



THE LAW SOCIETY  
OF NEW SOUTH WALES

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26 February 2013

Dr Stephen Pallavicini  
Chair of the Property Law Reform Alliance  
C/o Stockland Corporation  
DX 121 SYDNEY

Dear Dr Pallavicini,

### **Draft Uniform Torrens Title Act**

The Law Society of NSW appreciates the opportunity to participate in the consultation process for the Draft Uniform Torrens Title Act (Draft Act).

The Property Law Committee (Committee) advises the Council of the Law Society on developments in the area of property law and is comprised of experienced and specialist practitioners drawn from the ranks of the Society's members who act for various stakeholders in the area of property law and conveyancing.

The Committee has reviewed the Draft Act in detail. The Committee makes some general comments set out below, followed by specific comments and suggestions for further consideration set out in Attachment "A".

The Committee strongly supports the Property Law Reform Alliance initiative in releasing the Draft Act and envisages clear benefits in the development of a national uniform Torrens Act.

The Committee supports the examples of key principles set out on page iii of the Introductory note, except the Committee has reservations regarding the extension of the recognition of adverse possession and the proposed mechanism for protecting purchasers at completion, as further detailed in Attachment "A".

The Committee notes that the Draft Act excludes detailed provisions dealing with powers of attorney. The Committee recognises the rationale for excluding such provisions at this stage of the process but suggests that at a suitable time powers of attorney might also be included in national uniform legislation.

The Law Society looks forward to contributing to the next stages of consultation regarding the Draft Act. Please contact Gabrielle Lea, Policy Lawyer, Property Law Committee if you have any questions regarding this letter via email: [gabrielle.lea@lawsociety.com.au](mailto:gabrielle.lea@lawsociety.com.au) or on (02) 9926 0375.

Yours sincerely

John Dobson  
President

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Law Council  
OF AUSTRALIA  
CONSTITUENT BODY

## PART 1 – GENERAL

Draft Uniform Torrens Title Act	Comment
Subsection 3(1)	In the Committee's view, where some of these topics are addressed consistently and universally in the various <i>Interpretation Acts</i> of the States and Territories, such as subclause (e), it may be preferable to rely on the earlier legislation.
Section 6	The Committee notes that the Draft Act does not deal specifically with "qualified title" but observes that the Note to section 6 indicates this will form part of the legislation preserved by Schedule 1.

## PART 2 – THE REGISTRAR

Draft Uniform Torrens Title Act	Comment
General	The Committee notes that "Part 2 The Registrar" is placed early in the Draft Act but then "Part 20 Powers of, and Proceedings Against, Registrar" appears much later. The Committee questions the logical placement of these Parts.
Subsection 9(3)	The Committee notes the broad delegation powers referred to in this section without detailed provisions as to the process of delegation. The Committee suggests further consideration be given to expanding the section to give further details regarding the delegation process.

## PART 3 – THE REGISTER

Draft Uniform Torrens Title Act	Comment
Subsection 37(4)	The Committee supports the desirability of registering promptly, but prefers that the protection of section 43A in the <i>Real Property Act 1900</i> (NSW) (RP Act) not be lost if registration is not effected within a mandatory time. Sometimes there are sound reasons for not lodging transfers for registration; at other times there is delay beyond the fault of a purchaser. The Court should have the power to determine whether in all the circumstances the protection of the section has been lost. If the approach in the Draft Act is maintained the Committee considers three months as being too short a period.
Subsection 41(1)(b)	In the Committee's view, there should be a clear indication as to which decisions of the Registrar are reviewable, in more detail than contemplated by section 221.

## PART 4 – JOINT HOLDERS OF LAND

Draft Uniform Torrens Title Act	Comment
Subsection 46(4)	The Committee suggests that another approach would be for the Registrar to refuse to register an instrument in which the status of the co-owners is not indicated. The Committee prefers the approach of the Draft Act and only mentions this in case some jurisdictions are concerned about a change in approach from their current provisions.

