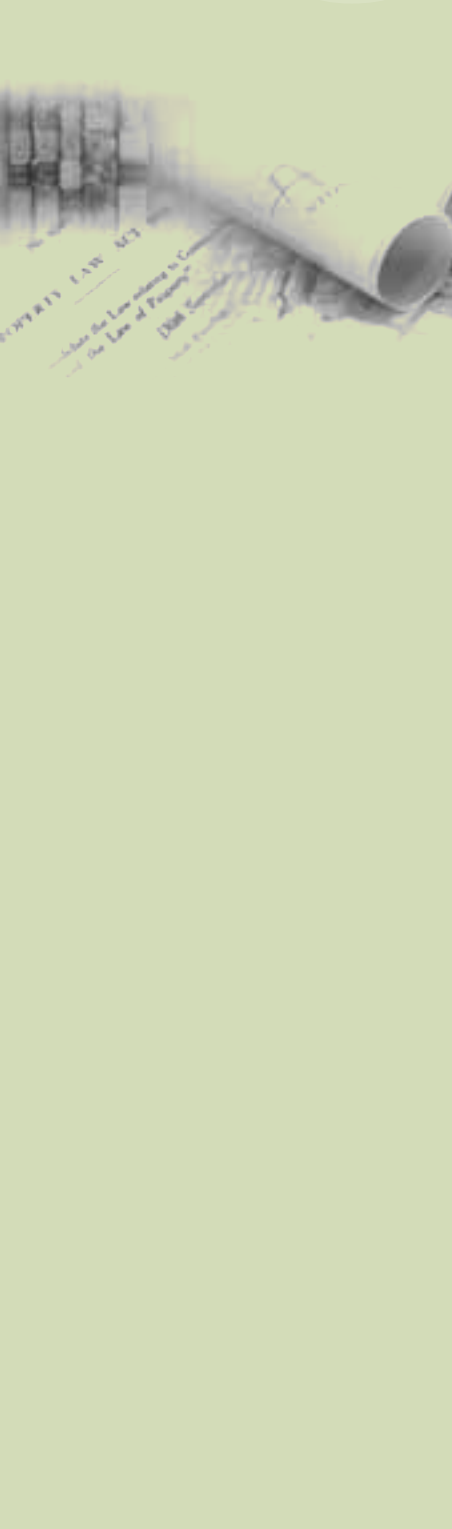


Chapter 5

Reform of Legal Estates and Trusts of Land

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OVERVIEW OF RECOMMENDED REFORMS

- 5.1 In this Chapter we recommend reducing the types of legal estates that may be created in freehold land and abolishing legal life estates and legal future interests. This is an overdue reform that has been successfully achieved in several other Australian and overseas jurisdictions.¹
- 5.2 A consequence of the reduction in legal estates is that a settlement which creates successive estates in land (such as a life estate followed by a remainder) will require the creation of a trust. Victoria has two sets of provisions regulating trusts: the *Settled Land Act 1958* (Settled Land Act), and the trust for sale provisions in sections 31–40 of the *Property Law Act 1958* (Property Law Act). Originally, they served different functions, but the difference has eroded. We recommend their replacement with new provisions for a more flexible statutory trust.
- 5.3 The introduction of the single statutory trust will affect legislation other than the Property Law Act. Effective implementation will require review of the Settled Land Act, the *Administration and Probate Act 1958* (Administration and Probate Act) and the *Trustee Act 1958* (Trustee Act).

REDUCTION OF LEGAL ESTATES IN FREEHOLD LAND

- 5.4 The concept of freehold land originates from the old English system of land holding known as the doctrine of tenure, a form of which Australia has inherited.² The ownership of land is defined by reference to how land is held (tenure) and to the duration of ownership (estate). Australia has received from English common law a scheme of legal estates and interests in land.
- 5.5 The closest estate to absolute ownership is the fee simple absolute. It is an unconditional freehold estate in land for an unlimited duration. The other legal estates in freehold land that can be created in Victoria are:
 - life estate and legal future interest (including remainder, reversion, and right of entry and of re-entry)
 - modified fee simple (modified fee).
- 5.6 Another legal estate that can be created, a term of years absolute, is a leasehold estate. The main difference between a freehold estate and a leasehold estate is that the duration of a leasehold estate must be 'certain or capable of being rendered certain'.³
- 5.7 It is important to note that native title stands outside the principle of tenure and the scheme of estates. At the time the Crown acquired sovereignty, the aboriginal peoples of Victoria enjoyed rights to land under their own legal system. In *Mabo v Queensland [No 2]*,⁴ the High Court held that native title rights are recognised by the common law but are not part of it. The nature and content of those rights are defined by the aboriginal laws and customs. The *Native Title Act 1993* (Cth) recognises, protects and enforces native title under Commonwealth law. Our recommendation for reduction of legal estates does not in any way affect native title or aboriginal title as defined in the *Traditional Owner Settlement Act 2010*.

IMPETUS FOR REFORM

- 5.8 The reduction of legal estates is a major and overdue initiative to simplify and modernise the law and abolish complex and outdated common law rules. Jude Wallace recommended in her 1984 review of the Property Law Act that the number of legal estates which can be created in relation to land in Victoria should be reduced.⁵
- 5.9 Victoria had the opportunity to make these reforms when the *Property Law Act 1928* was drafted. England had introduced major reforms to property law in 1925, and many of these reforms were adopted by Victoria in the *Property Law Act 1928* and re-enacted in the current Property Law Act.
- 5.10 One of the English reforms that Victoria did not adopt was the reduction of legal estates to just two; the fee simple absolute in possession and the term of years absolute. Since 1925, life estates and future interests such as reversions and remainders have been able to exist in England and Wales only in equity, behind a trust.
- 5.11 Sir Leo Cussen reviewed the 1925 English property legislation, to determine which provisions should be adopted in Victoria's 1928 consolidation of the Property Law Act. According to Wallace, Cussen's reasons for rejecting the simplification of estates was in line with the prevailing view in Australia at the time that the system of conveyancing would be better simplified by extending and improving the system of registered title.⁶
- 5.12 In recent years, the number of legal estates has been reduced in Queensland and the Northern Territory.⁷ Internationally, this issue has been the subject of recent reform in Ireland and New Zealand, and reform proposals in various other jurisdictions including Northern Ireland and Ontario.⁸
- 5.13 In our Consultation Paper, we proposed that Victoria should now reduce the number of legal estates to two: the fee simple estate and the leasehold estate. These would be the only estates that would be registrable under the Transfer of Land Act.⁹
- 5.14 The reduction of estates will simplify conveyancing by removing the need to retain the Settled Land Act and the separate trust for sale provisions in the Property Law Act, and by enabling the repeal of other complex rules which apply only to legal estates.

