SOME IMPORTANT CHANGES IN THE NEW PROPERTY LAW BILL

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Introduction

1. The *Property Law Bill 2023* is the culmination of an extensive review of the *Property Law Act 1974*. The 1974 statute is revered as the work of a team lead by one of the greatest lawyers Queensland has produced, Bruce McPherson. Those who put up their hands to overhaul it have to be admired for their confidence if nothing else.

2. In fact, the fundamental contributions to the proposed reform have included names well-known in Queensland in connection with property law, and the *Property Law Act*. They include Professor Bill Duncan of *Duncan and Vann* fame, and Professor Sharon Christensen, the author of (amongst many other titles) the well-regarded *Commercial Leases* textbook. So, those who put up their hands are to be admired principally for their erudition.

3. In 2018, a team from the Commercial and Property Law Research Centre at QUT and led by Professors Duncan and Christensen delivered a report to the State Government entitled "*Property Law Review Final Report*" (**QUT Report**).[1] The QUT Report is monolithic, traversing the whole of the *Property Law Act*, identifying problems and making the case for reform, modernisation and consolidation of much of the statutory regime affecting real and personal property.

Reform

4. There will be many who question the need for the reform. For one thing, modernisation of a statute necessarily involves use of new language in respect of familiar statutory subject matter. We all know that this aspect alone creates a lawyers' feast. We can all foresee time in court poring over minute changes in language the way Roman priests once pored over pigeon entrails.

5. Modernisation, though, has its place. Justice McPherson anticipated similar criticisms when arguing for the introduction of his *Property Law Bill* in 1973. His Honour and his colleagues in the Law Reform Commission wryly observed that:[2]

> There may even now be individuals who believe they can see advantages in being able to create estates in tail or legal contingent remainders or levying a distress on the chattels of a defaulting tenant. There may (although it is unlikely) be legal practitioners who appreciate the subtleties of estates *pur autre vie*, of the *Tabula in naufragio*, or *interesse termini*, to say nothing of those who belong to opposing schools of thought on the doctrine of *scintilla juris*,

[1] Available at this link:

https://www.justice.qld.gov.au/__data/assets/pdf_file/0009/568179/qut-pla-final-report.pdf

[2] Queensland Law Reform Commission Report No 16, February 1973.

> or who are acquainted with more than the name of the Rule in *Shelley's Case*. But in Queensland at least they are very few in number, and, if they exist at all, their interest in and affection for these topics can only be founded upon legal antiquarianism and not upon any belief in the social utility of the rule or institution for the community as a whole. At all points, therefore, an important purpose of the *Property Law Bill* is to simplify, as well as to codify and amend, the law of property …

6. In similar spirit, although perhaps with less flair, Professors Christensen and Duncan and their colleagues have identified provisions of the current Act which no longer have any utility. Section 8, which precludes the creation of interests in land by way of livery and seisin or by feoffment, is to be abandoned on the basis that there is no longer any (or at least any identifiable) old system land in Queensland. Section 9, which deals with easements in the context of the conveyance of old system land, is to be abandoned for similar reasons. So passes section 10, which effectively requires that dispositions of old system land be in writing. Section 13, which relieves third party beneficiaries of covenants under deeds with respect to interests in land from the strictures of privity, disappears as well.

7. I do not intend to go on at length about particular provisions to be abandoned. The ones I have just identified relate to the particular area of reform under the Bill that I want to examine: requirements of writing in respect of creation and transfer of interests in property.

Requirements of writing

8. One of the best-known provisions of the existing Act is the modern rendition in section 59 of the most famous provision of the *Statute of Frauds*; the requirement that contracts for the disposition of an interest in land be written down.

9. The new Bill seeks to place section 59 up front together with the other provisions requiring writing. So we have:

   (a) clause 7 (cf section 59 of the Act) which continues the requirement that a contract for the disposition of land be recorded or at least evidenced in writing and signed by the party against whom the contract is to be enforced;

   (b) clause 8 (cf section 11 of the Act) which requires that:

      (i) any creation of a legal or equitable interest in land must be in writing and signed by the person creating the interest;

      (ii) any trust relating to land must be in writing and signed by the person creating or declaring the trust;

   (c) clause 9 (cf section 12 of the Act) which requires that an interest in land created by parol – that is by verbal agreement – takes effect as an interest at will only (that is to say, an interest that can be determined by either party).

10. I propose to compare each of those clauses with their predecessors in the current Act. I will look at the supporting arguments in the QUT Report, and look at some issues that might arise.

11. I also propose to look at the language of the new clause 68 with respect to the enforcement of promises for the benefit of third parties and compare it to the current section 55.

Clause 7

12. Clause 7 is the replacement for section 59. The new provision, consistent with modern drafting practice, breaks up the alternative propositions into sub-paragraphs.

