

# Conveyancing Act 1919 No 6

[1919-6]



New South Wales

## Status Information

### Currency of version

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### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
[Conveyancing Amendment \(Building Management Statements\) Act 2001 No 9](#) (not commenced)
- **See also**  
[Conveyancing Amendment \(Mortgages\) Bill 2001](#) [Non-government Bill: Mr D L Page, MP]

### Authorisation

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# Conveyancing Act 1919 No 6



New South Wales

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# Conveyancing Act 1919 No 6



New South Wales

An Act to amend and consolidate the law of property and to simplify and improve the practice of conveyancing; and for such purposes to amend certain Acts relating thereto.

## Part 1A Preliminary

### 1 Name of Act and commencement

This Act may be cited as the *Conveyancing Act 1919* and shall commence and come into operation on the first day of July, one thousand nine hundred and twenty.

### 2 (Repealed)

### 3 Repeals

- (1) The Acts mentioned in the First Schedule to this Act are to the extent therein expressed hereby repealed.
- (2) All rules of court made under the authority of any Act or section hereby repealed and being in force at the commencement of this Act, shall so far as applicable, be deemed to have been made under the authority of this Act.

### 4 Operation of Act

Any alteration, by this Act, of the law, whether by the repeal of an enactment, or otherwise, shall not, unless otherwise expressly provided by this Act, affect:

- (a) any right accrued, or obligation incurred, before the commencement of this Act under the law so altered, or
- (b) the validity or invalidity, or any operation, effect or consequence, of any instrument executed or made, or of anything done or suffered before the commencement of this Act, or
- (c) any action, proceeding or thing then pending or uncompleted; every such action, proceeding and thing may be carried on and completed as if the enactment had not been repealed, or the law otherwise altered.

## 5 Restriction on validation of instruments

Where any instrument executed prior to the commencement of this Act is by any provision hereof rendered valid and effectual, and would, but for this Act, be or remain invalid or ineffectual, such instrument shall be deemed to be validated only where the person who is at the commencement of this Act in possession of the property affected by the instrument claims under such instrument and not adversely to it.

## 6 Application of Act to [Real Property Act 1900](#) and other Acts

- (1) Except as hereinafter provided, this Act, so far as inconsistent with the [Real Property Act 1900](#), shall not apply to lands, whether freehold or leasehold, which are under the provisions of that Act.
- (2) Except as hereinafter provided by this Act or the regulations made for the purposes of section 52A or 66ZA, this Act shall not be construed as affecting the provisions of the [Crown Lands \(Continued Tenures\) Act 1989](#), the [Western Lands Act 1901](#), the [Mining Act 1992](#) or the [Offshore Minerals Act 1999](#) or the provisions of any other Act dealing with Crown lands.
- (2A) Division 4 (Easements and restrictive and positive covenants) of Part 6, so far as it is applicable, applies to and in respect of Crown land and land in holdings to which the [Crown Lands \(Continued Tenures\) Act 1989](#) applies.
- (3) Wherever any provision of this Act is expressed to apply to land under the provisions of or dealings under the [Real Property Act 1900](#), such provision shall not be deemed to apply exclusively to such land or dealings unless the contrary appears.

## Part 1 Interpretation

### 7 Definitions

- (1) In the interpretation of this Act, and of any rules or regulations made thereunder, unless the context or subject matter otherwise indicates or requires:

**Administrator** means administrator within the meaning of the [Wills, Probate and Administration Act 1898](#), and includes the public trustee acting as collector under an order to collect.

**Approved form** means a form approved by the Registrar-General for the purposes of the provision of this Act in which the expression is used.

**Assurance** includes a conveyance and a disposition made otherwise than by will; and **assure** has a corresponding meaning.

**Bankruptcy** means any act or proceeding in law having, before or after the commencement of the [Conveyancing \(Amendment\) Act 1972](#), effects or results similar to those of bankruptcy, and includes the winding-up of a company under the

*Companies Act 1961* or the *Companies (New South Wales) Code*; and **bankrupt** has a meaning corresponding with that of bankruptcy.

**Commonwealth** means Commonwealth of Australia, and **Commonwealth Act** (with or without descriptive words) means an Act passed by the Parliament of the Commonwealth and includes any Act amending or substituted for the same.

**Conveyance** includes any assignment, appointment, lease, settlement, or other assurance by deed of any property; and **convey** has a meaning corresponding with that of conveyance.

**Court** means the Supreme Court.

**Crown plan** means a plan (such as a county or parish map, a town or village map or a portion plan) that has been prepared by or on behalf of the Crown and is held by the Surveyor-General, and includes a registered plan that has been lodged for registration at the office of the Registrar-General by or on behalf of the Crown.

**Current plan** has the meaning given by section 7A.

**Dealing** has the same meaning as it has in the *Real Property Act 1900*.

**Deed** in relation to land under the provisions of the *Real Property Act 1900*, includes a dealing having the effect of a deed under that Act.

**Disposition** includes a conveyance, and also an acknowledgment under section 83 of the *Wills, Probate and Administration Act 1898*, vesting instrument, declaration of trust, disclaimer, release and every other assurance of property by any instrument except a will, and also a release, devise, bequest, or an appointment of property contained in a will; and **dispose** has a corresponding meaning.

**Executor** means the executor to whom probate has been granted, and includes an executor by right of representation.

**Existing lot** means:

- (a) a lot whose boundaries are shown in a current plan, or
- (b) in relation to land that is not included in a current plan, any distinct lot or portion of land whose current boundaries are identified in the document or documents that evidence current legal interests in the land,

whether comprising the whole of a parcel, or 2 or more parts of a parcel separated by land reserved or acquired for a road, railway or other like purpose.

**General Register of Deeds** means the General Register of Deeds maintained under section 184C.

**Income**, when used with reference to land, includes rents and profits.

**Incumbrance** includes a mortgage in fee or for a less estate, and a trust for securing money, and a lien and a charge of a portion, annuity, or other capital or annual sum; and **incumbrancee** has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or satisfaction thereof.

**Instrument** includes deed, will, and Act of Parliament.

**Land** includes tenements and hereditaments, corporeal and incorporeal, and every estate and interest therein whether vested or contingent, freehold or leasehold, and whether at law or in equity.

**Land under the provisions of the Real Property Act 1900** or any equivalent expression, means estates registered under that Act.

**Licensed conveyancer** means the holder of a licence in force under the [Conveyancers Licensing Act 1992](#).

**Mental disability** means the legal disability by reason of which the property of a person subject thereto may, pursuant to the law from time to time in force with respect to mental health, be committed to the management and care of another person.

**Minor** means a person under the age of eighteen years; and **minority** has a corresponding meaning.

**Mortgage** includes a charge on any property for securing money or money's worth; and **mortgage-money** means money or money's worth secured by a mortgage.

**Mortgagee** includes any person from time to time deriving title to the mortgage under the original mortgagee; and **mortgagee in possession** means a mortgagee who in right of the mortgage has entered into and is in possession of the mortgaged property.

**Mortgagor** includes any person from time to time deriving title to the equity of redemption under the original mortgagor, or entitled to redeem a mortgage, according to the person's estate, interest, or right in the mortgaged property.

**Mortgage, mortgagee, and mortgagor** in relation to land under the provisions of the [Real Property Act 1900](#) have the same meaning as in that Act.

**Order** includes judgment.

**Personal representative** means the executor or administrator for the time being of a deceased person.

**Possession**, when used with reference to land, includes the receipt of income therefrom.

**Power to postpone sale** means power to postpone in the exercise of a discretion whether separately expressed or implied by the terms of the trust for sale.

**Property** includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest.

**Purchaser** means a purchaser for valuable consideration, and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property, except that in Part 4, Divisions 5 and 6 **purchaser** means only a person who acquires an interest in or charge on property for money or money's worth; and purchase has a meaning corresponding with that of **purchaser**.

**Registered** means registered in the appropriate register in the office of the Registrar-General.

**Registered plan** means any of the following:

- (a) a plan of subdivision, a plan of consolidation or a plan of identification (each within the meaning of section 195) that is registered in accordance with Division 3 of Part 23,
- (b) a strata plan, a strata plan of subdivision or a strata plan of consolidation that is registered in accordance with the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*,
- (c) a plan that is registered in accordance with section 53 (1A) of the *Strata Schemes (Freehold Development) Act 1973*, being a plan of the residue of a lot after a road widening referred to in that subsection,
- (d) a plan that is registered for the purpose of showing either or both of the following:
  - (i) land that is proposed to be acquired, by agreement or compulsory process, under a provision of an Act (including a Commonwealth Act) that authorises the acquisition of land by compulsory process, or
  - (ii) the residue of land of which part is proposed to be so acquired,
- (e) a plan (other than a plan referred to in paragraph (a)-(d)) that is registered or recorded in the office of the Registrar-General for the purpose of showing a parcel in a lawful division of land.

**Regulations** means regulations made under this Act.

**Rent** includes yearly or other rent, toll, duty, royalty, or other reservation by the acre,

the ton, or otherwise; and **fine** includes premium or foregift, and any payment, consideration, or benefit in the nature of a fine, premium, or foregift.

**Sale** means only a sale properly so called.

**Securities** include stocks, funds, and shares.

**Trust corporation** means the Public Trustee or a trustee company or The Official Receiver in Bankruptcy or the trustee in whom is vested the property of a bankrupt.

**Trust for sale** means a binding trust for sale, whether or not exercisable at the request or with the consent of any person, and with or without a power at discretion to postpone sale.

**Trustee company** means an incorporated company authorised by Act of Parliament of this State, to act as trustee in New South Wales.

**Trustees for sale** mean the persons holding property on trust for sale.

**Valuable consideration** includes marriage but does not include a nominal consideration in money.

**War damage** means damage caused by, or in repelling, enemy action, or by measures taken to avoid the spreading of the consequences of damage caused by, or in repelling, enemy action.

**Will** includes codicil.

(2)

(a) Any deed, will, agreement for a settlement, or other agreement, Act, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after the commencement of the [Conveyancing \(Amendment\) Act 1930](#), under or by virtue of which instrument or instruments any land on or after such commencement stands for the time being:

(i) limited to or in trust for any persons by way of succession, or

(ii) vested in, or limited in trust for a minor in possession,

creates, or is for the purposes of this Act a settlement, and is in this Act referred to as a settlement, or as the settlement, as the case requires:

Provided that where land is the subject of a compound settlement references in this Act to the settlement shall be construed as meaning such compound settlement, unless the context otherwise requires.

(b) Where a minor is beneficially entitled to land, and by reason of an intestacy or otherwise there is no instrument under which the interest of the minor arises or is

acquired, a settlement shall be deemed to have been made by the intestate or by the person whose interest the minor has acquired.

- (c) An estate or interest not disposed of by a settlement and remaining in or reverting to the settlor, or any person deriving title under the settlor, is for the purposes of this Act an estate or interest comprised in the subject of the settlement and coming to the settlor or such person under or by virtue of the settlement.

## **7A Current plan**

- (1) In this Act, **current plan** means a Crown plan or a registered plan, but does not include so much of a Crown plan or registered plan as is taken not to form part of a current plan because of subsection (2), (3) or (4).
- (2) So much of a Crown plan or registered plan as merely identifies:
- (a) land that is proposed to be acquired, by agreement or compulsory process, under a provision of an Act (including a Commonwealth Act) that authorises the acquisition of the land by compulsory process, or
  - (b) the residue of land of which part is proposed to be so acquired,
- is taken not to form part of a current plan until such time as the land is so acquired.
- (3) So much of a Crown plan or registered plan as merely identifies:
- (a) land that is, or is proposed to be, leased (otherwise than for a period that, including the period of any option to renew, exceeds 5 years), or
  - (b) land the subject of a plan of subdivision for lease purposes (within the meaning of section 23H),
- is taken not to form part of a current plan.
- (4) So much of a Crown plan or registered plan as relates to land the subject of a later current plan (that is, a current plan that was filed or lodged at the office of the Registrar-General after the Crown plan or registered plan was so lodged) is taken not to form part of a current plan.

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

### **Division 1 Rules of law upon certain points**

#### **8 (Repealed)**

#### **9 Equitable waste**

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



known as equitable waste, unless an intention to confer such right expressly appears by the instrument creating such estate.

## **10 Merger**

There shall not, after the commencement of this Act, be held or deemed to be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged or extinguished in equity, and this provision shall apply to any merger by operation of law only arising before or after the commencement of this Act.

## **11 Mortgagor**

A mortgagor entitled for the time being to the possession of any land as to which no notice of the mortgagee's intention to take possession, or to enter into the receipt of the rents and profits thereof, has been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in the mortgagor's own name only, unless the cause of action arises upon a lease or other contract made by the mortgagor jointly with any other person.

## **12 Assignments of debts and choses in action**

Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor: Provided always that if the debtor, trustee, or other person liable in respect of such debt or chose in action has had notice that such assignment is disputed by the assignor or anyone claiming under the assignor, or of any other opposing or conflicting claims to such debt or chose in action, the debtor, trustee or other person liable shall be entitled, if he or she thinks fit, to call upon the several persons making claim thereto to interplead concerning the same, or he or she may, if he or she thinks fit, pay the same into court under and in conformity with the provisions of the Acts for the relief of trustees.

## **13 Stipulations not of the essence of contracts**

Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in such court.

## **Division 2 Land**

### **14 The immediate freehold of land to lie in grant as well as in livery**

All land shall as regards the assurance of the immediate freehold thereof be deemed to lie in grant as well as in livery.

### **15 Creation of certain estate in chattels real**

Any estate or interest that can be created by will in any chattel real may also be created by deed.

### **16 When contingent remainders capable of taking effect**

- (1) A contingent remainder existing at any time after the commencement of this Act shall be capable of taking effect notwithstanding the want of a particular estate of freehold to support it in the same manner as it would take effect if it were a contingent remainder of an equitable estate supported by an outstanding legal estate in fee simple.
- (2) A contingent remainder or a contingent interest lying between two estates vested in the same person shall prevent the merger of those two estates.

### **17 Rule in Shelley's case excluded in certain cases**

Where in an instrument coming into operation after the commencement of this Act a remainder is limited mediately or immediately to the heirs or heirs of the body of a person to whom an estate for any life in the same premises is expressly given, the estate of such person shall be confined to an estate for the life mentioned with a remainder to the person's heirs or heirs of the person's body as purchasers.

### **18 Release of part of land from rent charge not to extinguish whole charge**

The release from a rent charge of part of the land charged therewith shall not extinguish the whole rent charge, but shall operate only to bar the right to recover any part of the rent charge out of the land released without prejudice nevertheless to the rights of all persons interested in the land remaining unreleased and not concurring in or confirming the release.

### **19 Limitations of estates tail to pass the fee simple**

- (1) In any instrument coming into operation after the commencement of this Act a limitation which, if this section had not passed, would have created an estate tail (legal or equitable) in any land in favour of any person shall be deemed to create an estate in fee simple (legal or equitable as the case may be) in such land in favour of such person to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail.

(2)

- (a) Where at the commencement of this Act any person is entitled to an estate tail (legal or equitable) and whether in possession, reversion, or remainder, in any land, such person, save as is hereinafter mentioned, shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in such land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail.
  - (b) Where any such person is an infant and such land for any estate or interest would pass to any other person in the event of the death of the infant under the age of twenty-one years and without issue, then in such case the infant shall be deemed to take an estate in fee simple with an executory limitation over of such estate or interest on the happening of such event in favour of such other person.
  - (c) This subsection does not apply in respect of a person under mental disability.
  - (d) In this subsection the expression **estate tail** includes that estate in fee into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred; also an estate in fee voidable or determinable by the entry of the issue in tail; but does not include the estate of a tenant in tail after possibility of issue extinct.
- (3) This section applies to land under the provisions of the *Real Property Act 1900*, and the Registrar-General is hereby authorised on application in the form approved under that Act to make all such recordings in the Register kept under that Act as may be necessary to give effect thereto.

#### **19A Estates tail—further provisions**

- (1) Where at or after the first day of January one thousand nine hundred and seventy-one any person is entitled, or would, but for section 19, be entitled, to an estate tail (legal or equitable) and whether in possession, reversion, or remainder, in any land, such person shall be deemed to be entitled to an estate in fee simple (legal or equitable, as the case may be) in such land, to the exclusion of all estates or interests limited to take effect after the determination or in defeasance of any such estate tail and to the exclusion of all estates or interests in reversion on any such estate tail.
- (2) In this section the expression **estate tail** includes that estate in fee into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred also an estate in fee voidable or determinable by the entry of the issue in tail; but does not include the estate of a tenant in tail after possibility of issue extinct.
- (3) This section applies to land under the provisions of the *Real Property Act 1900*, and the Registrar-General is hereby authorised on application in the form approved under

that Act to make all such recordings in the Register kept under that Act as may be necessary to give effect thereto.

**20 (Repealed)**

**21 Dower abolished**

No widow shall become entitled, nor on or after the fifteenth day of December, one thousand eight hundred and ninety (being the day of the passing of the *Probate Act of 1890*), shall any widow be deemed to have become entitled to dower out of any land or out of any estate or interest in the same.

**22 No assurance to have tortious operation**

No assurance of any land hereafter made shall be deemed to have a tortious operation.

**23 Dealings with land of undischarged bankrupt**

- (1) All transactions by a bankrupt with any bona fide purchaser in respect of any land acquired by the bankrupt after a sequestration order has been made, and whether with or without notice of the bankruptcy, shall, if completed before any intervention by the official assignee of the estate of the bankrupt, be valid against the official assignee, and any estate or interest in such land which by virtue of the *Bankruptcy Act 1898*, or any Act relating to insolvency, is vested in the official assignee, shall determine and pass in such manner and to such extent as may be required for giving effect to any such transaction.
- (2) This section shall apply to transactions with respect to land completed before the commencement of this Act in any case where there has not been any intervention by the official assignee before that date.

(2A)

- (a) After the expiration, whether before or after the commencement of the *Conveyancing (Amendment) Act 1930*, of twenty years after:
  - (i) the date of the sequestration of the estate of a bankrupt under any Act relating to bankruptcy, or
  - (ii) the execution of an assignment for the benefit of the creditors of the assignor, no action, suit, or other proceeding instituted by the official assignee or the trustee of the assignment for the recovery of land which by any such Act or by the assignment was vested in the official assignee or the trustee of the assignment shall succeed against a purchaser from the bankrupt or assignor, or under a sale in execution, or against a successor in title of such purchaser.
- (b) This subsection shall not apply where the official assignee or trustee of the assignment was in actual possession of the land at the time of the purchase.

(c) This subsection shall not apply where the land is under the provisions of the *Real Property Act 1900*.

- (3) The registration by the official assignee in the General Register of Deeds of a claim in the prescribed form, or in the case of lands under the provisions of the *Real Property Act 1900* the lodging of a caveat under that Act, shall be deemed to be a sufficient intervention.
- (4) An order affecting the title to any land (not being land under the provisions of the *Real Property Act 1900*) made under the *Bankruptcy Act 1898*, is void as against a person who, after the commencement of the *Conveyancing (Amendment) Act 1972* and without notice of the order, purchases land from a person whose title to the land is affected by the order, unless the order is registered in the General Register of Deeds.

### **23A Abolition of the double possibility rule**

- (1) The rule of law prohibiting the limitation after a life interest to an unborn person of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.
- (2) This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of the *Conveyancing (Amendment) Act 1930*.

## **Division 3 Assurances of land**

### **23B Assurances of land to be by deed**

- (1) No assurance of land shall be valid to pass an interest at law unless made by deed.
- (2) This section does not apply to:
  - (a) an acknowledgment under section 83 of the *Wills, Probate and Administration Act 1898*,
  - (b) a disclaimer made in accordance with any law relating to bankruptcy in force before or after the commencement of the *Conveyancing (Amendment) Act 1972*, or not required to be evidenced in writing,
  - (c) a surrender by operation of law, and a surrender which may, by law, be effected without writing,
  - (d) a lease or tenancy or other assurance not required by law to be made in writing,
  - (e) a vesting order,
  - (f) any other assurance taking effect under any Act or Commonwealth Act.
- (3) This section does not apply to land under the provisions of the *Real Property Act 1900*.

### **23C Instruments required to be in writing**

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

### **23D Creation of interests in land by parol**

- (1) All interests in land created by parol and not put in writing and signed by the person so creating the same, or by the person's agent thereunto lawfully authorised in writing, shall have, notwithstanding any consideration having been given for the same, the force and effect of interests at will only.
- (2) Nothing in this section or in sections 23B or 23C shall affect the creation by parol of a lease at the best rent which can reasonably be obtained without taking a fine taking effect in possession for a term not exceeding three years, with or without a right for the lessee to extend the term at the best rent which can reasonably be obtained without taking a fine for any period which with the term would not exceed three years.

### **23E Savings in regard to secs 23B, 23C, 23D**

Nothing in section 23B, 23C, or 23D shall:

- (a) invalidate any disposition by will, or
- (b) affect any interest validly created before the commencement of the [Conveyancing \(Amendment\) Act 1930](#), or
- (c) affect the right to acquire an interest in land by virtue of taking possession, or
- (d) affect the operation of the law relating to part performance.

## **Division 3A Transactions with respect to existing lots**

### **23F Certain transactions to refer to lots shown on current plan**

- (1) This section applies to the following transactions:
  - (a) the conveyance or transfer of part of an existing lot,
  - (b) the lease of part of an existing lot,
  - (c) the mortgage of part of an existing lot,
  - (d) the partition of an existing lot.
- (2) The Registrar-General may refuse to register a transaction to which this section applies unless:
  - (a) the land to which the transaction relates is shown on a current plan, and
  - (b) the boundaries of each part into which the land is divided as a result of the transaction follow the boundaries of an existing lot.
- (3) This section does not apply to an agreement with respect to land the subject of:
  - (a) a proposed plan of subdivision, a proposed plan of consolidation or a proposed plan of identification within the meaning of section 195, or
  - (b) a proposed strata plan, proposed strata plan of consolidation or proposed strata plan of subdivision within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*,

but the agreement is taken to be conditional on the registration of the proposed plan.

### **23G Exceptions to sec 23F**

Section 23F does not apply to the following transactions:

- (a) a transaction that relates to the whole of the land comprised in a folio of the Register kept under the *Real Property Act 1900*,
- (b) an application by the Crown to bring Crown land under the provisions of the *Real Property Act 1900*,
- (c) a transaction that relates to the whole of the residue of land comprised in a folio of the Register kept under the *Real Property Act 1900*, where part only of the land is shown in a current plan,
- (d) a transaction that comprises:
  - (i) the lease of part of an existing lot for a period that, including the period of any option to renew, does not exceed 5 years, or

- (ii) the transfer, conveyance, sublease, variation or mortgage of a leasehold interest so created,
- (e) a transaction that comprises:
  - (i) the lease of the whole or any part of a building, or
  - (ii) the transfer, conveyance, sublease, variation or mortgage of a leasehold interest so created,
- (f) a transaction that relates to an existing lot that is owned by 2 or more persons in severalty, where:
  - (i) one of the owners disposes of his or her part of the lot to another owner, or
  - (ii) all of the owners of the lot dispose of the lot to some other person,
- (g) a transaction that relates to part of an existing lot, where:
  - (i) that part (and no other part of the lot) is held by a person in his or her capacity as a trustee, administrator or executor of, or as a beneficiary of the estate of, an owner referred to in paragraph (f), and
  - (ii) the transaction relates to the whole of that part,
- (h) a transaction that relates to part of an existing lot, where:
  - (i) the transaction is necessary to give effect to an order, direction or judgment of a court of competent jurisdiction, and
  - (ii) the person by whom the transaction is given effect to does not have power to give effect to such a transaction with respect to any other part of the lot,
- (i) a transaction that relates to part of an existing lot, where:
  - (i) the transaction gives effect to a sale of land under a writ of execution, under Division 5 of Part 2 of Chapter 17 of the *Local Government Act 1993*, under section 24 of the *Protected Estates Act 1983* or under any power conferred by a Commonwealth Act, and
  - (ii) the person giving effect to the transaction does not have power to give effect to such a transaction with respect to any other part of the lot,
- (j) a transaction that relates to part of an existing lot (not being land under the provisions of the *Real Property Act 1900*), where:
  - (i) a person in adverse possession of that part disposes of that part to some other person, and
  - (ii) the firstmentioned person does not have power to dispose of any other part of the



existing lot,

- (k) a transaction that relates to part of an existing lot, where the transaction conveys or transfers land to an Aboriginal Land Council in accordance with the requirements of the *Aboriginal Land Rights Act 1983*, the *Native Title (New South Wales) Act 1994* or any other Act or law,
- (l) a transaction that relates to the whole of the residue of an existing lot, where part of the lot:
  - (i) has been the subject of a transaction referred to in paragraph (h), (i), (j) or (k), or
  - (ii) has been acquired, by agreement or compulsory process, under a provision of an Act (including a Commonwealth Act) that authorises the acquisition of land by compulsory process, or
  - (iii) has been dedicated as a public road.

## **Division 3B Transactions with respect to lots in a subdivision for lease purposes**

### **23H Definitions**

In this Division, ***plan of subdivision for lease purposes*** means a plan of subdivision (within the meaning of section 195) of land within a caravan park or a manufactured home estate (within the meaning of the *Local Government Act 1993*) that is marked, in accordance with the regulations, so as to indicate that development consent to the subdivision has been granted under the *Environmental Planning and Assessment Act 1979* subject to the condition that the subdivision is a subdivision for lease purposes.

### **23I Transactions**

- (1) The Registrar-General may refuse to register a transaction with respect to a lot in a plan of subdivision for lease purposes unless it comprises:
  - (a) the lease of the whole of the lot for a period that, including the period of any option to renew, does not exceed 20 years, or
  - (b) the transfer, conveyance, sublease, variation or mortgage of a leasehold interest so created.
- (2) This section does not apply to an agreement with respect to land the subject of a proposed plan of subdivision for lease purposes, but the agreement is taken to be conditional on the registration of the proposed plan.

## **Division 4 Property generally**

## **24 Person may assure property to himself or herself, or to himself or herself and others**

A person may assure property to himself or herself, or to himself or herself and others.

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

- (1) A body corporate shall be capable of acquiring and holding any property in joint tenancy in the same manner as if it were an individual, and where a body corporate and an individual or two or more bodies corporate become entitled to any property under circumstances or by virtue of any instrument which would, if the body corporate had been an individual, have created a joint tenancy they shall be entitled to the property as joint tenants:

Provided that the acquisition and holding of property by a body corporate in joint tenancy shall be subject to the like conditions and restrictions as attach to the acquisition and holding of property by a body corporate in severalty.

- (2) Where a body corporate is a joint tenant of any property, then on its dissolution the property shall devolve on the other joint tenant.

## **26 Construction of conveyance etc of any property beneficially to two or more persons together**

- (1) In the construction of any instrument coming into operation after the commencement of this Act a disposition of the beneficial interest in any property whether with or without the legal estate to or for two or more persons together beneficially shall be deemed to be made to or for them as tenants in common, and not as joint tenants.
- (2) This section does not apply to persons who by the terms or by the tenor of the instrument are executors, administrators, trustees, or mortgagees, nor in any case where the instrument expressly provides that persons are to take as joint tenants or tenant by entireties.

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

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

## **28 Release and disclaimer of powers**

- (1) A person to whom is given any power (other than a power coupled with a duty), whether coupled with an interest or not, may by deed release or contract not to exercise the power.
- (2) Any such person as aforesaid may by deed disclaim any such power, and after such

disclaimer shall not be capable of exercising or joining in the exercise of the power.

- (3) On such disclaimer the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.
- (4) This section applies to powers created by instruments coming into operation either before or after the commencement of this Act.
- (5) Where any such power is exercisable by a dealing to be registered under the *Real Property Act 1900*, the power may be released or disclaimed by a dealing in the form approved under that Act and such a dealing may be registered under that Act.

## **29 Appointments to be valid notwithstanding one or more objects excluded**

- (1) No appointment in exercise of any power to appoint any property amongst several objects shall be invalid on the ground that any object of the power has been altogether excluded, but every such appointment shall be valid and effectual notwithstanding that any one or more of the objects do not by such appointment or in default of appointment take a share or shares of the property.
- (2) Nothing in this section shall prejudice or affect any provision in any instrument creating any power which declares the amount of the share or shares from which no object of the power shall be excluded, or some one or more object or objects shall not be excluded.
- (3) This section applies to appointments made after the commencement of this Act in exercise of powers created before or after the commencement of this Act.

## **29A Protection of purchasers claiming under certain void appointments**

- (1) An instrument purporting to exercise a legal or equitable power of appointment over property, which, in default of and subject to any appointment, is limited to or held in trust for a class or number of persons including the appointee, shall not be void on the ground of fraud on the power as against a purchaser in good faith:

Provided that, if the interest appointed exceeds in amount or value the interest in such property to which immediately before the execution of the instrument the appointee was presumptively entitled under the trust in default of appointment, having regard to any advances made in the appointee's favour and to any hotchpot provision, the protection afforded by this section to a purchaser shall not extend to such excess.

- (2) In this section **a purchaser in good faith** means a person dealing with an appointee for valuable consideration and without notice of the fraud, or of any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.
- (3) A successor in title to a purchaser entitled to the benefit of this section shall be

entitled to the like benefit.

- (4) This section applies only to dealings effected after the commencement of the *Conveyancing (Amendment) Act 1930*, but applies to powers created or arising either before or after such commencement.
- (5) This section as amended by the *Minors (Property and Contracts) Act 1970* applies only to dealings effected after the commencement of that Act, but applies to powers created or arising either before or after such commencement.

## **29B Restrictions on executory limitations**

- (1) Where there is a person entitled to:

- (a) land for an estate in fee simple or for any less estate or interest, or
- (b) any other property,

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

- (2) This section applies where the executory limitation is contained in an instrument coming into operation after the first day of July one thousand nine hundred and twenty save that, as regards instruments coming into operation before the commencement of the *Conveyancing (Amendment) Act 1930* it only applies to limitations of land for an estate in fee, or for a term of years absolute or determinable on life, or for a term of life.
- (3) This section as amended by the *Minors (Property and Contracts) Act 1970* applies where the executory limitation is contained in an instrument coming into operation after the commencement of that Act.

## **29C Restrictions on operation of conditions of forfeiture**

- (1) Where there is a person entitled to income (including an annuity or other periodical income) or any other property, subject to a condition of forfeiture on alienation, whether voluntary or involuntary, and whether with or without words of futurity, then:
  - (a) unless the instrument containing the condition expressly provides to the contrary, no alienation, whether by way of charge or otherwise, of the income or other property, made or occurring before the person becomes entitled to receive payment of the income, or to call for a conveyance or delivery of the other property, shall operate to create forfeiture under the condition unless the alienation is in operation at the time the person becomes so entitled,

(b) notwithstanding any stipulation to the contrary in the instrument containing the condition no voluntary alienation made by the person, with the sanction of the court, shall operate to create forfeiture under the condition.

(2) This section applies where the condition of forfeiture is contained in an instrument executed, made, or coming into operation before or after the commencement of the *Conveyancing (Amendment) Act 1930*, but only in cases where such person becomes entitled to receive payment of the income, or to call for an assurance or delivery of the other property, or, where the alienation with the sanction of the court is made after such commencement.

### **30 Notice of severance of joint tenancy**

- (1) A person who unilaterally severs, or causes the severance of, a joint tenancy in land to which the *Real Property Act 1900* does not apply must give notice of the severance to all joint tenants in the joint tenancy as soon as practicable after the joint tenancy has been severed.
- (2) The notice is to be given in a form approved by the Registrar-General.
- (3) Failure to give notice as required by and in accordance with this section does not invalidate or otherwise affect the severance of the joint tenancy.

### **31, 31A (Repealed)**

### **32 Vesting in executor or administrator de bonis non**

- (1) Where, upon the death of an executor or administrator, administration of the estate remaining unadministered is granted, such estate shall, upon the grant, vest as from the death of such executor or administrator, in the person to whom the grant is made.
- (2) Where in the case of a person dying on or after the fifteenth day of December, one thousand eight hundred and ninety (being the day of the passing of the *Probate Act of 1890*), administration of the estate remaining unadministered has been granted prior to the commencement of this Act, a conveyance by the person to whom the grant was made shall be deemed to be and to have been effectual to pass any legal estate in the property conveyed which was vested in the deceased executor or administrator at the time of his or her death.

