

Property Law Bill 2023

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Property Law Bill 2023 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The *Property Law Act 1974* (PLA) governs many aspects of Queensland's property law, including: general rules affecting property; the creation and disposition of interests in land; co-ownership; deeds; covenants; mortgages; leases; the rule against perpetuities; and old system land. The PLA commenced in December 1975 and has not been substantially amended since.

The primary objective of the Bill is to replace the PLA with a new, modernised property law Act, drafted broadly in accordance with the recommendations of the *Property Law Act 1974 – Final Report* (2018) (PLA Report), prepared by the Commercial and Property Law Research Centre at Queensland University of Technology (QUT).

The PLA Report was prepared after a broad-ranging, independent review of Queensland's property laws, including a review of the PLA. It also involved a review of like provisions in other jurisdictions and substantial consultation with a wide range of stakeholders who were generally supportive of the recommendations of the PLA Report.

In generally adopting the recommendation of PLA Report, the Bill will simplify, streamline and modernise Queensland's property legislation, better facilitate e-conveyancing and electronic transactions and remove outdated provisions.

The Bill also implements a new statutory seller disclosure scheme drafted broadly in accordance with the recommendations of the *Final Report: Seller Disclosure in Queensland* (2017) also prepared by QUT (Seller Disclosure Report).

In generally adopting the recommendations of the Seller Disclosure Report, the Bill will create a more certain, co-ordinated and transparent regime for the sale of freehold land in Queensland by promoting consistency and clarity of disclosure. It will also simplify and consolidate the current obligations under the common law, statute and contract.

Buyers will benefit from being in a more informed position prior to signing a contract to purchase land with a view to minimising disputes that currently arise if defects in title are discovered after the contract is signed, thereby avoiding or minimising future litigation and associated costs.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Human rights engaged by the Bill are:

- property rights (section 24 of the HR Act); and
- the right to a fair hearing (section 31 of the HR Act).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Property Rights (section 24 of the HR Act)

(a) The nature of the right

All persons have the right to own property alone and in association with others and to not be arbitrarily deprived of their property. The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom.

The right includes the protection from the deprivation of property. Deprivation in this sense has been held to include the substantial restriction on a person's use and enjoyment of their property. Property generally includes all real and personal property interests recognised under general law (including but not limited to interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude). The right does not provide a right to compensation.

Various provisions of the Bill may place limitations on property rights.

(i) *Requirement for writing*

Part 2 division 1 of the Bill limits a person's rights, except in certain circumstances as set out in clause 10 of the Bill, to:

- enforce a contract for the disposition of land unless it is in writing and signed by the party against whom it is to be enforced;
- create a legal or equitable interest in land, or a trust relating to land, unless it is in writing and signed by the person creating the interest or trust;
- create an interest in land by parol, which is specified to have the effect of an interest at will only.

These clauses restate fundamental protections found in the Statute of Frauds (a historic statute in both England and Australia). The provisions limit or eliminate any rights to land where such rights are not in writing and signed by the parties, and provide certainty for property rights in Queensland.

(ii) *Freehold Estates*

Part 3 of the Bill: limits the property rights that are capable of being created in relation to land to an estate in fee simple or a life estate; replicates provisions from the PLA that abolish

antiquated estates (e.g. an estate tail or quasi-entail) and incidents of tenure for the benefit of State, quit rent and escheat in favour of the State. The part also provides for the rights of the remainder person under a life estate for: voluntary and equitable waste by a life tenant; and recovery and compensation for holding over when a life estate ends. Part 3 achieves the same outcome as the equivalent provisions in the PLA with clearer, simplified drafting and modern language.

(iii) Future Interests

Part 4 of the Bill: limits how a future interest in land may be created, providing for it to take effect as an equitable, and not legal, interest; limits how an interest in property can be created or disposed of (to during a person's lifetime or by will) while clarifying that it does not make a joint tenancy severable by will, (protecting the interest of the other joint tenant (s)); and provides when a gift over of property in favour of a person ends.

(iv) Sale or division of co-owned property

Part 5 division 1 provides for the liability of co-owners to account and limits a disposition of an equitable interest in property to take effect as a tenancy in common.

Upon application by a co-owner, part 5 division 2 of the Bill gives the court power to order a forced sale of the property or divide it amongst co-owners, as well as order payment of compensation, reimbursement or an accounting as between co-owners. The ability of the court to force a sale, or alter the division of ownership between co-owners, may have the effect of limiting a co-owner's right to property. However, it also enhances each co-owner's rights by ensuring, in the event of dispute between co-owners, that there is a mechanism to resolve that dispute.

(v) Covenants

Clause 64 of the Bill is a word saving provision that preserves the effect of section 53(1) and (2) of the PLA. It makes a covenant relating to land binding on successors in title of the parties to the covenant and, in the case of restrictive covenants, the owners or occupiers for the time being of the land burdened by the covenant. This may limit the property rights of the covenantors' successors in title (or anyone deriving title from them) and in the case of restrictive covenants, the owners or occupiers, of the land burdened by the covenant, whilst increasing the property rights of the covenantee's successors in title (or anyone deriving title from them).

