



# Property Law Act 1974

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## Queensland

# Property Law Act 1974

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# Property Law Act 1974

**An Act to consolidate, amend, and reform the law relating to conveyancing, property, and contract, to terminate the application of certain statutes, to facilitate the resolution of financial matters at the end of a de facto relationship, and for other purposes**

## Part 1 Preliminary

### 1 Short title

This Act may be cited as the *Property Law Act 1974*.

### 2 Act binds Crown

This Act, except where otherwise provided, binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

### 3 Dictionary

The dictionary in schedule 6 defines particular words used in this Act.

### 4 Act not to be taken to confer right to register restrictive covenant

Nothing in this Act shall be construed as conferring on any person a right, in respect of registered land, to registration of a restrictive covenant.

## **5 Application of Act**

- (1) This Act shall—
- (a) apply to unregistered land; and
  - (b) apply to land under the provisions of the *Land Title Act 1994*, including any lease of such land, but subject to that Act; and
  - (c) apply to estates, interests, and any other rights in or in respect of land, granted, created or taking effect under any Act or any repealed Act provisions of which continue to apply with respect to this Act, but subject to the provisions of such Act; and
  - (d) without limiting the generality of paragraph (c)—
    - (i) subject to the provisions of the Coal Mining Act, apply to land under that Act; or
    - (ii) subject to the provisions of the Land Act, apply to land under that Act; or
    - (iii) subject to the provisions of the Mineral Resources Act, apply to leases, and any other rights in or in respect of land, granted, created or taking effect under that Act.
- (2) Where, by this Act, including this section, a provision is expressed to apply to land or interests in land under the provisions of a particular Act, such expression shall not be construed to mean that the provision—
- (a) applies exclusively to such land; or
  - (b) does not apply to property other than land.

## **6 Savings in regard to ss 10–12 and 59**

Nothing in section 10 to 12 or 59—

- (a) invalidates any disposition by will; or
- (b) affects any interest validly created before the commencement of this Act; or

- 
- (c) affects the right to acquire an interest in land because of taking possession; or
  - (d) affects the law relating to part performance; or
  - (e) affects a sale by the court.

## **Part 2                      General rules affecting    property**

### **7                      Effect of repeal of Statute of Uses**

- (1) Interest in land which under the Statute of Uses could before the commencement of this Act have been created as legal interests shall after the commencement of this Act be capable of being created as equitable interests.
- (2) Despite subsection (1), an equitable interest in land shall, after the commencement of this Act, only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement.
- (3) In a voluntary conveyance executed after the commencement of this Act a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee.

### **8                      Lands lie in grant only**

- (1) All lands and all interests in land shall lie in grant and shall be incapable of being conveyed by livery or livery and seisin, or by feoffment, or by bargain and sale, or by lease and release, and a conveyance of an interest in land may operate to pass the possession or right to possession of land, without actual entry, but subject to all prior rights to the land.
- (2) The use of the word 'grant' is not necessary to convey land or to create an interest in the land.

## **9 Reservation of easements etc. in conveyances of land**

- (1) In a conveyance of land a reservation of any easement, right, liberty, or privilege not exceeding in duration the estate conveyed in the land, shall operate without any execution of the conveyance by the grantee of the land out of which the reservation is made, or any regrant by the grantee, so as to create the easement, right, liberty or privilege, and so as to vest the same in possession in the person (whether or not the person be the grantor) for whose benefit the reservation was made.
- (2) This section applies only to reservations made after the commencement of this Act.

## **10 Assurances of land to be in writing**

- (1) No assurance of land shall be valid to pass an interest at law unless made by deed or in writing signed by the person making such assurance.
- (2) This section does not apply to—
  - (a) a disclaimer made under any law relating to bankruptcy in force before or after the commencement of this Act, or not required to be evidenced in writing; or
  - (b) a surrender by operation of law, including a surrender which may, by law, be effective without writing; or
  - (c) a lease or tenancy or other assurance not required by law to be made in writing; or
  - (d) a vesting order; or
  - (e) an assurance taking effect under any Act or Commonwealth Act.

## **11 Instruments required to be in writing**

- (1) Subject to this Act with respect to the creation of interests in land by parol—

- (a) no interest in land can be created or disposed of except by writing signed by the person creating or conveying the same, or by the person's agent lawfully authorised in writing, or by will, or by operation of law; and
  - (b) a declaration of trust respecting any land must be manifested and proved by some writing signed by some person who is able to declare such trust or by the person's will; and
  - (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be manifested and proved by some writing signed by the person disposing of the same, or by the person's agent lawfully authorised in writing, or by will.
- (2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

## **12 Creation of interests in land by parol**

- (1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by the person's agent lawfully authorised in writing, shall have, despite any consideration having been given for the same, the force and effect of interests at will only.
- (2) Nothing in this Act shall affect the creation by parol of a lease taking effect in possession for a term not exceeding 3 years, with or without a right for the lessee to extend the term for any period which with the term would not exceed 3 years.

## **13 Persons taking who are not parties**

- (1) In respect of an assurance or other instrument executed after the commencement of this Act, a person may take—
  - (a) an immediate or other interest in land; or
  - (b) the benefit of any condition, right of entry, covenant or agreement over or respecting land;

even though the person may not have executed the assurance or other instrument, or may not be named as a party to the assurance or other instrument, or may not have been identified or in existence at the date of execution of the assurance or other instrument.

- (2) Such person may sue, and shall be entitled to all rights and remedies in respect of the assurance or other instrument, as if the person had been named as a party to and had executed the assurance or other instrument.

## **14 Conveyances by a person to the person etc.**

- (1) In conveyances and leases made after 28 December 1867, personal property, including chattels real, may be conveyed or leased by a person to the person jointly with another person by the like means by which it might be conveyed or leased by the person to another person.
- (2) In conveyances or leases made after the commencement of this Act freehold land, or a thing in action, may be conveyed or leased by a person to the person jointly with another person, by the like means by which it might be conveyed or leased by the person to another person, and may, in like manner, be conveyed or leased by a husband to his wife, and by a wife to her husband, alone or jointly with another person.
- (3) After the commencement of this Act a person may convey or lease land to or vest land in the person but may not convey to or vest in the person an estate in fee simple absolute in such land.
- (4) Two or more persons (whether or not being trustees or personal representatives) may convey or lease, and shall be deemed always to have been capable of conveying or leasing, any property vested in them to any 1 or more of themselves in like manner as they could have conveyed or leased such property to a third party.
- (4A) However, if the persons in whose favour the conveyance or lease is made are, because of any fiduciary relationship or otherwise, precluded from validly carrying out the

transaction, the conveyance or lease shall be liable to be set aside.

(5) In subsection (4)—

*or more of themselves* includes all the persons by whom the conveyance or lease is or has been made.

## **15 Rights of husband and wife**

A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of the Act, be treated as 2 persons.

## **15A Rights of aliens**

- (1) An alien may take, give, buy or sell property as if the alien were an Australian citizen.
- (2) The application of succession laws to a person is not different merely because the person is an alien.
- (3) This section does not entitle an alien to any right as an Australian citizen other than a right given by this section.
- (4) In this section—

*property* means any interest in real, personal, movable or immovable property.

## **16 Presumption that parties are of full age**

The persons expressed to be parties to any conveyance shall, until the contrary is proved, be presumed at the date of such conveyance to be of full age or of such other lesser age as to have capacity to give effect to the conveyance.

## **17 Merger**

An estate does not merge by operation of law only if the beneficial interest in the estate would not be merged or extinguished in equity.

## **18 Restrictions on operation of conditions of forfeiture**

- (1) Where there is a person entitled to income (including an annuity or other periodical income) or any other property, subject to a condition of forfeiture on alienation, whether voluntary or involuntary, and whether with or without words of futurity, then—
  - (a) unless the instrument containing the condition expressly provides to the contrary, no alienation, whether by way of charge or otherwise, of the income or other property, made or occurring before the person becomes entitled to receive payment of the income, or to call for a conveyance or delivery of the other property, shall operate to create forfeiture under the condition unless the alienation is in operation at the time the person becomes so entitled; and
  - (b) despite any stipulation to the contrary in the instrument containing the condition no voluntary alienation made by the person, with the sanction of the court, shall operate to create forfeiture under the condition.
- (2) This section applies where the condition of forfeiture is contained in an instrument executed, made, or coming into operation before or after the commencement of this Act, but only in cases where such person becomes entitled to receive payment of the income, or to call for an assurance or delivery of the other property, or where the alienation with the sanction of the court is made, after such commencement.



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## Part 3 Freehold estates

### 19 Freehold estates capable of creation

After the commencement of this Act the following estates of freehold shall be capable of being created and, subject to this Act, of subsisting in land—

- (a) estate in fee simple;
- (b) estate for life or lives.

### 20 Incidents of tenure on grant in fee simple

- (1) All tenures created by the Crown upon any grant of an estate in fee simple made after the commencement of this Act shall be taken to be in free and common socage without any incident of tenure for the benefit of the Crown.
- (2) Where any quit rent issues to the Crown out of any land, or the residue of any quit rent issues to the Crown out of any land in respect of which quit rent has been apportioned or redeemed, such land or residue is released from quit rent.
- (3) In respect of property of any person dying intestate on or after 16 April 1968—
  - (a) escheat is abolished; and
  - (b) all such property, whether real or personal, shall, subject to this section, be distributed in the manner and to the person or persons provided by the *Succession Act 1981*, but subject to the provisions (including part 4) of that Act.
- (4) Subject to any other Act, property of any corporation dissolved after the commencement of this Act shall not escheat, but the Crown shall be entitled to and take as *bona vacantia* all such property, whether real or personal, as would apart from this Act be liable to escheat or pass to the Crown as *bona vacantia*.

- (5) Despite this section, where the Crown, or it is made to appear to the Minister that the Crown, has a right to any property, by escheat or devolution or as *bona vacantia*, on the death intestate of any person, whether the death occurred before or after the passing of this Act, the Minister, upon application being made for the waiver of that right, may by gazette notice waive such right on such terms (if any), whether for the payment of money or otherwise, in favour of any 1 or more of the following persons, whether belonging to the same or to different classes—
- (a) any dependants, whether kindred or not, of the intestate;
  - (b) any other persons for whom the intestate might reasonably have been expected to make provision;
  - (c) any persons to whom the State would, if the State's title had been duly proved by inquisition, have the power to grant such property;
  - (d) any other persons having in the opinion of the Minister a just claim to the grant of the property;
  - (e) the trustees of any person as mentioned in paragraphs (a) to (d);
- as to the Minister seems reasonable.
- (6) Upon a waiver made under subsection (5), the right of the State so waived, subject to subsection (10), shall vest in the person or persons in favour of whom the waiver is made.
- (7) For the purpose of giving effect to any waiver under subsection (5) the Minister, by gazette notice or a further gazette notice, may do all or any of the following things—
- (a) appoint such person as the Minister considers suitable to be administrator of the property of the person who has died intestate (*the deceased*);
  - (b) appoint a person to execute any conveyance or transfer or other document for the purpose of conveying or transferring under the terms of the waiver to the person or persons in whose favour the waiver is made the right of the State so waived;

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- (c) give directions that the Minister considers necessary or desirable to give effect to the waiver (including the terms of the waiver) and the directions are to be given effect.
- (8) The person appointed under subsection (7)(a) to be administrator may apply to the Supreme Court for a grant of letters of administration of the property of the deceased and such letters of administration may be granted accordingly.
- (8A) For the purposes of the grant of the letters of administration and the administration under the grant, the property in respect of which the right of the State has been waived shall be deemed to form part of the estate of the deceased to be administered under the terms of the waiver for the benefit of the person or persons in favour of whom the waiver is made.
- (9) A waiver under subsection (5) shall have the effect of a grant of the land or other property of whatever kind the subject of the waiver or any part of the waiver, and in the case of land in fee simple or for any less estate, to the administrator appointed under this section or to any person or persons in favour of whom the waiver is made.
- (10) This section shall be subject to schedule 1 and all proceedings by way of writ of inquisition or otherwise may be had under that schedule.
- (11) Despite this section and that because of the death intestate of any person the State has a right to any property of that person by escheat or devolution or as *bona vacantia* the public trustee shall have and shall be deemed always to have had the same power—
- (a) to obtain from the court or otherwise under the *Public Curator Act 1915* or the *Public Trustee Act 1978* authority to administer the estate of such person; and
- (b) to deal in due course of administration with the estate of such person;
- as the public trustee has in a case where the State has no such right.
- (12) In this section—

*intestate* has the meaning given by the *Succession Act 1981*, section 5.

## **21 Alienation in fee simple**

Land held of the Crown in fee simple may be assured in fee simple without licence and without fine and the person taking under the assurance shall hold the land of the Crown in the same manner as the land was held before the assurance took effect.

## **22 Abolition of estates tail**

- (1) In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been enacted, would have created an estate tail (legal or equitable) in any land in favour of any person shall be deemed to create an estate in fee simple (legal or equitable as the case may be) in that land in favour of that person to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail and to the exclusion of all estates or interests in reversion on any such estate tail.
- (2) Where at or after the commencement of this Act any person is entitled, or would, but for subsection (1), be entitled, to an estate tail (legal or equitable) and whether in possession, reversion, or remainder, in any land, that person, subject to subsection (2A), shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in that land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of the estate tail and to the exclusion of all estates or interests in reversion on the estate tail.
- (2A) Where any such person is an infant and such land for any estate or interest would pass to any other person in the event of the death of the infant before attaining full age and without issue, then in such case, the infant shall be deemed to take an estate in fee simple with an executory limitation over of such

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estate or interest on the happening of such event in favour of such other person.

(3) In this section—

*estate tail* includes that estate in fee into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred, also an estate in fee voidable or determinable by the entry of the issue in tail, but does not include the estate of a tenant in tail after possibility of issue extinct.

(4) The registrar is authorised, on a request in the approved form, to make the recordings in the register necessary to give effect to this section.

## **23 Abolition of quasi-entails**

In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not been passed, would have created in favour of any person a quasi-entail (legal or equitable) in respect of any estate for life or lives of another or others shall be deemed to create in favour of that person an estate (legal or equitable as the case may be) for the life or lives of that other.

## **24 Liability of life tenant for voluntary waste**

- (1) A tenant for life or lives shall not commit voluntary waste.
- (2) Nothing in subsection (1) applies to any estate or tenancy without impeachment of waste, or affects any licence or other right to commit waste.
- (3) A tenant who infringes subsection (1) is liable in damages to the tenant's person in remainder or reversioner, but this section imposes no criminal liability.

## **25 Equitable waste**

An estate for life without impeachment of waste shall not confer, or be deemed to have conferred, upon the tenant for

life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate.

## **26 Recovery of property on determination of a life or lives**

- (1) Every person having any estate or interest in any property determinable upon a life or lives who, after the determination of such life or lives without the express consent of the person next immediately entitled upon or after such determination, holds over or continues in possession of such property estate or interest, or of the rents, profits or income of the property, shall be liable in damages or to an account for such rents and profits, or both, to the person entitled to such property, estate, interest, rents, profits or income after the determination of such life or lives.
- (2) Where a reversion, remainder, or other estate or interest in any property is expectant upon the determination of a life or lives, the reversioner, person in remainder, or other person entitled to such reversion, remainder, or estate or interest may in any proceeding claiming relief on the basis that such life or lives has or have determined, adduce evidence of belief that such life or lives has or have been determined and of the grounds of such belief, and the court may in its discretion order that, unless the person or persons on whose life or lives such reversion, remainder, or other estate or interest is expectant is or are produced in court or is or are otherwise shown to be living, such person or persons shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.
- (3) If in such proceedings a person in respect of whom it is material that the person be shown to be living or not is shown to have remained beyond Australia, or otherwise absented himself or herself from the place in which if in Australia the person might be expected to be found, for the space of 7 years or upwards, such person, if not proved to be living, shall for the purposes of such proceedings be accounted as dead, and relief may be given accordingly.

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- (4) If in any such proceedings judgment has been given against the plaintiff, and afterwards such plaintiff brings subsequent proceedings upon the basis that such life has determined, the court may make an order staying such proceedings permanently or until further order or for such time as may be thought fit.
  - (5) If in consequence of the judgment given in any such proceedings, any person having any estate or interest in any property determinable on such life or lives has been evicted from or deprived of any property or any estate or interest in the property, and afterwards it appears that such person or persons on whose life or lives such estate or interest depends is or are living or was or were living at the time of such eviction or deprivation, the court may give such relief as is appropriate in the circumstances.

## **27 Penalty for holding over by life tenant**

Where any tenant for life or lives or person who is in or comes into possession of any land by, from or under or by collusion with such tenant, wilfully holds over any land after—

- (a) termination of the tenancy; and
- (b) after demand has been made and notice in writing given for the delivery of possession of the land by the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;

then, the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of the land, be liable to the person kept out of possession at the rate of double the yearly value of the land so detained for as long as the land shall have been so detained, to be recovered by action in a court of competent jurisdiction.

## **28 Abolition of the rule in Shelley's Case**

Where by any instrument coming into operation after the commencement of this Act an interest in any property is

expressed to be given to the heir or heirs or issue or any particular heir or any class of the heirs or issue of any person in words which, but for this section would, under the rule of law known as the rule in Shelley's Case, and independently of section 22, have operated to give to that person an interest in fee simple or an entailed interest, such words shall operate as words of purchase and not of limitation, and shall be construed and have effect accordingly.

## **29 Words of limitation**

- (1) A disposition of freehold land to any person without words of limitation, or any equivalent expression, shall pass to the donee the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.
- (2) A disposition of freehold land to a corporation sole by the donor's corporate designation without the word 'successors' shall pass to the corporation the whole interest which the donor had power to dispose of in such land, unless a contrary intention appears in the disposition.
- (3) This section applies to dispositions effected after the commencement of this Act.

# **Part 4 Future interests**

## **30 Creation of future interests in land**

- (1) A future interest in land validly created after the commencement of this Act shall take effect as an equitable and not a legal interest.
- (2) An interest in remainder created after the commencement of this Act must not be registered in the freehold land register.
- (2A) Subsection (2) has effect despite anything in the *Land Title Act 1994*.
- (3) This section shall not apply to any future interest—



- 
- (a) created before the commencement of this Act whether that interest arose or arises before or after the commencement of this Act; or
  - (b) created or arising because of section 22.
- (4) In this section—
- future interest* means—
- (a) a legal contingent remainder; or
  - (b) a legal executory interest.

### **31 Power to dispose of all rights and interests in land**

- (1) All rights and interests in land may be disposed of including—
  - (a) a contingent, executory or future interest in any land or a possibility coupled with an interest in any land, whether or not the object of the gift or limitation of such interest or possibility be ascertained; and
  - (b) a right of entry, into or upon land whether immediate or future, and whether vested or contingent.
- (2) All rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may, after the commencement of this Act, be made exercisable by any person and the persons deriving title under that person, but, in regard to an estate in fee simple (not being a rent charge held for a legal estate) only within the period authorised by the rule relating to perpetuities.

### **32 Restriction on executory limitations**

- (1) Where there is a person entitled to—
  - (a) land, or an equitable interest in land, for an estate in fee simple or for any less estate or interest; or
  - (b) any other property, or an interest in any other property;

with an executory limitation over on default or failure of all or any of the person's issue, whether within or at any specified period of time or not, that executory limitation shall be or become void and incapable of taking effect if, and as soon as, there is living any issue who has attained full age and capacity of the class on default or failure of which the limitation over was to take effect.

- (2) This section applies where the executory limitation is contained in an instrument coming into operation after the commencement of this Act.

## **Part 5**                      **Concurrent interest—co-ownership**

### **Division 1**                **General rules**

#### **33**      **Forms of co-ownership**

- (1) Any property and any interest, whether legal or equitable, in any property may be held by 2 or more persons—
- (a) as joint tenants; or
  - (b) as tenants in common.
- (2) Any 2 or more persons acquiring land after the commencement of this Act in circumstances in which, but for the passing of this Act, they would have acquired the land as coparceners shall acquire such land as tenants in common and not as coparceners.

#### **34**      **Power for corporations to hold property as joint tenants**

- (1) A body corporate shall be capable of acquiring and holding any property in joint tenancy in the same manner as if it were an individual, and where a body corporate and an individual or 2 or more bodies corporate become entitled to any property under circumstances or because of any instrument which

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would, if the body corporate had been an individual, have created a joint tenancy they shall be entitled to the property as joint tenants.

- (1A) However, the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.
- (2) Where a body corporate is a joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.
- (3) This section shall apply in all cases of the acquisition or holding of property after the commencement of this Act.

### **35 Construction of dispositions of property to 2 or more persons together**

- (1) A disposition of the beneficial interest in any property, whether with or without the legal interest, to or for 2 or more persons together beneficially shall be construed as made to or for them as tenants in common, and not as joint tenants.
- (2) This section does not apply—
  - (a) to persons who by the terms or by the tenor of the disposition are executors, administrators, trustees, or mortgagees, nor in any case where the disposition provides that persons are to take as joint tenants or tenants by entirety; and
  - (b) to a disposition for partnership purposes in favour of persons carrying on business in partnership.
- (3) Subject to the provisions of the *Partnership Act 1891*, a disposition for partnership purposes of an interest in any property in favour of persons carrying on business in partnership shall, unless a contrary intention appears, be construed as—
  - (a) a disposition (if any) of the legal interest to those persons as joint tenants; and

- (b) a disposition (if any) of the beneficial interest to those persons as tenants in common.
- (4) This section applies to any disposition made after the commencement of this Act.
- (5) In this section—  
*disposition* includes a disposition which is wholly or partly oral.

### **36 Tenants in common of equitable estate acquiring the legal estate**

Where 2 or more persons entitled beneficially as tenants in common to an equitable estate in any property are or become entitled in their own right, whether as joint tenants or tenants in common, to the legal estate in such property equal to and coextensive with such equitable estate both the legal and equitable estates shall be held by them as tenants in common unless such persons otherwise agree.

## **Division 2 Statutory trusts, sale and division**

### **37 Definitions for div 2**

In this division—

*co-owner* has a corresponding meaning and includes an encumbrancee of the interest of a joint tenant or tenant in common.

*co-ownership* means ownership whether at law or in equity in possession by 2 or more persons as joint tenants or as tenants in common.

### **37A Property held on *statutory trust for sale***

Property held upon the *statutory trust for sale* shall be held upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs and expenses, and of

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the net income until sale after payment of costs, expenses, and outgoings, and in the case of land of rates, taxes, costs of insurance, repairs properly payable out of income, and other outgoings upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners.

### **37B Property held on *statutory trust for partition***

Property held upon the *statutory trust for partition* shall be held upon trust—

- (a) with the consent of the encumbrancee of the entirety (if any) to partition the property and to provide (by way of mortgage or otherwise) for the payment of any equality money; and
- (b) upon such partition being made to give effect to the partition by assuring the property so partitioned in severalty (subject or not to any mortgage created for raising equality money) to the persons entitled under the partition;

but a purchaser shall not be concerned to see or inquire whether any such consent has been given.

### **38 Statutory trusts for sale or partition of property held in co-ownership**

- (1) Where any property (other than chattels personal) is held in co-ownership the court may, on the application of any 1 or more of the co-owners, and despite any other Act, appoint trustees of the property and vest the same in such trustees, subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.
- (2) Where the entirety of the property is vested in trustees or personal representatives, those trustees or personal representatives shall, unless the court otherwise determines, be appointed trustees on either of such statutory trusts, but

subject, in the case of personal representatives, to, their rights and powers for the purposes of administration.

- (3) Where the entirety of the property is vested at law in co-owners the court may appoint a trustee corporation either alone or with 1 or 2 individuals (whether or not being co-owners), or 2 or more individuals, not exceeding 4 (whether or not including 1 or more of the co-owners), to be trustees of the property on either of such statutory trusts.
- (3A) On such appointment under subsection (3), the property shall, subject to the *Trusts Act 1973*, section 90, vest in the trustees.
- (4) If, on an application for the appointment of trustees on the statutory trust for sale, any of the co-owners satisfies the court that partition of the property would be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the court may, with the consent of the encumbrancee of the entirety (if any), appoint trustees of the property on the statutory trust for partition, or as to part of the property on the statutory trust for sale, and as to part on the statutory trust for partition, but a purchaser shall not be concerned to see or inquire whether any such consent has been given.
- (5) When such trustees for partition have prepared a scheme of partition they shall serve notice in writing of the scheme on all the co-owners of full age, and any of such co-owners dissatisfied with the scheme may, within 1 month after service upon the co-owner of such notice, apply to the court for a variation of the same.
- (5AA) If any of the co-owners is a person for whom an administrator has been appointed under the *Guardianship and Administration Act 2000* for the property, the notice must be served on the administrator.
- (5A) If any of the co-owners is an incapacitated person within the meaning of the *Public Trustee Act 1978*, the notice must be served on the person charged by law with the management and care of the incapacitated person's property, or if there is no person charged, on the public trustee.

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- (5B) Where any of the co-owners is a person not of full age or a person who cannot be found or ascertained, or as to whom it is uncertain whether the person is living or dead, the trustees may act on behalf of the person, and retain land or other property to represent the person's share.
- (6) In relation to the sale or partition of property held in co-ownership, the court may alter such statutory trusts, and the trusts so altered shall be deemed to be the statutory trust in relation to that property.
- (6A) Without limiting the power of the court so to alter the statutory trusts, the court shall, unless for good reason the court otherwise directs, so alter the statutory trusts as to provide in the case of the statutory trust for partition that—
- (a) any encumbrance which, prior to the appointment of the trustees, affected any undivided share shall continue to extend and apply to any such share; and
  - (b) any mortgage created for raising equality money shall rank in priority after any such encumbrance.
- (7) Where property becomes subject to such statutory trust for sale—
- (a) in the case of joint tenancy—a sale under the trust shall not of itself effect a severance of that tenancy; and
  - (b) in any case—land shall be deemed to be converted upon the appointment of trustees for sale unless the court otherwise directs.
- (8) This section applies to property held in co-ownership at the commencement of this Act and to property which becomes so held after such commencement.
- (9) This section does not apply to property in respect of which a subsisting contract for sale (whether made under an order in a suit for partition, or by or on behalf of all the co-owners) is in force at the commencement of this Act, if the contract is completed in due course, nor to land in respect of which a suit for partition is pending at such commencement if a decree for a partition or sale is subsequently made in such suit.

**39 Trustee on statutory trusts for sale or partition to consult persons interested**

- (1) So far as practicable trustees on the statutory trust for sale, or on the statutory trust for partition, shall—
  - (a) consult the persons of full age and not subject to disability for the time being beneficially entitled to income of the property until sale or partition, and the public trustee or other person charged by law with the management and care of the property of any person for whom an administrator has been appointed under the *Guardianship and Administration Act 2000* for the property, or protected person, for the time being beneficially entitled to income of the property until sale or partition; and
  - (b) so far as consistent with the general interest of the trust, give effect to the wishes of the persons so consulted if they are interested in respect of more than half of the income of the property until sale or partition or, in case of dispute, of such of the persons so consulted as are in agreement and are interested in respect of more than half of the income of the property until sale or partition.
- (2) A purchaser shall not be concerned to see that this section has been complied with.

**40 Right of co-owners to bid at sale under statutory power of sale**

- (1) On any sale under a statutory trust for sale the court may allow any of the co-owners of the property to purchase whether at auction or otherwise on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part of the purchase money instead of paying the same, or as to any other matters as to the court seems reasonable.
- (2) A co-owner, with a right to purchase shall not, without the leave of the court, be entitled to act as trustee in connection with the sale.



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## **41 Sale or division of chattels**

- (1) Where any chattel or chattels belong to 2 or more persons jointly or in undivided shares any such person or persons may apply to the court for an order under this section.
- (2) On any application under this section the court may—
  - (a) order that the chattels in respect of which the application is made, or any 1 or more of them, be sold and the proceeds of sale distributed among the persons entitled to them under their interests in the chattel or chattels; or
  - (b) order that the chattels or some of them in respect of which the application is made be divided among the persons entitled to them; or
  - (c) order that 1 or more of such chattels be sold and the others be divided; or
  - (d) make such other orders and give any consequential directions as it thinks fit.

## **42 Powers of the court**

In proceedings under section 38 or 41 the court may on the application of any party to the proceedings or of its own motion—

- (a) determine any question of fact arising (including questions of title) in the proceedings or give directions as to how such questions shall be determined; and
- (b) direct that such inquiries be made and such accounts be taken as may in the circumstances be necessary for the purpose of ascertaining and adjusting the rights of the parties.

## **43 Liability of co-owner to account**

- (1) A co-owner shall, in respect of the receipt by the co-owner of more than the co-owner's just or proportionate share according to the co-owner's interest in the property, be liable to account to any other co-owner of the property.

(2) In this section—

*co-owner* means a joint tenant, whether in law or in equity, or a tenant in common, whether at law or in equity, of any property.

## **Part 6                      Deeds, covenants, instruments and contracts**

### **Division 1                Deeds and covenants**

#### **44            Description and form of deeds**

- (1) A deed between parties, to effect its objects, has the effect of an indenture although not indented or expressed to be indented.
- (2) Any deed, whether or not being an indenture, may be described (at the commencement of the deed or otherwise) as a deed simply, or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected.

#### **45            Formalities of deeds executed by individuals**

- (1) Where an individual executes a deed, the individual shall either sign or place the individual's mark upon the same and sealing alone shall not be sufficient.
- (2) An instrument expressed—
  - (a) to be an indenture or a deed; or
  - (b) to be sealed;shall, if it is signed and attested by at least 1 witness not being a party to the instrument, be deemed to be sealed and, subject to section 47, to have been duly executed.

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- (3) No particular form of words shall be requisite for the attestation.
  - (4) A deed executed and attested under this section may in any proceedings be proved in the manner in which it might be proved if no attesting witness were alive.
  - (5) Nothing in this section shall affect—
    - (a) the execution of deeds by corporations; or
    - (b) how instruments are validly executed under the *Land Title Act 1994*; or
    - (c) any deed executed before the commencement of this Act.

#### **46 Execution of instruments by or on behalf of corporations**

- (1) In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed to the deed in the presence of and attested by its clerk, secretary or other permanent officer or his or her deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices, the deed shall, subject to section 47, be deemed to have been executed under the requirements of this section, and to have taken effect accordingly.
- (2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation.
- (3) Where a person is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of a corporation sole or aggregate, the person may as attorney execute the conveyance by signing the person's name in such a way as to show that the

person does so as attorney of the corporation in the presence of at least 1 witness, and in the case of a deed by executing the same under section 45, and such execution shall take effect and be valid in like manner as if the corporation had executed the conveyance.

- (4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to convey any interest in property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose, either generally or in the particular instance, by the board of directors, council or other governing body of the corporation by resolution or otherwise, may execute the deed or other instrument in the name of such other person, and where an instrument appears to be executed by an officer so appointed, then in favour of a purchaser the instrument shall be deemed to have been executed by an officer duly authorised.
- (5) Subsections (1) to (4) apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of this Act, except that, in the case of powers or appointments of an agent or officer, they apply whether the power was conferred or the appointment was made before or after the commencement of this Act or by this Act.
- (6) Despite anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs of the corporation, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.
- (7) This section does not affect how instruments are validly executed under the *Land Title Act 1994*.
- (8) In this section—  
***purchaser*** shall include the registrar and any other person who because of any Act has the power, duty, or function of registering or recording instruments including instruments executed by corporations.

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## 47 Delivery of deeds

(1) After the commencement of this Act, execution of an instrument—

- (a) in the form of a deed; or
- (b) in the form provided in section 45 or 46;

shall not of itself import delivery, nor shall delivery be presumed from the fact of such execution only, unless it appears that execution of the document was intended to constitute delivery of the document.

(2) Subject to subsection (1), delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery.

(3) In this section—

*delivery* means the intention to be legally bound either immediately or subject to fulfilment of a condition.

## 48 Construction of expressions used in deeds and other instruments

(1) In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the context otherwise requires—

- (a) *month* means calendar month; and
- (b) *person* includes an individual and a corporation; and
- (c) words indicating a gender include each other gender; and
- (d) words in the singular include the plural and words in the plural include the singular.

(2) A covenant, power or other provision implied in a deed or other instrument because of this or any other Act shall be construed in accordance with subsection (1).

#### **49 Implied covenants may be negated**

- (1) Subject to this Act, a covenant, power or other provision implied under this or any other Act shall have the same force and effect, and may be enforced in the same manner, as if it had been set out at length in the instrument in which it is implied.
- (2) Any such covenant or power may, unless otherwise provided in this or such other Act, be negated, varied, or extended by—
  - (a) an express declaration in the instrument in which it is implied; or
  - (b) another instrument.
- (3) Any such covenant or power so varied or extended shall, so far as may be, operate in the like manner and with all the like incidents, effects and consequences as if such variations or extensions were implied under the Act.

#### **50 Covenants and agreements entered into by a person with himself or herself and another or others**

- (1) Any covenant, whether express or implied, or agreement entered into by a person with the person and 1 or more other persons shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been entered into with the other person or persons alone.
- (2) This section applies to covenants or agreements entered into before or after commencement of this Act, and to covenants implied by statute in the case of a person who conveys or is expressed to convey to the person and 1 or more other persons, but without prejudice to any order of the court made before such commencement.

#### **51 Receipt in instrument sufficient**

- (1) A receipt for consideration money or securities in the body of a deed or other instrument shall be a sufficient discharge for the same to the person paying or delivering the same without

any further receipt for the same being endorsed on the deed or instrument.

- (2) This section applies only to deeds or instruments executed after the commencement of this Act.

## **52 Receipt in instrument or endorsed evidence**

- (1) A receipt for consideration money or other consideration in the body of a deed or instrument or endorsed on the deed or instrument shall in favour of a subsequent purchaser not having notice that the money or other consideration acknowledged to be received was not in fact paid or given wholly or in part be sufficient evidence of the payment or giving of the whole amount of the money or other consideration.
- (2) This section applies to deeds or instruments executed or endorsements made before or after the commencement of this Act.

## **53 Benefit and burden of covenants relating to land**

- (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and the covenantee's successors in title and the persons deriving title under the covenantee or the covenantee's successors in title, and shall have effect as if such successors and other persons were expressed.
- (2) A covenant relating to any land of a covenantor or capable of being bound by the covenantor, shall, unless a contrary intention is expressed, be deemed to be made by the covenantor on behalf of the covenantor, the covenantor's successors in title and the persons deriving title under the covenantor or the covenantor's successors in title, and, shall have effect as if such successors and other persons were expressed.

- (2A) Subsection (2) extends to a covenant to do some act relating to the land, even though the subject matter may not be in existence when the covenant is made.
- (3) For the purposes of this section in connection with covenants restrictive of the user of land—  
*successors in title* shall be deemed to include the owners and occupiers for the time being of such land.
- (4) This section applies only to covenants made after the commencement of this Act, but shall take effect subject, in the case of registered land, to the *Land Title Act 1994*.

## Division 2                      General rules affecting contracts

### 54            Effect of joint contracts and liabilities

- (1) Subject to this and to any other Act—
- (a) a promise made by 2 or more persons shall, unless a contrary intention appears, be construed as a promise made jointly and severally by each of those persons; and
- (b) a liability which is joint shall not be discharged, nor shall a cause of action with respect to the liability be extinguished, because of any fact, event, or matter except to the extent that the same would because of the fact, event or matter be discharged or extinguished if the liability were joint and several and not joint.
- (2) In this section—  
*promise* includes a promise under seal, a covenant, whether express or implied under this Act, and a bond or other obligation under seal.
- (3) This section applies only to a promise, liability or cause of action coming into existence after the commencement of this Act.



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## 55 Contracts for the benefit of third parties

- (1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.
- (2) Prior to acceptance the promisor and promisee may, without the consent of the beneficiary, vary or discharge the terms of the promise and any duty arising from it.
- (3) Upon acceptance—
  - (a) the beneficiary shall be entitled in the beneficiary's own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor, and relief by way of specific performance, injunction or otherwise shall not be refused solely on the ground that, as against the promisor, the beneficiary may be a volunteer; and
  - (b) the beneficiary shall be bound by the promise and subject to a duty enforceable against the beneficiary in the beneficiary's own name to do or refrain from doing such act or acts (if any) as may by the terms of the promise be required of the beneficiary; and
  - (c) the promisor shall be entitled to such remedies and relief as may be just and convenient for the enforcement of the duty of the beneficiary; and
  - (d) the terms of the promise and the duty of the promisor or the beneficiary may be varied or discharged with the consent of the promisor and the beneficiary.
- (4) Subject to subsection (1), any matter which would in proceedings not brought in reliance on this section render a promise void, voidable or unenforceable, whether wholly or in part, or which in proceedings (not brought in reliance on this section) to enforce a promissory duty arising from a promise is available by way of defence shall, in like manner and to the like extent, render void, voidable or unenforceable or be

available by way of defence in proceedings for the enforcement of a duty to which this section gives effect.