### **33 Meaning of heir, next of kin, or statutory next of kin of any person**

- (1) Where, under the terms of any will coming into operation, or of any instrument (other than a will) made, after the commencement of section 3 of the *Conveyancing (Amendment) Act 1977*, any property would, but for this section, vest in:
  - (a) the heirs of a person,
  - (b) the next of kin of a person, or

(c) the next of kin of a person to be determined in accordance with the *Wills, Probate and Administration Act 1898*,

the provisions of Division 2A of Part 2 of the *Wills, Probate and Administration Act 1898* (as in force after that commencement) shall, subject to subsection (2), apply in respect of that property in the same way as those provisions would apply if that person had died intestate as to that property.

- (2) Subsection (1) applies only if and so far as a contrary or another intention is not expressed in the will or other instrument and shall have effect subject to the provisions of the will or other instrument.
- (3) Where, under the terms of any will coming into operation, or of any instrument (other than a will) made, before the commencement of section 3 of the *Conveyancing (Amendment) Act 1977*, any property would, but for this subsection, vest in:

- (a) the heirs of a person,
- (b) the next of kin of a person, or
- (c) the next of kin of a person to be determined in accordance with the *Wills, Probate and Administration Act 1898*,

that property shall vest in the persons in whom it would have vested if that section had not commenced.

#### **34 Meaning of heir (male or female) or heirs (male or female) of the body of any person**

- (1) Where under the terms of any instrument coming into operation after the commencement of this Act any property vests in:
- (a) the heir or heirs of the body of any person, or
- (b) the heir or heirs male, or the heir or heirs male of the body of any person, or
- (c) the heir or heirs female, or the heir or heirs female of the body of any person,

the property shall vest as follows:

In case (a) in the issue of such person as tenants in common per stirpes,

in case (b) in the sons and issue of sons of such person as tenants in common per stirpes, and

in case (c) in the daughters and the issue of daughters of such person as tenants in common per stirpes.

- (2) This section applies only if and as far as a contrary or other intention is not expressed in the instrument, and shall have effect subject to the terms of the instrument and to

the provisions therein contained.

### **35 Presumption of survivorship**

In all cases where two or more persons have died under circumstances rendering it uncertain which of them survived, the deaths shall for all purposes affecting the title to any property be presumed to have taken place in order of seniority, and the younger be deemed to have survived the elder.

### **36 (Repealed)**

#### **36A Power to direct division of chattels**

Where any chattels belong to persons jointly or in undivided shares, the persons interested to the extent of a moiety or upwards may apply to the court for an order for division of the chattels or any of them, according to a valuation or otherwise, and the court may make such order and give any consequential directions as it thinks fit.

#### **36B Contingent and future testamentary gifts to carry the intermediate income**

- (1) A contingent or future specific or residuary devise or bequest of property, and a specific or residuary devise or bequest of property to trustees upon trust for a person whose interest is contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator except so far as such income, or any part thereof, may be otherwise expressly disposed of.
- (2) Where under an instrument other than a will property stands limited to a person for a contingent or future interest, or stands limited to trustees upon trust for a person whose interest is contingent or executory, such interest shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the time when the instrument comes into operation, except so far as such income or any part thereof may be otherwise expressly disposed of.
- (3) This section applies only to wills and instruments coming into operation after the commencement of the [Conveyancing \(Amendment\) Act 1930](#).

#### **36C Persons taking who are not parties**

- (1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant, or agreement over or respecting land or other property, although the person may not be named as a party to the assurance or other instrument.
- (2) Such person may sue, and shall be entitled to all rights and remedies in respect thereof as if he or she had been named as a party to the assurance or other instrument.

### **36D Provisions as to supplemental instruments**

Any instrument (whether executed before or after the commencement of the *Conveyancing (Amendment) Act 1930*) expressed to be supplemental to a previous instrument, shall, as far as may be, be read and have effect as if the supplemental instrument contained a full recital of the previous instrument, but this section shall not operate to give any right to an abstract or production of any such previous instrument, and a purchaser may accept the same evidence that the previous instrument does not affect the title as if it had merely been mentioned in the supplemental instrument.

### **37 Extension of sec 29 of *Wills, Probate and Administration Act 1898***

- (1) The provisions of section 29 of the *Wills, Probate and Administration Act 1898* shall extend to a child or other issue of the testator to whom any real or personal estate is devised or bequeathed as therein mentioned as a member of a class notwithstanding the reference in that section to the lapsing of the devise or bequest.
- (2) This section applies only to the wills of persons dying after the commencement of this Act.

## **Division 5 Voidable dispositions**

### **37A Voluntary alienation to defraud creditors voidable**

- (1) Save as provided in this section, every alienation of property, made whether before or after the commencement of the *Conveyancing (Amendment) Act 1930*, with intent to defraud creditors, shall be voidable at the instance of any person thereby prejudiced.
- (2) This section does not affect the law of bankruptcy for the time being in force.
- (3) This section does not extend to any estate or interest in property alienated to a purchaser in good faith not having, at the time of the alienation, notice of the intent to defraud creditors.

### **37B Voluntary alienation of land how far voidable as against purchasers**

- (1) Every instrument (other than a will) which operates, or on registration would operate as a voluntary alienation of land, shall, if made with intent to defraud a subsequent purchaser, be voidable at the instance of a subsequent purchaser.
- (2) For the purposes of this section no such instrument (whether made before or after the commencement of the *Conveyancing (Amendment) Act 1930*) shall, if registered before a subsequent purchase, be deemed to have been made with intent to defraud by reason only of that purchase, or that the instrument was not made for valuable consideration.



### **37C Acquisitions of reversions at an under value**

- (1) No acquisition made in good faith, without fraud or unfair dealing, of any reversionary interest in real or personal property for money or money's worth, shall be liable to be opened or set aside merely on the ground of under value.

In this subsection **reversionary interest** includes an expectancy or possibility.

- (2) This section does not affect the jurisdiction of the court to set aside or modify unconscionable bargains.

## **Division 6**

### **37D (Repealed)**

## **Part 3 General rules relating to deeds**

### **Division 1 Deeds and their effect**

#### **38 Signature and attestation**

- (1) Every deed, whether or not affecting property, shall be signed as well as sealed, and shall be attested by at least one witness not being a party to the deed; but no particular form of words shall be requisite for the attestation.
- (1A) For the purposes of subsection (1), but without prejudice to any other method of signing, a deed is sufficiently signed by a person if:
- (a) by the direction and in the presence of that person the deed is signed in the name of that person by another person,
  - (b) the signature is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
  - (c) the person attesting the signature certifies in his or her attestation that he or she is a prescribed witness and that the signature was affixed by the direction and in the presence of the person whose signature it purports to be.
- (1B) For the purposes of subsection (1) but without prejudice to any other method of signing, a deed is sufficiently signed by a person if:
- (a) that person affixes his or her mark to the deed,
  - (b) the affixing of the mark is attested by a person who is not a party or signatory (except by way of attestation) to the deed, and
  - (c) the person attesting the affixing of the mark certifies in his or her attestation:
    - (i) that, before the mark was affixed, he or she explained the nature and effect of the deed to the person making the mark, and

(ii) that he or she believed, at the time the mark was affixed, that the person making the mark understood the explanation.

- (2) Indenting shall not be necessary in any case.
- (3) Every instrument expressed to be an indenture or a deed, or to be sealed, which is signed and attested in accordance with this section, shall be deemed to be sealed.
- (4) Every deed, executed and attested in accordance with this section may be proved in the same manner as a deed not required by law to be attested might have been proved heretofore.
- (5) Nothing in this section contained shall affect:
  - (a) the execution of deeds by corporations, or
  - (b) the provisions of section 184F (4), or
  - (c) any deed executed prior to the commencement of this Act.

### **39 Receipt in deed sufficient**

- (1) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same without any further receipt for the same being indorsed on the deed.
- (2) This section applies only to deeds executed after the commencement of this Act.

### **40 Receipt in deed or indorsed evidence for subsequent purchaser**

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

### **41 Mode of exercise of powers**

- (1) Where a power of appointment by an instrument other than a will is exercised by deed, executed and attested in accordance with this Act, or in the case of a dealing under the *Real Property Act 1900* in accordance with that Act, such deed or dealing shall, so far as respects the execution and attestation thereof, be a valid exercise of the power, notwithstanding that by the instrument creating the power some additional or other form of execution or attestation or solemnity is required.
- (2) This section applies to the exercise after the commencement of this Act of any such

power created by an instrument coming into operation before or after the commencement of this Act.

## **Division 2**

### **42 (Repealed)**

## **Division 3 Operation of deed**

### **43 Form of deed**

A deed according to the form in the Second Schedule, or to the effect thereof, shall be effectual to pass any land for such estate as therein expressed.

### **44 No use to result from absence of consideration**

- (1) No use shall be held to result merely from the absence of consideration in a conveyance of land as to which no uses or trusts are therein declared.
- (2) Every limitation which may be made by way of use operating under the Statute of Uses or this Act may be made by direct conveyance without the intervention of uses.
- (2A) A provision in any instrument executed, made, or coming into operation whether before or after the commencement of the [Conveyancing \(Amendment\) Act 1930](#), directing or authorising land to be conveyed by way of use operating under the Statute of Uses may be given effect to by a direct conveyance without the intervention of uses.
- (3) This section applies only to deeds executed after the commencement of this Act.

### **45 Grant of easements etc by way of use**

- (1) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding in duration the estate conveyed in the land, any easement, profit à prendre, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, profit à prendre, right, liberty, or privilege, for the estate or interest expressed to be limited to him or her; and the person, and the persons deriving title under him or her, shall have, use, and enjoy the same accordingly.
- (2) This section applies only to conveyances made after the commencement of this Act.

### **45A Reservation of easements etc in conveyances of land**

- (1) In a conveyance of land a reservation of any easement, profit à prendre, right, liberty, or privilege not exceeding in duration the estate conveyed in the land, shall operate without any execution of the conveyance by the grantee of the land out of which the reservation is made, or any regrant by the grantee, so as to create the easement,

profit à prendre, right, liberty, or privilege, and so as to vest the same in possession in the person (whether being the grantor or not) for whose benefit the reservation is made.

- (2) This section applies only to reservations made after the commencement of the *Conveyancing (Amendment) Act 1930*.

#### **46 In conveyance use of word grant unnecessary**

In a conveyance executed after the commencement of this Act it shall not be necessary in order to convey land to use the word grant, but any words heretofore proper to convey land, and any other words indicating an intention to convey land, shall be sufficient.

#### **47 Words of limitation in fee**

- (1) In a deed it shall be sufficient in the limitation of an estate in fee simple to use the words in fee or fee simple without the word heirs, or in the case of a corporation sole without the word successors, or to use the words in tail or in tail male or in tail female, without the words heirs of the body, or heirs male of the body, or heirs female of the body.
- (2) Where land is conveyed to or to the use of any person without words of limitation, such conveyance shall be construed to pass the fee simple or other the whole estate or interest the person conveying had power to dispose of by deed in such land unless a contrary intention appears by such conveyance.
- (3) This section applies only to deeds executed after the commencement of this Act.

#### **48, 49 (Repealed)**

#### **50 Rights of entry etc**

- (1) Every right of entry, contingent remainder, and every contingent or executory or future estate, right, or interest, or possibility coupled with an interest, in property, may be conveyed by deed.
- (2) Any conveyance of a present right of entry in any land, other than a conveyance to the person in possession thereof, and any covenant or agreement for, or promise of a conveyance (other than as aforesaid) of the same shall be void as against the person in possession or those claiming under him or her unless the person conveying or covenanting, agreeing, or promising to convey, or the person through whom he or she claims has been in possession of the land within twelve months from the date of the conveyance, covenant, agreement or promise.
- (3) Sections two and four of the Imperial Act thirty-two, Henry the Eighth, chapter nine (known as The Bill of Bracery and Buying of Titles), are hereby repealed so far as the same apply to New South Wales.

## **51 (Repealed)**

### **Division 4 Corporation instruments**

#### **51A Execution of instruments by or on behalf of corporations**

- (1) In favour of a purchaser in good faith:
  - (a) a deed shall be deemed to have been duly executed by a corporation aggregate if its seal is affixed thereto in the presence of and attested by its clerk, secretary, or other permanent officer or his or her deputy, and a member of the board of directors, council, or other governing body of the corporation, and
  - (b) where a seal purporting to be the seal of a corporation has been affixed to a deed attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.
- (2) The board of directors, council, or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent either generally or in any particular case, to execute on behalf of the corporation any agreement or other instrument not under seal in relation to any matter within the powers of the corporation or any registration copy of any instrument to which the corporation is a party.
- (3) Where a person is authorised under a power of attorney or under any statutory or other power to assure any property in the name or on behalf of a corporation sole or aggregate, the person may as attorney execute the assurance by signing his or her name in such way as to show that the person does so as attorney of the corporation in the presence of at least one witness, and in the case of a deed by executing the same in accordance with section 38, and such execution shall take effect and be valid in like manner as if the corporation had executed the assurance.
- (4) Where a corporation aggregate is authorised under a power of attorney or under any statutory or other power to assure any property in the name or on behalf of any other person (including another corporation), an officer appointed for that purpose, either generally or in the particular instance, by the board of directors, council, or other governing body of the corporation by resolution or otherwise, may execute the assurance in the name of such other person; and where an instrument is executed by an officer who purports to be so appointed, then in favour of a purchaser in good faith the instrument shall be deemed to have been executed by an officer duly authorised.
- (5) The foregoing provisions of this section apply to transactions wherever effected, but only to deeds and instruments executed after the commencement of the [Conveyancing \(Amendment\) Act 1930](#), except that, in the case of a power or an appointment of an agent or officer, they apply whether the power was conferred or the appointment was made before or after such commencement or by this Act.

- (6) Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice, or by the Act, charter, memorandum or articles, deed of settlement, or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.

## **Part 4 Sales and other transactions**

### **Division 1A Application of Part**

#### **52 Application of Part 4 to land under [Real Property Act 1900](#)**

- (1) Divisions 1, 2, 3, and 4 shall not apply, but Divisions 5 and 6 shall apply and shall be deemed to have applied from the commencement of the [Conveyancing \(Amendment\) Act 1930](#) to land under the provisions of the [Real Property Act 1900](#), except where otherwise provided.
- (2) Divisions 7, 8 and 9 shall apply to land under the provisions of the [Real Property Act 1900](#).

### **Division 1 General provisions**

#### **52A Contracts for sale of land**

- (1) Except in so far as the regulations may otherwise provide, this section applies to contracts for the sale of any land, including land subject to the provisions of the [Real Property Act 1900](#), the [Crown Lands Consolidation Act 1913](#) or any other Act and irrespective of whether or not any such Act makes provision for or with respect to the conveyance or transfer of land.
- (2) A vendor under a contract for the sale of land:
  - (a) shall, before the contract is signed by or on behalf of the purchaser, attach to the contract such documents, or copies of such documents, as may be prescribed, and
  - (b) shall be deemed to have included in the contract such terms, conditions and warranties as may be prescribed.
- (3) Notwithstanding the provisions of any other Act (whether assented to before, on or after the commencement of the [Conveyancing \(Amendment\) Act 1985](#)) or any other law, where a vendor attaches to a contract for the sale of land a certificate or other document, or a copy of a certificate or other document, issued, on or before the date of the contract, to the vendor or to a person on the vendor's behalf by a government department, a statutory authority, the council of a local government area or a prescribed person or body, being a document:
  - (a) which is, or a copy of which is, required to be attached to the contract pursuant to

subsection (2) (a),

(b) which contains information consistent with the provisions of a term, condition or warranty prescribed as referred to in subsection (2) (b), or

(c) which contains information which has caused the vendor to make a specific disclosure in the contract in relation to any such term, condition or warranty,

the purchaser or a mortgagee of the purchaser shall have and may exercise, in relation to the certificate or document, the rights, powers and immunities that the purchaser or mortgagee would have had if the certificate or document had been issued to the purchaser or mortgagee.

(4) Except in so far as the regulations may otherwise provide, a provision, whether in a contract for the sale of land or any other agreement:

(a) which purports to exclude, modify or restrict any provision of this section or a regulation made for the purposes of this section, or

(b) which would, but for this subsection, have the effect of excluding, modifying or restricting any such provision,

is void.

(5) The regulations may provide that subsection (2) or any provision of that subsection shall not apply to or in respect of:

(a) a prescribed vendor or a vendor of a prescribed class or description,

(b) a prescribed contract or a contract of a prescribed class or description, or

(c) prescribed land or land of a prescribed class or description.

(6) The regulations may make provision for or with respect to the remedies and relief available to a purchaser under a contract for the sale of land and the penalties which may be incurred by a vendor under such a contract:

(a) for any failure or refusal to comply with any of the provisions of this section or the regulations made for the purposes of this section, and

(b) for any breach of a term, condition or warranty deemed to be included in the contract under this section.

(7) Without limiting the generality of subsection (6), the remedies and relief may include remedies and relief by way of rescission of the contract by the purchaser and the payment of compensation by the vendor.

(8) The regulations may provide that a term, condition or warranty prescribed as referred to in subsection (2) (b) shall not merge in the transfer or conveyance on completion of

the contract.

(9) The regulations:

- (a) may require the inclusion in contracts for the sale of land of terms, conditions and warranties prescribed as referred to in subsection (2) (b), and
- (b) may require the attachment to contracts for the sale of land of notices or other documents.

(10) This section binds the Crown.

### **53 Obligation to show title etc**

In the completion of any contract made after the commencement of the *Conveyancing (Amendment) Act 1930* for the purchase of land and subject to any stipulation to the contrary in the contract:

- (1) Thirty years shall be substituted as the period of commencement of title which a purchaser may require in place of forty years, the present period of such commencement; nevertheless earlier title than thirty years may be required in cases similar to those in which earlier title than forty years might before the commencement of such Act have been required, and
- (2) The obligations and rights of vendor and purchaser shall be regulated as follows:
  - (a) Recitals, statements, and descriptions of facts, matters, and parties contained in instruments or statutory declarations twenty years old at the date of the contract shall, unless and except so far as they are proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions; but no recital shall affect the period of commencement of title under the last preceding subsection.
  - (b) The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title where the purchaser will, on the completion of the contract, have an equitable right to the production of such document.
  - (c) Such covenant for production as the purchaser can and does require and the vendor is able to procure shall be furnished at the purchaser's expense, but the vendor shall bear the expense of perusal and execution on behalf of and by himself or herself.
  - (d) Where the vendor retains any part of an estate to which any documents of title relate the vendor shall be entitled to retain such documents.
  - (e) Where the vendor does not retain any part of an estate to which any documents of title relate and such documents are the subject of any covenant to produce or of



any right in any person to their production, the vendor shall deposit such documents with the Registrar-General pursuant to section 64, and as soon after completion as reasonably possible furnish the purchaser with an attested copy of the receipt therefor, and it shall be the duty of the purchaser's solicitor or licensed conveyancer to require an undertaking by the vendor or the vendor's solicitor or licensed conveyancer so to furnish the same.

This paragraph shall, in relation to contracts made after the commencement of the *Conveyancing (Amendment) Act 1930*, have effect notwithstanding any stipulation to the contrary.

- (3) A purchaser shall not be deemed to be or ever to have been affected with notice of any matter or thing of which, if he or she had investigated the title or made inquiries in regard to matters prior to the period of commencement of title fixed by this or any other Act, or by any rule of law, he or she might have had notice, unless he or she actually makes such investigation or inquiries.

#### **54 Application of stated conditions to all sales**

- (1) A purchaser of any property shall not require the production or any abstract or copy of any deed, will, or other document dated or made before the time prescribed by law or stipulated for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall the purchaser require any information or make any requisition or inquiry with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document or that prior title is recited covenanted to be produced or noticed; and the purchaser shall assume unless the contrary appears that the recitals contained in the abstracted instruments of any deed, will, or other document forming part of that prior title are correct, and give all the material contents of the deed, will, or other document so recited and that every document so recited was duly executed by all necessary parties and perfected if and as required by acknowledgment or otherwise.
- (2) Where land sold is held by lease (not including under-lease) the purchaser shall assume unless the contrary appears that the lease was duly granted; and on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase the purchaser shall assume unless the contrary appears that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase.
- (3) Where land sold is held by under-lease the purchaser shall assume unless the contrary appears that the under-lease and every superior lease were duly granted; and on production of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase the purchaser shall assume unless the contrary appears that all the covenants and provisions of the under-lease

have been duly performed and observed up to the date of actual completion of the purchase, and further, that all rent due under every superior lease and all the covenants and provisions of every superior lease have been paid and duly performed and observed up to that date.

- (4) On a sale of any property the expenses of the production and inspection of all records, proceedings of courts, deeds, wills, probates, letters of administration, and other documents not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested stamped office or other copies or abstracts of or extracts from any documents aforesaid not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser either for verification of the abstract or for any other purpose shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document the expenses of making any copy thereof attested or unattested which a purchaser requires to be delivered to him or her shall be borne by that purchaser.
- (5) On a sale of any property in lots a purchaser of two or more lots held wholly or partly under the same title shall not have a right to more than one abstract of the common title except at the purchaser's own expense.
- (6) This section applies only to titles and purchasers on sales properly so called notwithstanding any interpretation in this Act.
- (7) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract, and to the provisions therein contained.
- (8) This section applies only to sales made after the commencement of this Act.
- (9) Nothing in this section shall be construed as binding a purchaser to complete his or her purchase in any case where on a contract made independently of this section and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against the purchaser by the Court.
- (10) Nothing in this or the last preceding section shall preclude a purchaser from raising any objection to the vendor's title before the time prescribed by law or stipulated for commencement of the title.

#### **54A Contracts for sale etc of land to be in writing**

- (1) No action or proceedings may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such

action or proceedings is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto lawfully authorised by the party to be charged.

- (2) This section applies to contracts whether made before or after the commencement of the *Conveyancing (Amendment) Act 1930* and does not affect the law relating to part performance, or sales by the court.
- (3) This section applies and shall be deemed to have applied from the commencement of the *Conveyancing (Amendment) Act 1930* to land under the provisions of the *Real Property Act 1900*.

#### **54B Damages: defective title**

- (1) The rule of law known as the rule in *Bain v Fothergill* is abolished in relation to contracts for the sale or other disposal of land or any interest in land made after the commencement of this section.
- (2) The Court may award damages for loss of bargain against a vendor who cannot perform such a contract because of a defect in the vendor's title.
- (3) This section has effect notwithstanding any stipulation to the contrary.
- (4) This section applies to land under the provisions of the *Real Property Act 1900*.

#### **55 Right of purchaser to recover deposit etc**

- (1) In every case where specific performance of a contract would not be enforced against the purchaser by the Court by reason of a defect in the vendor's title, but the purchaser is not entitled to rescind the contract, the purchaser shall nevertheless be entitled to recover his or her deposit and any instalments of purchase money he or she has paid, and to be relieved from all liability under the contract whether at law or in equity, unless the contract discloses such defect and contains a stipulation precluding the purchaser from objecting thereto.
- (2) If such undisclosed defect is one which is known or ought to have been known to the vendor at the date of the contract the purchaser shall in addition be entitled to recover his or her expenses of investigating the title.
- (2A) In every case where the court refuses to grant specific performance of a contract, or in any proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without interest thereon.
- (3) On the application of the purchaser the Court may order payment under this section and declare and enforce a lien in respect thereof on the property the subject of the contract.
- (4) This section applies only to contracts made after the commencement of this Act and

shall have effect notwithstanding any stipulation to the contrary.

(5) This section applies to land under the provisions of the *Real Property Act 1900*.

**56 No rescission by vendor on purchaser's objections etc until purchaser has reasonable opportunity to waive objections etc**

(1) In any contract the vendor shall not be entitled to exercise any right to rescind the contract, whether given by the contract or otherwise, on the ground of any requisition or objection made by the purchaser unless and until the vendor has given the purchaser reasonable notice of his or her intention to rescind so as to enable the purchaser to waive the requisition or objection.

(2) This section applies only to contracts made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

(3) This section applies to lands under the provisions of the *Real Property Act 1900*.

**57 Conditions of sale of land under the provisions of the *Real Property Act 1900***

(1) Under a contract for the purchase of land under the provisions of the *Real Property Act 1900*, the purchaser shall be entitled at the cost of the vendor:

- (a) to receive from the vendor sufficient particulars of title to enable the purchaser to prepare the appropriate dealing to give effect to the contract, and
- (b) to receive from the vendor an abstract of any instrument forming part of the vendor's title, in respect of which a caveat is entered upon the Register kept under that Act, and
- (c) to have the relevant certificate of title or other document of title lodged by the vendor at the office of the Registrar-General to enable the dealing to be registered, and
- (d) to have any objection to the registration of the dealing removed by the vendor: Provided that, as to any such objection which the purchaser ought to have raised on the particulars or abstract, or upon the investigation of the title, or which arises from the purchaser's own act, default, or omission, the purchaser shall not be entitled to have the same removed except at the purchaser's own cost.

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

**58 Notice of restrictive covenants**

(1) Where land having a common title with other land is disposed of to a purchaser (other than a lessee or a mortgagee) who does not hold or obtain possession of the

documents forming the common title, such purchaser, notwithstanding any stipulation to the contrary, may require that a memorandum giving notice of any provision contained in the disposition to him or her restrictive of user of, or giving rights over, any other land comprised in the common title shall where practicable, be indorsed on, or, where impracticable, be permanently annexed to some one document selected by the purchaser but retained in the possession or power of the person who makes the disposition, or to be deposited by him or her with the Registrar-General under section 53 (2) (e), and being or forming part of the common title.

- (2) The title of any person omitting to require an indorsement to be made or a memorandum to be annexed shall not, by reason only of this enactment, be prejudiced or affected by the omission.

### **59 Rights of purchaser as to execution**

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

### **60 Implied conditions in contracts for sale of land**

- (1) Every contract made after the commencement of this Act for the sale of land shall be deemed to be made subject to the conditions of sale set out in the Third Schedule, subject, nevertheless, to any other condition or provision contained in the contract expressly or by necessary implication modifying or excluding any of them.
- (2) This section applies to land under the provisions of the [Real Property Act 1900](#).

### **61 Conditions of sale and agreements as to stamp duty void**

- (1) Every condition of sale, framed with the view of precluding objection or requisition upon the ground of absence or insufficiency of stamp upon any instrument executed before or after the commencement of this Act, and every contract, arrangement, or undertaking for assuming the liability on account of absence or insufficiency of stamp upon any such instrument or indemnifying against such liability, absence, or insufficiency, shall be void.
- (2) This section applies to conditions of sale contracts, arrangements or undertakings relating to land under the provisions of the [Real Property Act 1900](#).

### **62 (Repealed)**

## **Division 2 Production and safe custody of title deeds**

### **63 Covenants to produce implied by schedule of documents**

- (1) In a deed to which there is a schedule of documents expressed to be covenanted to be produced by any party indicated as the covenantor to any party indicated as the covenantee, there shall be deemed to be included and there shall by virtue of this Act be implied a covenant by such covenantor with such covenantee that the covenantor, the covenantor's executors, administrators, or assigns, or other the person for the time being in whose possession the documents mentioned in such schedule ought to be, at the request and cost of the covenantee, the covenantee's executors, administrators, or assigns, will unless prevented by fire or other accident, produce within New South Wales as often as required to the covenantee or them or as the covenantee or they shall direct all documents mentioned in such schedule, and that the covenantor, the covenantor's executors, administrators, or assigns, or such other person as aforesaid, will, unless prevented as aforesaid, keep the said documents safe, whole, and uncanceled, save so far as they shall be cancelled on the bringing under the provisions of the [Real Property Act 1900](#) of any of the land to which they relate.
- (2) Such covenant shall bind the person in whose possession the documents the subject thereof should for the time being be: Provided, however, that if any person not being entitled to the possession of any document shall impliedly covenant to produce it, the liability under the covenant shall not extend beyond the covenantor, the covenantor's executors, administrators, and assigns, but the covenantor and they shall be and remain subject to such liability.
- (3) Any person claiming to be entitled to the benefit of a covenant implied as aforesaid may apply to the Court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents, or any of them, to the person or some person on his or her behalf, and the Court may, if it thinks fit, order production, or production and delivery accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application or any other matter connected with the application.
- (4) Any person claiming to be entitled to the benefit of such covenant may apply to the Court to assess damages for any loss, destruction of, or injury to the documents, or any of them, and the Court may, if it thinks fit, assess damages accordingly and order payment thereof by the person liable.
- (5) This section only applies to deeds made after the commencement of this Act.

### **64 Satisfaction of covenants to produce deeds**

- (1) A covenant or undertaking expressed or implied whether entered into before or after

the commencement of this Act to produce any document relating to land, shall be satisfied by a deposit of the document permanently in the office of the Registrar-General, who shall give a receipt for and keep in the Registrar-General's office a list of all documents so deposited, and shall, on payment of the prescribed fees, permit any person to search therein and to inspect and obtain copies of every such deed.

(2) Where the Registrar-General has:

- (a) pursuant to section 17 (2) of the *Real Property Act 1900*, or pursuant to section 31A (2) of that Act, created a folio or folios of the Register, or
- (b) pursuant to section 28M (4) of that Act, cancelled the caution or cautions recorded in any folio or folios of the Register,

for the whole of the land affected by a document deposited pursuant to subsection (1) or deposited before the commencement of the *Conveyancing (Amendment) Act 1972*, pursuant to section 53 (2) (e) the Registrar-General may, notwithstanding subsection (1) but subject to section 14 of the *Archives Act 1960*, destroy that document.

## **Division 3 Sales by auction**

### **65 Auction sales**

(1) In the case of a sale of land by auction:

- (a) where the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the vendor, the vendor shall not be entitled to bid himself or herself or to employ any person to bid at the sale, nor shall the auctioneer be entitled to take any bid from the vendor or any such person; any sale contravening this rule may be treated as fraudulent by the purchaser,
- (b) a sale may be notified in the conditions of sale to be subject to a reserved or upset price, and a right to bid may also be therein expressly reserved by or on behalf of the vendor,
- (c) where a right to bid is expressly reserved, but not otherwise, the vendor or any one person on the vendor's behalf may bid at the auction.

(2) This section applies to land under the provisions of the *Real Property Act 1900*.

## **Division 4 Discharge of incumbrances on sale**

### **66 Provision by court for incumbrances and sale freed therefrom**

- (1) Where land subject to any incumbrance, whether immediately payable or not, is sold by the Court or out of court, the Court may, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when

invested in Government securities, the Court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the Court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the Court for special reason thinks fit to require a larger additional amount.

- (2) Thereupon the Court may, either after or without any notice to the incumbrancee as the Court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance or vesting order proper for giving effect to the sale, and give directions for the retention and investment of the money in court.
- (3) After notice served on the persons interested in or entitled to the money or fund in court, the Court may direct payment or transfer thereof to the persons entitled to receive or give a discharge for the same on such terms as to the delivering up of deeds or other documents, or on such other terms as the Court thinks fit, and generally may give directions respecting the application or distribution of the capital or income thereof.
- (4) This section applies to sales not completed at the commencement of this Act, and to sales thereafter made.
- (5) This section applies to land under the provisions of the *Real Property Act 1900*, and in such case the Registrar-General shall upon payment of the prescribed fee make all necessary recordings in the Register kept under that Act for giving effect to the order.

## **Division 5 Dispositions on trust for sale, or with power of sale**

### **66A Consents to the execution of a trust for sale**

- (1) If the consent or request of more than two persons is by the disposition made requisite to the execution of a trust for sale or the exercise of a power of sale of any property, then, in favour of a purchaser, the consent of any two of such persons to the execution of the trust or the exercise of the power or to the exercise of any statutory or other powers vested in the trustees shall be deemed sufficient.
- (2) Where a person whose consent to or request for the execution of a trust for sale, or the exercise of a power of sale, of any property would, but for this subsection, be required in a disposition is a minor or is under mental disability, the person's consent or request is not, in favour of a purchaser, necessary for the execution of the trust or the exercise of the power but the trust may not be executed or the power exercised without:



- (a) where that person is a minor—the consent of the person’s parent or testamentary or other guardian,
- (b) where that person is under mental disability—the consent of the person charged by law with the management and care of the person’s property, or
- (c) where the relevant consent referred to in paragraph (a) or (b) cannot be obtained—the consent of the Court.

