

Chapter 7

Repeal of Obsolete Provisions

CONTENTS

Rentcharges.....	106
Annuities.....	106
Submissions.....	106
Minors' contracts.....	107
History of section 28B.....	107
Current operation of section 28B.....	108
Why section 28B can be repealed.....	109
Represented persons with a mental illness.....	110
Conveyances by administrator.....	110
A patient who is a trustee of land.....	111
Other provisions that no longer serve a purpose.....	111

No. 6344.
PROPERTY LAW ACT 1958.

to consolidate the Law relating to Conveyancing
and the Law of Property.
[30th September, 1958.]

the Queen's Most Excellent Majesty
by consent of the Legislature
of Victoria in the
fifth year of the reign of Her Majesty

Repeal of Obsolete Provisions

RENTCHARGES

- 7.1 A rentcharge is 'a money charge on freehold property secured through a periodic rent issuing out of the property, which does not create the relationship of landlord and tenant'.¹
- 7.2 Sections 125–129 of the *Property Law Act 1958* (Property Law Act) deal with the creation of rentcharges. Land charged with payment of a rentcharge is 'settled land' and is subject to the *Settled Land Act 1958* (Settled Land Act).² Wallace argues that rentcharges are obsolete in Victoria and need not be retained, even as equitable interests.³
- 7.3 One possible contemporary use of a rentcharge is to overcome the common law rule in *Austerberry v Oldham Corporation*⁴ (the *Austerberry* rule) that the burden of a positive freehold covenant does not run at law.⁵ For example, a rentcharge may be imposed to require a purchaser of land to pay an annual sum for the maintenance of a facility. This use of rentcharges is further discussed below in the context of submissions received.
- 7.4 In our Consultation Paper we asked whether the creation of rentcharges over old system land should be abolished. We proposed that sections 125–129 be repealed with a savings provision for any existing rentcharges. These provisions would be replaced with a provision that the future creation of legal and equitable rentcharges is prohibited and any such agreement is enforceable only between the original parties as a contract debt.⁶
- 7.5 If rentcharges are abolished, section 70 of the Property Law Act would be redundant. The effect of section 70 is to reverse the common law rule that partial release of land from a rentcharge extinguishes the rentcharge entirely. Although Wallace suggested that the section should be repealed,⁷ we recommend that it be retained for the benefit of any subsisting rentcharges.⁸

ANNUITIES

- 7.6 An annuity is practically identical in effect to a rentcharge. It is defined as 'a sum of money payable periodically and charged on land by an instrument of charge'.⁹
- 7.7 The provisions in the Property Law Act expressly do not apply to annuities charged on land under the Transfer of Land Act.¹⁰ The Transfer of Land Act provides its own scheme for the enforcement of annuities.¹¹ The abolition of rentcharges would not affect the provisions for annuities registered in relation to land under the operation of the Transfer of Land Act.
- 7.8 Land charged with payment of an annuity as part of a family arrangement is settled land.¹² Since lawyers generally avoid settlements that attract the Settled Land Act, it is likely that non-commercial annuities charged on registered land are rare.
- 7.9 In our Consultation Paper we proposed that the abolition of the creation of rentcharges should expressly not affect the creation of annuities under the Transfer of Land Act and that the provisions for the benefit of existing rentcharges¹³ should be moved to the new schedules set out in Appendix B.

SUBMISSIONS

- 7.10 Our proposals received full support from submissions that addressed the issue.¹⁴ Associate Professor Tehan and colleagues submitted that the abolition of the creation of rentcharges on old system land should be considered in conjunction with the review of covenants, 'to ensure that no unintended consequences arise from the reform'.¹⁵

- 7.11 Although no ‘consequences’ were specified in the submission, we note the role of rentcharges in the law of freehold covenants discussed above. The use of rentcharges is more common in England, where developers used rentcharges to impose upon all future lot owners an enforceable obligation to make periodic contributions to the cost of maintaining the common property.¹⁶ In Victoria, an owner’s corporation can levy fees on lot owners under the *Owners Corporations Act 2006*.¹⁷ England lacked similar provision until 2004, when the *Commonhold and Leasehold Reform Act 2002* (UK) commenced.
- 7.12 The use of rentcharges is not common in Victoria and their abolition would not be a significant loss. There is little scope for their use to facilitate common property developments. Such developments require subdivision of land, and in most cases it is necessary to register land before it can be subdivided into separate lots for sale.¹⁸ Rentcharges cannot be created in respect of registered land.