Clause 65 of the Bill makes a covenant contained in a registered easement over land for the benefit of other land binding on the successors in title of the parties to the easement, unless those covenants are personal to the parties to the easement. This may limit the property rights of the successors in title to the burdened land, and may increase the rights of the successors in title of the benefited land. This clause operates retrospectively (by virtue of clause 247) and in certain cases will change the enforceability of positive covenants contained in easements and therefore alter parties' rights.

(vi) Contracts

Clause 68 of the Bill, which replicates the effect of section 55 of the PLA, allows a person who is not a party to a contract, but who will receive the benefit of a promise under that contract, to

enforce the benefit of that promise. This limits the property rights of parties to a contract by allowing a third party (who is not a party to the contract) to enforce covenants in the contract that benefit them. The clause also provides that, if the third party accepts the benefit of the promise, either expressly or by conduct, the promisor under the contract can enforce an obligation imposed by the contract on the third party for the benefit of the promisor.

Clause 69 of the Bill requires persons who would benefit from a guarantee to ensure that the document recording the guarantee is in writing and signed. Clause 77 of the Bill allows a buyer to rescind a contract for land containing a residential dwelling if the residential dwelling is damaged or destroyed so that it is unfit for occupation before the settlement date or before the buyer takes possession of the land. However, if before the settlement date the seller restores the dwelling to the condition it was in prior to the damage occurring, the buyer will not have the right of rescission. This limits the seller's property rights under the contract where the residential dwelling is damaged or destroyed but provides for a fair and just outcome for the buyer and provides certainty regarding the property to be purchased prior to settlement.

Clauses 79 of the Bill limits rights to terminate a contract for the sale of land where the title is unable to be verified by the buyer due to the land registry's computers being inoperative.

Clause 80 of the Bill limits rights to terminate a contract for the sale of land where the electronic settlement and lodgement system has computer systems that are inoperative so the electronic settlement is unable to proceed.

Clause 81 of the Bill limits rights to terminate a contract for the sale of land where a party is unable to attend settlement due to an adverse event.

Clause 83 of the Bill re-enacts current section 68 of the PLA by expressly abolishing the rule in *Bain v Fothergill*, a common law rule that provides a seller is not liable for an inability to settle a contract because of a defect in the seller's title. By abolishing the rule, the section puts the seller who cannot perform the contract for the sale of land due to a defect in the seller's title in the same position as any other party who fails to perform a contract. This could be viewed as limiting the seller's right to deal with property. At the same time, the clause enhances the right of a buyer of property so that the buyer can make an application to court for damages.

Clause 84 of the Bill re-enacts current section 69 of the PLA and applies where, due to a defect in the seller's title, the seller is not entitled to specific performance of a contract for the sale of land but the defect does not entitle the buyer to rescind, the buyer may recover the buyer's deposit and any instalments paid under the contract. This could be viewed as limiting the rights of the seller's right to deal with property. At the same time, the clause enhances the rights of a buyer of property so that the buyer can recover the buyer's deposit.

Clause 85 of the Bill relates to the forfeiture of a deposit under a contract to sell a proposed lot. The amount that may be forfeited by the seller is limited to 20% of the purchase price. This limits the rights of the seller to forfeit a 20% deposit whilst giving the buyer the right to seek a refund of any deposit held by the seller over and above this amount.

Clause 86 of the Bill limits the rights of a party to terminate before settlement of an e-conveyance to the time before the electronic workspace for the e-conveyance is locked for the purpose of settlement. This limitation is regulatory in nature and is necessary to ensure that there is certainty in the e-conveyancing process.

(vii) *Instalment contracts*

Part 7 division 3 of the Bill defines an "instalment contract" of land and:

- limits a seller's rights to:
 - terminate a contract that is an instalment contract for a buyer's breach;
 - sell or mortgage land the subject of an instalment contract without the buyer's prior consent;
- gives a buyer under an instalment contract a right to:
 - caveat the property; and
 - require transfer of the property on giving notice to the seller and payment of the balance purchase price owing.

Subject to the buyer paying a deposit sufficient to trigger the instalment contract provisions and the buyer electing for the contract to be an instalment contract these provisions, the provisions may apply so as to limit the seller's property rights. These limitations are justified to protect the buyer's interest in the land that is the subject of the instalment contract.

(viii) Seller Disclosure

Clause 104 of the Bill potentially limits the property rights of the seller by providing a right of termination to the buyer where the seller fails to give disclosure or gives inaccurate disclosure. The seller disclosure regime alters the seller's property rights by obliging the seller to make accurate disclosure about prescribed matters and may permit the buyer to terminate the contract to purchase the lot if the disclosure is not given, or is inaccurate or incomplete and relates to a material matter affecting the lot. Precontractual disclosure allows the buyer to become aware, before entering into a contract to purchase a lot, about important matters that may inform their decision to purchase the property.