## PART 6 - LEASES

Draft Uniform Torrens Title Act	Comment
Section 57	The Draft Act provides that leases which exceed three years "including any option to renew, whether or not exercised" must be registered. The Committee supports this approach and notes that it is consistent with subsection 42(1)(d) of the RP Act and the indefeasibility provisions at subsection 34(1)(g) of the Draft Act.
Section 58	The Committee supports this section.
Section 59	<ul style="list-style-type: none"> <li>▪ Under subsection 59(2) the Registrar has no discretion to register a variation after the term has expired. The Committee notes that this differs from the RP Act's provisions (refer subsection 55A(5)) but is in accordance with current practice in NSW.</li> <li>▪ Footnote 59 provides the rationale for the approach taken in subsection 59(2)(c) as preventing complications which could arise if the variation of the lease was lodged for registration after the lease has expired.</li> <li>▪ Subsection 59(4) - The purpose of the Register is that unless a lease is registered, another party is not deemed to have constructive notice. However, the principles of estoppel at common law apply in so far as the purchaser agrees to be bound. This may operate unfairly to the tenant where the purchaser may have constructive notice of a variation of lease ie "actual or constructive notice".</li> <li>▪ The Committee notes that the Draft Act has taken the approach that purchasers must do something more than just have notice for the principles of estoppel to apply. Under the Draft Act an unregistered variation does not bind the registered proprietor who is not a party to the variation despite their actual or constructive notice unless they accept the variation by their words or conduct.</li> <li>▪ At common law, the principles of estoppel are sufficient to</li> </ul>

Draft Uniform Torrens Title Act	Comment
	<p>capture the interests of the tenant. However, it gives the purchaser strong ammunition to deny it, which may operate unfairly to the tenant.</p> <ul style="list-style-type: none"> <li>▪ This additional requirement differs from the current position in NSW concerning the exemption to indefeasibility of title under subsection 42(1)(d) of the RPA for unregistered leases (with a term of not more than three years) where the registered proprietor has had actual or constructive notice.</li> <li>▪ The Committee recommends that subsection 59(4) be amended to bind a registered proprietor who is not a party to an unregistered variation where the registered proprietor has received actual or constructive notice of the variation.</li> </ul>
Section 60	<ul style="list-style-type: none"> <li>▪ In the Committee's view further clarification is required. At present in NSW there must be a certificate of title (CT) for each folio of the Register. A mortgagee must produce the CT at Land and Property Information (LPI) before a lease or variation can be registered. There is a presumption that the registered mortgagee has consented to the lease by virtue of the production of the CT.</li> <li>▪ Section 39 introduces an environment where a registered owner can opt out of having a CT issued.</li> <li>▪ Subsection 60(3)(ii) maintains a presumption of mortgagee consent in circumstances where a mortgagee holds a CT and has produced it for registration.</li> <li>▪ Where a mortgagee is not in possession of a CT it must indicate consent by endorsing the lease before it is registered (see subsection 60(3)(i)).</li> <li>▪ The Committee does not support subsection 60(1) which allows a lease or variation to be registered without proof of mortgagee consent or the production of title in circumstances where the mortgagee holds the CT.</li> <li>▪ Currently, the failure to produce a CT will prompt LPI to issue a requisition on title calling for production and ensuring that the lessor arranges mortgagee consent prior to registration.</li> <li>▪ The new legislative regime should mirror current practice which is that a lease cannot be registered without mortgagee consent.</li> <li>▪ The new legislative regime may create a high risk situation in circumstances where it is available to both a lessor and lessee to lodge an executed lease for registration without considering the consequences of not obtaining mortgagee consent prior to registration particularly in light of subsection</li> </ul>

Draft Uniform Torrens Title Act	Comment
	<p>60(2).</p> <ul style="list-style-type: none"> <li>▪ The Committee does not support subsection 60(2) which provides that a lease or variation will not bind a registered mortgagee unless the mortgagee consents to the lease or variation prior to registration.</li> <li>▪ A possible consequence of the provision is that a lessor cannot seek to remedy the failure of obtaining mortgagee consent prior to registration even where a mortgagee is prepared to consent to the lease after registration.</li> <li>▪ The Committee recognises that in practice, mortgagee consent is usually sought after or obtained well after the parties have concluded the negotiation of the lease terms and in most cases have already entered into the lease.</li> <li>▪ The Committee's preferred approach is to remove the possibility of registration of a lease (or variation of lease) without mortgagee consent. Accordingly the Committee suggests that subsection 60(1) be deleted and the word "However," be deleted from subsection 60(2).</li> </ul>
Section 61	The Committee notes that this section reflects the current position in NSW in that it relies on the instrument itself and not merely what is noted on the folio.
Section 62	The Committee anticipates that the Regulations made under the Draft Act may prescribe that a statutory declaration setting out all the relevant facts will satisfy the requirement of "supporting evidence" of the expiry of the lease.
Section 63	<ul style="list-style-type: none"> <li>▪ The Committee notes that this is a substantive change from NSW practice. Section 63 provides that the Registrar may record in the folio that the lease has been terminated without any express obligation for the Registrar to satisfy him or herself that re-entry has actually occurred. This is in stark contrast to the position under section 55 of the RP Act which requires the Registrar General to be satisfied as to lawful re-entry and recovery of possession by the lessor before noting the particulars of the re-entry in the Register.</li> <li>▪ The Committee recommends that section 63 be amended to include proof of re-entry as a pre-requisite to the Registrar recording termination of a registered lease.</li> </ul>
Section 64	<ul style="list-style-type: none"> <li>▪ The Committee supports this section and further notes that subsection 64(2) of the Draft Act is equivalent to subsection 54(5) of the RP Act.</li> <li>▪ This also brings section 130 of the <i>Conveyancing Act 1919</i> (NSW) (Conv Act) into operation. If the head lease is</li> </ul>