LEGAL LIFE ESTATES AND FUTURE INTERESTS

- 5.15 The life estate is an estate in land limited in duration to the life of the grantee or for the life of another person.¹⁰ The holder of a life estate is known as the 'life tenant'.
- 5.16 A future interest is an interest granting rights in land to be enjoyed at some time in the future. Future interests include: the interest remaining after the termination of an intermediate interest such as a life estate (a remainder); the residue of the estate owned by the grantor after an intermediate interest has been granted (a reversion); or the right of the grantor to re-enter the land after the condition of the grant of land has been breached (a right of entry or re-entry).
- 5.17 Future interests can be created in both law and equity, and can be either vested or contingent.
- Vested interests are existing property rights which will give a right to possession when the intermediate interest (for example, a life estate) granted comes to an end. An example of a vested interest is 'to A for life, remainder to B'. B holds a vested interest in remainder until A's death.
 - Contingent interests exist where there is an element of uncertainty as to when and in whom they will vest, or which vest upon satisfaction of a condition precedent. An example of a contingent interest is 'to A for life, remainder to B when he marries C'. B does not hold a vested interest unless and until he marries C. The marriage to C operates as a condition precedent to the interest vesting in B.

- 1 See discussion at [5.8]–[5.14] below.
- 2 See Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) [2.20–24] for discussion of the development of the doctrine of tenure in Australia in light of the decision in *Mabo v Queensland (No 2)* (1992) 175 CLR 1.
- 3 *Ibid* [2.135]. Until 1886, it was also possible to create a fee tail estate, which is a freehold estate limited to the (traditionally male) descendants of a grantor. Although it has not been possible to create an estate in fee tail since then (see *Transfer of Land Statute Amendment Act 1885* (Vic)); Part VI of the Property Law Act still applies to any fee tail estate created before 1886 that may still exist. The recommended amendments to Part VI are discussed in Chapter 6.
- 4 (1992) 175 CLR 1.
- 5 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 30.
- 6 Jude Wallace, 'Property Law Reform in Australia' (1987) 61 *Australian Law Journal* 174, 177.
- 7 *Property Law Act 1974* (Qld) s 19; *Law of Property Act 2000 No. 1* (NT) s 18.
- 8 *Land and Conveyancing Law Reform Act 2009* (Ir); *Property Law Act 2007* (NZ); Northern Ireland Law Commission, *Land Law Consultation Paper No 2* (2009); Ontario Law Reform Commission, *Report on Basic Principles of Land Law* (1996).
- 9 This proposal is based upon reforms already enacted in Queensland, the Northern Territory, New Zealand, England and Wales and Ireland: *Property Law Act 1974* (Qld) s 19; *Law of Property Act 2000 No. 1* (NT) s 18; *Property Law Act 2007* (NZ) s 58; *Law of Property Act 1925* (Eng) s 1; *Land and Conveyancing Law Reform Act 2009* (Ir) s 11.
- 10 The latter type is known as an 'estate *pur autre vie*'.



- 5.18 Dispositions which create successive estates at law are ‘settlements’ within the meaning of the Settled Land Act, and are subject to that Act. The Act has long been considered to operate unsatisfactorily.¹¹ The difficulties associated with the Settled Land Act are discussed in further detail later in this Chapter.
- 5.19 Legal settlements which create future interests are subject to the common law contingent remainder rules, as modified in Victoria by sections 191–193 of the Property Law Act. These arcane rules were originally created to facilitate the collection of feudal dues by avoiding a gap in seisin (ownership), and to prevent the creation of successive interests too far into the future. The rules do not apply to successive interests which are created at equity, under a trust. As the land remains vested in the trustees continuously, there is no gap in ownership.¹²
- 5.20 To avoid the complexities of the Settled Land Act and the contingent remainder rules, it is standard practice for conveyancers to create settlements in equity, behind a trust. It would be most unusual for an experienced practitioner to recommend the creation of a legal settlement. The abolition of legal future interests would remove a method used only by the ill advised.¹³

REFORM IN OTHER JURISDICTIONS

- 5.21 The scope of reform of this area varies throughout different jurisdictions. Some Australian jurisdictions, including Victoria, have adopted ‘remedial legislation’¹⁴ to modify the common law contingent remainder rules.¹⁵ Others have taken the further step of abolishing legal future interests and the contingent remainder rules altogether.
- 5.22 In Queensland, the *Property Law Act 1974* now provides that a future interest in land shall take effect as an equitable and not a legal interest.¹⁶ This reflects the 1925 English reforms.¹⁷ Similar reforms have been enacted in the Northern Territory, Ireland and Manitoba,¹⁸ and recommended by law reform commissions in Northern Ireland and Ontario.¹⁹

PROPOSAL FOR REDUCTION OF LEGAL ESTATES IN VICTORIA

- 5.23 In our Consultation Paper, we asked whether it should remain possible to create legal life estates and legal future interests. We proposed that successive interests in land should be able to be created only in equity, as beneficial interests under a trust.²⁰ This proposal would bring the law into line with long-established conveyancing practice, and enable the repeal of archaic and complex laws which are retained only for legal settlements.
- 5.24 The proposal is integrally linked with our proposal to introduce a single statutory trust to replace both the Settled Land Act and the trust for sale provisions in the Property Law Act.²¹
- 5.25 We have received general support from consultees for the proposed reduction of legal estates.²² One submission confirmed that ‘life estates and the like, as a matter of conveyancing practice are invariably dealt with in equity’.²³
- 5.26 The support of consultees is qualified to the extent that it is subject to the review and future resolution of one or more issues. The main issue is the protection of holders of unregistered interests, detailed discussion of which is set out in Chapter 8. The other issues raised are: loss of the ability of a tenant for life to use his or her legal life interest as security for borrowing; and the impact of the proposed reforms on Victoria’s land tax and estate planning regimes. The position of existing life interests and future interests has also been queried. These issues are discussed in the following paragraphs.