- (5) In so far as a duty to which this section gives effect may be capable of creating and creates an interest in land, such interest shall, subject to section 12, be capable of being created and of subsisting in land under any Act but subject to that Act.

- (6) In this section—

**acceptance** means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on the promisor's behalf, in the manner (if any), and within the time, specified in the promise or, if no time is specified, within a reasonable time of the promise coming to the notice of the beneficiary.

**beneficiary** means a person other than the promisor or promisee, and includes a person who, at the time of acceptance is identified and in existence, although that person may not have been identified or in existence at the time when the promise was given.

**promise** means a promise—

- (a) which is or appears to be intended to be legally binding; and  
(b) which creates or appears to be intended to create a duty enforceable by a beneficiary;

and includes a promise whether made by deed, or in writing, or, subject to this Act, orally, or partly in writing and partly orally.

**promisee** means a person to whom a promise is made or given.

**promisor** means a person by whom a promise is made or given.

- (7) Nothing in this section affects any right or remedy which exists or is available apart from this section.

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- (8) This section applies only to promises made after the commencement of this Act.

## **56 Guarantees to be in writing**

- (1) No action may be brought upon any promise to guarantee any liability of another unless the promise upon which such action is brought, or some memorandum or note of the promise, is in writing, and signed by the party to be charged, or by some other person by the party lawfully authorised.
- (2) A promise, or memorandum or note of a promise, in writing shall not be treated as insufficient for the purpose of this section merely because the consideration for such promise does not appear in writing or by necessary inference from a written document.

## **57 Effect of provisions as to conclusiveness of certificates etc.**

- (1) Subject to any other Act, a provision in a contract or instrument to the effect that a certificate, statement or opinion of any person shall be or be received as conclusive evidence of any fact in the certificate, statement or opinion contained shall be construed to mean only that such certificate, statement or opinion shall be or be received as prima facie evidence of that fact.
- (2) This section shall not apply to—
- (a) a certificate, statement or opinion of a person who, in making the certificate or statement or in forming the opinion, is bound to act judicially or quasi-judicially or as arbitrator or quasi-arbitrator; or
  - (b) a provision agreed to after a dispute has arisen as to the relevant fact.
- (3) This section applies to a contract made or instrument executed after but not before the commencement of this Act, and shall have effect despite any stipulation to the contrary.
- (4) In this section—

*fact* includes any matter, thing, event, circumstance or state of affairs.

## **57A Effect of Act or statutory instrument**

- (1) A statutory instrument, other than prescribed subordinate legislation, does not and can not—
  - (a) render void or unenforceable any contract or dealing concerning property that is made, entered into or effected contrary to the statutory instrument; or
  - (b) for a contract for the sale of land—give a party to the contract a right to terminate the contract for a failure by another party to the contract to comply with the statutory instrument.
- (2) Where an Act or statutory instrument requires that a certificate, consent or approval relating to any contract or dealing with property (by sale, lease, mortgage or otherwise) be obtained or tendered before or at the time the contract is entered into or the time of the dealing, then, in the absence of greater particularity as to that time in the Act or instrument, it shall be sufficient compliance with that requirement if the certificate, consent or approval is obtained or tendered as required at or immediately before—
  - (a) in the case of a sale—settlement; and
  - (b) in the case of a lease—the lessee’s entry into possession under the lease; and
  - (c) in the case of a mortgage—the mortgagor’s accepting liability under the mortgage; and
  - (d) in the case of any other dealing—its finalisation.
- (3) In this section—

*prescribed subordinate legislation* means subordinate legislation that is prescribed by regulation.

*Note—*

See section 357 in relation to the application of this section.

## 58 Insurance money from burnt building

Where a building is destroyed or damaged by fire a person who has granted a policy of insurance for insuring it against fire may, and shall, on the request of a person interested in or entitled to the building, cause the money for which the building is insured to be laid out and expended, so far as it will go, towards rebuilding, reinstating, or repairing the building, unless—

- (a) the person claiming the insurance money within 30 days next after the person's claim is adjusted, gives sufficient security to the person who has granted that policy that the insurance money will be so laid out and expended; or
- (b) the insurance money is in that time settled and disposed of to and amongst the contending parties to the satisfaction and approbation of the person who has granted the policy of insurance.

## Division 3 Sales of land

### 58A Definitions for div 3

In this division—

***conveyancing transaction*** see the National Law, section 3.

***e-conveyance*** means a conveyancing transaction to be completed using e-conveyancing.

***e-conveyancing*** means a system of land conveyancing that uses an ELN to lodge documents electronically for the purposes of the land titles legislation.

***electronic workspace***, for an e-conveyance, means a shared electronic workspace within an ELN that allows the participating subscribers to the e-conveyance—

- (a) to lodge a document electronically under the National Law; and

- (b) if relevant, to authorise or complete financial settlement of the e-conveyance.

*ELN* means an Electronic Lodgment Network under the National Law.

*financial settlement*, of an e-conveyance, means the exchange of value, in an ELN, between financial institutions in accordance with the instructions of participating subscribers to the e-conveyance.

*land titles legislation* see the *Electronic Conveyancing National Law (Queensland) Act 2013*, section 6.

*National Law* means the Electronic Conveyancing National Law (Queensland).

*participating subscriber*, to an e-conveyance, means a subscriber who is involved in the e-conveyance as a party to the e-conveyance or as a representative of a party.

*subscriber* see the National Law, section 3.

## **58B Meaning of *settlement* of a sale of land in an e-conveyance**

- (1) In an Act, a reference to the *settlement* (however described) of a sale of land or a contract for the sale of land has the meaning given by this section if the sale is to be completed using e-conveyancing, unless the Act expressly provides otherwise.

*Example of another way to describe a settlement of the sale of land—*  
completion of the sale of the land

- (2) Settlement, of the sale of land, occurs when the electronic workspace for the e-conveyance records that—
- (a) financial settlement occurs; or
- (b) if there is no financial settlement, the documents necessary to transfer title have been accepted for electronic lodgment by the registrar.
- (3) In this section—  
*sale*, of land, includes an exchange for value.

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## **59 Contracts for sale etc. of land to be in writing**

No action may be brought upon any contract for the sale or other disposition of land or any interest in land unless the contract upon which such action is brought, or some memorandum or note of the contract, is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised.

## **60 Sales of land by auction**

- (1) In the case of a sale of land by auction—
  - (a) where the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the vendor—the vendor shall not be entitled to bid or to employ any person to bid at the sale, nor shall the auctioneer be entitled to take any bid from the vendor or any such person; and
  - (aa) any sale contravening paragraph (a) may be treated as fraudulent by the purchaser; and
  - (b) a sale may be notified in the conditions of sale to be subject to a reserved or upset price, and a right to bid may also be in the auction expressly reserved by or on behalf of the vendor; and
  - (c) where a right to bid is expressly reserved, but not otherwise—the vendor or any one person on the vendor's behalf may bid at the auction.
- (2) This section applies to sales effected after the commencement of this Act.

## **61 Conditions of sale of land**

- (1) Under a contract for the sale of registered land the purchaser shall be entitled at the cost of the vendor—
  - (a) to receive from the vendor sufficient particulars of title to enable the purchaser to prepare the appropriate instrument to give effect to the contract; and

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- (b) to receive from the vendor an abstract of any instrument, forming part of the vendor's title, in respect of which a caveat is entered upon the register; and
  - (c) to have the relevant certificate of title or other document of title lodged by the vendor in the land registry to enable the instrument to be registered; and
  - (d) to have any objection to the registration of the instrument removed by the vendor.
- (1A) However, as to any such objection which the purchaser ought to have raised on the particulars or abstract, or upon the investigation of the title, or which arises from the purchaser's own act, default, or omission, the purchaser shall not be entitled to have the same removed except at the purchaser's own cost.
- (2) Under any contract for the sale of any land there shall be implied a term that—
- (a) payment or tender of any money payable under the contract may be made by a financial institution cheque drawn on itself or a bank; and
  - (b) an obligation on the part of the vendor to execute and deliver a conveyance of the subject land, or instruments of title to the land, free of encumbrances shall be satisfied if the vendor will, upon completion of the contract, be able to and does in fact discharge any existing encumbrance out of the purchase money payable under the contract by the purchaser; and
  - (c) unless otherwise agreed by the parties, their solicitors or conveyancers, settlement of the contract must take place at the office of the land registry at which the document relating to the conveyance may be lodged or, if there are 2 or more such offices, the office that is nearest to the land.
- (3) Where in any contract for the sale of any land the date for payment of the purchase money or any part of the purchase moneys is to be ascertained by reference to a period of time expiring on a day which is a Saturday, a Sunday, or a public



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holiday, then, unless the contract designates such day as a Saturday, a Sunday, or by the name of the public holiday, completion shall take place—

(a) on such other day as may be agreed by the parties, their solicitors or conveyancers; or

in default of such agreement—

(b) on the day, other than a Saturday, Sunday, or public holiday, next following the day on which the period of time so expired.

(3A) However, if under subsection (2)(c) settlement of the contract must take place at an office of the land registry, but the office is not open for business on the day (the *relevant day*) provided for completion under subsection (3), the completion must take place—

(a) on a day, on which the office is open for business, agreed by the parties, their solicitors or conveyancers; or

(b) if there is no agreement under paragraph (a)—on the next day the office is open for business after the relevant day.

(4) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract, and to the provisions contained in the contract.

## **62 Stipulations not of the essence of the contract**

Stipulations in contracts, as to time or otherwise, which under rules of equity are not deemed to be or to have become of the essence of the contract, shall be construed and have effect at law under rules of equity.

## **63 Application of insurance money on completion of a sale or exchange**

(1) Where after the date of any contract for sale or exchange of property, money becomes payable under any policy of

insurance maintained by the vendor in respect of any damage to or destruction of property included in the contract, the money shall, on completion of the contract, be held or receivable by the vendor on behalf of, and, on completion of the sale or exchange or so soon afterwards as the same shall be received by the vendor, paid—

- (a) to any person entitled to the money because of an encumbrance over or in respect of the land; and
  - (b) as to any balance remaining, to the purchaser.
- (2) For the purpose of this section, cover provided by such a policy maintained by the vendor extends until the date of completion, and money does not cease to become payable to the vendor merely because the risk has passed to the purchaser.
- (3) This section shall apply only to contracts made after the commencement of this Act, and shall have effect subject to—
- (a) any stipulation to the contrary contained in the contract; or
  - (b) the payment by the purchaser of the proportionate part of the premium from the date of the contract.
- (4) This section shall apply to a sale or exchange by an order of court, as if—
- (a) for references to the ‘vendor’ there were substituted references to the ‘person bound by the order’; and
  - (b) for the reference to the completion of the contract there were substituted a reference to the payment of the purchase or equality money (if any) into court; and
  - (c) for reference to the date of the contract there were substituted a reference to the time when the contract became binding.

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**64 Right to rescind on destruction of or damage to dwelling house**

- (1) In any contract for the sale of a dwelling house where, before the date of completion or possession whichever earlier occurs, the dwelling house is so destroyed or damaged as to be unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's solicitor not later than the date of completion or possession whichever the earlier occurs.
- (2) Upon rescission of a contract under this section, any money paid by the purchaser shall be refunded to the purchaser and any documents of title or transfer returned to the vendor who alone shall be entitled to the benefit of any insurance policy relating to such destruction or damage subject to the rights of any person entitled to the insurance policy because of an encumbrance over or in respect of the land.

- (3) In this section—

*sale of a dwelling house* means the sale of improved land the improvements on which consist wholly or substantially of a dwelling house or the sale of a lot on a building units plan within the meaning of the *Building Units and Group Titles Act 1980* or the sale of a lot included in a community titles scheme under the *Body Corporate and Community Management Act 1997* if the lot—

- (a) wholly or substantially, consists of a dwelling; and
  - (b) is, under the *Land Title Act 1994*—
    - (i) a lot on a building format plan of subdivision; or
    - (ii) a lot on a volumetric format plan of subdivision, and wholly contained within a building.
- (4) This section applies only to contracts made after the commencement of this Act and shall have effect despite any stipulation to the contrary.

## 65 Rights of purchaser as to execution

- (1) On a sale, the purchaser shall not be entitled to require that the conveyance to the purchaser be executed in the purchaser's presence, or in that of the purchaser's solicitor or conveyancer, as such, but shall be entitled to have, at the purchaser's own cost, the execution of the conveyance attested by some person appointed by the purchaser, who may, if the purchaser thinks fit, be the purchaser's solicitor or conveyancer.
- (2) This section applies only to sales made after the commencement of this Act.

## 66 Receipt in instrument or endorsed authority for payment

- (1) If a financial institution manager, a solicitor or a conveyancer produces an instrument, having in the body of the instrument or endorsed on the instrument a receipt for consideration money or other consideration, the instrument being executed, or the endorsed receipt being signed, by the person entitled to give a receipt for that consideration, or produces a duly executed instrument in respect of registered land, the instrument shall be a sufficient authority to the person liable to pay or give the same for the person's paying or giving the same to the financial institution manager, solicitor, or conveyancer without the financial institution manager, solicitor or conveyancer producing any separate or other direction or authority in that behalf from the person who executed or signed the receipt or instrument.
- (2) In this section—

*conveyancer* includes the agent of the conveyancer.

*financial institution manager* means the person performing the function of general manager or manager of a financial institution, and includes an agent of the financial institution manager.

*instrument* includes a discharge of mortgage.

*solicitor* includes the agent of the solicitor.

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**67 Restriction on vendor's right to rescind on purchaser's objection**

- (1) In any contract the vendor shall not be entitled to exercise any right to rescind the contract, whether given by the contract expressly or otherwise, on the ground of any requisition or objection made by the purchaser unless and until the vendor has given the purchaser 7 days notice of the vendor's intention to rescind so as to enable the purchaser to withdraw or waive the requisition or objection.
- (2) This section applies only to contracts made after the commencement of this Act, and shall have effect despite any stipulation to the contrary.

**67A When statutory rights of termination end for land sales if e-conveyancing is used**

- (1) This section applies if—
  - (a) an Act provides for a right of termination (however described) in relation to the sale of land or a contract for the sale of land; and
  - (b) the right is expressed to end on settlement; and
  - (c) the sale is settled using e-conveyancing.
- (2) The right of termination ends on settlement.
- (3) However, the right of termination may not be exercised during any period the electronic workspace for the e-conveyance is locked for the purpose of settlement.
- (4) In this section—

*locked*, in relation to an electronic workspace for an e-conveyance, means the ELN for the workspace does not allow a participating subscriber to the e-conveyance to change a document or instruction in the workspace.

## **68 Damages for breach of contract to sell land**

- (1) A vendor who in breach of contract fails to perform a contract for the sale of land shall be liable by way of damages as compensation for the loss sustained by the purchaser in such sum as at the time the contract was made was reasonably foreseeable as the loss liable to result, and which does in fact result, from the failure of the vendor to perform the contract and, unless the contract otherwise provides, the vendor shall not be relieved, wholly or in part, of liability for damages measured under this section merely because of the vendor's inability to make title to the land the subject of the contract of sale, whether or not such inability was occasioned by the vendor's own default.
- (2) This section shall not affect any right, power or remedy which, apart from this section, may be available to a purchaser in respect of the failure of a vendor to show or make good title or otherwise to perform a contract for the sale of land.
- (3) This section shall not apply to contracts for the sale of unregistered land and shall apply only to contracts entered into after the commencement of this Act.

## **68A Forfeiture of deposit on purchaser's default**

- (1) This section applies in relation to a contract for the sale of a proposed lot.
- (2) The contract may provide for a sum not exceeding 20% of the purchase price of the proposed lot paid under the contract as a deposit (whether paid in 1 or more amounts) to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser.
- (3) However, the sum may only be forfeited or retained by the vendor if the breach results in the termination of the contract.
- (4) It is declared, for this section, that a sum not exceeding 20% of the purchase price of the proposed lot that is paid under the contract as a deposit (whether paid in 1 or more amounts) is not, either at law or in equity, a penalty if the sum is forfeited

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and retained by the vendor because the contract is terminated following the purchaser's breach of the contract.

(5) In this section—

**proposed lot** means—

- (a) a proposed lot within the meaning of the Land Sales Act 1984; or
- (b) a proposed lot within the meaning of the Body Corporate and Community Management Act 1997; or
- (c) land that will be shown as a lot on a building units plan or group titles plan registered under the *Building Units and Group Titles Act 1980*; or

*Note—*

There is limited scope for the registration of new building units plans and group titles plans under the *Building Units and Group Titles Act 1980*—see section 5A of that Act.

- (d) a proposed lot within the meaning of the *South Bank Corporation Act 1989*, section 97B.

## **69 Rights of purchaser where vendor's title defective**

- (1) Where specific performance of a contract would not be enforced against the purchaser by the court because of a defect in or doubt as to the vendor's title, but such defect or doubt does not entitle the purchaser to rescind the contract, the purchaser shall nevertheless be entitled to recover the purchaser's deposit and any instalments under the contract and to be relieved from all liability under the contract, unless the contract discloses such defect or doubt and contains a stipulation precluding the purchaser from objecting to the defect or doubt.
- (2) If the defect or doubt not disclosed by the contract is one which is known or ought to have been known to the vendor at the date of the contract the purchaser shall in addition be entitled to recover the purchaser's expenses of investigating the title.
- (3) This section applies—

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- (a) to a contract for the sale or exchange of land or any interest in land made after the commencement of this Act; and
- (b) despite any provision to the contrary contained in the contract.

## **70 Applications to court by vendor and purchaser**

A vendor or purchaser of land, or their respective representatives, may apply in a summary way to the court, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with a contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as to the court may appear just, and may order how and when and by whom all or any of the costs of and incident to the application are to be borne and paid.

### **70A Computers inoperative on day for completion**

- (1) This section applies if—
  - (a) a contract for the sale of land does not provide otherwise; and
  - (b) time is of the essence of the contract; and
  - (c) the purchaser under the contract, without default on the purchaser's part, can not, on the date for completion of the contract, verify the vendor's title because computers in the relevant office of the land registry under the *Land Title Act 1994* are inoperative for any reason.
- (2) Time ceases to be of the essence of the contract.
- (3) The vendor is taken—
  - (a) not to have proved title to the land; and
  - (b) not to be in breach of the contract only because of the failure to prove title at that time.



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- (4) The vendor or purchaser may give a written notice to the other party to the contract to complete the sale.
  - (5) The notice must state—
    - (a) that the computers are again fully operational; and
    - (b) a period of days, of not more than 7 business days, from the day the notice is given for completion of the sale.
  - (6) The notice may be given no earlier than the day after the first continuous day of operation of the computers after computer operation is fully restored.
  - (7) From a party's receipt of the notice, time is again of the essence of the contract.

## Division 4 Instalment sales of land

### 71 Definitions for div 4

In this division—

*deposit* means a sum—

- (a) not exceeding the prescribed percentage of the purchase price payable under an instalment contract; and
- (b) paid or payable in 1 or more amounts; and
- (c) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser.

*instalment contract* means an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments.

*mortgage* includes any encumbrance or charge other than a charge attaching by the operation of any statutory enactment.

*prescribed percentage* means—

- (a) for a contract for the sale of a proposed lot—20%; or

(b) otherwise—10%.

**proposed lot** means—

- (a) a proposed lot within the meaning of the Land Sales Act 1984; or
- (b) a proposed lot within the meaning of the Body Corporate and Community Management Act 1997; or
- (c) land that will be shown as a lot on a building units plan or group titles plan registered under the Building Units and Group Titles Act 1980; or

*Note—*

There is limited scope for the registration of new building units plans and group titles plans under the Building Units and Group Titles Act 1980—see section 5A of that Act.

- (d) a proposed lot within the meaning of the South Bank Corporation Act 1989, section 97B.

**purchaser** includes any person from time to time deriving an interest under an instalment contract from the original purchaser under the contract.

**sale** includes an agreement for sale and an enforceable option for sale.

**vendor** includes any person to whom the rights of a vendor under an instalment contract have been assigned.

## **71A Application of div 4**

- (1) This division shall not bind the Crown.
- (2) Where a contract for the sale of land may, at the election of the purchaser, be performed in a manner which would constitute it an instalment contract, it shall, unless and until the purchaser elects to perform it in some other manner, be presumed to be an instalment contract within the meaning of this section.
- (3) This division applies—

- (a) to an instalment contract entered into after the commencement of this Act; and
  - (b) despite anything to the contrary contained in any contract.
- (4) Sections 74 to 76 do not apply with respect to a contract for the sale of land by the public trustee.

## **72 Restriction on vendor's right to rescind**

- (1) An instalment contract shall not be determinable or determined because of default on the part of the purchaser in payment of any instalment or sum of money (other than a deposit or any part of a deposit) due and payable under the contract until the expiration of a period of 30 days after service upon the purchaser of a notice in the approved form.
- (2) A purchaser upon whom a notice in the approved form has been served may within the period mentioned in subsection (1) pay or tender to the vendor or the vendor's agent such sum as would have been due and payable under the contract at the date of such payment or tender but for such default (including any sum in respect of which the default was made).
- (3) Upon payment or tender under subsection (2) any right or power of the vendor to determine the contract because of the default specified in the notice shall cease and the purchaser shall be deemed not to be in default under the contract.
- (4) A notice shall be deemed to be to the like effect of that in the approved form if it is reasonably sufficient fully and fairly to apprise the purchaser of the purchaser's default and of the effect of the purchaser's failure to remedy the default within the time specified in this section.

## **73 Land not to be mortgaged by vendor**

- (1) A vendor under an instalment contract shall not without the consent of the purchaser sell or mortgage the land the subject of the contract.

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- (2) Where land is mortgaged in contravention of this section—
  - (a) the instalment contract shall be voidable by the purchaser at any time before completion of the contract; and
  - (b) the vendor shall be guilty of an offence against this Act.  
Maximum penalty—9 penalty units.
- (3) Nothing in this section affects—
  - (a) the rights of any bona fide purchaser from the vendor for value and without notice of the instalment contract; or
  - (b) the *Land Title Act 1994*.

#### **74 Right of purchaser to lodge caveat**

- (1) A purchaser under an instalment contract for the sale of land registered under the *Land Title Act 1994* may, by a caveat under that Act that is expressed to be lodged under this section, forbid the registration of any instrument affecting the land the subject of the contract until completion of the instalment contract.
- (1A) A caveat lodged under this section is taken, for the purposes of the *Land Title Act 1994*, to have been lodged other than under part 7, division 2 of that Act.
- (2) A caveat lodged under this section may on the application of any person interested be removed upon proof to the satisfaction of the registrar or of the court—
  - (a) that the purchaser has consented to removal of the caveat; or
  - (b) that the instalment contract has been rescinded or determined or discharged by performance or otherwise; or
  - (c) of any other ground which justifies removal of a caveat.
- (3) Nothing in this section affects the powers of the registrar in relation to caveats under the *Land Title Act 1994*.

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## 75 Right to require conveyance

- (1) A purchaser who is not in default under an instalment contract may at any time after an amount equal to one-third of the purchase price has been paid serve upon the vendor a notice in writing requiring the vendor to convey the land to the purchaser conditionally upon the purchaser at the same time executing a mortgage in favour of the vendor or such other person as the vendor may specify to secure payment of all money which would afterwards but for the execution of such mortgage have become payable by the purchaser under the instalment contract.
- (2) A vendor who is not in default under an instalment contract may at any time after an amount equal to one-third of the purchase price has been paid serve upon a purchaser a notice in writing requiring the purchaser to accept conveyance of the land from the vendor conditionally upon the purchaser at the same time executing a mortgage, or (if it is reasonable to so require) mortgages, in favour of the vendor or such other person or persons as the vendor may specify to secure payment of all money which would afterwards but for the execution of such mortgage or mortgages have become payable by the purchaser under the instalment contract.
- (3) A vendor who requires a purchaser to accept a conveyance under subsection (2) shall be obliged to advance to the purchaser—
  - (a) an amount equal to the transfer duty imposed under the *Duties Act 2001* on the conveyance; and
  - (b) an amount equal to legal costs payable by the purchaser of preparation, execution and registration of conveyance of the land to the purchaser;but such obligation shall be conditional upon the purchaser agreeing to the amount so advanced being added to the principal sum secured by the mortgage or by such 1 of the mortgages as is specified by the vendor.
- (4) A mortgage executed under this section shall—

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- (a) contain all such terms and all such powers and covenants on the part of the mortgagor as may be agreed by the vendor and the purchaser and shall accord with and provide for observance of all obligations of the purchaser under the instalment contract; and
  - (b) in the case of subsection (1), but subject to subsection (7)—be prepared and registered at the expense of the purchaser; and
  - (c) in the case of subsection (2), but subject to subsection (7)—be prepared and registered at the expense of the vendor.
- (5) Transfer duty under the *Duties Act 2001* and the legal costs of preparation, execution and registration of conveyance of the land to the purchaser shall be payable by the party or parties in the same way as if such land were being conveyed to the purchaser in consequence of payment in full of the purchase price or other performance by the purchaser of the contract.
- (6) In the event of the vendor and the purchaser failing to agree upon the terms, covenants and powers, or any of them, to be contained in the mortgage or whether it is reasonable on the part of the vendor to require the purchaser to execute more than 1 mortgage, the mortgage and any such term, covenant or power to be contained in the mortgage shall be settled, or the number of mortgages and the land to be made subject to such mortgages determined, by an independent practising solicitor or conveyancer appointed by the president of the Law Society on the application to the solicitor or conveyancer of the vendor and the purchaser or either of them, and the mortgage so settled and the number so determined shall be deemed to have been agreed upon by both the vendor and the purchaser.
- (7) The reasonable costs of settling a mortgage under subsection (6) shall be borne by the vendor and the purchaser in such proportions (if any) as in the circumstances the president of the Law Society thinks fit, and such costs shall be recoverable by the solicitor or conveyancer in those proportions (if any) from the vendor and the purchaser in any court of competent jurisdiction.

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- (8) A person liable for costs because of subsection (7) shall be entitled to require those costs to be taxed under the *Costs Act 1867*.
- (9) Where a notice in writing under this section has been served upon a vendor by a purchaser or upon a purchaser by a vendor, and such vendor or, as the case may be, purchaser without lawful excuse fails to convey or to accept a conveyance of the land or to execute any instrument requisite for giving effect to this section, such vendor or purchaser—
- (a) shall be deemed to have broken a condition of the contract, and the purchaser or, as the case may be, vendor shall be entitled to all civil remedies accordingly; and
  - (b) the party so failing shall be guilty of an offence under this Act.
- Maximum penalty—9 penalty units.
- (10) In any contract entered into after the commencement of this Act, a reference to the *Contracts of Sale of Land Act 1933*, section 9 shall be construed as a reference to this section.

## **76 Deposit of title deed and conveyance**

- (1) A purchaser who is not in default under an instalment contract may at any time after the contract has been entered into direct the vendor at the cost of the purchaser to deposit with a prescribed authority—
- (a) the title deed or deeds relating to the land the subject of the contract; and
  - (b) a duly executed conveyance or instrument of transfer of the land in favour of the purchaser, which shall be deemed to be delivered by the vendor in escrow pending discharge of the contract by performance or otherwise.
- (2) A vendor who fails to comply with a direction given under subsection (1) shall be deemed to have broken a condition of the contract, and the purchaser shall be entitled to all civil remedies accordingly.

- (3) The title deed or deeds and the conveyance or instrument of transfer referred to in subsection (1) shall be held in trust by the prescribed authority who shall not, except for the purpose of safekeeping, deliver the same to any person (other than another prescribed authority, to be held by the person under this section) until—
- (a) the time for performance of the contract arrives; or
  - (b) the contract is discharged by performance or otherwise; or
  - (c) the court otherwise orders on the application of the prescribed authority or of the vendor or the purchaser or some interested person.

- (4) In this section—

***prescribed authority*** means any of the following—

- (a) any person, firm or corporation who at the commencement of this Act is a prescribed authority for the purposes of the *Contracts of Sale of Land Act 1933*, section 5(i);
- (b) any financial institution carrying on business in the State;
- (c) a trustee corporation;
- (d) a solicitor or conveyancer or firm of solicitors or conveyancers, other than a solicitor, conveyancer or firm whom the Council of the Queensland Law Society Incorporated has resolved should not be a prescribed authority;

but does not include a person to whom paragraph (a) applies where the Minister's approval of that person to be a prescribed authority has been withdrawn, which the Minister is authorised to do.

- (5) Nothing in this section applies to an instalment contract where at the time such contract is made the land is subject to an existing mortgage.



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## Part 7                      Mortgages

### 77        Definitions for pt 7

In this part—

*instrument of mortgage* includes an instrument or memorandum of mortgage under the Land Act, the *Land Title Act 1994* or the Mineral Resources Act.

*principal money* includes any annuity, rent charge or principal money secured or charged by an instrument of mortgage registered under the *Land Title Act 1994*.

### 77A      Application of pt 7

(1) This part—

- (a) applies to unregistered land and to any mortgage of such land; and
- (b) applies to land and any mortgage of land which is subject to the provisions of—
  - (i) the *Land Title Act 1994*; or
  - (ii) the Land Act; or
  - (iii) the Mineral Resources Act; or
  - (iv) the Housing Act; or
  - (v) any other Act, and any repealed Act which continue to apply to such land or mortgage made before that Act was repealed; and
- (c) subject to any other Act, applies to any other mortgage whether of land or any other property.

### 78        Implied obligations in mortgages

- (1) In every instrument of mortgage there shall be implied on the part of the mortgagor the following obligations—

- (a) that the mortgagor will pay the principal money and interest secured according to the rate and at the times and mentioned in the mortgage without any deduction whatever;
  - (b) that the mortgagor will keep all buildings and other improvements erected and made upon the land in as good and substantial repair as the same were in at the date of the mortgage, and that the mortgagor will permit the mortgagee at all convenient times, until such mortgage is redeemed, with or without agents, to enter into and upon such land to view and inspect the state of repair of such buildings and improvements.
- (2) An obligation implied because of this section shall, if the mortgage is by deed, take effect as a covenant on the part of the mortgagor.
  - (3) This section applies only if and as far as a contrary intention is not expressed in the instrument of mortgage, and shall have effect subject to the terms of the instrument, and to the provisions contained in the instrument.
  - (4) Subject to subsection (3), an obligation implied by this section shall have effect as if it were in terms contained in the instrument of mortgage.

## **79 Variation of mortgage**

- (1) A mortgage evidenced by an instrument of mortgage in respect of land may be varied by a memorandum of variation, which may—
  - (a) increase or reduce the rate of interest payable in respect of the debt or obligation secured by the mortgage; or
  - (b) increase or reduce the amount secured by the mortgage; or
  - (c) shorten, extend or renew the term or currency of the mortgage; or
  - (d) vary any condition, covenant or other provision of the instrument of mortgage; or

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- (e) provide for any 1 or more of the matters mentioned in paragraphs (a) to (b).
  - (2) A memorandum of variation may be registered and, if registered, must be in the approved form, with such variations or additions as circumstances may require.
  - (3) The power of and procedure for variation provided by this section shall be in addition to any other such power existing at law.

## **80 Inspection and production of instruments**

- (1) A mortgagor, as long as the mortgagor's right to redeem subsists, shall because of this Act be entitled from time to time at reasonable times on the mortgagor's request and at the mortgagor's own cost and on payment or tender of the mortgagee's proper costs and expenses in that behalf, by the mortgagor or the mortgagor's solicitor or conveyancer, to inspect and to make or be supplied with copies or abstracts of, or extracts from, the documents of title or other documents relating to the mortgaged property in the possession, custody or power of the mortgagee.
- (2) Subject to any other Act, where in the case of a mortgage of land the mortgagor executes any instrument or other document subsequent to that mortgage in relation to—
  - (a) any authorised dealing with the land; or
  - (b) a second or subsequent mortgage;the mortgagee or other person holding the relevant certificate of title, instrument of lease or other documents of title shall—
  - (c) upon being requested in writing so to do by the mortgagor or a person entitled to the benefit of the subsequent instrument or document; and
  - (d) at the cost of the person making that request; and
  - (e) upon payment or tender to that mortgagee or other person of the person's proper costs and expenses in that behalf;

produce the document or documents of title for lodgment in the land registry so that the subsequent instrument or document may be registered.

- (2A) If the mortgagee or other person refuses or neglects to comply with a request made under subsection (2), the mortgagor or person entitled to the benefit of the subsequent instrument or document concerned may make application to a judge of the Supreme Court in chambers for an order directed to that mortgagee or other person to show cause why the document or documents of title should not be produced under subsection (2).
- (2B) If the mortgagee or other person neglects or refuses to attend before the judge of the Supreme Court in chambers at the time appointed in the order, the judge may issue a warrant authorising and directing some person to be named in the warrant to apprehend and arrest the person so ordered to show cause and bring the person before a judge of the Supreme Court in chambers for examination.
- (2C) Upon the appearance before the judge of any person under subsection (2A) or (2B) and after examining that person upon oath the judge may—
- (a) order that person to deliver up the document or documents of title; or
  - (b) order the registrar or warden to dispense with production of the document or documents of title to enable the subsequent instrument or document to be registered.
- (3) A certificate of title, instrument of lease, or other document of title lodged in terms of subsection (2)—
- (a) shall, when the dealing or mortgage referred to in that subsection has been registered, be redelivered to the mortgagee or other person authorised by the mortgagee to take delivery of the dealing or mortgage; and
  - (b) shall not whilst so lodged, be used or available for the purpose of registering any instrument, dealing, or mortgage other than those referred to in subsection (2).

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- (3A) Subsection (3)(a) does not apply to a certificate of title or other document of title if, under the *Land Title Act 1994*, it must be cancelled and not be redelivered to the mortgagee.
- (4) The execution or attempted execution of a second or subsequent mortgage shall not—
- (a) constitute a breach of any term, covenant, condition or proviso for re-entry contained in the mortgage; or
  - (b) occasion any forfeiture or penalty; or
  - (c) render payable or accelerate the time for payment of any sum or sums which, if such mortgage had not been executed or if the attempt to execute such mortgage had not been made, would not have been payable or would not have been payable at that time.
- (5) A mortgagee, whose mortgage is surrendered, discharged or otherwise extinguished, shall not be liable on account of delivering documents of title in the mortgagee's possession to the person not having the best right to the mortgage, unless the mortgagee has notice of the right or claim of a person having a better right, whether because of a right to require a surrender, discharge or reconveyance or otherwise.
- (6) This section shall apply to mortgages made after but not before the commencement of this Act and shall have effect despite any stipulation to the contrary in any mortgage.

## **81 Actions for possession by mortgagors**

- (1) A mortgagor for the time being entitled to the possession or receipt of the rents and profits of any land, as to which the mortgagee has not given notice of the mortgagee's intention to take possession or to enter into the receipt of the rents and profits of the land, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative to the land, in the mortgagor's own name only, unless the cause of action arises upon a lease or other contract made by the mortgagor jointly with any other person.

- (2) This section does not prejudice the power of a mortgagor independently of this section to take proceedings in the mortgagor's own name only, either in right of any legal estate vested in the mortgagor or otherwise.
- (3) This section applies whether the mortgage was made before or after the commencement of this Act.

## **82 Tacking and further advances**

- (1) After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable)—
  - (a) if an arrangement has been made to that effect with the subsequent mortgagees; or
  - (b) if the mortgagee had no notice of such subsequent mortgages at the time when the further advance was made by the mortgagee; or
  - (c) if the mortgagee's mortgage imposes on the mortgagee an obligation to make such further advances.
- (2) Nothing in subsection (1) affects the right of a prior mortgagee to rank in priority to subsequent mortgagees in respect of expenses properly incurred in preserving the mortgaged property.
- (3) In relation to the making of further advances after the commencement of this Act a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered under an Act providing for registration of mortgages or deeds, if it was not so registered at the time when the original mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened.
- (3A) Subsection (3) applies only where the prior mortgage was made expressly for securing a current account or other further advances.
- (4) Save in regard to the making of further advances as mentioned in subsection (1), the right to tack is abolished.

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- (4A) However, nothing in this Act shall affect any priority acquired before the commencement of this Act by tacking, or in respect of further advances made without notice of a subsequent encumbrance or by arrangement with the subsequent encumbrancee.
- (5) This section applies to mortgages of land made whether before or after the commencement of this Act.