Draft Uniform Torrens Title Act	Comment
	<p>surrendered, the owner becomes the sub-lessor. The sub-lessee can apply to the Court for relief in circumstances where the head lessor defaults under the lease; and the Court can make an order as to whether the sub-lessor has consented to the lease. Presumably, this will not be changed by the Draft Act.</p>
Sections 65 and 66	<ul style="list-style-type: none"> <li>▪ Subject to the amendment of subsection 66(5), the Committee is in favour of sections 65 and 66.</li> <li>▪ The Committee endorses the introduction of implied covenants in light of Professor Butt's comments outlined at footnotes 69 and 70 of the Draft Act that it overrides any inconsistent statutes (see subsection 7(2) of the Draft Act), and so negating the provisions of the Conv Act.</li> <li>▪ The Committee recognises that the sections are consistent with the objectives of achieving uniformity across Australia with regard to such implied covenants.</li> <li>▪ Section 65 introduces implied covenants by lessees which are generally consistent with the Conv Act (see section 84).</li> <li>▪ Subsection 65(3) provides that the implied covenants can be varied or negated by express provision of the lease which is also consistent with the Conv Act.</li> <li>▪ The Committee is concerned with the effect of subsections 66(4) and 66(5) as currently drafted: <ul style="list-style-type: none"> <li>• The provision implied by subsections 66(4) and (5) makes a substantive variation to a lessor's right to repossess and terminate a lease for non-payment of rent.</li> <li>• Subsection 66(4) provides the implied power of the lessor to re-enter the leased premises and terminate the lease in circumstances where: <ul style="list-style-type: none"> <li>(a) Rent is over due by 30 days; or</li> <li>(b) Any other breach of the lease where the breach has continued for at least 30 days after the lessor serves a rectification notice.</li> </ul> </li> <li>• Subsection 66(5) provides that the 30 day period noted above may be lengthened by express provisions of the lease but not reduced.</li> <li>• Whilst there may be a similar implied term provided in section 85 of the Conv Act, an express term of a lease will override the implied term.</li> </ul> </li> </ul>

Draft Uniform Torrens Title Act	Comment
	<ul style="list-style-type: none"> <li>• Most commercial and retail leases allow for repossession or termination by the lessor for non-payment of rent after only 14 days (or in some cases as little as seven days). Yet the period of 30 days introduced under subsection 66(5) cannot be reduced by express provisions of the lease.</li> <li>▪ The Committee endorses section 65 and subsections 66(1) to (4), (6) and (7).</li> <li>▪ Subsection 66(5) should, in the Committee's view, be amended to allow the period of 30 days to be shortened by the express provisions of the lease in accordance with current leasing practice.</li> </ul>
Section 67	<ul style="list-style-type: none"> <li>▪ The Committee notes that this section deals with registration of a disclaimer of a lease under the law relating to bankruptcy and that under section 4 definitions, "bankruptcy" includes liquidation of companies.</li> <li>▪ It is not clear from the section who has the right to register the disclaimer though it would appear to be either the lessor or the lessee.</li> <li>▪ The more detailed mechanism for removing the lease from the Register by the lessor in section 91 of the RP Act is not repeated in this Part.</li> <li>▪ The Committee notes that Part 15 of the Draft Act does not address this issue either. It appears that the provisions under section 91 of the RP Act for notifying the mortgagee or other person claiming an interest in the lease do not appear in the Draft Act.</li> <li>▪ In the Committee's view, the brevity of the proposed section 67 doesn't appear to address the complexity of the issues involved.</li> <li>▪ The protections in section 91 of the RP Act that other persons have under the lease when the lessor seeks to remove it are not repeated in this Draft Act. There is no mechanism under the current RP Act to register a disclaimer of lease, only surrender.</li> <li>▪ In the Committee's view, issues to be further clarified include: <ul style="list-style-type: none"> <li>• The effect of registering a disclaimer under this Act, especially the notice requirement;</li> <li>• What is achieved or intended by registering a disclaimer eg does the lease remain on title?</li> </ul> </li> </ul>