This obligation on the seller to disclose and the corresponding buyer's right to terminate (and accordingly, the restriction on the seller's property rights) if disclosure is not given, is incomplete or is given inaccurately, is subject to certain exemptions.

This disclosure obligation and corresponding right of termination for non-disclosure or incomplete or inaccurate disclosure does not apply where the buyer is a government entity, or the buyer is a listed corporation or a subsidiary of a listed corporation. Given the greater sophistication and bargaining position of these buyers, it is appropriate that the seller disclosure regime not apply.

Certain transactions where the buyer is, or should already be, aware of the relevant disclosure information, are also excluded, including where the buyer is an existing co-owner of the land, an adjoining owner with the sale giving effect to a realignment of a common boundary, or where the buyer was already provided with disclosure under an option agreement with the sale giving effect to the exercise of the option under the option agreement.

There are also exclusions including, but not limited to, where the sale gives effect to a court order, an enforcement warrant, a financial agreement under the *Family Law Act 1975* (Cth), or to give effect to a transmission or transfer of a lot pursuant to the administration of the deceased person's estate under a will or the rules of intestacy (as varied by any court order under part 4 of the *Succession Act 1981*). In these instances, the disclosure obligations are unlikely to be any benefit to the transferee and it would pose an unnecessary cost burden on the seller if the disclosure obligations were imposed.

The disclosure obligations, and corresponding right to terminate may also be waived by the buyer where the seller and buyer are related parties, or where the contract price is more than

the \$10 million including GST or other amount as prescribed by regulation. This provides an appropriate balancing of the respective rights of the seller and buyer.

This right of termination is also limited where the right arises as a result of an inaccuracy or incompleteness in the disclosure given by a seller, as the buyer may only terminate if the inaccuracy or incompleteness relates to a matter which is material to the lot.

Additionally, if a failure to comply with the disclosure obligations, or the inaccuracy, is a failure to comply with another Act, then the consequence for the failure or inaccuracy under that other Act will apply instead of the remedy in the seller disclosure regime..

(ix) Mortgages

Part 8 of the Bill places limitations on the property rights of mortgagees and mortgagors under a mortgage.

In particular, clause 113 of the Bill gives mortgagees implied powers to deal with mortgaged land, or land and other property, subject to the terms of the mortgage documents. These powers may affect the property rights of the mortgagor of the property and improve the rights of the mortgagee of the property including but not limited to: giving the mortgagee a right to sell the property (or any part of) or a fixture on the land, a right to insure the land against loss and damage; a right to enter into possession and cut and sell timber on the land; and a right to grant an easement, right or privilege in relation to the land if the mortgage document does not exclude or alter those powers. These powers ensure that mortgagees have appropriate rights and powers in respect of their security interest under the mortgage.

However, this power of sale granted to the mortgagee which restricts the property rights of the mortgagor of the property is tempered by:

- Clause 114 of the Bill which limits the right of a mortgagee to exercise a power of sale of a property the subject of a mortgage, despite any agreement to the contrary, until a default has occurred, and the mortgagee has given the mortgagor a notice setting out the default and requiring the default to be remedied within 30 days, and the mortgagor has failed to remedy that default.

This process limits the right of the mortgagee under the mortgage, while also increasing the rights of the mortgagor in the property the subject of the mortgage, by giving the mortgagor an opportunity to remedy any default before the mortgagee is entitled to exercise a power of sale of the mortgaged property.

This clause, which replicates the effect of section 84A of the PLA, limits the rights of the mortgagee under the mortgage requiring the mortgagee to give notice to any interested parties before being entitled to exercise a power of sale of the mortgaged property. However, it also promotes the right to property by allowing the mortgagee a simplified process to exercise a power of sale over disclaimed property.

- Clause 116 of the Bill which limits the mortgagee's right under a mortgage, despite any agreement to the contrary, by requiring the mortgagee, when exercising its power of sale, to take reasonable care to sell the property for market value.

While this limits the mortgagee's right to sell, it protects the rights of the owner of the property in so far as possible so that market value is to be obtained.

- Clause 118 of the Bill, which requires the mortgagee to apply the sale proceeds in a certain order with any balance to be paid to the owner of the property, protects the rights of the owner of the property.

Clause 115 of the Bill which allows the mortgagee to exercise a power of sale of a mortgaged property, without giving a notice to the mortgagor of the default, where the property has been disclaimed by the trustee in bankruptcy under the *Bankruptcy Act 1966* (Cth) or a liquidator under the *Corporations Act 2001* (Cth). However, the clause requires the mortgagee to give notice that it intends to exercise the power of sale at least 30 days before it exercises that power to the registrar of titles and to any person who has an interest in the land.

Clause 117 of the Bill provides that where property is sold in an exercise of a power of sale by a mortgagee, the buyer: is not answerable for the non-application of the purchase money; and need not inquire whether the power of sale was properly exercised. This effectively prevents a mortgagor, who suffers loss or damage because of a breach of a mortgagee's duty to sell the property at market value or because of an improper exercise of the power of sale, from seeking compensation from that buyer. Subclause (3) provides that the mortgagor may claim compensation from the mortgagee.