- (3) This section applies whether the trust for sale or power of sale is created or arises before or after the commencement of the *Conveyancing (Amendment) Act 1930*.

**66B Purchaser not to be concerned with the trusts of the proceeds of sale which are to be paid to two or more trustees or to a trust corporation**

- (1) A purchaser of property from trustees for sale or having power of sale shall not be concerned with the trusts affecting the proceeds of sale of the property (whether made to attach to such proceeds by virtue of this Act or otherwise), or affecting the income of the property until sale, whether or not those trusts are declared by the same instrument by which the trust for sale or power of sale is created.
- (2) Notwithstanding anything to the contrary in the instrument (if any) creating a trust for sale or power of sale of property or in the settlement of the net proceeds, the proceeds of sale or other capital money shall not be paid to or applied by the direction of fewer than two persons as trustees, except where the trustee is a trust corporation, or the trustee was appointed as a sole trustee by the instrument creating the trust or power, but this subsection does not affect the right of a sole personal representative as such to give valid receipts for, or direct the application of, the proceeds of sale or other capital money; nor, except where capital money arises on the transaction, render it necessary to have more than one trustee.

**66C Implied trust for sale in personalty settlements**

- (1) Where an instrument contains a power to invest money in the purchase of land, such land shall, unless the instrument otherwise provides, be held by the trustees on trust for sale, and the net rents and profits until sale, after keeping down costs of repairs properly payable out of income, insurance, and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested otherwise than in the purchase of land.
- (2) This section applies only to instruments coming into operation after the commencement of the *Conveyancing (Amendment) Act 1930*.

**66D Powers of management etc conferred on trustees for sale**

- (1) Subject to any direction to the contrary in the disposition on trust for sale, trustees for

sale shall, in relation to land during postponement of sale, have the powers of management conferred by section 151C during a minority, but without the restriction relating to waste and the cutting of timber.

- (2) Subject to any direction to the contrary in the disposition on trust for sale or in the settlement of the proceeds of sale, the net rents and profits of the land until sale, after keeping down costs of repairs properly payable out of income, insurance, and other outgoings, shall be paid or applied in like manner as the income of investments representing the purchase money would be payable or applicable if a sale had been made and the proceeds had been duly invested.
- (3) Where the net proceeds of sale have under the trusts affecting the same become absolutely vested in possession in two or more persons as joint tenants or tenants in common, the trustees for sale may, with the consent of the persons, if any, of the age of eighteen years or upwards, not being annuitants, interested in possession in the net rents and profits of the land until sale:
  - (a) partition the land remaining unsold or any part thereof, and
  - (b) provide (by way of mortgage or otherwise) for the payment of any equality money,

and, upon such partition being arranged, the trustees for sale shall give effect thereto by conveying the land so partitioned in severalty (subject or not to any mortgage created for raising equality money) to the persons entitled under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given.

- (4)
  - (a) If a share in the net proceeds belongs to a person under mental disability, the consent of the person charged by law with the management and care of the property of the person under mental disability or, if there is no person so charged, of the court, shall be sufficient to protect the trustees for sale.
  - (b) If a share in the net proceeds is affected by an incumbrance, the trustees for sale may either give effect thereto or provide for the discharge thereof by means of the property allotted in respect of such share, as they may consider expedient.
- (5) If a share in the net proceeds is absolutely vested in a minor, or in a person who cannot be found or ascertained, or as to whom it is uncertain whether the person is living or dead, the trustees for sale may act on behalf of the minor or person, and retain land or other property to represent the minor or person's share.
- (6) This section applies to dispositions on trust for sale coming into operation either before or after the commencement or by virtue of the [Conveyancing \(Amendment\) Act 1930](#).

### **66E Powers of court where trustees for sale refuse to exercise powers**

If the trustees for sale refuse to sell or to exercise any of the powers conferred by section 66D, or any requisite consent cannot be obtained, any person interested may apply to the court for a vesting or other order for giving effect to the proposed transaction or for an order directing the trustees for sale to give effect thereto, and the court may make such order as it thinks fit.

## **Division 6 Statutory trusts of property held in co-ownership**

### **66F Definitions**

In this Division:

- (1) **Co-ownership** means ownership whether at law or in equity in possession by two or more persons as joint tenants or as tenants in common; and **co-owner** has a corresponding meaning and includes an incumbrancer of the interest of a joint tenant or tenant in common.
- (2)
  - (a) Property held upon the “statutory trust for sale” shall be held upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of costs and expenses, and of the net income until sale after payment of costs, expenses, and outgoings, and in the case of land of rates, taxes, costs of insurance, repairs properly payable out of income, and other outgoings upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners,
  - (b) where:
    - (i) an undivided share is subject to a settlement, and
    - (ii) the settlement remains subsisting in respect of other property, and
    - (iii) the trustees thereof are not the same persons as the trustees for sale,then the statutory trust for sale includes a trust for the trustees for sale to pay the proper proportion of the net proceeds of sale or other capital money attributable to the share to the trustees of the settlement to be held for and to go to the same persons successively in the same manner and for and on the same estates, interests, and trusts as the undivided share would if not disposed of have been held and have gone under the settlement.
- (3) Property held upon the “statutory trust for partition” shall be held upon trust:
  - (a) with the consent of the incumbrancer of the entirety (if any) to partition the property and to provide (by way of mortgage or otherwise) for the payment of any

equality money, and

- (b) upon such partition being made to give effect thereto by assuring the property so partitioned in severalty (subject or not to any mortgage created for raising equality money) to the persons entitled under the partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given.

**66G Statutory trusts for sale or partition of property held in co-ownership**

- (1) Where any property (other than chattels) is held in co-ownership the court may, on the application of any one or more of the co-owners, appoint trustees of the property and vest the same in such trustees, subject to incumbrances affecting the entirety, but free from incumbrances affecting any undivided shares, to be held by them on the statutory trust for sale or on the statutory trust for partition.
- (1A) Subject to this section, on the death of a co-owner, any proceedings by or against the co-owner under subsection (1) (whether instituted before or after the commencement of this subsection) survive against or for the benefit of the estate of the deceased co-owner despite, in the case of a joint tenancy, the rule of survivorship.
- (2) Where the entirety of the property is vested in trustees or personal representatives, those trustees or personal representatives shall, unless the court otherwise determines, be appointed trustees on either of such statutory trusts, but subject, in the case of personal representatives, to their rights and powers for the purposes of administration.
- (3)
- (a) Where the entirety of the property is vested at law in co-owners the court may appoint a trust corporation either alone or with one or two individuals (whether or not being co-owners), or two or more individuals, not exceeding four (whether or not including one or more of the co-owners), to be trustees of the property on either of such statutory trusts.
- (b) On such appointment the property shall, subject to the provisions of section 78 of the [Trustee Act 1925](#), vest in the trustees.
- (4) If, on an application for the appointment of trustees on the statutory trust for sale, any of the co-owners satisfies the court that partition of the property would be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the court may, with the consent of the incumbrancers of the entirety (if any), appoint trustees of the property on the statutory trust for partition, or as to part of the property on the statutory trust for sale, and as to part on the statutory trust for partition, but a purchaser shall not be concerned to see or inquire whether any such consent as aforesaid has been given.

(5)

- (a) When such trustees for partition have prepared a scheme of partition they shall serve notice in writing thereof on all the co-owners of the age of eighteen years or upwards, and any of such co-owners dissatisfied with the scheme may, within one month after service upon him or her of such notice, apply to the court for a variation of the same.
- (b) Where any of the co-owners is a person under mental disability, the notice shall be served on the person charged by law with the management and care of the property of the person under mental disability or, if there is no person so charged, on such officer of the court as may be prescribed by rules of court.
- (c) Where any of the co-owners is a minor or a person who cannot be found or ascertained, or as to whom it is uncertain whether the co-owner is living or dead, the trustees may act on behalf of the minor or person, and retain land or other property to represent the co-owner's share.

(6) In relation to the sale or partition of property held in co-ownership, the court may alter such statutory trusts, and the trust so altered shall be deemed to be the statutory trust in relation to that property.

(7) Where property becomes subject to such statutory trust for sale:

- (a) in the case of joint tenancy, a sale under the trust shall not of itself effect a severance of that tenancy,
- (b) in any case land shall be deemed to be converted upon the appointment of trustees for sale unless the court otherwise directs.

(8) This section applies to property held in co-ownership at the commencement of the [Conveyancing \(Amendment\) Act 1930](#) and to property which becomes so held after such commencement.

(9) This section does not apply to property in respect of which a subsisting contract for sale (whether made under an order in a suit for partition, or by or on behalf of all the co-owners) is in force at the commencement of the [Conveyancing \(Amendment\) Act 1930](#) if the contract is completed in due course, nor to land in respect of which a suit for partition is pending at such commencement if a decree for a partition or sale is subsequently made in such suit.

#### **66H Trustee on statutory trusts for sale or partition to consult persons interested**

So far as practicable trustees on the statutory trust for sale, or on the statutory trust for partition, shall consult the persons of the age of eighteen years or upwards and not subject to disability for the time being beneficially entitled to the income of the property until sale or partition, and shall, so far as consistent with the general interest of the trust,

give effect to the wishes of such persons, or, in the case of dispute, of the majority (according to the value of their combined interests) of such persons, but a purchaser shall not be concerned to see that the provisions of this section have been complied with.

**66I Right of co-owners to bid at sale under statutory power of sale**

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

**Division 7 Passing of risk between vendor and purchaser**

**66J Definitions**

- (1) In this Division:

**damage** includes destruction.

**land** includes buildings and other fixtures.

**sale** includes exchange.

- (2) For the purposes of this Division, land damaged after the making of a contract for the sale of the land is substantially damaged if the damage renders the land materially different from that which the purchaser contracted to buy.

**66K Postponement of passing of risk to purchaser**

- (1) The risk in respect of damage to land shall not pass to the purchaser under a contract for the sale of the land until:
  - (a) the completion of the sale, or
  - (b) the time stipulated by the parties to the contract, being a time after the purchaser enters into, or is entitled to enter into, possession of the land,whichever first occurs.
- (2) The reference in subsection (1) to possession of land includes a reference to:
  - (a) the occupation of the land (whether pursuant to a licence or otherwise) pending completion of the sale of the land, and
  - (b) the receipt of income from the land.

**66L Power to rescind contract where land substantially damaged**

- (1) Where land is substantially damaged after the making of a contract for the sale of the land and before the risk in respect of the damage passes to the purchaser, the purchaser may rescind the contract by notice in writing served on the vendor before the completion of the sale and:
  - (a) within 28 days after the purchaser first became aware of the damage, or
  - (b) within such longer period as may be agreed to by the vendor and purchaser.
- (2) A notice under subsection (1) which is served:
  - (a) by a solicitor or an agent acting for the purchaser, or
  - (b) on a solicitor or an agent acting for the vendor,shall be deemed to have been served by the purchaser or on the vendor, as the case may be.
- (3) A notice under subsection (1) may be served:
  - (a) in any manner prescribed by section 170, or
  - (b) in any manner prescribed by the contract to which it relates for the service of notices under that contract.
- (4) Where the purchaser rescinds a contract for the sale of land pursuant to the right conferred by subsection (1):
  - (a) all money paid by the purchaser under the contract shall be repaid to the purchaser, and
  - (b) the vendor and purchaser shall be relieved from all liability under the contract, except a liability arising out of a breach of any term or condition contained or implied in the contract occurring before the date of rescission.
- (5) Subsection (4) does not affect any provision in a contract relating to an adjustment between the vendor and purchaser where the purchaser has received the benefit of possession of the land.
- (6) A purchaser is not entitled to exercise the right conferred by subsection (1) if the damage was caused by a wilful or negligent act or omission on the part of the purchaser.

**66M Abatement of purchase price where land damaged**

- (1) Where land is damaged after the making of a contract for the sale of the land and before the risk in respect of the damage passes to the purchaser, the purchase price shall be reduced on completion of the sale by such amount as is just and equitable in

the circumstances.

- (2) Subsection (1) applies whether or not the land concerned is substantially damaged.
- (3) Subsection (1) does not apply where the damage was caused by a wilful or negligent act or omission on the part of the purchaser.
- (4) If the purchase price is not reduced on completion of the sale of land as required by subsection (1), the amount by which the purchase price should have been reduced may be recovered by the purchaser from the vendor as a debt.

#### **66N Refusal to enforce specific performance against vendor**

The Court may, if it thinks that it would be unjust or inequitable to require the vendor to complete the sale of land that is substantially damaged after the making of the contract for the sale of the land and before the risk in respect of the damage passes to the purchaser:

- (a) refuse to enforce against the vendor specific performance of the contract,
- (b) order the repayment of any money paid by the purchaser under the contract, and
- (c) make such other orders as the Court considers appropriate in the circumstances.

#### **66O Contracting out**

- (1) In this section:

**dwelling-house** means premises (including a lot under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*) used, or designed for use, principally as a place of residence, and includes:

- (a) outbuildings and other appurtenances to a dwelling-house, and
- (b) a dwelling-house which is in the course of construction.

- (2) This Division has effect:

- (a) in the case of the sale of a dwelling-house—withstanding any stipulation to the contrary, or
- (b) in any other case—subject to any stipulation to the contrary.

### **Division 8 Sale of residential property**

#### **66P Definitions**

- (1) In this Division:

**agent**, in relation to the sale of residential property, includes any agent or representative named in the contract for the sale of the property.



**barrister** means a barrister of a court of any State or Territory.

**business day** means any day except Saturday or Sunday or a day that is a public or bank holiday throughout the State.

**purchaser** includes a prospective purchaser.

**residential property** has the meaning given by section 66Q.

**solicitor** means a solicitor of a court of any State or Territory, and includes a licensed conveyancer.

**vendor** includes a prospective vendor.

- (2) References in this Division to a particular time are to be construed according to Sydney time.

#### **66Q Meaning of “residential property”**

- (1) For the purposes of this Division, **residential property** is:
- (a) land on which are situated (or in the course of construction) not more than two places of residence, and no other improvements, or
  - (b) vacant land on which the construction of a single place of residence alone is not prohibited by law, or
  - (c) a lot or lots (including a proposed lot or lots) under the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*, comprising not more than one place of residence alone, whether constructed or in the course of construction, and including any place used or designed for use for a purpose ancillary to the place of residence.
- (2) Residential property does not however include:
- (a) land or a lot that is used wholly for non-residential purposes, or
  - (b) land that is more than 2.5 hectares in area (or such other area as may be prescribed).
- (3) For the purposes of this section, **place of residence** means a building or part thereof used, or currently designed for use, as a single dwelling only, and includes outbuildings or other appurtenances incidental to any such use.

#### **66R Preparation of proposed contract for sale of land**

- (1) A vendor who, by a written or broadcast advertisement:
- (a) indicates that residential property is for sale or is to be auctioned at any future time, or

- (b) offers to sell residential property, or
- (c) invites an offer to purchase residential property, or
- (d) offers to grant an option to purchase residential property, or
- (e) invites an offer to take an option to purchase residential property,

is guilty of an offence unless the required documents are all available for inspection at the same place by any purchaser.

Maximum penalty: 10 penalty units.

- (2) For the purposes of this section, the required documents are:
  - (a) a copy of the proposed contract for the sale of the property (excluding particulars of the purchaser and purchase price), and
  - (b) the documents required by section 52A to be attached to the contract before signature by the purchaser, and
  - (c) in the case of an offer or invitation relating to an option—a copy of the proposed option document (excluding particulars of the purchaser and consideration for the option).
- (3) This section applies to sales by way of private treaty, auction or tender (including tender by post).

### **66S Cooling off period**

- (1) Subject to section 66T, there is to be a cooling off period for every contract for the sale of residential property, during which the purchaser may exercise rights under section 66U.
- (2) The cooling off period commences when the contract is made.
- (3) The cooling off period ends at 5 pm on the fifth business day after the day on which the contract was made.
- (4) The cooling off period may be extended by a provision in the contract, or by the vendor in writing before the end of the cooling off period.
- (5) The cooling off period may be shortened by a provision in the contract, or by a separate written or oral agreement of the parties, but the provision or agreement does not take effect unless and until the purchaser gives to the vendor (or the vendor's solicitor or agent) a certificate that complies with section 66W.
- (6) The extension or shortening of the cooling off period may be effected under subsection (4) or (5) before, at or after the time the contract is made.

### **66T No cooling off period in certain cases**

There is no cooling off period in relation to a contract for the sale of residential property if:

- (a) at or before the time the contract is made, the purchaser gives to the vendor (or the vendor's solicitor or agent) a certificate that complies with section 66W, or
- (b) the property is sold by public auction, or
- (c) the contract is made on the same day as the property was offered for sale by public auction but passed in, or
- (d) the contract is made in consequence of the exercise of an option to purchase the property, other than an option that is void under section 66ZG.

### **66U Cooling off rights**

- (1) The purchaser under a contract for the sale of residential property may serve a written notice to the effect that the purchaser rescinds the contract.
- (2) The notice may only be served during the cooling off period, but is ineffective if served after completion.
- (3) The notice of rescission must be signed by:
  - (a) the purchaser or the purchaser's solicitor, or
  - (b) if there is more than one purchaser, each of the purchasers or their respective solicitors.
- (4) The notice of rescission must be served on:
  - (a) the vendor or the vendor's solicitor, or
  - (b) if there is more than one vendor, any one of the vendors or the solicitor of any of them, or
  - (c) the agent of the vendor or vendors.
- (5) Service of a notice under this section may be effected in accordance with section 170 or at the address of the vendor shown in the contract or (without affecting the foregoing) by facsimile transmission or in accordance with the service provisions in the contract.

### **66V Consequences of rescission**

- (1) On service of an effective notice of rescission in accordance with section 66U in relation to a contract for the sale of residential property, the contract is to be taken to be rescinded ab initio, but subject to the rights and obligations conferred by this section.

- (2) The purchaser forfeits 0.25 per cent of the purchase price of the property to the vendor.
- (3) The amount forfeited may be recovered from any deposit paid under the contract.
- (4) If the deposit is insufficient, the balance of any amount forfeited may be recovered from the purchaser as a debt in any court of competent jurisdiction.
- (5) The balance of the deposit remaining after deduction of any amount forfeited is payable to the purchaser.
- (6) Subject to subsection (7), neither the vendor nor the purchaser is liable to pay any other sum for damages, costs or expenses.
- (7) Either party is entitled to make a claim for:
  - (a) such compensation, adjustment or accounting as is just and equitable between the vendor and purchaser where the purchaser has received the benefit of possession of the property, or
  - (b) the payment of damages, costs or expenses arising out of a breach of any term, condition or warranty contained or implied in the contract (other than a term, condition or warranty referred to in section 52A),but not so as to affect rights and obligations arising under this Division.
- (8) The vendor may agree to waive any rights regarding forfeiture under this section.
- (9) Stamp duty ceases to be payable on a contract rescinded under this Division, and any duty already paid on it is refundable under the [Stamp Duties Act 1920](#).
- (10) In this section, **deposit** includes any amount paid by the purchaser in relation to the contract or on account of the purchase price of residential property.

#### **66W Certificates**

- (1) A certificate referred to in section 66S or 66T complies with this section if it:
  - (a) is in writing, and
  - (b) is signed by a solicitor or barrister, other than:
    - (i) a solicitor acting for the vendor, or
    - (ii) any other solicitor employed in the legal practice of a solicitor acting for the vendor, or
    - (iii) any other solicitor who is a member or employee of a firm of which a solicitor acting for the vendor is a member or employee, and

- (c) indicates the purpose for which the certificate is given, and
  - (d) contains a statement to the effect that the solicitor or barrister explained to the purchaser the effect of the contract, the nature of the certificate and the effect of giving the certificate to the vendor.
- (2) If the purchaser is a corporation, the reference in subsection (1) (d) to the purchaser is to be read as a reference to an officer of the corporation or a person involved in the management of its affairs.
  - (3) A document in the form of a certificate that complies with subsection (1) (c) and (d) and that purports to have been signed by a solicitor or barrister is to be regarded, and may be relied on by the vendor, as a valid certificate for all purposes.
  - (4) A certificate may, in addition to any other means, be given by facsimile transmission.

**66X Contract to contain statement regarding cooling off period**

- (1) A statement in the form prescribed by the regulations, relating to the cooling off period, is required to be included in every contract for the sale of residential property.
- (2) If a contract does not contain the statement required under this section, the purchaser may serve a notice of rescission under section 66U, except that the notice may be served at any time before completion (whether or not the cooling off period has expired).
- (3) On service of the notice, section 66V applies, except that the purchaser is not liable to the forfeiture provided for under that section.
- (4) Service of the notice is ineffective if it is served after completion.
- (5) This section does not apply where a certificate under section 66W has been given for the purposes of section 66S or 66T.

**66Y Operation of Division 8**

- (1) This Division extends to residential property under the provisions of the [Western Lands Act 1901](#), the [Crown Lands Act 1989](#) or any other Act, whether or not it deals with the conveyance or transfer of land.
- (2) This Division does not apply to a contract made before the commencement of this Division (as inserted by the [Conveyancing \(Sale of Land\) Amendment Act 1990](#)).
- (3) This Division, or a prescribed provision of this Division, does not apply to prescribed vendors, purchasers, contracts or land or in prescribed circumstances.
- (4) A provision of a contract for the sale of land or any other agreement or arrangement is void if it would, but for this subsection, have the effect of excluding, modifying or

restricting the operation of this Division.

- (5) This Division does not affect any right or remedy available otherwise than under this Division.
- (6) This Division binds the Crown.
- (7) Proceedings for an offence under section 66R may only be brought before a Local Court constituted by a Magistrate sitting alone, and may not be instituted except with the consent in writing of the Minister (which is to be presumed to have been given unless the contrary is proved).

## **Division 9 Options for purchase of residential property**

### **66Z Definitions**

- (1) In this Division:

**agent**, in relation to an option to purchase residential property, includes any agent or representative named in the option or in the proposed contract for the sale of the property attached to the option.

**barrister** means a barrister of a court of any State or Territory.

**business day** means any day except Saturday or Sunday or a day that is a public or bank holiday throughout the State.

**purchaser** includes a prospective purchaser, and also includes a grantee or prospective grantee of an option.

**residential property** has the meaning given by section 66Q.

**solicitor** means a solicitor of a court of any State or Territory, and includes a licensed conveyancer.

**vendor** includes a prospective vendor, and also includes a grantor or prospective grantor of an option.

- (2) References in this Division to a particular time are to be construed according to Sydney time.

### **66ZA Option to contain certain terms, conditions and warranties**

- (1) A vendor under an option to purchase residential property shall be deemed to have included in the option such terms, conditions and warranties as may be prescribed.
- (2) The regulations may make provision for or with respect to the remedies and relief available to a purchaser under an option to purchase residential property and the penalties which may be incurred by a vendor under such an option:

- (a) for any failure or refusal to comply with any of the provisions of the regulations made for the purposes of this section, and
  - (b) for any breach of a term, condition or warranty deemed to be included in the option under this section.
- (3) The regulations may adopt, with or without modification, regulations made for the purposes of section 52A.

**66ZB Cooling off period**

- (1) Subject to section 66ZC, there is to be a cooling off period for every option to purchase residential property, during which the purchaser may exercise rights under section 66ZD.
- (2) The cooling off period commences when the option is granted.
- (3) The cooling off period ends at 5 pm on the fifth business day after the day on which the option was granted.
- (4) The cooling off period may be extended by a provision in the option, or by the vendor in writing before the end of the cooling off period.
- (5) The cooling off period may be shortened by a provision in the option, or by a separate written or oral agreement of the parties, but the provision or agreement does not take effect unless and until the purchaser gives to the vendor (or the vendor's solicitor or agent) a certificate that complies with section 66ZF.
- (6) The extension or shortening of the cooling off period may be effected under subsection (4) or (5) before, at or after the time the option is granted.

**66ZC No cooling off period in certain cases**

There is no cooling off period in relation to an option to purchase residential property if:

- (a) at or before the time the option is granted, the purchaser gives to the vendor (or the vendor's solicitor or agent) a certificate that complies with section 66ZF, or
- (b) the option is granted on the same day as the property was offered for sale by public auction but passed in.

**66ZD Cooling off rights**

- (1) The purchaser under an option to purchase residential property may serve a written notice to the effect that the purchaser rescinds the option.
- (2) The notice may only be served during the cooling off period.
- (3) The notice of rescission must be signed by:

- (a) the purchaser or the purchaser's solicitor, or
  - (b) if there is more than one purchaser, each of the purchasers or their respective solicitors.
- (4) The notice of rescission must be served on:
- (a) the vendor or the vendor's solicitor, or
  - (b) if there is more than one vendor, any one of the vendors or the solicitor of any of them, or
  - (c) the agent of the vendor or vendors.
- (5) Service of a notice under this section may be effected in accordance with section 170 or at the address of the vendor shown in the option or in the proposed contract attached to the option or (without affecting the foregoing) by facsimile transmission or in accordance with the service provisions in the option or proposed contract attached to the option.

#### **66ZE Consequences of rescission**

- (1) On service of an effective notice of rescission in accordance with section 66ZD in relation to an option to purchase residential property, the option is to be taken to be rescinded ab initio, but subject to the rights and obligations conferred by this section.
- (2) The purchaser forfeits 0.25 per cent of the purchase price of the property to the vendor.
- (3) The amount forfeited may be recovered from any consideration paid in relation to the option or from any deposit paid in relation to the purchase of the property.
- (4) If the consideration or deposit is insufficient, the balance of any amount forfeited may be recovered from the purchaser as a debt in any court of competent jurisdiction.
- (5) The balance of the consideration or deposit remaining after deduction of any amount forfeited is payable to the purchaser.
- (6) Subject to subsection (7), neither the vendor nor the purchaser is liable to pay any other sum for damages, costs or expenses.
- (7) Either party is entitled to make a claim for:
  - (a) such compensation, adjustment or accounting as is just and equitable between the vendor and purchaser where the purchaser has received the benefit of possession of the property, or
  - (b) the payment of damages, costs or expenses arising out of a breach of any term, condition or warranty contained or implied in the option,



but not so as to affect rights and obligations arising under this Division.

- (8) The vendor may agree to waive any rights regarding forfeiture under this section.
- (9) Stamp duty ceases to be payable on an option rescinded under this Division, and the provisions of the *Stamp Duties Act 1920* relating to the refund of any stamp duty paid on a rescinded agreement for the sale of property apply in relation to any stamp duty already paid on the rescinded option.
- (10) In this section, **deposit** includes any amount paid by the purchaser in relation to the proposed contract attached to the option or on account of the purchase price of residential property.

#### **66ZF Certificates**

- (1) A certificate referred to in section 66ZB or 66ZC complies with this section if it:
  - (a) is in writing, and
  - (b) is signed by a solicitor or barrister, other than:
    - (i) a solicitor acting for the vendor, or
    - (ii) any other solicitor employed in the legal practice of a solicitor acting for the vendor, or
    - (iii) any other solicitor who is a member or employee of a firm of which a solicitor acting for the vendor is a member or employee, and
  - (c) indicates the purpose for which the certificate is given, and
  - (d) contains a statement to the effect that the solicitor or barrister explained to the purchaser the effect of the option and the proposed contract attached to the option, the nature of the certificate and the effect of giving the certificate to the vendor.
- (2) If the purchaser is a corporation, the reference in subsection (1) (d) to the purchaser is to be read as a reference to an officer of the corporation or a person involved in the management of its affairs.
- (3) A document in the form of a certificate that complies with subsection (1) (c) and (d) and that purports to have been signed by a solicitor or barrister is to be regarded, and may be relied on by the vendor, as a valid certificate for all purposes.
- (4) A certificate may, in addition to any other means, be given by facsimile transmission.

#### **66ZG Option void in certain circumstances**

- (1) An option granted for the purchase of residential property is void:

- (a) unless it is granted by way of exchange of counterparts, one of which is signed by the purchaser and the other signed by the vendor, or
  - (b) if it is exercisable within 42 days after it is granted or, if a different period is prescribed, within that period.
- (1A) Subsection (1) (a) does not render an option void if it was granted, without an exchange of counterparts, before the commencement of the amendment made to this section by the *Conveyancing Amendment Act 1997* and it was signed in duplicate by both parties.
- (2) If an option is void under this section, section 66ZE applies as if an effective notice of rescission of the option had been served under this Division, except that:
- (a) the purchaser is not liable to the forfeiture provided for under that section, and
  - (b) that section has effect as if it provided that the whole of the consideration paid in relation to the option and the whole of any deposit paid in relation to the purchase of the property are payable to the purchaser.

**66ZH Option to contain statement regarding cooling off period**

- (1) A statement in the form prescribed by the regulations, relating to the cooling off period, is required to be included in every option to purchase residential property.
- (2) If an option does not contain the statement required under this section, either party may serve a written notice to the effect that the party rescinds the option or (if the option has been exercised) the contract resulting from the exercise of the option.
- (3) On service of an effective notice of rescission under this section, section 66ZE or (if relevant) section 66V applies, except that:
  - (a) the purchaser is not liable to the forfeiture provided for under those sections, and
  - (b) those sections have effect as if they both provided that the whole of the consideration paid in relation to the option and the whole of any deposit paid in relation to the purchase of the property are payable to the purchaser.
- (4) The notice may be served at any time during the period commencing when the option was granted and ending when the option is exercised or ceases to be exercisable or (if relevant) during the period commencing when the option is exercised and ending at 5 pm on the fifth business day after the day when the option is exercised.
- (5) The notice is ineffective if served after completion of the resulting contract.
- (6) This section does not apply where a certificate under section 66ZF has been given for the purposes of section 66ZB or 66ZC.

**66ZI Annexure of proposed contract for sale of land**

- (1) If an option to purchase residential property is granted and the required documents are not attached to the option document at the time it is granted, either party may serve a written notice to the effect that the party rescinds the option or (if the option has been exercised) the contract resulting from the exercise of the option.
- (2) For the purposes of this section, the required documents are:
  - (a) a copy of the proposed contract for the sale of the property (excluding particulars of the purchaser, but including particulars of the purchase price), and
  - (b) the documents required by section 52A to be attached to the contract before signature by the purchaser.
- (3) On service of an effective notice of rescission under this section, section 66ZE or (if relevant) section 66V applies, except that:
  - (a) the purchaser is not liable to the forfeiture provided for under those sections, and
  - (b) those sections have effect as if they both provided that the whole of the consideration paid in relation to the option and the whole of any deposit paid in relation to the purchase of the property are payable to the purchaser.
- (4) The notice may be served at any time during the period commencing when the option was granted and ending when the option is exercised or ceases to be exercisable or (if relevant) during the period commencing when the option is exercised and ending at 5 pm on the fifth business day after the day when the option is exercised.
- (5) The notice is ineffective if served after completion of the resulting contract.

**66ZJ Provisions relating to notices under sections 66ZH and 66ZI**

- (1) This section applies to a notice of rescission under section 66ZH or 66ZI.
- (2) The notice of rescission, if given by the purchaser, must be signed by:
  - (a) the purchaser or the purchaser's solicitor, or
  - (b) if there is more than one purchaser, each of the purchasers or their respective solicitors.
- (3) The notice of rescission, if given by the vendor, must be signed by:
  - (a) the vendor or the vendor's solicitor, or
  - (b) if there is more than one vendor, each of the vendors or their respective solicitors.
- (4) The notice of rescission, if given by the purchaser, must be served on:

- (a) the vendor or the vendor's solicitor, or
  - (b) if there is more than one vendor, any one of the vendors or the solicitor of any of them, or
  - (c) the agent of the vendor or vendors.
- (5) The notice of rescission, if given by the vendor, must be served on:
- (a) the purchaser or the purchaser's solicitor, or
  - (b) if there is more than one purchaser, any one of the purchasers or the solicitor of any of them.
- (6) Service of the notice of rescission may be effected in accordance with section 170 or at the address of the party to be served shown in the option or in the proposed contract attached to the option or (without affecting the foregoing) by facsimile transmission or in accordance with the service provisions in the option or proposed contract attached to the option.