Draft Uniform Torrens Title Act	Comment
	<ul style="list-style-type: none"> <li>• How is the lease removed from the title if the surrender provisions don't apply to bankruptcy?</li> <li>• How are the rights of the person claiming an interest based on the lease, eg the mortgagee, protected?</li> </ul>

## PART 9 – EASEMENTS

Draft Uniform Torrens Title Act	Comment
Subsection 90(1)	The Committee notes that although this clause appears to be directed at allowing the creation of easements that permanently exclude the use of the burdened land by the owner, the introduction of the concept of 'exclusive possession' (which is an essential characteristic of a lease) may encourage the use of easements as a way of getting around restrictions in some States (such as NSW) on the grant of leases of parts of land for terms exceeding five years.
Subsection 91(1)(d) and Section 95	The Committee is of the view that the registration of an easement arising by prescription or implication is contrary to the paramountcy of the Register in the Torrens system (see <i>Williams v State Transit Authority of NSW [2004] NSWCA 179</i> ), (other than as an exception to indefeasibility under the current subsection 42(1)(a1) of the RP Act where a prescribed or implied easement that can be shown to have existed at the date the land was brought under the Torrens system is omitted from the Register). In the Committee's view the power to create easements by Court Order in section 94 is broad enough to deal with easements arising by prescription or implication.
Subsection 92(2)(d)	The Committee suggests that the consent of the owner of the dominant land be included as a specific requirement.
Subsection 93(3)(b)	The Committee suggests that the consent of the owner of the dominant land be included as a specific requirement.
Section 94	<ul style="list-style-type: none"> <li>▪ This section is the equivalent of section 88K of Conv Act and allows the Supreme Court, on application, to impose an easement over land.</li> <li>▪ Subsection 94(4) provides that the Supreme Court 'may' order that the easement be registered.</li> <li>▪ The Committee queries whether it is appropriate for the Draft Act to deal with the imposition of unregistered easements or whether such orders are best dealt with in the property law statutes of the relevant States and Territories.</li> <li>▪ The Committee queries the reference to "Supreme Court" in</li> </ul>



Draft Uniform Torrens Title Act	Comment
	subsection 94(1) where the reference is "Court" for the balance of the section 94.
Section 96 and section 99	<ul style="list-style-type: none"> <li>▪ If as a matter of policy easements arising by prescription or implication are introduced, the Committee disagrees with the reversal of the onus for establishing an easement by prescription or implication for the following reasons: <ul style="list-style-type: none"> <li>• the application is made to the Registrar. The Committee queries whether it is appropriate for the Registrar to make orders for the imposition of easements and suggests that orders for the imposition of such easements should be made by the Court rather than the Registrar;</li> <li>• once an application is lodged, the onus is on the owner of or other person claiming an interest in the servient land to lodge a caveat on the title to the servient land and for the Registrar, by written notice, to require the caveator to start proceedings in the Supreme Court to show cause why the Registrar should not register the easement. In the Committee's view it is unreasonable that the lodgement of an application under this section should compel an owner of servient land to start Supreme Court proceedings or risk the Registrar ordering the imposition of the easement rather than the applicant having to lodge Supreme Court proceedings if an objection to the application is lodged by the registered proprietor or person claiming an interest in the servient land; and</li> <li>• section 99(3) provides that the Registrar 'may require' the application to provide the names and addresses of all registered proprietors and occupiers of the servient land. In the Committee's view, any such application should identify the registered proprietors and persons having a registered interest in the servient land.</li> </ul> </li> <li>▪ As noted above, the Committee queries the need for the registration of easements by prescription or implication over Torrens title land as a separate right and suggests applications for the imposition of such easements should be dealt with by the Supreme Court under its general power to order the imposition of easements (such as under section 88K of the Conv Act).</li> </ul>
Subsection 100(1)	"Establish" in the second line should be "establishes".
Subsection 100(2)	The Committee notes that this section allows an applicant to lodge an application for an easement by prescription or implication in different terms if the Registrar refuses to register the easement. There are no limits on the number of times that an applicant can lodge such an application.