LOSS OF ABILITY TO GRANT A MORTGAGE

- 5.27 In our Consultation Paper we recognised that there could be some advantage in retaining the current provision for legal life estates, as a life tenant's registered title could potentially be used as security for a mortgage loan. A life tenant can, with the consent of the trustees or the court, raise money by mortgaging the land for the purposes permitted by section 71 of the Settled Land Act. If the legal life estate is abolished, lending institutions may be unwilling to lend to the life tenant who can offer only an equitable interest as security.
- 5.28 This concern was originally raised in consultations with a committee of property experts. The same concern has also been expressed in a submission from Associate Professor Tehan and colleagues at Melbourne Law School.²⁴ In our consultations we endeavoured to establish whether lending institutions are in fact accepting a legal life estate as security for loans.
- 5.29 We consulted with Mr Macnamara, an experienced legal practitioner, who has a history of working with lending institutions. He commented that he had not come across this practice in his experience. We also contacted Perpetual and asked them whether they have any experience of this practice.²⁵ Perpetual commented that they have not experienced financial institutions lending to life tenants using the life estate as security.
- 5.30 We consider that the reasoning in our Consultation Paper still applies. The impairment of the life tenant's statutory power to mortgage the land does not appear to be a significant consideration in practice. The power is limited to purposes which preserve the capital assets of the trust, and the mortgage advance is deemed to be capital monies of the settlement.²⁶ If the life interest is created by a statutory trust as we recommend later in this Chapter, it will be open to the settlor to confer powers on the trustees to raise funds by loan for broader purposes.²⁷

LAND TAX AND ESTATE PLANNING

- 5.31 In his submission, Professor Glover expressed concern about the impact of our proposal on Victoria's land tax regime in the context of the *Land Tax Act 2005* (Land Tax Act).²⁸ He submitted that life interests are increasingly used in estate planning for tax minimisation and that, if their creation is permitted only in equity, this will attract the general land tax surcharge on trusts contained within Part 3 of Schedule 1 to the Land Tax Act.²⁹ The trust surcharge is discussed later in this Chapter in the context of trusts of land.
- 5.32 We have reviewed the legislation and have consulted with the State Revenue Office (SRO) in order to establish the tax treatment of life estates. Under the Land Tax Act, the 'owner' of the land is liable for land tax.³⁰ Section 11 of the Act deems a life tenant in possession to be the owner of the land. The deemed owner pays the general rate of land tax and not the surcharge. The SRO have expressed the view that the deeming provision operates whether the life estate is legal or beneficial and held under a trust.
- 5.33 We consider that this answers Professor Glover's concerns on this point.
- 5.34 Professor Glover also submitted that life interests are still used in estate planning as a '(lawful) species of avoidance'.³¹ Life interests of a testator are not separately valued by the court in making an order under the Family Provision sections in Part 4 of the Administration and Probate Act.³²
- 5.35 We do not consider this a sufficient reason to retain legal life estates, nor does it appear to be in keeping with current taxation or inheritance policy.

11 Richard Eggleston, 'Some Suggestions for Law Reform' (1949) 23 *Australian Law Journal* 222.

12 The creation of future interests both legal and equitable are still, however, subject to the rule against perpetuities as modified by the *Perpetuities and Accumulations Act 1968* (Vic). For an overview of this legislation and proposals for its reform, see Scrutiny of Acts and Regulations Committee, Review of Redundant and Unclear Legislation Report concerning the *Maintenance Act 1965, Marriage Act 1958 and Perpetuities and Accumulations Act 1968* November 2004, 13.

13 This would also allow the repeal of sections 191–193 of the *Property Law Act 1958*, as they would have no application to future interests created under a trust mechanism.

14 Queensland Law Reform Commission, *Report on a Bill to Consolidate, Amend and Reform the Law Relating to Conveyancing* 16 (1973) 25.

15 *Property Law Act 1958* (Vic) ss 191–193; *Conveyancing Act 1919* (NSW) s 16; *Property Law Act 1969* (WA) s 26; *Law of Property Act 1936* (SA) s 25.

16 *Property Law Act 1974* (Qld) s 30.

17 *Law of Property Act 1925* (Eng) s 4(1).

18 *Law of Property Act 2000* No. 1 (NT) s 30; *Land and Conveyancing Law Reform Act 2009* (Ir) ss 15, 16; *The Perpetuities and Accumulations Act 1983* (Manitoba) s 4(1).

19 Northern Ireland Law Commission (2009), above n 8; Ontario Law Reform Commission (1996), above n 8.

20 Victorian Law Reform Commission, *Review of the Property Law Act 1958 Consultation Paper* (2010) [3.19].

21 See discussion in Chapter 4 *ibid*. These recommendations are discussed later in this Chapter. In their submission, the Law Institute of Victoria express the need to comprehensively consider the reduction of legal estates in conjunction with review/repeal of the *Settled Land Act 1958* (Vic): Law Institute of Victoria, Submission 13,9.

22 Associate Professor Maureen Tehan et al, Submission 9, 11; Mr Michael Macnamara Submission 2, 2; Law Institute of Victoria, Submission 13, 9; Land Victoria, Submission 18, 4.