### **83 Powers incident to estate or interest of mortgagee**

- (1) A mortgagee, where the mortgage is made by instrument, shall, because of this Act, have the following powers, to the like extent as if they had in terms been conferred by and were contained in the instrument of mortgage, but not further, namely—
- (a) a power to sell, or to concur with any other person in selling, the mortgaged property, or any part of the mortgaged property, either subject to prior charges or not, and either together or in lots, in subdivision or otherwise, by public auction or by private contract, and for a sum payable either in 1 sum or by instalments, subject to such conditions respecting title, or evidence of title, or other matters as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to resell, without being answerable for any loss occasioned by the exercise of the power, with power to make such roads, streets and passages and grant such easements of right of way or drainage over the same as the circumstances may require and the mortgagee thinks fit;
- (b) a power, at any time after the date of the instrument of mortgage, to insure and keep insured against loss or damage by fire and by storm and tempest any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the property which or an estate or interest in which is mortgaged, and the premiums paid for any such insurance shall be a charge on the mortgaged property or

- estate or interest, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money;
- (c) a power to appoint a receiver of the income of the mortgaged property, or any part of the mortgaged property or, if the mortgaged property consists of an interest in income, or of a rent charge or an annual or other periodical sum, a receiver of that property or any part of that property;
  - (d) a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding 12 months from the making of the contract;
  - (e) a power to sell any easement, right or privilege of any kind over or in relation to the mortgaged property.
- (2) The power of sale includes the following powers as incident to the sale, namely—
- (a) a power to impose or reserve or make binding, as far as the law permits, by covenant, condition, or otherwise, on the unsold part of the mortgaged property or any part of it, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or for the purpose of the more beneficial working of the land, or with respect to any other thing;
  - (b) a power to sell the mortgaged property, or any part of it, or all or any mines and minerals apart from the surface—
    - (i) with or without a grant or reservation of rights of way, rights of water, easements, rights, and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or any part of it, or to any property sold; and



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- (ii) with or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged property, and with or without a grant or reservation of powers of working, wayleaves, or rights of way, rights of water and drainage and other powers, easements and rights and privileges for or connected with mining purposes in relation to the property remaining unsold or any part of it, or to any property sold; and
  - (iii) with or without covenants by the purchaser to expend money on the land sold.
- (3) The provisions of this Act relating to the powers mentioned in subsections (1) and (2), comprised either in this section, or in any other section regulating the exercise of those powers, may be varied or extended by the instrument of mortgage.
  - (4) This section applies only—
    - (a) to an instrument of mortgage of land executed whether before or after the commencement of this Act; and
    - (b) if and so far as a contrary intention is not expressed in the instrument of mortgage and has effect subject to the terms of the instrument and to the provisions expressed in it.
  - (5) The provisions of this Act relating to the powers mentioned in subsections (1) and (2) comprised in this section, or in any other section regulating the exercise of those powers, apply to mortgages of land under the Land Act or the Mineral Resources Act, but subject to and to the extent only that the provisions of this Act are consistent with those provisions.

## **84 Regulation of exercise of power of sale**

- (1) A mortgagee shall not exercise the power of sale conferred by this Act or otherwise unless and until—
  - (a) default has been made in payment of the principal money or interest or any part of it secured by the instrument of mortgage, and notice requiring payment

- of the amount the failure to pay which constituted the default under such instrument of mortgage has been served on the mortgagor and such default has continued for a space of 30 days from service of the notice; or
- (b) default has been made in the observance or fulfilment of some provision contained in the instrument of mortgage or implied by this or any other Act and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed and performed, and notice requiring the default to be remedied has been served on the mortgagor, and such default has continued for the space of 30 days from service of the notice.
- (2) A notice under this section may be in the approved form.
- (3) This section applies, despite any stipulation to the contrary and despite section 49, to mortgages made whether before or after the commencement of this Act, but only to the exercise of a power of sale arising upon or in consequence of a default occurring after the commencement of this Act.
- (4) A reference in any instrument of mortgage to the power of sale conferred on a mortgagee by any 1 or more of the Acts repealed by the *Land Title Act 1994* shall be construed as a reference to the power of sale conferred by this Act.
- (5) Nothing in this section applies to the exercise by a mortgagee of the power of sale conferred on a mortgagee under the Land Act.

#### **84A Exercise of power of sale in relation to disclaimed properties**

- (1) This section applies in relation to the mortgaged freehold property of a bankrupt that has been disclaimed by the trustee of the estate of the bankrupt under the *Bankruptcy Act 1966* (Cwlth), section 133(1) if—
- (a) for property in relation to which section 133(3) of that Act applies—the trustee has given notice of the disclaimer under section 133(3) of that Act; and

- (b) an application to a court for an order under section 133(9) of that Act in relation to the property—
    - (i) has not been made; or
    - (ii) has been finally dealt with by the court or withdrawn; and
  - (c) a court has not made an order in relation to the property under section 133(9) of that Act, other than an order vesting the property in the mortgagee.
- (2) Also, this section applies in relation to the mortgaged freehold property of a company that has been disclaimed by a liquidator of the company under the Corporations Act, section 568(1) if—
- (a) the liquidator has complied with section 568A of that Act in relation to the disclaimer; and
  - (b) the disclaimer is in effect under that Act; and
  - (c) an application to a court under section 568E or 568F of that Act in relation to the property—
    - (i) has not been made; or
    - (ii) has been finally dealt with by the court or withdrawn; and
  - (d) a court has not made an order in relation to the property under section 568F(1) of that Act, other than an order vesting the property in the mortgagee.
- (3) The disclaimer does not affect the right of the mortgagee to exercise the mortgagee's power of sale conferred by this Act or otherwise in relation to the property.
- (4) Despite section 84(1), the mortgagee may exercise the mortgagee's power of sale conferred by this Act or otherwise in relation to the property if the mortgagee has given notice, in the approved form, of the mortgagee's intention to exercise the power of sale to—
- (a) each person who has an interest in the property; and
  - (b) the registrar for recording in the land registry.

- (5) The mortgagee must not exercise the power of sale until 30 days after the last of the notices mentioned in subsection (4) has been given.
- (6) This section does not apply in relation to the exercise of a power of sale conferred on the mortgagee under the *Land Act 1994*.
- (7) In this section—  
*bankrupt* see the *Bankruptcy Act 1966* (Cwlth), section 5(1).  
*company* means a company registered under the Corporations Act.

## 85 Duty of mortgagee or receiver as to sale price

- (1) It is the duty of a mortgagee, including as attorney for the mortgagor, or a receiver acting under a power delegated to the receiver by a mortgagee, in the exercise of a power of sale conferred by the instrument of mortgage or by this or any other Act, to take reasonable care to ensure that the property is sold at the market value.
- (1A) Also, if the mortgage is a prescribed mortgage, the duty imposed by subsection (1) includes that a mortgagee or receiver must, unless the mortgagee or receiver has a reasonable excuse—
  - (a) adequately advertise the sale; and
  - (b) obtain reliable evidence of the property's value; and
  - (c) maintain the property, including by undertaking any reasonable repairs; and
  - (d) sell the property by auction, unless it is appropriate to sell it in another way; and
  - (e) do anything else prescribed under a regulation.Maximum penalty—
  - (a) if the contravention of duty relates only to paragraph (e)—20 penalty units; or
  - (b) otherwise—200 penalty units.

- (2) Within 28 days from completion of the sale, the mortgagee shall give to the mortgagor notice in the approved form.
- (3) The title of the purchaser is not impeachable on the ground that the mortgagee or receiver has committed a breach of any duty imposed by this section, but a person damnified by the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.
- (4) A mortgagee who, without reasonable excuse, fails to comply with subsection (2) commits an offence.

Maximum penalty—2 penalty units.

- (5) An agreement or stipulation is void to the extent that it purports to relieve, or might have the effect of relieving, a mortgagee or receiver from the duty imposed by this section.
- (6) Nothing in this section affects the operation of any rule of law relating to the duty of the mortgagee to account to the mortgagor.
- (7) Nothing in sections 83(1)(a), 89(3) and 92(2) affects the duty imposed by this section.
- (8) Nothing in this section affects the operation of a law of the Commonwealth, including, for example, the Corporations Act, section 420A.
- (9) This section applies to mortgages whether made before or after the commencement of this Act but only in relation to the exercise of a power of sale if—
  - (a) the exercise of the power arises upon or in consequence of a default, mentioned in section 84(1), that happens after the commencement of this Act; or
  - (b) the power is being exercised under section 84A(4).
- (10) In this section—

***prescribed mortgage*** means a mortgage of a kind prescribed under a regulation.

## **86 Effect of conveyance on sale**

- (1) A mortgagee exercising the power of sale conferred by this Act has, in the case of unregistered land, power by deed or instrument in writing to convey to and vest in the purchaser the property sold for all the estate (including the legal estate) and interest in it which the original mortgagor had power to dispose of freed from all estates, interests and rights to which the mortgage has priority, but subject to all estates, interests and rights which have priority to the mortgage.
- (2) A mortgagee exercising the power of sale conferred by this Act has, in the case of land the subject of an instrument of mortgage registered under the *Land Title Act 1994*, power to sell and, subject to any prior registered encumbrance, transfer the land mortgaged and all the interest in the land mortgaged of the mortgagor.
- (3) A conveyance on sale by a mortgagee, made after the commencement of this Act, shall be deemed to have been made in exercise of the power of sale conferred by this Act unless a contrary intention appears.
- (4) This section shall not apply to a transfer in the exercise of the power of sale conferred on a mortgagee under the Land Act or Mineral Resources Act.

## **87 Protection of purchasers**

- (1) Where a conveyance is made in exercise of the power of sale conferred by this Act the title of the purchaser shall not be impeachable on the ground—
  - (a) that no case had arisen to authorise the sale; or
  - (b) that due notice was not given; or
  - (c) that leave of the court, when so required, was not obtained; or
  - (d) whether the mortgage was made before or after the commencement of this Act, that the power was otherwise improperly or irregularly exercised;

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and a purchaser is not, either before or on conveyance, concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given or the power is otherwise properly and regularly exercised, but any person damnified by an unauthorised, or improper, or irregular exercise of power shall have a remedy in damages against the person exercising the power.

- (2) This section shall not apply to a transfer made in exercise of the power of sale conferred on a mortgagee under the Land Act or Mineral Resources Act, except that where, after the commencement of this Act, a transfer is so made the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, and the purchaser is not, either before or on conveyance, concerned to see whether a case has arisen to authorise the sale, but any person damnified by an unauthorised exercise of such power of sale shall have a remedy in damages against the person exercising the power.

## **88 Application of proceeds of sale**

- (1) Subject to this section, the money arising from sale, and which is in fact received by the mortgagee, shall be held by the mortgagee in trust to be applied by the mortgagee—
- (a) firstly, in payment of all costs, charges and expenses properly incurred by the mortgagee as incident to the sale, or any attempted sale, or otherwise; and
  - (b) secondly, in discharge of the mortgage money, interest and costs, and other money (if any) due under the mortgage; and
  - (c) thirdly, in payment of any subsequent mortgages or encumbrances;

and the residue (if any) of the money so received shall be paid to the person entitled to receive or entitled to give receipts for the proceeds of sale of the mortgaged property.

- (2) However, if the money arises from the sale of mortgaged freehold property that has been disclaimed under the *Bankruptcy Act 1966* (Cwlth), section 133(1) or the

Corporations Act, section 568(1), the residue of the money mentioned in subsection (1) must be paid into court.

- (3) The money that is in fact received by a mortgagee arising from sale in the exercise of the power conferred under the Mineral Resources Act must, subject to subsection (1)(a) and (b), be dealt with as provided under that Act.
- (4) The proceeds of sale arising from a sale by a mortgagee in the exercise of the power conferred by the Land Act shall be disposed of as provided in that Act.

## **89 Provisions as to exercise of power of sale**

- (1) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money.
- (2) The power of sale conferred by this Act does not affect the right of foreclosure.
- (3) The mortgagee shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act, or of any trust connected with it, or of any power or provision contained in the instrument of mortgage.
- (4) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the power may demand and recover from any person, other than a person having in the mortgaged property an estate, interest, lien, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title to the property, which a purchaser under the power of sale would be entitled to demand and recover from the person.

## **90 Mortgagee's receipts discharges etc.**

- (1) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in the mortgagee's mortgage, or arising under the



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mortgage, and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage or to see to the application of the money or securities so paid or transferred.

- (2) Money received by a mortgagee under the mortgagee's mortgage or from the proceeds of securities comprised in the mortgagee's mortgage shall be applied in like manner as in this Act directed respecting money received by the mortgagee arising from a sale under the power of sale conferred by this Act, but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

## **91 Amount and application of insurance money**

- (1) The amount of an insurance effected by a mortgagee against loss or damage by fire or otherwise under the power in that behalf conferred by this Act shall not exceed such amount as is specified in the mortgage, or, if no amount is specified, the full insurable value of the buildings upon the mortgaged land or the amount owing to the mortgagee in respect of the mortgage.
- (2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee in any of the following cases, namely—
  - (a) where there is a declaration in the instrument of mortgage that no insurance is required;
  - (b) where an insurance is kept up by or on behalf of the mortgagor in accordance with the instrument of mortgage;
  - (c) where the instrument of mortgage contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor with the consent of the mortgagee to the amount to which the mortgagee is by this Act authorised to insure.

- (3) All money received on an insurance of mortgaged property against loss or damage by fire or otherwise effected under this Act or on an insurance for the maintenance of which the mortgagor is liable under the instrument of mortgage, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.
- (4) If and so far as a contrary intention is not expressed in the instrument of mortgage, a mortgagee may require that all money received on an insurance of mortgaged property against loss or damage by fire, or otherwise effected under this Act, or on an insurance for the maintenance of which the mortgagor is liable under the instrument of mortgage, shall be applied in or towards the discharge of the mortgage money.
- (5) Despite subsection (4) where a mortgagee requires a mortgagor to effect, or consents to a mortgagor effecting, insurance for the reinstatement or replacement value of the mortgaged property, and the mortgagor so insures, the mortgagor may require that all money received or payable on such insurance be applied in reinstating or replacing the mortgaged property.
- (6) Any obligation of a mortgagor to insure or continue to insure mortgaged property on a reinstatement or replacement basis shall be suspended if, and for as long as, it ceases—
  - (a) to be possible to effect the reinstatement or replacement of the mortgaged property; or
  - (b) to be lawful to use the mortgaged property for a use to which, prior to such reinstatement or replacement, such property was being put; or
  - (c) to be lawful to use the mortgaged property for such use without the approval of the local government, or other authority having power to grant or withhold approval to such use, and such approval is withheld.
- (6A) But subsection (6) shall not relieve a mortgagor of an obligation of insuring mortgaged property against the risk of destruction or damage by fire to an extent not exceeding the

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current market value of such property as might be destroyed or damaged by fire.

- (7) This section applies to mortgages whether made before or after the commencement of this Act and shall have effect despite any stipulation to the contrary.

## **92 Appointment, powers, remuneration and duties of receiver**

- (1) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this Act shall not appoint a receiver until the mortgagee has become entitled to exercise the power of sale conferred by this or any other Act, but may then appoint such person as the mortgagee thinks fit to be receiver.
- (1A) However, for a mortgage registered under the Land Act or the Mineral Resources Act a mortgagee entitled to appoint a receiver may appoint a receiver at any time after the mortgagee has become entitled to enter upon and take possession of the land subject to the mortgage.
- (2) A receiver appointed under the powers conferred by this Act, shall be deemed to be the agent of the mortgagor, and the mortgagor shall be solely responsible for the receiver's acts or defaults unless the instrument of mortgage otherwise provides.
- (3) The receiver shall have power to demand and recover all the income of which the receiver is appointed receiver, by action or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts accordingly for the same, and to exercise any powers which may have been delegated to the receiver by the mortgagee under this Act.
- (4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.
- (5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee by writing.

- (6) The receiver shall be entitled to retain out of any money received by the receiver, for the receiver's remuneration, and in satisfaction of all costs, charges and expenses incurred by the receiver as receiver, a commission at such rate, not exceeding 5% on the gross amount of all money received, as is specified in the receiver's appointment, and if no rate is so specified, then at the rate of 5% on that gross amount, or at such other rate as the court thinks fit to allow, on application made by the receiver for that purpose.
- (7) The receiver shall, if so directed in writing by the mortgagee, insure to the extent (if any) to which the mortgagee might have insured, and keep insured against loss or damage by fire, or by storm and tempest out of the money received by the receiver, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.
- (8) Subject to this Act as to the application of insurance money, the receiver shall apply all money received by the receiver as follows, namely—
  - (a) in discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property;
  - (b) in keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right of which the receiver's is receiver;
  - (c) in payment of the receiver's commission, and of the premiums on fire, life, or other insurances (if any) properly payable under the instrument of mortgage or under this Act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee;
  - (d) in payment of the interest accruing due in respect of any principal money due under the mortgage;
  - (e) in or towards discharge of the principal money if so directed in writing by the mortgagee;

and shall pay the residue (if any) of the money received by the receiver to the person who, but for the possession of the receiver, would have been entitled to receive the income of

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which the receiver is appointed receiver, or who is otherwise entitled to the mortgaged property.

- (9) The appointment of a receiver or of a new receiver under this section shall be made by the mortgagee by writing in the approved form.

### **93 Effect of advance on joint account**

- (1) Where—

- (a) in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than 1 out of money, or as money, belonging to them on a joint account; or
- (b) a mortgage, or such an obligation, or such a transfer is made to more persons than 1, jointly;

the mortgage money, or other money or money's worth, for the time being due to those persons on the mortgage or obligation, shall, as between them, and the mortgage or obligor, be deemed to be and remain money or money's worth belonging to those persons on a joint account, and the receipt in writing of the survivors or last survivor of them, or of the personal representative of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, despite any notice to the payer of a severance of the joint account.

- (2) This section applies if and so far as a contrary intention is not expressed in the mortgage, obligation, or transfer, and has effect subject to the terms of the mortgage, obligation, or transfer, and to the provisions contained in the mortgage, obligation or transfer.
- (3) Where the Act (if any) under which the mortgage is registered provides for registration of a record of death or transmission by or upon death, this section shall have effect only upon such registration as is provided by that Act.

- (4) This section applies only to mortgages made or obligations created after the commencement of this Act.

## **94 Obligation to transfer instead of discharging mortgage**

- (1) Where a mortgagor is entitled to redeem the mortgagor shall because of this Act, have power to require the mortgagee, instead of discharging, and on the terms on which the mortgagee would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs, and the mortgagee shall because of this Act be bound to transfer accordingly.
- (2) The right of the mortgagor conferred by this section shall belong to and be capable of being enforced by each encumbrancee, or by the mortgagor, despite any intermediate encumbrance, but a requisition of an encumbrancee shall prevail over a requisition of the mortgagor, and as between encumbrancees a requisition of a prior encumbrancee shall prevail over a requisition of a subsequent encumbrancee.
- (3) This section shall not apply—
- (a) in the case of a mortgagee being or having been in possession; or
  - (b) in the case of a mortgage which contains a valid and enforceable covenant or condition in favour of the mortgagee in restraint of the trade or business of the mortgagor or any other collateral benefit or advantage in favour of the mortgagee.
- (4) This section applies to mortgages whether made before or after the commencement of this Act, and shall have effect despite any stipulation to the contrary.

## **95 Relief against provision for acceleration of payment**

- (1) Where default has taken place—
- (a) in payment of any instalment due of principal or interest under a mortgage; or

(b) in the observance of any covenant or obligation in a mortgage;

and under the terms of the mortgage an accelerated sum may or has, because of such default or of the exercise upon such default of any option or election conferred by the mortgage, become due and payable, the mortgagor shall be entitled to relief under this section.

(2) A mortgagor who, at any time before sale by the mortgagee or before the commencement of proceedings to enforce the rights of the mortgagee—

(a) performs the covenant or obligation in respect of which the default has taken place; and

(b) tenders to the mortgagee, who accepts payment of, the amount of the instalment in respect of which the default has taken place and any reasonable expenses incurred by the mortgagee;

is relieved from the consequences of such default.

(3) The mortgagor, in any proceedings brought to enforce the rights of the mortgagee or brought by the mortgagor, may—

(a) upon undertaking to the court to perform any such covenant or obligation; and

(b) upon tender or payment into court of such instalment;

apply to the court for relief from the consequences of such default, and the court may grant or refuse relief (whether by staying proceedings brought by the mortgagee or otherwise) as the court, having regard to the conduct of the parties and to all other circumstances, thinks fit, and in the case of relief may grant it on such terms (if any) as to payment of any reasonable expenses of the mortgagee and as to the costs or otherwise as the court in the circumstances thinks fit.

(4) Where in granting relief under subsection (3) the court stays proceedings for the enforcement of the rights of the mortgagee, the court may on application remove the stay if default takes place in carrying out the undertaking referred to in subsection (3).

- (5) This section applies to mortgages of any property whether made before or after the commencement of this Act, but only to a default occurring after the commencement of this Act, and shall have effect despite any stipulation to the contrary.
- (6) In this section—  
*accelerated sum* means the whole or part of principal or interest secured by the mortgage other than the instalment referred to in subsection (1)(a).

## **96 Mortgagee accepting interest on overdue mortgage not to call up without notice**

- (1) Where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, and the mortgagee has accepted interest on the sum for any period (not being less than 3 months) after default has been so made, then so long as the mortgagor performs and observes all covenants expressed or implied in the mortgage, other than the covenant for payment of the principal sum, the mortgagee shall not be entitled to take proceedings to compel payment of the sum, or for foreclosure, or to enter into possession, or to exercise any power of sale, without giving to the mortgagor 3 months' notice of the mortgagee's intention so to do.
- (2) No purchaser from the mortgagee exercising the mortgagee's power of sale shall be concerned to inquire whether the mortgagee has accepted interest after such default.
- (3) This section applies to mortgages whether made before or after the commencement of this Act, but only where the default has occurred after such commencement, and shall have effect despite any stipulation to the contrary.

## **97 Interest of mortgagor not seizable on judgment for mortgage debt**

- (1) On a judgment of any court for a debt secured by mortgage of any property, the interest of the mortgagor in that property shall not be taken in execution.



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- (2) This section applies to execution on a judgment whether obtained before or after the commencement of this Act, and applies despite any stipulation to the contrary in the mortgage.

## **98 Abolition of consolidation of mortgages**

- (1) A mortgagor seeking to redeem any 1 mortgage is entitled to do so without paying any money due under any separate mortgage made by the mortgagor, or by any person through whom the mortgagor claims, solely on property other than that comprised in the mortgage which the mortgagor seeks to redeem.
- (2) This section has effect despite any stipulation to the contrary.
- (3) This section applies only where the mortgages are or 1 of them is made after the commencement of this Act.

## **99 Sale of mortgaged property in action for redemption or foreclosure**

- (1) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by the person either for redemption alone, or for sale alone, or for sale or redemption in the alternative.
- (2) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and, even though—
- (a) any other person dissents; or
  - (b) the mortgagee or any person so interested does not appear in the action;

and without allowing any time for redemption or for payment of any mortgaged money, may direct a sale of the mortgaged property, on such terms, subject to subsection (3), as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale and to secure performance of the terms.

- (3) In an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.
- (4) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of encumbrances.
- (5) This section applies to actions brought whether before or after the commencement of this Act.
- (6) In this section—  
*mortgaged property* includes the estate or interest which a mortgagee would have had power to convey if the statutory power of sale were applicable.
- (7) For the purposes of this section the court may, in favour of a purchaser, make an order vesting the mortgaged property, or appoint a person to convey the property, subject or not to any encumbrance, as the court may think fit or, in the case of an equitable mortgage, may create and vest a legal estate in the mortgagee to enable the mortgagee to carry out the sale as if the mortgage had been made by deed or instrument by way of legal mortgage.

## **100 Realisation of equitable charges by the court**

- (1) Where an order for sale is made by the court in reference to an equitable mortgage of land the court may, in favour of a purchaser, make an order vesting the land or may appoint a person to convey the land or create and vest in the mortgagee a legal estate in the land to enable the mortgagee to carry out the sale, as the case may require, in like manner as if the mortgage had been created by instrument or deed by way of legal mortgage, but without prejudice to any encumbrance having priority to the equitable mortgage unless the encumbrancee consents to the sale.

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- (2) This section applies to equitable mortgages whether made or arising before or after the commencement of this Act.

**101 Facilitation of redemption in case of absent or unknown mortgagees**

- (1) When any person entitled to receive or alleged to have received payment of any money secured by mortgage is out of the jurisdiction, cannot be found, or is unknown, or it is uncertain who is so entitled, the court, upon the application of the person entitled to redeem the mortgaged premises, may order the amount of such debt to be ascertained in such manner as the court thinks fit, and direct the amount so ascertained and not paid (if any) to be paid into court.
- (2) A certificate of the registrar of the court that such payment was directed and has been made or that no amount remains payable under the mortgage, shall operate to discharge the mortgage debt, but, as between the mortgagor and the person so entitled to receive payment, any amount which is eventually shown by the person entitled to the mortgage debt to have been in fact due or payable over and above the amount so paid shall continue to be a debt due under the mortgage.
- (3) The court shall order the amount so paid into court to be paid to the person entitled, upon the application of such person, and on proof that the deed or instrument of mortgage, and all the title deeds which were delivered by the mortgagor to the mortgagee on executing the same, or in connection with the execution, have been delivered up to the person by whom the amount was so paid into court, or the person's executors, administrators, or assigns, or have been otherwise satisfactorily accounted for.
- (4) The certificate referred to in subsection (2)—
- (a) shall, in the case of a mortgage of unregistered land, upon registration of the certificate under this Act operate in favour of a purchaser of the land as a discharge of the land as from the date of the certificate and as a reconveyance of the estate and interest of the mortgagee of and in the mortgaged property to the person who at

- the date of the certificate is entitled to the equity of redemption according to the person's interest in the mortgaged property; and
- (b) shall, in the case of a mortgage of registered land, be registrable in the manner prescribed under the *Land Title Act 1994* and upon registration shall have effect as a discharge under that Act; and
  - (c) shall, in the case of a mortgage registered under the Land Act, be registered in the manner of a discharge of mortgage under that Act and upon registration shall have effect accordingly; and
  - (d) shall, in the case of a mortgage registered under the Mineral Resources Act, be delivered to the warden and have effect under that Act as a certificate signed by the mortgagee to the effect that the debt secured has been paid or discharged.
- (5) For the purpose of effecting registration under subsection (4)(b), the registrar may dispense with production of a certificate of title or other instrument and with the publication of any notice or the doing of any other act required by the *Land Title Act 1994*.
- (6) Nothing in this section affects the *Public Trustee Act 1978*, section 61.

## Part 8 Leases and tenancies

### Division 1 Rights, powers and obligations

#### 102 Abolition of *interesse termini* as to reversionary leases and leases for lives

- (1) The doctrine of *interesse termini* is abolished.
- (2) As from the commencement of this Act all terms of years absolute shall, whether the interest is created before or after such commencement, be capable of taking effect at law or in

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equity, according to the estate interest or powers of the grantor, from the date fixed for commencement of the term, without actual entry.

- (3) A term, at a rent or granted in consideration of a fine, limited after the commencement of this Act to take effect more than 21 years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void, but this subsection does not apply to any term taking effect in equity under a settlement, or created out of an equitable interest under a settlement, or under an equitable power for mortgage, indemnity or other like purposes.
- (4) Nothing in subsections (1) and (2) prejudicially affects the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions, or, as respects terms or interests created before the commencement of this Act, operates to vary any statutory or other obligations imposed in respect of such terms or interests.
- (5) Nothing in this Act affects the rule of law that a legal term, whether or not being a mortgage term, may be created to take effect in reversion expectant on a longer term, which rule is confirmed.
- (6) In this section—  
*term of years* includes a term for less than a year, or for a year or years and a fraction of a year or from year to year.

## 104 Voluntary waste

- (1) A lessee shall not commit voluntary waste.
- (2) Nothing in subsection (1) applies to any lease without impeachment of waste, or affects any licence or other right to commit waste.
- (3) A lessee who infringes subsection (1) is liable in damages to the reversioner but this section imposes no criminal liability.
- (4) This section does not affect the operation of any event which may determine a tenancy at will.

## 105 Obligations of lessees

- (1) Subject to this Act and to the provisions of the lease, in every lease of land made after the commencement of this Act there shall, unless otherwise agreed, be implied the following obligations by the lessee with the lessor—
  - (a) **To pay rent**—that the lessee will pay the rent reserved at the time mentioned in the lease, but, if the demised premises or any part of the premises shall at any time during the continuance of the lease be destroyed or damaged by fire without fault on the part of the lessee, flood, lightning, storm, or tempest so, in any such event as to render the same unfit for the occupation and use of the lessee, then and so often as the same shall happen, the rent reserved, or a proportionate part of the rent, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part of the rent shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee;
  - (b) **To keep in repair**—that the lessee will, at all times during the continuance of the lease, keep and, at the termination of the lease, yield up the demised premises in good and tenantable repair, having regard to their condition at the commencement of the lease, damage from fire, flood, lightning, storm and tempest, and reasonable wear and tear excepted, but this obligation is not implied in the case of a lease for a term of 3 years or for any less period of premises for the purpose or principally for the purpose of human habitation.
- (2) In the case of a lease by deed any obligation implied by this section shall take effect as a covenant.

## 106 Obligations in short leases

- (1) In a lease of premises for a term of 3 years or for any less period there is an obligation—

- (a) on the part of the lessor, in the case of a lease of premises for the purpose or principally for the purpose of human habitation, to provide and maintain the premises or such part as is let for such purpose in a condition reasonably fit for human habitation; and
  - (b) on the part of the lessee—
    - (i) to care for the premises in the manner of a reasonable tenant; and
    - (ii) to repair damage caused by the lessee or by persons coming on the premises with the lessee's permission.
- (2) This section applies—
- (a) to leases made after the commencement of this Act; and
  - (b) despite any other provision of this Act or any agreement to the contrary.

## 107 Powers in lessor

Unless otherwise agreed, in every lease of land made after the commencement of this Act there shall be implied the following powers in the lessor—

- (a) **To enter and view**—that the lessor may, by the lessor, or the lessor's agents, during the term at a reasonable time of the day upon giving to the lessee 2 days previous notice in writing of the lessor's intention to enter, enter upon the demised premises and view the state of repair of the premises, and may serve upon the lessee or leave at the lessee's last or usual place of abode in the State, or upon the demised premises, a notice in writing of any defect, requiring the lessee, within a reasonable time, to repair same in accordance with any covenant or obligation expressed or implied in the lease;
- (b) **To enter and repair**—that in default of the lessee repairing any defect according to notice, the lessor may from time to time enter the premises and execute the required repairs;

- (c) **To enter and carry out requirements of public authority, and repair under the lease**—that the lessor may, by the lessor, or the lessor’s agents, at all reasonable times during the term, with workpersons and others and all necessary materials and appliances, enter upon the demised premises or any part of the premises, for the purpose of complying with the terms of any present or future legislation affecting the premises, and of any notices served upon the lessor or lessee by the licensing, local, municipal, or other competent authority, involving the destruction of noxious weeds or animals, or the carrying out of repairs, alterations, or works of a structural character, which the lessee may not be bound, or if bound may neglect, to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease;
- (ca) However, such destruction, repairs, alterations, and works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee;
- (d) **To re-enter and take possession**—that, in case the rent or any part of the rent is in arrear for the space of 1 month (although no formal demand therefor has been made), or in case default is made in the fulfilment of any covenant, obligation, condition, or stipulation, whether expressed or implied in the lease, and on the part of the lessee to be performed or observed, and such default is continued for the space of 2 months, or in case the repairs required by such notice are not completed within the time specified in the lease, the lessor may re-enter upon the demised premises (or any part of the premises in the name of the whole) and determine the estate of the lessee in the premises, but without releasing the lessee from liability in respect of the breach or non-observance of any such covenant, obligation, condition, or stipulation.



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## **109 Short forms of covenants and obligations of lessees**

- (1) Whenever in any lease which expressly refers to schedule 3 there is used the form of words contained in column 1 and distinguished by a number in it, such form of words shall imply an obligation by the lessee or the lessor with the lessor or the lessee in the terms contained in column 2, and distinguished by the corresponding number.
- (2) There may be introduced into or annexed to any form in column 1 any addition to, exception from, or qualification of the same, or any words in such column may be struck out or omitted, and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission, shall be taken to be added to the corresponding form in column 2.
- (3) In the case of a lease by deed any obligation implied by this section shall take effect as a covenant.
- (4) This section applies only to leases made after the commencement of this Act.

## **110 Cases in which statutory obligations or powers not implied**

Where on the face of any lease it appears that any of the short forms of words contained in schedule 3, column 1 has been struck out, the covenant, obligation or proviso represented by such short form of words shall not be implied in the lease by sections 105 and 109.

## **111 Lessee to give notice of ejectment to the lessor**

Every lessee to whom there is delivered any writ or plaint for recovery or for delivery of land leased to or held by the lessee, or to whose knowledge any such writ or plaint comes, shall immediately give notice to the lessor or the lessor's agent, and, if the lessee fails to do so, the lessee shall be liable to the person of whom the lessee holds the land for any damages sustained by that person because of the failure, to be recovered by action in any court of competent jurisdiction.

## **112 Provisions as to covenants to repair**

- (1) Damages for a breach of a covenant, obligation or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant, obligation or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant, obligation, or agreement, and in particular no damage shall be recovered for a breach of any such covenant, obligation, or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been or be pulled down, or such structural alterations made to the premises as would render valueless the repairs covered by the covenant, obligation, or agreement.
- (2) A right of re-entry or forfeiture for a breach of any such covenant, obligation, or agreement shall not be enforceable, by action or otherwise, unless the lessor proves that the fact that such a notice as is required by section 124 had been served on the lessee was known either—
  - (a) to the lessee; or
  - (b) to an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee; or
  - (c) to the person who last paid the rent due under the lease either on the person's own behalf or as agent for the lessee or under-lessee;

and that a time reasonably sufficient to enable the repairs to be executed had elapsed since the time when the fact of the service of the notice came to the knowledge of any such person.

- (3) Where a notice as referred to in subsection (2) has been sent by post in a registered letter addressed to a person at the person's last known place of abode in or out of the State, and that letter is not returned through the post office undelivered, then, for the purposes of subsection (2), that person shall be

deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

- (4) This section applies whether the lease was created before or after the commencement of this Act.

## **Division 2                      Surrenders, assignments and waiver**

### **113      Head leases may be renewed without surrendering under-leases**

- (1) In case any lease is duly surrendered in order to be renewed, and a new lease made and executed by the head landlord, such new lease shall without a surrender of all or any of the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived out of that lease had been likewise surrendered at or before the taking of such new lease.
- (2) Every person in whom any estate for life, or lives, or for years, is from time to time vested because of such new lease and the person's executors and administrators shall be entitled to the rents, covenants, obligations, and duties, and have like remedy for the recovery of the rents, covenants, obligations and duties, and the under-lessees shall hold and enjoy the lands in the respective under-leases comprised, as if the original leases out of which the respective under-leases are derived had been still kept on foot and continued.
- (3) The head landlord shall be entitled to the same remedy by entry in and upon the lands comprised in any such under-lease for the rents and duties reserved by such new lease (so far as the same do not exceed the rents and duties reserved in the lease out of which such under-lease was derived) as the head landlord would have had in case such former lease had been still continued or as the head landlord would have had in case the respective under-leases had been renewed under such new principal lease.

- (4) For a registered lease of registered land, this section is subject to the *Land Title Act 1994*.

## **114 Provision as to attornments by tenants**

- (1) Where land is subject to a lease—
- (a) the conveyance of a reversion in the land expectant on the determination of the lease; or
  - (b) the creation or conveyance of a rent charge to issue or issuing out of the land;

shall be valid without any attornment of the lessee.

- (1A) Nothing in subsection (1)—
- (a) affects the validity of any payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to the lessee by the person entitled under the conveyance or grant; or
  - (b) renders the lessee liable for any breach of covenant to pay rent, on account of the lessee's failure to pay rent to the person entitled under the conveyance or grant before such notice is given to the lessee.
- (2) An attornment by the lessee in respect of any land to a person claiming to be entitled to the interest in the land of the lessor, if made without the consent of the lessor, shall be void.
- (2A) Subsection (2) does not apply to an attornment—
- (a) made under a judgment of a court of competent jurisdiction; or
  - (b) to a mortgagee, by a lessee holding under a lease from the mortgagor where the right of redemption is barred; or
  - (c) to any person rightfully deriving title under the lessor.

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**115 When reversion on a lease is surrendered etc. the next estate to be deemed the reversion**

- (1) When the reversion expectant on a lease of land made either before or after the commencement of this Act is surrendered or merges after the commencement of this Act, the estate which for the time being confers as against the lessee under the lease the next vested right to the land, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the reversion as, but for the surrender or merger of the lease, would have subsisted, be deemed the reversion expectant on the lease.
- (2) This section is subject, in the case of a registered lease of registered land, to the provisions of the *Land Title Act 1994*.