Clause 7 (new)	Section 59 (current)
A contract for the disposition of land is not enforceable by action in a proceeding unless— (a) the contract is in writing or some memorandum or note of the contract is recorded in writing; and (b) the contract or the memorandum or note of the contract is signed by the party against whom the contract is sought to be enforced.	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.

13. It is worth noting that the QUT Report canvassed arguments about whether section 59 should simply be repealed. The arguments in favour included the following.[3]

14. *First*, it has been argued that section 4 of the *Statute of Frauds* – the progenitor of the current section 59 – was a product of its times. It was designed to protect against perjury about agreements at a time when parties were not allowed to give evidence in their own cause. Back in 1677, juries were making factual decisions and they were allowed to make decisions on their own knowledge of the facts in dispute. The risk posed by spurious claims was much higher, and the requirement of writing was designed to overcome that much higher risk.

15. *Secondly*, the section has been known to cause hardship and injustice. The example given in the report is of a defendant entering into an oral agreement, finding that they cannot perform, and then relying on the absence of writing. The authors of the QUT Report refer to an observation by Zelling J of the South Australian Supreme Court in a report from that state's Law Reform Committee:

> The only value of this section is to aid the dishonest man who thinks after concluding his bargain that he can in fact get a higher price for his land elsewhere and so he does not wish to be bound to his word. All other objections can be met under other areas of the law.

16. Reference to the relevant report shows just how heavily scornful Zelling J was of the cognate provision in South Australia. After setting out a range of reasons why the section was unnecessary – many of which might have been regarded by McPherson J as being of interest principally to the antiquarians – Zelling J said this:[4]

> All that Section 26 achieves is that an offer is made by a purchaser which the vendor can hold the purchaser to, whilst seeing whether he can build on that offer to get himself a better

[3] QUT Report at page 159 and following.

[4] 34th Report of the Law Reform Committee of South Australia (1975) at page 11.

> price. That seems to me to be neither socially desirable nor legally necessary and if vendors have made their bargain they should be compelled to stand by it …

17. Zelling J was in the minority in campaigning for the abolition of the provision, but even the majority of the Committee only supported its retention unenthusiastically, saying that the section provided a defence "used by people who do not wish to go into the witness box because they would lose their case if they did."[5]

18. *Thirdly*, after all this time, difficulties of interpretation remain. Some of those come from the confusing co-existence in the current Act of section 11 (which is to be abolished) and section 59, which both deal with the requirement for writing in connection with creation of interests in land.

19. *Lastly*, there is an argument that section 59 undermines the reputation of the legal system because it provides an opportunity to evade a contractual obligation on a technical, but unmeritorious basis.

20. Those arguments notwithstanding, the QUT Report did not recommend abolition of section 59. Instead, it recommended the introduction of new provisions that rationalised sections 10 – 12 and 59 of the Act. That recommendation has not been entirely accepted.

21. Subject to one important matter, the new clause 7, which restates the current section 59 in modern language, is not different in substance. In particular, the QUT Report recommended retention of the words "some memorandum or note of the contract" because there is a large body of case law which settles the meaning of that phrase.[6]

22. The important difference between the old and the new is that the new clause makes no mention of signature by an agent of the person against whom the contract is to be enforced as distinct from the signature of the person themselves. The removal of the reference to agents was not recommended in the QUT Report. There is (quelle surprise) no explanation in the explanatory memorandum.

23. So, one can easily see an argument that the intention of the legislation is to strengthen the provision even further. That seems unlikely, but there may be difficulty in reading the provision as extending to any written record executed by an agent. On the other hand, one can apprehend real judicial resistance to such an interpretation. It would create real inconvenience. It would be unnecessary to achieve the historically accepted purposes of the provision. In other settings, changes in language, apparently designed to modernise the expression of a rule rather than to change it, have given way to the long history of a statutory provision.[7]

Clause 8

24. Clause 8 is the replacement for the current section 11. The new clause is stated with more economy of language than the current provision:

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[5] *Ibid* at page 3.

[6] QUT Report at page 166.

[7] See, for example, the approach to section 64 of the *Supreme Court of Queensland Act 1999* and its predecessors as identified by Muir JA in *Lessbrook Pty Ltd v Whap* [2014] 2 Qd R 102.

Clause 8 (new)	Section 11 (current)
(1) The creation of a legal or equitable interest in land must be in writing and signed by the person creating the interest.	(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) A trust relating to land must be created or declared in writing and signed by the person creating or declaring the trust.	(2) This section does not affect the creation or operation of resulting, implied, or constructive trusts.

25. Apart from the economy of language, the most striking differences are:

    (a) the removal of references to wills;

    (b) the removal of the provision that the section does not affect the creation or operation of resulting, implied, or constructive trusts.