#### **66ZK Operation of Division 9**

- (1) This Division extends to residential property under the provisions of the [Western Lands Act 1901](#), the [Crown Lands Act 1989](#) or any other Act, whether or not it deals with the conveyance or transfer of land.
- (2) This Division does not apply to an option granted before the commencement of this Division (as inserted by the [Conveyancing \(Sale of Land\) Amendment Act 1990](#)).
- (3) This Division, or a prescribed provision of this Division, does not apply to prescribed vendors, purchasers, options or land or in prescribed circumstances.
- (4) Except as provided by regulations made for the purposes of section 66ZA, a provision of an option or any other agreement or arrangement is void if it would, but for this subsection, have the effect of excluding, modifying or restricting the operation of this Division.
- (5) This Division does not affect any right or remedy available otherwise than under this Division.
- (6) This Division binds the Crown.

### **Part 5 General words in conveyances of land**

#### **67 General words in conveyances of land or buildings**

- (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, profits à

prendre, rights, and advantages whatsoever appertaining to the land or any part thereof, at the time of conveyance.

- (2) A conveyance of land having houses or other buildings thereon shall be deemed to include and shall by virtue of this Act operate to convey with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, profits à prendre, rights, and advantages whatsoever appertaining to the land, houses, or other buildings conveyed, or any of them, or any part thereof, at the time of conveyance.
- (3) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained.
- (4) This section shall not be construed as giving to any person a better title to any property, right or thing in this section mentioned than the title which the conveyance gives to the person to the land expressed to be conveyed, or as conveying to the person any property, right, or thing in this section mentioned further or otherwise than as the same could have been conveyed to the person by the conveying parties.
- (5) This section applies only to conveyances made after the commencement of this Act of land other than land under the provisions of the *Real Property Act 1900*.

## **68 Provision for all the estate etc**

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

## **Part 6 Covenants and powers**

### **Division 1A Application of Part**

#### **69 Application of Part 6 to land under the *Real Property Act 1900***

Divisions 1 and 4 shall apply, but Divisions 2, 3 and 5 shall not apply to land under the provisions of the *Real Property Act 1900*, except where otherwise provided.

## Division 1 General provisions

### 70 Benefit of covenants relating to land

- (1) A covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and the covenantee's successors in title and the persons deriving title under the covenantee or them, and shall have effect as if such successors and other persons were expressed.

For the purposes of this subsection in connection with covenants restrictive of the user of land **successors in title** shall be deemed to include the owners and occupiers for the time being of the land of the covenantee intended to be benefited.

- (2) This section applies to covenants whether express or implied under this or any other Act made or implied after the commencement of the *Conveyancing (Amendment) Act 1930*, but the repeal of the section for which this section is substituted does not affect the operation of covenants to which the repealed section applied.

### 70A Burden of covenants relating to land

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

This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject matter may not be in existence when the covenant is made.

- (2) For the purposes of this section in connection with covenants restrictive of the user of land **successors in title** shall be deemed to include the owners and occupiers for the time being of such land.
- (3) This section applies only to covenants made or implied after the commencement of the *Conveyancing (Amendment) Act 1930*.

### 71 Effect of covenant with two or more jointly

- (1) A covenant, whether express, or implied under this or any other Act, and a contract by deed, and a bond or obligation by deed, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to them or for their benefit, shall be deemed to include, and shall by virtue of this Act imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to or for the benefit of any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves.

- (2) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.
- (3) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this Act.

## **72 Covenants etc by a person with himself or herself and another, or others**

- (1) A covenant, whether express, or implied under this or any other Act, or an agreement made by a person with himself or herself and another or others shall be construed and be capable of being enforced in like manner as if the covenant or agreement had been made with the other or others.
- (2) This section applies to covenants or agreements made or implied before or after the commencement of this Act.

## **73 Implied covenants to be joint and several**

- (1) Where a covenant is implied under this or any other Act, and more persons than one are covenantors, such covenant shall be deemed to bind the covenantors and any two or greater number of them jointly and each of them severally.
- (2) Section eighty, subsection four of the *Real Property Act 1900* is hereby repealed.

## **74 Implied covenants may be negatived etc**

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

## **75 Benefit of implied covenants**

The benefit of a covenant implied under this or any other Act shall be annexed and incident to, and shall go with the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is for the whole or any part thereof from time to time vested.

## **76 Construction of implied covenants and provisions**

In the construction of a covenant, or proviso, or other provision implied in a deed by virtue of this or any other Act words importing the singular or plural number or the masculine gender shall be read as also importing the plural or singular number or as extending to females as the case may require.

## **77 No implied rights in certain cases**

No exchange or partition of any land made by deed executed after the commencement of this Act shall imply any condition in law, and the word “give” or the word “grant” in a deed executed after the commencement of this Act shall not imply any covenant in respect of any lands.

## **Division 2 Covenants for title**

### **78 Covenants for title to be implied**

(1) In a conveyance there shall in the several cases in this section mentioned be deemed to be included, and there shall in those several cases by virtue of this Act be implied, a covenant to the effect in this section stated by the person or by each person who is therein expressed to convey, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by that person, with the person, if one, to whom the conveyance is expressed to be made, or with the persons jointly, if more than one, to whom the conveyance is expressed to be made as joint tenants, or with each of the persons if more than one to whom the conveyance is expressed to be made as tenants in common (that is to say):

#### **(A) On conveyance for value (other than a mortgage) by beneficial owner**

In a conveyance (other than a mortgage) for valuable consideration executed after the first day of July, one thousand nine hundred and twenty, and before the commencement of the [Conveyancing \(Amendment\) Act 1972](#), the following covenant by a person therein expressed to convey as beneficial owner and in a conveyance (other than a mortgage and whether or not for valuable consideration) executed after that commencement the following covenant by a person therein expressed to convey as beneficial owner, namely:

That, notwithstanding anything by the person therein expressed to convey as beneficial owner, or any one through whom the person derives title otherwise than by purchase for value made, done, executed, or omitted, or knowingly suffered the person therein expressed to convey as beneficial owner, has with the concurrence of every other person (if any) therein expressed to be conveying by the person’s direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed: AND that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon,



received, and held, occupied, enjoyed, and taken by the person to whom the conveyance is expressed to be made, and any person deriving title under that person, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person therein expressed to convey as beneficial owner, or any person therein expressed to be conveying by the person's direction, or rightfully claiming or to claim by, through, under, or in trust for the person therein expressed to convey as beneficial owner, or any person therein expressed to be conveying by the person's direction, or by, through, or under any one, not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person therein expressed to convey as beneficial owner derives title, otherwise than by purchase for value: AND that, freed and discharged from, or otherwise by the person therein expressed to convey as beneficial owner sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person therein expressed to be conveying by the person's direction, or by any person rightfully claiming by, through, under, or in trust for the person therein expressed to convey as beneficial owner, or by, through, or under any person therein expressed to be conveying by the person's direction, or by, through, or under any one through whom the person therein expressed to convey as beneficial owner, derives title, otherwise than by purchase for value: AND further, that the person therein expressed to convey as beneficial owner, and any person therein expressed to be conveying by the person's direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person therein expressed to convey as beneficial owner, or by, through, or under any person therein expressed to be conveying by the person's direction, or by, through, or under any one through whom the person therein expressed to convey as beneficial owner, derives title, otherwise than by purchase for value, will from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be made, or of any person deriving title under that person, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is expressed to be made, and to those deriving title under that person, subject as, if so expressed, and in the manner in which, the conveyance is expressed to be made, as by that person or them, or any of them, shall be reasonably required;

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage).

**(B) On conveyance of leaseholds for value by beneficial owner**

In a conveyance (other than a mortgage) of leasehold property for valuable consideration executed after the first day of July, one thousand nine hundred and twenty, and before the commencement of the [Conveyancing \(Amendment\) Act 1972](#), the following further covenant by a person therein expressed to convey as beneficial owner and in such a conveyance (other than a mortgage and whether or not for valuable consideration) executed after that commencement the following further covenant by a person therein expressed to convey as beneficial owner, namely:

That, notwithstanding anything by the person therein expressed to convey as beneficial owner or any one through whom the person derives title otherwise than by purchase for value made, done, executed, or omitted or knowingly suffered, the lease or grant creating the term or estate for which the land is expressed to be conveyed, is at the time of conveyance a good, valid, and effectual lease or grant of the property expressed to be conveyed, and is in full force unforfeited, unsurrendered, and in nowise become void or voidable: AND that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee, and the persons deriving title under that person, to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance;

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage).

**(C) On mortgage by beneficial owner**

In a conveyance by way of mortgage executed after the first day of July, one thousand nine hundred and twenty, the following covenant by a person therein expressed to convey as beneficial owner, namely:

That the person therein expressed to convey as beneficial owner has, with the concurrence of every other person (if any) who executes the conveyance and is therein expressed to be conveying by the person's direction, full power to convey the subject-matter expressed to be conveyed by that person, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed; and also that, if default is made in payment of the money intended to be secured by the conveyance or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made and the persons deriving title under that person, to enter into and upon or receive and thenceforth quietly hold, occupy, and enjoy, or take, and have the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person therein expressed to convey as

beneficial owner, or any person who executes the conveyance and is therein expressed to be conveying by the person's direction, or any other person not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made: AND that, freed and discharged from or otherwise by the person therein expressed to convey as beneficial owner sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made: AND further, that the person therein expressed to convey as beneficial owner, and every person who executes the conveyance and is therein expressed to be conveying by the person's direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter expressed to be conveyed or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under that person, but as long as any right of redemption exists under the conveyance, at the cost of the person therein expressed to convey as beneficial owner or of those deriving title under that person, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter expressed to be conveyed and every part thereof to the person to whom the conveyance is expressed to be made and to those deriving title under that person, subject as, if so expressed and in the manner in which, the conveyance is expressed to be made, as by that person or them or any of them shall be reasonably required.

**(D) On mortgage of leaseholds by beneficial owner**

In a conveyance by way of mortgage of leasehold property executed after the first day of July, one thousand nine hundred and twenty, the following further covenant by a person therein expressed to convey as beneficial owner, namely:

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good valid and effectual lease or grant of the land expressed to be conveyed and is in full force, unforfeited and unsurrendered, and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in the lease or grant, and on the part of the lessee or grantee and the persons deriving title under that person to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance: AND also that the person therein expressed to convey as beneficial owner, or the persons deriving title under that person will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or

grantee and the persons deriving title under that person to be paid, observed, and performed, and will keep the person to whom the conveyance is expressed to be made, and those deriving title under that person, indemnified against all actions, proceedings, costs, charges, damages, claims, and demands (if any) to be incurred or sustained by that person or by those deriving title under that person by reason of the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them.

**(E) On settlement**

In a conveyance by way of settlement executed after the first day of July, one thousand nine hundred and twenty, the following covenant by a person therein expressed to convey as settlor, namely:

That the person therein expressed to convey as settlor and every person deriving title under that person by deed or act or operation of law, in the person's lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on the person's death, will, from time to time and at all times after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter expressed to be conveyed to the persons to whom the conveyance is expressed to be made and those deriving title under them, subject as, if so expressed, and in the manner in which, the conveyance is expressed to be made, as by them or any of them shall be reasonably required.

**(F) On conveyance by trustee or mortgagee etc**

In a conveyance executed after the first day of July, one thousand nine hundred and twenty, the following covenant by every person therein expressed to convey as trustee, mortgagee, executor or administrator, or in a specified capacity for the time being apt to describe a person having the management and care of the property of a person under mental disability, or under an order of the Court, which covenant shall be deemed to extend to the person's own acts only, namely:

That the person therein so expressed to convey has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter expressed to be conveyed, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise.

This covenant shall be deemed to be implied in every memorandum of discharge indorsed on or annexed to a conveyance by way of mortgage in the same manner as if such memorandum were a deed of conveyance by the mortgagee.

- (2) Where, in a conveyance executed after the first day of July one thousand nine hundred and twenty:
- (a) a person is therein expressed to be conveying at the direction of another person, and
  - (b) that other person is therein expressed to have given that direction as beneficial owner,
- the same covenant by that other person shall be implied in the conveyance as would be implied therein by the operation of subsection (1) if that other person had been expressed therein to convey as beneficial owner.
- (3) Where a conveyance executed after the first day of July, one thousand nine hundred and twenty, is a conveyance by a wife of property not held by her as her separate property and she and her husband are in the conveyance each expressed to convey as beneficial owner, the same covenant by the husband shall be implied in the conveyance as would be implied if he were therein expressed to have, as beneficial owner, directed his wife to convey.
- (4) A covenant by a person is not implied by the operation of this section in a conveyance executed after the first day of July one thousand nine hundred and twenty where:
- (a) that person is not therein expressed to be conveying as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as executor or administrator, or in a specified capacity for the time being apt to describe a person having the management and care of the property of a person under mental disability, or under an order of the court, or
  - (b) the conveyance is expressed to be at the direction of that person, but the person:
    - (i) did not execute the conveyance, or
    - (ii) is not therein expressed to have given the direction as beneficial owner.
- (5) In this section a conveyance does not include a demise by way of lease at a rent.
- (6) (Repealed)

## **Division 3 Other covenants**

### **79 Covenants implied on conveyance of property subject to incumbrance**

- (1) In every conveyance by way of sale subject to an incumbrance, and whether the conveyance is executed by the purchaser or not, there shall be implied a covenant by the person to whom the property is conveyed with the person making the conveyance, to pay the moneys or perform the obligations secured by the incumbrance, and to perform and observe the covenants and provisions of the

incumbrance, and to keep harmless and indemnified the person making the conveyance in respect of such moneys, obligations, covenants, and provisions.

- (2) This section does not apply to sales made in pursuance of any writ of execution.
- (3) This section applies only to conveyances made after the commencement of this Act.

#### **80 Covenant implied in mortgage**

- (1) In every deed of mortgage there shall be implied against the mortgagor a covenant that the mortgagor will keep all buildings or other improvements erected and made upon the land in as good and substantial repair as the same were in at the date of the mortgage, and that the mortgagee, the mortgagee's executors, administrators, and assigns, may at all convenient times, until such mortgage is redeemed, be at liberty, with or without surveyors or others, to enter into, and upon, such land to view and inspect the state of repair of such buildings and improvements.
- (2) This section applies only to deeds made after the commencement of this Act.
- (3) This section applies to every mortgage under the *Real Property Act 1900*, and section seventy-seven of that Act is hereby repealed.

#### **81 Short forms of covenants by mortgagor**

- (1) Whenever, in any deed of mortgage which is expressed to be made in pursuance of this Act, or in any mortgage under the *Real Property Act 1900*, the mortgagor employs the form of words contained in the first column of Part 1 of the Fourth Schedule, and distinguished by a number therein, such form of words shall imply a covenant by the mortgagor for himself or herself, his or her executors, administrators, and assigns, with the mortgagee, his or her executors, administrators, and assigns, in the terms contained in the second column of the said Schedule, and distinguished by the corresponding number.
- (2) There may be introduced into, or annexed to, any form in the said first column any addition to, exception from, or qualification of the same; or any words in such column may be struck out or omitted; and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission shall be taken to be added to the corresponding form in the second column.
- (3) This section applies only to deeds made after the commencement of this Act and to mortgages made under the *Real Property Act 1900*, after the commencement of the *Conveyancing (Amendment) Act 1930*.

#### **82 Case in which covenant in sec 80 not implied**

- (1) Where on the face of any mortgage it appears that the short form of words contained in the first column of Part 1 of the Fourth Schedule and therein numbered 1 has been

struck out, the covenant represented by such short form of words shall not be implied by section 80.

(2) This section applies to a mortgage under the *Real Property Act 1900*.

### **83 Implied covenants, with mortgagees**

(1) In any deed of mortgage, and in any memorandum of transfer of mortgage indorsed thereon or annexed thereto, and in any deed of transfer of mortgage where there are more mortgagees or more transferees than one, any implied covenant with them shall be deemed to be a covenant with them jointly, in equity as well as at law, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to each of them respectively.

(2) This section applies to dealings under the *Real Property Act 1900*.

### **84 Covenants by lessees**

(1) In every lease of land made after the commencement of this Act there shall be implied the following covenants by the lessee, for himself or herself, his or her executors, administrators, and assigns, with the lessor, his or her executors, administrators, and assigns:

(a) That the lessee or the lessee's executors, administrators and assigns will pay the rent thereby reserved at the time therein mentioned:

Provided, however, that in case the demised premises or any part thereof shall at any time during the continuance of the lease be destroyed or damaged by fire, flood, lightning, storm, or tempest or shall suffer war damage so, in any such event as to render the same unfit for the occupation and use of the lessee, then and so often as the same shall happen, the rent thereby reserved, or a proportionate part thereof, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part thereof shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee, and in case of any dispute arising under this proviso the same shall be referred to arbitration under the provisions of the *Commercial Arbitration Act 1984*.

(b) That the lessee or the lessee's executors, administrators and assigns will, at all times during the continuance of the said lease, keep and, at the termination thereof, yield up the demised premises in good and tenantable repair, having regard to their condition at the commencement of the said lease, accidents war damage and damage from fire, flood, lightning, storm and tempest, and reasonable wear and tear excepted.

- (2) This section applies to every lease under the *Real Property Act 1900*, and section seventy-eight of that Act is hereby repealed.

#### **84A Special provisions in relation to certain leases**

The following provisions shall have effect with respect to every lease in which the covenants implied by section 84 are negatived, and in which the forms of words contained in the first column of Part 2 of Schedule 4 and distinguished by the numbers 2, 4 and 5 or any of them are not employed or are employed with exceptions, qualifications or omissions:

- (a) Where in any such lease there is a covenant to pay the rent reserved there shall be implied the following proviso:

Provided, however, that in case the demised premises or any part thereof shall suffer war damage so as to render the same unfit for the occupation and use of the lessee, then and so often as the same shall happen, the rent thereby reserved, or a proportionate part thereof, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part thereof shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee, and in case of any dispute arising under this proviso the same shall be referred to arbitration under the provisions of the *Commercial Arbitration Act 1984*.

- (b) Where in any such lease there is a covenant by the lessee that the lessee will, during the continuance of the lease, keep the demised premises in good and tenable repair or that the lessee will at the termination of the lease yield up the demised premises in good and tenable repair it shall be implied in such covenant that war damage shall be excepted.

#### **85 Powers in lessor**

- (1) In every lease of land made after the commencement of this Act there shall be implied the following powers in the lessor, the lessor's executors, administrators, or assigns:

- (a) That the lessor, the lessor's executors, administrators or assigns, or the agent of the lessor, the lessor's executors, administrators or assigns, may, twice in every year during the term at a reasonable time of the day upon giving to the lessee two days' previous notice, enter upon the demised premises and view the state of repair thereof, and may serve upon the lessee, the lessee's executors, administrators, or assigns, or leave at the lessee's or the lessee's executors, administrators or assigns last or usual place of abode in New South Wales, or upon the demised premises, a notice in writing of any defect, requiring the lessee or the lessee's executors, administrators or assigns, within a reasonable time, to repair same in accordance with any covenant expressed or implied in the lease.



- (b) That in default of the lessee, the lessee's executors administrators or assigns repairing any defect according to notice, the lessor or the lessor's executors, administrators or assigns may from time to time enter the premises and execute the required repairs.
- (c) That the lessor, the lessor's executors, administrators or assigns, or the agent of the lessor, the lessor's executors, administrators or assigns, may, at all reasonable times during the term, with workers and others and all necessary materials and appliances, enter upon the demised premises or any part thereof, for the purpose of complying with the terms of any present or future legislation affecting the said premises, and of any notices served upon the lessor or lessee by the Secretary of the Department of Health, licensing, municipal, or other competent authority, involving the control of noxious weeds on land or the destruction of noxious animals, or the carrying out of any repairs, alterations, or works of structural character, which the lessee may not be bound, or if bound, may neglect to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease: Provided that such control, destruction, repairs, alterations, and works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee.
- (d) That, in case the rent or any part thereof is in arrear for the space of one month (although no formal demand therefor has been made), or in case default is made in the fulfilment of any covenant, condition, or stipulation, whether expressed or implied in the lease, and on the part of the lessee to be performed or observed, and such default is continued for the space of two months, or in case the repairs required by such notice as aforesaid are not completed within the time therein specified, the lessor or the lessor's executors, administrators or assigns may re-enter upon the demised premises (or any part thereof in the name of the whole) and thereby determine the estate of the lessee, the lessee's executors, administrators, or assigns, therein, but without releasing the lessee or the lessee's executors, administrators or assigns from liability in respect of the breach or non-observance of any such covenant, condition, or stipulation.

- (2) This section applies to every lease under the *Real Property Act 1900*, and section seventy-nine of that Act is hereby repealed.

## **86 Short forms of covenants by lessees**

- (1) Whenever in any lease which is expressed to be made in pursuance of this Act, or in any lease under the *Real Property Act 1900*, the lessee or the lessor employs the form of words contained in the first column of Part 2 of the Fourth Schedule and distinguished by a number therein, such form of words shall imply a covenant by the lessee or the lessor for himself or herself, the lessee or lessor's executors, administrators, and assigns, with the lessor or the lessee, the lessor or lessee's executors, administrators, and assigns, in the terms contained in the second column

of the said Schedule, and distinguished by the corresponding number.

- (2) There may be introduced into or annexed to any form in the first column any addition to, exception from, or qualification of the same; or any words in such column may be struck out or omitted; and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission, shall be taken to be added to the corresponding form in the second column.
- (3) This section applies only to leases made by deed executed after the commencement of this Act and to leases made under the *Real Property Act 1900*, after the commencement of the *Conveyancing (Amendment) Act 1930*.

### **87 Cases in which covenants or powers in secs 84 and 85 not implied**

- (1) Where on the face of any lease it appears that any of the short forms of words contained in the first column of Part 2 of the Fourth Schedule has been struck out, the covenant or proviso represented by such short form of words shall not be implied in the lease by sections 84 or 85.
- (2) This section applies to a lease under the *Real Property Act 1900*.

## **Division 4 Easements and restrictive and positive covenants**

### **87A Definitions**

In this Division:

**carbon sequestration** by a tree or forest means the process by which the tree or forest absorbs carbon dioxide from the atmosphere.

**carbon sequestration right**, in relation to land, means a right conferred on a person by agreement or otherwise to the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land after 1990.

**forestry covenant**, in relation to land, means a covenant that is incidental to a forestry right and includes any such covenant that imposes obligations requiring:

- (a) the construction and maintenance of access roads within the land,
- (b) the erection and maintenance of fencing on the land,
- (c) the provision and maintenance of water supplies within the land,
- (d) the provision of access to or the maintenance of trees or forests on land that is the subject of any carbon sequestration right, or
- (e) the ownership of any tree or trees on land that is the subject of a forestry right to be vested in the person who owns the forestry right,

or imposes any term or condition with respect to the performance of or failure to perform any such obligation.

**forestry right**, in relation to land, means:

- (a) an interest in the land pursuant to which a person having the benefit of the interest is entitled:
  - (i) to enter the land and establish, maintain and harvest (or to maintain and harvest) a crop of trees on the land, or
  - (ii) to enter the land and establish, maintain and harvest (or to maintain and harvest) a crop of trees on the land and to construct and use such buildings, works and facilities as may be necessary or convenient to enable the person to establish, maintain and harvest the crop, or
- (b) a carbon sequestration right in respect of the land, or
- (c) a combination of the interest and right referred to in paragraphs (a) and (b).

**positive covenant** means a covenant for maintenance or repair imposed under section 88BA, a public positive covenant or a forestry covenant.

**public positive covenant**, in relation to land, includes a covenant which imposes obligations requiring:

- (a) the carrying out of development on or with respect to the land, within the meaning of the *Environmental Planning and Assessment Act 1979*,
- (b) the provision of services on or to the land or other land in its vicinity, or
- (c) the maintenance, repair or insurance of any structure or work on the land,

or imposes any term or condition with respect to the performance of or failure to perform any such obligation.

## **88 Requirements for easements and restrictions on use of land**

- (1) Except to the extent that this Division otherwise provides, an easement expressed to be created by an instrument coming into operation after the commencement of the *Conveyancing (Amendment) Act 1930*, and a restriction arising under covenant or otherwise as to the user of any land the benefit of which is intended to be annexed to other land, contained in an instrument coming into operation after such commencement, shall not be enforceable against a person interested in the land claimed to be subject to the easement or restriction, and not being a party to its creation unless the instrument clearly indicates:
  - (a) the land to which the benefit of the easement or restriction is appurtenant,

(b) the land which is subject to the burden of the easement or restriction:

Provided that it shall not be necessary to indicate the sites of easements intended to be created in respect of existing tunnels, pipes, conduits, wires, or other similar objects which are underground or which are within or beneath an existing building otherwise than by indicating on a plan of the land traversed by the easement the approximate position of such easement,

(c) the persons (if any) having the right to release, vary, or modify the restriction, other than the persons having, in the absence of agreement to the contrary, the right by law to release, vary, or modify the restriction, and

(d) the persons (if any) whose consent to a release, variation, or modification of the easement or restriction is stipulated for.

(1A) Land (including the site of an easement) is clearly indicated for the purposes of this section if it is shown:

(a) in the manner prescribed by regulations made under this Act or the *Real Property Act 1900*, or

(b) in any other manner satisfactory to the Registrar-General in the particular case or class of cases concerned.

This subsection does not limit other ways in which land may be clearly indicated.

(2) This section shall not prevent the enforcement by a person entitled to a reversion remainder or other future estate or interest in any land of any contract against a person entitled to the estate or interest on which the reversion remainder or other future estate or interest is expectant.

(3) This section applies to land under the provisions of the *Real Property Act 1900*, and in respect thereof:

(a) the Registrar-General shall have, and shall be deemed always to have had, power to record a restriction referred to in subsection (1), in such manner as the Registrar-General considers appropriate, in the folio of the Register kept under that Act that relates to the land subject to the burden of the restriction, to record in like manner any dealing purporting to affect the operation of a restriction so recorded and to record in like manner any release, variation or modification of the restriction,

(b) a recording in the Register kept under that Act of any such restriction shall not give the restriction any greater operation than it has under the dealing creating it, and

(c) a restriction so recorded is an interest within the meaning of section 42 of that Act.

- (4) Subsection (1) does not apply to an easement without a dominant tenement acquired by or for a prescribed authority referred to in section 88A, nor to any restriction on the use of land in relation to any such easement.

**88AA Limitation of enforceability of profits à prendre**

- (1) Except to the extent to which this Division otherwise provides, a profit à prendre expressed to be created by an instrument coming into operation after the commencement of the *Conveyancing (Forestry Rights) Amendment Act 1987* shall not be enforceable against a person interested in land claimed to be subject to the profit à prendre (other than a person who is a party to the instrument) unless the instrument indicates:
- (a) the land which is subject to the burden of the profit à prendre, and
  - (b) in the case of a profit à prendre that is expressed to benefit land—the land to which the benefit of the profit à prendre is appurtenant.
- (2) This section shall not prevent the enforcement, by a person entitled to a reversion, remainder or other estate or interest in any land, of any agreement against a person entitled to the estate or interest on which the reversion, remainder or other estate or interest is expectant.

**88AB Forestry rights to be deemed to be profits à prendre**

- (1) A forestry right shall, for all purposes, be deemed to be a profit à prendre.
- (2) If a forestry right consists in whole or in part of a carbon sequestration right, the profit à prendre deemed to exist by subsection (1) in relation to the carbon sequestration right consists of the following:
- (a) the profit from the land is taken to be the legal, commercial or other benefit (whether present or future) of carbon sequestration by any existing or future tree or forest on the land that is the subject of the carbon sequestration right,
  - (b) the right to take something from the land is taken to be the right to the benefit conferred by the carbon sequestration right.

**88AC Other easements and restrictions appurtenant to easements**

- (1) Another easement, or the benefit of a restriction on the use of land, may be made appurtenant or annexed to an easement.
- (2) The power conferred by this section is taken always to have existed.
- (3) This section applies, and is taken always to have applied, to land under the provisions of the *Real Property Act 1900*.

## 88A Easements in gross

(1) In this section:

***prescribed authority*** means:

- (a) the Crown, or
- (b) a public or local authority constituted by an Act, or
- (c) a corporation prescribed by the regulations for the purposes of this section.

(1A) An easement without a dominant tenement may be created in favour of a prescribed authority, and any such easement may be assured to a prescribed authority.

(1B) However, an easement without a dominant tenement may only be created in favour of, or assured to, a corporation prescribed by the regulations for the purposes of this section if the easement is for the purpose of, or incidental to, the supply of a utility service to the public, including (but not limited to):

- (a) the supply of gas, water or electricity, or
- (b) the supply of drainage or sewage services.

(2) In an instrument which:

- (a) takes effect on or after 15 June 1964 (the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*),
- (b) purports to create a right-of-way or drainage easement without a dominant tenement, and
- (c) purports to create or assure such a right-of-way or drainage easement in favour of or to a prescribed authority,

the expressions “right of carriage way”, “right of footway”, “easement to drain water” and “easement to drain sewage” have the same effect as if there had been inserted in lieu thereof respectively the words contained in Schedule 4A.

(2A) In an instrument which takes effect after the commencement of Schedule 1 [5] to the *Property Legislation Amendment (Easements) Act 1995* and purports to create or assure an easement without a dominant tenement of the following kind in favour of or to a prescribed authority, the following expressions have effect as if the words attributed in Schedule 4A to those expressions were inserted instead:

easement for repairs

easement for drainage of sewage

easement for drainage of water

easement for electricity purposes

easement for services

easement for water supply

right of access

(2B) The meaning given to an expression by this section and Schedule 4A may be varied (whether by way of addition, exception, qualification or omission), and is taken to have always been capable of being so varied, by the instrument in which the expression is used.

(2C) In Schedule 4A:

(a) a body includes any person for the time being authorised by the body, and

(b) a lot includes any other distinct piece or parcel of land (such as an island, a portion of a Parish or a Section).

(2D) The power conferred by this section is taken always to have existed. However, the power conferred by this section on a corporation prescribed by the regulations for the purposes of this section confers that power on and from the date the corporation is first so prescribed if the regulations so provide.

(2E) The restriction imposed by subsection (1B) on the power conferred by this section does not apply to an easement created or assured before the commencement of that subsection.

(3) This section applies and shall be deemed always to have applied to land under the provisions of the *Real Property Act 1900*.

(4)-(8) (Repealed)

#### **88BA Positive covenants for maintenance or repair**

(1) A covenant may be imposed requiring the maintenance or repair, or the maintenance and repair, of land that is the site of an easement or other land that is subject to the burden of the easement (or both) by any one or more of the persons from time to time having the benefit or burden of the easement.

(2) Such a covenant may be imposed:

(a) by registration under this Act or the *Real Property Act 1900* (as the case may require) of the instrument indicating the persons bound by or including the terms of the easement, if the terms of the covenant are included in that instrument, or

(b) by registration under the *Real Property Act 1900* of a memorandum of positive covenant in the form approved under that Act that includes the terms of the

covenant, if the site of the easement is under the provisions of that Act, or

- (c) by registration under Division 1 of Part 23 of a deed expressed to be made under this section and including the terms of the covenant, if the site of the easement is not under the provisions of that Act.
- (3) The instrument including the covenant must clearly indicate the land which is to be maintained or repaired, the land to which the benefit of the covenant is appurtenant and the land which is subject to the burden of the covenant. If the land is subject to an easement without a dominant tenement created in favour of a prescribed authority (as referred to in section 88A), the instrument must indicate the name of the prescribed authority.
- (4) The instrument must be executed by each person to be bound by the covenant:
  - (a) who has an estate or interest registered under the *Real Property Act 1900* in land to which the benefit or burden of the covenant relates, or
  - (b) who is seised or possessed of an estate or interest in land to which the benefit or burden of the covenant relates, if the land is not under the provisions of that Act.
- (5) When recorded in the Register kept under the *Real Property Act 1900*, such a covenant is an interest within the meaning of section 42 of that Act.
- (6) Such a covenant may be released or varied:
  - (a) by registration under the *Real Property Act 1900* of a dealing in the form approved under that Act providing for the release of the covenant or for variation of the covenant, if the site is under the provisions of that Act, or
  - (b) by registration under Division 1 of Part 23 of a deed of release or a deed of variation, if the site is not under the provisions of that Act.
- (7) The instrument releasing or varying the covenant must be executed by:
  - (a) each person for the time being entitled to enforce the covenant or otherwise having the benefit of the covenant, and
  - (b) each person against whom the covenant may be enforced for the time being, in the case of a variation.