RECOMMENDATIONS

53. Sections 125–129 should be repealed with a savings provision for any existing rentcharges. These provisions should be replaced with a provision that the future creation of legal and equitable rentcharges is prohibited and any such agreement is enforceable only between the original parties as a contract debt.
54. The savings provision, upon the repeal of sections 125–129, should expressly state that the creation of annuities under the *Transfer of Land Act 1958* is not affected.

MINORS’ CONTRACTS

- 7.13 Under section 28B, a contract between a specified lending society and a minor to repay money lent, and any instrument the minor executes by way of security for the repayment of the loan, is as valid and effectual as if the minor were of full age and capacity at the time.
- 7.14 Section 28B operates as an exception to section 49 of the *Supreme Court Act 1986* (Supreme Court Act), which provides that loan contracts entered into by minors are void.

HISTORY OF SECTION 28B

- 7.15 Section 28B was inserted into the Property Law Act in 1965. It replaced section 28A(2). Section 28A had been inserted into the Property Law Act four years earlier.¹⁹ The age of majority at that time was 21. Section 28A(1) enabled a minor between the ages of 18 and 21 to execute a mortgage by way of security for any moneys borrowed from ‘any bank or life assurance society’. Section 28A(2) made any such mortgage binding as if the minor were of full age and prevented the minor from avoiding any obligations or liabilities under it on the basis of his or her minority.
- 7.16 Section 28A(1) was repealed, and section 28A(2) was replaced with section 28B,²⁰ to remove doubts that had arisen concerning mortgages by minors to lending institutions.
- 7.17 Unlike the provision it replaced, section 28B specified that it was an exception to section 69 of the *Supreme Court Act 1958* (now section 49 of the Supreme Court Act). It also broadened and clarified the scope of the exception. Rather than applying to mortgages to secure a loan from ‘any bank or life assurance society’ section 28B applied to any contract at any time entered by a person under the age of 21 with a financial institution specified in section 28B(1)(a)–(e).

- 1 Land Law Working Party of the Faculty of Law, Queen’s University Belfast, *Survey of the Land Law of Northern Ireland* (1971) [60].
- 2 *Settled Land Act 1958* (Vic) s 8(1)(e).
- 3 Jude Wallace, *Review of the Victorian Property Law Act 1958* (1984) 37. The Irish Law Reform Commission has recently recommended that the future creation of rentcharges be abolished as they have become obsolete: Law Reform Commission [Ireland], *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* CP 34 (2004) [7.11–12]. Rentcharges have been abolished in Queensland: *Property Law Act 1974* (Qld) s 176 and most forms of rentcharge were abolished in Northern Ireland in 1997: *The Property (Northern Ireland) Order 1997* art 27.
- 4 *Austerberry v Oldham Corporation* (1885) 29 Ch D 750.
- 5 Adrian Bradbrook et al, *Australian Real Property Law* (Lawbook Co, 4th ed, 2007) 782.
- 6 See eg, *Land and Conveyancing Law Reform Act 2009* (Ir) ss 41–42.
- 7 Wallace (1984), above n 3, 135–136.
- 8 Queensland has retained the equivalent provision despite prohibiting the creation of rentcharges prospectively: *Property Law Act 1974* (Qld) s 177.
- 9 *Transfer of Land Act 1958* (Vic) s 4(1).
- 10 *Transfer of Land Act 1958* (Vic) s 125(6).
- 11 For most purposes, the Act treats annuities in a similar way to mortgages.
- 12 *Settled Land Act 1958* (Vic) s 8(1)(e).
- 13 *Property Law Act 1958* (Vic) ss 70, 77(1)(a), (b), 190(1), (2).
- 14 Mr Michael Macnamara, Submission 2, 3; Associate Professor Maureen Tehan et al, Submission 9, 16; Law Institute of Victoria Submission 13, 10.
- 15 Associate Professor Maureen Tehan et al, Submission 9, 16.
- 16 Law Commission [England and Wales], *Easements, Covenants and Profits a Prendre: A Consultation Paper* CP No 186 (2008) [7.50]–[7.52].
- 17 *Owners Corporations Act 2006* (Vic), Part III, Div 1.
- 18 *Sale of Land Act 1962* (Vic) s 9AA.
- 19 *Property Law (Loans to Minors) Act 1961* (Vic) s 2.
- 20 *Property Law (Loans to Minors) Act 1965* (Vic) s 2.