Draft Uniform Torrens Title Act	Comment
Subsection 103(2)	<ul style="list-style-type: none"> <li>▪ Subsection (2) prohibits an instrument of variation from changing the location of the easement, varying the area affected by the easement or changing a party to the easement.</li> <li>▪ The Committee queries the reasons for including section 103, particularly a variation of the area or a change of a party, as presumably the parties will need to change as the servient and dominant lands changes.</li> </ul>
Subsections 103(4) and (5)	<ul style="list-style-type: none"> <li>▪ Subsection (4) requires an instrument of variation or release to be executed by the registered owner of the benefited land and may (but need not) be executed by the registered owner of the burdened land. While this may be acceptable for a release it is not acceptable for a variation where there is the potential for onerous terms to be imposed on the servient owner.</li> <li>▪ Subsection (5) again requires all registered mortgagees and registered lessees of the burdened land (except in the case of easements in gross) to consent to a variation of easement but not registered mortgagees and lessees of the benefited land. Such consent should be required in the case of variations of easements, even easements in gross, although the Registrar should have discretion to waive the need for consent by all registered lessees.</li> </ul>
Section 104	<ul style="list-style-type: none"> <li>▪ Subsection (1) provides that the Registrar "must" cancel the registration of easements if satisfied of certain events, including "the easement has been abandoned" (by non-use for at least 20 years). This section reflects section 49 of the RP Act.</li> <li>▪ The servient owner has the onus of proving the easement has not, for example, been abandoned by lodging an objection to an application for cancellation within one month of notice from the Registrar. If the Registrar does not consider the objection to be of "sufficient" merit, the Registrar must cancel the registration of the easement.</li> <li>▪ The Committee questions whether the Registrar will want to take on this responsibility particularly in light of the High Court decision in <i>Treweeke v 36 Wolseley Road Pty Ltd (1973) 128 CLR 274</i> and whether the issue of abandonment is better dealt with by the Supreme Court under section 105 of the Draft Act which gives the Supreme Court the power to extinguish (rather than cancel) or vary an easement, as it presently is under section 89 of the Conv Act .</li> <li>▪ It would be interesting to ascertain the number of times the NSW Registrar has exercised his cancellation power under section 49 of the RP Act.</li> </ul>

Draft Uniform Torrens Title Act	Comment
Section 105	<ul style="list-style-type: none"> <li>▪ This section reflects (but is more limited than) section 89 of the Conv Act.</li> <li>▪ As this section only applies to registered easements, there will continue to be a need for a similar section in the general property statutes of the various States and Territories to apply to other forms of land title.</li> </ul>
Subsection 106(3)	<ul style="list-style-type: none"> <li>▪ Section 106 recognises that a positive covenant to contribute to the cost of constructing or repairing the subject matter of the easement will be enforceable against successors in title. This reflects section 88BA of the Conv Act.</li> <li>▪ The Committee supports the retrospectivity of this provision.</li> <li>▪ As section 106 only applies to registered easements, if the general property legislation in a State or Territory does not recognise the enforceability of a positive obligation in an easement over non-Torrens title land, a difference will be created between Torrens and non-Torrens title land.</li> </ul>

#### PART 10 – COVENANTS

Draft Uniform Torrens Title Act	Comment
Section 111(2)	<ul style="list-style-type: none"> <li>▪ The Committee notes the approach in paragraph (b) which expressly allows the benefit of a covenant (other than a covenant in gross) to benefit or burden only part of the dominant or servient land.</li> <li>▪ Paragraph (d) requires the consent of all registered lessees of the land to be burdened by the covenant. The Committee considers that the Registrar should have discretion to waive the need for the consent of all registered lessees.</li> </ul>
Subsection 112(3)	<p>Subsection (b) requires the consent of all registered lessees of the land to be burdened by the covenant. The Committee considers that the Registrar should have discretion to waive the need for the consent of all registered lessees.</p>
Subsection 114(2)	<ul style="list-style-type: none"> <li>▪ Subsection (2) prohibits an instrument of variation from changing the area affected by the covenant or changing a party to the covenant.</li> <li>▪ The Committee queries the need to include subsection 114(2) as presumably the parties will need to change as the servient and dominant land changes.</li> </ul>