Clause 121 of the Bill tempers the power of a mortgagee to insure a mortgaged property by specifying limitations on the following matters and applies despite any agreement to the contrary between the mortgagor and mortgagee: the amount the mortgaged property may be insured for by the mortgagee; and when the mortgagee is able to insure the property.

Clause 122 of the Bill provides for when the mortgagee may require the insurance money received from the mortgaged property to be applied to reinstatement of the property or towards discharge of the mortgage, with the right of the mortgagor to require reinstatement to prevail.

Clause 128 of the Bill implies obligations on the mortgagor in relation to a mortgage over land including an obligation to allow the mortgagee to enter the land to view and inspect the state of repair of buildings and other improvements on the land when reasonably convenient, subject to any agreement to the contrary between the mortgagor and mortgagee. This limits the mortgagor's property rights to unrestricted use and enjoyment of the property by allowing the mortgagee a right of entry to the property. However, it is restricted to "when reasonably convenient" and for the limited purpose of viewing the state and repair of the improvements on the land.

Clause 130 of the Bill limits the rights of a mortgagee to enforce payment of an accelerated payment under a mortgage on a mortgagor's default, provided the mortgagor remedies the default and meets any reasonable expenses of the mortgagee due to the default, before the mortgagee exercises the power of sale or starts proceedings to enforce the mortgagee's rights. If the mortgagee tries to enforce these rights, the mortgagor may apply to the court for relief against payment of an accelerated payment. This limits the mortgagee's property rights under the mortgage whilst providing additional rights to the mortgagor.

Clause 131 of the Bill limits the mortgagee's rights against the mortgagor to require repayment of an overdue principal amount where the mortgagee has accepted interest payments under the mortgage for at least 3 months after the end of the term of the mortgage, and the mortgagor is not otherwise in breach of the mortgage terms, unless the mortgagee gives at least 3 months' notice calling up the principal amount owed. This provides additional rights to the mortgagor to prevent the mortgagee calling up the principal amount without having first given the 3 months' notice to the mortgagor.

Clause 132 of the Bill allows the mortgagor, or a subsequent mortgagee, to require the mortgagee to transfer the mortgage rather than discharging it. This limits the rights of the mortgagee under the mortgage while enlarging the rights of the mortgagor, and a subsequent mortgagee who may prefer to transfer a mortgage rather than release it.

Clause 133 of the Bill prevents a mortgagee requiring a mortgagor on discharge of a mortgage over land to pay money due under another mortgage over other land. This limits the rights of the mortgagee under the mortgage and gives greater rights to the mortgagor.

Clause 134 of the Bill allows the court to order sale of mortgaged property when an application is made for sale, redemption, foreclosure, and/or the raising or payment in any way of mortgage money. This limits the rights of the mortgagor to use and enjoy the property if a sale is ordered.

(x) Leases

Clause 139 of the Bill implies standard terms into a lease, subject to any agreement to the contrary and any other Act. These implied terms allow the lessor, or the lessor's agent, at all reasonable times, to enter the leased premises to inspect their state or repair, carry out repairs, or comply with the requirement of any law or any notice given by a competent authority. The implied terms also provide that the lessor must not unreasonably interfere with the lessee's occupation and use of the leased premises.

These implied terms may affect the lessee's quiet enjoyment of the property, however, such limitation is only on reasonable notice and for very limited purposes and is able to be contracted out by agreement. These terms are reasonable, commonly accepted in leases of all types, and are necessary such that any alteration of the lessee's rights because of the terms (which can be altered by contract) is justified.

Clause 142 of the Bill limits the lessor's ability to withhold consent to the lessee's proposed dealing with the lease or leased premises. This clause limits the lessor's rights to refuse consent to these dealings and gives the lessee additional rights to apply to court to determine whether the lessor has unreasonably withheld consent either by refusing consent, attaching an unreasonable, unnecessary or onerous condition to the consent or failing to make a decision on the proposed dealing.

Clause 144 of the Bill provides that, if a lessee assigns the lease to an assignee, and then the assignee subsequently assigns the lease to a subsequent assignee, the lessee and any guarantor of the lessee are released from any liability to the lessor for a breach of the lease by the subsequent assignee. This removes the lessor's rights against the lessee, without limiting the lessor's rights against any assignee or subsequent assignee of the lease.

Part 9 division 5 subdivision 2 of the Bill imposes limitations on when the lessor may exercise a right to re-enter leased land for a breach of the lease by the lessee. These limitations do not apply if the lessee has given up possession of the leased land (and in that case the lessor can re-enter). When the lessee has not given up possession of the land, in order to re-enter, the lessor must first give the lessee a notice to remedy breach and the lessee must not have remedied that breach within the reasonable period set out in that notice. The lessor may only exercise the right to re-entry by:

- peaceably re-entering the land; or
- if the lessor cannot peaceably re-enter the land, making a written demand for possession of the land to the lessee; or

- if the lessee has refused to give up possession of the land after a written demand, applying to the court for recovery of possession of the land.