23 Mr Michael Macnamara Submission 2, 2.

24 Associate Professor Maureen Tehan et al, Submission 9, 12.

25 Perpetual Legal, Perpetual. Perpetual (formerly Perpetual Trustees) is an Australian company which provides investment and trustee services in wealth management.

26 *Settled Land Act 1958* (Vic) s 71.

27 *Settled Land Act 1958* (Vic) s 109.

28 Professor John Glover, Submission 1.

29 Professor John Glover, Submission 1, 2.

30 *Land Tax Act 2005* (Vic) s 8.

31 Professor John Glover, Submission 1, 2.

32 *Administration and Probate Act 1958* (Vic) s 97(2).



PROSPECTIVE APPLICATION

- 5.36 Some consultees have queried how existing legal life estates and legal future interests will be affected by our reform proposals.
- 5.37 Associate Professor Tehan and colleagues have submitted that, although they favour the reduction of legal estates, 'reform should not unfairly prejudice the rights of current holders of life estates and future interests'.³³
- 5.38 Land Victoria also generally supported the simplification of legal estates, but queried how existing life interests and remainders which are currently on the register will be dealt with if future interests are to be abolished.³⁴
- 5.39 Our proposal anticipates prospective application to the creation of life interests and future interests from the commencement of the new Property Law Act. These new interests will be created in equity. Legal life interests and future interests created before commencement will continue to exist as legal interests.

PROTECTION OF BENEFICIARIES OF TRUSTS OF REGISTERED LAND

- 5.40 In our Consultation Paper, we noted that the reduction of legal estates would relegate some interest holders from their currently well-protected status of registered proprietor to the less secure status of beneficiary under a trust. In their submission, Associate Professor Tehan and colleagues submitted that reform regarding the reduction of legal estates and the introduction of a single statutory trust of land 'should be considered alongside the possibility of an amendment to the Transfer of Land Act to ensure that equitable interests are afforded greater protection'. They also submitted that 'consideration be given to the possibility of repealing s 37 of the Transfer of Land Act, in order that beneficial interests under a trust be registrable under s 42(1)'.³⁵
- 5.41 The protection for the interests of beneficiaries of trusts is an issue of wider application, which lies outside our present terms of reference. We include it in our list of issues for further review in Chapter 8, but we do not think the recommendations in this Chapter depend upon the outcome of such a review.

MODIFIED FEES

- 5.42 A class of freehold interests known as modified fee simple estates (modified fees) also exist at law. These interests fall into the categories of determinable fee, and fee simple subject to a right of entry or re-entry (conditional fee).
- 5.43 An example of a determinable fee is a gift 'to A in fee simple so long as the University of Melbourne functions as a University'. In this instance the grantor retains a possibility of reverter and the estate will revert to him or her on the occurrence of the event. As Ziff puts it, 'the determining event is like a fence post that demarcates the durational extent of the entitlement'.³⁶
- 5.44 An example of a conditional fee is a gift 'to A in fee simple on the condition that he does not gamble'. Here, the grantor retains a right of re-entry which may be exercised at the grantor's option on the happening of the event. The condition essentially brings the estate to an end and is like a 'dark cloud that hovers over the fee'.³⁷
- 5.45 Dispositions of land which create a determinable fee are deemed to be 'settlements' and are subject to the Settled Land Act, unless created under a trust for sale.³⁸ A conditional fee, being a fee simple subject to a right of entry or re-entry, does not fall within the definition of 'settlement',³⁹ and therefore does not attract the Settled Land Act.

MODIFIED FEES IN LAW AND EQUITY

- 5.46 In Victoria, both kinds of modified fees can be created as legal estates or as equitable estates under a trust. If an aim of reform is the reduction of legal estates in land, the question is how to treat these modified fees.
- 5.47 In our Consultation Paper, we asked whether determinable and conditional fees should only be created in equity. We discussed the following options:
- recognise modified fee simples alongside the fee simple absolute, or
 - permit the creation of modified fees in equity only.
- 5.48 In recent land law reform, Ireland has recognised modified fee simples alongside the fee simple absolute.⁴⁰ The view of the Irish Law Reform Commission was that conditional and determinable fees generally do not create a clear succession of interests.⁴¹ This approach recognises the remoteness of the limitation on the fee simple and that the grantee is 'very close to being the full owner of the land'.⁴² The remote possibility of a succession of interests is not substantial enough to justify the imposition of settled land provisions or trust law in every case.
- 5.49 The option of permitting creation of modified fees only in equity, would allow this class of interests to be brought within the proposed statutory trust (discussed later in this Chapter), and removed entirely from the Settled Land Act. This approach was favoured by the Ontario Law Reform Commission, which proposed that determinable and conditional fees be deemed to be successive interests and held on a statutory trust.⁴³
- 5.50 Wallace also commented that the creation of legal limited fees is rarely attempted in Victoria, and that 'little practical opportunity would be lost and major simplification achieved if limited fees and their rights of reversion and re-entry were converted into equitable interests'.⁴⁴
- 5.51 The English position distinguishes between determinable and conditional fees. Determinable fees can be created only at equity, while conditional fees can exist both in law and equity.

DISTINGUISHING BETWEEN DETERMINABLE FEES AND CONDITIONAL FEES

- 5.52 In our Consultation Paper we also discussed the distinctions between a determinable fee and a conditional fee. The two estates are very similar but to confuse them in drafting a grant has important consequences.
- 5.53 First, if a determinable fee is found to be invalid due, for example, to the determining event being contrary to public policy, then the entire gift fails. By contrast, invalidity of the condition subsequent attaching to a conditional fee results in severance of the condition and the gift being made absolute. A minor drafting error or misinterpretation can therefore frustrate the grantor's intentions.
- 5.54 Secondly, while a disposition subject to a condition subsequent may be void on public policy grounds, the same disposition, if drafted as a determinable fee, would be effective. This is demonstrated by the following example from Professor Glanville Williams, as cited by the Ontario Law Reform Commission:⁴⁵

If A gives property on trust to B, 'but if B marries then to C', the gift to C is struck out because it tends to induce B to remain unmarried, and the procreation of legitimate children is regarded as a public interest. Thus on this form B will take absolutely. But if the words used were 'on trust for B until he marries and thenceforth to C', the gift would be valid and B would lose the property if he were to marry.