Draft Uniform Torrens Title Act	Comment
Subsections 114(4) and (5)	<ul style="list-style-type: none"> <li>▪ Subsection (4) requires an instrument of variation or release to be executed by the registered owner of benefited land and may (but need not) be executed by the registered owner of burdened land. While this may be acceptable for a release, in the Committee's view it is not acceptable for a variation where there is the potential for onerous terms to be imposed on the servient owner.</li> <li>▪ Subsection (5) requires all registered mortgagees and registered lessees of the burdened land (except in the case of covenants in gross) to consent to a variation of easement but not registered mortgagees and lessees of benefited land. Such consent should be required in the case of variations of covenants, even covenants in gross, although the Registrar should have discretion to waive the need for consent by all registered lessees.</li> </ul>
Subsection 115(1)(d)	<ul style="list-style-type: none"> <li>▪ This section allows an owner of land affected by a covenant to apply to the Registrar to cancel the registration on various grounds, including in paragraph (d) that "the covenant has otherwise ceased to be enforceable".</li> <li>▪ The Committee queries whether the Registrar should have this broad power (or will want to assume such a responsibility) and in its view, covenants on title should only be removed by the Court (other than where the terms of the covenant make it clear that the covenant no longer applies, as set out in paragraphs (a) – (c)).</li> <li>▪ Even if as a matter of policy the right of the Registrar to order the removal of covenants on the basis of their unenforceability is accepted, then: <ul style="list-style-type: none"> <li>• the Committee's view is that there should be an express right of appeal to a Court on the exercise by the Registrar of its rights under this clause or its decision under subsection 115(3)(b) that an objection lodged by the servient owner has "insufficient merit";</li> <li>• the Committee disagrees with the reversal of the onus in subsection (2) that effectively requires the owner of the servient land to commence Supreme Court proceedings or risk the Registrar ordering the cancellation of the covenant. The Committee's preferred approach is that an applicant seeking cancellation of a covenant should have to commence Supreme Court proceedings if an objection to the application is lodged by the registered proprietor or person claiming an interest in the servient land; and</li> <li>• there is no provision for notice of the application to be served by the Registrar or the applicant on all persons having a registered interest in the dominant land (with a discretion for the Registrar to dispense with the need</li> </ul> </li> </ul>

Draft Uniform Torrens Title Act	Comment
	for service on all registered lessees).
Section 116	<ul style="list-style-type: none"> <li>▪ This section reflects (but is more limited than) section 89 of the Conv Act.</li> <li>▪ As this section presumably only applies to covenants recorded on title, there will presumably continue to be a need for a similar section in the general property statute of the various States and Territories to apply to other forms of land title.</li> </ul>
Section 117	<ul style="list-style-type: none"> <li>▪ This section prescribes that covenants cease to be enforceable 20 years after registration but that any person having the benefit of the covenant may, before the covenant ceases to be enforceable, extend it by unilaterally lodging with the Registrar "an instrument of extension".</li> <li>▪ The Committee does not agree that all covenants should lapse after 20 years unless "any" person having the benefit of a covenant extends it.</li> </ul>

**PART 13 – TRUSTS**

Draft Uniform Torrens Title Act	Comment
Section 132	The Committee does not support a departure from the conventional approach that trust arrangements are not recorded on the Register.

**PART 16 – WRITS**

Draft Uniform Torrens Title Act	Comment
Subsection 142(3)	The Committee does not support the loss of the right to proceed to registration despite recording of the writ at the expiration of three months after completion of the purchase or mortgage. This section is akin to subsection 37(4) and the Committee does not support subsection 142(3) on similar grounds.

## PART 17 – ADVERSE POSSESSION

Draft Uniform Torrens Title Act	Comment
GENERAL	The Committee does not support the proposed extension of adverse possession beyond already existing provisions. However given the divergence of approaches across the jurisdictions the topic is worth further examination.

## PART 18 - CAVEATS

Draft Uniform Torrens Title Act	Comment
Subsection 158(e)	In the Committee's view, whether the holder of a right of pre-emption should have a caveatable interest is debatable.
Subsection 162(3)	The Committee suggests that the list of instruments and interests able to be registered despite a caveat on title may be too short when compared with say subsection 74H(5) of the RP Act.
Subsection 164(1)(a)	The Committee queries the necessity for including subsection 164(1)(a), as there may be owners' caveats which should be the subject of lapsing (e.g. a co-owner who lodges a caveat and then refuses to withdraw it or cannot be located).
Subsection 164(3)	<ul style="list-style-type: none"> <li>▪ The Committee notes that under the Draft Act the Registrar serves the lapsing notice rather than the applicant as required under the RP Act.</li> <li>▪ The Committee questions whether the NSW Registrar General would be happy to accept this role, given the private nature of caveats, the procedural nature of caveats and that often the caveat and lapsing process is a precursor to litigation. Presumably the Registrar may have to prove service, giving rise to potential judicial review of government action. (The Committee notes the critical comments made in <i>Blue Haven Pools and Spas Pty Ltd v Cunningham and Anor [2011] NSWSC 1435</i> regarding the Consumer Trader and Tenancy Tribunal in relation to its processes regarding service of documents.)</li> <li>▪ The Committee notes the absence of any provisions regarding proof of service of the lapsing notice and recommends such a provision be added.</li> </ul>
Subsections 164(4)	<ul style="list-style-type: none"> <li>▪ The Committee notes the significant departure from the NSW approach in that under the Draft Act the commencement of proceedings by the caveator within 21 days after service of the lapsing notice is sufficient to stop the caveat lapsing rather than obtaining an order extending</li> </ul>