**116 Apportionment of conditions on severance**

- (1) Despite the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and despite the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised in the lease, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term on which each severed part is reversionary, or the term in the part of the land as to which the term has not been surrendered, or has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.
- (2) In this section—  
*right of re-entry* includes a right to determine the lease by notice to quit or otherwise, but where the notice is served by a person entitled to a severed part of the reversion so that it extends to part only of the land demised, the lessee may within 1 month determine the lease in regard to the rest of the

land by giving to the owner of the reversionary estate in it a counter notice expiring at the same time as the original notice.

- (3) This section applies to—
- (a) leases made after the commencement of this Act; and
  - (b) leases made before the commencement of this Act where the reversionary estate in the lands comprised in the lease is severed or there is an avoidance or cesser of the term as mentioned in this section after the commencement of this Act.

### **117 Rent and benefit of lessee's covenants to run with the reversion**

- (1) Rent reserved by a lease, and the benefit of every covenant, obligation, or provision contained in the lease, touching and concerning the land, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition contained in the lease, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part of the reversionary estate, immediately expectant on the term granted by the lease, despite severance of that reversionary estate, and without prejudice to any liability affecting a covenantor or the covenantor's estate.
- (2) Any such rent, covenant, obligation, or provision shall be capable of being recovered, received, enforced, and taken advantage of, by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.
- (3) Where that person becomes entitled by conveyance or otherwise, such rent, covenant, obligation, or provision may be recovered, received, enforced or taken advantage of by the person even though the person becomes so entitled after the condition of re-entry or forfeiture has become enforceable, but this subsection does not render enforceable any condition of re-entry or other condition waived or released before such person becomes entitled.
- (4) This section applies to—

- (a) leases made after the commencement of this Act; and
- (b) leases made before the commencement of this Act, but with respect only to rent accruing due after the commencement of this Act and to the benefit of a condition of re-entry or forfeiture for a breach committed after the commencement of this Act of any covenant, condition, obligation or provision contained in the lease.

### **118 Obligation of lessor's covenants to run with reversion**

- (1) The obligation under a condition or of a covenant or other obligation entered into by a lessor touching and concerning the land shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts of the reversionary estate, despite severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise, and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation may be taken advantage of and enforced against any person so entitled.
- (2) This section applies to—
  - (a) leases made after the commencement of this Act; and
  - (b) leases made before the commencement of this Act so far only as relates to breaches of covenant committed after the commencement of this Act.
- (3) This section takes effect without prejudice to any liability affecting a covenantor or the covenantor's estate.

### **119 Waiver of a covenant in a lease**

- (1) Where any actual waiver by a lessor or the persons deriving title under the lessor of the benefit of any covenant, obligation, or condition in any lease is proved to have taken

place in any particular instance, such waiver shall not be deemed to extend to any instance, or to any breach of covenant, obligation, or condition save that to which such waiver specially relates, nor operate as a general waiver of the benefit of any such covenant, obligation, or condition.

- (2) Unless a contrary intention appears, this section applies and extends to waivers effected after 28 December 1867.

## **120 Effect of licences granted to lessees**

- (1) Where a licence is granted to a lessee to do any act, the licence, unless otherwise expressed, extends only—
- (a) to the permission actually given; or
  - (b) to the specific breach of any provision or covenant referred to; or
  - (c) to any other matter specifically authorised to be done by the licence;

and the licence does not prevent any proceeding for any subsequent breach unless otherwise specified in the licence.

- (2) Despite any such licence—
- (a) all rights under covenants, obligations, and powers of re-entry contained in the lease remain in full force and are available as against any subsequent breach of covenant, obligation, condition or other matter not specifically authorised or waived, in the same manner as if no licence had been granted; and
  - (b) the condition or right of entry remains in force in all respects as if the licence had not been granted, save in respect of the particular matter authorised to be done.
- (3) Where in any lease there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted—
- (a) to any 1 of 2 or more lessees to do any act, or to deal with the lessee's equitable share or interest; or



- (b) to any lessee, or to any 1 of 2 or more lessees to assign or underlet part only of the property, or to do any act in respect of part only of the property;

the licence does not operate to extinguish the right of entry in case of any breach of covenant, obligation, or condition by the co-lessees of the other shares or interests in the property, or by the lessee or lessees of the rest of the property (as the case may be), in respect of such shares or interests or remaining property, but the right of entry remains in force in respect of the shares, interests or property not the subject of the licence.

- (4) This section applies to licences granted after 28 December 1867.

## **121 Provisions as to covenants not to assign etc. without licence or consent**

- (1) In all leases whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against assigning, underletting, charging or parting with the possession of premises leased or any part of the premises, without licence or consent, such covenant, condition, or agreement shall—
- (a) despite any express provision to the contrary, be deemed to be subject—
- (i) to a proviso to the effect that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the licence or consent; and
- (ii) if the lease is for more than 40 years and is made in consideration wholly or partially of the erection, or the substantial improvement, addition, or alteration of buildings—to a proviso to the effect that in the case of any assignment, underletting, charging, or parting with the possession (whether by the holders of the lease or any under-lessee whether immediate

or not) effected more than 7 years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within 6 months after the transaction is effected; and

- (b) unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of the licence or consent, but this proviso does not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or consent.
- (2) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against the making of improvements without licence or consent, such covenant, condition, or agreement shall be deemed, despite any express provision to the contrary, to be subject to the proviso that the licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right to require as a condition of the licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor, and of any legal or other expenses properly incurred in connection with the licence or consent nor in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of the licence or consent, where such a requirement would be reasonable, an undertaking on the part of the lessee to reinstate the premises in the condition in which they were before the improvement was executed.
- (3) In all leases, whether made before or after the commencement of this Act, containing a covenant, condition, or agreement against the alteration of the user of the leased premises without licence or consent such covenant, condition, or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, despite any express provision to the contrary, to be subject to a proviso

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that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of the licence or consent, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor and of any legal or other expenses incurred in connection with the licence or consent.

- (4) Where a dispute as to the reasonableness of any such sum has been determined by a court of competent jurisdiction, the lessor shall be bound to grant the licence or consent on payment of the sum so determined to be reasonable.

## **122 Involuntary assignment no breach of covenant**

Neither the assignment nor the underletting of any lease by the trustee of a bankrupt, or by the liquidator on behalf of a company (other than a liquidator in a voluntary winding up of a solvent company), nor the sale of any lease under an execution, nor the bequest of a lease shall be deemed to be a breach of a covenant, condition, or agreement against the assigning, underletting, parting with the possession, or disposing of the land leased.

## **Division 3 Relief from forfeiture**

### **123 Definitions for div 3**

In this division—

*lease* includes an original or derivative under-lease, also a grant at a fee farm rent, or securing a rent by condition, and an agreement for a lease where the lessee has become entitled to have the lease granted.

*lessee* includes an original or derivative under-lessee, a grantee under such a grant, a grantee's executors, administrators, and assigns, a person entitled under such an

agreement, and the executors, administrators, and assigns of a lessee.

*lessor* includes an original or derivative under-lessor, such a grantor, a person bound to grant a lease under such an agreement, and the executors, administrators, and assigns of a lessor.

*proceedings* include an application commenced by originating summons.

*under-lease* includes an agreement for an under-lease where the under-lessee has become entitled to have the under-lease granted.

*under-lessee* includes any person deriving title through or from an under-lessee.

### **123A Application of div 3**

This division does not apply to leases from the State of land held from the State under the Coal Mining Act, Land Act, Mineral Resources Act or Housing Act, but does apply to under-leases from the holder of such land.

### **124 Restriction on and relief against forfeiture**

- (1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, obligation, condition or agreement (express or implied) in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice—
  - (a) specifying the particular breach complained of; and
  - (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
  - (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same;

and the lessee fails within a reasonable time after service of the notice to remedy the breach, if it is capable of remedy, and, where compensation in money is required, to pay

reasonable compensation to the satisfaction of the lessor for the breach.

- (2) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, or has re-entered without action the lessee may, in the lessor's action (if any) or in proceedings instituted by the lessee, apply to the court for relief, and the court, having regard to the proceedings and conduct of the parties under subsection (1), and to all the other circumstances, may grant or refuse relief, as it thinks fit, and in case of relief may grant the same on such terms (if any) as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court in the circumstances of each case thinks fit.

- (3) The making of an application under this section shall not of itself be construed as an admission on the part of the lessee—

- (a) that any such notice as is mentioned in subsection (1) has been served by the lessor; or
- (b) that any such breach as is mentioned in subsection (1) has occurred or that any right of or cause for re-entry or forfeiture has accrued or arisen;

and the court may, if it thinks fit, grant relief without making a finding that, or arriving at a final determination whether, any such notice has been served, or any such breach has occurred, or that any such right has accrued or cause arisen.

- (4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease under the directions of any Act of Parliament.
- (5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant or obligation shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

- (6) This section does not extend—

- (a) to any lease or tenancy for a term of 1 year or less; or

- (b) to a covenant, condition, or agreement against the assigning, underletting, parting with the possession or disposing of the land leased where the breach occurred before the commencement of this Act; or
  - (c) to a condition for forfeiture on the taking in execution of the lessee's interest in any lease of—
    - (i) agricultural or pastoral land; or
    - (ii) mines or minerals; or
    - (iii) a house used or intended to be used as licensed premises under the *Liquor Act 1992*; or
    - (iv) a house let as a dwelling house; or
    - (v) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor or to any person holding under the lessor; or
  - (d) in case of a mining lease—to a covenant, condition, or agreement for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines, or other things, or to enter or inspect the mine or the workings of the mine; or
  - (e) to a condition for forfeiture on the taking in execution of the lessee's interest in any lease (other than a lease mentioned in paragraph (c)) after the expiration of 1 year from the date of taking in execution, provided the lessee's interest be not sold within such 1 year.
- (6A) But if the lessee's interest be sold within such 1 year this section shall extend and be applicable to such condition for forfeiture.
- (7) The rights and powers conferred by this section are in addition to and not in derogation of any right to relief or power to grant relief had apart from this section.
- (8) The notice mentioned in this section shall be in the approved form.

- (9) This section applies to leases made either before or after the commencement of this Act, and shall have effect despite any stipulation to the contrary.

## **125 Power of court to protect under-lessee on forfeiture of superior leases**

- (1) Where a lessor is proceeding, by action or otherwise, to enforce a right of re-entry or forfeiture, under any covenant, proviso, or stipulation in a lease made either before or after the commencement of this Act or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease, or any part of any estate or interest in the property, make an order staying any such action or other proceeding on such terms as to the court may seem just, and vesting, for the whole term of the lease, or any less term, the property comprised in the lease or any part of any estate or interest in the property, in any person entitled as under-lessee to any estate or interest in such property, upon such conditions as to execution of any deed or other document, payment of proper and reasonable rent, costs, expenses, damages, compensation, giving security, or otherwise as the court in the circumstances of each case, and having regard to the consent or otherwise of the lessor to the creation of the estate or interest claimed by the under-lessee, thinks fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to the under-lessee for a larger area of land or for any longer term than the under-lessee had under the original under-lease.
- (2) Any such order may be made in proceedings brought for the purpose by the person claiming as under-lessee or, where the lessor is proceeding by action or otherwise in the court, may be made in such proceeding.

## **126 Costs and expenses**

- (1) A lessor shall be entitled to recover as a debt due to the lessor from a lessee, and in addition to damages (if any), all

reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under this Act.

- (2) The lessor shall be so entitled to recover whether the lessee has or has not rendered forfeiture unenforceable against the lessee under section 124(2).

## **127 Relief against notice to effect decorative repairs**

- (1) After a notice is served on a lessee relating to the internal decorative repairs to a house or other building, the lessee may apply to the court for relief, and if, having regard to all the circumstances of the case (including in particular the length of the lessee's term or interest remaining unexpired), the court is satisfied that the notice is unreasonable, it may, by order, wholly or partially relieve the lessee from liability for such repairs.
- (2) This section does not apply—
  - (a) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed; or
  - (b) to any matter necessary or proper—
    - (i) for putting or keeping the property in a sanitary condition; or
    - (ii) for the maintenance or preservation of the structure; or
  - (c) to any statutory liability to keep a house in all respects reasonably fit for human habitation; or
  - (d) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term.



- (3) This section applies whether the notice is served before or after the commencement of this Act, and has effect despite any stipulation to the contrary.
- (4) The rights and powers conferred by this section are in addition to and not in derogation of any right to relief or power to grant relief had apart from this section.

## 128 Relief against loss of lessee's option

- (1) In this section—
  - (a) a reference to an option contained in a lease is a reference to a right on the part of the lessee to require the lessor—
    - (i) to sell, or offer to sell, to the lessee the reversion expectant on the lease; or
    - (ii) to grant, or offer to grant, to the lessee a renewal or extension of the lease, or a further lease, of the demised premises or a part of the demised premises, whether the right is conferred by the lease or by an agreement collateral to the lease; and
  - (b) a reference to a breach by a lessee of the lessee's obligations under a lease containing an option is a reference to a breach of those obligations by an act done or omitted to be done before or after the commencement of this Act in so far as the act or omission would constitute a breach of those obligations if there were no option contained in the lease.
- (2) This section applies to and in respect of leases granted before or after the commencement of this Act and options contained in such leases, and has effect despite any stipulation to the contrary.
- (3) In this section—

***prescribed notice*** means a notice in writing that—

  - (a) specifies an act or omission; and

- (b) states that, subject to any order of the court under subsection (6), a lessor giving the notice proposes to treat that act or omission as having precluded a lessee on whom the notice is served from exercising an option contained in the lease.
- (4) Where an act or omission that constituted a breach by a lessee of the lessee's obligations under a lease containing an option would, but for this section, have had the effect of precluding the lessee from exercising the option, the act or omission shall be deemed not to have had that effect where the lessee purports to exercise the option unless, during the period of 14 days next succeeding the purported exercise of the option, the lessor serves on the lessee prescribed notice of the act or omission and—
  - (a) an order for relief against the effect of the breach in relation to the purported exercise of the option is not sought from the court before the expiration of the period of 1 month next succeeding service of the notice; or
  - (b) where such relief is so sought—
    - (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting relief; or
    - (ii) where relief is granted upon terms to be complied with by the lessee before compliance by the lessor with the order granting relief, the lessee fails to comply with those terms within the time stipulated by the court for the purpose.
- (5) Relief referred to in subsection (4) may be sought—
  - (a) in proceedings instituted in the court for the purpose; or
  - (b) in proceedings in the court in which—
    - (i) the existence of an alleged breach by the lessee of the lessee's obligations under the lease; or
    - (ii) the effect of the breach from which relief is sought; is in issue.

- (6) The court may, in proceedings in which relief referred to in subsection (4) is sought—
- (a) make such orders (including orders affecting an assignee of the reversion) as it thinks fit for the purpose of granting the relief sought; or
  - (b) refuse to grant the relief sought.
- (7) The court may, in proceedings referred to in subsection (6), take into consideration—
- (a) the nature of the breach complained of; and
  - (b) the extent to which, at the date of the institution of the proceedings, the lessor was prejudiced by the breach; and
  - (c) the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice; and
  - (d) the rights of persons other than the lessor and the lessee; and
  - (e) the operation of subsection (9); and
  - (f) any other circumstances considered by the court to be relevant.
- (8) The court—
- (a) may make an order under subsection (6) on such terms as to costs, damages, compensation or penalty, or on such other terms, as the court thinks fit; and
  - (b) may make any consequential or ancillary order it considers necessary to give effect to an order made under that subsection.
- (9) Subject to any order of the court and to subsections (10) and (11)—
- (a) where—
    - (i) an option is contained in a lease; and
    - (ii) the lessee exercises, or purports to exercise, the option; and

(iii) the lease would, but for this paragraph, expire within the period of 14 days after the exercise, or purported exercise, of the option;

the lease shall be deemed to continue in force until the expiration of that period; and

(b) where—

(i) a prescribed notice is duly served on a lessee; and

(ii) the lease in respect of which the notice is served would, but for this paragraph, expire within the period of 1 month referred to in subsection (4)(a);

the lease shall be deemed to continue in force until the expiration of that period; and

(c) where, in relation to a lease continued in force under paragraph (b), relief referred to in subsection (4) is sought by a lessee, the lease shall, subject to subsections (10) and (11) be deemed to continue in force until—

(i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting the relief; or

(ii) effect is given to orders made by the court in granting that relief in so far as they affect the lessor or relate to an assurance to the lessee.

(10) Subsection (9)(c)—

(a) does not apply to or in respect of a lease that, but for that paragraph, would continue in force for a period longer than the period for which it is, by the operation of that paragraph, continued in force; and

(b) does not, where a lessee fails to comply with terms imposed upon the lessee under subsection (8)(a), operate to continue the lease in force beyond the time of that failure by the lessee.

(11) Where, under subsection (9), a lease continues in force after the day on which, but for that subsection, it would expire—

- (a) the lease so continues in force subject to the provisions, stipulations, covenants, conditions and agreements in the lease (other than those relating to the term and the option contained in the lease) but without prejudice to any rights or remedies of the lessor or lessee in relation to the lease; and
  - (b) the lessee, if the lease is of registered land and the lessee is in possession of the leased premises, has the protection given by the *Land Title Act 1994* to—
    - (i) if the lessee's interest in the lease is held by the lessee as a registered proprietor—a registered proprietor; or
    - (ii) if the lease is an unregistered short lease (within the meaning of the *Land Title Act 1994*)—the interest of a lessee under a short lease.
- (12) Subject to subsection (13), where, under an option contained in a lease continued in force under subsection (9), the lease is renewed or a new lease is granted, the period during which the lease was so continued in force shall be deemed to be part of the term for which the lease was renewed or the new lease granted, and any lease granted under an exercise of the option shall be expressed to have commenced when the lease containing the option would, but for subsection (9), have expired.
- (13) Subsection (12) does not apply to or in respect of a lease that stipulates for the commencement of any lease granted under an exercise of the option contained in the lease on a day that is later than the day on which the lease so granted would, but for this subsection, commence under subsection (12).

## Division 4 Termination of tenancies

### 129 Abolition of yearly tenancies arising by implication of law

- (1) No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a

tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by 1 month's notice in writing expiring at any time.

- (2) This section shall not apply where there is a tenancy from year to year which has arisen by implication before the commencement of this Act, and, in the case of any such tenancy in respect of which the date of its creation is unknown to the lessor or lessee, as the case may be, who is seeking to determine the same, such tenancy shall, subject to any express agreement to the contrary, be determinable by 6 months' notice in writing expiring on the day immediately before the first anniversary of the coming into operation of this Act, or any date afterwards.

### **130 Notice of termination of tenancy**

- (1) Subject to the other provisions of this division, a weekly, monthly, yearly, or other periodic tenancy may be terminated by either the landlord or the tenant upon notice to the other and, unless otherwise agreed upon, the notice—
  - (a) shall satisfy the requirements of section 131; and
  - (b) shall be given in the manner prescribed by section 132; and
  - (c) shall be given in sufficient time to provide the period of notice required by section 133, 134, 135 or 136, as the case may be.
- (2) Subject to section 129, any other kind of tenancy determinable on notice may, unless otherwise expressly agreed upon, be terminated as provided by sections 131 and 132.
- (3) In this section—

*yearly tenancy* means a tenancy from year to year other than a tenancy from year to year arising by implication before the commencement of this Act.

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### **131 Form and contents of notice**

- (1) A landlord or a tenant may give notice to terminate either orally or in writing, but a notice by a landlord to a tenant shall not be enforceable under division 5 unless it is in writing.
- (2) A notice in writing—
  - (a) shall be signed by the person giving the notice or by the person's agent; and
  - (b) shall identify the land or premises in respect of which the notice is given; and
  - (c) shall state the date on which the tenancy is to terminate or that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice.
- (3) A notice may state both—
  - (a) the date on which the tenancy is to terminate; and
  - (b) that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice;and, if it does state both, and the date on which the tenancy is to terminate is incorrectly stated, the notice shall be effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.
- (4) A notice need not be in a particular form, but a notice by a landlord to a tenant, or by a tenant to a landlord, may be in the approved form.

### **132 Manner of giving notice**

- (1) Notice to terminate shall be sufficiently given if delivered personally to the tenant or, as the case may be, to the landlord or the landlord's agent.
- (2) Where the tenant is absent from the land or premises, or is evading service, the notice may be given to the tenant—

- (a) by delivering it to some person apparently over the age of 18 years and apparently residing on or in occupation of the land or premises; or
  - (b) by delivering it to the person by whom the rent is usually paid, if such person is apparently over the age of 18 years; or
  - (c) by posting it up in a conspicuous place upon some part of the land or premises; or
  - (d) by sending it by registered post to the tenant at the tenant's usual or last known place of abode or business.
- (3) Where a tenant has died and probate or letters of administration of the tenant's estate have not been granted, any notice to terminate which might have been given to the legal personal representative of the deceased tenant had probate or letters of administration of the tenant's estate been granted shall be sufficiently given if—
- (a) where any person is or persons are apparently residing on or in occupation of the land or premises—it is delivered to any of such persons apparently over the age of 18 years; and
  - (b) in any other case—it is advertised twice in a daily newspaper circulating in the district in which the land or premises are situated.
- (3A) Where a proceeding for the recovery of the possession of land or premises is taken in reliance on a notice to terminate given in a manner provided in subsection (3)(a), any occupier of the land or premises or other person claiming an interest in the land or premises shall be entitled to be heard in the proceeding and the contesting of the proceeding shall not of itself be regarded as an act of administration or as intermeddling in the estate of the deceased tenant or as constituting the person so contesting the proceeding an executor *de son tort* of the deceased tenant.
- (4) Nothing in this section shall affect the right of a landlord to give notice to terminate otherwise than as provided in this section.



### **133 Notice to terminate weekly tenancy**

- (1) A notice to terminate a weekly tenancy shall be given on or before the last day of 1 week of the tenancy to be effective on the last day of the following week of the tenancy.
- (2) In this section—

*week of the tenancy* means the weekly period on which the tenancy is based and not necessarily a calendar week, and, unless otherwise expressly agreed upon, the week shall be deemed to begin on the day on which the rent is payable.

### **134 Notice to terminate monthly tenancy**

- (1) A notice to terminate a monthly tenancy shall be given on or before the last day of 1 month of the tenancy to be effective on the last day of the following month of the tenancy.
- (2) In this section—

*month of the tenancy* means the monthly period on which the tenancy is based and not necessarily a calendar month, and, unless otherwise expressly agreed upon, the month shall be deemed to begin on the day on which the rent is payable.

### **135 Notice to terminate yearly tenancy**

- (1) A notice to terminate a yearly tenancy shall be given on or before the first day of the period of 6 months ending with the last day of any year of the tenancy to be effective on the last day of that year of the tenancy.
- (2) In this section—

*year of the tenancy* means the yearly period on which the tenancy is based and not necessarily a calendar year, and, unless otherwise expressly agreed upon, the year shall be deemed to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

### **136 Notice to terminate other periodic tenancy**

(1) A notice to terminate a periodic tenancy other than a weekly, monthly, or yearly tenancy shall be given on or before the last day of any period of the tenancy to be effective on the last day of the following period of the tenancy.

(2) In this section—

*period of the tenancy* means the period on which the tenancy is based, and, unless otherwise expressly agreed upon, such period shall be deemed to begin on the day on which the rent is payable.

### **137 Notice to terminate other tenancies**

(1) A notice to terminate a tenancy, including a tenancy at will, must be for a reasonable period.

(2) What constitutes a reasonable period of notice depends on the circumstances, including the nature of the tenancy, the circumstances surrounding the creation of the tenancy, the terms (if any) of the tenancy, and any proper implications from the agreement (if any) of the parties with respect to the tenancy.

(3) Subsection (1) does not apply to—

(a) a tenancy for which a period of notice has, expressly or impliedly, been agreed on by the parties; and

(b) a weekly, monthly, yearly or other periodic tenancy subject to this Act with respect to notices to terminate; and

(c) a tenancy at will arising because of the abolition by this Act of the implication of a tenancy from year to year.

### **138 Tenants and other persons holding over to pay double the yearly value**

Where any tenant for years, including a tenant from year to year or other person who is or comes into possession of any

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land by, from or under or by collusion with such tenant, wilfully holds over any land after—

- (a) determination of the lease or term; and
- (b) after demand made and notice in writing has been given for the delivery of possession of the land by the lessor or landlord or the person to whom the remainder or reversion of such land belongs or the person's agent lawfully authorised;

then the person so holding over shall, for and during the time the person so holds over or keeps the person entitled out of possession of such land, be liable to the person so kept out of possession at the rate of double the yearly value of the land so detained for so long as the land shall have been so detained, to be recovered by action in any court of competent jurisdiction.

### **139 Tenant holding over after giving notice to be liable for double rent**

- (1) Where a lessee who has given notice of intention to quit the land held by the lessee at a time specified in such notice does not accordingly deliver up possession at the time so specified, then, the lessee shall after that time be liable to the lessor for double the rent or sum which would have been payable to the lessor before such notice was given.
- (2) Such lessee shall continue to be liable for such double rent or sum during the time the lessee continues in possession, to be recovered by action in any court of competent jurisdiction.

## **Division 5 Summary recovery of possession**

### **140 Definitions for div 5**

In this division—

*agent* means—

- (a) a person usually employed by the landlord in the letting of the land or in the collection of the rents of the land; or

- (b) a person specially authorised to act in the particular matter by writing under the hand of the landlord; or
- (c) a solicitor authorised to act on behalf of the landlord.

*court* means a Magistrates Court.

*defendant* means the person alleged in a complaint under this division to be a person who fails to deliver up possession of land.

*Magistrates Court District* means a district for the purposes of Magistrates Courts appointed under the *Justices Act 1886*.

## 141 Summary proceedings for recovery of possession

- (1) When the term or interest of the tenant of any land held by the tenant as tenant for any term of years or for any lesser estate or interest whether with or without being liable for payment of rent—
  - (a) has expired by effluxion of time; or
  - (b) has been determined by notice to terminate or demand of possession;

and the tenant or any person claiming under the tenant and in actual occupation of the land or any part of the land fails to deliver up possession of such land or part, the landlord may by complaint under this division proceed to recover possession of that land or part of it.

- (2) The power to recover possession of any land or part of land conferred by this division shall be in addition to, and not, except where otherwise provided, in derogation from, any other power, right, or remedy of the landlord.

## 142 Mode of proceeding

- (1) Subject to this Act proceedings under this division for the recovery of possession of any land referred to in section 141 may be heard and determined by a Magistrates Court in a summary way under the *Justices Act 1886*, upon the complaint in writing of the landlord or the landlord's agent.

- (2) The complaint shall be heard and determined at a place where it could be heard and determined were it a complaint for a breach of duty committed in the Magistrates Courts district within which the land concerned is situated or, where the land concerned is situated in more than 1 such district, in any of those districts.

### **143 Contents of complaint**

- (1) A complaint under this division for the recovery of the possession of land shall state—
- (a) the description in brief of the land or premises or such other particulars as are sufficient to identify the land; and
  - (b) where the land is situated; and
  - (c) the landlord of whom the land was held; and
  - (d) that the land was held under a tenancy and (if practicable) the nature of the tenancy under which the land was so held; and
  - (e) the date on which the tenancy expired by effluxion of time or as the case may be, was determined by a notice to terminate or demand of possession; and
  - (f) that the defendant fails to deliver up possession of the land.
- (2) The complaint may be in the approved form.

### **144 Summons upon complaint for recovery of possession of land**

- (1) Upon complaint under section 143 signed by the complainant or his or her agent a justice may issue his or her summons directed to the defendant requiring him or her to appear on the day and at the time stated in the summons at the Magistrates Court at the place stated in the summons to answer the complaint and to show cause why a warrant to eject the defendant from the land should not be issued.

- (2) The summons may be in the approved form.
- (3) Every summons shall be endorsed on its face with a notice directed to the defendant that unless the defendant, not less than 3 days before the day on which the defendant is required by the summons to appear, gives written notice to the clerk of the court at which the defendant is summoned to appear that the defendant wishes to appear to answer the complaint, the complaint may be heard and determined in the defendant's absence and evidence by affidavit on behalf of the complainant may be admitted.
- (4) The summons shall be served within a reasonable time before the time appointed for the defendant to appear and in the manner provided by the *Justices Act 1886*.
- (5) However, where it is made to appear by oral evidence or affidavit (including affidavit founded upon information and belief and stating the sources of such information and grounds of belief) to the court before which the defendant is required by the summons to appear that for any cause the service of a summons issued and complaint made under this division cannot be effected in the manner provided by that Act, the court may—
  - (a) make such order for substituted or other service as it thinks proper, in which case the summons and complaint served in the manner provided by such order shall be deemed to have been duly served on the defendant; or
  - (b) upon being satisfied that the summons and complaint have by any means come to the knowledge of the defendant, order that the defendant be deemed to have been duly served with the summons and on the making of such order may deal with the complaint as if such complaint and summons had been duly served under the *Justices Act 1886*.

## 145 Hearing and determination

- (1) At the hearing and upon proof of—
  - (a) the tenancy; and

- (b) the expiry or determination, by notice to terminate or demand of possession, of the tenancy; and
- (c) the lawful right of the landlord as against the defendant to possession; and
- (d) the failure of the defendant to deliver up possession; and
- (e) (where the defendant does not appear in person or by counsel or solicitor) due service of the summons upon the defendant a reasonable time (being in no case less than 7 days) before the time appointed for the defendant's appearance;

it shall be lawful for the court, unless the defendant appears and shows to its satisfaction reasonable cause why such a warrant should not be issued, or the court is otherwise satisfied that there is such cause, to order that a warrant be issued against the defendant requiring and authorising any person to whom it is addressed to take and give possession of the land the subject of the complaint to the landlord or, where the complaint was made by an agent, the agent.

- (2) Where a defendant does not, at least 3 days before the day on which the defendant is required by the summons to appear, give written notice to the clerk of the court before which the defendant is summoned to appear, that the defendant wishes to appear to answer the complaint, and proof is made to the court upon oath, or by deposition made in manner prescribed by the *Justices Act 1886*, or by admission of the defendant, of due service of the summons upon the defendant a reasonable time (being in no case less than 7 days) before the time appointed for the defendant's appearance, then—
  - (a) an affidavit or affidavits, made by some person or persons having personal knowledge of the facts deposed to and deposing to all or any of the matters prescribed in subsection (1), shall, until the contrary is shown, be accepted by the court as prima facie evidence of all or, as the case may be, each of such matters; and
  - (b) the court shall hear and determine the matter of the complaint upon all the evidence properly adduced at the hearing or any adjourned hearing of the complaint,

including any evidence adduced by or on behalf of the defendant, and any further evidence (which the complainant shall be at liberty to adduce) in rebuttal or in support of the complaint.

## **146 Warrant for possession**

- (1) The warrant issued by order of the court shall be in the approved form, may be issued by the court (or, after the case has been heard and determined, by the clerk of the court), and shall require and authorise any person to whom it is addressed, within the period specified in it (not being more than 3 months from the date of the order), to enter (by force if necessary) into and upon the land specified in the warrant (being the land the subject of the complaint) and to eject from the land the defendant and all persons claiming under or through the defendant together with the defendant's or their goods and effects, and to give possession of the same to the landlord or, as the case requires, the landlord's agent.
- (2) The warrant shall be sufficient authority to any person to whom it is addressed to enter (by force if necessary) into and upon the land specified in the warrant, with such assistants as the person deems necessary, to eject from the land the defendant and all persons claiming under or through the defendant together with the defendant's or their goods and effects, and to give possession to the landlord or, as the case requires, the landlord's agent accordingly.
- (3) The warrant may be executed not only against the defendant but also against every person claiming under or through the defendant who is in actual occupation of the land specified in the warrant or any part of the land and for this purpose a person whose occupation is referable to a tenancy held of the defendant (whether the tenancy was created before or after the commencement of the proceeding out of which the warrant was issued) shall be deemed to claim under the defendant even though such tenancy has expired by effluxion of time, has been determined by a notice to terminate, or has been otherwise terminated.



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- (4) A warrant issued under this section in relation to a building, or a unit or part of a multiple house or other building, shall be sufficient authority to any person to whom it is addressed to pass (by force if necessary), with such assistants as the person thinks necessary, through, along, across, over or under any land (including in the case of any such unit or part, any other part of the multiple house or other building in which it is comprised) ordinarily used as a means of access to such building, or unit or part.
  - (5) No entry upon a warrant issued under this section shall be made on a Sunday, Good Friday, Christmas Day or Anzac Day, or at any time except between the hours of 9a.m. and 4p.m.
  - (6) Where the complaint has been heard and determined *ex parte* such a warrant shall not be issued within 7 days after the determination.
  - (7) Where the circumstances of the case make it appear to the court proper so to do, the court may, upon making an order that such a warrant be issued, further order that the issue of the warrant be postponed for such time (not exceeding 15 clear days from the date of the adjudication) and on such conditions (if any) as appear to it just and are specified in the order, and on the making of the further order the warrant shall not be issued within such time while such conditions are complied with.
  - (8) Despite a postponement of the issue of a warrant under subsection (7) the maximum period within which the warrant, when issued, may be executed shall not exceed 3 months from the date on which was made the order that the warrant be issued.

## **147 Arrears of rent etc.**

- (1) In a complaint under this division for the recovery of the possession of land, it may be joined as a further matter of complaint that the defendant is indebted to the landlord for rent or mesne profits, or both, in respect of the land the subject of the complaint.

- (1A) Such further matter of complaint shall be set out in a separate paragraph in the complaint.
- (2) In respect of such further matter of complaint the same particulars of the complainant's claim for rent or mesne profits, or both, shall be supplied and served as would be required if the claim were being made by way of a claim filed in a Magistrates Court exercising jurisdiction under the *Magistrates Courts Act 1921*.
- (3) In any case where the court orders that the further matter of complaint be heard separately it may, by the same or any subsequent order, give directions for the conduct of the proceedings in relation to the complaint or may order that the proceedings be carried on in the same manner as if the claim were being made by way of a claim filed in a Magistrates Court exercising jurisdiction under the *Magistrates Courts Act 1921*.
- (4) Where the matters of complaint are heard together, if, under section 145(2), the matters prescribed by section 145(1) may be proved by affidavit, the amount of indebtedness the subject of the further matter of complaint may also be proved by affidavit.
- (5) In respect of the further matter of complaint, the court shall order the defendant to pay to the landlord such amount (if any) (but not exceeding \$150,000) as it determines to be payable and unpaid in respect of the indebtedness the subject of the complaint when it makes the determination.
- (6) An order made by a court under subsection (5) shall, for the purposes of the enforcement of the order, be deemed to have been made by a Magistrates Court in the exercise of its jurisdiction under the *Magistrates Courts Act 1921*, and shall be enforceable accordingly, and not otherwise.
- (6A) However, where the matters of complaints are heard and determined together ex parte, action to enforce the order made in respect of the further matter of complaint shall not be taken within 7 days after the determination.
- (7) A postponement of the issue of a warrant under section 146(7) shall not affect any order for payment made under this section.

- (8) An order for the payment of arrears of rent under this section may be made whether or not a warrant for possession is issued.

## **148 Rehearing where proof made by affidavit**

- (1) Where, in default of appearance of the defendant at the time and place appointed by the summons for the hearing and determination of the complaint, or at any time or place to which the hearing is adjourned, the court has, upon proof by affidavit of the matters required by section 145(1) to be proved, ordered that the warrant mentioned in that subsection be issued, a Magistrates Court at the place where the order was made may, upon application in that behalf made by the defendant or by the defendant's counsel or solicitor, within 7 days after the date on which the order was made, if in its opinion there is a proper reason for so doing, grant a rehearing of the complaint upon which the order was made on such terms and subject to the payment of such costs as it thinks fit.
- (2) Upon and because of the grant of a rehearing—
- (a) subject to subsection (4), the order for the issue of a warrant made upon the first hearing and any warrant issued under it shall cease to have effect; and
  - (b) the court may, with the consent of the complainant, proceed with the rehearing immediately or it may and, if the complainant does not consent to the court proceeding with the rehearing immediately, shall set down the rehearing for a later date; and
  - (c) on the rehearing, the complaint shall be reheard and redetermined as if the rehearing were the original hearing and determination.
- (3) Upon the rehearing proof shall not be made by affidavit of any of the matters required by section 145(1) to be proved.
- (4) If the defendant when called does not appear at the time and place appointed for the rehearing, the court, if it thinks fit, may without rehearing the complaint order that the original order (and, where applicable, warrant) be restored and such

order (and, where applicable, warrant) shall be restored to effect accordingly and shall be deemed to have had force and effect on and from the date when the order was first made or, in the case of such warrant, it was first issued.