The court may also grant relief to the lessee or a designated person (i.e. the lessee's mortgagee or receiver, sublessee, sublessee's mortgagee or receiver, or guarantor and, where the lease has been assigned, any assignor or assignor's guarantor who remains liable under the lease) against the lessor's right to re-enter and forfeit the lease. This restricts the rights of the lessor and provides additional rights to the lessee, and other parties who have an interest in the lessee's lease.

Part 9 division 5 subdivision 3 of the Bill limits the lessor's ability to refuse to renew or extend a term of the lease, or sell the reversion of the lease to the lessee by:

- requiring the lessor to give a notice to the lessee setting out that the lessor is refusing to renew, or extend the term, or sell the reversion of, the lease, and certain other matters (as set out in clause 164 of the Bill); and
- allowing the lessee or the lessee's mortgagee or receiver to make an application to court within 1 month of the lessee receiving the notice for relief against forfeiture.

The court may also grant relief to the lessee or a designated person, against the lessor's refusal to renew the lease or extend a term of the lease or sell the reversion of the lease to the lessee. This restricts the rights of the lessor and provides additional rights to the lessee, and other parties who have an interest in the lessee's rights.

Part 9, division 7 of the Bill allows certain leases to be terminated on notice being given by one party to another party to the lease. The period of the notice required varies depending on the type of lease. These provisions alter the rights of the parties under the lease by providing a right for a party to the lease to end any property rights granted under the lease on giving notice as provided for under the Bill. These provisions are justified because of the certainty that they provide to the parties. This division may be contracted out of.

Clause 178 of the Bill limits the lessor's ability to claim damages for breach of an obligation to keep or put premises in good repair during the term of the lease or when the lease ends. The damages are limited to the lesser of the amount, if any, by which the value of the reversion of the lease is diminished by the breach, and the amount of the actual cost for remedying the breach. Further, no damages may be awarded if the lessee proves that on or after termination of the lease the premises have, or will be, demolished, or structural alterations have been, or will be, made to the premises such that the cost of remedying the breach is of no value or of insufficient value to justify the cost. This restricts the lessor's rights under the lease to claim damages and also increases the rights of the lessee to resist claims for damages.

(xi) Neighbouring Property Rights

Part 10 division 1 of the Bill abolishes the common law right of nuisance in relation to acts or omissions that adversely affect the support provided by supporting land to supported land. However, this is replaced with a duty of care under negligence where owners of supporting land and supported land owe respective duties of care to each other not to do or omit to do anything that adversely affects the support provided by the supporting land to the supported land.

However, this duty of care in negligence is able to be excluded or modified by express agreement. This alters the property rights between the owners of supporting land and supported

land to limit their rights to enforcement of any breaches of a duty of care under negligence which may be further limited or eliminated by agreement between the respective owners.

Part 10 division 2 of the Bill allows the court to impose a statutory right of use over other land if the statutory right of use is reasonably necessary for the effective use and development of land which will benefit from the statutory right of use.

This may limit the property rights of any person with an interest in the land burdened by the statutory right of use by restricting their use or occupation of the land. This may also give any owner of land who benefits from the statutory right of use, or a public utility provider in the case of a statutory right of use for an easement in gross, additional rights to use or occupy the land burdened by the statutory right of use pursuant to the terms of the statutory right of use.

Part 10 division 2 of the Bill also allows the court to modify or extinguish an easement or covenant benefiting other land or an easement in gross, or a building management statement, in certain circumstances.

Modification or extinguishment under the clause may alter property rights associated with land that benefited from an easement, covenant or building management statement. This may also increase the property rights of the owner or occupiers of the burdened land to enforce those obligations or to no longer be restricted by the easement, covenant or building management statement.

Part 10 division 3 of the Bill allows the court to grant relief from encroachment of buildings onto other land. These orders may vary the rights of the parties involved by altering the property rights in the land involved in the encroachment including by way of transfer, lease, grant of an easement of the property affected by the encroachment, payment of compensation or removal of the encroachment. This permits a court to restrict or alter the parties' rights in relation to the properties affected by the encroachment.

Part 10 division 4 of the Bill allows the court to provide relief in relation to any lasting improvement made by a person (or someone acting for the person) to another person's land under a mistaken belief that the person owned the land. This provides certainty as to property rights with respect to the lasting improvement and the land affected by the lasting improvement as between the parties. This may limit the property rights of the parties who have an interest in the improvement or the affected land.

(xii) Dispositions to defraud creditors

Clause 193 of the Bill, a disposition of property by a person (the transferor) which is made with the intent to defraud the transferor's creditors is voidable, unless it is disposed of to a buyer or transferee in good faith, for valuable consideration without notice of the transferor's intention to defraud creditors. This may limit the rights of any buyer or transferee of the property whilst protecting the rights of creditors of the transferor and bona fide purchasers.