Draft Uniform Torrens Title Act	Comment
	<p>the operation of the caveat (compare section 74J RP Act).</p> <ul style="list-style-type: none"> <li>▪ (Note that footnote 153 states that subsection 164(4) follows the NSW model which would seem to be incorrect).</li> <li>▪ The Committee considers that the Draft Act's approach favours the caveator and gives the caveator an additional advantage.</li> <li>▪ In the Committee's view it would be preferable to either: <ul style="list-style-type: none"> <li>• follow the current NSW approach where the caveator is required to obtain an order extending the operation of the caveat within 21 days, rather than merely commence proceedings to justify the caveat; or</li> <li>• introduce a two pronged approach, where the caveator is required to: <ul style="list-style-type: none"> <li>- commence proceedings within 14 days; and</li> <li>- obtain an order extending the operation of the caveat within 21 days.</li> </ul> </li> </ul> </li> <li>▪ The two pronged approach would assist in reducing urgent applications by the caveator on the 21<sup>st</sup> day and would probably reduce incidences of ex parte hearings, making better use of the Court's time.</li> </ul>
Subsection 165(2)(c)	<p>The Committee notes the shift in onus provided in subsection 165(2)(c), which provides that the caveatee bears the onus of establishing that the caveat should be removed where the caveatee applies to the Court for an order that the caveat be removed and the caveator has not been served or does not appear. The Committee regards this new approach as satisfactory.</p>
Subsection 165(3)	<p>The Committee recommends that the word "may" be replaced with "must" such that if the Court orders the caveat be removed the Registrar must record that fact in the folio of the Register.</p>
Section 168	<ul style="list-style-type: none"> <li>▪ The Committee notes that the Draft Act appears to follow the current NSW approach and requires leave of the Court only in the case of a subsequent caveat lodged by the same caveator which claims an interest in land relying on the same grounds (section 74O RP Act). This section should be amended to require any party who claims an interest relying on the same grounds (whether as assignee or otherwise as successor to the original caveator) to obtain leave to lodge a further caveat.</li> <li>▪ The Committee also suggests that where a caveator has voluntarily removed a caveat, that caveator (or an assignee or successor) should be permitted to lodge a further caveat in respect of the same interest.</li> </ul>

## PART 19 – REGISTRATION OF INSTRUMENTS

Draft Uniform Torrens Title Act	Comment
Section 191	<ul style="list-style-type: none"> <li>▪ The Registrar appears to have complete discretion to require a person who lodges an instrument to lodge any of a sketch plan, plan of survey, map or diagram of the land</li> <li>▪ The Committee notes there is more discretion in the new Draft Act than currently applies in NSW and regards the approach taken as quite sensible. A map, diagram, sketch plan or plan of survey that satisfies the requirements of the Registrar under section 212 can be registered with an instrument. Presumably, the sketch plan to be attached to a lease would be fairly straight forward.</li> <li>▪ Further consideration could be given as to whether a similar provision to section 48 of the RP Act relating to the creation of cross easements by reference to "party walls" on plans should be adopted by this Draft Act.</li> </ul>

## PART 20 – POWERS OF, AND PROCEEDINGS AGAINST, REGISTRAR

Draft Uniform Torrens Title Act	Comment
GENERAL	<ul style="list-style-type: none"> <li>▪ The Committee notes the increase in inquisitorial powers, ability to gather evidence and quasi-judicial powers of the Registrar as compared to the current position in NSW.</li> <li>▪ The Committee queries whether sufficient discretion is provided for unanticipated matters that may arise - is it too prescriptive?</li> </ul>
Subsection 203(3)	The Committee notes that under the Draft Act the Registrar's power to correct the Register is similar to the NSW position found in section 12 of the RP Act, in that any correction does not affect a party that may be prejudiced by the correction.
Subsection 204(2)	<ul style="list-style-type: none"> <li>▪ The Committee notes that the Registrar's powers to amend the title are subject to the Registrar making "reasonable endeavours" to give written notice to the registered proprietor and other affected persons. The Committee supports a standard of "reasonable endeavours".</li> <li>▪ The Committee notes that the Draft Act is wider than the NSW comparable provision, subsection 32(6) of the RP Act.</li> </ul>
Section 205	The Committee notes that the provision could be used to protect an interest pursuant to a trust.
Section 206	The Committee notes the intention of this section to provide a "catch all" power where the power is not explicit, to enable the