#### **88BB Creation of cross-easements for party walls by plans**

- (1) A plan lodged for registration or recording under Division 3 of Part 23 after the commencement of this section is, for the purposes of section 88B (2) (c), taken to be intended to create cross-easements if:
  - (a) a boundary of a lot is shown in the plan as passing longitudinally through the whole or any part of a wall, and



- (b) the wall is described in the plan as a “party wall”.
- (2) The benefit of such an easement is appurtenant to each lot shown in the plan as consisting of or including a portion of the wall.
- (3) Each lot shown in the plan as consisting of or including another portion of the wall is subject to the burden of the easement.
- (4) The easement entitles each person for the time being having the benefit of the easement to the continued existence of each portion of the wall:
  - (a) that is necessary for the support of so much of the building as is contained within the lot to which the easement is appurtenant, and
  - (b) that consists of or is included within another lot which is subject to the burden of the easement.

**88B Creation and release of easements, profits à prendre and restrictions on use of land by plans**

- (1) In this section **public road** and **road** have the meanings respectively ascribed to those expressions by the [Roads Act 1993](#).
- (2) A plan shall not be lodged in the office of the Registrar-General for registration or recording under Division 3 of Part 23 unless it indicates in the manner prescribed in respect of the plan by regulations made under this Act or the [Real Property Act 1900](#):
  - (a) what easements, if any, are intended to be created:
    - (i) burdening land comprised in the plan and appurtenant to any existing roads shown on the plan, and
    - (ii) appurtenant to any roads to be vested upon registration of the plan,
  - (b) what easements, if any, referred to in section 88A are intended to be created burdening land comprised in the plan and in whose favour those easements are intended to be created,
  - (c) what other easements or profits à prendre, if any, are intended to be created appurtenant to or burdening land comprised in the plan, and
  - (c1) what easements or profits à prendre, if any, appurtenant to or burdening land comprised in the plan are intended to be released or partially released, and
  - (d) what restrictions on the use of land or positive covenants, if any, are intended to be created benefiting or burdening land comprised in the plan.
- (3) On registration or recording under Division 3 of Part 23 of a plan upon which any easement, profit à prendre, restriction or positive covenant is indicated in accordance

with paragraph (a), (b), (c) or (d) of subsection (2) then, subject to compliance with the provisions of this Division:

- (a) any easement so indicated as intended to be created as appurtenant to any existing public roads shown in the plan or any roads to be vested in the council upon registration of the plan shall be created and shall without any further assurance vest in the council by virtue of such registration and of this Act,
- (b) any easement so indicated as intended to be created pursuant to section 88A shall be created and shall without any further assurance vest in the relevant prescribed authority referred to in that section by virtue of such registration and of this Act,
- (c) any other easement, profit à prendre or any restriction on the use of land (not being a restriction as to user of the type that may be imposed under section 88D or 88E) so indicated as intended to be created shall:
  - (i) be created,
  - (ii) without any further assurance and by virtue of such registration or recording and of this Act, vest in the owner of the land benefited by the easement or profit à prendre or be annexed to the land benefited by the restriction, as the case may be, notwithstanding that the land benefited and the land burdened may be in the same ownership at the time when the plan is registered or recorded and notwithstanding any rule of law or equity in that behalf, and
  - (iii) not be extinguished by reason of the owner of a parcel of land benefited by such easement, profit à prendre or restriction holding or acquiring a greater interest in a separate parcel of land burdened thereby, and
- (d) any restriction on the use of land or positive covenant that is of the type that may be imposed under section 88BA, 88D or 88E and is so indicated as intended to be created takes effect as if it had been so imposed.

(3AA) On registration or recording under Division 3 of Part 23 of a plan on which a release of an easement or profit à prendre is indicated in accordance with subsection (2) (c1), the easement or profit à prendre is released.

(3A) When creating a folio of the Register kept under the *Real Property Act 1900* for land benefited by any easement, or for land burdened by any easement, restriction on the use of land or positive covenant, created by this section, the Registrar-General shall record in that folio, in such manner as the Registrar-General considers appropriate, the easement, restriction on the use of land or positive covenant, as the case may be.

(4) Any restriction on the use of land or positive covenant created by this section shall for the purposes of this Act and the *Real Property Act 1900*, have effect as if it was contained in a deed.

### **88C Restrictions relating to brick construction**

- (1) In this section **restriction** means a restriction as to the user of land that arose, under covenant or otherwise, before the commencement of the *Conveyancing (Amendment) Act 1972*, or so arises after that commencement, the benefit of which is intended to be annexed to other land.
- (2) For the purposes of this section:
  - (a) a wall of a building or structure is of brick veneer construction in so far as the outer part of that wall consists of brick having a thickness of at least 76 millimetres and the inner part of that wall consists of a material other than brick, and
  - (b) a building or structure is of brick veneer construction if its external walls are of brick veneer construction, or partly of brick construction and partly of brick veneer construction, whether or not its other walls are so constructed.
- (3) To the extent to which a restriction:
  - (a) does not operate to prohibit the erection on land to which the restriction relates of a building or structure having walls of brick, and
  - (b) does not exclude the operation of this section by specific reference thereto or does not, by the express use in the instrument under which it arises of terms appropriate to describe brick veneer construction, operate to prohibit the use of that form of construction in a building or structure to be erected on that land,it is not a breach of the restriction to erect on that land a building or structure of brick veneer construction.
- (4) This section applies to and in respect of a building or structure erected before or after the commencement of the *Conveyancing (Amendment) Act 1972*, and so applies as if a building or structure erected before that commencement had been erected after that commencement.

### **88D Regulation of use of land held by a prescribed authority**

- (1) In this section:

**prescribed authority** means:

- (a) the Crown,
- (b) a public or local authority constituted by an Act, or
- (c) a corporation prescribed for the purposes of this section.

**prescribed land** means land vested in a prescribed authority.

- (2) A prescribed authority may, by an order that:
- (a) describes the land in a manner enabling it to be identified and specifies, in the case of land under the provisions of the *Real Property Act 1900*, the reference to the folio of the Register kept under that Act, or the registered dealing under that Act, that evidences the title to that land,
  - (b) specifies the particulars of the restrictions or public positive covenants, and
  - (c) specifies the prescribed authority in which the land is vested,
- impose restrictions on the use of or impose public positive covenants on any prescribed land vested in it.
- (3) Subject to subsection (7), upon lodgment in a form approved by the Registrar-General of a copy of an order made under subsection (2), the Registrar-General shall:
- (a) where the land to which the order relates is land under the provisions of the *Real Property Act 1900*—make such recordings in the Register in respect of the restriction or public positive covenant as the Registrar-General considers appropriate, or
  - (b) in any other case—cause the copy of the order to be registered in the General Register of Deeds kept under Division 1 of Part 23.
- (4) For the purposes of Division 1 of Part 23, a copy of an order registered pursuant to subsection (3) (b) shall be deemed to be a registration copy of an instrument duly registered under that Division.
- (5) A restriction or public positive covenant referred to in an order made under subsection (2):
- (a) has no force or effect:
    - (i) unless it is recorded, or the copy of the order is registered, pursuant to subsection (3), and
    - (ii) unless, at the time when that recording or registration is effected, the land to which the restriction or public positive covenant relates is vested in the prescribed authority which made the order,and subject thereto takes effect upon being so recorded or registered, and
  - (b) when recorded as provided by subsection (3) (a), has no greater operation than it has under the order that relates to it and under this section.
- (6) Where a restriction or public positive covenant is recorded pursuant to subsection (3) (a), the restriction or public positive covenant is an interest within the meaning of section 42 of the *Real Property Act 1900*.

- (7) Where the Registrar-General is satisfied that, by the operation of subsection (5) (a) (ii), a restriction or public positive covenant referred to in an order made under subsection (2) would have no force or effect if recorded under subsection (3) or if a copy of the order in which the restriction or public positive covenant is referred to is registered under that subsection, the Registrar-General shall, where the land described in the order is land under the provisions of the *Real Property Act 1900*, and may, in any other case, refuse to record the restriction or public positive covenant or, as the case may require, to register a copy of the order in which the restriction or public positive covenant is referred to.
- (8) Subject to subsection (9), where a restriction or public positive covenant takes effect under this section the prescribed authority which made the order by which the restriction or public positive covenant was imposed may enforce the restriction or public positive covenant against a person claiming an interest in the land described in the order as if, upon the acquisition by that person of that interest, that person had entered into a binding covenant with that prescribed authority to observe the restriction or public positive covenant.
- (9) Subsection (8) does not authorise enforcement against a person claiming an interest in land of a restriction or public positive covenant imposed on the land under this section where that person:
- (a) is a person who, at the time the restriction or public positive covenant took effect, had acquired that interest or had acquired or become entitled to an option to purchase that interest, or
  - (b) is a person claiming that interest through or under a person referred to in paragraph (a).
- (10) (Repealed)
- (11) The powers of a prescribed authority to rescind or revoke an order made under subsection (2) may be exercised in relation to the whole of the land described in the order or any part thereof.
- (12) Where an order rescinding or revoking an order made under subsection (2) is made, the prescribed authority which made the order rescinded or revoked shall lodge with the Registrar-General in a form approved by the Registrar-General a copy of the order of rescission or revocation and subsections (3) and (4) shall apply to and in respect of such a copy so lodged as if it were a copy of an order made under subsection (2).
- (13) Subject to subsection (14), a restriction or public positive covenant imposed on land under this section may be varied by an agreement in writing between the prescribed authority which made the order by which the restriction or public positive covenant was imposed and the person or persons against whom, at the time of the recording or registration referred to in subsection (14), the restriction or public positive covenant is

enforceable.

- (14) An agreement referred to in subsection (13) does not take effect unless:
- (a) where the land to which the restriction or public positive covenant relates is under the provisions of the *Real Property Act 1900*—the agreement is recorded under subsection (15), or
  - (b) in any other case—the agreement is by deed registered under Division 1 of Part 23.
- (15) Where an agreement referred to in subsection (13) relates to a restriction or public positive covenant imposed on land under the provisions of the *Real Property Act 1900*, the Registrar-General, upon lodgment in the Registrar-General's office of an application in the form approved under that Act, shall, in the Register kept under that Act, make such recordings with respect to the agreement as the Registrar-General considers appropriate.

**88E Regulation of use of land not held by a prescribed authority**

- (1) In this section ***prescribed authority*** means:
- (a) the Crown,
  - (b) a public or local authority constituted by an Act, or
  - (c) a corporation prescribed for the purposes of this section.
- (2) A prescribed authority may, in accordance with this section, impose restrictions on the use of or impose public positive covenants on any land not vested in the authority, so that the restriction or public positive covenant is enforceable by the authority whether or not the benefit of the restriction or public positive covenant is annexed to other land.
- (3) A restriction or public positive covenant referred to in subsection (2) may be imposed in relation to land under the provisions of the *Real Property Act 1900* by a memorandum of restriction or public positive covenant in the form approved under that Act that:
- (a) specifies the prescribed authority that is imposing the restriction or public positive covenant,
  - (b) is executed by that prescribed authority, by the registered proprietor of the land and by each other person who has a registered estate or interest in the land and is to be bound by the restriction or public positive covenant, and
  - (c) is lodged in the office of the Registrar-General,
- and such a restriction or public positive covenant takes effect when the Registrar-

General has made, in the Register kept under that Act, such recordings with respect to the restriction or public positive covenant as the Registrar-General considers appropriate.

- (4) A restriction or public positive covenant referred to in subsection (2) may be imposed in relation to land that is not under the provisions of the *Real Property Act 1900* by a deed that:
- (a) is expressed to be made pursuant to this section,
  - (b) specifies the prescribed authority that is imposing the restriction or public positive covenant, and
  - (c) is executed by that prescribed authority, by the owner of the land and by each other person who is seised or possessed of any estate or interest in the land and is to be bound by the restriction or public positive covenant,

and such a restriction or public positive covenant takes effect when the deed by which it is imposed is registered under Division 1 of Part 23.

- (5) Where a restriction or public positive covenant referred to in subsection (2) takes effect, the prescribed authority that imposed the restriction or public positive covenant may enforce it against any person who is, or claims under, a signatory to the memorandum or deed that imposed the restriction or public positive covenant as if that person had entered into a binding covenant with that prescribed authority to observe the restriction or public positive covenant.
- (6) Where a restriction or public positive covenant referred to in subsection (2) is recorded in the Register kept under the *Real Property Act 1900*, the restriction or public positive covenant is an interest within the meaning of section 42 of that Act.
- (7) A restriction or public positive covenant imposed pursuant to this section may be released or varied:
- (a) where the land affected by the restriction or public positive covenant is under the provisions of the *Real Property Act 1900*—by a memorandum of release or a memorandum of variation, as the case may require, in the form approved under that Act and recorded in the Register kept under that Act, or
  - (b) where the land so affected is not under the provisions of that Act—by a deed of release or a deed of variation, as the case may require, registered under Division 1 of Part 23,

executed by the prescribed authority entitled to enforce the restriction or public positive covenant and, in the case of a variation of a restriction or public positive covenant, bearing the written consent of each person against whom, at the time the memorandum is recorded, or the deed registered, the restriction or public positive

covenant is enforceable.

- (8) Upon lodgment in the Registrar-General's office of a memorandum of release or a memorandum of variation referred to in subsection (7), the Registrar-General shall, in the Register kept under the *Real Property Act 1900*, make such recordings with respect to the release or variation as the Registrar-General considers appropriate.

**88EA Regulation of use of land subject to a forestry right**

- (1) A restriction on the use of land, or a forestry covenant, may be imposed on land the subject of a forestry right by an instrument (whether the same instrument as that by which the forestry right is created or by another instrument) that:
- (a) describes the land in a manner enabling it to be identified, and
  - (b) specifies the particulars of the restriction or covenant.
- (2) In the case of land under the provisions of the *Real Property Act 1900*, a restriction or forestry covenant referred to in subsection (1) takes effect when the Registrar-General has made, in the Register kept under that Act, such recordings with respect to the restriction or covenant as the Registrar-General considers appropriate.
- (3) A restriction or forestry covenant referred to in subsection (1) may be imposed in relation to land that is not under the provisions of the *Real Property Act 1900* by a deed that:
- (a) is expressed to be made pursuant to this section, and
  - (b) is executed:
    - (i) by the person to whom the benefit of the restriction or covenant enures,
    - (ii) by the owner of the land, and
    - (iii) by each other person who is seised or possessed of any estate or interest in the land and who is to be bound by the restriction or covenant,

and such a restriction or covenant takes effect when the deed by which it is imposed is registered under Division 1 of Part 23.

- (4) Where a restriction or forestry covenant referred to in subsection (1) takes effect, the person to whom the benefit of the restriction or covenant enures may enforce it against any person who is, or who claims under, a signatory to the instrument that imposed the restriction or covenant as if that person had entered into a binding agreement with the person to whom the benefit of the restriction or covenant enures to observe the restriction or covenant.
- (5) Where a restriction or forestry covenant referred to in subsection (1) is recorded in the Register kept under the *Real Property Act 1900*, the restriction or covenant is an



interest within the meaning of section 42 of that Act.

- (6) A restriction or forestry covenant imposed pursuant to this section may be released or varied:
- (a) where the land affected by the restriction or covenant is under the provisions of the *Real Property Act 1900*—by a memorandum of release or a memorandum of variation, as the case may require, in the form approved under that Act and recorded in the Register kept under that Act, or
  - (b) where the land so affected is not under the provisions of that Act—by a deed of release or a deed of variation, as the case may require, registered under Division 1 of Part 23,

executed by the person entitled to enforce the restriction or covenant and (in the case of a variation of a restriction or covenant) bearing the written consent of each person against whom, at the time the memorandum is recorded or the deed registered, the restriction or covenant is enforceable.

- (7) Upon lodgment in the office of the Registrar-General of a memorandum of release or a memorandum of variation referred to in subsection (6), the Registrar-General shall, in the Register kept under the *Real Property Act 1900*, make such recordings with respect to the release or variation as the Registrar-General considers appropriate.
- (8) Notwithstanding any other provision of this section, a restriction or forestry covenant has effect while the forestry right to which it is incidental subsists, and not otherwise.

#### **88F Effect of certain positive covenants**

- (1) If a positive covenant is imposed on land, the covenant affects the land and persons from time to time having any estate or interest in the land in the same way as if it were a covenant imposing a restriction on the use of the land.
- (2) The prescribed authority having the benefit of a public positive covenant shall have the following powers:
- (a) for the purpose of ensuring observance of the covenant, the authority may, by its servants or agents, twice in every year at a reasonable time of the day and upon giving to the person against whom the covenant is enforceable not less than 2 days' notice, enter the land and view the condition of the land and the state of construction or repair of any structure or work on the land, except to the extent that the authority and that person may otherwise agree,
  - (b) where the covenant requires that person to insure any structure, the authority may insure on the failure of that person to comply with the covenant,
  - (c) where the covenant requires the carrying out of development of any nature by that person, the authority may carry out development of that nature on the failure

of that person to comply with the covenant,

- (d) the authority may recover from that person, in a court of competent jurisdiction, any expense reasonably incurred by it in exercising its powers under paragraph (b) or (c).
- (3) This section does not prevent the imposition on land under section 88D or 88E or otherwise of a covenant containing powers of a like nature to or a different nature from those granted by this section.
- (4) Where a prescribed authority obtains a judgment for an amount payable to it for a failure to comply with a public positive covenant imposed on land under section 88D or 88E, the authority may lodge with the Registrar-General an application for registration of a charge over the land for the amount from time to time payable in accordance with the judgment:
  - (a) where the land is under the provisions of the *Real Property Act 1900*—in the form approved under that Act, or
  - (b) in any other case—in the manner prescribed for registration of the charge under section 187.
- (5) When an application is lodged under the provisions of the *Real Property Act 1900* pursuant to subsection (4) (a), the Registrar-General shall, in the Register kept under that Act, make appropriate recordings with respect to the charge to which the application relates.
- (6) A charge referred to in subsection (4) takes effect when registered under section 187 or recorded pursuant to subsection (5), as the case may be, and operates in favour of the prescribed authority which applied for registration of the charge as a charge on the land for the amount to which it relates.
- (7) Where a charge is imposed under this section, the judgment to which the charge relates shall not be enforced by execution against the land which is subject to the charge, but nothing in this subsection affects any remedy afforded a chargee under this Act, the *Real Property Act 1900* or the *Strata Schemes Management Act 1996*.
- (8) Where a charge is recorded under the *Real Property Act 1900* pursuant to subsection (5), the charge is an interest within the meaning of section 42 of that Act.

### **88G Certificate of amount due**

- (1) Any person may apply to a prescribed authority for a certificate under this section as to the amount (if any) payable to it because of a failure to comply with a public positive covenant imposed on land under section 88D or 88E.
- (2) The application for the certificate shall be made in writing and shall state the name

and address of the applicant and particulars of the land in respect of which the information is required.

- (3) On receipt of the application and after payment of the prescribed fee, the prescribed authority shall immediately give or post to the applicant a certificate in writing:
  - (a) stating the amount (if any) payable to the authority because of a failure to comply with a public positive covenant imposed on the land and particulars of how the amount is comprised or that no such amount is payable, or
  - (b) stating particulars of the work (if any) carried out by the authority the cost or part of the cost of which may be recovered by the authority under the covenant or that no such work has been carried out.
- (4) Production of the certificate shall for all purposes be conclusive proof in favour of a purchaser in good faith and for value of the land that, at the time at which the certificate is issued:
  - (a) no amount other than that stated in the certificate was due or payable to the prescribed authority in respect of the land because of any such failure, and
  - (b) no work the cost or part of the cost of which may be recovered by the authority under the covenant other than that the particulars of which are stated in the certificate has been carried out by the authority.

#### **88H Injunctions**

- (1) Where a person has engaged, is engaged or is proposing to engage in any conduct that constituted, constitutes or would constitute a contravention of a covenant imposing a restriction on the use of land or a positive covenant, the Court may, on the application of the prescribed authority or other person having the benefit of the covenant, grant an injunction restraining the firstmentioned person from engaging in that conduct and, if in the opinion of the Court it is desirable to do so, requiring that person to do any act or thing.
- (2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do any act or thing that the person is required to do by or under a positive covenant, the Court may, on the application of the prescribed authority having the benefit of the covenant, grant an injunction requiring the person to do that act or thing.
- (3) Where an application is made to the Court for an injunction under subsection (1), the Court may, if in its opinion it is desirable to do so, before considering the application, grant an interim injunction restraining a person from engaging in conduct of the kind referred to in that subsection pending the determination of the application.
- (4) The Court may rescind or vary an injunction granted under subsection (1), (2) or (3).

- (5) The power of the Court to grant an injunction under subsection (1) or (3) may be exercised:
- (a) if the Court is satisfied that the person has engaged in conduct of that kind—whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind, or
  - (b) if it appears to the Court that, in the event that the injunction is not granted, it is likely that the person will engage in conduct of that kind—whether or not the person has previously engaged in conduct of that kind and whether or not there would be an imminent danger of substantial damage to any person if the firstmentioned person were to engage in conduct of that kind.
- (6) Where an application is made to the Court for the grant of an injunction requiring a person to do a particular act or thing, the power of the Court to grant the injunction may be exercised:
- (a) if the Court is satisfied that the person has refused or failed to do that act or thing—whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing, or
  - (b) if it appears to the Court that, in the event that an injunction is not granted, it is likely that the person will refuse or fail to do that act or thing—whether or not the person has previously refused or failed to do that act or thing and whether or not there is an imminent danger of substantial damage to any person if the firstmentioned person refuses or fails to do that act or thing.
- (7) In any case in which an application is made to the Court for an injunction under this section, the Court may, if in its opinion it is desirable to do so, award damages to the applicant instead of or as well as granting an injunction.
- (8) A person who has been refused an order under section 160 of the *Strata Schemes Management Act 1996* may not apply for an injunction under this section to the same effect as the order sought.

### **88I Transfer of land to prescribed authority**

- (1) Where a person has contravened, whether by act or omission, a public positive covenant imposed on land under section 88D or 88E, the prescribed authority entitled to enforce the covenant may apply to the Court for an order that the land be conveyed or transferred to the authority.
- (2) Notice of the application shall be served on the person by the prescribed authority, and otherwise the application shall be made, in accordance with rules of Court.
- (3) An order may be made under this section only where the Court is satisfied:
- (a) that, because of the contravention by the person or for any other reason, the

continued holding of the land by the person is reasonably likely to endanger the health or safety of the public,

- (b) that there is no reasonable likelihood of the person complying with the obligations imposed by the covenant,
- (c) that the person has previously committed frequent contraventions of restrictive or public positive covenants imposed on the land, or
- (d) that the person has persistently and unreasonably delayed complying with the obligations of any public positive covenant imposed on the land,

or that the order should be made because of any other special circumstances, whether of a like or different nature.

- (4) If the Court makes the order requested, the Court may impose such conditions on the conveyance or transfer of the land as the Court thinks fit.
- (5) Where land is conveyed or transferred to a prescribed authority in accordance with an order made under this section, the consideration payable by the authority shall be the value of the land reduced by the amount of any outstanding liability of the person to the authority arising out of contravention of the public positive covenant.
- (6) In calculating the value of land for the purposes of subsection (5), any increase in the value of the land attributable to:
  - (a) the carrying out of development in contravention of the public positive covenant, or
  - (b) the development which is likely to be carried out on the land in accordance with the covenant,shall be disregarded.

### **88J Production of title documents where sale, lease or foreclosure**

- (1) A prescribed authority having the benefit of a public positive covenant, being an authority:
  - (a) which is authorised (whether or not by this Act or the *Real Property Act 1900*) to sell or lease land subject to the covenant, or
  - (b) which has obtained an order for foreclosure relating to that land,

may apply to the Court for an order requiring the delivery, at or within such time as may be fixed by the Court, to the authority by the person whose land is subject to the covenant or by any other person of any deed, certificate of title or other instrument relating to the title to the land which may be reasonably required by the authority.

- (2) An application shall be made in accordance with rules of Court.
- (3) Where an order has been made under this section and any instrument required by the Registrar-General for the purposes of the *Real Property Act 1900* has not been delivered to the prescribed authority in accordance with the order, the Registrar-General may dispense with production of the instrument or, if appropriate, take action under section 111 (3) of that Act.

#### **88K Power of Court to create easements**

- (1) The Court may make an order imposing an easement over land if the easement is reasonably necessary for the effective use or development of other land that will have the benefit of the easement.
- (2) Such an order may be made only if the Court is satisfied that:
  - (a) use of the land having the benefit of the easement will not be inconsistent with the public interest, and
  - (b) the owner of the land to be burdened by the easement and each other person having an estate or interest in that land that is evidenced by an instrument registered in the General Register of Deeds or the Register kept under the *Real Property Act 1900* can be adequately compensated for any loss or other disadvantage that will arise from imposition of the easement, and
  - (c) all reasonable attempts have been made by the applicant for the order to obtain the easement or an easement having the same effect but have been unsuccessful.
- (3) The Court is to specify in the order the nature and terms of the easement and such of the particulars referred to in section 88 (1) (a)-(d) as are appropriate and is to identify its site by reference to a plan that is, or is capable of being, registered or recorded under Division 3 of Part 23. The terms may limit the times at which the easement applies.
- (4) The Court is to provide in the order for payment by the applicant to specified persons of such compensation as the Court considers appropriate, unless the Court determines that compensation is not payable because of the special circumstances of the case.
- (5) The costs of the proceedings are payable by the applicant, subject to any order of the Court to the contrary.
- (6) Such an easement may be:
  - (a) released by the owner of the land having the benefit of it, or
  - (b) modified by a deed made between the owner of the land having the benefit of it and the persons for the time being having the burden of it or (in the case of land under the provisions of the *Real Property Act 1900*) by a dealing in the form

approved under that Act giving effect to the modification.

- (7) An easement imposed under this section, a release of such an easement or any modification of such an easement by a deed or dealing takes effect:
  - (a) if the land burdened is under the *Real Property Act 1900*, when the Registrar-General registers a dealing in the form approved under that Act setting out particulars of the easement, or of the release or modification, by making such recordings in the Register kept under that Act as the Registrar-General considers appropriate, or
  - (b) in any other case, when a minute of the order imposing the easement or the deed of release or modification is registered in the General Register of Deeds.
- (8) An easement imposed under this section has effect (for the purposes of this Act and the *Real Property Act 1900*) as if it was contained in a deed.
- (9) Nothing in this section prevents such an easement from being extinguished or modified under section 89 by the Court.

**89 Power of Court to modify or extinguish easements, profits à prendre and certain covenants**

- (1) Where land is subject to an easement or a profit à prendre or to a restriction or an obligation arising under covenant or otherwise as to the user thereof, the Court may from time to time, on the application of any person interested in the land, by order modify or wholly or partially extinguish the easement, profit à prendre, restriction or obligation upon being satisfied:
  - (a) that by reason of change in the user of any land having the benefit of the easement, profit à prendre, restriction or obligation, or in the character of the neighbourhood or other circumstances of the case which the Court may deem material, the easement, profit à prendre, restriction or obligation ought to be deemed obsolete, or that the continued existence thereof would impede the reasonable user of the land subject to the easement, profit à prendre, restriction or obligation without securing practical benefit to the persons entitled to the easement or profit à prendre or to the benefit of the restriction or obligation, or would, unless modified, so impede such user, or
  - (b) that the persons of the age of eighteen years or upwards and of full capacity for the time being or from time to time entitled to the easement or profit à prendre or to the benefit of the restriction, whether in respect of estates in fee simple or any lesser estates or interests in the land to which the easement, the profit à prendre or the benefit of the restriction is annexed, have agreed to the easement, profit à prendre, restriction or obligation being modified or wholly or partially extinguished, or by their acts or omissions may reasonably be considered to have abandoned the easement or profit à prendre wholly or in part or waived the benefit of the

restriction wholly or in part,

(b1) in the case of an obligation:

- (i) that the prescribed authority entitled to the benefit of the obligation has agreed to the obligation's being modified or wholly or partially extinguished or by its acts or omissions may reasonably be considered to have waived the benefit of the obligation wholly or in part, or
- (ii) that the obligation has become unreasonably expensive or unreasonably onerous to perform when compared with the benefit of its performance to the authority, or

(c) that the proposed modification or extinguishment will not substantially injure the persons entitled to the easement or profit à prendre, or to the benefit of the restriction or obligation.

- (2) Where any proceedings are instituted to enforce an easement, profit à prendre, restriction or obligation, or to enforce any rights arising out of a breach of any restriction or obligation, any person against whom the proceedings are instituted may in such proceedings apply to the Court for an order under this section.
- (3) The Court may on the application of any person interested make an order declaring whether or not in any particular case any land is affected by an easement, profit à prendre, restriction or obligation, and the nature and extent thereof, and whether the same is enforceable, and if so by whom.
- (4) Notice of any application made under this section shall, if the Court so directs, be given to the council of the area (within the meaning of the [Local Government Act 1993](#)) in which the land is situated, and to such other persons and in such manner, whether by advertisement or otherwise, as may be prescribed by rules of Court or as the Court may order.
- (5) An order under this section shall, when registered as in this section provided, be binding on all persons, whether of full age or capacity or not, then entitled or thereafter becoming entitled to the easement or profit à prendre, or interested in enforcing the restriction or obligation and whether such persons are parties to the proceedings or have been served with notice or not.
- (6) This section applies to easements, profits à prendre and restrictions existing at the commencement of the [Conveyancing \(Amendment\) Act 1930](#), or coming into existence after such commencement.
- (7) An order under this section affecting land not under the provisions of the [Real Property Act 1900](#) may be registered in the General Register of Deeds. No such order shall release or bind any land until it is so registered.



- (8) This section applies to land under the provisions of the *Real Property Act 1900*, and the Registrar-General shall, on application made in the form approved under that Act, make all necessary recordings in the Register kept under that Act for giving effect to the order.

For the purposes of this subsection, a grant, certificate of title or duplicate registered dealing that is not in the possession of the Registrar-General shall be deemed to be wrongfully retained within the meaning of section 136 of the *Real Property Act 1900*.

- (9) In the case of land which is not under the provisions of the *Real Property Act 1900*, a memorandum of such order shall be endorsed on such of the instruments of title as the Court directs.

## Division 5 Other covenants

### 89A Application of Division

In this Division:

**registered memorandum** means a memorandum registered under section 89B of this Act or filed under section 80A of the *Real Property Act 1900*.

**registrable instrument** means an instrument registrable in the General Register of Deeds.

### 89B Memorandum of covenants

The Registrar-General may register in the General Register of Deeds a memorandum setting out provisions which are capable of being covenants in a registrable instrument of a class specified in the memorandum.

### 89C Inclusion in registrable instrument of covenants in registered memorandum

A registrable instrument is taken to include the following covenants as if they were set out at length in the instrument:

- (a) the covenants in a registered memorandum, if the instrument states that the covenants are included and does not state that they are amended,
- (b) the covenants in a registered memorandum amended as set out in the instrument, if the instrument states that the covenants are included as so amended.

## Part 7 Mortgages and certain charges

### Division 1 General provisions

#### 90 Application of Division 1 to land subject to *Real Property Act 1900*

The provisions of this Division apply to and in respect of mortgages of and charges on

land under the *Real Property Act 1900* only to the extent specified in those provisions.

### **91 Indorsements on mortgages**

(1) In the case of every mortgage (whether made before or after the commencement of this Act):

(a) the mortgage debt may be discharged, and

(b) the rate of interest may be increased or reduced, and

(c) the amount secured by the mortgage may be increased or reduced, and

(d) the term or currency of the mortgage may be shortened, extended, or renewed, and

(d1) the provisions of a mortgage may be otherwise varied, omitted or added to, and

(e) the mortgage may be transferred:

by a memorandum indorsed on or annexed to the mortgage, and signed by the persons to be bound thereby and attested by one witness.

(2) Such memorandum may be in such one of the forms of the Fifth Schedule as applicable, or to the effect thereof, and shall in cases (b), (c), (d), (d1) and (e) operate as a deed.

(3)

(a) Every such memorandum of discharge, upon registration, but as from the date of such memorandum, shall, unless a contrary intention appears in the memorandum, vacate the mortgage debt, and shall operate as a deed of conveyance of the estate and interest of the mortgagee of and in the mortgaged property to the person for the time being entitled to the equity of redemption to the uses and for the estates and interests, and subject to the powers and trusts to, for, and subject to which, the equity of redemption at the date of such memorandum stood limited or subject discharged from all moneys secured by the mortgage: Provided that in case there is any subsequent subsisting mortgage on the property at the date of such memorandum, the legal estate in the property under the discharged mortgage shall vest in the person in whom the subsequent mortgage is vested, or in the event of there being more than one such mortgage then in the person who has the prior right to call for a conveyance of such legal estate.