Clause 196 of the Bill provides that, when a buyer acquires property, which has been sold to the buyer for valuable consideration by an appointee under an invalidly exercised power of appointment, in stated circumstances, the buyer's right to the property will be limited to the value of the appointee's valid entitlement to the property immediately before the invalid exercise of the property. This limits the right of a purchaser to the property whilst increasing the rights of the other persons eligible to have the power of appointment exercised in their favour with respect to the property.

(xiii) Perpetuities

Part 13 of the Bill:

- abolishes the common law rule against perpetuities;
- imposes a maximum perpetuity period of 125 years for the disposition of property under a trust;
- where necessary for property of the trust to be disposed of before the end of the perpetuity period, reduces the stated age of the persons eligible to receive the disposition to not less than 18 years;
- unless such exclusion would exhaust the class of members eligible to receive the disposition of property from the trust entirely, allows potential members of the class who fail to meet all conditions to be members of the class by the end of the perpetuity period to be excluded; and
- provides under division 4 that, before the end of the perpetuity period, property on trust that is subject to:
 - a condition precedent must vest;
 - a condition subsequent must be re-entered or possession taken of the property if the condition subsequent is broken or the property will no longer be subject to the condition subsequent;
 - a right of reverter on the determination of a determinable fee simple must vest or the determinable fee simple becomes absolute; or
 - a resulting trust on the determination of a determinable interest in property must vest of the determinable interest becomes absolute.

These changes will apply prospectively to new trusts settled after the commencement of the relevant provisions. However, the Bill will allow for some existing trusts to opt in to the new 125-year period if the trustee has the power to vary vesting date of the disposition or where all the beneficiaries agree. Clause 218 of the Bill allows applications to the court for declarations of validity of a disposition under part 13. Taken as a whole, the provisions enhance the rights of a settlor of a trust in creating the trust with respect to the extended perpetuity period and the trustee of a trust to deal with the trust property.

(xiv) Limitation Period for Deeds

Part 19 division 5 of the Bill varies the limitation period for deeds from 12 years to six years. This limits the time in which a person can bring an action under a deed thereby limiting their ability to enforce property rights from 12 years to six years. This will apply only to deeds executed after the commencement of the relevant provisions.

(xv) Penalty Provisions

The Bill also imposes or permits penalties to be imposed for certain contraventions of the obligations under the Bill including:

- a mortgagee's failure, without reasonable excuse, to take steps as required under clause 116(3) to ensure the property is sold at the market value of the property;
- a mortgagee's failure, without reasonable excuse, to give notice to the mortgagor of the sale in the approved form within 28 days of the sale under clause 116(4);

- allowing the Governor in Council to make regulations which may prescribe fees payable under the Act and provide for penalty units for a contravention of a regulation under clause 235;
- amendments to section 205 of the *Body Corporate and Community Management Act 1997* and insertion of new section 40AA of the *Building Units and Group Titles Act 1980* to impose penalties on the body corporate for failing to give a body corporate certificate in the approved form or the requested financial information within 5 days of receiving a request for same under clauses 263 and 275.

Penalty provisions may impact on a person's property rights by depriving a person of property by requiring them to pay the penalty issued..

- (b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the Bill is to replace and modernise the existing PLA that is an essential part of the fabric of property law in Queensland, and which has not been comprehensively reviewed since its enactment. It is necessary to modernise Queensland's property law to take account of current property law practice, including changes as a result of digital advances relating to electronic documents, electronic signing and e-conveyancing procedures. This modernisation process will ensure that Queensland's property laws continue to protect and promote a person's right to own and deal with property.

As set out above, a number of provisions in the Bill will limit or restrict how a person may deal with property in certain circumstances. The provisions in the Bill will continue the application of well-known and settled property law provisions, with modern drafting to clarify particular areas of uncertainty and to balance the rights and interest between parties in a way that provides commercial certainty.

The potential limitations relating to requirements for writing, freehold estates, future interests, sale and division of co-owned property, contracts, instalment contracts, mortgages, and dispositions to defraud creditors effectively replicate the existing provisions of the PLA. The provisions are intended to provide commercial certainty, continuing long-established and well-settled property law practices. The limitations imposed by the Bill in these areas are consistent with a free and democratic society based on human dignity, equality and freedom because the limitations: are consistent with existing legal requirements, or represent incremental and minor amendments to existing requirements; and have been designed to provide commercial certainty while balancing competing rights of interested persons affected by the relevant provisions.

The potential limitations relating to penalty provisions are also consistent with the equivalent provisions in the PLA. The penalties are provided for in the Bill to encourage compliance with obligations under the Act and in the regulations, and, as any penalties will be issued for failure to comply with or breach of particular provisions, the penalties are not arbitrary.

The potential limitations relating to covenants, leases, neighbouring property rights and the limitation period for deeds build upon the existing legal requirements, but include new provisions and changed obligations that are balanced, fair and provide certainty. This is through modernisation and simplification of existing processes (e.g. under the lease provisions in the Bill) or by replacing provisions that were not resulting in fair outcomes (e.g. the right to support in section 179 of the PLA between owners of supported and supporting land) with a new approach that more effectively balances competing interests.