- (4A) However, in the case of such a warrant the time limited for its execution shall begin to run on and from the date of the order restoring it to effect.
- (5) Where in the case of a complaint containing a further matter of complaint under section 147, the matters of complaint have been heard together, then upon and because of the grant of a rehearing of the complaint the order (if any) made against the defendant in respect of such further matter of complaint shall, subject to subsection (6), cease to have effect and upon the rehearing such further matter of complaint shall be reheard and redetermined as if the rehearing were the original hearing and determination of the original hearing.
- (6) If, under subsection (4), the court orders the original order for the issue of a warrant made upon the complaint to be restored the order (if any) made against the defendant in respect of the further matter of complaint shall, without any order of the court be also restored to effect.
- (7) However, the court, upon the application of the complainant and upon proof, which may be by affidavit, of the amount payable and unpaid at the date it restores the order for the issue of a warrant made upon the original complaint, may vary the order made in respect of the further matter of complaint so as to require the payment of such amount.

## **149 Court's powers in proceeding under this division**

- (1) The powers conferred on a court by this division are in addition to the powers (including any power of amending a complaint) of the court under the *Justices Act 1886*.
- (2) In respect of a proceeding under this division upon a complaint that includes a claim for the recovery of possession of land the court shall have and may exercise all or any of its

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powers as if the proceeding were upon a complaint for a breach of duty.

- (3) In respect of a claim for rent or mesne profits made before it by way of complaint under this division the court shall have and may exercise all or any of the powers conferred by the *Magistrates Courts Act 1921* on a Magistrates Court constituted by the person or persons who constitute the court in the proceeding in which the claim is made.
- (4) An order made in a proceeding under this division for the payment of money (including by way of costs) shall, for the purposes of the enforcement of the order, be deemed to have been made by a Magistrates Court in the exercise of its jurisdiction under the *Magistrates Courts Act 1921* and shall be enforced accordingly and not otherwise.

## **150 Protection of justices etc.**

An action or prosecution shall not be brought against—

- (a) a justice who constituted a court which issued a warrant under this division; or
- (b) a clerk of the court who issued a warrant under an order of a court made under this division; or
- (c) a person by whom any such warrant was executed;

on account of the issue or execution of the warrant by reason that the landlord by or on whose behalf the warrant was obtained had no lawful right to possession of the land for the recovery of which the warrant was issued.

## **151 Protection of landlord entitled to possession**

In all cases where at the time of the execution of a warrant issued under this division the landlord by or on whose behalf the warrant was obtained, had as against the person in possession of the land lawful right to the possession of the land, then neither such landlord, nor the landlord's agent nor any other person acting on the landlord's behalf, shall be a trespasser merely because of any irregularity or informality in

the manner of obtaining possession under the authority of this division but the party aggrieved may, if the party thinks fit, bring an action for any such irregularity or informality.

## **152 Persons lacking right to possession not protected**

- (1) Neither a provision of this division nor a warrant to take and give possession of land issued under this division shall be construed to protect a landlord by whom or on whose behalf the warrant was obtained from action brought against the landlord on account of entry upon or taking possession of the land or any part of the land because of the warrant where the landlord, at the time the warrant was executed, had not lawful right to possession of the land or part as against the person in possession of the land at that time.
- (2) Without prejudice to the rights to which any person may be entitled as outgoing tenant, where the landlord had not such right to possession the landlord shall be liable in respect of the entry and taking possession as if the same were made or effected by the landlord or at the landlord's direction without the authority of the warrant.

## **Division 6 Agricultural holdings**

### **153 Definitions for div 6**

- (1) In this division—

*absolute owner* means the owner or person capable of disposing by appointment or otherwise of the fee simple or whole interest in a holding, although the land or the person's interest in the land is mortgaged or encumbered or charged.

*compensation* means compensation payable under this division, or compensation payable under any agreement which by this division is deemed to be substituted for compensation under this division.

***contract of tenancy*** means a letting of a holding for a term, or for lives, or for lives and years, or from year to year, under a contract entered into at any time after 1 January 1905.

***determination of tenancy*** means the cesser of a tenancy by effluxion of time or from any other cause.

***holding*** means any parcel of agricultural land (which expression includes land suitable for dairying purposes) of an area of not less than 5 acres held by a tenant under a landlord.

***landlord*** means the person for the time being entitled to possession of a holding, as the absolute owner of the land, subject to a contract of tenancy.

***tenant*** means the person in possession of a holding under a contract of tenancy.

- (2) The designations of landlord and tenant shall continue to apply to the parties until the conclusion of any proceedings taken under this division.

## 154 Application of div 6

- (1) Except where otherwise provided, this division—
  - (a) applies to any contract of tenancy entered into after the commencement of this Act; and
  - (b) does not apply to any lease or licence from the Crown under any law in force for the time being relating to the leasing and occupying of Crown land.
- (2) A provision in a contract of tenancy, or in any other agreement made at the time the contract of tenancy is entered into, is unenforceable in so far as it purports to take away or limit the right of a tenant to compensation in respect of any improvement, unless the contract of tenancy or such other agreement—
  - (a) specifies the particular improvement or improvements; and
  - (b) provides that, or to the effect that, the tenant is required to make such improvement or improvements; and

- (c) specifies what compensation (if any) shall be payable in respect of the improvement or improvements.
- (3) The provisions of this division are in addition to any other right, power or privilege of a tenant, whether arising by agreement or otherwise.

## **155 Tenant's property in fixtures**

- (1) Subject to this section—
- (a) any engine, machinery, fencing or other fixture affixed to a holding by the tenant of the holding; and
  - (b) any building (other than one in respect of which the tenant is entitled to compensation under this Act or otherwise) erected by the tenant on the holding;

not being a fixture affixed or, as the case may be, a building erected under some obligation in that behalf or instead of some fixture or building belonging to the landlord, as the case may be, shall be removable by the tenant at any time during the continuance of the tenancy or before the expiration of 2 months from the termination of the tenancy, and shall remain the tenant's property so long as the tenant may remove it because of this subsection.

- (2) The right conferred by subsection (1) shall not be exercisable in relation to a fixture or building unless the tenant—
- (a) has paid all rent owing by the tenant and has performed or satisfied all the tenant's other obligations to the landlord in respect of the holding; and
  - (b) has, at least 1 month before both the exercise of the right and the termination of the tenancy, given to the landlord notice in writing of the tenant's intention to remove the fixture or building.
- (3) If, before the expiration of the notice given under subsection (2), the landlord gives to the tenant a counter-notice in writing electing to purchase a fixture or building comprised in the notice, subsection (1) shall cease to apply to that fixture or building, but the landlord shall be



liable to pay to the tenant the fair value of that fixture or building to an incoming tenant of the holding.

- (4) In the removal of a fixture or building because of subsection (1), the tenant shall not do to any other building or other part of the holding any avoidable damage, and immediately after the removal shall make good all damage so done that is occasioned by the removal.
- (5) This section applies—
  - (a) to a contract of tenancy entered into after the commencement of this Act; and
  - (b) subject to any agreement to the contrary contained in the contract of tenancy.

## **156 Tenant's right to compensation**

When a tenant makes on the tenant's holding any of the improvements mentioned in schedule 4, part 1 or 2, the tenant shall be entitled, on quitting the holding at the determination of the tenancy, to obtain from the landlord compensation for such of those improvements as are not removed by the tenant under section 155 or otherwise.

## **157 Intended improvements**

- (1) Despite section 156, compensation shall not be payable in respect of any improvement mentioned in schedule 4, part 1 unless the tenant has, not more than 3 months nor less than 2 months before beginning to make such improvement, given to the landlord, or to the landlord's agent duly authorised in that behalf, notice in writing of the tenant's intention to make the improvement and of the manner in which the tenant proposes to do the intended work.
- (2) The landlord may within 1 month from the giving of such notice serve upon the tenant a dissent in writing to such intended improvement and require the matter in difference to be referred to arbitration, and on service of the dissent and

requirement a reference may be had in manner provided by this division.

- (2A) If the arbitrator is satisfied that any improvement specified in the tenant's notice will increase the value of the holding to an incoming tenant and will be a suitable and desirable improvement, the arbitrator shall make an award accordingly, and the tenant shall be entitled to compensation for every improvement which the tenant makes under such award.
- (2B) If the arbitrator is satisfied that such improvement will not increase the value of the holding to an incoming tenant, and will be an unsuitable and undesirable improvement, the tenant shall not, if the tenant executes such improvement, be entitled to any compensation in relation to the improvement.
- (3) If no agreement is entered into within 1 month after such notice has been given, or if there is a reference to arbitration, then, within 1 month after the award has been made the landlord may, unless the notice of the tenant is previously withdrawn, undertake to make the improvement, and may make the same accordingly in any reasonable and proper manner the landlord thinks fit, and may charge the tenant interest at the rate of 5% per annum on the outlay incurred in making the improvement.
- (3A) Such interest shall be payable and recoverable as rent in the same manner and at the same time as the rent in respect of the holding is payable and recoverable.
- (4) In default of any such agreement or undertaking, and also in the event of the landlord failing to comply with the landlord's undertaking within a reasonable time, the tenant may make the improvement, and shall in that case be entitled to compensation in respect of the improvement.

## **158 Agreements etc.**

- (1) The landlord and tenant may at the time—
  - (a) dispense (whether expressly, by conduct, or otherwise) with any notice required by this division to be given by either party to the other; and

- (b) subject to section 153(2), enter into an agreement between themselves as to the party by whom and the mode in which any improvement is to be made, or as to the amount and mode and time of payment of compensation or other money to be paid to the tenant or to the landlord under this division.
- (2) Any compensation payable under such agreement shall be deemed to be substituted for compensation under this division.

### **159 Arbitration**

- (1) In the absence of an agreement between the parties, every matter or question arising under this division shall be determined by arbitration under schedule 5.
- (2) An arbitration shall, unless the parties otherwise agree, be before a single arbitrator.

### **160 Notice of intended claim**

- (1) A tenant shall not be entitled to compensation, unless 2 months at least before the determination of the tenancy the tenant gives notice in writing to the landlord claiming compensation.
- (2) When a tenant gives such a notice, the landlord may, within 1 month, give a notice in writing to the tenant claiming any set off.
- (3) Every notice under this section shall state as far as reasonably may be the particulars and amount of the intended claim.
- (4) However, noncompliance by either party with this section shall not deprive such party of any rights under this division if the arbitrator is of opinion that there was reasonable excuse for such noncompliance.

## **161 Rules for ascertaining amount of compensation**

In ascertaining the amount of compensation payable to the tenant in respect of any improvements made by the tenant, the arbitrator shall be guided by the following rules—

- (a) the amount to be awarded shall be such sum as fairly represents the value of the improvements to an incoming tenant;
- (b) there shall not be taken into account as part of such improvements what is justly due to the inherent capabilities of the soil;
- (c) there shall be taken into account by way of set off against such improvements—
  - (i) any benefit which the landlord has given or allowed to the tenant in consideration of the tenant making the improvements; and
  - (ii) any sum due to the landlord from the tenant for rent or otherwise; and
  - (iii) compensation to the landlord by way of damages for any waste, or for any breach of covenant, contract or agreement connected with the tenancy committed or permitted by the tenant, but the landlord shall not be entitled to have taken into account any waste or breach by the tenant in relation to a matter of husbandry or cultivation committed or permitted more than 2 years before the determination of the tenancy; and
  - (iv) any rates, taxes, or assessments due in respect of the holding to which the tenant is liable as between the tenant and the landlord.

## **162 Recovery of compensation**

- (1) Where any money agreed to be paid for compensation, costs, or otherwise is not paid within 14 days after the time when it is agreed to be paid, it shall be recoverable upon an order made by a judge of the District Court as money ordered to be

paid by the District Court in its ordinary jurisdiction is recoverable.

- (2) Where any money awarded to be paid for compensation, costs, or otherwise is not paid in accordance with such order, a copy of such award may be filed in a District Court registry, and on the order may then be enforced in all respects as if it were judgment of the District Court for the amount due, together with the costs of and incidental to enforcing the award.

### **163 Landlord who is a trustee**

- (1) Where the landlord is a person entitled to receive the rents and profits of any holding as a trustee or otherwise than for the landlord's own benefit, the amount due from such landlord in respect of compensation, costs, or otherwise shall not be recoverable personally against the landlord, nor shall the landlord be under any personal liability to pay such amount, but the same shall be a charge on and recoverable against the holding.
- (1A) If such landlord has not paid to the tenant the amount due to the tenant within 14 days after the time when such amount was agreed or awarded to be paid, then the tenant shall be entitled to obtain from the court an order in favour of the tenant, the tenant's executors, administrators, and assigns charging the holding to the amount due to the tenant together with all costs properly incurred in obtaining the charge.
- (2) Such landlord shall, either before or after payment to the tenant of the amount due to the tenant, be entitled to obtain from the court an order charging the holding to the amount to be paid or paid, as the case may be, to the tenant, together with all costs properly incurred in obtaining the charge.
- (3) The court may, by such order or by any subsequent order, give all directions necessary for securing full legal effect to any such charge, and every such order shall be obeyed.

## **164 Compensation to tenants, when mortgagee in possession**

- (1) Where a tenant holds land under a contract of tenancy with the mortgagor, and such land is mortgaged at the time when such contract was made, or is subsequently mortgaged, and the mortgagee enters into possession of the holding, then the tenant shall, as against such mortgagee in possession, be entitled to any compensation which is or would be due to the tenant from the mortgagor.
- (2) Before such mortgagee deprives the tenant of possession of the holding otherwise than under such contract, the mortgagee shall give to the tenant 6 months' notice in writing of the mortgagee's intention so to deprive the tenant.
- (3) In ascertaining the amount of such compensation payable by the mortgagee the arbitrator shall have regard to the same rules as are hereinbefore provided for the ascertainment of compensation payable by a landlord, with this addition, that compensation shall be paid to the tenant for the tenant's crops, and for any expenditure upon the land which the tenant has made in the expectation of holding the land for the full term of the tenant's contract of tenancy, in so far as any improvement resulting therefrom is not exhausted at the time of the tenant being deprived of possession.
- (4) Such compensation shall be determined and recovered in like manner as compensation under this division, and for all such purposes the expression *landlord*, wherever used in this division, shall be deemed to include such mortgagee in possession.

## **165 Incoming tenant's claim for compensation reserved**

Where an incoming tenant has, with the consent in writing of the tenant's landlord, paid to an outgoing tenant any compensation in respect of the whole or part of any improvement, such incoming tenant shall be entitled, on quitting the holding, to obtain compensation in respect of such improvement or part in like manner (if at all) as the outgoing tenant would have been entitled if the tenant had remained

tenant of the holding, and had quitted the holding at the time when the incoming tenant quits the same.

**166 Change of tenancy not to affect right to compensation**

A tenant who has remained on his or her holding during a change or changes of tenancy shall not afterwards, on quitting his or her holding at the determination of a tenancy, be deprived of the tenant's right to compensation in respect of improvements merely because such improvements were made by the tenant during a former tenancy or tenancies, and not during the tenancy at the determination of which the tenant is quitting.

**167 Power of entry**

The landlord of a holding, or any person authorised by the landlord, may at all reasonable times enter on the holding, or any part of it, for the purpose of viewing the state of the holding.

**Part 10 Incorporeal hereditaments and appurtenant rights**

**176 Prohibition upon creation of rent charges**

No rent charge shall be created after the commencement of this Act, and any rent charge so created shall be void and of no effect.

**177 Release of part of land subject to rent charge**

The release from a rent charge of part of the land charged with it shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the land released without prejudice to the rights of all

persons interested in the land remaining unreleased and not concurring in or confirming the release.

### **178 No presumption of right to access or use of light or air**

From and after 1 March 1907, no right to the access or use of light or air to or for any building shall be deemed to exist, or to be capable of coming into existence, merely because of the enjoyment of such access or use for any period or of any presumption of lost grant based upon such enjoyment.

### **179 Right to support of land and buildings**

For the benefit of all interests in other land which may be adversely affected by any breach of this section, there shall be attached to any land an obligation not to do anything on or below it that will withdraw support from any other land or from any building, structure or erection that has been placed on or below it.

### **180 Imposition of statutory rights of user in respect of land**

- (1) Where it is reasonably necessary in the interests of effective use in any reasonable manner of any land (*the dominant land*) that such land, or the owner for the time being of such land, should in respect of any other land (*the servient land*) have a statutory right of user in respect of that other land, the court may, on the application of the owner of the dominant land but subject to this section, impose upon the servient land, or upon the owner for the time being of such land, an obligation of user or an obligation to permit such user in accordance with that order.
- (2) A statutory right of user imposed under subsection (1) may take the form of an easement, licence or otherwise, and may be declared to be exercisable—
  - (a) by such persons, their servants and agents, in such number, and in such manner and subject to such conditions; and



- (b) on 1 or more occasions; or
  - (c) until a date certain; or
  - (d) in perpetuity or for some fixed period;
- as may be specified in the order.
- (3) An order of the kind referred to in subsection (1) shall not be made unless the court is satisfied that—
- (a) it is consistent with the public interest that the dominant land should be used in the manner proposed; and
  - (b) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
  - (c) either—
    - (i) the owner of the servient land has refused to agree to accept the imposition of such obligation and the owner's refusal is in all the circumstances unreasonable; or
    - (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of such obligation.
- (4) An order under this section (including an order under this subsection)—
- (a) shall, except in special circumstances, include provision for payment by the applicant to such person or persons as may be specified in the order of such amount by way of compensation or consideration as in the circumstances appears to the court to be just; and
  - (b) may include such other terms and conditions as may be just; and
  - (c) shall, unless the court otherwise orders, be registered as provided in this section; and
  - (d) may on the application of the owner of the servient tenement or of the dominant tenement be modified or

extinguished by order of the court where it is satisfied that—

- (i) the statutory right of user, or some aspect of it, is no longer reasonably necessary in the interests of effective use of the dominant land; or
  - (ii) some material change in the circumstances has taken place since the order imposing the statutory right of user was made; and
- (e) shall when registered as provided in this section be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the servient land or the dominant land, whether or not such persons are parties to proceedings or have been served with notice or not.
- (5) The court may—
- (a) direct a survey to be made of any land and a plan of survey to be prepared; and
  - (b) order any person to execute any instrument or instruments in registrable or other form necessary for giving effect to an order made under this section; and
  - (c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
  - (d) give directions for the conduct of proceedings; and
  - (e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.
- (6) In any proceedings under this section the court shall not, except in special circumstances, make an order for costs against the servient owner.
- (7) In this section—

**owner** includes any person interested whether presently, contingently or otherwise in land.

**statutory right of user** includes any right of, or in the nature of, a right of way over, or of access to, or of entry upon land,

and any right to carry and place any utility upon, over, across, through, under or into land.

*utility* includes any electricity, gas, power, telephone, water, drainage, sewerage and other service pipes or lines, together with all facilities and structures reasonably incidental to the utility.

- (8) This section does not bind the Crown.

## **181 Power to modify or extinguish easements and restrictive covenants**

- (1) Where land is subject to an easement or to a restriction arising under covenant or otherwise as to the user of the land, the court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement or restriction upon being satisfied—
- (a) that because of change in the user of any land having the benefit of the easement or restriction, or in the character of the neighbourhood or other circumstances of the case which the court may deem material, the easement or restriction ought to be deemed obsolete; or
  - (b) that the continued existence of the easement or restriction would impede some reasonable user of the land subject to the easement or restriction, or that the easement or restriction, in impeding that user, either—
    - (i) does not secure to persons entitled to the benefit of it any practical benefits of substantial value, utility, or advantage to them; or
    - (ii) is contrary to the public interest;and that money will be an adequate compensation for the loss or disadvantage (if any) which any such person will suffer from the extinguishment or modification; or
  - (c) that the persons of full age and capacity for the time being or from time to time entitled to the easement or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in

the land to which the easement or the benefit of the restriction is annexed, have agreed to the easement or restriction being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement wholly or in part or waived the benefit of the restriction wholly or in part; or

- (d) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement, or to the benefit of the restriction.
- (2) In determining whether a case is one falling within subsection (1)(a) or (b), and in determining whether (in such case or otherwise) an easement or restriction ought to be extinguished or modified, the court shall take into account the town plan and any declared or ascertainable pattern of the local government for the grant or refusal of consent, permission or approval to use any land or to erect or use any building or other structure in the relevant area, as well as the period at which and context in which the easement or restriction was created or imposed, and any other material circumstance.
- (3) The power conferred by subsection (1) to extinguish or modify an easement or restriction includes a power to add such further provisions restricting the user or the building on the land as appear to the court to be reasonable in view of the relaxation of the existing provisions, and as may be accepted by the applicant, and the court may accordingly refuse to modify an easement or restriction without such addition.
- (4) An order extinguishing or modifying an easement or restriction under subsection (1) may direct the applicant to pay to any person entitled to the benefit of the easement or restriction such sum by way of consideration as the court may think it just to award under one, but not both, of the following heads, that is to say, either—
- (a) a sum to make up for any loss or disadvantage suffered by that person in consequence of the extinguishment or modification; or

- (b) a sum to make up for any effect which the restriction had, at the time when it was imposed, in reducing the consideration then received for the land affected by it.
- (5) Where any proceedings by action or otherwise are instituted to enforce an easement or restriction, or to enforce any rights arising out of a breach of any restriction, any person against whom the proceedings are instituted may in such proceedings apply to the court for an order under this section, and such application shall, unless the court otherwise orders, operate to stay such proceedings until determination of the application made under this section.
- (6) The court may in any proceedings under this section on the application of any person interested make an order declaring whether or not in any particular case any land is or would in any given event be affected by an easement or restriction, and the nature and extent of it, and whether the same is or would in any given event be enforceable, and if so by whom.
- (7) Notice of any application made under this section shall, if the court so directs, be given to the local government in whose area the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as the court, either generally or in a particular instance, may order.
- (8) An order under this section shall, when registered, entered or endorsed, be binding on all persons, whether of full age or capacity or not, then entitled or afterwards becoming entitled to the easement, or interested in enforcing the restriction and whether such persons are parties to the proceedings or have been served with notice or not.
- (9) The court may—
  - (a) direct a survey to be made of any land and a plan of survey to be prepared; and
  - (b) order any person to execute any instrument or instruments in registrable or other form necessary for giving effect to an order made under this section; and

- (c) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
- (d) give such directions for the conduct of proceedings; and
- (e) make orders in respect of the costs of any of the preceding matters and of proceedings generally.

## Part 11                      Encroachment and mistake

### Division 1                      Encroachment of buildings

#### 182      Definitions for div 1

In this division—

*adjacent owner* means the owner of land over which an encroachment extends.

*boundary* means the boundary line between contiguous parcels of land.

*building* means a substantial building of a permanent character, and includes a wall.

*encroaching owner* means the owner of land contiguous to the boundary beyond which an encroachment extends.

*encroachment* means encroachment by a building, including encroachment by overhang of any part as well as encroachment by intrusion of any part in or upon the soil.

*owner* means any person entitled to an estate of freehold in possession—

- (a) whether in fee simple or for life or otherwise; or
- (b) whether at law or in equity; or
- (c) whether absolutely or by way of mortgage, and includes a mortgagee under a registered mortgage of a freehold

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estate in possession in land under the *Land Title Act 1994*.

*subject land* means that part of the land over which an encroachment extends.

### **183 Application of div 1**

This division applies despite the provisions of any other Act.

### **184 Application for relief in respect of encroachments**

- (1) Either an adjacent owner or an encroaching owner may apply to the court for relief under this division in respect of any encroachment.
- (2) This section applies to encroachments made either before or after the commencement of this Act.

### **185 Powers of court on application for relief in respect of encroachment**

- (1) On an application under section 184 the court may make such order as it may deem just with respect to—
  - (a) the payment of compensation to the adjacent owner; and
  - (b) the conveyance, transfer, or lease of the subject land to the encroaching owner, or the grant to the encroaching owner of any estate or interest in the land or of any easement, right, or privilege in relation to the land; and
  - (c) the removal of the encroachment.
- (2) The court may grant or refuse the relief or any part of the relief as it deems proper in the circumstances of the case, and in the exercise of this discretion may consider, amongst other matters—
  - (a) the fact that the application is made by the adjacent owner or by the encroaching owner, as the case may be; and

- (b) the situation and value of the subject land, and the nature and extent of the encroachment; and
- (c) the character of the encroaching building, and the purposes for which it may be used; and
- (d) the loss and damage which has been or will be incurred by the adjacent owner; and
- (e) the loss and damage which would be incurred by the encroaching owner if the encroaching owner were required to remove the encroachment; and
- (f) the circumstances in which the encroachment was made.

## **186 Compensation**

- (1) The minimum compensation to be paid to the adjacent owner in respect of any conveyance, transfer, lease, or grant under section 185 to the encroaching owner shall, if the encroaching owner satisfies the court that the encroachment was not intentional and did not arise from negligence, be the unimproved capital value of the subject land, and in any other case 3 times such unimproved capital value.
- (2) In determining whether the compensation shall exceed the minimum and if so by what amount, the court shall have regard to—
  - (a) the value, whether improved or unimproved, of the subject land to the adjacent owner; and
  - (b) the loss and damage which has been or will be incurred by the adjacent owner through the encroachment and through the orders proposed to be made in favour of the encroaching owner; and
  - (c) the circumstances in which the encroachment was made.

## **187 Charge on land**

- (1) The order for payment of compensation may be registered in the land registry in such manner as the registrar determines and shall, except so far as the court otherwise directs, upon



registration operate as a charge upon the land of the encroaching owner, and shall have priority to any charge created by the encroaching owner or the encroaching owner's predecessor in title.

- (2) In this section, the land of the encroaching owner means the parcel of land contiguous to the boundary beyond which the encroachment extends, or such part of the land as the court may specify in the order.

### **188 Encroaching owner—compensation and conveyance**

Wherever the court sees fit, and in particular where the encroaching owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court may determine—

- (a) by whom and in what proportions the compensation is to be paid in the first instance, and is to be borne ultimately; and
- (b) to whom, for whose benefit and upon what limitations the conveyance, transfer, or lease of the subject land or grant in respect of the land is to be made.

### **189 Adjacent owner—compensation and conveyance**

Wherever the court sees fit, and in particular where the adjacent owner is not an owner beneficially entitled to the fee simple free from encumbrances, the court may determine—

- (a) to whom, for whose benefit, and in what proportions the compensation is to be paid or applied; and
- (b) by whom the conveyance, transfer, or lease of the subject land or grant in respect of the subject land is to be made.

### **190 Vesting order**

Wherever the court may make or has made an order under this division with respect to the subject land, the court may make

such vesting order as it may deem proper instead of or in addition to the order, or in default of compliance with the order.

## **191 Boundaries**

- (1) Where any question arises as to whether an existing building encroaches or a proposed building will encroach beyond the boundary, either of the owners of the contiguous parcels of land may apply to the court for the determination under this division of the true boundary.
- (2) On the application the court may make such orders as it may deem proper for determining, marking, and recording the true boundary.
- (3) This section applies to buildings erected either before or after the commencement of this Act.

## **192 Suit, action or other proceeding**

- (1) In any suit or proceeding before the court, however originated, the court may, if it sees fit, exercise any of the powers conferred by this division, and may stay the suit or proceeding on such terms as it may deem proper.
- (2) Where any action or proceeding is taken or is about to be taken at law by any person, and the court is of opinion that the matter could more conveniently be dealt with by an application under this division, the court may grant an injunction, on such terms as it may deem proper, restraining the person from taking or continuing the action or proceedings at law.
- (3) In any action at law a judge may, if the judge is of opinion that the matter could more conveniently be dealt with by an application under this division, stay the action or proceeding on such terms as the judge may deem proper.

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### **193 Persons interested**

In any application under this division the court may require—

- (a) that notice of the application shall be given to any person interested; and
- (b) that any person who is or appears to be interested shall be made a party to the application.

### **194 Costs**

In any application under this division the court may make such order as to payment of costs (to be taxed as between solicitor and client or otherwise), charges, and expenses as it may deem just in the circumstances and may take into consideration any offer of settlement made by either party.

## **Division 2 Improvements under mistake of title**

### **195 Application of div 2**

This division applies despite the provisions of any other Act.

### **196 Relief in case of improvements made by mistake**

Where a person makes a lasting improvement on land owned by another in the genuine but mistaken belief that—

- (a) such land is the person's property; or
- (b) such land is the property of a person on whose behalf the improvement is made or intended to be made;

application may be made to the court for relief under this division.

### **197 Nature of relief**

- (1) If in the opinion of the court it is just and equitable that relief should be granted to the applicant or to any other person, the

court may if it thinks fit make any 1 or more of the following orders—

- (a) vesting in any person or persons specified in the order the whole or any part of the land on which the improvement or any part of the improvement has been made either with or without any surrounding or contiguous or other land;
  - (b) ordering that any person or persons specified in the order shall or may remove the improvement or any part of the improvement from the land or any part of it;
  - (c) ordering that any person or persons specified in the order pay compensation to any other person in respect of—
    - (i) any land or part of the land; or
    - (ii) any improvement or part of the improvement; or
    - (iii) any damage or diminution in value caused or likely to be caused by or to result from any improvement or order made under this division;
  - (d) ordering that any person or persons specified in the order have or give possession of the land or improvement or part of the improvement for such period and upon such terms and conditions as the court may specify.
- (2) An order under this division, and any provision of the order, may—
- (a) include or be made upon and subject to such terms and conditions as the court thinks fit, whether as to payment by any person of any sum or sums of money including costs (to be taxed as between solicitor and client or otherwise), or the execution by any person of any mortgage, lease, easement, contract or other instrument, or otherwise; and
  - (b) declare that any estate or interest in the land or any part of the land on which the improvement has been made to be free of any mortgage, lease, easement or other

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encumbrance, or may vary, to such extent as may be necessary in the circumstances, any mortgage, lease, easement, contract, or other instrument affecting or relating to such land or any part of the land; and

- (c) direct that any person or persons execute any instrument or instruments in registrable or other form necessary to give effect to the declaration or order of the court; and
- (d) order any person to produce to any person specified in the order any title deed or other instrument or document relating to any land; and
- (e) direct a survey to be made of any land and a plan of survey to be prepared.

## **198 Right to apply or be served**

- (1) Application for relief under this division may be made by—
  - (a) any person who made or who is for the time being in possession of any improvement referred to in section 196; and
  - (b) any person having any estate or interest in the land or any part of the land upon which such improvement has been made; and
  - (c) any person claiming to be a party to or to be entitled to any benefit under any mortgage, lease, easement, contract or other instrument relating to such land or improvement; and
  - (d) the successor in title to, or mortgagee or lessee of, any person upon whose land the improvement or any part of the improvement was intended to be made; and
  - (e) the local government within whose area the land or improvement or any part of the land or improvement is situated.
- (2) In any application under this division the court may require—
  - (a) that notice of the application be given to any of the persons referred to in subsection (1) and to any other

- person who is or appears to be interested in or likely to be affected by an order made under this division; and
- (b) that any such person be made a party to the application.

## **Part 11A Rights of way**

### **198A Prescriptive right of way not acquired by user**

- (1) User after the commencement of this Act of a way over land shall not of itself be sufficient evidence of an easement of way or a right of way having been acquired by prescription or by the fiction of a lost grant.
- (2) If at any time it is established that an easement of way or right of way over land existed at the commencement of this Act, the existence and continuance of the easement or right shall not be affected by subsection (1).
- (3) For the purpose of establishing the existence at the commencement of this Act of an easement of way or right of way over land user after such commencement of a way over that land shall be disregarded.

## **Part 12 Equitable interests and things in action**

### **199 Statutory assignments of things in action**

- (1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice—
  - (a) the legal right to such debt or thing in action; and

- (b) all legal and other remedies for the same; and
  - (c) the power to give a good discharge for the same without the concurrence of the assignor.
- (2) If the debtor, trustee or other person liable in respect of such debt or thing in action has notice—
- (a) that the assignment is disputed by the assignor or any person claiming under the assignor; or
  - (b) of any other opposing or conflicting claims to such debt or thing in action;

the debtor may, if the debtor thinks fit, either call upon the persons making claim to the debt or other thing in action to interplead concerning the same, or pay the debt or other thing in action into court under and in conformity with the provisions of the Acts relating to relief of trustees.

## **200 Efficacy in equity of voluntary assignments**

- (1) A voluntary assignment of property shall in equity be effective and complete when, and as soon as, the assignor has done everything to be done by the assignor that is necessary in order to transfer the property to the assignee—
- (a) even though anything remains to be done in order to transfer to the assignee complete and perfect title to the property; and
  - (b) provided that anything so remaining to be done is such as may afterwards be done without intervention of or assistance from the assignor.
- (2) This section is without prejudice to any other mode of disposing of property, but applies subject to the provisions of this and of any other Act.

## **Part 13 Powers of appointment**

### **201 Application of pt 13**

This part applies to powers created or arising either before or after the commencement of this Act.

### **202 Mode of exercise of powers**

- (1) Where a power of appointment by an instrument other than a will is exercised by deed, executed and attested under this Act, or, in the case of an instrument under the *Land Title Act 1994*, under that Act, such deed or instrument shall, so far as respects the execution and attestation of the instrument, be a valid exercise of the power, even though by the instrument creating the power some additional or other form of execution or attestation or solemnity is required.
- (2) This section does not operate to defeat any direction in the instrument creating the power that—
  - (a) the consent of any particular person is to be necessary to a valid execution; or
  - (b) in order to give validity to any appointment, any act is to be performed having no relation to the mode of executing and attesting the instrument.
- (3) This section does not prevent the donee of a power from executing it under the power by writing, or otherwise than by an instrument executed and attested as a deed, and where a power is so executed this section does not apply.
- (4) This section applies to the exercise after the commencement of this Act of any such power created by an instrument coming into operation before or after the commencement of this Act.



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**203 Validation of appointments where objects are excluded or take illusory shares**

- (1) No appointment made in exercise of any power to appoint any property among 2 or more objects shall be invalid on the ground that—
  - (a) an unsubstantial, illusory, or nominal share only is appointed to or left unappointed to devolve upon any 1 or more of the objects of the power; or
  - (b) any object of the power is altogether excluded;but every such appointment shall be valid even though any 1 or more of the objects is not, or in default of appointment, to take any share in the property.
- (2) This section does not affect any provision in the instrument creating the power which declares the amount of any share from which any object of the power is not to be excluded.
- (3) This section applies to appointments made before or after the commencement of this Act.

**204 Protection of purchasers claiming under certain void appointments**

- (1) An instrument purporting to exercise a power of appointment over property, which, in default of and subject to any appointment, is held in trust for a class or number of persons of whom the appointee is one, shall not be void on the ground of fraud on the power as against a purchaser in good faith.
- (1A) However, if the interest appointed exceeds, in amount or value, the interest in such property to which immediately before the execution of the instrument the appointee was presumptively entitled under the trust in default of appointment, having regard to any advances made in the appointee's favour and to any hotchpot provision, the protection afforded by this section to a purchaser shall not extend to such excess.
- (2) In this section—

*a purchaser in good faith* means a person dealing with an appointee of the age of not less than 25 years for valuable consideration in money or money's worth, and without notice of the fraud, or of any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.

- (3) Persons deriving title under any purchaser entitled to the benefit of this section shall be entitled to the like benefit.
- (4) This section applies only to dealings effected after the commencement of this Act.

## **205 Disclaimer etc. of powers**

- (1) A person to whom any power, whether or not coupled with an interest, is given, may by deed disclaim, release or contract not to exercise the power, and after such disclaimer release or contract shall not be capable of exercising or joining in the exercise of the power.
- (2) On such disclaimer, release, or contract, the power may be exercised by the other person or persons or the survivor or survivors of the other persons to whom the power is given unless the contrary is expressed in the instrument creating the power.
- (3) Where such power is exercisable by any instrument which may or is required to be registered under any Act, the power may be released or disclaimed by a memorandum in the approved form which may be registered.
- (4) This section—
  - (a) does not apply to a power coupled with a duty; and
  - (b) applies to a power created by an instrument coming into operation whether before or after the commencement of this Act.

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## Part 14 Perpetuities and accumulations

### 206 Definitions for pt 14

In this part—

*disposition* includes the conferring or exercise of a power of appointment or any other power or authority to dispose of an interest in or a right over property and any other disposition of an interest in or right over property.

*instrument* includes a will, and also includes an instrument, testamentary or otherwise, exercising a power of appointment whether general or special but does not include an Act.

*power of appointment* includes any discretionary power to transfer or grant or create a beneficial interest in property without the furnishing of valuable consideration.

### 206A When disposition in will made

For the purposes of this part a disposition contained in a will shall be deemed to be made at the death of the testator.