(b) Where the mortgage consists of a mortgage and a further charge or of more than one instrument it shall be sufficient for the purposes of this section if the memorandum refers to all the instruments whereby the mortgage money is secured or to the aggregate amount of the mortgage money thereby secured, and

is indorsed on or annexed to one of the mortgage instruments.

- (4) Every such memorandum of transfer shall operate as a deed of assignment of the mortgage debt, and as a deed of conveyance of the estate and interest of the mortgagee of and in the mortgaged property, and shall vest the debt and estate and interest in the assignee, together with all the rights, powers, and remedies of the mortgagee expressed or implied in the mortgage.
- (5) The mortgagor may require the mortgagee to execute a proper instrument of reconveyance of the mortgaged property instead of executing a memorandum of discharge.
- (5A) A memorandum of variation of mortgage may not operate so as to vary the land to which the mortgage relates.
- (6) Subject to the memorandum referred to in subsection (1) being in or to the effect of an approved form within the meaning of the *Real Property Act 1900*, paragraphs (b), (c), (d) and (d1) of that subsection apply to mortgages under that Act and, upon lodgment of such a memorandum for registration, the Registrar-General shall make such recordings in the Register kept under that Act as may be necessary to give effect to the memorandum.

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

- (1) Where the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage, or of any period for which it has been renewed or extended, and the mortgagee has accepted interest on the said sum for any period (not being less than three months) after default has been so made, then, so long as the mortgagor performs and observes all covenants expressed or implied in the mortgage, other than the covenant for payment of the principal sum, the mortgagee shall not be entitled to take proceedings to compel payment of the said sum, or for foreclosure, or to enter into possession, or to exercise any power of sale, without giving to the mortgagor three months' notice of his or her intention so to do.
- (2) No purchaser from the mortgagee exercising his or her power of sale shall be concerned to inquire whether the mortgagee has accepted interest as aforesaid after such default.
- (3) This section applies to mortgages under the *Real Property Act 1900*.
- (4) This section shall have effect notwithstanding any stipulation to the contrary.

## **93 Right to redeem before time fixed for redemption**

- (1) A mortgagor is entitled to redeem the mortgaged property although the time appointed for redemption has not arrived; but in such case the mortgagor shall pay to the mortgagee, in addition to any other moneys then owing under the mortgage,

interest on the principal sum secured thereby for the unexpired portion of the term of the mortgage: Provided that redemption under this subsection shall not prejudice the right of the mortgagee to any collateral benefit, or to enforce any burden or restriction to the extent to which the mortgagee would be entitled under the mortgage or otherwise if the mortgage were paid off at the due date.

- (2) For the purposes of this section ***moneys owing under a mortgage*** includes all costs, charges, and expenses reasonably and properly incurred by the mortgagee:
  - (a) for the protection and preservation of the mortgaged land or the title thereto, or otherwise in accordance with the provisions of the mortgage, and
  - (b) with a view to the realisation of the mortgagee's security,and in either case includes interest on the sums so expended after the rate expressed in the mortgage.
- (3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.
- (4) This section applies to mortgages under the [Real Property Act 1900](#).

#### **94 Obligation on mortgagee to transfer instead of discharging**

- (1) Where a mortgagor is entitled to redeem the mortgagor shall by virtue of this Act have power to require the mortgagee instead of discharging, and on the terms on which the mortgagee would be bound to discharge, to transfer the mortgage to any third person as the mortgagor directs; and the mortgagee shall by virtue of this Act be bound to transfer accordingly.
- (2) This section does not apply in the case of a mortgagee being or having been in possession.
- (3) This section applies to mortgages made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.
- (4) This section applies to mortgages under the [Real Property Act 1900](#).

#### **95 Person entitled to require transfer**

The right of the mortgagor under the last preceding section shall belong to and be capable of being enforced by each incumbrancee or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancee shall prevail over a requisition of the mortgagor, and as between incumbrancees a requisition of a prior incumbrancee shall prevail over a requisition of a subsequent incumbrancee.

#### **96 Power for mortgagor to inspect title deeds**

- (1) A mortgagor, as long as the mortgagor's right to redeem subsists, shall by virtue of

this Act be entitled from time to time at reasonable times on the mortgagor's request, and at the mortgagor's own cost and on payment of the mortgagee's costs and expenses in this behalf by the mortgagee, the mortgagee's solicitor or licensed conveyancer, to inspect and to be supplied with copies or abstracts of, or extracts from, the documents of title or other documents relating to the mortgaged property in the custody or power of the mortgagee.

- (2) This section applies to mortgages under the *Real Property Act 1900*, and in such case the mortgagor shall be entitled to have the relevant certificate of title, or other document of title, lodged at the office of the Registrar-General, to allow of the registration of any authorised dealing by the mortgagor with the land, upon payment of the mortgagee's proper costs and expenses.
- (3) This section applies only to mortgages made after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

#### **96A Notice of trusts affecting mortgage debts**

- (1) A person dealing in good faith with a mortgagee, or with the mortgagor if the mortgage has been discharged or released as to the whole or any part of the mortgaged property, shall not be concerned with any trust at any time affecting the mortgage money or the income thereof, whether or not the person has notice of the trust, and may assume, unless the contrary is expressly stated in the instruments relating to the mortgage:
  - (a) that the mortgagees (if more than one) are or were entitled to the mortgage money on a joint account, and
  - (b) that the mortgagee has or had power to give valid receipts for the purchase money or mortgage money and the income thereof (including any arrears of interest) and to release or postpone the priority of the mortgage debt or any part thereof, or to deal with the same or the mortgaged property or any part thereof,without investigating the equitable title to the mortgage debt or the appointment or discharge of trustees in reference thereto.
- (1A) For the purposes of this section the expression **mortgagee** includes a mortgagee who, pursuant to any power conferred by a trust instrument or by law has purchased or otherwise acquired the equity of the redemption in the mortgaged property.
- (2) This section applies to mortgages made before or after the commencement of the *Conveyancing (Amendment) Act 1930*, but only as respects dealings effected after such commencement.
- (3) This section does not affect the liability of any person in whom the mortgage debt is vested for the purposes of any trust to give effect to that trust.

- (4) This section applies and shall be deemed to have applied from the commencement of the *Conveyancing (Amendment) Act 1930* to mortgages under the *Real Property Act 1900*.

### **97 Consolidation of mortgages abolished**

- (1) A mortgagor seeking to redeem any one mortgage made after the commencement of this Act shall by virtue of this Act be entitled to do so without paying any money due under any separate mortgage made whether before or after the commencement of this Act by the mortgagor or by any person through whom the mortgagor claims on property other than that comprised in the mortgage which the mortgagor seeks to redeem.
- (2) This section applies notwithstanding any stipulation to the contrary.
- (3) This section applies to mortgages under the *Real Property Act 1900*.

### **98 Facilitation of redemption in case of absent or unknown mortgagees**

- (1) Where land is subject to a mortgage and the person empowered to reconvey the land or, where the land is under the provisions of the *Real Property Act 1900*, to execute in respect thereof a discharge referred to in section 65 of that Act, is out of the jurisdiction, cannot be found or is unknown, or if it is uncertain who that person is, the court may, upon the application of the person for the time being entitled to redeem the mortgaged land, determine in such manner as the court thinks fit whether or not all amounts due under the mortgage have been paid and, if not, the amount thereof outstanding.
- (1A) Where the court has made a determination under subsection (1) in relation to a mortgage, the mortgagee is, to the extent provided by this section, liable to pay the costs of the applicant incurred in obtaining the determination, any rule of law or stipulation to the contrary notwithstanding.
- (1B) The amount of costs that a mortgagee is liable under subsection (1A) to pay in respect of a determination under subsection (1) is the amount by which:
- (a) the amount certified by the court when making the determination as reasonable costs of the applicant incurred in obtaining the determination, exceeds:
- (b) the amount of remuneration that would have been payable by the mortgagee pursuant to the general order for the time being in force under section 206 if:
- (i) a discharge of the mortgage had been executed at the time the determination was made, and
- (ii) that general order had been applicable in respect of that discharge of

mortgage.

(1C) The amount of costs that a mortgagee is liable, under subsection (1A), to pay to an applicant shall, except to the extent that it is extinguished or reduced by the operation of this section, be deemed to be a specialty debt recoverable by the applicant and incurred at the time of the making of the determination to which the costs relate.

(1D) Where the court determines under subsection (1) that the amount due under a mortgage has not been repaid and the amount thereof determined by the court to be outstanding exceeds the amount of costs calculated under subsection (1B) in respect of the determination, the applicant for the determination may pay into court the difference between the amount so determined and the amount so calculated and, upon the amount of that difference being so paid:

- (a) the amount due under the mortgage at the time of the payment into court shall be deemed to have been reduced by the amount so calculated and by the amount paid into court, and
- (b) the debt owing under subsection (1C) by the mortgagee to the applicant shall be deemed to have been extinguished.

(1E) Where the court determines under subsection (1) that the amount due under a mortgage has not been repaid and the amount thereof determined by the court to be outstanding is equal to or less than the amount of costs calculated under subsection (1B) in respect of the determination:

- (a) the amount due under the mortgage at the time of the determination shall be deemed to have been reduced by the amount so determined,
- (b) the debt owing under subsection (1C) by the mortgagee to the applicant for the determination shall be deemed to have been reduced by the amount so determined, and
- (c) for the purposes of subsection (1F), the court shall be deemed to have determined that the amount due under the mortgage has been repaid.

(1F) Where:

- (a) the court determines under this section that the amount due under a mortgage has been repaid, whether by the operation of paragraph (c) of subsection (1E) or otherwise, or
- (b) payment into court is made under subsection (1D),

an officer of the court prescribed by rules of court may give a certificate to the effect that this section has been complied with in relation to the mortgage in respect of which the determination was made or the money paid into court.

- (2) In favour of a purchaser of land comprised in a mortgage referred to in a certificate given under subsection (1F), the certificate operates as a discharge of the land from the amount due under the mortgage, and as a deed of conveyance, in the same manner as a memorandum of discharge operates under subsection (3) of section 91.
- (3) The Court shall order an amount paid into court under subsection (1D) to be paid to the person entitled, upon the application of such person, and on proof that the deed or instrument of mortgage, and all the title deeds which were delivered by the mortgagor to the mortgagee on executing the same, or in connection therewith, have been delivered up to the person by whom the amount was so paid into court, or the person's executors, administrators, or assigns, or have been otherwise satisfactorily accounted for.
- (3A) A determination by the court under this section with respect to a mortgage is not, as between persons referred to in subsection (1), conclusive as to:
- (a) whether or not an amount is due under the mortgage at the time of the determination, or
  - (b) whether the amount determined by the court to be due under the mortgage is the amount so due at the time of the determination, and except to the extent of the operation of paragraph (a) of subsections (1D) and (1E), and of subsection (2), that determination does not prejudice any right conferred by the mortgage for the recovery of an amount due thereunder.
- (4) This section, subsection (2) excepted, applies to and in respect of mortgages under the *Real Property Act 1900*.
- (4A) Upon:
- (a) application to the Registrar-General in the form approved under the *Real Property Act 1900*,
  - (b) production to the Registrar-General of a certificate under subsection (1F) that relates to a mortgage registered under that Act, and
  - (c) payment of the fee prescribed under that Act,
- the Registrar-General:
- (d) shall, in the Register kept under that Act, make such recordings as the Registrar-General considers appropriate to give effect to the discharge of the mortgage, and
  - (e) may, if the relevant grant, certificate of title or duplicate registered dealing upon which the mortgage is recorded, or the duplicate registered mortgage, is produced to the Registrar-General for the purpose, record thereon the discharge of the mortgage.



(5) Section sixty-seven of the *Real Property Act 1900* is hereby repealed.

**99 Effect of advance on joint account etc**

- (1) Where, in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money or as money belonging to them on a joint account, or where a mortgage, or such an obligation, or such a transfer, is made to more persons than one, and not in shares, the mortgage-money or other money or money's worth for the time being due to those persons on the mortgage or obligation shall, as between them and the mortgagor or obligor, be deemed to be and remain money or money's worth belonging to them on a joint account; and the receipt in writing of the survivors or last survivor of them, or of the executors or administrators of the last survivor, or the assigns of the last survivors or survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of the severance of the joint account.
- (2) Such survivors or survivor, or the executors or administrators of such last survivor, or the assigns of the last survivors or survivor, may exercise all powers conferred by the mortgage or obligation as fully and effectually as the mortgagees, if living, could have done; subject as to lands under the provisions of the *Real Property Act 1900* to compliance with the provisions of that Act.
- (3) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this Act, and then only in so far as a contrary intention is not expressed in the mortgage, obligation, or transfer, and shall have effect subject to the terms and provisions thereof.

**99A Foreclosure order for certain charged land**

- (1) Where:
  - (a) default has been made for 6 months in the payment of the principal and interest secured by a charge,
  - (b) the land charged has been offered for sale at a public auction by a licensed auctioneer after notice has been given in accordance with section 111,
  - (c) the amount of the highest bid at that sale was not sufficient to satisfy the money secured by the charge, together with the expenses of the sale, and
  - (d) notice in writing of the intention to make the application has been served on the person whose land is subject to the charge in the manner prescribed by section 170,the chargee or the solicitor, attorney or agent of the chargee may make application to

the Court for an order for foreclosure.

- (2) The application shall be made in accordance with rules of Court.
- (3) The notice of intention to make the application may be given personally or by post to the Public Trustee where, at the time the notice is so given:
  - (a) the chargee knows the person whose land is subject to the charge is dead, and
  - (b) there is no personal representative of the deceased in New South Wales,and any such notice shall be accompanied by a statement containing such particulars as may be prescribed.
- (4) A notice given in accordance with subsection (3) shall be deemed to have been served on the person whose land is subject to the charge unless probate of the will or letters of administration of the estate of the person is or are granted to some person other than the Public Trustee within one month after the notice has been so given.
- (5) Where an application has been made in accordance with this section and such further notice of its intention to make the order as the Court considers appropriate has been given, the Court may make an order for foreclosure in favour of the applicant, unless in the interval a sufficient amount has been realised by the sale of the land to satisfy the principal and interest due and all expenses occasioned by the sale and proceedings for foreclosure.
- (6) An order for foreclosure made under this section shall have the effect of vesting in the chargee all the estate and interest in that land of the person whose land was subject to the charge.
- (7) Except as provided by section 101, this section applies only to charges imposed under section 88F on land which is not under the provisions of the *Real Property Act 1900*.

#### **100 Foreclosure extinguishes right of action for debt, and equity of redemption**

- (1) On an order absolute for foreclosure the mortgagee or chargee shall be deemed to have taken the property mentioned in such order, in full satisfaction of the mortgage debt or amount secured by the charge, and the mortgagee or chargee's right or equity to bring any action or to take other proceedings for the recovery of the mortgage money or amount secured by the charge from the debtor, surety, or other person, shall be extinguished, and all collateral securities for the debt or amount secured by the charge which have not previously been enforced shall be released, and the right or equity of the mortgagor to redeem the said property shall also be extinguished.
- (2) In the case of mortgages of or charges on land under the *Real Property Act 1900*, **order absolute** includes an order for foreclosure under the hand of the Registrar-General when recorded in the Register kept under that Act.

- (3) This section applies only to:
  - (a) foreclosures obtained after the commencement of this Act, and
  - (b) charges imposed under section 88F.
- (4) This section shall have effect notwithstanding any stipulation to the contrary.

**101 Foreclosure, sale or redemption of land partly under the [Real Property Act 1900](#)**

- (1) Where mortgage money or an amount secured by a charge is secured partly by a mortgage or charge registered under the [Real Property Act 1900](#) and partly by other securities:
  - (a) an order for foreclosure or sale, in respect of land the subject of the mortgage or charge, or
  - (b) an order for redemption, in respect of land the subject of the mortgage,may, notwithstanding anything contained in that Act, be made by the Court as if the land was not under the provisions of that Act.
- (2) In cases where an order absolute for foreclosure is made by the Court under this section, the Registrar-General shall, on lodgment of an application in the form approved under that Act, register as proprietor the person in whose favour the order is made.
- (3) This section applies only to charges imposed under section 88F.

**102 On judgment for mortgage debt the interest of the mortgagor not seizable**

- (1) On a judgment of any court for a debt secured by mortgage of any property (including land under the provisions of the [Real Property Act 1900](#)), the interest of the mortgagor in that property shall not be taken in execution under the judgment.
- (2) Nothing in this section shall affect the construction of the section for which this section is substituted.

**103 Sale of mortgaged or charged property in proceedings for foreclosure etc**

- (1) Any person entitled to redeem mortgaged property may have an order for sale instead of for redemption in any proceedings instituted by the person either for redemption alone or for sale alone, or for sale or redemption, in the alternative.
- (2) In any proceedings, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money or an amount secured by a charge, the Court, on the request of the mortgagee or person whose land is subject to the charge, or of any person interested either in the mortgage money or amount so secured or in the right of redemption, and notwithstanding the dissent of any other

person, and notwithstanding that the mortgagee or person whose land is subject to the charge or any person so interested does not appear in the proceedings, and without allowing any time for redemption or for payment of any mortgage money or amount so secured, may direct a sale of the mortgaged or charged property on such terms as to the Court may seem just, including, if the Court thinks fit, the deposit in court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

- (3) In any proceedings instituted by a person interested in the right of redemption or by a person whose land is subject to a charge and seeking a sale, the Court may, on the application of any defendant, direct the plaintiff to give such security for costs as the Court thinks fit, and may give the conduct of the sale to any party or other person, and may give such directions as to the Court may seem just respecting the costs of the defendants or any of them.
- (4) In any case within this section the Court may direct a sale without previously determining the priorities of incumbrancees or mortgagees, and may direct a sale out of Court.
- (5) (Repealed)
- (6) This section applies to proceedings instituted either before or after the commencement of this Act.
- (7) Except as provided by section 101, this section applies only to charges imposed under section 88F on land which is not under the provisions of the *Real Property Act 1900*.

#### **104 Mortgaged property may be sold or leased together at one price or rent**

- (1) In the exercise by the mortgagee of a power of sale or lease contained or implied in any mortgage:
  - (a) the mortgaged premises or any part thereof, may be sold or leased, together with any other land or property of whatsoever nature or tenure which is the subject of the mortgage or of any collateral security from the mortgagor to the mortgagee by one sale or lease at one price or rent; and in such case:
  - (b) the mortgagee shall fairly and equitably apportion all costs, expenses, purchase moneys, and rents between the properties sold or leased.
- (2) A failure by the mortgagee to make such apportionment shall not affect the purchaser or lessee, nor the title to the property in the purchaser or lessee's hands.
- (3) This section extends to any case in which the whole or any part of any land the subject of the sale or lease is under the provisions of the *Real Property Act 1900*.
- (4) This section applies to sales and leases made after the commencement of this Act

under mortgages, whether made before or after the commencement of this Act.

## **Division 2 Leasing powers under mortgages and certain charges**

### **105 Application of Division 2**

- (1) The provisions of this Division apply to and in respect of mortgages of and charges on land under the *Real Property Act 1900*.
- (2) In this Division, **charge** means a charge imposed under section 88F.

### **106 Leasing powers where mortgages or certain charges**

- (1) A mortgagor of land while in possession shall as against every incumbrancee have by virtue of this Act power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorised. For the purposes of this subsection the expression **mortgagor** does not include an incumbrancee deriving title under the original mortgagor.
- (2) A mortgagee of land or person having the benefit of a charge on land while in possession shall as against all prior incumbrancees (if any) and as against the mortgagor or person whose land is subject to the charge have by virtue of this Act power to make from time to time any such lease as aforesaid.
- (3) The lease which this section authorises is—A lease for any term not exceeding five years.
- (4) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.
- (5) Every such lease shall be made to take effect in possession not later than three months after its date.
- (6) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken or the rent made payable in advance except as to the last payment which may be made payable on a day not more than one month before the expiration of the term.
- (7) Every such lease shall contain a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days, and the covenants implied by section 84 shall not be excluded therefrom.
- (8) Where the land comprised in any such lease is under the provisions of the *Real Property Act 1900*, the lease shall be registered in accordance with the provisions of that Act.
- (8A) Where the land comprised in such lease is not under the provisions of the *Real Property Act 1900*, the lease shall be executed by the lessee and registered under

Division 1 of Part 23.

- (9) Within one month after having made a lease under this section:
- (a) a mortgagor shall deliver to the mortgagee (or, if there is more than one, to the mortgagee first in priority) and, where another person has the benefit of a charge on the land, to the other person, or
  - (b) a person whose land is subject to a charge shall deliver to the person having the benefit of the charge and, where the land is mortgaged to another person, to the mortgagee (or, if there is more than one, to the mortgagee first in priority),
- a duplicate or a counterpart of the lease duly executed by the lessee, but the lessee shall not be concerned to see that this provision is complied with.
- (10) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding if:
- (a) in so far as the lease, if granted, would comprise land under the provisions of the *Real Property Act 1900*—a caveat has been lodged pursuant to section 74F of that Act in respect of the contract, and
  - (b) in so far as the lease, if granted, would comprise land not under the provisions of the *Real Property Act 1900*—the contract has been registered pursuant to Division 1 of Part 23.
- (11) This section applies in relation to a mortgagor and mortgagee or the parties to a charge only if and in so far as a contrary intention is not expressed in the instrument creating the mortgage or the covenant in respect of which the charge arose, or otherwise in writing, and shall have effect subject to the terms and conditions of that instrument, or any such writing.
- (12) Nothing in this Act shall prevent the instrument creating the mortgage or the covenant in respect of which the charge arose from reserving to or conferring on either or both of the parties to the mortgage or charge any further or other powers of leasing or having reference to leasing, and any further or other powers so reserved or conferred, shall be exercisable as far as may be as if they were conferred by this Act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in that instrument.
- (13) Nothing in this Act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term, or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrances, if this Act had not been passed.
- (14) This section applies only in case of a mortgage made after the commencement of this Act, but the provisions thereof, or any of them, may by agreement in writing,

made after the commencement of this Act between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this Act, so nevertheless that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

- (15) The provisions of this section referring to a lease shall be construed to extend and apply as far as circumstances admit to any letting, and to an agreement, whether in writing or not, for leasing or letting.
- (16) The power of leasing conferred by this section shall, after a receiver of the income of the mortgaged or charged land has been appointed under this Act by the mortgagee or person having the benefit of the charge and the instrument by which the appointment was made has been registered, be exercisable while that appointment is in force by that mortgagee or person instead of by the mortgagor or person whose land is subject to the charge in relation to any land affected by the receivership in the same manner as it would be if the mortgagee or person having the benefit was in possession of the land and the mortgagee or person may, by deed, delegate that power to the receiver.
- (16A) Where a trust corporation has been appointed receiver pursuant to section 115 (6A), a delegation under subsection (16) by that trust corporation in its capacity as mortgagee or person having the benefit of a charge shall be sufficiently evidenced by a statement in the lease of the decision of that trust corporation to exercise the power conferred by subsection (16).
- (17) This section applies to land under the provisions of the *Real Property Act 1900* subject to mortgage or charge under that Act and section 53 (4) of that Act shall not apply to leases authorised under this Division.

#### **107 Acceptance of certain surrenders of leases**

- (1) For the purpose only of enabling a lease, authorised under section 106, or under any agreement made pursuant to such section or by the mortgage deed (in this section referred to as an authorised lease) to be granted, a mortgagor of land while in possession shall, in like manner as if the legal estate were vested in the mortgagor and as against every incumbrancee, have, by virtue of this Act, power to accept from time to time a surrender of any lease of the mortgaged land or any part thereof comprised in the lease, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them, and, on a surrender of part only of the land or mines and minerals leased, the rent may be apportioned.
- (2) For the same purpose a mortgagee of or person having the benefit of a charge on land while in possession shall, in like manner, and as against all prior or other incumbrancees (if any), and as against the mortgagor or person whose land is subject to the charge, have, by virtue of this Act, power to accept from time to time any such

surrender as aforesaid.

- (3) On a surrender of part only of the land or mines and minerals leased the original lease may be varied: Provided that the lease when varied would have been valid as an authorised lease if granted by the person accepting the surrender, and on a surrender and the making of a new or other lease, whether for the same or for an extended or other term, and whether subject or not to the same or to any other covenants, provisions, or conditions, the value of the lessee's interests in the lease surrendered may, subject to the provisions of this section, be taken into account in the determination of the amount of the rent to be reserved and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.
- (4) Nothing in this section shall, where any consideration (except an agreement to accept an authorised lease) for the surrender is given by or on behalf of the lessee to or on behalf of the person accepting the surrender, authorise a surrender to a mortgagor or person whose land is subject to a charge without the consent of the incumbrancees, or authorise a surrender to a second or subsequent incumbrancee without the consent of any prior incumbrancee.
- (5) No surrender shall, by virtue of this section, be rendered valid unless:
  - (a) an authorised lease is granted of the whole of the land or mines and minerals comprised in the surrender, to take effect in possession immediately or within one month after the date of the surrender, and
  - (b) the term certain or interest granted by the new lease is not less in duration than the unexpired term or interest which would have been subsisting under the original lease if that lease had not been surrendered, and
  - (c) where the whole of the land mines and minerals originally leased has been surrendered, the rent reserved by the new lease is not less than the rent which would have been payable under the original lease if it had not been surrendered; or where part only of the land or mines and minerals has been surrendered, the aggregate rents respectively remaining payable or reserved under the original lease and new lease are not less than the rent which would have been payable under the original lease if no partial surrender had been accepted, and
  - (d) a memorandum thereof, signed by the parties thereto, is registered.
- (6) A contract to make or accept a surrender under this section may be enforced by or against every person on whom the surrender, if completed, would be binding.
- (7) Section 106 (11), (14) and (15) shall apply to surrenders under this section.
- (8) Nothing in this section shall prevent the instrument creating the mortgage or the covenant in respect of which the charge arose from reserving to or conferring on the mortgagor or mortgagee, or both, or any one or more of the parties to the instrument



creating the charge, any further or other powers relating to the surrender of leases; and any further or other powers so conferred or reserved shall be exercisable, as far as may be, as if they were conferred by this Act, and with the like results, unless a contrary intention is expressed in the instrument creating the mortgage or the covenant in respect of which the charge arose.

- (9) Nothing in this section shall operate to enable a mortgagor or mortgagee to accept a surrender which could not have been accepted by the mortgagor, with the concurrence of all the incumbrancees, if this Act had not been passed.
- (10) For the purposes of this section, the expression **mortgagor** does not include an incumbrancee deriving title under the original mortgagor.
- (11) The power of accepting surrenders conferred by this section shall, after a receiver of the income of the mortgaged or charged land has been appointed under this Act by the mortgagee or person having the benefit of the charge and the instrument by which the appointment was made has been registered, be exercisable while that appointment is in force by that mortgagee or person instead of by the mortgagor or person whose land is subject to the charge in relation to any land affected by the receivership in the same manner as it would be if the mortgagee or person having the benefit was in possession of the land and the mortgagee or person may, by deed, delegate that power to the receiver.
- (11A) Where a trust corporation has been appointed receiver pursuant to section 115 (6A), a delegation under subsection (11) by that trust corporation in its capacity as mortgagee or person having the benefit of a charge shall be sufficiently evidenced by a statement in the instrument of surrender of the decision of that trust corporation to exercise the power conferred by subsection (11).
- (12) This section applies to land under the provisions of the *Real Property Act 1900*.

### **Division 3 Powers of mortgagees and persons having the benefit of certain charges**

#### **108 Application of Division 3**

- (1) The provisions of this Division apply to and in respect of mortgages of and charges on land under the *Real Property Act 1900*.
- (2) In this Division, **charge** means a charge imposed under section 88F.

#### **109 Powers of mortgagees and certain chargees**

- (1) A mortgagee and a chargee shall by virtue of this Act have the following powers to the like extent as if they had been in terms conferred by the instrument creating the mortgage or the covenant under which the charge arose but not further, namely:

- (a) A power to sell or to concur with any other person in selling the mortgaged or charged property, or any part thereof, either subject to prior charges or not, and either together or in lots, in subdivision or otherwise, by public auction or by private contract, subject to such conditions respecting title or evidence of title or other matter as the mortgagee or chargee thinks fit, with power to vary any contract for sale, and to buy in at an auction or to rescind any contract for sale, and to resell without being answerable for any loss occasioned thereby.
  - (b) A power at any time after the date of the instrument to insure and keep insured against loss or damage by fire any building or any effects or property of an insurable nature whether affixed to the freehold or not being or forming part of the mortgaged or charged property, and the premiums paid for any such insurance shall be a charge on the mortgaged or charged property in addition to the money secured by the mortgage or charge, and with the same priority and with interest at the same rate as that money.
  - (c) A power to appoint a receiver of the income of the mortgaged or charged property or of any part thereof.
  - (d) A power, while the mortgagee or chargee is in possession, to cut and sell timber except trees planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.
  - (e) A power to sever and sell fixtures apart from the balance of the mortgaged or charged property.
  - (f) A power to sell any easement, profit à prendre, right, or privilege of any kind over or in relation to the mortgaged or charged property.
- (2) The provisions of this Act (except section 111 (5) and the provisions of section 111 relating to notice or lapse of time where default is made in the payment, in accordance with the terms of the instrument creating the mortgage or the covenant under which the charge arose, of any principal, interest or other money) relating to the foregoing powers comprised either in this section or in any subsequent section regulating the exercise of those powers may be varied or extended by the instrument, and as so varied or extended shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences as if such variations or extensions were contained in this Act.
- (3) Subsection (1) applies only if and as far as a contrary intention is not expressed in the instrument, and shall have effect subject to the terms of the instrument and to the provisions therein contained.
- (4) This section applies to mortgages executed before, and to mortgages executed after, the commencement of Schedule 3 to the *Conveyancing (Amendment) Act 1976*.

- (5) This section applies to mortgages and charges under the *Real Property Act 1900*.

**109A Saving on severance of fixtures**

- (1) An instrument creating a mortgage or a charge which confers on the mortgagee or chargee a power to sever and sell fixtures apart from the balance of the mortgaged or charged property, shall not be, and shall be deemed never to have been, merely because of such power:
- (a) a bill of sale, or
  - (b) subject to avoidance or invalidity under the *Bills of Sale Act of 1898*, or under the *Companies (Registration of Securities) Act 1918*, or under Part 9 of the *Companies Act 1936*, or under Division 7 of Part 4 of the *Companies Act 1961*, or under Division 9 of Part IV of the *Companies (New South Wales) Code*, by reason of the instrument not having been filed or registered under the provisions of any such Act or Code.
- (2) This section applies to mortgages and charges under the *Real Property Act 1900*.
- (3) This section applies to mortgages and incumbrances made either before or after the commencement of the *Conveyancing (Amendment) Act 1939*.

**110 Powers incidental to power of sale**

- (1) The power of sale conferred on a mortgagee or chargee by section 109 shall include the following powers as incident thereto, namely:
- (a) A power to impose, or reserve, or make binding, as far as the law permits, by covenant, condition, or otherwise, on the unsold part of the mortgaged or charged property or any part thereof, or on the purchaser and any property sold, any restriction or reservation with respect to building on or other user of the land, or with respect to mines and minerals, or for the purpose of the more beneficial working thereof, or with respect to any other thing.
  - (b) A power to sell the mortgaged or charged property, or any part thereof, or any mines and minerals apart from the surface:
    - (i) with or without a grant or reservation of rights of way, rights of water, easements, profits à prendre, rights, and privileges for or connected with building or other purposes in relation to the property remaining subject to the mortgage or charge or any part thereof, or to any property sold,
    - (ii) with or without an exception or reservation of all or any of the mines and minerals in or under the mortgaged or charged property, and with or without a grant or reservation of powers of working, way-leaves, or rights of way, rights of water and drainage and other powers, easements, profits à prendre, rights, and privileges for or connected with mining purposes in relation to the

property remaining unsold or any part thereof, or to any property sold,

(iii) with or without covenants by the purchaser to expend money on the land sold.

(c) A power to lay out and make such roads, streets, and ways, to be dedicated to the public or not, and grant such easements, profits à prendre, rights of way, or drainage over the same as the circumstances of the case may require, and the mortgagee or chargee thinks fit.