CURRENT OPERATION OF SECTION 28B

- 7.18 Paragraphs (b)–(e) of section 28B(1) were subsequently repealed by the *Age of Majority Act 1977*.²¹ Section 28B now applies only to a loan contract entered by a person under the age of 18 with a lending society specified in section 28B(1)(a).
- 7.19 Section 28B(1)(a) lists the following four lending societies:
- a building society registered under the *Building Societies Act 1986* (Building Societies Act)
 - an industrial and provident society registered under the *Industrial and Provident Societies Act 1958* (Industrial and Provident Societies Act)
 - a co-operative housing society registered under the *Co-operative Societies Act 1958* (Co-operative Societies Act)
 - a co-operative registered under the *Co-operatives Act 1996* (Co-operatives Act).
- 7.20 We noted in the consultation paper that the Building Societies Act and the Industrial and Provident Societies Act have been repealed. It follows that the references in section 28B(1)(a) to lending societies registered under those Acts²² are obsolete and should be repealed.
- 7.21 Section 28B(1)(a)(iii) refers to a housing society registered under the Co-operative Societies Act. Following changes to the regulation of credit providers, only nine co-operative housing societies still operate in Victoria. None have any members and all are in liquidation.²³ Consequently, this provision no longer serves a purpose and should also be repealed.
- 7.22 This leaves the reference in section 28B(1)(a)(ii) to a co-operative registered under the Co-operatives Act as the only provision which applies to an existing lending society. Even so, we consider that the reference is redundant.
- 7.23 When it was inserted into the Property Law Act in 1965, section 28B(1)(a)(ii) referred to a society registered under the *Co-operation Act 1958*. This Act already prevented a member who was a minor from avoiding liabilities. Section 30(4) of that Act provided that:
- A member of a society shall not at any time be entitled on any ground relating to his infancy or former infancy to avoid any of his obligations or liabilities as a member or under any deed mortgage bill lien charge or other contract instrument or document or otherwise.*
- 7.24 This provision was broader than section 28B(1)(a)(ii), which is directed only to contracts for loans. The Co-operatives Act contains a similarly broad provision.
- 7.25 Section 69(1) of the Co-operatives Act prevents a member of a co-operative who is a minor from avoiding 'any obligation or liability under any contract, deed or other document entered into as a member on any ground relating to minority.' An identical provision appears in the co-operatives legislation of all other jurisdictions²⁴ and in the proposed co-operatives national law.²⁵