### 206B When person to be treated as member of class

For the purposes of this part a person shall be treated as a member of a class if in the person's case all the conditions identifying a member of the class are satisfied, and shall be treated as a potential member if in the person's case only 1 or some of those conditions are satisfied but there is a possibility that the remainder will in time be satisfied.

### 207 Application of pt 14

- (1) Save as otherwise provided in this part, this part shall apply only in relation to instruments taking effect after the commencement of this Act, and in the case of an instrument under which a special power of appointment is exercised shall

apply only where the instrument creating the power takes effect after that commencement.

- (1A) However, section 208 shall apply in all cases for construing the reference in this subsection to a special power of appointment.
- (2) This part applies in relation to a disposition made otherwise than by an instrument as if the disposition had been contained in an instrument taking effect when the disposition was made.

## **208 Powers of appointment**

- (1) For the purposes of the rule against perpetuities a power of appointment shall be treated as a special power unless—
  - (a) in the instrument creating the power it is expressed to be exercisable by 1 person only; and
  - (b) it could at all times during its currency when that person is of full age and capacity be exercised by the person so as immediately to transfer to or otherwise vest in the person the whole of the interest governed by the power without the consent of any other person or compliance with any other condition, not being a formal condition relating only to the mode of exercise of the power.
- (2) However, for the purpose of determining whether a disposition made under a power of appointment exercisable by will only is void for remoteness the power shall be treated as a general power where it would have fallen to be so treated if exercisable by deed.

## **209 Power to specify perpetuity period**

- (1) Except as otherwise provided in this part where the instrument by which any disposition is made so provides the perpetuity period applicable to the disposition under the rule against perpetuities instead of being of any other duration shall be such number of years not exceeding 80 as is specified in the instrument as the perpetuity period applicable to the disposition.

- (2) Subsection (1) shall not have effect where the disposition is made in exercise of a special power of appointment but where a period is specified under that subsection in the instrument creating such a power the period shall apply in relation to any disposition under the power as it applies in relation to the power itself.
- (3) If no period of years is specified in an instrument by which a disposition is made as the perpetuity period applicable to the disposition but a date certain is specified in the instrument as the date on which the disposition shall vest the instrument shall, for the purposes of this section, be deemed to specify as the perpetuity period applicable to the disposition a number of years equal to the number of years from the date of the taking effect of the instrument to the specified vesting date.

## **210    *Wait and see rule***

- (1) Where apart from the provisions of this section and of section 213 a disposition would be void on the ground that the interest disposed of might not become vested until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the vesting must occur, if at all, after the end of the perpetuity period as if the disposition were not subject to the rule against perpetuities, and its becoming so established shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.
- (2) Where apart from the provisions of this section and of section 213 a disposition consisting of the conferring of a general power of appointment would be void on the ground that the power might not become exercisable until too remote a time the disposition shall be treated until such time (if any) as it becomes established that the power will not be exercisable within the perpetuity period as if the disposition were not subject to the rule against perpetuities.
- (3) Where apart from the provisions of this section and of section 213 a disposition consisting of the conferring of any

power, option or other right would be void on the ground that the right might be exercised at too remote a time the disposition shall be treated as regards any exercise of the right within the perpetuity period as if it were not subject to the rule against perpetuities and subject to the provisions shall be treated as void for remoteness only if and so far as the right is not fully exercised within that period.

- (4) Nothing in this section makes any person a life in being for the purposes of ascertaining the perpetuity period unless the life of that person is one expressed or implied as relevant for this purpose by the terms of the disposition and would have been reckoned a life in being for such purpose if this section had not been enacted.
- (5) However, in the case of a disposition to a class of persons or to 1 or more members of a class, any person living at the date of the disposition whose life is so expressed or implied as relevant for any member of the class may be reckoned a life in being in ascertaining the perpetuity period.

## **211 Power to apply to court for declaration as to validity**

- (1) A trustee of any property, or any person interested under, or on the invalidity of, a disposition of property, may at any time apply to the court for a declaration as to the validity, in respect to the rule against perpetuities, of a disposition of that property.
- (2) The court may, on an application under subsection (1), make a declaration, on the basis of facts existing and events that have occurred at the time the declaration is made, as to the validity or otherwise of the disposition in respect of which the application is made, but the court shall not make a declaration in respect of any disposition the validity of which cannot be determined at the time at which the court is asked to make the declaration.

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## **212 Presumptions and evidence as to future parenthood**

- (1) Where in any proceedings there arises on the rule against perpetuities a question which turns on the capacity of a person to have a child at some future time, then—
  - (a) it shall be presumed, subject to paragraph (b), that a male can have a child at the age of 12 years or over but not under that age and that a female can have a child at the age of 12 years or over but not under that age or over the age of 55 years; but
  - (b) in the case of a living person evidence may be given to show that he or she will or will not be capable of having a child at the time in question.
- (2) Where any such question is decided by treating a person as incapable of having a child at a particular time and he or she does so, the court may make such order as it thinks fit for placing the persons interested in the property comprised in the disposition so far as may be just in the position they would have held if the question had not been so decided.
- (3) Subject to subsection (2), where any such question is decided in relation to a disposition by treating a person as capable or incapable of having a child at a particular time then he or she shall be so treated for the purpose of any question which may arise on the rule against perpetuities in relation to the same disposition in any subsequent proceedings.
- (4) In this section, references to having a child are references to begetting or giving birth to a child, but this section (other than subsection (1)(b)) shall apply in relation to the possibility that a person will at any time have a child by adoption, legitimation or other means as they apply to the person's capacity at that time to beget or give birth to a child.

## **213 Reduction of age and exclusion of class members to avoid remoteness**

- (1) Where a disposition is limited by reference to the attainment by any person or persons of a specified age exceeding 18

years and it is apparent at the time the disposition is made or becomes apparent at a subsequent time—

- (a) that the disposition would apart from this section be void for remoteness; but
- (b) that it would not be so void if the specified age had been 18 years;

the disposition shall be treated for all purposes as if instead of being limited by reference to the age in fact specified it had been limited by reference to the age nearest to that age which would if specified instead, have prevented the disposition from being so void.

- (2) Where in the case of any disposition different ages exceeding 18 years are specified in relation to different persons—
  - (a) the reference in subsection (1)(b) to the specified age shall be construed as a reference to all the specified ages; and
  - (b) that subsection shall operate to reduce each such age so far as is necessary to save the disposition from being void for remoteness.
- (3) Where the inclusion of any persons being potential members of a class or unborn persons who at birth would become members or potential members of the class prevents subsections (1) and (2) from operating to save a disposition from being void for remoteness, those persons shall be deemed for all the purposes of the disposition to be excluded from the class and subsections (1) and (2) shall have effect accordingly.
- (4) Where in the case of a disposition to which subsection (3) does not apply it is apparent at the time the disposition is made or becomes apparent at a subsequent time that apart from this subsection the inclusion of any persons, being potential members of a class or unborn persons who at birth could become members or potential members of the class would cause the disposition to be treated as void for remoteness, those persons shall unless their exclusion would



exhaust the class be deemed for all the purposes of the disposition to be excluded from the class.

- (5) Where this section has effect in relation to a disposition to which section 210 applies the operation of this section shall not affect the validity of anything previously done in relation to the interest disposed of by way of advancement, application of intermediate income or otherwise.

## **214 Unborn husband or wife**

The widow or widower of a person who is a life in being for the purposes of the rule against perpetuities shall be deemed to be a life in being for the purpose of—

- (a) a disposition in favour of that widow or widower; and
- (b) a disposition in favour of a charity which attains or of a person who attains or of a class the members of which attain under the terms of the disposition a vested interest on or after the death of the survivor of the person who is a life in being and that widow or widower, or on or after the death of that widow or widower or on or after the happening of any contingency during her or his lifetime.

## **215 Dependent dispositions**

A disposition shall not be treated as void for remoteness merely because the interest disposed of is ulterior to and dependent upon an interest under a disposition which is so void, and the vesting of an interest shall not be prevented from being accelerated on the failure of a prior interest merely because the failure arises because of remoteness.

## **216 Abolition of the rule against double possibilities**

- (1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is abolished.

- (2) This section applies only to limitations or trusts created by an instrument coming into operation after the commencement of this Act.

## **217 Restrictions on the perpetuity rule**

- (1) For removing doubts, it is declared that the rule of law relating to perpetuities does not apply and shall be deemed never to have applied—
- (a) to any power to distrain on or to take possession of land or the income of the land given by way of indemnity against a rent, whether charged upon or payable in respect of any part of that land or not; or
  - (b) to any rent charge created only as an indemnity against another rent charge, although the indemnity rent charge may arise or become payable only on breach of a condition or stipulation; or
  - (c) to any power, whether exercisable on breach of a condition or stipulation or not, to retain or withhold payment of any instalment of a rent charge as an indemnity against another rent charge; or
  - (d) to any grant, exception or reservation of and right of entry on, or user of, the surface of land or of any easements, rights or privileges over or under land for the purpose of—
    - (i) winning, working, inspecting, measuring, converting, manufacturing, carrying away and disposing of mines and minerals; and
    - (ii) inspecting, grubbing up, felling and carrying away timber and other trees, and the tops and lops of them; and
    - (iii) executing repairs, alterations or additions to any adjoining land, or the buildings and erections on the land; and
    - (iv) constructing, laying down, altering, repairing, renewing, cleansing and maintaining sewers,

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watercourses, cesspools, gutters, drains, water pipes, gas pipes, electric wires or cables or other like works.

- (2) This section applies to instruments coming into operation before or after the commencement of this Act.
- (3) In this section—  
*instrument* includes a statute creating a settlement.

## 218 Options

- (1) The rule against perpetuities shall not apply to a disposition consisting of the conferring of an option to acquire for valuable consideration an interest reversionary (whether directly or indirectly) on the term of a lease if—
  - (a) the option is exercisable only by the lessee or the lessee's successors in title; and
  - (b) it ceases to be exercisable at or before the expiration of 1 year following the determination of the lease.
- (1A) Subsection (1) applies in relation to an agreement for a lease as it applies in relation to a lease, and *lessee* shall be construed accordingly.
- (2) An option to acquire an interest in land (not being an option to which subsection (1) applies) or a right of pre-emption in respect of land, which according to its terms is or may be exercisable at a date more than 21 years from the date of its grant shall after the expiration of 21 years from the date of its grant be void and not exercisable by any person and no remedy shall lie in contract or otherwise for giving effect to it or making restitution for its lack of effect, but—
  - (a) this subsection shall not apply to an option or right of pre-emption conferred by will; and
  - (b) nothing in this subsection shall affect an option for renewal or right of pre-emption contained in a lease or an agreement for a lease.

## **219 Determinable interests**

- (1) The rule against perpetuities shall apply—
  - (a) to a possibility of reverter in land on the determination of a determinable fee simple, in which case if the fee simple does not determine within the perpetuity period it shall afterwards continue as a fee simple absolute; and
  - (b) to a possibility of a resulting trust on the determination of any other determinable interest in property, in which case if the first interest created by the trust does not determine within the perpetuity period the interest it creates shall afterwards continue as an absolute interest; and
  - (c) to a right of entry for condition broken the exercise of which may determine a fee simple subject to a condition subsequent and to an equivalent right in the case of property other than land, in which case if the right of entry or other right is not exercised within the perpetuity period the fee simple shall afterwards continue as an absolute interest and any such other interest in property shall afterwards continue free from the condition.
- (2) This section shall apply whether or not the determinable or conditional disposition is charitable except that the rule against perpetuities shall not apply to a gift over from 1 charity to another.
- (3) Where a disposition is subject to any provision that causes an interest to which subsection (1)(a) or (b) applies to be determinable, or to any condition subsequent giving rise on breach of it to a right of re-entry or an equivalent right in the case of property other than land, or to any exception or reservation the disposition shall be treated for the purposes of this Act as including a separate disposition of any rights arising because of the provision condition subsequent exception or reservation.

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## 220 Trustee powers and superannuation funds

- (1) The rule of law known as the rule against perpetuities does not apply and shall be deemed never to have applied so as to render void—
  - (a) a trust or power to sell property, where a trust of the proceeds of sale is valid; or
  - (b) a trust or power to lease or exchange property, where the lease or exchange directed or authorised by the trust or power is ancillary to the carrying out of a valid trust; or
  - (c) any other power which is ancillary to the carrying out of a valid trust or the giving effect to a valid disposition of property; or
  - (d) a trust or fund established for the purpose of making provision by way of assistance, benefits, superannuation, allowances, gratuities or pensions for persons who are or have been—
    - (i) employees; or
    - (ii) self-employed persons; or
    - (iii) employees and self-employed persons; or
    - (iv) the spouses, children, grandchildren, parents, dependants or legal personal representatives of employees or self-employed persons; or
    - (v) persons selected or nominated by an employee or a self-employed person under the provisions of such trust or fund; or
  - (e) any provision for the remuneration of trustees.
- (2) This section does not—
  - (a) render any trustee liable for any acts done prior to the commencement of this Act for which that trustee would not have been liable had this section not been enacted; or
  - (b) enable any person to recover any money distributed or paid under any trust prior to the commencement of this

Act, if the person could not have recovered that money had this section not been enacted.

(3) In this section—

*employee* includes directors, servants, officers or employees of any employer or employers.

*self-employed persons* includes persons engaged in any lawful profession, trade, occupation or calling.

## **221 Non-charitable purpose trusts**

- (1) Except as provided in subsection (2) nothing in this Act shall affect the operation of the rule of law rendering non-charitable purpose trusts and trusts for the benefit of corporations which are not charities void for remoteness in cases where the trust property may be applied for the purposes of the trusts after the end of the perpetuity period.
- (2) If any such trust is not otherwise void sections 209 and 210 shall apply to it and the property subject to the trust may be applied for the purposes of the trust during the perpetuity period but not afterwards.

## **222 Accumulation of income**

- (1) Where property is settled or disposed of in such manner that the income of the property may be or is directed to be accumulated wholly or in part the power or direction to accumulate that income shall be valid if the disposition of the accumulated income is or may be valid but not otherwise.
- (2) Nothing in this section shall affect the power of any person or persons to terminate an accumulation that is for his or her benefit or any jurisdiction or power of the court to maintain or advance out of accumulations or any power of a trustee under the *Trusts Act 1973* or under any other Act or law or under any instrument creating a trust or making a disposition.

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## **Part 15                      Corporations**

### **223      Devolution of property of corporation sole**

Where either before or after the commencement of this Act any property or interest in the property is or has been vested in a corporation sole (including the Crown), the same shall, unless and until disposed of by the corporation, pass and devolve to and vest in and be deemed always to have passed and devolved to and vested in the successors from time to time of such corporation.

### **224      Vacancy in corporation**

Where either before or after the commencement of this Act there is or has been a vacancy in the office of a corporation sole or in the office of the head of a corporation aggregate (in any case in which the vacancy affects the status or powers of the corporation) at the time when, if there had been no vacancy, any interest in or charge on property would have been acquired by the corporation, such interest shall despite such vacancy vest and be deemed to have vested in the successor to such office on the successor's appointment as a corporation sole, or in the corporation aggregate (as the case may be), but without prejudice to the right of such successor, or of the corporation aggregate after the appointment of its head officer, to disclaim that interest or charge.

### **225      Transactions with corporation sole**

Any contract or other transaction expressed or purporting to be made with a corporation sole, or any appointment of a corporation sole as trustee, at a time when there was a vacancy in the office and no administrator acting, shall on the vacancy being filled take effect and be deemed to have taken effect as if the vacancy had been filled before the contract, transaction or appointment was expressed to be made or was capable of taking effect, and on the appointment of a successor shall be

capable of being enforced, accepted, disclaimed or renounced by the successor.

## **226 Corporation incapable of acting**

- (1) Where, because of the death or incapacity (whether before or after the commencement of this Act) of any 1 or more of the officers or members of a corporation or for any other reason, the corporation ceases to be capable of acting—
  - (a) either generally or in respect of a particular transaction or transactions; and
  - (b) either temporarily or for an indefinite or any lesser period;the court may, on the application of any officer or member of the corporation or the personal representative of such member or of any creditor or person having or appearing to have any claim against the corporation, appoint an administrator.
- (2) The court may in its discretion appoint any administrator for an indefinite period or for a fixed period or until the happening of any specified event and on such terms and conditions as to remuneration out of the assets of the corporation and otherwise as it thinks fit.
- (3) Unless the court otherwise directs, the administrator shall, to the exclusion of the corporation and any officer or member of the corporation, have authority to and may exercise all the powers of the corporation subject to such terms and conditions (if any) as the court sees fit to impose.
- (4) Unless the court otherwise directs, the administrator may delegate any of the powers exercisable by the administrator.
- (5) The court may in its discretion on the application of the administrator or of any person referred to in subsection (1)—
  - (a) give to the administrator directions—
    - (i) as to the exercise of any of the powers exercisable by the administrator; and



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- (ii) as to any question or matter arising in or with respect to the affairs of the corporation; or
  - (b) remove or replace the administrator.
  - (6) On any application under this section the court may make such order for the payment of costs as it thinks fit.
  - (7) This section applies to any corporation, whether a corporation aggregate or corporation sole—
    - (a) incorporated under the *Associations Incorporation Act 1981*; or
    - (b) incorporated or registered under the Corporations Act; or
    - (c) constituted under any other Act.
  - (8) Where an order is made under this section for the appointment, removal or replacement of an administrator in relation to a company incorporated or registered under the Corporations Act the order shall not take effect until the lodgment within 7 days of the making of the order, or such longer period as the court may allow, of an office copy of the order with the Australian Securities and Investments Commission.

## **227 Corporate contracts and transactions not under seal**

- (1) Contracts and other transactions may be made or effected by any body corporate, wherever incorporated, as follows—
  - (a) a contract or other transaction which if made or effected by or between individuals would by law be required to be in writing, signed by the party to be charged with it or effecting the same, may be made by the corporation in writing signed by any person under its authority, express or implied; and
  - (b) a contract or other transaction, which if made or effected by or between individuals would by law be valid although made by parol only, and not reduced to

writing, may be made by parol by the corporation by any person acting under its authority, express or implied.

- (2) A contract or other transaction made or effected under this section shall be effective in law, and shall bind the corporation and the corporation's successors and all other parties to the contract or other transaction.
- (3) A contract or other transaction made or effected under this section may be varied or discharged in the same manner in which it is by this section authorised to be made or effected.
- (4) Nothing in this section shall be taken to prevent a contract or other transaction from being made or effected under the seal of the corporation.
- (5) This section—
  - (a) applies to the making, effecting, variation or discharge of a contract or transaction after the commencement of this Act, whether the corporation gave its authority before or after the commencement of this Act; and
  - (b) does not apply to contracts made by any company within the meaning of the Corporations Act, or by any corporation incorporated under any other Act which expressly prescribes the manner and form in which contracts may be made or transactions effected by or on behalf of such corporation.

## **Part 16                      Voidable dispositions**

### **228      Voluntary conveyances to defraud creditors voidable**

- (1) Subject to this section, every alienation of property, made whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person prejudiced by the alienation of property.
- (2) This section does not affect the law of bankruptcy for the time being in force.

- (3) This section does not extend to any estate or interest in property conveyed for valuable consideration and in good faith to any person not having, at the time of the conveyance, notice of the intent to defraud creditors.

## **229 Voluntary disposition of land how far voidable as against purchasers**

- (1) Every voluntary alienation of land made with intent to defraud a subsequent purchaser is voidable at the instance of that purchaser.
- (2) For the purposes of this section, no voluntary disposition, whenever made, shall be deemed to have been made with intent to defraud merely because a subsequent conveyance for valuable consideration was made, if such subsequent conveyance is made after the commencement of this Act.

## **230 Acquisitions of reversions at an under value**

- (1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property, for money or money's worth, shall be liable to be opened or set aside merely on the ground of under value.
- (1A) In subsection (1)—  
*reversionary interest* includes an expectancy or possibility.
- (2) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

# **Part 17 Apportionment**

## **231 Definitions for pt 17**

In this part—

*annuities* include salaries and pensions.

*dividends* include (besides dividends strictly so-called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of any company or other body corporate incorporated under any statute, divisible between all, or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise.

*rents* include rent service, rent charge, and rent seek, and all periodical payments or renderings instead of or in the nature of rent.

### **232 Rents etc. apportionable in respect of time**

- (1) All rents, annuities, dividends, and other periodical payments in the nature of income whether reserved or made payable under an instrument in writing or otherwise shall, like interest on money lent be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.
- (2) The apportioned part of any such rent, annuity, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part, forms part becomes due and payable, and not before, and in the case of a rent annuity or other such payment determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not so determined, and not before.
- (3) All persons and their respective executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies, at law and in equity, for recovering such apportioned parts when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions if entitled to them respectively.
- (4) Despite subsection (3), where any person is liable to pay rent reserved out of or charged on lands, that person and the lands shall not be resorted to for any such apportioned part forming

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part of an entire or continuing rent specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the person who, if the rent had not been apportionable under this section or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such last person by the executors, administrators, or other parties entitled to it under this section by action or suit.

### **233 Exceptions and application**

- (1) Nothing in this part renders apportionable any annual sums payable under policies of assurance of any description.
- (2) This part does not extend to any case in which it is expressly stipulated that apportionment shall not take place.

## **Part 18 Unregistered land**

### **Division 1 Application of part—interpretation**

#### **234 Definition for pt 18**

In this part—

*instrument* includes not only conveyances and other deeds, but also all instruments in writing of any kind, under which real or leasehold estate is affected or is intended so to be, including—

- (a) a certificate under section 101; and
- (b) a power of attorney registered under an Act.

#### **234A Application of pt 18**

Subject to section 241, this part applies only to unregistered land and any estate or interest in unregistered land.

## **Division 2                      Sales and conveyances**

### **235      No conveyance to have tortious operation**

No conveyance of any land made or purporting to be made after the commencement of this Act shall have a tortious operation.

### **236      Want of livery of seisin**

- (1) Livery of seisin shall not be deemed to have been necessary to give effect to any feoffment executed before 3 January 1842, but every such feoffment shall be taken to have operated in the same manner as the same would have done in case there had been livery of seisin in the most valid form.
- (2) However, nothing in subsection (1) shall make any such feoffment operate as a tortious conveyance or shall prejudice or affect the title of any person now in possession of land the subject of any such feoffment and claimed adversely to the feoffee or the feoffee's heirs or assigns.

### **237      Statutory commencements of title**

- (1) After the commencement of this Act 30 years shall be substituted for 60 years as the period of commencement of title which a purchaser of land may require, even though earlier title than 30 years may be required in cases similar to those in which earlier title than 60 years might immediately before the commencement of this Act be required.
- (2) Under a contract to grant or assign a term of years, whether derived or to be derived out of freehold or leasehold land, the intended lessee or assign shall not be entitled to call for the title to the freehold.
- (3) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion.

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- (4) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.
  - (5) Where, because of subsection (2), (3) or (4), an intending lessee or assign is not entitled to call for the title to the freehold or to a leasehold reversion, as the case may be, the intending lessee or assign shall not, where the contract is made after the commencement of this Act, be deemed to be affected with notice of any matter or thing of which, if the intending lessee or assign had contracted that such title should be furnished, the intended lessee or assign might have had notice.
  - (6) A purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing of which, if the purchaser had investigated the title or made enquires in regard to matters prior to the period of commencement of title fixed by this Act, or by any other statute, or by any rule of law, the purchaser might have had notice, unless the purchaser actually makes such investigation or enquires.
  - (7) Where a lease whether made before or after the commencement of this Act, is made under a power contained in a settlement, will, Act or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.
  - (8) This section applies to contracts for sale whether made before or after the commencement of this Act, and applies to contracts for exchange in like manner as to contracts for sale, save that it applies only to contracts for exchange made after such commencement.
  - (9) This section applies only if and so far as a contrary intention is not expressed in the contract.

## **238 Other statutory conditions of sale**

- (1) A purchaser of any property shall not—

- (a) require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for the commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; or
- (b) require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, even though any such deed, will, or other document, or that prior title, is recited, agreed to be produced, or noticed;

and the purchaser shall assume, unless the contrary appears, that the recitals contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise.

- (1A) However, subsection (1) shall not deprive a purchaser of the right to require the production, or an abstract or copy of—
  - (a) any power of attorney under which any abstracted document is executed; or
  - (b) any document creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the property is disposed of by an abstracted document; or
  - (c) any document creating any limitation or trust by reference to which any part of the property is disposed of by an abstracted document.
- (2) Where land sold is held by lease (other than an under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted, and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and



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provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.

- (3) Where land is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted, and, on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, the purchaser shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date.
- (4) On a sale of any property, the following expenses shall be borne by the purchaser where the purchaser requires them to be incurred for the purpose of verifying the abstract or any other purpose—
  - (a) the expenses of the production and inspection of all records, proceedings of courts, deeds, wills, probates, letters of administration, and other documents, not in the possession of the vendor or the vendor's mortgagee or trustee, and the expenses of all journeys incidental to such production or inspection;
  - (b) the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the possession of the vendor or the vendor's mortgagee or trustee, and all attested, stamped, office, or other copies or abstracts of, or extracts from, the documents referred to in paragraph (a), not in the possession of the vendor or the vendor's mortgagee or trustee;

and where the vendor or the vendor's mortgagee or trustee retains possession of any document, the expenses of making any copy of the document, attested or unattested, which a purchaser requires to be delivered to the purchaser, shall be borne by that purchaser.

- (5) On a sale of any property in parcels, a purchaser of 2 or more parcels held wholly or partly under the same title, shall not have a right to more than 1 abstract of the common title, except at the purchaser's own expense.
- (6) Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, or statutory declarations, 20 years old at the date of the contract, shall, unless and except so far as they may be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions.
- (7) The inability of a vendor to furnish a purchaser with an acknowledgment of the vendor's right to production and delivery of copies of documents of title or with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents.
- (8) Such acknowledgments of the right of production or covenants for production and such undertakings or covenants for safe custody of documents as the purchaser can and does require shall be furnished or made at the purchaser's expense, and the vendor shall bear the expense of perusal and execution on behalf of and by the vendor, and on behalf of and by necessary parties other than the purchaser.
- (9) A vendor shall be entitled to retain documents of title where—
  - (a) the vendor retains any part of the land to which the documents relate; or
  - (b) the document consists of a trust instrument or other instrument creating a trust which is still subsisting, or an instrument relating to the appointment or discharge of a trustee of a subsisting trust.
- (10) This section applies to contracts for sale made after the commencement of this Act, and applies to contracts for exchange in like manner as to contracts for sale.
- (11) This section applies subject to any stipulation or contrary intention expressed in the contract.

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- (12) Nothing in this section shall be construed as binding a purchaser to complete the purchase in any case where, on a contract made independently of this section, and containing stipulations similar to this section, or any of them, specific performance of the contract would not be enforced against the purchaser by the court.

### **239 General words implied in conveyances**

- (1) A conveyance of land after the commencement of this Act shall be deemed to include and shall because of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land or any part of the land, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part of the land.
- (2) A conveyance of land, having houses or other buildings on it, shall be deemed to include and shall because of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages of any kind, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part of them, or, at the time of conveyance, demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part of them.
- (3) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions contained in the conveyance.

## **240 All estate clause implied**

- (1) Every conveyance is effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have, in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.
- (2) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and has effect subject to the terms of the conveyance and to the provisions contained in the conveyance.
- (3) This section applies to conveyances made after the commencement of this Act.

## **Division 3 Registration of deeds**

### **241 Registration of instruments and wills**

- (1) After the commencement of this Act—
  - (a) any agreement in writing, deed, conveyance or other instrument (except a lease for less than 3 years) affecting any estate in land may; and
  - (b) any will or devise affecting any estate in land may; and
  - (c) any other instrument, record or document which, prior to the passing of this Act, might have been registered under the *Registration of Deeds Act 1843* may; and
  - (d) every Act shall;under this division, be registered, enrolled or, as the case may be, recorded in the land registry.
- (2) A reference in any Act or instrument to, or to registration of an instrument under, the *Registration of Deeds Act 1843* or the *Titles to Land Act 1858* shall be construed as a reference to this division.

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## 242 Mode of registration

- (1) Registration under this division shall be effected by lodging in the land registry a full copy of the instrument signed by some 1 or more of the parties to the original instrument, or will, certified under this section.
- (2) The copy referred to in subsection (1)—
  - (a) shall be legibly and neatly written or printed upon paper of such form, size and quality as the registrar may from time to time direct; and
  - (b) shall be certified to be a true copy by the oath of a credible person, such oath to be taken before any of the persons mentioned in the *Land Title Act 1994*, schedule 1 to whom the original such instrument or will shall be produced at the time of certification.
- (3) Any erasure or interlineation on the copy referred to in subsection (1) shall be endorsed in the margin opposite to it with the signature or initials of the person certifying the same to be a true copy.

## 243 Signature on behalf of dead or absent party

When any party to any instrument is dead or absent from the State at the time when registration of the instrument is required—

- (a) the executor or administrator of that person; or
- (b) the attorney constituted under a power of attorney of the absent party; or
- (c) if the registrar is satisfied that the signature of a party cannot for any other reason be obtained, the registrar;

may, in place of a party referred to in the preceding section, sign the copy instrument, and such signature shall be valid to all intents and purposes as if such copy had been signed by the original party to the instrument.

## **244 Receipts by registrar and endorsement**

- (1) Upon the lodging in the land registry of any such certified copy and the verification of the same, the registrar shall grant and sign a receipt for such copy, specifying the day and hour on which it was lodged, and the name and place of abode of the witnesses attesting or verifying the same, and the number of such verified copy according as the same shall be numbered in the land registry, and such receipt shall be endorsed upon the original instrument to which such certified copy relates, and shall also be entered on such certified copy.
- (2) The time so endorsed shall be taken to be the time of registration of every such instrument of which the certified copy has been made.
- (3) Every such certified copy so lodged in the office shall be numbered successively accordingly to the order of time in which the same has been lodged, and shall immediately be registered according to such number and order of time in a book or books to be provided and kept for such purpose in the office, and every such book shall be open at all convenient times to the inspection of persons desirous of searching the same.
- (4) The registrar shall make and keep proper indexes to all registrations so that, as far as may be, information may readily be obtained by parties interested as to all encumbrances, liens or instruments affecting any land.

## **245 Mistakes in registration**

No registration of any instrument under any Act now or previously in force for the registration of deeds or intended to be under any such Act shall be defeated or made ineffectual because of any omission, misdescription or error in any case where the identity of the instrument in evidence with the one alleged to have been registered is established and the substantial requirements of the Act have been complied with.

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**246 Deeds to take effect according to priority of registration**

All deeds and other instruments (wills excepted) affecting land or any interest in the land which shall be executed or made bona fide and for valuable consideration and which shall be duly registered under this division shall have and take priority not according to their respective dates but according to the priority of the registration of the land only.

**247 Fraud of conveying party**

No instrument that in future is executed and registered under this division shall lose any priority to which it would be entitled because of such registration merely because of bad faith in the conveying party if the party beneficially taking under such instrument acted bona fide and there was a valuable consideration for the same paid or given.

**248 Covenants to produce deeds**

A covenant or undertaking whether now or in the future entered into to produce to any purchaser, lessee or mortgagee of land or the person's assigns any deed of or relating to such land shall be satisfied by a deposit of the deed permanently in the land registry and the registrar shall give a receipt for and keep in the land registry a list of all deeds so deposited and shall permit any person on payment of the proper fees to inspect and obtain copies of every such deed.

**249 Certified copy as evidence**

- (1) In all proceedings before any court of justice, a copy of any instrument, will or copy registered, deposited or lodged under this division shall, if such copy be signed by the registrar and sealed with the seal of the registrar, be received in evidence as prima facie proof of the instrument or will and of all matters contained or recited in or endorsed on the original instrument.
- (2) In any case where the production of a certified copy or of any endorsement or memorial is required for the purpose of

evidence under this Act the same may be produced by the registrar or any officer appointed by the registrar for the purpose.

(3) In this section—

*copy* includes photostatic copy and machine copy.

## Division 4                      Compulsory registration of title

### 250      Progressive registration of unregistered land

- (1) The registrar may from time to time by gazette notice (the *prescribed notice*) direct that any unregistered land described, or that all such land in any area defined, in the notice shall be subject to this division and that, unless an application to bring the land under the Real Property Acts is made within the period of time as is specified in the prescribed notice (the *specified time*) by the person entitled to make such application, such land shall be liable, under the further provisions of this division, to be brought under the Real Property Acts and a certificate of title issued for it in the name of the public trustee free from any estates, encumbrances, liens or interests whatsoever otherwise than are registrable under the *Real Property Act 1861* (*registrable interests*) and which shall have been allowed by the registrar under this section and which immediately prior to the issue of such certificate of title were registered in respect of that unregistered land.
- (2) In addition to publication of the prescribed notice as provided in subsection (1), the registrar shall give to each person appearing to the registrar (whether by reference to records of any local government or otherwise) to be the owner of the land and to each person appearing to have an interest in the land a copy of such notice together with a written statement briefly explaining the nature of this division.
- (3) The registrar may also cause a copy of the prescribed notice and a statement briefly explaining the nature of this division to be advertised in a newspaper published in Brisbane and in



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addition where in the opinion of the registrar the land is situated at a distance more than 50km from Brisbane in any newspaper circulated in the neighbourhood of the land to which such notice relates.

- (4) Within the specified time the person entitled in respect of any land the subject of a prescribed notice to make application to bring the land under the provisions of Real Property Acts, shall make and afterwards with due diligence proceed with an application to bring the land under those Acts.
- (5) Any person claiming to be entitled to any registrable interests in respect of any land the subject of a prescribed notice may within the specified time make application to have such interests noted on any certificate of title which may issue in respect of such land under this section and on the making of the application the Real Property Acts shall apply to such application as if it were an application to bring unregistered land under those Acts, with any necessary modification to meet the circumstances of the case.
- (5A) If the applicant establishes the claim, the registrar upon issuing a certificate of title for the land shall note on the certificate the interest of the applicant under the *Real Property Act 1861*, section 33.
- (6) In regard to any land the subject of the prescribed notice which shall not have been brought under the Real Property Acts upon the expiration of the specified time the following provisions shall apply—
  - (a) if no application has been made, or every application made has been rejected by the master of titles and refused by the registrar—the land shall vest in the public trustee;
  - (b) if an application has been made within the specified time and is refused by the registrar having been previously rejected by the master of titles—the land shall on such refusal become vested in the public trustee;
  - (c) if an application has been made but in the opinion of the registrar the applicant has not proceeded with due

diligence—the registrar may give written notice to the applicant requiring the applicant to take such action in regard to the application as the registrar may require in a time to be stated in the notice and if the applicant in the opinion of the registrar does not afterwards take such action within such time or such further time as the registrar may allow, the master of titles shall reject and the registrar shall refuse such application;

- (d) despite the compliance by the applicant with a notice given under paragraph (c) and until the registrar has allowed or refused the application—the registrar may from time to time give further such notices requiring such further action as the registrar thinks fit.
- (7) Where the master of titles has rejected and the registrar has refused an application, the applicant may, even though the land has vested in the public trustee, proceed under the *Real Property Act 1861*, section 27 and the court may in such case make such order or orders in respect of the application as shall seem just and equitable.
- (8) Any land shall, upon its vesting in the public trustee under this section, be deemed to be registered land and the registrar shall issue a certificate of title in the name of the public trustee subject to such estates, encumbrances, liens or interests, and bearing a memorial of any benefit easements appurtenant to the land, which shall have been then registered in respect of such land, and which are registrable under the Real Property Acts.
- (9) Nothing in this section affects the operation of the *Public Trustee Act 1978*, part 8.
- (10) The public trustee shall not, merely because of the vesting in the public trustee of land under this section, be subject to any liability in respect of such land.
- (11) The public trustee may, if the public trustee sees fit, take such action to obtain damages or compensation for any taking or other dealing (whether under any statutory power or otherwise) with land vested in the public trustee under this section or any interest in the land as the public trustee might if

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the land were otherwise vested in the public trustee as a trustee.

- (12) Any money received by the public trustee because of action taken by the public trustee under subsection (11) shall be dealt with as if they were received by the public trustee under the *Public Trustee Act 1978*, part 8, division 2.