The changes to the limitation period for deeds allow parties to a deed and a contract to have the same limitation period in which to enforce their property rights. This provides certainty and consistency to parties' rights and obligations and reflects modern community expectations on timeframes for enforcement of property rights.

Changes to the perpetuity provisions are made to modernise and clarify these provisions and their effect on vesting of property in a trust so as to provide certainty for people who advise on and use trusts. The primary change, which is to extend the perpetuity period to 125 years from the date that the disposition was made, is necessary and proportionate. The provisions enhance a property owner's ability to provide an extended trust period reflective of greater longevity whilst providing certainty on when a trustee must vest property to vest within the perpetuity period.

The purpose of the proposed seller disclosure scheme provisions within the Bill is to provide a more certain, coordinated and transparent regime for the sale of land in Queensland by promoting consistency and clarity of disclosure obligations for sellers. It will also place buyers in a more informed position prior to signing a contract to purchase land with a view to minimising disputes that currently arise if defects are discovered after the contract is signed, thereby avoiding or minimising future litigation and associated costs.

The remedies available for failure to provide a disclosure statement and relevant prescribed certificates, or providing an inaccurate or incomplete seller statement and relevant prescribed certificates, are intended to promote compliance with these obligations by the seller, and also provide recourse to a buyer where the buyer is not provided with the required information or is provided with inaccurate information which was material to the buyer's decision to purchase when the buyer was not aware of the correct state of affairs before making their decision to purchase.

The seller disclosure scheme is consistent with a free and democratic society based on human dignity, equality and freedom because providing information to the buyer, including information impacting on title to property or ongoing financial liability of ownership, assists the buyer to be more comprehensively informed in exercising the buyer's property rights.

However, as set out above, the seller's obligation to disclose, and the potential termination rights of the buyer if disclosure is not given, or is given inaccurately or is incomplete, is tempered appropriately by exceptions to disclosure and by restricting the buyer's rights to terminate for inaccurate or incomplete disclosure unless the inaccurate disclosure is of a material matter affecting the land. This appropriately balances the competing rights of buyers and sellers.

The potential limitations on property rights in the Bill do not arbitrarily deprive a person of their property or property rights and largely re-enact, with modernised language, long standing limits on the rights of property to balance interests between co-owners of property, buyers and sellers, mortgagors and mortgagees, lessors and lessees, and neighbouring land owners.

Where changes are being made to adjust the respective rights and obligations of parties with property rights, the changes are balanced, proportionate taking into significant stakeholder consultation.

(c) The relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitations in the Bill described above achieve the purpose of the Bill by ensuring a modernised framework for property law in Queensland. The limitations provide certainty as to property rights and reflect an appropriate balance between the various competing property rights.

(d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

The objectives of the Bill cannot be achieved with provisions that are less restrictive on an individual's property rights.

The Bill also balances the competing property rights of parties to property transactions including leases, mortgages, sales and other dealings with property. As set out above, where property rights are limited or restricted for one party then, in most cases, a property right is provided to benefit another party so as to balance the interests of each party to the transaction.

(e) The balance between the importance of the purposes of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The Bill adopts an appropriate balancing of competing property rights, which is consistent with human rights. The Bill, whilst placing limitations on certain property rights, offers additional protections and property rights for competing property rights so as to achieve this appropriate balance. The benefits gained by fulfilling the purpose of the Bill outweigh the harm caused to the human rights identified.

Fair Hearing (section 31 of the HR Act)

(a) The nature of the right

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil procedures and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

What constitutes a 'fair' hearing will depend on the facts of the case and will require the weighing of a number of factors including the rights of the applicant and the rights of any person who may be affected by the order sought by the applicant.

This generally requires that any party who may be affected by the orders sought is given an opportunity to be heard and to put their position forward.

The Bill upholds the rights of a fair hearing by providing for:

- the court to determine property rights between co-owners on an application by a co-owner for sale or division of co-owned property, subject to allowing any security holders to be notified of the proceedings, before the court (part 5 division 2 of the Bill);
- a mortgagor to apply to court for relief against payment for any accelerated amount claimed by a mortgagee under a mortgage (clause 130 of the Bill);
- the court to order sale of a mortgaged property if an application is made for sale, redemption, foreclosure, or the raising of payment in any way of mortgage money (clause 134 of the Bill);

- a lessor to apply to court for recovery of possession of land, subject to a lease, in exercise of a right to forfeit the lease because of a breach by the lessee of a lease term (clause 158 of the Bill);
- a lessee, or designated party (i.e. a lessee's guarantor, sublessee, mortgagee or receiver), to a lease covered by clause 150 of the Bill, to apply to the court for relief:
 - against forfeiture of the lease for a breach of the terms of the lease after being served with a notice to remedy breach by the lessor (part 9 division 5 subdivision 2 of the Bill);
 - against refusal to renew, or extend term of, or sell reversion of, the lease after being served with a breach notice by the lessor (part 9 division 5 subdivision 3 of the Bill);
- the court to determine neighbouring land issues under part 10 of the Bill including:
 - imposing a statutory right of use which is reasonably necessary for the effective use and development of other land;
 - modifying or extinguishing easements or covenants over burdened land;
 - providing relief from encroachments over or from neighbouring properties;
 - providing relief for improvements made to third party land under a mistaken belief as to the title of the land;
- the court to determine an application as to whether a disposition made with the intention to defraud creditors is voidable under part 11 division 2 of the Bill;
- the court to determine an application for the declaration about the validity of a disposition of property or to apply for an order that the property of the trust vest within 125 years after creation of the trust under part 13 of the Bill.