WHY SECTION 28B CAN BE REPEALED

- 7.26 Inserting a list under section 28B(1) of the financial institutions with which a minor could enter valid and binding loans for money clarified the scope of the exception to the rule under the Supreme Court Act that loan contracts with minors are void. Now that it applies only to co-operatives, which are regulated under an Act that already prevents minors from avoiding their obligations and liabilities under contracts, section 28B serves little purpose.
- 7.27 Another reason why section 28B has diminished in significance is that lowering the age of majority from 21 to 18 reduced the need for a provision that enables young adults who were likely to be working or starting families to enter into mortgages and similar contracts.
- 7.28 It may be that the only benefit of retaining section 28B would be to clarify that section 49 of the Supreme Court Act does not apply to loans to a minor by a co-operative registered under the Co-operatives Act. However, even in the absence of section 28B, a co-operative would still be able to exercise a power to sell if a minor defaults on a registered mortgage.
- 7.29 The law when section 28B was inserted into the Property Law Act was that a mortgagee's interest could be defeated on the grounds that the mortgage instrument was void. If a mortgage contract entered by a minor was void, the lender was unable to exercise a power to sell if the minor defaulted. Since the decision of the Supreme Court in *Horvath v CBA*²⁶ a mortgage registered by a co-operative is indefeasible, even if the covenant to repay is void. A co-operative would not need to rely on section 28B to ensure that it has the ability to recover money loaned on a registered mortgage to a minor.
- 7.30 If the mortgage with the minor is not registered, a co-operative's interest in the property would more likely be defeated by operation of section 49 of the Supreme Court Act. In this case, the exclusion specified in section 28B is more significant.
- 7.31 We raised in the Consultation Paper the overlap between section 28B(1)(a) and other legislation. We received two responses. One favoured dealing with the issue of minors' contracts only in the legislation regulating the financial institutions.²⁷ The other supported uniform provisions or, alternatively, cross referring notes in each Act.²⁸
- 7.32 As we have since found out that the only overlap in practice is with the Co-operatives Act, we see no need for section 28B to be retained. To remove any doubt that section 69(1) of the Co-operatives Act operates notwithstanding section 49 of the Supreme Court Act, a note to this effect should be inserted into the Co-operatives Act (or the proposed nationally consistent legislation).

RECOMMENDATION

55. Section 28B, concerning the validity of contracts with minors, should be repealed. To ensure that a loan contract entered into by a minor member of a co-operative with the co-operative is valid, the *Co-operatives Act 1996* should be amended to provide that section 69(1) of that Act applies notwithstanding anything to the contrary in section 49 of the *Supreme Court Act 1986* or in any rule of common law or equity. If proposed nationally consistent co-operatives legislation is introduced in Victoria, the equivalent provision should carry a similar notation.

- 21 Schedule 2.
- 22 The references are at s 28B(1)(a)(i) and (iv) and s 28B(1)(aa).
- 23 Information provided by the Department of Treasury and Finance, July 2010.
- 24 *Co-operatives Act 1997* (Qld) s 63; *Co-operatives Act 1992* (NSW) s 65; *Co-operatives Act 2002* (ACT) s 64; *Co-operatives Act 1999* (Tas) s 62; *Co-operatives Act 1997* (NT) s 64; *Co-operatives Act 1997* (SA) s 64; *Co-operatives Act 2009* (WA) s 60.
- 25 Proposed *Co-operatives National Law Bill* cl 2506. See www.fairtrading.nsw.gov.au. The proposed Co-operatives National Law will replace the co-operatives legislation of each State and Territory with a single national law. It is planned that New South Wales will enact the national law in 2010. Other States and Territories will then have 12 months to apply the national law or enact consistent legislation.
- 26 [1998] VSCA 51.
- 27 Mr Michael Macnamara, Submission 2, 4.
- 28 Law Institute of Victoria, Submission 13, 11.