(2) Subsections (2) and (3) of section 109 shall apply to the foregoing powers conferred by this section.

(3) This section applies in relation to a mortgage only where the mortgage deed is executed after the commencement of this Act.

(4) This section applies to mortgages and charges under the *Real Property Act 1900*.

#### **111 Regulation of exercise of power of sale**

(1) In case of a mortgage or charge registered under the *Real Property Act 1900*, the mortgagee or chargee shall only exercise the power of sale conferred by this Act in the events and subject to the conditions contained in sections 57, 58 and 58A of that Act, and the provisions of section 59 of that Act shall apply to any transfer executed for the purpose of such sale.

(2) Except in the case of a mortgage or charge referred to in subsection (1), a mortgagee or chargee shall not exercise a power to sell land the subject of the mortgage or charge, whether conferred by this Act or otherwise, unless:

(a) in the case of a mortgage, default has been made in:

(i) the observance of a covenant, agreement or condition expressed or implied in the mortgage,

(ii) the payment, in accordance with the terms of the mortgage, of the principal, interest or other money the payment of which is secured by the mortgage, or

(iii) the payment, in accordance with the terms of the mortgage, of any part of that principal, interest or other money,

(a1) in the case of a charge, default has been made in:

(i) the payment, in accordance with the terms of the judgment to which the charge relates, of the principal, interest or other money the payment of which is secured by the charge, or

(ii) the payment, in accordance with the terms of that judgment, of any part of that principal, interest or other money,

(b) where:

- (i) the default relates to that payment, or
- (ii) in the case of a mortgage, the default does not relate to that payment and notice or lapse of time pursuant to this section has not been dispensed with by agreement expressed in the mortgage,

a written notice that complies with subsection (3) has been served on the mortgagor or person whose land is subject to the charge in the manner authorised by section 170,

(b1) where a notice is required to be served under paragraph (b), a copy of that notice has been served (in the manner authorised by section 170) on each mortgagee or chargee (if any) under a mortgage or charge to which the land is subject registered in the General Register of Deeds (other than the mortgagee or chargee intending to exercise the power of sale), and

(c) where such a notice is so served, the requirements of the notice are not complied with within the time notified pursuant to subsection (3) (d).

(3) A notice referred to in subsection (2) complies with this subsection if:

- (a) it specifies that it is a notice pursuant to section 111 (2) (b) of the [Conveyancing Act 1919](#),
- (b) it requires the mortgagor or person whose land is subject to the charge on whom it is served:
  - (i) in the case of a mortgage, to observe, except in relation to any time expressed in the covenant, agreement or condition for its observance, the covenant, agreement or condition in respect of the observance of which the mortgagor or person made default, or
  - (ii) as the case may be, to pay the principal, interest or other money in respect of the payment of which the mortgagor or person made default,
- (c) if the costs and expenses of preparing and serving the notice are to be demanded, it requires payment of a reasonable amount for those costs and expenses and specifies the amount, and
- (d) it notifies the mortgagor or person whose land is subject to the charge that, unless the requirements of the notice are complied with within one month after service of the notice (or, where some other period exceeding one month is limited by the mortgage or judgment for remedying the default referred to in the notice, within that other period after service of the notice) it is proposed to exercise a power of sale in respect of the land the subject of the mortgage or charge.

- (4) Where a notice is served under subsection (2) (b) and the requirements of the notice are complied with within the time applicable to the notice under subsection (3) (d), the default to which the notice relates shall be deemed not to have occurred.
- (5) Without prejudice to any other manner in which it may be deprived of force or effect, a covenant, agreement or condition whereby upon a default referred to in subsection (2) (a):
  - (a) the whole of the principal or other money of which the payment is secured by a mortgage becomes payable, or
  - (b) a part of that principal or other money (not being a part to which that default relates) becomes payable,has no force or effect until the power of the mortgagee to sell the land the subject of the mortgage becomes exercisable by reason of that default.

### **112 Protection of purchaser and disposal of proceeds of sale**

- (1) A mortgagee or chargee exercising the power of sale conferred by this Act shall have power by deed to convey the property sold for such estate and interest therein as is the subject of the mortgage or charge, freed from all estates, interests, and rights to which the mortgage or charge has priority, but subject to all estates, interests, and rights which have priority to the mortgage or charge.
- (2) In the case of a mortgage by demise, such mortgagee shall in exercise of any power of sale vested in him or her have power to convey the reversion for all the estate which was held by the mortgagor at the date of the mortgage, whether the same is by the mortgage deed declared to be held in trust for the mortgagee or any purchaser from him or her or not.
- (3) Where a conveyance is made in professed exercise of the power of sale conferred by this Act:
  - (a) a purchaser shall not, either before or on conveyance, be concerned to see or inquire whether a case has arisen to authorise the sale, or due notice has been given, or the power is otherwise properly and regularly exercised,
  - (b) the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorise the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised, but any person damnified by an unauthorised or improper or irregular exercise of the power shall have a remedy in damages against the person exercising the power.
- (4) The money which is received by the mortgagee or chargee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject (if any), or after payment into court under this Act of a sum to meet any prior incumbrance, shall

in the absence of an express contract to the contrary be held by the mortgagee or chargee in trust to be applied by the mortgagee or chargee, first in payment of all costs, charges, and expenses properly incurred by the mortgagee or chargee as incident to the sale or any attempted sale or otherwise; and, secondly, in discharge of the money, interest, and costs, and other money (if any) due under the mortgage or charge and the residue of the money so received shall be paid to the person entitled to the mortgaged or charged property or authorised to give receipts for the proceeds of the sale thereof.

- (5) The power of sale conferred by this Act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money or the money secured by the charge.
- (6) The power of sale conferred by this Act shall not affect the right of foreclosure.
- (7) The mortgagee or chargee, the mortgagee or chargee's executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this Act or of any trust connected therewith, or of any power or provision contained in the instrument creating the mortgage or the covenant under which the charge arose.
- (8) At any time after the power of sale conferred by this Act has become exercisable the person entitled to exercise the same may demand and recover from any person other than a person having in the mortgaged or charged property an estate, interest, or right in priority to the mortgage or charge, all the deeds and documents relating to the property or to the title thereto which a purchaser under the power of sale would be entitled to demand and recover from that person.
- (9) This section does not apply to mortgages or charges under the [Real Property Act 1900](#).

### **113 Receipts and discharges**

- (1) The receipt in writing of a mortgagee or chargee shall be a sufficient discharge for any money arising under the power of sale conferred by this Act, or for any money or securities comprised in his or her mortgage or arising thereunder, and a person paying or transferring the same to the mortgagee or chargee shall not be concerned to inquire whether any money remains due under the mortgage or charge or to see to the application of the money or securities so paid or transferred.
- (2) Money received by a mortgagee or chargee under his or her mortgage or charge, or from the proceeds of securities comprised in his or her mortgage, shall be applied in like manner as in this Act directed respecting money received by the mortgagee or chargee arising from a sale under the power of sale conferred by this Act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or

securities, and of conversion of securities into money instead of those incident to sale.

(3) This section applies to mortgages and charges under the *Real Property Act 1900*.

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

- (1) The amount of an insurance effected by a mortgagee or chargee against loss or damage by fire under the power in that behalf conferred by this Act shall not exceed the amount specified in the instrument creating the mortgage or the covenant under which the charge arose, or if no amount is therein specified, the full insurable value of the buildings upon the mortgaged or charged land, or the amount owing to the mortgagee or chargee in respect of the mortgage or charge.
- (2) An insurance shall not, under the power conferred by this Act, be effected by a mortgagee or chargee in any of the following cases, namely:
  - (a) Where there is a declaration in the instrument creating the mortgage or the covenant under which the charge arose that no insurance is required.
  - (b) Where an insurance is kept up by or on behalf of the mortgagor or person whose land is subject to the charge in accordance with that instrument.
  - (c) Where that instrument contains no stipulation respecting insurance and an insurance is kept up by or on behalf of the mortgagor or person whose land is subject to the charge to the amount in which the mortgagee or chargee is by this Act authorised to insure.
- (3) All money received on an insurance effected under the instrument creating the mortgage or the covenant under which the charge arose, or under this Act, shall, if the mortgagee or chargee so requires, be applied in making good the loss or damage in respect of which the money is received.
- (4) Without prejudice to any obligation to the contrary imposed by law or by express contract, a mortgagee or chargee may require that all money received on an insurance effected under the instrument creating the mortgage or the covenant under which the charge arose, or under this Act, be applied in or towards discharge of the money secured by the mortgage or charge whether due or not.

#### **115 Powers, remuneration and duties of receiver**

- (1) Except where otherwise expressly provided, this section applies only to a receiver appointed under the power in that behalf conferred by this Act.
- (2) The receiver shall be deemed to be the agent of the mortgagor or person whose land is subject to the charge, and the mortgagor or person shall be solely responsible for the receiver's acts or defaults, unless the instrument creating the mortgage or the covenant under which the charge arose otherwise provides.



- (3) The receiver shall have power to demand and recover all the income of the property of which he or she is appointed receiver, by action or otherwise, in the name either of the mortgagor or person whose land is subject to the charge or of the mortgagee or chargee, to the full extent of the estate or interest which the mortgagor or person could dispose of, and to give effectual receipts accordingly, for the same, and to exercise any powers which may have been delegated to him or her by the mortgagee or chargee pursuant to this Act.
- (4) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorise the receiver to act.
- (5) The receiver may be removed, and a new receiver may be appointed, from time to time by the mortgagee or chargee, as the case may require, by writing under his or her hand.
- (6) The receiver shall be entitled to retain out of any money received by him or her, for his or her remuneration, and in satisfaction of all costs, charges, and expenses incurred by him or her as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his or her appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the Court thinks fit to allow, on application made by him or her for that purpose.
- (6A) Where a mortgagee or chargee or two or more co-mortgagees is or are entitled to appoint a receiver under the power in that behalf conferred by this Act or by the instrument creating the mortgage or the covenant under which the charge arose, or is or are in possession of the mortgaged or charged property, and such mortgagee or chargee or one of such co-mortgagees is a trust corporation, such mortgagee or chargee or co-mortgagees may appoint such trust corporation receiver and in that event such trust corporation shall be entitled to retain out of any money received by it as such receiver for its remuneration, and in satisfaction of all costs, charges and expenses incurred by it as such receiver, such commission as would under the provisions of this Act or of that instrument, as the case may be, be retainable by another person if appointed receiver.
- (6B) Where a trust corporation is appointed receiver under subsection (6A), it shall not be deemed to be the agent of the mortgagor or person whose land is subject to the charge.
- (7) The receiver shall, if so directed in writing by the mortgagee or chargee, insure and keep insured against loss or damage by fire, out of the money received by him or her, any building, effects, or property subject to the mortgage or charge, whether affixed to the freehold or not, being of an insurable nature.
- (8) The receiver shall apply all money received by him or her as follows, namely:

- (a) in discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged or charged property, and
- (b) in keeping down all annual sums or other payments, and the interest on all principal sums having priority to the mortgage or charge in right whereof he or she is receiver, and
- (c) in payment of the receiver's commission, and of the premiums on fire, life, or other insurances (if any) properly payable under the instrument creating the mortgage or the covenant under which the charge arose or under this Act, and the costs of executing necessary or proper repairs directed in writing by the mortgagee or chargee, and
- (d) in payment of the interest due and unpaid and accruing due in respect of any principal money due under the mortgage or charge, and
- (e) in or towards discharge of the principal money due under the mortgage or charge if so directed in writing by the mortgagee or chargee,

and shall pay the residue, if any, of the money received by him or her to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged or charged property, or who is otherwise entitled to that property.

- (9) Where a trust corporation has been appointed receiver under subsection (6A), a decision of the corporation:
- (a) to effect the insurance referred to in subsection (7), or
  - (b) to apply money received by it as receiver in payment of the costs of executing necessary or proper repairs or in or towards discharge of the money due under the mortgage or charge,

shall, for all purposes, be deemed to be a direction given under subsection (7) in writing to that corporation.

- (10) A direction given by a mortgagee or chargee to apply money received by a receiver in or towards satisfaction of the money due under a mortgage or charge (or a decision of a trust corporation so to apply money received by it as receiver) shall not be carried into effect unless the mortgagee, chargee or trust corporation is entitled, when the money is so applied, to exercise any power of sale contained or implied in the mortgage or charge.

### **115A Appointment of receivers**

- (1) In this section, **default**, in respect of a mortgage or charge, means default in:
- (a) in the case of a mortgage, the observance of a covenant, agreement or condition

expressed or implied in the mortgage,

- (b) the payment, in accordance with the terms of the mortgage or judgment to which the charge relates, of the principal, interest or other money the payment of which is secured by the mortgage or charge, or
- (c) the payment, in accordance with the terms of the mortgage or that judgment, of any part of that principal, interest or other money.

(2) Notwithstanding anything contained in any other section of this Act or in any other instrument:

- (a) a mortgagee under a mortgage, whether executed before or after the commencement of this section, or a chargee is not entitled to appoint, whether under the power conferred by this Act or otherwise, a receiver in respect of the mortgaged or charged property unless default has been made in respect of the mortgage or the judgment to which the charge relates,
- (b) subject to paragraph (a), a mortgagee under a mortgage executed before the commencement of this section is entitled to exercise the power to appoint a receiver conferred on the mortgagee by this Act or otherwise as if section 111 (2) (b) and (c), (3) and (4) of this Act, or, as the case may be, section 57 (2) (b) and (c), (3) and (4) of the *Real Property Act 1900*, had not been enacted, and
- (c) a person purporting to have been appointed as a receiver in respect of mortgaged or charged property, whether or not by the instrument creating the mortgage or the covenant under which the charge arose, shall not be entitled to exercise, as a receiver, any powers in respect of the mortgaged or charged property unless:
  - (i) default has been made in respect of the mortgage or charge, and
  - (ii) that appointment was made by an instrument in writing which has been registered.

(3) A receiver, however appointed, shall not exercise a power to sell any land the subject of the mortgage or charge unless the mortgagee or chargee is entitled to exercise a power to sell the land.

(4) This section applies to mortgages and charges under the *Real Property Act 1900*.

## **Part 8 Leases**

### **Division 1A Application of Part**

#### **116 Application of Part 8 to land under Real Property Act**

The provisions of this Part shall apply to leases and sub-leases of land under the provisions of the *Real Property Act 1900*, notwithstanding anything in that Act contained.

## **Division 1 General provisions**

### **117 Rent and benefit of lessees' covenants to run with reversion**

- (1) Rent reserved by a lease and the benefit of every covenant or provision therein contained having reference to the subject-matter thereof and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained shall be annexed and incident to, and shall go with the reversionary estate in the land or in any part thereof immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part as the case may require of the land leased.

This subsection extends to a covenant to do some act relating to the land, notwithstanding that the subject-matter may not be in existence when the covenant is made.

- (2) The benefit of every condition of re-entry or forfeiture for a breach of any covenant or condition contained in a lease shall be capable of being enforced and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased, although that person became, by conveyance or otherwise, so entitled after the condition of re-entry or forfeiture had become enforceable.
- (3) This section shall not render enforceable any condition of re-entry or other condition waived or released before the person became entitled as aforesaid.
- (4) This section applies to:
  - (a) leases made after the commencement of this Act, and
  - (b) leases made before the commencement of this Act, but with respect only to rent accruing due after the commencement of this Act and to the benefit of a condition of re-entry or forfeiture for a breach committed after the commencement of this Act of any covenant, condition, or provision contained in the lease.

### **118 Obligation of lessors' covenants to run with reversion**

- (1) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to, and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise, and if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the

obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2) This section applies to:

- (a) leases made after the commencement of this Act, and
- (b) leases made before the commencement of this Act so far only as relates to breaches of covenant committed after the commencement of this Act.

### **119 Apportionment of conditions on severance etc**

(1) Notwithstanding the severance by conveyance, surrender, or otherwise of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition contained in the lease, shall be apportioned and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered or as to which the term has not been avoided, or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2) This section applies to:

- (a) leases made after the commencement of this Act, and
- (b) leases made before the commencement of this Act where the reversionary estate in the lands comprised therein is severed or there is an avoidance or cesser of the term as above mentioned after the commencement of this Act.

### **120 Restriction of effect of waiver**

Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor or the lessor's heirs, executors, administrators, or assigns is proved to have taken place in any one particular instance, such actual waiver shall not be assumed, or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver specially relates, nor to be a general waiver of the benefit of any such covenant or condition unless an intention to that effect appears.

### **120A Abolition of interesse termini and as to reversionary leases**

- (1) The doctrine of *interesse termini* is hereby abolished.
- (2) As from the commencement of the *Conveyancing (Amendment) Act 1930* all terms of years shall, whether the interest is created before or after such commencement be capable of taking effect at law or in equity, according to the estate, interest, or powers

of the grantor, from the date fixed for the commencement of the term, without actual entry.

- (3) A term, at a rent or granted in consideration of a fine, limited after the commencement of the *Conveyancing (Amendment) Act 1930* to take effect more than twenty-one years from the date of the instrument purporting to create it, shall be void, and any contract made after such commencement to create such a term shall likewise be void.
- (4) Nothing in subsections (1) and (2) shall prejudicially affect the right of any person to recover any rent or to enforce or take advantage of any covenants or conditions, or, as respects terms or interests created before the commencement of the *Conveyancing (Amendment) Act 1930*, shall operate to vary any statutory or other obligations imposed in respect of such terms or interests.
- (5) Nothing in this Act affects the rule of law that a legal term, whether or not being a mortgage term, may be created to take effect in reversion expectant on a longer term, which rule is hereby confirmed.
- (6) In this section **term of years** includes a term for less than a year, or for a year or years and a fraction of a year or from year to year.

#### **121 Chief leases may be renewed without surrendering under-leases**

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

hereby repealed so far as the same applies to New South Wales.

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

When the reversion expectant on a lease of land made either before or after the commencement of this Act is surrendered or merges after the commencement of this Act, the estate which for the time being confers as against the tenant under the lease the next vested right to the land, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the lease.

**123 Restriction on effect of licence to alien etc**

Where any licence to do any act which without such licence would create a forfeiture or give a right to re-enter under a condition or power reserved in any lease is given to any lessee or the lessee's assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given or to any specific breach of any proviso or covenant made, or to be made, or to the actual assignment under-lease or other matter thereby specifically authorised to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and shall be available as against any subsequent breach of covenant or condition assignment under-lease or other matter not specifically authorised or made dispunishable by such licence in the same manner as if no such licence had been given, and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given except in respect of the particular matter authorised to be done.

**124 Restricted operation of partial licences**

Where in any lease there is a power or condition of re-entry on assigning, or under-letting, or doing any other specified act without licence, and a licence is given to one of several lessees or co-owners to assign or under-let the lessee or co-owner's share or interest, or to do any other act prohibited to be done without licence, or is given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by co-lessees or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property, as the case may be, over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence.

**125 Attornment etc**

(1) Upon a conveyance of the reversion or remainder expectant or depending upon a

lease of any land no attornment by the lessee under the lease shall be necessary.

- (2) No lessee shall be prejudiced or damaged by payment of any rent to any grantor, transferrer, or assignor of any reversion, or by breach thereby occasioned of any condition for non-payment of rent, before notice is given to the lessee of such grant, transfer, or assignment by the grantee, transferee, or assignee.
- (3) An attornment by a lessee of land to a stranger claiming title to the estate of the lessor shall be void unless the same is made with the consent of the lessor.
- (4) Sections nine and ten of the Imperial Act Four Anne, chapter sixteen (or chapter three), and section eleven of the Imperial Act Eleven, George the Second, chapter nineteen, are hereby repealed, so far as the same apply to New South Wales.

#### **126 Contract for lease not part of title to lease**

- (1) Where a lease is made under a power contained in any instrument, any preliminary contract for, or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title or evidence of the title to the lease.
- (2) This section applies to leases made either before or after the commencement of this Act.

#### **127 Tenancy from year to year not to be implied**

- (1) No tenancy from year to year shall, after the commencement of this Act, be implied by payment of rent; if there is a tenancy, and no agreement as to its duration, then such tenancy shall be deemed to be a tenancy determinable at the will of either of the parties by one month's notice in writing expiring at any time.
- (2) This section shall not apply where there is a tenancy from year to year which has arisen by implication before the commencement of this Act:

Provided that in the case of any such tenancy in respect of which the date of its creation is unknown to the lessor or the lessee, as the case may be, who is seeking to determine the same, such tenancy shall, subject to any express agreement to the contrary, be determinable by six months' notice in writing expiring on the thirtieth day of June, one thousand nine hundred and twenty-one, or any date thereafter.

## **Division 2 Forfeiture**

### **128 Definitions**

For the purposes of this Division and Divisions 3 and 4:

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



**Lessee** includes an original or derivative under-lessee, a grantee under such a grant as aforesaid, his or her executors, administrators, and assigns, a person entitled under an agreement as aforesaid, and the executors, administrators, and assigns of a lessee.

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

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

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

### **129 Restrictions on and relief against forfeiture of lease**

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant, condition, or agreement (express or implied) in the lease, shall not be enforceable by action or otherwise unless and until the lessor serves on the lessee a notice:

- (a) specifying the particular breach complained of, and
- (b) if the breach is capable of remedy, requiring the lessee to remedy the breach, and
- (c) in case the lessor claims compensation in money for the breach, requiring the lessee to pay the same,

and the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and where compensation in money is required to pay reasonable compensation to the satisfaction of the lessor for the breach.

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

(2A) If such right of re-entry or forfeiture arises under a lease for a term of ten years or upwards by reason of a breach of a covenant by the lessee that the lessee will not make alterations in the demised premises without the consent of the lessor, and if it shall be proved to the satisfaction of the Court that the alterations made or proposed to be made have been or may be made without substantial injury to the lessor the Court may grant relief on such terms as the Court may think proper.

- (3) The provisions of subsection (1) shall not extend to a covenant or condition or agreement against doing, committing, or suffering anything whereby or by means whereof either alone or with other circumstances any licence under the *Liquor Act 1982* is or may be endangered, or is or may be liable to lapse or be suspended, cancelled or refused.
- (4) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.
- (5) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.
- (6) This section does not extend:
  - (a) to any Crown lease or to any lease granted by an owner under section 69 of the *Mining Act 1906*, or to any lease or tenancy for a term of one year or less, or
  - (b) to a covenant, condition, or agreement against the assigning, under-letting, parting with the possession or disposing of the land leased where the breach occurred before the commencement of the *Conveyancing (Amendment) Act 1930*, or
  - (c) to a condition for forfeiture on the taking in execution of the lessee's interest in any lease of:
    - (i) agricultural or pastoral land,
    - (ii) mines or minerals,
    - (iii) a house used or intended to be used as licensed premises under the *Liquor Act 1982*,
    - (iv) a house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures,
    - (v) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor or to any person holding under the lessor,
  - (d) in case of a mining lease to a covenant, condition, or agreement for allowing the lessor to have access to or inspect books, accounts, records, weighing-machines, or other things, or to enter or inspect the mine or the workings thereof,
  - (e) to a condition for forfeiture on the taking in execution of the lessee's interest in

any lease (other than a lease mentioned in paragraph (c)) after the expiration of one year from the date of the taking in execution, provided the lessee's interest be not sold within such one year: But if the lessee's interest be sold within such one year this section shall extend and be applicable to such condition for forfeiture.

- (7) (Repealed)
- (8) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.
- (9) The notice mentioned in this section shall be in the form set out in the Sixth Schedule or to a similar effect.
- (10) This section applies to leases made either before or after the commencement of this Act, and shall have effect notwithstanding any stipulation to the contrary.

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

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

### **131 Costs and expenses**

A lessor shall be entitled to recover as a debt due to him or her from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act.

The lessor shall be so entitled to recover whether the lessee has or has not rendered forfeiture unenforceable against him or her under section 129 (1).

**132 No fine for a licence to assign**

In all leases containing a covenant, condition, or agreement that the lessee shall not, without the licence or consent of the lessor, assign, underlet, part with the possession, or dispose of the demised premises or any part thereof, such covenant, condition, or agreement shall, unless the lease contains an express provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall, after the commencement of this Act, be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such licence or consent.

**133 Involuntary assignment no breach of covenant against assignment etc**

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

**Division 3 Special provisions as to certain covenants**

**133A Provisions as to covenants to repair**

- (1) Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the lease have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.
- (2) A right of re-entry or forfeiture for a breach of any such covenant or agreement as aforesaid shall not be enforceable, by action or otherwise, unless the lessor proves that the fact that such a notice as is required by section 129 had been served on the lessee was known either:
  - (a) to the lessee, or

- (b) to an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee, or
- (c) to the person who last paid the rent due under the lease either on the person's own behalf or as agent for the lessee or under-lessee,

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

Where a notice has been sent by post in a registered letter addressed to a person at the person's last known place of abode in or out of New South Wales, and that letter is not returned through the post office undelivered, then, for the purposes of this subsection, that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

This subsection shall be construed as one with section 129.

- (3) This section applies whether the lease was created before or after the commencement of the *Conveyancing (Amendment) Act 1930*.

### **133B Covenants against assigning etc**

- (1) In all leases whether made before or after the commencement of the *Conveyancing (Amendment) Act 1930* containing a covenant, condition, or agreement against assigning, underletting, charging, or parting with the possession of demised premises or any part thereof without licence or consent, such covenant, condition, or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject:
  - (a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent, and
  - (b) (if the lease is for more than forty years and is made in consideration wholly or partially of the erection, or the substantial improvement, addition, or alteration of buildings) to a proviso to the effect that in the case of any assignment, underletting, charging, or parting with the possession (whether by the holders of the lease or any under-lessee whether immediate or not) effected more than seven years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected.
- (2) In all leases whether made before or after the commencement of the *Conveyancing (Amendment) Act 1930* containing a covenant, condition, or agreement against the making of improvements without licence or consent, such covenant, condition, or

agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to the proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the lessee to reinstate the premises in the condition in which they were before the improvement was executed.

- (3) In all leases whether made before or after the commencement of the *Conveyancing (Amendment) Act 1930* containing a covenant, condition, or agreement against the alteration of the user of the demised premises, without licence or consent, such covenant, condition, or agreement shall, if the alteration does not involve any structural alteration of the premises, be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that no fine or sum of money in the nature of a fine, whether by way of increase of rent or otherwise, shall be payable for or in respect of such licence or consent; but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the lessor and of any legal or other expenses incurred in connection with such licence or consent.

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

- (4) Paragraph (b) of subsection (1), and subsections (2) and (3), do not apply to mining leases.

## **Division 4 Options in leases**

### **133C Definitions**

In this Division:

- (a) a reference to an option contained in a lease is a reference to a right on the part of the lessee to require the lessor:
- (i) to sell, or offer to sell, to the lessee the reversion expectant on the lease, or
  - (ii) to grant, or offer to grant, to the lessee a renewal or extension of the lease, or a further lease, of the demised premises or a part thereof,
- whether the right is conferred by the lease or by an agreement collateral to the lease,

and

- (b) a reference to a breach by a lessee of the lessee's obligations under a lease containing an option is a reference to a breach of those obligations by an act done or omitted to be done before or after the commencement of the *Conveyancing (Amendment) Act 1972*, in so far as the act or omission would constitute a breach of those obligations if there were no option contained in the lease.

**133D Application of Division**

- (1) This Division applies to and in respect of leases granted before or after the commencement of the *Conveyancing (Amendment) Act 1972* and options contained therein.
- (2) This Division has effect notwithstanding:
  - (a) any stipulation to the contrary, and
  - (b) the provisions of subsection (3) of section 53 of the *Real Property Act 1900*.

**133E Breach of certain obligations not to preclude lessee from exercising option except in certain circumstances**

- (1) In this Division **prescribed notice** means a notice in writing that:
  - (a) specifies an act or omission, and
  - (b) states that, subject to any order of the court under section 133F, a lessor giving the notice proposes to treat that act or omission as having precluded a lessee on whom the notice is served from exercising an option contained in the lease.
- (2) Where an act or omission that constituted a breach by a lessee of the lessee's obligations under a lease containing an option would, but for this section, have had the effect of precluding the lessee from exercising the option, the act or omission shall be deemed not to have had that effect where the lessee purports to exercise the option unless, during the period of fourteen days next succeeding the purported exercise of the option, the lessor serves on the lessee prescribed notice of the act or omission and:
  - (a) an order for relief against the effect of the breach in relation to the purported exercise of the option is not sought from the court before the expiration of the period of one month next succeeding service of the notice, or
  - (b) where such relief is so sought:
    - (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting relief, or
    - (ii) where relief is granted upon terms to be complied with by the lessee before

compliance by the lessor with the order granting relief, the lessee fails to comply with those terms within the time stipulated by the court for the purpose.

**133F Court may grant relief from breach of certain obligations**

- (1) Relief referred to in section 133E may be sought:
  - (a) in proceedings instituted in the court for the purpose, or
  - (b) in proceedings in the court in which:
    - (i) the existence of an alleged breach by the lessee of the lessee's obligations under the lease, or
    - (ii) the effect of the breach from which relief is sought, is in issue.
- (2) The court may, in proceedings in which relief referred to in section 133E is sought:
  - (a) make such orders (including orders affecting an assignee of the reversion) as it thinks fit for the purpose of granting the relief sought, or
  - (b) refuse to grant the relief sought.
- (3) The court may, in proceedings referred to in subsection (2), take into consideration:
  - (a) the nature of the breach complained of,
  - (b) the extent to which, at the date of the institution of the proceedings, the lessor was prejudiced by the breach,
  - (c) the conduct of the lessor and the lessee, including conduct after the giving of the prescribed notice,
  - (d) the rights of persons other than the lessor and the lessee,
  - (e) the operation of section 133G, and
  - (f) any other circumstances considered by the court to be relevant.
- (4) The court:
  - (a) may make an order under subsection (2) on such terms as to costs, damages, compensation or penalty, or on such other terms, as the court thinks fit, and
  - (b) may make any consequential or ancillary order it considers necessary to give effect to an order made under that subsection.



**133G Lease to continue in force until issue decided**

(1) Subject to any order of the court and to this section:

(a) where:

- (i) an option is contained in a lease,
  - (ii) the lessee exercises, or purports to exercise, the option, and
  - (iii) the lease would, but for this paragraph, expire within the period of fourteen days after the exercise, or purported exercise, of the option,
- the lease shall be deemed to continue in force until the expiration of that period,

(b) where:

- (i) a prescribed notice is duly served on a lessee, and
- (ii) the lease in respect of which the notice is served would, but for this paragraph, expire within the period of one month referred to in paragraph (a) of subsection (2) of section 133E,

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

(c) where, in relation to a lease continued in force under paragraph (b), relief referred to in section 133E is sought by a lessee, the lease shall, subject to subsections (2) and (3), be deemed to continue in force until:

- (i) the proceedings in which the relief is sought are disposed of, in so far as they relate to that relief, otherwise than by granting the relief, or
- (ii) effect is given to orders made by the court in granting that relief in so far as they affect the lessor or relate to an assurance to the lessee.

(2) Paragraph (c) of subsection (1):

- (a) does not apply to or in respect of a lease that, but for that paragraph, would continue in force for a period longer than the period for which it is, by the operation of that paragraph, continued in force, and
- (b) does not, where a lessee fails to comply with terms imposed upon the lessee pursuant to paragraph (a) of subsection (4) of section 133F, operate to continue the lease in force beyond the time of that failure by the lessee.

(3) Where, under subsection (1), a lease continues in force after the day on which, but for that subsection, it would expire:

- (a) the lease so continues in force subject to the provisions, stipulations, covenants,

conditions and agreements in the lease (other than those relating to the term and the option contained in the lease) but without prejudice to any rights or remedies of the lessor or lessee in relation to the lease, and

(b) the lessee, if the lease is of land under the provisions of the *Real Property Act 1900* and the lessee is in possession of the demised premises, has the protection of paragraph (d) of section 42 of that Act as if the lease were a tenancy referred to in that paragraph.

(4) Subject to subsection (5), where, pursuant to an option contained in a lease continued in force under subsection (1), the lease is renewed or a new lease is granted, the period during which the lease was so continued in force shall be deemed to be part of the term for which the lease was renewed or the new lease granted, and any lease granted pursuant to an exercise of the option shall be expressed to have commenced when the lease containing the option would, but for subsection (1), have expired.