26. The second of those is quickly explained. Clause 10 of the Bill sets out provisos to clauses 7 – 9, including preservation of the law relating to part performance, and that relating to resulting, implied and constructive trusts.

27. The removal of references to wills is not explained by the QUT Report or by the explanatory memorandum. It appears arguable that where a will comes into existence by operation of statute, but without its being signed by the testator, it may not be effective for the purposes of the proposed clause 8.

28. For example, section 21 of the *Succession Act* contemplates an order of the Court making a will for a person lacking testamentary capacity. The section does not, for obvious reasons, contemplate execution by the person lacking testamentary capacity. Section 26 of the *Succession Act* provides that such a will is "properly executed" if it is in writing and signed and stamped by the registrar within a required period. Section 27 of the

Succession Act provides for the validity of such a will, particularly by providing that it has the same effect as if it had been executed by the person without testamentary capacity.

29. Again, clause 10 will come into play inasmuch as it provides that Part 2, Division 1 (including clause 8) "does not affect … the making or operation of a will". But the meaning of that phrase is likely to attract debate. An important ambiguity of such provisos has recently been identified by Henry J in *Buckingham v Buckingham*.[8] That notwithstanding, the better view is that clause 8 is not intended to affect the operation of the will, and a will has always been able operate to create or convey an interest in land.

Clause 9

30. The new clause 9 is the proposed replacement for section 12 of the current Act.

Clause 9 (new)	Section 12 (current)
(1) An interest in land created by parol, and not put in writing and signed by the person creating the interest, has the effect of an interest at will only.	(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) Subsection (1) applies despite any consideration given for the interest.	(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.

31. The new clause breaks up subsection (1) into two parts. The proviso in the current section is effectively picked up in the omnibus proviso clause 10.[9] This clause raises the same issue *vis-à-vis* agents as those I have already discussed in respect of clause 8.

Clause 68

32. The new clause 68 corresponds to the current section 55, which allows the beneficiary of a contractual promise to enforce it notwithstanding lack of privity.

33. The current section essentially provides that where parties contract to bestow a benefit on a third party, and the beneficiary accepts both the benefit of the contractual promise and the burden of any conditions, the beneficiary may enforce the promise. The beneficiary can be a person or corporation not in existence at the time when the promise was given. The putative promisor has available to them the same defences that would be available as against a party in privity.

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[8] [2020] QSC 230 at [63] – [64].

[9] Although clause 10 makes no reference to the 3-year time period mentioned in the current section 12, the dictionary in Schedule 2 of the Bill defines a "short lease" to be either a lease for a term of not more than three years or a tenancy from year to year for a shorter period.

34. The new clause exhibits some interesting differences. Chief amongst them is the omission of any definition of what constitutes acceptance of the benefit of the promise. In the current section acceptance is specifically defined:

> ***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.

35. The omission of a similar definition from the new clause is not explained by the QUT Report. The QUT Report argued for the omission of the requirement of acceptance altogether.[10] That would have had the added effect of removing the opportunity for the parties to the contract to resile from the promise by agreement before any third party had accepted the benefit of the promise.

36. Some elucidation of what constitutes acceptance is provided in subsection (4) which talks about the consequences of acceptance "either expressly or by conduct". That should be enough to overcome any uncertainty about the sort of conduct capable of constituting acceptance, but it leaves at large the question of time. It is not clear, for example, that the third party retains the luxury of accepting "within a reasonable time of the promise coming to [their] notice" as under the current section.

37. It may be arguable that there is no time constraint on acceptance (unless expressly stated in the contract). It may also be arguable that there is an implied requirement of acceptance within a reasonable time whether or not the promise has come to the attention of the third party. There would be sound policy arguments for such an approach based on providing certainty to the contracting parties. Against that, it may be argued that there is no need to provide such certainty when the contracting parties can take care of that themselves when drafting. There is no reason why the period during which the promise can be accepted by a third party cannot be limited within the contract.

Conclusion

38. That is a tiny snapshot of the vast expanse of the new Bill, which goes beyond the scope of the current Act. One example of that is the paper to be presented next by Sarah Holland on the new disclosure provisions relevant to real estate transactions, which have previously been located elsewhere.

39. The final observation I would make is that everyone who practises in this area should make sure they download a copy of the QUT Report.[11] Difficult questions under the current *Property Law Act* have often been resolved by reference to the Queensland Law Reform Commission report which preceded its enactment.[12] It is highly likely that the QUT Report will be of similar value.

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[10] QUT Report at pages 370 – 380.

[11] https://www.justice.qld.gov.au/__data/assets/pdf_file/0009/568179/qut-pla-final-report.pdf

[12] Queensland Law Reform Commission Report No 16, February 1973.