- 33 Associate Professor Maureen Tehan et al, Submission 9, 11.
- 34 Land Victoria, Submission 18, 4.
- 35 Associate Professor Maureen Tehan et al, Submission 9, 15.
- 36 Bruce Ziff, *Principles of Property Law* (Thomson Carswell, 4th ed, 2006) 223.
- 37 Ibid 222.
- 38 *Settled Land Act 1958* (Vic) s 8(1)(b)(iii).
- 39 *Settled Land Act 1958* (Vic) s 8(1); E Wolstenholme, *Wolstenholme and Cherry's Conveyancing Statutes* (Oyez, 13th ed, 1972) 23.
- 40 *Land and Conveyancing Law Reform Act 2009* (Ir) s 11(2).
- 41 Law Reform Commission [Ireland], *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* CP No 34 (2004) 43.
- 42 Law Reform Commission [Ireland], *Report on Reform and Modernisation of Land Law and Conveyancing Law* No 75 (2005) 47.
- 43 Ontario Law Reform Commission (1996), above n 8, 54.
- 44 Wallace (1984), above n 5, 36.
- 45 Ontario Law Reform Commission (1996), above n 8, 63, citing Professor Glanville Williams, *Language and the Law* (1945) 61 L Q Rev. 71, 79.



- 5.55 The argument made is that if a disposition is found to be against public policy interests, this should be the case regardless of how it is expressed.⁴⁶
- 5.56 The above considerations prompted the Ontario Law Reform Commission to propose that the distinction between limited fees should be abolished so that, if created, a determinable fee will be deemed a conditional fee.⁴⁷ This is a possible option for the treatment of modified fees in Victorian property law.

PROPOSAL TO CONVERT DETERMINABLE FEES TO CONDITIONAL FEES

- 5.57 In our Consultation Paper, we proposed that determinable fees be converted to conditional fees because this option appears to offer a comprehensive solution to both the invalidity issue and the question of whether they should be created only in equity.
- 5.58 First, determinable fees would no longer fail due to the invalidity of the determining event. Secondly, if all modified fees are deemed to be conditional fees, the need for a trust or Settled Land Act mechanism to enforce the succession becomes unnecessary. Conditional fees, unlike determinable fees, have the right of re-entry which is a clear mechanism for termination and succession. The right of re-entry on the happening of the conditional event is a positive right which can be exercised by a defined person to terminate the prior interest.

SUBMISSIONS

- 5.59 We asked consultees whether determinable and conditional fees should be created only in equity and, following on from our discussion of the invalidity issue above, whether determinable fees should be converted to conditional fees. Only two submissions addressed these issues.⁴⁸
- 5.60 The Law Institute of Victoria agreed with our proposals. Mr Macnamara supported our proposal that determinable and conditional fees should be created only in equity but did not support our proposal regarding conversion of determinable fees to conditional fees. He submitted that 'the determinable fee has generally fared better than the conditional fee' on the basis that the determining event is automatic.⁴⁹
- 5.61 We consider that the consequences of confusing the two estates in the drafting of grants, and the fact that the right of re-entry is a positive right which can be exercised by a defined person to terminate a prior interest, are strong arguments for preferring conditional fees.
- 5.62 Mr Macnamara also queried the consistency of our proposal with the rule against perpetuities. Although at common law the rule against perpetuities does not apply to determinable fees,⁵⁰ the *Perpetuities and Accumulations Act 1968* has modified this position.⁵¹ Under that Act, the possibility of reverter on the determination of a determinable fee simple is now also subject to the rule against perpetuities. The legislation provides that if the determining event does not happen within the perpetuity period or the right of entry for condition broken is not exercised within this time, then the determinable or conditional fee continues as a fee simple absolute free from any determining event or condition respectively.
- 5.63 As conditional and determinable fees are treated alike under the perpetuity provisions, determinable fees no longer enjoy any advantage under the perpetuities rule.

RECOMMENDATIONS

32. From the commencement of the new Property Law Act, legal life estates and legal future interests should be capable of creation only in equity as beneficial interests under a trust.
33. From the commencement of the new Property Law Act, the number of legal estates should be reduced to two: the fee simple estate and the leasehold estate. The fee simple estate can be absolute or conditional. These should be the only estates that are registrable under the *Transfer of Land Act 1958*.
34. From the commencement of the new Property Law Act, the creation of a determinable fee should operate to create a conditional fee.
35. Successive interests in land should be capable of creation only in equity, as beneficial interests under a trust. (See recommendations 36 and 37.)

TRUSTS OF LAND

THE DUAL TRUST SCHEME

- 5.64 The trust for sale provisions in the Property Law Act,⁵² in conjunction with the Settled Land Act, constitute a dual scheme of trusts for dispositions of land in Victoria. In our Consultation Paper we proposed replacing this dual scheme with a single, unified and more flexible statutory trust.
- 5.65 This, together with the reduction in legal estates, are major reforms and our review of the trust for sale provisions requires discussion of the operation of the Settled Land Act. We acknowledge that, as the Settled Land Act is beyond the scope of the present reference, our recommendations are for future reform.