The Bill limits rights to a fair hearing where the party is unable to be located or ascertained, and where possible, placing protections in place for the party not heard or to give that party the opportunity to be heard:

- Clause 20 of the Bill allows the court to presume that a life tenant or third party has died where they have been absent for at least seven years and for orders to be made on the basis which may be against their interest.
However, this presumption is rebuttable and, if the life tenant or third party is later proved to be alive, that person may apply to the court to enforce their rights against any property and associated property rights including possession of the property, a right to damages, and/or an account of rent or profits. Accordingly, whilst a presumption may be applied by the court, that person is given a right to a later fair hearing to protect or enforce their rights before the court.
- Clause 136 of the Bill allows a court to make orders in the absence of a mortgagee of land where a mortgagee is out of the jurisdiction, cannot be found, is unknown, is dead and no personal representative is administering the deceased mortgagee's estate, or is uncertain, to facilitate the redemption of the mortgage on application of the person entitled to redeem the land. However, the mortgagee's rights in relation to any outstanding debt, which is shown to be payable over and above the amount determined by the court, continues to be an amount payable by the person entitled to redeem the mortgage.
- Part 15 of the Bill allows the registrar of titles to decide whether to record unregistered land as unallocated State land or freehold land, or to record information if any, provided by any person claiming an interest in the land including information relating to the use

and possession of the land. This is subject to the registrar of titles giving public notice of the registrar's intention to include such land in the land registry, calling for any person to claim an interest to give notice within two months of the publication of the public notice and, where appropriate, referring the matter to an inquiry and, if appropriate, referring the matter to the court for consideration under part 2 divisions 4 and 5 of the *Land Title Act 1994*.

- (b) The nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The limitations in clauses 20 and 136 allow the court to make orders in the absence of a person affected by the order. This is necessary to protect the rights of the party making the application. However, these limitations on the rights to a fair trial of the person affected by the proposed orders are also tempered by placing additional protections or rights in place for the person affected by the order who is not heard by the court.

In the case of clause 20, the provision allows a further application and orders to be made if the presumption turns out to be incorrect to protect their rights, and, in the case of clause 136, the rights of the mortgagee to any amount over and above that determined by the court, is still retained as an outstanding debt.

Therefore, there is an appropriate balance of the fairness and justice in the individual circumstances to allow the rights of the party making the application to be protected in a timely manner, whilst still incorporating appropriate safeguards to protect the rights of the party that is not heard in the application.

The limitation in part 15 of the Bill, requires the registrar of titles to act in a quasi-judicial capacity, to give public notice so that any interested person can be heard on the matter, and take into account all submissions received before making a decision. If necessary, the registrar of titles is also required to refer the matter for an inquiry and/or to the court for determination. The opportunity for all parties to be heard on a matter, and to, if necessary, hold an inquiry allows all interested persons an opportunity for procedural fairness. The option for the registrar of titles to refer this matter to the court for determination also supports the rights to a fair trial, in appropriate circumstances.

Therefore, these limitations on the right to a fair trial are necessary for the balancing of competing rights and are consistent with the rights of a free and democratic society.

- (c) The relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitations imposed help achieve the purpose of modernising Queensland's property law by balancing the competing rights of people consistently with a free and democratic society.

The limitations allow a determination to be made as soon as possible, whilst putting safeguards in place to protect the rights of a person impacted by the determination who is not a party to the matter, or to ensure that, in so far as possible, procedural fairness is given to all potentially interested persons before a determination is made that may impact on their rights.

- (d) Whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose

The objectives of the Bill cannot be achieved with provisions that are less restrictive on an individual's right to a fair trial.

The Bill balances the rights of a person to timely justice as against another person, who may be impacted by the proceedings, and the other person's right to be heard.

- (e) The balance between the important of the purposes of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

The Bill adopts an appropriate balancing of competing rights, which is consistent with human rights. The Bill, while placing limitations on a right to a fair hearing in very limited circumstances, offers additional protections or further rights to persons who may not have been given the opportunity to be heard at first instance, or ensure that the opportunity for procedural fairness is given to any person who may have an interest in the outcome of the determination.

Conclusion

In my opinion, the Property Law Bill 2023 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the *Human Rights Act 2019*.

SHANNON FENTIMAN MP

ATTORNEY-GENERAL AND MINISTER FOR JUSTICE

MINISTER FOR WOMEN AND MINISTER FOR THE PREVENTION OF

DOMESTIC AND FAMILY VIOLENCE