## **251 Claims by persons claiming to be entitled to land or registrable interests**

- (1) In respect of any land which has become vested in the public trustee under section 250, a person claiming that but for section 250 the person would have been entitled after application to the registrar to have such land brought under the Real Property Acts and to have a certificate of title issued in respect of the land may make application to the registrar in the same manner in so far as is applicable to the circumstances of the case for the issue of a new certificate of title in respect of such land in such form and to such person as but for section 250 the person would have been entitled to have issued and on the making of the application the Real Property Acts shall apply to such application, as if it were an application to bring unregistered land under those Acts, with any necessary modification to meet the circumstances of the case.
- (2) If upon such application the master of titles would have been satisfied as to the claim of the applicant and the registrar would have brought such land under the Real Property Acts if such land was unregistered land which had not become vested in the public trustee, the registrar shall issue a new certificate of title to the land in the same manner as provided by the Real Property Acts in that case and shall cancel the certificate of title issued to the public trustee under section 250.
- (2A) However, before the issue of any new certificate of title under this section the applicant shall pay to the land registry such sum as the registrar shall determine as representing the costs reasonably attributable to such land incurred by the registrar

in obtaining any plan of survey for the purposes of section 250.

- (3) Despite the proviso to the *Real Property Act 1861*, section 16, any person who claims to be entitled to an estate or interest in fee simple in any land which has vested in the public trustee under section 250 and who would have been a person entitled to make application to have the person's estate or interest in the land brought under the Real Property Acts except for the proviso, may make an application to the registrar to have that estate or interest divested from the public trustee and vested in the person and the application shall be dealt with in the same manner as an application under subsection (1).
- (4) In respect of any land which has become vested in the public trustee under section 250, a person claiming that the person would have been entitled to make application within the specific time under section 250(5) to have any registrable interests in respect of the land noted may make application to the registrar in the same manner in so far as is applicable to the circumstances of the case to have such interests noted on the certificate of title for the land and on the making of the application the provisions of the Real Property Acts shall apply to such application, as if it were an application to bring unregistered land under those Acts, with any necessary modification to meet the circumstances of the case.
- (5) If an applicant shall establish a claim under subsection (4), the registrar shall note the interest of the applicant on the certificate of title for the land in the same manner as is provided in the *Real Property Act 1861*, section 33.

## **252 Vesting of land in Crown**

- (1) Despite any Act or rule of law to the contrary, if, within 12 years from the date when any land became vested in the public trustee under section 250, no person establishes title to such land or to any registrable interests in the land it shall vest absolutely in the Crown.
- (2) Any person who would have been entitled to make an application to the registrar of titles under section 251 in

respect of such land may within a further period of 5 years after such vesting in the Crown apply to the court for an order that the registrar take such action as the registrar might have on an application under section 251.

- (3) On any such application the court may with the consent of the Crown grant such application if it considers it just and equitable to do so and on such terms and conditions if any as it thinks reasonable and any order made by the court under this section shall so far as necessary have the effect of a grant of that land to the person in whose favour the order is made.
- (4) If the Crown shall not consent to such application the court, if it thinks it just and equitable to do so, may order the payment out of the assurance fund constituted under the *Real Property Act 1861*, sections 42 and 43 to the applicant or any other person of such sum or sums of money as it thinks reasonable not exceeding in all the value of the land or of the interest of the applicant at the date of the vesting in the Crown.

*Note—*

Now see the *Land Title Act 1994*, section 207.

- (5) In exercising its jurisdiction under subsections (3) and (4), the court shall have regard to all the circumstances including whether there is reasonable excuse for any delay and for failure of the applicant or any other person to proceed under sections 250 and 251.
- (6) Whether or not any application has been made to the court under this section the Governor in Council may by order in council waive the right of the Crown in regard to the land or any part of the land on such terms (if any) whether for the payment of money or otherwise as to the Governor in Council seems reasonable in favour of any person having in the opinion of the Governor in Council a just claim in regard to the land or such part of the land and on the making of the order in council such land or such part shall vest in such person and on such trusts (if any) as may be specified in the order in council and a waiver under this subsection shall have the effect of a grant of such land or such part to that person in favour of whom the waiver is made.

- (7) Even though any land has vested in the public trustee under this division, and whether or not it has vested subsequently in the Crown absolutely, any person claiming because of the operation of this division to have been deprived without default on the person's part of some right or interest in respect to such land may make application to the court for payment of compensation in relation to such deprivation and the court may order the payment out of the assurance fund to the applicant or any other person of such sum or sums of money by way of compensation as to the court seems reasonable.

### **253 Powers and duties of the registrar**

For the purposes of carrying into effect this division, the registrar—

- (a) in the case of any application to bring land under the Real Property Acts whether under section 250 or otherwise, or in the case of any application for the issue of a certificate of title under section 251—may, if the registrar thinks fit, and with the approval of the master of titles by direction under his or her hand dispense with advertisement of the application or with any other step which is or may be required under the Real Property Acts for the purpose or in the course of making or dealing with an application to bring land under those provisions, and afterwards the application shall not be invalidated because of the failure to take any such step but shall proceed without such step having been taken; and
- (b) may cause any necessary survey to be made and a plan of survey to be prepared of any unregistered land which it is proposed to describe in a notice under section 250(1); and
- (c) shall have such further powers and duties as may be prescribed.

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## 254 Investigator of old system titles

- (1) In order to enable the registrar to perform the registrar's duties under this division and otherwise to ensure that the provisions of this division are carried into effect, there shall be an investigator of old system titles.
- (2) The power to make regulations under section 350 includes power to make such regulations for the following purposes—
  - (a) regulating the appointment of the investigator of old system titles and such number of assistants as may be necessary;
  - (b) regulating the duties of such investigator;
  - (c) prescribing all matters and things required or necessary for the purposes of carrying out or giving effect to this division.

## 254A Continuation of division after commencement of Land Title Act 1994

- (1) In this section—

*repealed Acts* means the *Real Property Act 1861* and the *Real Property Act 1877*.
- (2) This division continues to operate after the commencement of the *Land Title Act 1994* with all changes necessary to take account of enactment of that Act and any changes prescribed by regulation.
- (3) The repealed Acts continue to apply to the extent necessary for the continued operation of this division but subject to any changes prescribed by regulation.

## **Part 19**                      **Property (de facto relationships)**

### **Division 1**                      **Preliminary**

#### **255**      **Main purposes of pt 19**

This part has the following main purposes—

- (a) to facilitate the resolution of financial matters at the end of a de facto relationship;
- (b) to recognise de facto partners should be allowed to plan their financial future, and resolve financial matters at the end of their relationship, by a cohabitation or separation agreement;
- (c) to facilitate a just and equitable property distribution at the end of a de facto relationship in relation to the de facto partners and, in particular cases, any child of the de facto partners;
- (d) to provide for declaratory relief to help persons ascertain their existing interests in property of de facto partners;
- (e) to provide for injunctive relief to help persons protect their existing and adjusted interests in property of de facto partners;
- (f) to provide for declaratory relief about the existence or non-existence of a de facto relationship and to avoid the duplication of proceedings if the existence or non-existence of a de facto relationship is relevant in 2 or more proceedings;
- (g) to facilitate the resolution of matters concerning a de facto relationship by the Supreme Court, the District Court or a Magistrates Court.



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## 255A Relationship of this part with the Family Law Act in relation to particular financial matters

- (1) The State, by the *Commonwealth Powers (De Facto Relationships) Act 2003*, referred the following matters (to the extent that they are not otherwise included in the legislative powers of the Parliament of the Commonwealth) to the Parliament of the Commonwealth—
  - (a) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of different sexes;
  - (b) financial matters relating to de facto partners arising out of the breakdown (other than by reason of death) of de facto relationships between persons of the same sex.
- (2) Consequently, this part does not apply in relation to financial matters relating to de facto partners arising out of the breakdown of their de facto relationship if the Commonwealth Act applies in relation to the matters.

*Note—*

In most cases de facto partners seeking resolution of financial matters arising out of the breakdown of their relationship should now proceed under the Commonwealth Act.

- (3) However, this part continues to apply in relation to financial matters relating to de facto partners if the Commonwealth Act does not apply.

*Examples—*

- 1 The Commonwealth Act, section 90SK provides that particular requirements must be satisfied before a court may make a declaration under section 90SL of that Act. If, in the particular circumstances of a case, those requirements are not satisfied, this part may apply.
- 2 This part applies to de facto relationships that break down after 21 December 1999 and before the commencement of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cwlth) (the **Commonwealth amending Act**) on 1 March 2009. However, section 86A of the Commonwealth amending Act provides that de facto partners whose relationship broke down before the commencement of that amending Act may choose to agree to the application of particular provisions of the

Commonwealth Act to the de facto relationship in particular circumstances.

## **256 How main purposes are to be achieved**

The way in which these purposes are to be achieved includes—

- (a) providing in division 3 for the resolution of financial matters by de facto partners; and
- (b) providing in division 4 for the resolution of financial matters by courts; and
- (c) providing in division 5 for declaratory relief about the existence or non-existence of de facto relationships; and
- (d) providing in division 6 for the jurisdiction and powers of the Supreme Court, the District Court and Magistrates Courts to deal with matters under this part.

## **257 Application of pt 19**

- (1) This part applies to all de facto relationships other than relationships that ended before the commencement of this section.
- (2) It does not matter whether a de facto relationship started before or after the commencement of this section.
- (3) Despite subsection (1), this part does not apply in relation to a de facto relationship to the extent the Commonwealth Act applies in relation to the relationship.
- (4) Also if, in relation to a de facto relationship—
  - (a) a de facto partner in the relationship makes an application about a matter to a court having jurisdiction under this part (the *State proceeding*); and
  - (b) the other de facto partner in the relationship makes an application about the same matter or a related matter to a court having jurisdiction under the Commonwealth Act (the *Commonwealth proceeding*); and

(c) neither of the applications has been finally dealt with;  
the court mentioned in paragraph (a) must stay the State proceeding until the Commonwealth proceeding is finally dealt with.

## 258 Other rights not affected

- (1) Nothing in this part affects a right of a de facto partner to apply for a remedy or relief under another law.
- (2) In this section—  
*law* includes a law of the Commonwealth or a State.

## Division 2 Interpretation

### Subdivision 1 General

#### 259 Definitions for pt 19

In this part—

*account of a de facto proceeding* has the meaning given by section 268.

*child* of de facto partners means—

- (a) a biological child of the de facto partners; or
- (b) a child of the female de facto partner whose male de facto partner is presumed or proved to be the father of the child under an Act of the Commonwealth or a State;  
or
- (c) a child adopted by the de facto partners; or
- (d) a child who, at a time during the de facto relationship, is or was—
  - (i) treated by either de facto partner as a child of the relationship; and

- (ii) ordinarily a member of the de facto partners' household.

***cohabitation agreement*** has the meaning given by section 264.

***Commonwealth Act*** means the *Family Law Act 1975* (Cwlth).

***court*** means a court having jurisdiction under this part.

*Note—*

See section 329.

***court document*** of a proceeding means—

- (a) a pleading in the proceeding; or
- (b) a transcript of evidence in the proceeding; or
- (c) another document used in relation to the proceeding.

***de facto partner*** has the meaning given by section 260.

***de facto relationship*** has the meaning given by section 261.

***financial matters*** has the meaning given by section 262.

***financial resources*** has the meaning given by section 263.

***monetary limit—***

- (a) for the District Court—has the meaning given by the *District Court of Queensland Act 1967*, section 68; and
- (b) for a Magistrates Court—means the prescribed limit under the *Magistrates Courts Act 1921*.

***property adjustment order*** means an order under section 286.

***publish*** has the meaning given by section 267.

***recognised agreement*** has the meaning given by section 266.

***separation agreement*** has the meaning given by section 265.

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## Subdivision 2 De facto partner and relationship concepts

### 260 Extended meaning of *de facto partner* for pt 19

- (1) A reference to a *de facto partner* is a reference to either 1 of 2 persons who—
  - (a) are, under the *Acts Interpretation Act 1954*, section 32DA (*section 32DA*), de facto partners of each other; or
  - (b) have been, or would have been had section 32DA been in force, de facto partners of each other, but who are no longer living together as a couple on a genuine domestic basis within the meaning of section 32DA.
- (2) Subsection (1)(b) applies despite the *Acts Interpretation Act 1954*, section 32DA(6).

### 261 Meaning of *de facto relationship*

A *de facto relationship* is the relationship between de facto partners.

## Subdivision 3 Financial matters and financial resources concepts

### 262 Meaning of *financial matters*

De facto partners' *financial matters* are matters about the property or financial resources of either or both of them.

### 263 Meaning of *financial resources*

A person's *financial resources* include the following—

- (a) a prospective claim or entitlement under a scheme, fund or arrangement under which superannuation,

- resignation, termination, retirement or similar benefits are provided to, or in relation to, the person;
- (b) property that, under a discretionary trust, may become vested in, or applied to the benefit of, the person;
  - (c) property the disposition of which is wholly or partly under the control of the person and that may be used or applied by or on behalf of the person for the person's benefit;
  - (d) any other valuable benefit of the person.

## **Subdivision 4 Cohabitation, separation and recognised agreement concepts**

### **264 Meaning of *cohabitation agreement***

- (1) A *cohabitation agreement* is an agreement—
  - (a) made by de facto partners—
    - (i) in contemplation of starting their de facto relationship; or
    - (ii) during their de facto relationship; and
  - (b) dealing with all or some of the de facto partners' financial matters.
- (2) A *cohabitation agreement* includes a cohabitation agreement varying a cohabitation agreement.
- (3) It does not matter whether—
  - (a) a cohabitation agreement is made before or after the commencement of this section; or
  - (b) there are other parties to a cohabitation agreement; or
  - (c) a cohabitation agreement deals with other matters.

### **265 Meaning of *separation agreement***

- (1) A *separation agreement* is an agreement—

- (a) made by de facto partners—
    - (i) in contemplation of ending their de facto relationship; or
    - (ii) after their de facto relationship has ended; and
  - (b) dealing with all or some of the de facto partners' financial matters.
- (2) A *separation agreement* includes a separation agreement varying a cohabitation agreement or separation agreement.
- (3) It does not matter whether—
- (a) a separation agreement is made before or after the commencement of this section; or
  - (b) there are other parties to a separation agreement; or
  - (c) a separation agreement deals with other matters.

## **266 Meaning of *recognised agreement***

- (1) A *recognised agreement* of de facto partners is a cohabitation or separation agreement of the de facto partners that—
- (a) is a written agreement; and
  - (b) is signed by the de facto partners and witnessed by a justice of the peace (qualified) or solicitor; and
  - (c) contains a statement of all significant property, financial resources and liabilities of each de facto partner when the de facto partner signs the agreement.
- (2) Whether all significant property, financial resources and liabilities of a de facto partner are stated depends on whether the value of a property, financial resource or liability of the de facto partner that is not stated is significant given the total value of the de facto partner's stated property, financial resources and liabilities.

## **Subdivision 5      Publication and account of a de facto proceeding concepts**

### **267      Meaning of *publish***

- (1) A person *publishes* something if the person publishes the thing or causes the thing to be published to the public or a section of the public, including, for example—
  - (a) in a newspaper, periodical or circular; or
  - (b) through radio or television; or
  - (c) by another form of communication, including, for example, telephone, fax or computer.
- (2) In subsection (1)—  
*section of the public* includes an individual.

### **268      Meaning of *account of a de facto proceeding***

An *account of a de facto proceeding* is an account of all or part of a proceeding under this part.

## **Division 3              Resolution of financial matters by de facto partners**

### **Subdivision 1      Purpose of division and use of agreements**

#### **269      Purpose of div 3**

- (1) The purpose of this division is to allow de facto partners to plan their financial future and resolve financial matters at the end of their relationship.
- (2) This purpose is achieved by permitting de facto partners to make cohabitation and separation agreements that, in



particular circumstances, exclusively regulate the resolution of financial matters at the end of their relationship.

## **270 Cohabitation and separation agreements are valid**

De facto partners may make cohabitation and separation agreements.

## **271 Court's jurisdiction may not be excluded**

A provision in an agreement purporting to exclude the jurisdiction of a court in relation to a cohabitation or separation agreement is invalid, but its invalidity does not affect the validity of the rest of the agreement.

## **272 Law of contract applies**

A cohabitation or separation agreement is subject to, and enforceable according to, the law of contract except as otherwise provided by this part.

*Example—*

The effect of mistake, fraud, duress, undue influence or unconscionability in relation to a cohabitation or separation agreement is decided by the law of contract.

## **273 Effect of de facto partner's death**

If a de facto partner dies before the provisions of a cohabitation agreement or separation agreement have been carried out, the provisions may be enforced on behalf of or against the estate of the deceased de facto partner unless the agreement expressly provides otherwise.

## **Subdivision 2      Relationship between recognised agreements and proceedings**

### **274      No property adjustment order inconsistent with recognised agreement**

- (1) If a court is satisfied there is a recognised agreement, the court must not make a property adjustment order inconsistent with the agreement's provisions on financial matters.
- (2) Subsection (1) is subject to sections 275 and 276.

### **275      Court to ignore revoked provision**

For section 274, a court must ignore a provision on a financial matter if the de facto partners have, in writing or by their conduct, revoked the provision or consented to its revocation.

### **276      Court may vary recognised agreement if serious injustice or impracticable**

- (1) On an application for a property adjustment order, the court may vary all or any of the provisions of the agreement if the court is satisfied—
  - (a) enforcement of the agreement would result in serious injustice for a party to the agreement or a child of either of the de facto partners; or
  - (b) because of circumstances arising since the agreement was made, it is impracticable for the agreement or part of the agreement to be carried out.
- (2) It does not matter whether the agreement purports to prevent a variation of all or any of the agreement's provisions.
- (3) If the court varies a provision of the agreement, section 274 applies to the agreement as varied.
- (4) This section does not affect any other right a person may have to have the agreement varied under another law.
- (5) In this section—

*law* includes a law of the Commonwealth or a State.

*vary* includes set aside.

### **Subdivision 3      Relationship between agreements other than recognised agreements and proceedings**

#### **277      Other cohabitation or separation agreements may be considered**

- (1) This section applies if, on an application for a property adjustment order, a court is—
  - (a) satisfied there is a cohabitation or separation agreement of the de facto partners; and
  - (b) not satisfied the agreement is a recognised agreement.
- (2) The court may make any order it could have made if there were no cohabitation or separation agreement.
- (3) However, in making its order, the court may consider the agreement's provisions on financial matters, in addition to the matters the court is required to consider under division 4, subdivision 2.

#### **278      Court to ignore revoked provision**

For section 277, a court must ignore a provision on a financial matter if the de facto partners have, in writing or by their conduct, revoked the provision or consented to its revocation.

## **Division 4                      Resolution of financial matters by court**

### **Subdivision 1                Declaration of property interests**

#### **279      Purpose of sdiv 1**

- (1) The purpose of this subdivision is to help persons ascertain their existing rights in property of de facto partners.
- (2) This purpose is achieved by allowing a court to declare the title or rights of parties to a proceeding in property of de facto partners.

#### **280      Court may declare property interests**

- (1) In a proceeding between de facto partners about existing title or rights in property, a court may declare any title or rights a de facto partner or another party to the proceeding has in the property.
- (2) It does not matter whether or not the de facto relationship has ended.

#### **281      Court may give effect to declaration**

A court may make orders to give effect to a declaration under this subdivision.

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## **Subdivision 2      Adjustment of property interests**

### **Subsubdivision 1 General**

#### **282      Purpose of sdiv 2**

- (1) The purpose of this subdivision is to ensure a just and equitable property distribution at the end of a de facto relationship.
- (2) This purpose is achieved by—
  - (a) providing de facto partners who satisfy the requirements mentioned in subsubdivision 2 with particular property rights; and
  - (b) allowing applications to a court for an adjustment of interests in property.

#### **283      De facto partner may apply**

After a de facto relationship has ended, a de facto partner may apply to a court for an order adjusting interests in the property of either or both of the de facto partners.

#### **284      De facto partners or child may benefit from adjustment**

The application may be for the benefit of either or both of the de facto partners or a child of the de facto partners.

#### **285      Not affected by other rights**

- (1) An application may be made under this subdivision whether or not an application for another remedy or relief has been made, or may be made, under this part or another law.
- (2) In this section—

*law* includes a law of the Commonwealth, other than the Commonwealth Act, or a State.

## **286 Court may make property adjustment order**

- (1) A court may make any order it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the de facto partners or a child of the de facto partners in the property.
- (2) In deciding what is just and equitable, a court must consider the matters mentioned in subdivision 3.
- (3) It does not matter whether the court has declared the title or rights in the property.
- (4) In this section—  
*adjust*, for interests of persons in property, includes give an interest in the property to a person who had no previous interest in the property.

## **Subsubdivision 2 Requirements for property adjustment proceedings**

### **287 Type of de facto relationship**

A court may make a property adjustment order only if it is satisfied—

- (a) the de facto partners have lived together in a de facto relationship for at least 2 years; or
- (b) there is a child of the de facto partners who is under 18 years; or
- (c) the de facto partner who applied for the order has made substantial contributions of the kind mentioned in section 291 or 292 and failure to make the order would result in serious injustice to the de facto partner.

### **288 Time limit for making application**

- (1) A court may make a property adjustment order only if—

- (a) the application was made within 2 years after the day on which the de facto relationship ended; or
  - (b) the court has given the applicant leave to apply.
- (2) The court may give leave only if it is satisfied hardship would result to the applicant or a child of the de facto partners if leave were not given.

### **289 Disclosure of financial circumstances**

- (1) A party to a proceeding for a property adjustment order must disclose the party's financial circumstances in the way prescribed by the rules, or a practice direction, of the relevant court.
- (2) A court may make a property adjustment order in favour of a party only if the party has complied with subsection (1).
- (3) Nothing in this section affects a court's power to make an interim order.

### **290 Disclosure of child support and relevant orders**

- (1) A party to a proceeding for a property adjustment order who is aware of either of the following must inform the court about the support or order—
  - (a) any child support under the *Child Support (Assessment) Act 1989* (Cwlth) provided, or to be provided, by a de facto partner for a child of the de facto partners;
  - (b) any order affecting a de facto partner or a child of the de facto partners made under a law of the Commonwealth or a State concerning de facto relationships.
- (2) However, an order made in the proceeding for a property adjustment order is not invalid only because the party does not inform the court about the support or order.

### **Subsubdivision 3 Matters for consideration in deciding what is just and equitable**

#### **291 Contributions to property or financial resources**

- (1) The court must consider the financial and non-financial contributions made directly or indirectly by or for the de facto partners or a child of the de facto partners to—
  - (a) the acquisition, conservation or improvement of any of the property of either or both of the de facto partners; and
  - (b) the financial resources of either or both of the de facto partners.
- (2) However, the non-financial contributions of a child of the de facto partners must be considered only if the child's contributions are substantial.
- (3) It does not matter whether the property or financial resources mentioned in subsection (1) still belong to either or both of the de facto partners when the court is considering the contributions made.

#### **292 Contributions to family welfare**

- (1) The court must consider the contributions, including any homemaking or parenting contributions, made by either of the de facto partners or a child of the de facto partners to the welfare of—
  - (a) the de facto partners; or
  - (b) the family constituted by the de facto partners and 1 or more of the following—
    - (i) a child of the de facto partners;
    - (ii) a person who is—
      - (A) accepted by either of the de facto partners into the household of the de facto partners; and



(B) dependent on either of the de facto partners.

- (2) However, the contributions of a child of the de facto partners must be considered only if the child's contributions are substantial.

*Example—*

A de facto couple own and live on a farm. They have twins, a boy and a girl. The twins always lived on the farm. After the twins left school, the parents bought 2 additional farms. The son then worked on the farms for no wages assuming, in time, 1 of the farms would be his. The daughter looked after the family's home for no wages assuming, in time, 1 of the farms would be hers. In both cases, the children did much more than the household chores (such as mowing the lawn and doing the dishes) that a family might normally expect of family members. When the children were 31 years, the parents separated.

The son's contributions are substantial and would be considered under section 291. The daughter's contributions are also substantial and would be considered under this section.

### **293 Effect on future earning capacity**

The court must consider the effect of any proposed order on the earning capacity of the de facto partners.

### **294 Child support**

The court must consider any child support under the *Child Support (Assessment) Act 1989* (Cwlth) provided, or to be provided, by a de facto partner for a child of the de facto partners.

### **295 Other orders**

The court must consider any other order affecting a de facto partner or a child of the de facto partners made under a law of the Commonwealth or a State concerning de facto relationships the court considers should be taken into account.

## **296 Other matters**

The court must consider the matters mentioned in subsubdivision 4 to the extent they are relevant in deciding what order adjusting interests in property is just and equitable.

## **Subsubdivision 4 Additional matters for consideration to the relevant extent in deciding what is just and equitable**

### **297 Age and health**

The court must consider the age and state of health of each of the de facto partners.

### **298 Resources and employment capacity**

The court must consider—

- (a) the income, property and financial resources of each of the de facto partners; and
- (b) the physical and mental capacity of each of them for appropriate gainful employment.

### **299 Caring for children**

The court must consider whether either de facto partner has the care of a child of the de facto partners who is under 18 years.

### **300 Necessary commitments**

The court must consider the commitments of each of the de facto partners necessary to enable the de facto partner to support—

- (a) himself or herself; and

- 
- (b) a child or another person whom the de facto partner has a duty to maintain.

### 301 Responsibility to support others

The court must consider the responsibility of either de facto partner to support another person.

### 302 Government assistance

- (1) The court must consider—
  - (a) the eligibility of either de facto partner for—
    - (i) an Australian pension, allowance or benefit that is not income tested; or
    - (ii) a foreign pension, allowance or benefit; and
  - (b) the amount of any pension, allowance or benefit mentioned in paragraph (a) being paid to either de facto partner.
- (2) The court must disregard—
  - (a) the eligibility of either de facto partner for an Australian pension, allowance or benefit that is income tested; and
  - (b) the amount of any pension, allowance or benefit mentioned in paragraph (a) being paid to either de facto partner.
- (3) For this section, whether an Australian pension, allowance or benefit is income tested depends on whether it is an income tested pension, allowance or benefit within the meaning of the *Family Law Act 1975* (Cwlth).
- (4) In this section—

***Australian pension, allowance or benefit*** means a pension, allowance or benefit under the law of the Commonwealth or a State.

***foreign pension, allowance or benefit*** means a pension, allowance or benefit under the law of a foreign country.

**303 Appropriate standard of living**

If the de facto partners have separated, the court must consider what standard of living is reasonable for each of the de facto partners in all the circumstances.

**304 Contributions to income and earning capacity**

The court must consider the contributions made by either of the de facto partners to the income and earning capacity of the other de facto partner.

**305 Length of relationship**

The court must consider the length of the de facto relationship.

**306 Effect of relationship on earning capacity**

The court must consider the extent to which the de facto relationship has affected the earning capacity of each of the de facto partners.

**307 Financial circumstances of cohabitation**

If either de facto partner is cohabiting with another person, the court must consider the financial circumstances of the cohabitation.

**308 Child maintenance**

The court must consider any payments provided for the maintenance of a child in the care of either de facto partner.

**309 Other facts and circumstances**

The court must also consider any fact or circumstance the court considers the justice of the case requires to be taken into account.

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## **Subsubdivision 5 Adjournment because of likely change in financial circumstances**

### **310 Likelihood of significant change in financial circumstances**

A court may adjourn an application to adjust interests in the property of either or both of the de facto partners, if the court considers—

- (a) there is likely to be a significant change in the financial circumstances of either or both of the de facto partners and it is reasonable to adjourn the application having regard to the time when the change is likely to happen; and
- (b) an order the court could make about the property if the change happens is more likely to do justice between the parties than an order the court could make immediately.

### **311 Matters for consideration by court**

In considering whether there is likely to be a significant change in the financial circumstances of either of the de facto partners, the matters a court may consider include any change in the financial circumstances of the de facto partner that may happen because of—

- (a) the vesting of a financial resource in the de facto partner; or
- (b) the use or application of a financial resource for the de facto partner's benefit.

### **312 Orders may be made before adjournment**

Before a court adjourns an application to adjust interests in property, it may make any order it considers appropriate about the property.

### **313 Adjourments on other grounds not affected**

Section 310 does not limit the power of the court to adjourn a proceeding before it.

## **Subsubdivision 6 Change in circumstances**

### **314 Delayed operation of order**

If the court considers a de facto partner is likely, within a short time, to become entitled to property that may be applied in satisfaction of a property adjustment order, the court may delay the operation of the order until a day, or the happening of an event, stated in the order.

### **315 Effect on proceeding of death of party**

If a party to a proceeding for a property adjustment order dies before a final order has been made, a court may make an order if it considers—

- (a) it would have adjusted interests in property if the deceased party had not died; and
- (b) it is still appropriate to adjust the interests despite the death of the deceased party.

*Note—*

See also the *Succession Act 1981*, section 66(1).

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## **Division 5                    Existence of a de facto relationship**

### **Subdivision 1            Declaration about existence of relationship**

#### **316    Purpose of div 5**

- (1) The purpose of this division is to avoid the duplication of proceedings where the existence or non-existence of a de facto relationship is relevant in 2 or more proceedings.
- (2) This purpose is achieved by allowing applications to a court for a declaration about the existence or non-existence of a de facto relationship.

#### **317    Application**

A person may apply to the Supreme Court or the District Court for a declaration that—

- (a) there is, or has been, a de facto relationship between the person and another named person or between 2 named persons at a particular time or for a particular period; or
- (b) there is not, or was not, a de facto relationship between the person and another named person or between 2 named persons at a particular time or for a particular period.

#### **318    Court may adjourn hearing if other affected person**

- (1) This section applies if, on an application under this subdivision, a court considers—
  - (a) a person whose interests would be affected by the making of a declaration—
    - (i) is not present or represented at the hearing of the application; or

- (ii) has not been given the opportunity to be present or represented at the hearing of the application; and
  - (b) the person ought to be present or represented at the hearing.
- (2) The court may adjourn the hearing to enable the person to be given an opportunity to be present or represented.

### **319 Court may make declaration about existence of relationship**

If, on an application under this subdivision, the court is satisfied there is, or was, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.

### **320 Court may make declaration about non-existence of relationship**

If, on an application under this subdivision, the court is satisfied there is not, or was not, a de facto relationship between the named persons at a particular time or for a particular period, the court may make a declaration to that effect.

### **321 Declaration to include date**

A declaration must include either or both of the following—

- (a) the date at which there was, or was not, a de facto relationship;
- (b) the dates between which there was, or was not, a de facto relationship.

### **322 Death of de facto partners irrelevant**

A declaration may be made whether or not the person or either of the persons named by the applicant as a de facto partner or de facto partners in the de facto relationship is alive.



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### **323 Effect of declaration**

- (1) A declaration made by a court has effect as a judgment of the court.
- (2) The persons named in the declaration are taken, as stated in the declaration, to have had or not to have had a de facto relationship and to have been or not to have been de facto partners for this part and the *Acts Interpretation Act 1954*, section 32DA (*section 32DA*), at the date stated in the declaration, between the dates stated in the declaration or both.
- (3) The declaration—
  - (a) only has effect for the persons, and for the date or during the period, stated in it; and
  - (b) has effect for the purposes of another Act only to establish whether the persons were, on the stated date or during the stated period, de facto partners of each other, as defined in section 32DA.

## **Subdivision 2 Revocation of declaration**

### **324 Party or affected person may apply**

If a declaration has been made under subdivision 1—

- (a) a person who applied, or could have applied, for the declaration; or
- (b) a person who is affected by the declaration;

may apply to the court that made the declaration for a revocation of the declaration.

### **325 Court may adjourn hearing if other affected person**

- (1) This section applies if, on an application under this subdivision, a court considers—

- (a) a person whose interests would be affected by the making of a declaration—
    - (i) is not present or represented at the hearing of the application; or
    - (ii) has not been given the opportunity to be present or represented at the hearing of the application; and
  - (b) the person ought to be present or represented at the hearing.
- (2) The court may adjourn the hearing to enable the person to be given an opportunity to be present or represented.

### **326 Court may revoke declaration**

On an application under this subdivision, the court may make an order revoking the declaration if satisfied—

- (a) a new fact or circumstance has arisen that has not previously been disclosed to the court; and
- (b) if the applicant was a party to the application for the declaration, the fact or circumstance was not within the applicant's knowledge when the declaration was made.

### **327 Court may make ancillary orders**

- (1) If a court makes an order revoking a declaration, the court may, if it considers it would be just and equitable to do so, make any ancillary order necessary to place a person affected by the revocation of the declaration in the same position, as far as practicable, as the person would have been in if the declaration had not been made.
- (2) Without limiting subsection (1), the court may make an order varying rights in property or the financial resources of de facto partners or another person.

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**328 Effect of revocation**

- (1) If the court makes an order revoking a declaration, the declaration ceases to have effect.
- (2) The revocation of the declaration does not affect anything done in reliance on the declaration before the order revoking the declaration was made.

**Division 6 Courts**

**Subdivision 1 Jurisdiction**

**329 Courts having jurisdiction under pt 19**

- (1) The Supreme Court and the District Court have jurisdiction under division 5 to make or revoke a declaration.
- (2) The Supreme Court and, subject to subsection (4), the District Court and the Magistrates Courts each have jurisdiction to hear and decide all other matters under this part.
- (3) The *Uniform Civil Procedure Rules 1999*, rule 35 does not apply to a proceeding under this part.

*Note—*

*Uniform Civil Procedure Rules 1999*, rule 35 provides that a person must start a proceeding before a court in 1 of the districts mentioned.

- (4) In a proceeding, the District Court or a Magistrates Court may make an order or declaration concerning an interest in property if the value of the interest is more than the court's monetary limit only if—
  - (a) for the District Court—a document has been filed under the *District Court of Queensland Act 1967*, section 72; or
  - (b) for a Magistrates Court—a document has been filed under the *Magistrates Courts Act 1921*, section 4A.

### **330 Stay or dismissal of proceeding in relation to same person**

- (1) If there is a proceeding under this part started by or in relation to the same person pending in more than 1 court, a court in which a proceeding is pending may—
  - (a) stay the proceeding pending before it for the time it considers appropriate; or
  - (b) dismiss the proceeding.
- (2) Before staying or dismissing a proceeding, a court may make any orders and give any directions it considers appropriate.

### **331 Transfer of proceeding to more appropriate court**

- (1) A court may transfer a pending proceeding to another court having jurisdiction under this part if the first court considers it is more appropriate for the proceeding to be dealt with in the other court.
- (2) Before transferring a proceeding, a court may make any orders and give any directions it considers appropriate pending the disposal of the proceeding by the court to which the proceeding is transferred.

## **Subdivision 2 Powers**

### **332 Purpose of sdiv 2**

The purpose of this subdivision is to ensure the courts having jurisdiction under this part have adequate powers to make appropriate orders.

### **333 Court's powers**

- (1) In exercising its powers under this part, a court may do any 1 or more of the following—
  - (a) order the transfer of property;

- (b) order the sale of property, and the distribution of the proceeds of sale in any proportions the court considers appropriate;
- (c) order that a document be executed, that a document of title be produced or that anything else be done to enable an order to be carried out effectively or to provide security for the performance of an order;
- (d) order payment of a lump sum, whether in a single amount or by instalments;
- (e) order that payment of an amount ordered to be paid be wholly or partly secured in a way the court directs;
- (f) appoint or remove a receiver or trustees;
- (g) make an order or grant an injunction—
  - (i) for the protection of, or otherwise relating to, the property or financial resources of a party to an application; or
  - (ii) to aid enforcement of another order made in relation to an application;
- (h) make an order or grant an injunction about the use or occupancy of the de facto partners' home;
- (i) if a de facto partner is the lessee of the home in which the de facto partners have lived and on separation the other de facto partner wishes to remain in the home, the court may, with the consent of the lessor, order that the lease be assigned from the lessee to the other de facto partner;
- (j) order that payments be made direct to a de facto partner, to a trustee or into court for the benefit of a de facto partner;
- (k) make a final order or grant a final injunction;
- (l) make an order or grant an injunction—
  - (i) pending the disposal of the proceeding; or
  - (ii) for a fixed term or for life or during joint lives; or

- (iii) until the happening of a particular event, including, for example, a further order;
  - (m) impose conditions;
  - (n) make an order by consent;
  - (o) make any other order or grant any other injunction it considers necessary to do justice.
- (2) This section does not affect any other power of the court under this part or another law.
- (3) This section applies for a Magistrates Court despite the *Magistrates Courts Act 1921*, section 7.
- (4) In this section—  
*law* includes a law of the Commonwealth or a State.

### **334 Variation and setting aside of orders**

- (1) On the application of a person in relation to whom an order has been made under this part, a court may vary the order if satisfied—
  - (a) there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence, failing to disclose matters as required by this part or another circumstance; or
  - (b) because of circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out; or
  - (c) a person has defaulted in carrying out an obligation imposed on the person by the order and, because of circumstances that have arisen because of the default, it is just and equitable to vary the order; or
  - (d) a child of the de facto partners (or the applicant if the applicant has the care of a child of the de facto partners) will suffer hardship if the court does not vary the order because of circumstances of an exceptional nature

relating to the welfare of the child that have arisen since the order was made.