SETTLED LAND ACT

- 5.66 A settlement in relation to land is created when a deed, will or other instrument provides that land is 'limited'⁵³ to or in trust for any persons in succession.⁵⁴ Where there is no trust, and the successive interests are legal interests, the settlement is known as a 'strict settlement'. The person who establishes the settlement is called the 'settlor'.
- 5.67 Historically, settlements operated as a way to keep land within families for successive generations. To ensure that settled land could be disposed of more readily, the *Settled Land Act 1882* (Eng) was introduced. The Act gave the tenant for life powers to dispose of the fee simple absolute and to manage the land, subject to provisions designed to protect the beneficiaries of the settlement.
- 5.68 The equivalent legislation in Victoria is the Settled Land Act, under which the tenant for life has extensive powers to sell or lease the land, effect repairs or maintenance and raise funds by mortgage for limited purposes. The exercise of these powers requires the consent of the trustees of the settlement, or otherwise the consent of the court.⁵⁵
- 5.69 The Settled Land Act applies to a 'settlement' of land, including land under the operation of the Transfer of Land Act. A 'settlement' includes a settlement made at law or by a trust (other than a trust for sale). The definition of 'settlement' goes well beyond the common law meaning of a disposition of successive interests in land.⁵⁶

46 Ontario Law Reform Commission (1996), above n 8.

47 Ibid 64.

48 Mr Michael Macnamara, Submission 2, 2; Law Institute of Victoria, Submission 13, 9.

49 Mr Michael Macnamara, Submission 2, 2.

50 At common law the possibility of reverter which arises in the case of a determinable fee is an exception to the rule against perpetuities whereas the right of entry for condition broken in the case of a conditional fee is not. The application of the rule against perpetuities to 'rights of entry for condition broken attached to a fee simple estate' is established in English case law which has been approved and applied in Victoria; Bradbrook (2007), above n 2, [11.210]–[11.220]; *Re Smith (decd)* [1976] VR 341.

51 *Perpetuities and Accumulations Act 1968* (Vic) s 16(1), (3).

52 *Property Law Act 1958* (Vic) ss 31–40.

53 A limited interest is an interest in land which is less than a fee simple absolute.

54 *Settled Land Act 1958* (Vic) s 8.

55 Where there is no tenant for life, the powers are conferred on the trustees of the settlement. Proceeds of the sale of the settled land are 'capital monies' which must be paid to trustees of the settlement.

56 Also included are determinable fees, fees which are subject to a 'gift over' to somebody else in a specified event, entailed estates, estates charged with the payment of rentcharges and other capital or periodic sums for the benefit of other persons, estates granted to a married woman with a restraint on alienation, and estates limited to or in trust for minors: *Settled Land Act 1958* (Vic) s 8(1).



DIFFICULTIES WITH THE SETTLED LAND ACT

- 5.70 Legal practitioners generally try to avoid using the Settled Land Act because its provisions are overly restrictive, anomalous, outdated, complex and difficult to understand. Many administrative matters require an application to the court, which adds to the costs of managing settlements. The problems which affect Victoria's Settled Land Act are also reported in many other common law jurisdictions.
- 5.71 A major problem is that the Act does not permit the settlor to alter the balance of powers between the trustees and the tenant for life.⁵⁷ The provisions dealing with investments of capital monies and the power to make improvements have been described as 'redolent from another age'.⁵⁸ Speaking in 1949 about the *Settled Land Act 1928*, which was in substantially similar terms to the 1958 consolidation, Sir Richard Eggleston said that the Act 'requires such careful study for its adequate understanding that most practitioners, although aware of its existence, prefer to regard it merely as an unpleasant nightmare'.⁵⁹
- 5.72 In his submission on this issue, Mr Macnamara described his difficulties in navigating the legislation in trying to establish practical issues in the exercise of a life tenant's power of sale:⁶⁰

I found it impossible despite consultation of standard texts ... and consultations with the legal branch of the Office of Titles to reach confident conclusions as to the practical issues in the exercise of a life tenant's power of sale under the Settled Land Act. Who should be shown as vendor in the contract of sale? Who should execute the transfer of land when according to the register under the Transfer of Land Act the legal estate is vested in the trustee and not in the life tenant or tenants?

- 5.73 A further issue with the Act is its application to minors' property. Some parents have put land in the names of their minor children, unaware that they would be unable to transfer the land to a purchaser. In some cases it has been necessary to apply to the court for the appointment of trustees of the settlement of a minor's property.
- 5.74 The scope of operation of the Settled Land Act is so wide that its requirements are easily overlooked by legal practitioners, particularly when drafting wills or administering estates. The result may be to deprive the beneficiaries of their entitlements and expose legal practitioners to liability.⁶¹

TRUST FOR SALE

- 5.75 The usual way to create a settlement which avoids the Settled Land Act is to establish a trust for sale as these trusts are excluded from the operation of the Act by section 9. Trusts for sale are regulated by the Property Law Act and operate free of many of the problems associated with the Settled Land Act.
- 5.76 The legislative distinction between settlements and trusts for sale reflects their functional difference in the 19th century. As Butt explains, the object of the trust for sale was that the trustees would immediately sell the trust property and administer the proceeds as a capital fund to be invested.⁶² For this reason, equity regarded the trust for sale as a trust of personal property rather than land.
- 5.77 The once clear functional division between the settlement and the trust for sale has eroded over time as settlors, anxious to avoid the Settled Land Act, established trusts for sale and granted powers to the trustees to postpone the sale.

5.78 In Victoria, the trust for sale is defined in both the Property Law Act and the Settled Land Act in the following terms:⁶³

A trust for sale, in relation to land, means an immediate binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone the sale.