Draft Uniform Torrens Title Act	Comment
	Registrar to "clean up" the Register. The Committee suggests that the use of the archaic word "defeasance" is unfortunate and perhaps an alternative word could be used.
Section 207	In the Committee's view this section is satisfactory.
Subsection 208(2)	The Committee suggests that the notice obligation described in this subsection should replicate that described in subsection 204(2), namely reasonable endeavours to give written notice to the registered proprietor and other affected persons.
Section 209	<ul style="list-style-type: none"> <li>▪ The Committee notes that section 124 of the RP Act provides the Registrar with a stated case mechanism for determinations by the Supreme Court.</li> <li>▪ The Committee notes the Court's obligation to give directions or decisions even for a hypothetical matter, which is unusual but not problematic.</li> <li>▪ The Committee suggests that subsection 209(3) be amended to specify that the affected party is also bound.</li> <li>▪ The Committee notes that this section is the only section that seemed to deal with the relationship between the Registrar and the Court and does not provide a lot of detail.</li> <li>▪ The Committee notes that the section does not deal with the affected parties' right to be heard in the proceedings and should do so. The Committee suggests that the section should be amended to provide a right for affected parties to be heard, similar to subsection 124(2) of the RP Act.</li> <li>▪ The Committee further suggests the section be amended to provide for an interpleader-like mechanism.</li> </ul>
Section 210	The provision for charging fees is satisfactory in the Committee's view.
Sections 212 and 213	<ul style="list-style-type: none"> <li>▪ The Committee suggests that section 213 "Registrar's practice manual" should be subsumed in section 212 "Registrar's directions" as there is considerable overlap between the two related items.</li> <li>▪ The Committee suggests that subsection 213(4) should be amended to delete the need for a manual copy to be available at the Registry, update via internet publication is sufficient.</li> </ul>
Section 214	<ul style="list-style-type: none"> <li>▪ The Committee notes the origin of this section in Queensland practice and that it would be novel in NSW.</li> <li>▪ The Registrar's ability to hold an inquiry may provide a useful cost effective mechanism, though the Committee</li> </ul>

Draft Uniform Torrens Title Act	Comment
	<p>expects it may be used sparingly in NSW.</p> <ul style="list-style-type: none"> <li>▪ The Committee suggests that this Part should be amended by adding a new Division 4 to provide appeal rights from an inquiry to the Supreme Court, exercisable by a person affected by the inquiry.</li> </ul>
Section 215	The notice of inquiry procedure is consistent with other notice provisions in the Draft Act and in the Committee's view is satisfactory.
Section 216	The Committee notes that the provisions regarding the conduct of the inquiry are quite prescriptive.
Section 218	The Committee expects that offences by witnesses provisions are not likely to be invoked often.
Section 219	<ul style="list-style-type: none"> <li>▪ The Committee suggests that the section should be expanded to mandate the Registrar to publish reasons for any decision rather than this being optional under subsection(f).</li> <li>▪ The Committee notes that nothing in the section requires the Registrar to conduct an inquiry before taking certain actions.</li> </ul>
Sections 221	As referred to in comments made on subsection 41(1)(b) above, the Committee suggests that the Draft Act should give a clear indication as to which decisions of the Registrar are reviewable. The Committee further suggests that some decisions would be more efficiently reviewed by an Administrative Disputes Tribunal, Victorian Civil and Administrative Tribunal or their equivalents.

## PART 21 – COMPENSATION FOR LOSS

Draft Uniform Torrens Title Act	Comment
Sections 223 to 230	<p>The Committee suggests this Part should be amended in three ways:</p> <ul style="list-style-type: none"> <li>▪ the administrative claims process as provided in NSW should be added as this process saves time and cost;</li> <li>▪ cost penalties should follow if a matter is not first dealt with by the administrative claims process as a means of encouraging matters to be resolved this way where possible; and</li> <li>▪ the evidence procedures requirements as specified in NSW</li> </ul>

<b>Draft Uniform Torrens Title Act</b>	<b>Comment</b>
	should also be added to improve efficiency and save time and costs.
Section 225	The Committee notes that the limitation of a mortgagee's rights in relation to a dwelling is novel, but is supported for the reasons set out in footnote 195. The phrase "dwelling" should be defined, and perhaps the operation of the section should be extended to strata dwellings.