*Note—*

See also the *Uniform Civil Procedure Rules 1999*, rule 667.

(2) In this section—

*vary* includes—

- (a) set aside; and
- (b) set aside and substitute another.

### **335 Transactions to defeat claims**

- (1) If a court is satisfied an existing or anticipated order in a proceeding under this part is likely to be defeated by the making of a document or disposition by a party to the proceeding, the court may set aside or restrain the making of the document or disposition.
- (2) If a court is satisfied an order in a proceeding under this part was defeated by the making of a document or disposition by a party to the proceeding, the court may order that—
  - (a) any property dealt with by the document or disposition be applied towards, or charged with, payment of—
    - (i) an amount payable under a property adjustment order; or
    - (ii) costs; or
  - (b) the proceeds of a sale of the property be paid into court to await its order.
- (3) A court may order a party, or person acting in collusion with a party, to pay the costs of—
  - (a) another party; or
  - (b) a purchaser in good faith; or
  - (c) another interested person.
- (4) The costs mentioned in subsection (3) are the costs of and incidental to—

- (a) the document or disposition; or
  - (b) the setting aside or restraining of the document or disposition.
- (5) For this section, something is made by a person if the thing is made by or on behalf of, or by direction or in the interests of, the person.
- (6) For this section, it does not matter whether the document or disposition is or was intended to defeat the order it is likely to defeat or has defeated.

### **336 Interests of other parties**

- (1) In the exercise of its powers under this part, a court must have regard to the interest in the property of, and must make any order proper for the protection of, a purchaser in good faith and other interested persons.
- (2) A court may order that a person be given notice of a proceeding or be made a party to the proceeding on the application of the person or if it appears to the court the person may be affected by an order under this part.

### **337 Duty of court to end financial relationship**

In a proceeding under division 4, subdivision 2, a court must make orders that, as far as practicable, will end the financial relationship between the de facto partners.



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## **Subdivision 3      Miscellaneous matters concerning proceedings**

### **Subsubdivision 1 Intervention**

#### **338      Application for leave**

A person may apply for leave to intervene in a proceeding under this part.

#### **339      Leave to intervene**

- (1) A court may give a person leave to intervene in a proceeding before the court.
- (2) The court may give leave subject to any conditions it considers appropriate.

#### **340      Intervener's rights**

A person who intervenes in a proceeding by leave of the court is a party to the proceeding with all the rights, duties and liabilities of a party unless the court orders otherwise.

### **Subsubdivision 2 Costs**

#### **341      Party bears own costs**

- (1) A party to a proceeding under this part bears the party's own costs.
- (2) However, if the court is satisfied there are circumstances justifying it making an order, it may make any order for costs or security for costs it considers appropriate.
- (3) The court may make an order at any stage of the proceeding or after the proceeding ends.

- (4) In considering whether there are circumstances justifying it making an order, the court must consider the following matters—
- (a) the income, property and financial resources of each of the parties;
  - (b) whether any party has legal aid and the terms of the legal aid;
  - (c) the conduct of each of the parties in relation to the proceeding, including, for example, conduct about pleadings, particulars, disclosure, inspection, interrogatories, admissions of facts and production of documents;
  - (d) whether the proceeding results from a party's failure to comply with a previous order made under this part;
  - (e) whether any party has been wholly unsuccessful in the proceeding;
  - (f) whether any party made an offer to settle under the *Uniform Civil Procedure Rules 1999* and the terms of the offer;
- Note—*
- See the *Uniform Civil Procedure Rules 1999*, chapter 9, part 5.
- (g) any fact or circumstance the court considers the justice of the case requires to be taken into account.

## Subsubdivision 3 Publication of proceedings

### 342 Specifically authorised publication

- (1) A person may publish an account of a de facto proceeding in the following ways—
- (a) by communicating, to a person involved in another proceeding in any court, a court document from the de facto proceeding for use in the other proceeding;

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- (b) by communicating a court document from the de facto proceeding to—
    - (i) a body responsible for disciplining members of the legal profession; or
    - (ii) a person involved in a disciplinary proceeding against a member of the legal profession;
  - (c) by communicating, to a body that grants legal aid, a court document from the de facto proceeding for use in deciding whether legal aid should be provided or continued in a particular case;
  - (d) by publishing a notice or report about the de facto proceeding by direction of a court;
  - (e) by publishing an account of the de facto proceeding in a publication that is—
    - (i) genuinely intended primarily for use by the members of a profession; and
    - (ii) a separate volume or part of a series of law reports or another publication of a technical character;
  - (f) by publishing an account of the de facto proceeding to—
    - (i) a member of a profession in relation to the member's practice of the profession; or
    - (ii) a student in relation to the student's studies.
- (2) In this section—

***court*** means a court or tribunal established under a law of the Commonwealth or a State.

### **343 No identification in general publication**

- (1) A person may publish an account of a de facto proceeding only if the publication does not identify—
  - (a) a party to the proceeding; or
  - (b) a witness in the proceeding; or

- (c) another person who is, or is alleged to be, involved in a matter relevant to the proceeding; or
  - (d) a person related to, or associated with, a person mentioned in paragraph (a), (b) or (c).
- (2) A publication identifies a person if it is sufficient to identify the person to—
- (a) a member of the public; or
  - (b) a member of the section of the public to whom the publication was made.
- (3) Subsection (1) does not apply to a publication under section 342.

### **344 Offence**

- (1) A person must not publish an account of a de facto proceeding other than under section 342 or 343.
- Maximum penalty—40 penalty units.
- (2) A proceeding for an offence against this section may be started only with the written consent of the director of public prosecutions.
- (3) A document purporting to be a consent mentioned in subsection (2) is taken to be the consent, and to have been properly given, unless the contrary is established.

## **Part 20 Miscellaneous**

### **345 Protection of solicitors and others adopting this Act**

- (1) The powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be deemed to be included or implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words,

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to be given by or to be contained in any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction, and a solicitor, counsel or conveyancer shall not be deemed guilty of neglect or breach of duty, or become in any way liable, because of the person omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place of them, in any case where this Act would allow of the person doing so.

- (2) Nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.
- (3) Where the solicitor, counsel or conveyancer is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.
- (4) Where such persons are acting without a solicitor, counsel or conveyancer, they shall also be protected in like manner.

### **346 Restriction on constructive notice**

- (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless—
  - (a) it is within the purchaser's own knowledge, or would have come to the purchaser's knowledge, if such searches as to instruments registered or deposited under any Act, inquiries, and inspections had been made as ought reasonably to have been made by the purchaser; or
  - (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser's counsel as such, or of the purchaser's solicitor or other agent as such, or would have come to the knowledge of the purchaser's solicitor

or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

- (2) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, condition, provision, or restriction contained in any instrument under which the purchaser's title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.
- (3) A purchaser shall not because of anything in this section be affected by notice in any case where the purchaser would not have been so affected if this section had not been enacted.
- (4) This section applies to purchases made either before or after the commencement of this Act, save that where an action is pending at the commencement of this Act the rights of the parties shall not be affected by this section.

### **347 Service of notices**

- (1) A notice required or authorised by this Act to be served on any person or any notice served on any person under any instrument or agreement that relates to property may be served on that person—
  - (a) by delivering the notice to the person personally; or
  - (b) by leaving it for the person at the person's usual or last known place of abode, or, if the person is in business as a principal, at the person's usual or last known place of business; or
  - (c) by posting it to the person by registered mail as a letter addressed to the person at the person's usual or last known place of abode, or, if the person is in business as a principal, at the person's usual or last known place of business; or
  - (d) in the case of a corporation by leaving it or by posting it as a letter addressed in either case to the corporation at

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its registered office or principal place of business in the State.

- (1A) A notice so posted shall be deemed to have been served, unless the contrary is shown, at the time when by the ordinary course of post the notice would be delivered.
- (2) If the person is absent from the State, the notice may be delivered as provided in subsection (1) to the person's agent in the State.
- (2A) If the person is deceased, the notice may be so delivered to the person's personal representative.
- (3) If the person is not known, or is absent from the State and has no known agent in the State or is deceased and has no personal representative, the notice shall be delivered in such manner as may be directed by an order of the court.
- (4) Despite anything in subsections (1) to (3), the court may in any case make an order directing the manner in which any notice is to be delivered, or dispensing with the delivery of any notice.
- (5) This section does not apply to notices served in proceedings in the court, nor where the person serving the notice prevents its receipt by the person on whom the notice is intended to be served.
- (6) This section applies unless a contrary method of service of a notice is provided in the instrument or agreement or by this Act.

### **348 Payments into and applications to court**

- (1) Payment of money into court under this or any other Act shall effectually exonerate the person making the payment.
- (2) Every application to the court shall be by summons at chambers, except where it is otherwise provided in this Act (expressly or by implication) or in a regulation made under this Act.

- (3) On an application by a purchaser, notice shall be served in the first instance on the vendor unless the court dispenses with such service.
- (4) On an application by a vendor, notice shall be served in the first instance on the purchaser unless the court dispenses with such service.
- (5) On any application, notice shall be served on such persons (if any) as the court thinks fit.
- (6) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

### **349 Forms**

- (1) Where by this Act any application, instrument or document is authorised or required to be made in the approved form, such form, if the application, instrument or document is to be registered in respect of land under the Real Property Acts, shall in addition to any of the requirements of this Act—
  - (a) be attested under the requirements of the Real Property Acts; and
  - (b) unless in any case the registrar otherwise directs, bear the endorsement referred to in the *Real Property Act 1861*, section 139.
- (2) The registrar may, before registering any such application, instrument or document, require proof by statutory declaration or otherwise of any matter because of which the applicant or person seeking registration claims to be entitled to registration of the application, instrument or document.
- (3) This section applies despite any other section of this Act.

### **350 Approval of forms**

The chief executive may approve forms for use under this Act.



**351 Regulation-making power**

- (1) The Governor in Council may make regulations under this Act.
- (2) The regulations may be about fees including—
  - (a) the persons who are liable to pay fees; and
  - (b) when fees are payable; and
  - (c) the waiver of fees; and
  - (d) the recovery of unpaid amounts of fees.

**Part 21 Transitional provision for  
Property Law (Mortgagor  
Protection) Amendment Act  
2008****352 Mortgagor protection**

- (1) Section 85, as amended by the amending Act, applies to mortgages whether made before or after the commencement of this section.
- (2) However, section 85(1A) does not apply to a mortgagee or receiver if, immediately before the commencement, the mortgagee—
  - (a) was entitled to immediately exercise the power of sale conferred by this Act or otherwise; and
  - (b) was not prevented from doing so by section 84(1).
- (3) In this section—

*amending Act* means the *Property Law (Mortgagor Protection) Amendment Act 2008*.

## Part 22

# Transitional Provision for Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010

### 353 Amendments do not affect existing matters

- (1) The amendment of section 147(5) by the amending Act does not apply in relation to a further matter of complaint as mentioned in section 147(5) if the proceeding in relation to the complaint was commenced before the commencement of this section.
- (2) The change to the monetary limit for part 19 brought into effect by amendments of this Act, the *Magistrates Courts Act 1921* and the *District Court of Queensland Act 1967* by the amending Act does not apply to a proceeding commenced before the commencement of this section.
- (3) In this section—

*amending Act* means the *Civil and Criminal Jurisdiction Reform and Modernisation Amendment Act 2010*.

## Part 23

# Transitional provisions for Land Sales and Other Legislation Amendment Act 2014

### 354 Definitions for pt 23

In this part—

*amendment Act* means the *Land Sales and Other Legislation Amendment Act 2014*.

*commencement* means the commencement of this section.

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**355 Application of s 68A**

Section 68A applies only in relation to a contract entered into after the commencement.

**356 Existing instalment contracts**

- (1) This section applies to an instalment contract entered into before the commencement.
- (2) Part 6, division 4 as in force before the commencement continues to apply in relation to the instalment contract as if this Act had not been amended by the amendment Act.

## **Part 24 Transitional provisions for Court and Civil Legislation Amendment Act 2017**

**357 Application of s 57A**

- (1) For a statutory instrument other than subordinate legislation, amended section 57A—
  - (a) applies from the commencement, regardless of when the statutory instrument was made; but
  - (b) does not apply in relation to a contract or dealing concerning property mentioned in that section if the contract or dealing was made, entered into or effected before the commencement.
- (2) For subordinate legislation, amended section 57A—
  - (a) applies on and from the relevant day, regardless of when the subordinate legislation was made; but
  - (b) does not apply in relation to a contract or dealing concerning property mentioned in that section if the contract or dealing was made, entered into or effected before the relevant day.

- (3) Section 57A, as in force immediately before the commencement, continues to apply in relation to subordinate legislation during the transitional period as if the section had not been amended by the *Court and Civil Legislation Amendment Act 2017*.
- (4) In this section—
- amended section 57A*** means section 57A as amended by the *Court and Civil Legislation Amendment Act 2017*.
- relevant day*** means the earlier of the following—
- (a) the day that is 1 year after the commencement;
  - (b) the day prescribed by regulation.
- transitional period*** means the period—
- (a) starting on the commencement; and
  - (b) ending immediately before the relevant day.

### **358 Saving provision for s 57A**

Section 57A(3), as in force immediately before the commencement, is declared to be a law to which the *Acts Interpretation Act 1954*, section 20A applies.

## **Part 25 Transitional provisions for Justice and Other Legislation Amendment Act 2020**

### **359 Application of s 84A**

Section 84A applies in relation to a mortgaged freehold property disclaimed under the *Bankruptcy Act 1966* (Cwlth), section 133(1) or the Corporations Act, section 568(1)—

- (a) whether the mortgage was made before or after the commencement; but
- (b) only if—

- (i) for a disclaimer under the *Bankruptcy Act 1966* (Cwlth), section 133(1)—the disclaimer was made on or after the commencement; or
- (ii) for a disclaimer under the Corporations Act, section 568(1)—the disclaimer took effect on or after the commencement.

**360 Application of proceeds of sales that happened before commencement**

Section 88(2), as inserted by the *Justice and Other Legislation Amendment Act 2020*, does not apply in relation to the sale of a mortgaged freehold property that happened before the commencement.

## **Schedule 1      Procedure in cases of bona vacantia**

section 20

### **1      Procedure in cases of escheat or other like cases**

When any question arises as to the title of the State to any land, or interest in land in any case of escheat or alleged escheat or of *bona vacantia* or alleged *bona vacantia*, or in the case of a grant to an alleged alien, or as to the title of the State in any other case in which, prior to the passing of the *Escheat (Procedure and Amendment) Act 1891*, an inquest of office might have been held, the truth of the matter shall be ascertained in the manner prescribed in this schedule.

### **2      Writ of inquisition**

In any such case a writ called a writ of inquisition shall be issued from the Supreme Court on the fiat of a Crown law officer, which writ shall be addressed to a District Court judge, or a commissioner of the Supreme Court for taking affidavits, and shall command the person to make diligent inquiry into the matter and to certify under the person's hand and seal such facts respecting the failure of the heirs or next of kin of an intestate, or the alienage of a grantee, or such other facts, as may be necessary to establish the title of the State or otherwise.

### **3      Return of writ**

The writ of inquisition with the certificate shall be immediately returned into the office of the Supreme Court at Brisbane, Rockhampton or Townsville, as the case may be, and any person aggrieved by the certificate shall be entitled to traverse or object to it, in such manner and within such time as may be directed by rules of court, and in the absence of any such rules within 1 month after the return of the writ.

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**4 Writ to be returned before new grant made**

No grant shall be made of any land alleged to be escheated or to have become *bona vacantia* until after the writ of inquisition and the certificate finding the title of the land has been returned into the office of the Supreme Court, and the time for traversing the same has expired.

**5 Effect of certificate**

Except as this schedule or rules of court otherwise provide, the certificate shall be conclusive evidence of the facts stated in it.

**6 Saving**

The proceedings upon a writ of inquisition shall not prejudice any rights which at the time of the death of the person that led to the issue of the writ were vested in some other person.

**7 Procedure when waiver by the Crown**

- (1) If at any time not later than 2 months after the making of an instrument under section 20 waiving the title of the State to any property, any person claiming any estate or interest in or to the property requests that a writ of inquisition in respect of the State's title be issued, and gives security to the satisfaction of a Crown law officer for the costs of the issue and execution of such writ, such writ may issue under this schedule and the instrument waiving the right of the State shall cease to have effect from the date when it was made.
- (2) If the title of the State to the property is established by a certificate returned under this schedule, then, at any time after the time for traversing such certificate has expired, a further instrument (which may or may not differ from the previous order in council) waiving the right of the State may be made under section 20(5) but no further request may be made under this clause.
- (3) If an instrument is made waiving the right of the State to any land or interest in land clause 1 shall be read subject to this

clause save that a writ of inquisition at the instance of the Crown may issue at any time.

**8 Power to regulate procedure with respect to escheats to the Crown**

- (1) Rules of court may be made prescribing and regulating the procedure of the court on and incidental to writs of inquisition and consequential on the holding of inquiries under such writs.
- (2) The rules of court may prescribe that any questions of fact arising upon any such inquiry shall be determined by a jury, and may prescribe the number of jurors, and may direct that any provisions of the laws relating to juries shall apply to such juries and jurors.

**10 Interpretation**

In this schedule—

*a Crown law officer* means and includes the Attorney-General and the solicitor-general.



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## **Schedule 3      Short forms of covenants in leases**

section 109

### **Direction as to the forms in this schedule**

- 1 Parties who use any of the forms in column 1 may substitute for the words 'lessee' or 'lessor', any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in column 2.
- 2 Such parties may substitute 1 gender for another, or the plural number for the singular, in the forms in column 1, and corresponding changes shall be taken to be made in the corresponding forms in column 2.
- 3 Such parties may fill up the blank spaces left in the forms in column 1 so employed by them with any words or figures and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.
- 4 Such parties may introduce into or annex to any form in column 1 any addition to, exception from, or qualification of the same, or may strike out or omit any words of or from such column, and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission shall be taken to be added to the corresponding form in column 2.
- 5 The covenants in column 2 shall be taken to be made with or by and apply to the lessor or lessee, as the case may be.

## Leases

### Column 1

- 1 That the lessee covenants with the lessor to pay rent.
  
- 2 Provided that in the event of damage by fire, lightning, flood, or tempest, rent shall abate until the premises are restored.

### Column 2

- 1 And the lessee covenants with and promises to the lessor that the lessee, will, during the term, pay to the lessor, the rent reserved, in manner mentioned previously, without any deduction of any kind, other than any deduction which the lessee is by an Act entitled to make.
  
- 2 Provided that in case the demised premises, or any part of the demised premises, shall at any time during the continuance of the lease be destroyed or damaged by fire without fault on the part of the lessee, flood, lightning, storm, or tempest, so, in any such event as to render the same unfit for the occupation and use of the lessee, then, and so often as the same shall happen, the rent reserved, or a proportionate part of the rent, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part of the rent shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee.

**Column 1****Column 2**

- |   |   |   |   |
|---|---|---|---|
| 3 | And to pay taxes, except for local improvements.  | 3 | And also that the lessee will pay all taxes, rates and assessments of any kind, whether municipal, local government, parliamentary, or otherwise which are at any time during the term charged upon the demised premises, or upon the lessor, on account of the demised premises, except taxes for local improvements or works assessed upon the property benefited by them.  |
| 4 | And to maintain and leave the premises in good repair (having regard to their condition at the commencement of the lease), reasonable wear and tear, and damage by fire, lightning, flood and tempest excepted. | 4 | <p>And also that the lessee will during the term, when, where, and so often as the need shall be, but having regard to the condition of the leased premises at the commencement of the lease and excepting reasonable wear and tear, and damage by fire, lightning, flood and tempest occurring within the term—</p> <p>(a) well and sufficiently maintain, amend, and keep; and</p> <p>(b) at the expiration or sooner determination of the term peaceably surrender and yield up to the lessor;</p> <p>in good and substantial repair the leased premises, including all appurtenances, buildings, erections and fixtures belonging to the leased premises, or at any time within the term lawfully made or erected by the lessor upon or within the leased premises.</p> |

**Column 1**

5 And that the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, and that in default the lessor may repair.

**Column 2**

5 That the lessor, may, by himself or herself or the lessor's agents, during the term at a reasonable time of the day upon giving to the lessee 2 days previous notice, enter upon the demised premises and view the state of repair of the demised premises, and may serve upon the lessee or leave at the lessee's last or usual place of abode in the State, or upon the demised premises, a notice in writing of any defect, requiring the lessee, within a reasonable time, to repair same in accordance with any covenant expressed or implied in the lease, and that in default of the lessee so doing it shall be lawful for the lessor from time to time to enter and execute the required repairs.

**Column 1**

6 And that the lessor may enter and carry out requirements of public authorities, and repair under the lease.

**Column 2**

6 That the lessor may, by himself or herself or the lessor's agents, at all reasonable times during the term, with workers and others, and all necessary materials and appliances, enter upon the demised premises, or any part of the demised premises, for the purpose of complying with the terms of any present or future legislation affecting the premises, and of any notices served upon the lessor or lessee by licensing, local, municipal, or other competent authority, involving the destruction of noxious weeds or animals, or the carrying out of any repairs, alterations, or works of a structural character, which the lessee may not be bound, or if bound may neglect, to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease.

However, such destruction, repairs, alterations, and works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee.

**Column 1**

**Column 2**

7 And to insure from fire in the joint names of the lessor and the lessee.

7 And also that the lessee will immediately insure the demised premises to the full insurable value of the demised premises in some insurance office approved by the lessor in the joint names of the lessor and the lessee, and keep the same so insured during the continuance of the lease, and will upon the request of the lessor show to the lessor the receipt for the last premium paid for such insurance, and as often as the demised premises shall be destroyed or damaged by fire all and every the sum or sums of money which shall be recovered or received for or in respect of such insurance, shall be laid out and expended in building or repairing the demised premises or such parts of the demised premises as shall be destroyed or damaged by fire.

8 And to paint outside every (\_\_\_) year.

8 And also that the lessee will, in every (\_\_\_) year during the continuance of the lease, paint all the outside woodwork and ironwork belonging to the demised premises now or usually painted with 2 coats of proper paint, in a well executed manner.

**Column 1****Column 2**

- |   |   |
|---|---|
| 9 And to paint and paper inside every (___) year. | 9 And also that the lessee will, in every (___) year, paint the inside wood, iron and other works now or usually painted, with 2 coats of proper paint, in a well executed manner, and also will repaper with paper of a quality as at present such parts of the premises as are now papered, and also wash, stop, whiten, or colour such parts of the demised premises as are now plastered. |
| 10 And to fence.                                  | 10 And also that the lessee will, during the continuance of the lease, erect and put up on the boundaries of the demised land or upon such boundaries upon which no substantial fence now exists a good and substantial fence.  |
| 11 And to keep up fences.                         | 11 And also will, from time to time, during the continuance of the lease, keep up the fences and walls of or belonging to the demised premises, and make anew any parts of the demised premises that may require to be new-made in a good and careful manner and at proper seasons of the year.   |
| 12 And to cultivate.                              | 12 And also that the lessee will at all times during the continuance of the lease cultivate, use, and manage all such parts of the land as are or shall be broken up or converted into tillage in a proper and careful manner, and will not impoverish or waste the same.   |

**Column 1**

**Column 2**

13 That the lessee will not cut timber.

13 That also that the lessee will not cut down, fell, injure, or destroy any growing or living timber or timber-like trees standing and being upon the demised land, without the consent in writing of the lessor.

14 That the lessee will not without consent use premises otherwise than as a private dwelling house.

14 And also that the lessee or any subtenant will not convert, use, or occupy the demised premises or any part of the demised premises into or as a shop, warehouse, or other place for carrying on any trade or business of any kind, or suffer the premises to be used for any such purpose or otherwise than as a private dwelling house, without the consent in writing of the lessor.



**Column 1**

15 And will not assign or sublet without leave; no fine to be taken.

**Column 2**

15 And also that the lessee or any subtenant will not, during the continuance of the lease, assign, transfer, demise, sublet, or part with the possession or by any act or deed, procure the demised premises, or any part of the demised premises, to be assigned, transferred, demised, sublet to or put into the possession of any person or persons, without the consent in writing of the lessor, but such consent shall not be refused in the case of a proposed respectable and responsible assign, tenant or occupier.

Provided further, that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent, but this proviso shall not preclude the right of the lessor to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such license or consent.

**Column 1**

16 That the lessee will not carry on any offensive trade.

**Column 2**

16 That the lessee or any subtenant will not at any time during the continuance of the lease use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the demised premises or any part of the demised premises, any noxious, noisome, or offensive art, trade, business, occupation, or calling, and no act, matter, or thing of any kind shall, at any time during the continuance of the lease, be done in or upon the premises or any part of the demised premises which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the occupiers or owners of any neighbouring premises.

**Column 1****Column 2**

- |   |   |
|---|---|
| 17 That the lessee will carry on the business of a licensee within the meaning of the <i>Liquor Act 1992</i> and conduct the same in an orderly manner. | 17 And also that the lessee, or the subtenant for the time being, will at all times during the continuance of the lease, use, exercise, and carry on, in and upon the demised premises, the trade or business of a licensee within the meaning of the <i>Liquor Act 1992</i> , and keep open and use the buildings upon the demised land as and for a hotel, and manage and conduct such trade or business in a quiet and orderly manner, and will not do, commit, or permit, or suffer to be done or committed any act, matter, or thing of any kind by which or by means of which any licence shall or may be forfeited or become void or liable to be taken away, suppressed, or suspended in any manner at all, and will comply in all respects with the requirements of the <i>Liquor Act 1992</i> . |
| 18 And will apply for renewal of licence.   | 18 And also that the lessee, or the subtenant for the time being, will from time to time, during the continuance of the lease at the proper times for that purpose, apply for and endeavour to obtain at the person's own expense all such licences as are or may be necessary for carrying on the trade or business of a licensee within the meaning of the <i>Liquor Act 1992</i> in and upon the demised premises, and keeping the buildings open as and for a hotel.  |

**Column 1**

**Column 2**

19 And will facilitate the transfer of licence.

19 And also that the lessee, or the subtenant for the time being, will at the expiration or other sooner determination of the lease sign and give such notice or notices, and allow such notice or notices of a renewal or transfer of any licence as may be required by law to be affixed to the demised premises, to be affixed and remain so affixed during such time or times as shall be necessary or expedient in that behalf, and generally to do and perform all such further acts, matters, and things as shall be necessary to enable the lessor, or any person authorised by the lessor, to obtain the renewal of any licence or any new licence or the transfer of any licence then existing and in force.

20 The (lessor) covenants with the (lessee) for quiet enjoyment.

20 And the lessor covenants with the lessee that the lessee paying the rent reserved, and performing the covenants on the lessee's part contained, shall and may peaceably possess and enjoy the demised premises for the term granted, without any interruption or disturbance from the lessor or any other person or persons lawfully claiming by, from or under the lessor.

**Column 1**

21 And that the lessee may remove the lessee's fixtures.

**Column 2**

21 And also that the lessee may at or prior to the expiration of the lease take, remove, and carry away from the demised premises all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes, or other articles upon the demised premises in the nature of trade or tenants' fixtures bought upon the demised premises by the lessee, but the lessee shall in such removal do no damage to the demised premises, or shall immediately make good any damage which the lessee may occasion to them.

## **Schedule 4      Improvements by tenant**

section 156

### **Part 1**

- 1 drainage of land
- 2 erection or enlargement of buildings
- 3 making of fences
- 4 formation of silos
- 5 making of water meadows or works of irrigation
- 6 making of dams for the conservation of water, or wells
- 7 clearing of land

### **Part 2**

- 8 liming of land
- 9 manuring or fertilising of land with purchased artificial or other purchased manures or fertilisers
- 10 laying down pasture with clover, grass, lucerne, sainfoin, or other seeds sown more than 2 years prior to the determination of the tenancy
- 11 making of plantations of bananas or pineapples
- 12 planting of sugarcane
- 13 planting of orchards with fruit trees permanently set out

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## Schedule 5      Rules as to arbitration

section 159

### Part 1                      Arbitration before a single arbitrator

#### Appointment of arbitrator

- 1 The arbitrator shall be a person appointed by agreement between the parties, or in default of agreement between the parties within 14 days of the date of the giving of notice by one party to the other party requiring appointment of an arbitrator, a person appointed by the Minister on the application in writing of either of the parties.
- 2 If a person appointed arbitrator dies, or is incapable of acting, or for 7 days after notice from either party requiring the arbitrator to act fails to act, a new arbitrator may be appointed as if no arbitrator had been appointed.
- 3 Neither party shall have power to revoke the appointment of the arbitrator without the consent of the other party.
- 4 Every appointment, notice, revocation, and consent under this part of these rules must be in writing.

#### Time for award

- 5 The arbitrator shall make and sign the award within 28 days of the arbitrator's appointment or within such longer period as the Minister may (whether the time for making the award has expired or not) direct.

#### Removal of arbitrator

- 6 Where an arbitrator has misconducted himself or herself, the court or a judge of the court may remove the arbitrator.

## **Evidence**

- 7 The parties to the arbitration, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrator, on oath or affirmation, in relation to the matters in dispute, and shall, produce before the arbitrator all samples, books, deeds, papers, accounts, writings, and documents, within their possession or power respectively which may be required or called for, and do all other things which during the proceedings the arbitrator may require.
- 8 The arbitrator shall have power to administer oaths, and to take the affirmation of parties and witnesses appearing, and witnesses shall, if the arbitrator thinks fit, be examined on oath or affirmation.

## **Statement of case**

- 9 The arbitrator may at any stage of the proceedings, and shall, if so directed by a judge of the court (which direction may be given on the application of either party), state in the form of a special case for the opinion of that court any question of law arising in the course of the arbitration.

## **Award**

- 10 The arbitrator shall on the application of either party specify the amount awarded in respect of any particular improvement or improvements, and the award shall fix a day not sooner than 1 month nor later than 2 months after the delivery of the award for the payment of the money awarded for compensation, costs, or otherwise, and shall be in such form as may be prescribed by the Minister.
- 11 The award to be made by the arbitrator shall be final and binding on the parties and the persons claiming under them respectively.
- 12 The arbitrator may correct in an award any clerical mistake or error arising from any accidental slip or omission.





then, on the application of the party giving notice, the Minister shall appoint a person to be an arbitrator.

- 5 Where 2 arbitrators are appointed, then (subject to these rules) they shall, before they enter on the arbitration, appoint an umpire.
- 6 If before award an umpire dies or is incapable of acting, or for 7 days after notice from either party requiring the umpire to act fails to act, the arbitrators may appoint another umpire.
- 7 If for 7 days after request from either party, the arbitrators fail to appoint an umpire, or another umpire, then, on the application of either party, the Minister shall appoint a person to be the umpire.
- 8 Neither party shall have power to revoke an appointment of an arbitrator without the consent of the other.
- 9 Every appointment, notice, request, revocation, and consent under this part of these rules shall be in writing.

### **Time for an award**

- 10 The arbitrators shall make and sign their award in writing within 28 days after the appointment of the last appointed of them, or on or before any later day to which the arbitrators, by any writing signed by them, may enlarge the time for making the award, not being more than 49 days from the appointment of the last appointed of them.
- 11 If the arbitrators have allowed their time or extended time to expire without making an award, or have delivered to either party or to the umpire a notice in writing stating that they cannot agree, the umpire may immediately enter on the arbitration instead of the arbitrators.
- 12 The umpire shall make and sign the umpire's award within 1 month after the original or extended time appointed for making the award of the arbitrators has expired.
- 13 The time for making an award may from time to time be extended by the Minister, whether the time for making the award has expired or not.

**Removal of arbitrator, evidence, statement of case, award, costs, forms**

- 14 The provisions of part 1 as to the removal of an arbitrator, the evidence, the statement of a case, the award, costs, and forms shall apply to an arbitration under this part as if the expression *arbitrator* whenever used in those provisions included 2 arbitrators or an umpire, as the case may require.

## Schedule 6 Dictionary

### section 3

***account of a de facto proceeding***, for part 19, see section 268.

***assurance*** includes a conveyance and a disposition made otherwise than by will.

***bankruptcy*** includes any act or proceeding in law having under any Act or Commonwealth Act effects or results similar to those of bankruptcy, and includes the winding-up of an insolvent company.

***child*** of de facto partners, for part 19, see section 259.

***Coal Mining Act*** means the *Coal Mining Safety and Health Act 1999*.

***cohabitation agreement***, for part 19, see section 264.

***commencement of this Act*** means the commencement of this Act other than part 18, division 4.

***Commonwealth Act***, for part 19, see section 259.

***conveyance*** includes a transfer of an interest in land, and any assignment, appointment, lease, settlement, or other assurance in writing of any property.

***conveyancing transaction***, for part 6, division 3, see section 58A.

***court*** means—

- (a) for part 19—a court having jurisdiction under the part;  
and

*Note—*

See section 329.

- (b) otherwise—the Supreme Court.

***court document***, of a proceeding, for part 19, see section 259.

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**deed** includes an instrument having under this or any other Act the effect of a deed.

**de facto partner**, for part 19, see section 260.

**de facto relationship**, for part 19, see section 261.

**disposition** includes a conveyance, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by an instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will.

**District Court** means the District Court or the District Court judge.

**e-conveyance**, for part 6, division 3, see section 58A.

**e-conveyancing**, for part 6, division 3, see section 58A.

**electronic workspace**, for part 6, division 3, see section 58A.

**ELN**, for part 6, division 3, see section 58A.

**encumbrance** includes a mortgage in fee or for a lesser estate or interest, and a trust for securing money, and a lien and a charge of a portion, annuity or other capital or annual sum.

**encumbrancee** has a meaning corresponding with that of encumbrance, and includes every person entitled to the benefit of an encumbrance, or to require payment or satisfaction of an encumbrancee.

**financial matters**, for part 19, see section 262.

**financial resources**, for part 19, see section 263.

**financial settlement**, for part 6, division 3, see section 58A.

**fine** includes premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium or foregift.

**Housing Act** means the *Housing Act 2003*.

**Imperial Act** means any statute law in force in the realm of England on 25 July 1828.

**income**, when used with reference to land, includes rents and profits.

*instrument* includes deed, will, and Act.

*Land Act* means the *Land Act 1994*.

*land titles legislation*, for part 6, division 3, see section 58A.

*land under the provisions of the Land Act*, or any equivalent expression, means estates, interests, or any other rights in or in respect of land, granted, leased, or granted in trust or reserved and set aside under that Act but does not include registered land or unregistered land.

*Mineral Resources Act* means the *Mineral Resources Act 1989*.

*monetary limit*, for part 19, see section 259.

*mortgage* includes a charge on any property for securing money or money's worth.

*mortgagee* includes any person from time to time deriving title to the mortgage under the original mortgagee.

*mortgagee in possession* means a mortgagee who in right of the mortgage has entered into and is in possession of the mortgaged property.

*mortgage-money* means money or money's worth secured by a mortgage.

*mortgagor* includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to the mortgagor's estate, interest, or right in the mortgaged property.

*National Law*, for part 6, division 3, see section 58A.

*notice* includes constructive notice.

*order* includes judgment and decree of a court.

*participating subscriber*, for part 6, division 3, see section 58A.

*possession*, when used with reference to land, includes the receipt of income from land.

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***president of the Law Society*** means the president for the time being of the Queensland Law Society Incorporated constituted under the *Queensland Law Society Act 1952*.

***property adjustment order***, for part 19, means an order under section 286.

***publish***, for part 19, see section 267.

***purchaser*** means a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property.

***recognised agreement***, for part 19, see section 266.

***registered*** means the making or recording by proper authority in the appropriate register (if any) or other book, instrument or document of such entries, endorsements, particulars or other information as may be requisite for recording a dealing or other transaction with respect to land.

***registered land*** means land under the provisions of the *Land Title Act 1994*.

***registrar*** means the registrar of titles.

***rent*** includes yearly or other rent, toll, duty, royalty, or other reservation by the acre, hectare, the ton, tonne or otherwise.

***sale*** means only a sale properly so called.

***securities*** include stocks, funds, and shares.

***separation agreement***, for part 19, see section 265.

***settlement***, of a sale of land or a contract for the sale of land, see section 58B.

***subscriber***, for part 6, division 3, see section 58A.

***title deed*** includes a certificate of title to, or deed of grant in respect of, registered land.

***trustee corporation*** means the public trustee and any corporation authorised by the *Trustee Companies Act 1968* to administer the estates of deceased persons and other trust estates.

***unregistered land*** means land that has been granted in fee simple and is not registered land or land granted in trust under the Land Act.

***valuable consideration*** includes marriage but does not include a nominal consideration in money.

***warden*** has the meaning given by the *Mineral Resources Act 1989*.