5.79 A power to postpone the sale is implied into every trust for sale unless the contrary intention appears.⁶⁴ The distinctiveness of a trust for sale is further muddled by section 32(4) of the Property Law Act, which provides that where a settlement 'contains a trust either to retain or sell land the same shall be construed as a trust to sell the land with a power to postpone the sale'. This 'falls midway between a trust for sale and the power of sale'⁶⁵ and gives the trustees 'an uncontrolled discretion whether to sell or not'.⁶⁶

REFORM OF THE DUAL TRUST SCHEME

5.80 The distinction between the trust for sale regulated by the Property Law Act, and the trust with a mere power to sell which attracts the Settled Land Act, is confusing. Settlers find it paradoxical that they have a better chance of the land being retained in the family if they place it on a trust for sale.⁶⁷ If the settlor gives the trustees a mere power of sale, the Settled Land Act will apply. Under that Act, the tenant for life may sell the land with the consent of the trustees (which consent must not be arbitrarily withheld)⁶⁸ or by obtaining an order of the court.⁶⁹

5.81 In their submission, State Trustees agreed with our view that the distinction between the trust for sale regulated by the Property Law Act, and the trust with a mere power to sell which attracts the Settled Land Act, is confusing for both settlers and some legal practitioners. In their experience of administering testamentary trusts, they stated that 'it is often unclear whether the creation of a trust with a mere power to sell was inadvertent or intentional'.⁷⁰

5.82 State Trustees specifically commented as follows on administering trusts with a mere power of sale:⁷¹

In our experience, the difficulty in administering trusts with a mere power of sale arises where the trust is a 'dry' trust i.e. one with no available funds to cover repairs and outgoings, and where the life tenant is obliged under the instrument of trust to effect repairs and refuses to do so. Where the property deteriorates and falls into disrepair, the trustee has no power to force the life tenant to repair and cannot sell the property without an order from the Court. Similarly, where the trustee has an obligation under a trust instrument to effect repairs, insure or pay other outgoings, but has no access to funds, the trustee has no power to sell the property, even where it has fallen into disrepair, without an order from the Court.

5.83 Over many decades, conveyancers and settlers have indicated a clear preference by choosing to establish settlements under a trust for sale. Under a correctly drafted trust mechanism, there is often less need to resort to court applications, as the trustees are usually given extensive powers of management, sale and mortgage.⁷²

5.84 The law should make equivalent provision for those not so well advised. In the words of the Ontario Law Reform Commission:⁷³

In general, we think that the law should, unless there is a compelling reason to the contrary, provide similar consequences for the settlement created mistakenly or without the benefit of skilled advice as would have occurred if a skilled draftsman had devised the transaction. This point favours therefore the application of a trust even where the settlor has not so provided.

57 Eggleston (1949), above n 11.

58 Simon Gannon, 'Unsettling Repercussions' (2010) *Law Institute Journal* 31, 33.

59 Eggleston (1949), above n 11, 226.

60 Mr Michael Macnamara, Submission 2, 2.

61 Gannon (2010), above n 58.

62 Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2009) 217–219.

63 *Property Law Act 1958* (Vic) s 18; *Settled Land Act 1958* (Vic) s 3.

64 *Property Law Act 1958* (Vic) s 32(1).

65 Wikramanayake, *Voumard: The Sale of Land in Victoria* (Lawbook Co 1986), 187.

66 *Ibid.*

67 Brian Harvey, *Settlement of Land* (Sweet and Maxwell, 1973).

68 *Settled Land Act 1958* (Vic) s 93(a).

69 *Settled Land Act 1958* (Vic) s 38.

70 State Trustees, Submission 16, 1.

71 State Trustees, Submission 16, 1.

72 Ontario Law Reform Commission (1996), above n 8, 44.

73 *Ibid.*



- 5.85 State Trustees have supported this view. They believe that the introduction of a single statutory trust 'with provisions that confer on trustees specific powers to deal with trust property, may go some way to resolving this issue'.⁷⁴
- 5.86 In our Consultation Paper we proposed that substantial simplification of property law could be achieved if all settlements involving successive interests were created under a single statutory trust mechanism, replacing both the Settled Land Act and the trust for sale provisions of the Property Law Act.
- 5.87 We considered the reform options for replacing the Settled Land Act, and noted that any replacement legislation would need to be flexible enough to encompass all the different types of 'settlements' to which the Settled Land Act applies.
- 5.88 We reviewed previous reform discussions in Victoria,⁷⁵ other Australian jurisdictions,⁷⁶ and legislative initiatives internationally,⁷⁷ and identified four feasible options for reform. These options were:⁷⁸
- amend the Settled Land Act
 - repeal the Settled Land Act and replace it with a statutory holding trust for 'settlements'
 - repeal the Settled Land Act and replace it with a dual scheme of statutory holding trust and trust for sale mechanisms, or
 - replace both the Settled Land Act and the trust for sale provisions with a single statutory trust.
- 5.89 We asked consultees whether all 'settlements' as defined in the Settled Land Act should be held under a single statutory trust.⁷⁹ The response was positive and the fourth option was preferred in all submissions which addressed the issue.⁸⁰
- 5.90 The fourth option presents a simpler, more flexible approach. Both the Settled Land Act and the trust for sale provisions in the Property Law Act would be repealed. They would be replaced by statutory mechanisms to create a trust which encompasses both holding trusts and trusts for sale and covers all settlements.

PROSPECTIVE APPLICATION

- 5.91 Land Victoria supported the simplification of trusts of land, but says that 'consideration should be given to what will happen to those trusts already in existence, some of which are reflected in the Register'.⁸¹
- 5.92 State Trustees submitted that consideration should be given to a retrospective approach, providing trustees with the power to bring current settlements under the new legislation.
- 5.93 Our proposal anticipates prospective application and would apply to interests created after the commencement of the new Act. The trusts currently subsisting would not be affected. This is reflected in our recommendation. Any provision for bringing existing settlements under the new regime voluntarily would need to be considered in future discussions and consultations on the detailed characteristics and operation of the single statutory trust.