REPRESENTED PERSONS WITH A MENTAL ILLNESS

CONVEYANCES BY ADMINISTRATOR

- 7.33 Section 30(1) provides for an administrator appointed under the *Guardianship and Administration Act 1986* (Guardianship and Administration Act) to convey or create a legal estate on behalf of and in the name of a patient within the meaning of the *Mental Health Act 1986* (Mental Health Act) under an order of the court or any statutory power.
- 7.34 The section originally provided for conveyances on behalf of a 'lunatic' by 'his committee'. It did not define 'lunatic'. At that time, the Supreme Court had equitable jurisdiction to appoint guardians and committees for people who were incapable of managing their own affairs, including 'lunatics'. In addition, under the *Public Trustee Act 1958*, as amended by the *Mental Health Act 1959*, the Court could appoint the Public Trustee or any other person whom it thought fit to be the committee of a 'lunatic so found'. A 'lunatic so found' was a person whom the Court had determined was 'mentally ill or intellectually defective and incapable of managing his affairs'.²⁹ Before section 30(1) was passed, land was conveyed in the committee's name.³⁰
- 7.35 The Supreme Court no longer has either equitable or statutory jurisdiction to appoint a committee for a person with a mental illness. Section 16 of the *Supreme Court Act 1958*, on which the Court's equitable jurisdiction was based, was repealed by section 96 of the *Constitution Act 1975*. The *Public Trustee Act 1958* has long since been repealed and jurisdiction to appoint an administrator of a person who is incapable of managing his or her affairs because of mental illness rests with VCAT under the Guardianship and Administration Act. Orders concerning the property of a person whose estate is managed by an administrator appointed under that Act are made by VCAT and not by a Court.
- 7.36 The statutory powers of administrators to deal with property on behalf of a represented person are set out in Part 5 of the Guardianship and Administration Act. They include many of the powers that the Public Trustee once exercised. As section 30(1) does not apply to any person who is not both a patient within the meaning of the Mental Health Act and a person whose estate is managed by an administrator appointed under the Guardianship and Administration Act, it merely echoes the powers and responsibilities that are directly conferred on administrators by Part 5 of that Act.
- 7.37 We suggested in the Consultation Paper that section 30(1) may be redundant and asked whether it should be repealed. All submissions in response agreed that it should be repealed.³¹

A PATIENT WHO IS A TRUSTEE OF LAND

- 7.38 Section 30(2) applies to a patient within the meaning of the Mental Health Act for whom a guardian has been appointed under the Guardianship and Administration Act. It provides that a patient in this situation who is a trustee of land held on trust for sale must be replaced by another trustee or otherwise discharged from the trust. It appears to be a purely mechanical provision to enable the exercise of powers by trustees for sale. It is consistent with the general rule of law that all trustees must concur in the conveyance of a legal estate.
- 7.39 Section 48 of the *Trustee Act 1958* (Trustee Act) allows the court to appoint a new trustee to replace a trustee who is a patient within the meaning of the Mental Health Act (whether or not a guardian has been appointed). The review of the dual trust system that we recommend in Chapter 5 should consider the operation of section 30(2) of the Property Law Act as it interacts with section 48 of the Trustee Act.

RECOMMENDATIONS

56. Section 30(1), concerning conveyances by an administrator on behalf of a patient within the meaning of the *Mental Health Act 1986*, should be repealed.
57. Section 30(2), concerning land held on trust for sale that is vested in a patient within the meaning of the *Mental Health Act 1986*, should be reviewed in the context of the proposed replacement of the dual trust scheme. (See recommendations 36 and 37.)

OTHER PROVISIONS THAT NO LONGER SERVE A PURPOSE

- 7.40 We have identified a number of other provisions that no longer serve a purpose. Some are obsolete because they refer to legislation that has been repealed or practices that are no longer followed. Others are redundant because their function is now performed by newer legislation. We have listed all of these provisions in Appendix C and recommend that they be repealed.

RECOMMENDATION

58. The provisions that are listed at Appendix C, and which are not elsewhere recommended for repeal, are obsolete and should be repealed.

- 29 *Public Trustee Act 1958* (Vic) (repealed) s 34(2).
- 30 Wallace (1984), above n 3, 260 citing *Re Tugwell* (1884) 27 Ch d 309, 312.
- 31 Mr Michael Macnamara, Submission 2, 4; Associate Professor Maureen Tehan et al, Submission 9, 17; Law Institute of Victoria, Submission 13, 11; State Trustees, Submission 16, 2.