LAND TAX ACT 2005

- 5.94 In conjunction with his concerns regarding the abolition of legal life estates, Professor Glover submitted that the ‘abolition of successive interests in property, in this jurisdiction, is mismatched with the Land Tax regime applicable to land-holding trusts’.⁸² He expressed the view that a regime of land holding trusts may attract the general land tax surcharge on trusts.⁸³ Professor Glover submitted that this surcharge was designed to discourage the use of trusts for holding land.⁸⁴
- 5.95 We consider that the operation of section 46 of the Land Tax Act mitigates Professor Glover’s concerns. Where a trust is a fixed trust and beneficial interests are reported to the Commissioner of State Revenue, section 46B removes the trusts surcharge and calculates tax as if the beneficiary owned the land. The SRO has expressed the view that the new single statutory trust would most likely be regarded as a fixed trust for the purposes of the legislation. Such a trust would benefit from section 46B provided the trust and beneficial interests are reported and the beneficiary occupies the land as their principal place of residence.⁸⁵
- 5.96 The interplay between the proposed new single statutory trust and the applicable tax regime is an issue which will require detailed discussion in any future review of this area.

DETAILS OF A SINGLE STATUTORY TRUST SCHEME

- 5.97 In our Consultation Paper, we noted that further discussion and consultation will be needed on the specific content of a new single statutory trust regime. This requirement for further detailed review of has been supported by consultees.⁸⁶
- 5.98 We discussed different models of single statutory trusts in other jurisdictions. There are variations within the single statutory trust models adopted in these jurisdictions with respect to the powers given to trustees, the extent to which the powers can be augmented or restricted by the settlor, and the Act in which the trust provisions are located.⁸⁷
- 5.99 In Ireland the model is incorporated in property legislation. In England there is a stand-alone statute. A different approach has been taken in Queensland and Western Australia. In these jurisdictions the settled land legislation has been repealed and settled land has been incorporated into general trustee legislation. In Victoria, the statutory trust provisions could be incorporated into the Property Law Act or alternatively into the Trustee Act.
- 5.100 In the Western Australian model, contained in the *Trustees Act 1962*, the term ‘trust for sale’ and its distinction from a trust with a power to sell has been preserved to some extent.⁸⁸ The powers conferred by the Western Australian legislation only apply insofar as there is no contrary intention in the terms of the instrument creating the trust, and are subject to that instrument.⁸⁹
- 5.101 In their submission, State Trustees supported this approach and submitted that ‘legislation should also specify that some or all of a trustee’s statutory powers apply unless the instrument of trust expressly provides otherwise’.
- 5.102 The Law Institute of Victoria expressed a preference for the Western Australian model ‘as it preserves the term “trust for sale” and the powers conferred by the relevant Act only apply to the extent there is no contrary intention to the terms of the instrument creating the trust and are subject to that instrument’.⁹⁰
- 5.103 There is a range of different options and elements to be considered in the introduction of a single statutory trust scheme in Victoria. The details of a new statutory trust scheme require a further review of provisions in the Property Law Act, the Settled Land Act, the Trustee Act and the Administration and Probate Act.

- 74 State Trustees, Submission 16, 2.
- 75 Eggleston (1949), above n 11; Wallace (1984), above n 5, Chapter 4.
- 76 Queensland Law Reform Commission, *Report on the Law Relating to Trusts, Trustees, Settled Land and Charities* Report 8 (1971). See *Trusts Act 1973* (Qld) Part IV and *Trustees Act 1962* (WA) Part IV.
- 77 *Land and Conveyancing Law Reform Act 2009* (Ir) Part IV; *Trusts of Land and Appointment of Trustees Act 1996* (Eng).
- 78 Victorian Law Reform Commission (2010), above n 20, [4.17]–[4.36].
- 79 Ibid [4.49].
- 80 Associate Professor Maureen Tehan et al, Submission 9, 16; Mr Michael Macnamara Submission 2, 3; Law Institute of Victoria, Submission 13, 9; Land Victoria, Submission 18, 5.
- 81 Land Victoria, Submission 18, 5.
- 82 Professor John Glover, Submission 1, 2.
- 83 Professor John Glover, Submission 1, 2; *Land Tax Act 2005* (Vic) Schedule 1, Part 3.
- 84 Professor John Glover, Submission 1, 2.
- 85 *Land Tax Act 2005* (Vic) s 46A.
- 86 Mr Michael Macnamara, Submission 2, 2; State Trustees, Submission 16, 1; Law Institute of Victoria, Submission 13, 9; Associate Professor Maureen Tehan et al, Submission 9, 16.
- 87 See discussion at [4.37]–[4.46] of Victorian Law Reform Commission (2010), above n 20.
- 88 *Trustees Act 1962* (WA).
- 89 *Trustees Act 1962* (WA) s 5(2).
- 90 Law Institute of Victoria, Submission 13, 9.



MINORS' PROPERTY

- 5.104 A related issue which we considered in our Consultation Paper is the status of property held by minors. Currently, the Settled Land Act deems all land held by a minor to be a settlement.⁹¹ The statutory powers of dealing with minors' property are conferred on the trustees of the settlement.⁹² Although a minor is capable of holding a legal estate in land, the effect of the Settled Land Act is that the minor's estate is merely equitable, since the legal estate vests in the trustees.
- 5.105 We considered that if settlements in the sense of dispositions of successive interests in land are removed from the Settled Land Act, a scheme for minors' property would need to be provided. We asked consultees whether minors' property should be held under the single statutory trust, instead of under the Settled Land Act.
- 5.106 Where specifically addressed, the responses from consultees supported our proposal to include minors' property under the umbrella of the single statutory trust.⁹³

91 *Settled Land Act 1958* (Vic) s 8(1)(b).

92 *Settled Land Act 1958* (Vic) s 26.

93 Mr Michael Macnamara, Submission 2, 3; Law Institute of Victoria, Submission 13, 9; Associate Professor Maureen Tehan et al, Submission 9, 16.

RECOMMENDATIONS

36. All future settlements involving successive interests should be created under a single statutory scheme for a trust of land, replacing both the *Settled Land Act 1958* and the dispositions on trust for sale provisions in Part II Division 1 Subdivision 2 of the *Property Law Act 1958*.
37. All future dispositions of property to minors should be held under the single statutory scheme for a trust of land, instead of under the *Settled Land Act 1958*.