(5) Subsection (4) does not apply to or in respect of a lease that stipulates for the commencement of any lease granted pursuant to an exercise of the option contained therein on a day that is later than the day on which the lease so granted would, but for this subsection, commence under subsection (4).

## **Part 9 Long terms**

### **134 Enlargement of residue of long term into fee simple**

(1) Where a residue unexpired of not less than two hundred years of a term which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, or a money value not exceeding four dollars per annum originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

(2) Each of the following persons, namely:

(a) Any person beneficially entitled in right of the term, whether subject to an incumbrance or not, to possession of any land comprised in the term,

(b) any person being in receipt of income as trustee, in right of the term, or having the term vested in him or her in trust for sale, whether subject to any incumbrance or not,

(c) any person in whom, as legal representative of any deceased person, the term is vested, whether subject to any incumbrance or not,

shall, as far as regards the land to which the person is entitled, or in which the person is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution and registration of the deed, the term shall be enlarged into a fee simple.

- (3) Upon registration of the deed the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.
- (4) This section shall apply to and include every such term, whether having as the immediate reversion thereon the freehold or not; but not:
- (a) any term liable to be determined by re-entry for condition broken, or
  - (b) any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.
- (5) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.
- (6) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be, conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.
- (7) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right or in fact, or are not reserved to the Crown.
- (8) This section applies to every such term as aforesaid subsisting at or after the commencement of this Act.
- (9) This section applies to lands under the provisions of the [Real Property Act 1900](#).

## **Part 10 Invalid leases under powers**

### **135 Lease deemed to be granted in intended exercise of power**

When a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this Part, be deemed to be granted in the intended exercise of such power, although such power is not referred to in such lease.

### **136 Certain invalid leases under powers to be construed as agreements to lease**

- (1) Where in the intended exercise of any power of leasing, whether derived under an Act or under any instrument lawfully creating such power, a lease has been or may hereafter be granted which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled for any estate to the property comprised in such lease, such lease, in case the same has been made bona fide, and the lessee named therein, the lessee's executors, administrators, or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, the lessee's executors, administrators, or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract:
- (2) Provided that no lessee under any such invalid lease as aforesaid, the lessee's executors, administrators, or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease where the persons who would have been bound by such contract are willing to confirm such lease without variation.
- (3) Land the subject of any such equitable contract shall, for the purposes of subsection (2) of section 14 of the *Real Property Act 1900*, be deemed to be a leasehold.

### **137 Certain leases validated where grantor could not grant them**

- (1) Where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the property comprised in such lease has continued after the time when such or the like lease might have been granted by the person in the lawful exercise of such power,

then and in every such case such lease shall take effect, and be as valid as if the same had been granted at such last-mentioned time, and all the provisions contained in this Part shall apply to every such lease:

Provided that this section shall not apply where at the time of the granting of the lease the person granting the same was under the age of eighteen years, unless the lease is presumptively binding on the person in accordance with the *Minors (Property and Contracts) Act 1970*.

- (2) The amendments made to this section by the *Minors (Property and Contracts) Act 1970* apply to a lease granted after the commencement of that Act.

### **138 Confirmation of invalid leases**

Where, upon or before the acceptance of rent under any such invalid lease as above mentioned, any receipt, memorandum, or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person lawfully authorised by the person, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

### **139 Lessee bound to accept confirmation of lease**

Where, during the continuance of the possession taken under any such invalid lease as above mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the property comprised in such lease, or to the possession thereof, is able to confirm such lease without variation, the lessee, the lessee's executors, or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorised; and after confirmation and acceptance of confirmation such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid.

### **140 Savings**

Nothing in this Part shall extend or be construed to prejudice or take away any right of action or other right or remedy to which, but for the enacting of this Part, the lessee named in any such lease as aforesaid, the lessee's executors, administrators, or assigns would or might have been entitled under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice or take away any right of re-entry or other right or remedy to which, but for the enacting of this Part, the person granting such lease, the person's executors, administrators, or assigns, or other the person for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled, for or

by reason of any breach of the covenants, conditions, or provisos contained in such lease, and on the part of the lessee, the lessee's executors, administrators, or assigns, to be observed or performed.

#### **141 This Part not to extend to certain leases**

This Part shall not extend to any lease where, before the twenty-first day of August, one thousand nine hundred and five (being the day of the commencement of the *Forfeiture and Validation of Leases Act 1905*), the property comprised in such lease was surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there has been any judgment or order in any action or suit concerning the validity of such lease.

## **Part 11 Apportionment**

### **142 Definitions**

For the purposes of this Part:

**Annuities** include salaries and pensions.

**Dividends** include (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies or companies within the meaning of the *Companies (New South Wales) Code*, divisible between all, or any, of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this Part be deemed to have accrued by equal daily increment during, and within, the period for or in respect of which the payment of the same revenue shall be declared, or expressed to be made; but the said word **dividend** does not include payments in the nature of a return or reimbursement of capital.

**Rents** include rent-service, rent-charge, and rent-seck, and all periodical payments or renderings in lieu of or in the nature of rent.

### **143 (Repealed)**

### **144 Rents and periodical payments**

- (1) All rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.
- (2) The apportioned part of any such rent, annuity, dividend, or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment, when the entire portion of which such apportioned part forms part becomes due and payable, and not before; and in the case of a rent annuity or other such payment determined by re-entry, death, or otherwise, when the next entire portion of

the same would have been payable if the same had not so determined, and not before.

- (3) All persons and their respective executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies, at law and in equity, for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively:

Provided that where any person is liable to pay rent reserved out of or charged on lands, that person and the said lands shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the person who, if the rent had not been apportionable under this section or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such lastmentioned person by the executors, administrators, or other parties entitled thereto under this section by action or suit.

- (4) Nothing in this section shall render apportionable any annual sums payable under policies of assurance of any description.
- (5) This section shall not extend to any case in which it is expressly stipulated that no apportionment shall take place.
- (6) This section extends to and includes deeds, wills, and other instruments that were made before, but came into operation on or after the twenty-fourth day of July, one thousand nine hundred and five (being the day of the commencement of the [Apportionment Act 1905](#)).

## **Part 12 Debts charged on property of deceased**

### **145 Charges on property of deceased to be paid primarily out of the property charged**

- (1) Where a person dies after the commencement of the [Conveyancing \(Amendment\) Act 1930](#) possessed of or entitled to, or, under a general power of appointment by his or her will disposes of:
- (a) property, which at the time of his or her death is charged with the payment of money, whether by way of legal mortgage, equitable charge, or otherwise (including a lien for unpaid purchase money), or
  - (b) land in respect of which there is owing at the time of his or her death any money under a contract of purchase whether from the Crown or not,
- and the deceased has not by will, deed, or other document signified a contrary or

other intention, the property so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the charge; and every part of the property, according to its value, shall bear a proportionate part of the charge on the whole thereof.

- (2) Such contrary or other intention shall not be deemed to be signified:
- (a) by a general direction for the payment of debts or of all the debts of the testator out of the testator's personal estate or the testator's residuary real and personal estate, or the testator's residuary real estate, or
  - (b) by a charge of debts upon any such estate,
- unless such intention is further signified by words expressly or by necessary implication referring to all or some part of the charge.
- (3) Nothing in this section affects the right of a person entitled to the charge to obtain payment or satisfaction thereof either out of the other assets of the deceased or otherwise.

## **Part 13 Rent-charges and other annual sums**

### **146 Recovery of annual sums charged on land**

- (1) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rent-charge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further.
- (2) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged, or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.
- (3) If at any time the annual sum or any part thereof is unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged, or any part thereof, and take the income thereof, until thereby or otherwise the annual sum, and all arrears thereof due at the time of the person's entry, or afterwards becoming due during the person's continuance in possession, and all costs and expenses occasioned



by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

- (4) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus (if any) of the money raised or of the income received under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.
- (5) The rule of law relating to perpetuities shall not apply to any powers or remedies conferred by this section, nor to the same or like powers or remedies conferred by any instrument for recovering or compelling the payment of any annual sum within the meaning of this section.
- (6) This section applies only where the instrument under which the annual sum arises comes into operation after the commencement of this Act, and then only if and as far as a contrary intention is not expressed in such instrument, and shall have effect subject to the terms and provisions thereof.
- (7) This section shall not apply to land under the provisions of the [Real Property Act 1900](#).

## **Part 13A Aliens**

### **146A Capacity of aliens to hold and deal with property and interests in property**

Notwithstanding the provisions of any Act or law:

- (a) a person is not prevented from taking, acquiring, holding or disposing of any property by reason only that the person is not a natural born British subject, and
- (b) title to property may be derived through, from, or in succession to such a person, in all respects as through, from or in succession to a natural born British subject.

## **Part 14 Married women**

### **147 Acknowledgment by married woman not necessary**

- (1) It shall not be necessary to the validity of any deed or instrument executed by a married woman after the commencement of this Act, that such deed or instrument be

acknowledged by her.

- (2) This section applies to land under the provisions of the *Real Property Act 1900*, and section one hundred and nine of that Act is hereby repealed; that section shall be deemed not to have applied in any case where a married woman has executed any instrument registered under that Act in respect of her separate property, or in exercise of a power of appointment or to any instrument executed for the purposes of that Act by a married woman, with the written consent of her husband, in favour of a purchaser in good faith.

#### **148 Married woman may by deed dispose of land or reversionary interest in property etc**

- (1) A married woman may, by deed:
  - (a) dispose of any land, or
  - (b) dispose of any future or reversionary interest in property, or
  - (c) release or extinguish or disclaim or contract not to exercise any power in regard to property, or
  - (d) release her right or equity to a settlement out of any property, or
  - (e) disclaim any interest in any property.
- (2) (Repealed)

#### **149-151 (Repealed)**

### **Part 14A Minors and minors' property**

#### **151A Minors not to be appointed trustees**

- (1) The appointment of a minor to be a trustee in relation to any trust shall be void, but without prejudice to the power to appoint a new trustee to fill the vacancy.
- (2) This section applies only to appointments made after the commencement of the *Conveyancing (Amendment) Act 1930*.
- (3) The amendments made to this section by the *Minors (Property and Contracts) Act 1970* apply only to appointments made after the commencement of that Act.

#### **151B (Repealed)**

#### **151C Management of land during minority**

- (1) If and as long as any person who is entitled to a beneficial interest in possession affecting land is a minor, the trustees appointed for this purpose by the settlement, or if there are none so appointed, then the trustees of the settlement, unless the settlement or the order of the court whereby they or their predecessors in office were

appointed to be such trustees expressly provides to the contrary, or if there are none, then any persons appointed as trustees for this purpose by the court on the application of a guardian or next friend of the minor may enter into and continue in possession of the land on behalf of the minor, and in every such case the subsequent provisions of this section shall apply.

(2) The trustees shall manage or superintend the management of the land, with full power:

- (a) to fell timber from time to time in the usual course for sale, or for repairs or otherwise, and
- (b) to erect, alter, pull down, rebuild, and repair houses, and other buildings, dams, fences, and other erections, and
- (c) to continue the working of mines, minerals, and quarries which have usually been worked, and
- (d) to drain or otherwise improve the land or any part thereof, and
- (e) to insure against any insurable risk, and
- (f) to grant leases for any term not exceeding three years, and
- (g) to make allowances to and arrangements with tenants and others, and
- (h) to determine tenancies, and to accept surrenders of leases and tenancies, and
- (i) generally to deal with the land in a proper and due course of management,

but so that, where the minor is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the minor could, if of the age of eighteen years or upwards, cut the same.

(3) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber, pay the expenses (including any commission to which they are entitled) incurred in the management or in the exercise of any power conferred by this section or otherwise in relation to the land, and all outgoings not payable by any tenant or other person, and shall keep down any annual sum and the interest of any principal sum charged on the land.

(4) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, under which the interest of the minor arises, and has effect subject to the terms of that instrument and to the provisions therein contained.

**151D Power to appoint trustees of minors' property**

(1)

- (a) Where a minor is absolutely entitled under the will or on the intestacy of a person dying before or after the commencement of the *Conveyancing (Amendment) Act 1930* (in this section called **the deceased**), to a devise or legacy, or to the residue of the estate of the deceased, or any share therein, and such devise, legacy, residue, or share is not under the will, if any, of the deceased, devised or bequeathed to trustees for the minor, the personal representatives of the deceased may by registered deed appoint a trust corporation or two or more individuals not exceeding four (whether or not including the personal representatives or one or more of the personal representatives) to be the trustee or trustees of such devise, legacy, residue, or share for the minor, and to be trustees of any land devised or any land being or forming part of such residue or share for the purposes of section 151C.
- (b) Where a trust corporation, or a trust corporation and one or more individuals are the personal representatives of the deceased, the personal representatives may by registered deed appoint the trust corporation either alone or with one or two individuals (whether or not including one or both the individual personal representatives) to be such trustees for the minor.
- (c) On such appointment the provisions of section 9 of the *Trustee Act 1925* shall apply to the vesting in the trustees of such devise, legacy, residue, or share.
- (d) On such appointment:
- (i) the personal representatives, as such, shall be discharged from all further liability in respect of such devise, legacy, residue or share,
  - (ii) the rights to which the minor is entitled in virtue of such devise, legacy, residue or share shall be restricted to the property which, by the operation of this section and section 9 of the *Trustee Act 1925*, is vested in the trustees for the minor and shall not extend to any other property,
  - (iii) the devise, legacy, residue or share may be retained in its existing condition or state of investment or may be converted into money and such money may be invested in any authorised investment.
- (2) Where a personal representative has, before the commencement of the *Conveyancing (Amendment) Act 1930*, retained or sold any such devise, legacy, residue, or share, and invested the same or the proceeds thereof in any investments in which the personal representative was authorised to invest money subject to the trust, then, subject to any order of the court made before such commencement, the personal representative shall not be deemed to have incurred any liability on that account, or by reason of not having paid or transferred the money or property into court.

## Part 15 Executors and administrators

### 152 Definitions

For the purposes of this Part:

- (a) **Real estate** has the same meaning as in Part 2 of the *Wills, Probate and Administration Act 1898*.
- (b) **Purposes of administration** includes the payment in a due course of administration of the debts, funeral and testamentary expenses duties and commission, and the costs, charges, and expenses of the executor or administrator, and any costs which may be ordered to be paid out of the estate.
- (c) A power to mortgage includes power to remortgage from time to time for the purpose of paying off a mortgage executed under the power.

### 153 Powers of executors and administrators as to sale, mortgage or lease of real estate

- (1) Subject as hereinafter mentioned executors and administrators may without the consent of any person or the order of a court:
  - (a) sell or mortgage the real estate of the deceased person for purposes of administration,
  - (b) sell the real estate of the deceased person as to which the deceased person died intestate for purposes of distribution or division amongst the persons entitled,
  - (c) lease the real estate of the deceased person in possession for any term not exceeding three years.
- (2) Any conditions may be imposed on the exercise of any such power of sale, mortgage, or lease by an administrator, and either generally or in the case of a particular sale, mortgage, or lease, by rules of court, or by the court in the grant of administration (if any) or by other order.
- (2A) No conditions imposed on the exercise by an executor of any such power of sale, mortgage, or lease shall operate after the commencement of the *Conveyancing (Amendment) Act 1930*.
- (2B) The court shall cause to be embodied in or endorsed on every certificate of the grant of administration a copy or record of any such conditions imposed by the order of the court.
- (2C) No purchaser nor the Registrar-General, Crown Solicitor, or other person registering or certifying title under any sale, mortgage, or lease under this section shall be affected by any such conditions imposed by order of which the purchaser, Registrar-General, Crown Solicitor or person has not actual notice unless a copy or record of the

order is registered.

- (3) No purchaser, nor the Registrar-General, Crown Solicitor, or other person registering or certifying title under any sale, mortgage, or lease under this section, shall be bound to inquire whether the powers abovementioned or any of them are being or have been exercised for the purposes abovementioned, and the receipt of the executor or administrator shall be sufficient discharge, and shall exonerate the persons paying the same from any responsibility for the application of the moneys expressed to have been so received.
- (4) Some or one only of several executors or administrators shall be entitled to exercise such powers with the leave of the court and not otherwise, and the court may make such orders as it thinks fit for the purpose of carrying out any such sale, mortgage, or lease.
- (5) This section applies in the case of:
  - (a) grants of probate or administration or orders to collect made after the commencement of this Act, and
  - (b) grants of administration or orders to collect made before the commencement of this Act in respect of the estates of persons dying on or after the fifteenth day of December, one thousand eight hundred and ninety (being the day of the passing of the *Probate Act of 1890*).

#### **154 Powers of executors as to sale, mortgage or lease of real estate**

- (1) The executor of any person dying on or after the fifteenth day of December, 1890 (being the day of the passing of the *Probate Act of 1890*), and to whom probate has been granted prior to the commencement of this Act, shall have and shall be deemed to have had power without the leave of a Court:
  - (a) to sell or mortgage the real estate of the deceased for purposes of administration,
  - (b) to sell the real estate as to which the testator died intestate for purposes of distribution or division amongst the persons entitled,
  - (c) to lease the real estate of the deceased in possession for any term not exceeding three years.
- (2) (Repealed)
- (3) No purchaser, nor the Registrar-General, Crown Solicitor, or other person registering or certifying title under any sale, mortgage, or lease under this section shall be bound to inquire whether the powers abovementioned, or any of them, are being or have been exercised for the purposes abovementioned, and the receipt of the executor or administrator shall be a sufficient discharge and shall exonerate the persons paying the same from any responsibility for the application of the moneys expressed to have

been so received.

- (4) Nothing in this section shall be taken to invalidate any lease for a longer period than three years which was validly granted by an executor prior to the commencement of this Act.

#### **155 Partial repeal of 1900 No 38, sec 4**

- (1) Section four of the *Administration (Validating) Act 1900* is hereby repealed so far as relates to executors under all grants of probate, made before or after the commencement of this Act, and to administrators under grants of administration made after the commencement of this Act.
- (2) The last two preceding sections of this Act shall apply to the Public Trustee notwithstanding anything contained in the *Public Trustee Act 1913*.

#### **156 Validation of certain sales by administrators**

In all cases where administration of the estate of a deceased person was granted before the twenty-sixth day of October, one thousand nine hundred (being the day of the commencement of the *Administration (Validating) Act 1900*), no sale of any land of such deceased person heretofore or hereafter made by the administrator shall be deemed to have been or to be invalid by reason:

- (a) that the grant contains a prohibition against the sale of such land without the order of the Supreme Court in its ecclesiastical or probate jurisdiction, or
- (b) that at the date of such sale a period of more than twenty years since the death of such deceased person had elapsed.

#### **157 Purchaser from devisee etc not bound to inquire as to payment of debts of testator or intestate**

- (1) Where an executor or administrator has, as to any land of a deceased person vested in him or her as such executor or administrator:
  - (a) conveyed the land to, or
  - (b) executed an acknowledgment vesting the land in, or
  - (c) consented to the transmission under the *Real Property Act 1900* of the land to, a devisee, legatee, or person entitled on intestacy as the case may be, or to any person claiming under that devisee, legatee or person entitled on intestacy, neither the purchaser of the land nor the Registrar-General, nor in the case of land under any Act relating to Crown lands, the Crown Solicitor shall be or shall be deemed ever to have been concerned to inquire as to the payment of the debts, funeral and testamentary expenses of such deceased person.

- (2) Any such purchaser shall take and be deemed to have taken the land free from such debts, funeral and testamentary expenses, and no action shall lie against the Registrar-General or the Crown in respect of any such debt, funeral or testamentary expense.
- (3) This section applies to purchases made before as well as after the commencement of this Act.

**157A Trustee or personal representative deemed entitled to sell and convey land resumed under statutory authority**

- (1) In this section, **resumption** means the acquisition of land by compulsory process in accordance with the *Land Acquisition (Just Terms Compensation) Act 1991* or any other Act.
- (2) Notwithstanding anything contained in any Act, where land is acquired by resumption from a trustee or personal representative, such trustee or personal representative or his or her successor in office shall be entitled to sell and convey the land resumed, and to agree upon and receive all compensation money whatsoever payable in respect of the resumption.
- (3) Such compensation money shall be held by the trustee or personal representative receiving the same on the trusts affecting the land in respect of which the compensation money is paid, or affecting the compensation money, and, subject to the terms of the instrument (if any) containing such trusts and to the provisions of this Act, on trust for investment in accordance with section 14A of the *Trustee Act 1925*.
- (4) A sole trustee other than a trust corporation or a trustee or body of trustees incorporated by any Act or a person appointed as a sole trustee by the creator of the trust shall not be entitled under this section to agree upon or to receive the compensation money payable in respect of a resumption, but upon the appointment of an additional trustee of the instrument containing the trust affecting the land approved by the Crown Solicitor such trustees shall be entitled under this section to agree upon and receive such money, but this subsection does not affect the right of a sole personal representative as such to agree upon and give a valid receipt for or direct the application of such compensation money.
- (5)
  - (a) Subject to the provisions of the instrument (if any) creating such trusts, the trustees or the personal representatives may, with the consent of the person of the age of eighteen years or upwards and free from disability, who would have been entitled to the income of the land resumed, apply the compensation money paid under this section in respect of a resumption for the following purposes:
    - (i) in the purchase of other lands to be conveyed upon the like trusts as the lands in respect of which such money has been paid stood limited, or



- (ii) if such money has been paid in respect of any buildings taken under the authority of any such Act as aforesaid, or injured by the proximity of any work authorised by any such Act,—in removing or replacing such buildings or substituting others in their stead.
- (b) If the person who would have been entitled to the income is a person under mental disability the consent of the person charged by law with the management and care of the property of the person under mental disability or, if there is no person so charged, of the court, is sufficient authority to protect the trustees or personal representatives so applying the compensation money.
- (c) If the person who would have been entitled to the income is a minor, or a person who cannot be found or ascertained, or as to whom it is uncertain whether the person is living or dead, the trustees or personal representatives may so apply the money without the consent of any person.
- (6) The costs of the appointment of an additional trustee under subsection (4), and of obtaining the necessary consents under subsection (5), shall be paid by the person in whom the land vests on resumption.
- (7) This section applies only to resumptions made after the commencement of the [Conveyancing \(Amendment\) Act 1930](#).
- (8) The powers of trustees and personal representatives under this section shall be cumulative, and not in substitution for, or in derogation of any other powers of any such persons to sell and convey land the subject of a resumption, or to agree upon and receive compensation money payable in respect of a resumption.

## Part 16 Powers of attorney

### Division 1 General

#### 158 Definitions and application of Part

- (1) In this Part:

**attorney**, in relation to a power of attorney, means an attorney under the power.

**commencement**, in relation to the [Conveyancing \(Powers of Attorney\) Amendment Act 1983](#), means the commencement of section 3 of, and Schedule 1 to, that Act.

**power of attorney** or **power** includes an authorised substitution, delegation or appointment of sub-attorney.

**principal**, in relation to a power of attorney, means the person giving the power.

- (2) In sections 161, 162 and 162A, **suspended**, in relation to a power of attorney, means:

- (a) suspended or restricted in operation by reason of unsoundness of mind of the principal occurring after the execution of the instrument creating the power, or
  - (b) suspended by section 110A of the *Mental Health Act 1958*.
- (3) This Part does not enable an attorney, without express authority, irrevocably to appoint a substitute, delegate or sub-attorney.
- (4) This Part extends to powers of attorney authorising, whether expressly or in general terms, the execution of dealings under the *Real Property Act 1900*.

### **159 Execution etc under power**

- (1) An attorney under a power of attorney may, in the exercise of the power:
- (a) execute any assurance or instrument with his or her own signature and, where sealing is required, with his or her own seal, or
  - (b) do any other thing in his or her own name.
- (2) An assurance or instrument executed, or thing done, in accordance with subsection (1) is as effectual as if executed or done by the attorney with the signature and seal or, as the case may be, in the name, of the principal.

### **160 Irrevocable powers**

- (1) Where a power of attorney is, in the instrument creating the power, expressed to be irrevocable and is, or in the instrument creating the power is expressed to be, given for valuable consideration, the power is not, except to the extent (if any) that the instrument otherwise provides, revoked or otherwise terminated by, and remains effective notwithstanding:
- (a) anything done by the principal without the concurrence of the attorney,
  - (b) bankruptcy of the principal,
  - (c) mental incapacity of the principal,
  - (d) the principal becoming a patient, a protected person or an incapable person within the meaning of the *Mental Health Act 1958*, or any other event happening whereby the property or affairs of the principal becomes or become subject to care, management, collection, administration, charge or control under that Act,
  - (e) death of the principal,
  - (f) if the principal is a corporation, dissolution of the corporation.
- (2) Where the objects of a power of attorney to which this section applies have been carried out, or have become incapable of being carried out, or a power of attorney to

which this section applies is otherwise exhausted, the Court may order that the power of attorney terminate and may order that the instrument creating the power be delivered up for cancellation.

- (3) This section does not apply to a power of attorney created by an instrument executed before the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

#### **161 Termination etc—protection of attorney**

- (1) Where:

- (a) an attorney under a power of attorney does an act within the scope of the power, and
- (b) at that time the attorney does not have notice that the power has terminated or has been suspended,

the attorney shall be entitled to rely on the power, as against the principal and any other person, notwithstanding any termination or suspension of the power before the time of the act, in the same manner and to the same extent as if the power had not terminated, or had not been suspended, before the time of the act.

- (2) This section applies only to an act done by an attorney after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

#### **162 Termination etc—protection of strangers**

- (1) Where:

- (a) an attorney under a power of attorney does an act within the scope of the power, professing to act on behalf of another,
- (b) at the time of the act of the attorney or afterwards, a third person:
  - (i) acts as a purchaser or incurs an obligation or otherwise acts to his or her detriment in a transaction (with the attorney or with any other person) which depends for its validity or effect on the power not having terminated, and not being suspended, at the time of the act of the attorney, or
  - (ii) acts in reliance on a right, title or interest which so depends, and
- (c) at the time of the act of the third person he or she does not have notice that, at the time of the act of the attorney, the power had terminated, or was suspended so far as concerns the authority of the attorney to do that act,

the third person and any person claiming under him or her shall be entitled, as against the principal and the attorney and any other person, to rely on the power notwithstanding any termination of the power before the time of the act of the

attorney, and notwithstanding any suspension of the power at that time so far as concerns authority to do that act, in the same manner and to the same extent as if the power had not terminated before the time of the act of the attorney or, as the case may be, were not under suspension at that time.

- (2) Subsection (1) does not entitle an attorney to rely on a power in support of an act within the scope of the power done by him or her with notice of termination of the power or notice of suspension of the power so far as concerns authority to do that act.
- (3) This section applies only to an act done by an attorney after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

#### **162A Attorney acting with knowledge of termination or suspension of power**

- (1) Where a power of attorney has terminated and an attorney under the power, knowing of the termination, does any act or thing under or in pursuance of the power, that attorney under the power is guilty of an indictable offence and liable to imprisonment for 5 years.
- (2) Where a power of attorney is suspended so far as concerns authority to an attorney to do an act or thing of any nature and an attorney under the power, knowing of the suspension, does an act or thing of that nature under or in pursuance of the power, that attorney under the power is guilty of an indictable offence and liable to imprisonment for 5 years.
- (3) This section applies only to acts or things done after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

#### **162B Saving**

Sections 161, 162 and 162A, as enacted immediately before the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*, continue to apply to and in respect of a power of attorney executed before that commencement as if they had not been repealed.

#### **163 Registration of powers of attorney**

- (1) Any instrument (whether executed before or after the commencement of this Act) creating a power of attorney for any purpose whatever may be registered.
- (2) Where such instrument is executed after the commencement of this Act no conveyance or other deed not being a lease or agreement for a lease for a term not exceeding three years, and no memorandum by this Act operating as a deed executed by the attorney under the power in pursuance of the power shall be of any force or validity whatsoever unless the instrument creating the power has been registered:

Provided that on registration of the instrument creating the power every such conveyance deed or memorandum executed by the attorney under the power shall

take effect as if the instrument creating the power had been registered before the execution of the conveyance deed or memorandum.

- (3) Any instrument revoking any such power may also be registered.
- (4) Every such conveyance and other deed and memorandum as is mentioned in subsection (2) executed by the attorney under a power of attorney before the commencement of the *Conveyancing (Amendment) Act 1930*, shall have the same effect as if that Act had been in operation at the time of the execution.
- (5) Nothing in the last preceding subsection shall affect the rights of any party to any proceeding at law or in equity concluded before or pending at the commencement of the *Conveyancing (Amendment) Act 1930*.

### **163A Proof of powers of attorney**

- (1) Where, in the manner provided by subsection (2), a document (being a legible document) is certified to be a true and complete copy of the contents of an instrument creating a power of attorney, the document is evidence:
  - (a) as against the principal under the power of attorney—of the execution and contents of the instrument, and
  - (b) as against any other person—of the contents of the instrument.
- (2) A document is certified in the manner provided by this subsection:
  - (a) if there is endorsed on the document a written certificate, to the effect that the document is a true and complete copy of the contents of the instrument of which it purports to be a copy, by:
    - (i) the principal under the power of attorney created by the instrument, or
    - (ii) a person of a prescribed class, and
  - (b) if each page of the document bears the signature of the person who gives the certificate referred to in paragraph (a).
- (3) Subsection (1) does not make a document better evidence than is the instrument of the contents of which it purports to be a copy.
- (4) This section does not affect any other method of proving the execution or contents of an instrument creating a power of attorney.
- (5) A person who gives a certificate for the purposes of this section knowing the certificate to be false is guilty of an indictable offence and liable to imprisonment for 5 years.
- (6) This section applies only to a document certified for the purposes of this section after

the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

### **163B Power conferred by prescribed form of instrument**

- (1) Subject to this section, an instrument (whether or not under seal) in or to the effect of the form in Schedule 7 confers on the attorney thereby appointed authority to do on behalf of the person executing the instrument anything the person executing the instrument may lawfully authorise an attorney to do.
- (2) The authority conferred by an instrument referred to in subsection (1) does not include:
  - (a) authority to exercise or perform any power, authority, duty or function as a trustee conferred or imposed on the person executing the instrument, or
  - (b) unless it is expressly conferred by the instrument—authority to execute an assurance or other document, or do any other act, as a result of which a benefit would be conferred on the attorney appointed by the instrument.
- (3) Where an instrument referred to in subsection (1) specifies any conditions or limitations to which the authority conferred by the instrument is to be subject, the authority is so conferred subject to compliance with those conditions or limitations.

## **Division 2 Unsoundness of mind etc**

### **163C Application of Division**

This Division applies only to a power of attorney given after the commencement of the *Conveyancing (Powers of Attorney) Amendment Act 1983*.

### **163D Definitions**

In this Division:

***incommunicate***, in relation to a person, means under such a handicap of body or mind, by way of coma or paralysis or otherwise, whether or not induced by any drug or by medical or other treatment, that the person is unable to receive communications respecting the person's property or affairs, or to express the person's will respecting the person's property or affairs.

***protected power of attorney*** means a power of attorney referred to in section 163F (2).

### **163E Initial unsoundness of mind**

- (1) Subject to this section, a power of attorney is not ineffective by reason that any act within the scope of the power is of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.
- (2) Subject to subsections (3) to (6), a power of attorney does not authorise an attorney

under the power to do an act of a nature which is, at the time when the power is given, beyond the understanding of the principal through unsoundness of mind.

- (3) Where, on application by the principal under a power of attorney, it appears to the Court that the nature of the acts, or some one or more of the acts, within the scope of the power was not, at the time when the power was given, beyond the understanding of the principal through unsoundness of mind, the Court may by order confirm the power wholly or in part as the case requires.
- (4) Where, on application by the principal under a power of attorney, it appears to the Court that the principal has, before or during the proceedings on the application, affirmed the power wholly or in part, the Court may by order confirm the power wholly or in part as the case requires, but only to the extent to which it appears to the Court that the principal was, at the time of the affirmation, sufficiently of sound mind so to affirm.
- (5) Where, on application by the principal under a power of attorney (whether or not a protected power of attorney) it appears to the Court:
  - (a) that the principal is incapable of affirming the power because:
    - (i) the principal lacks capacity by reason of the continuation of unsoundness of mind that affected the principal when the principal gave the power, or
    - (ii) the principal is incommunicate, and
  - (b) that it is for the benefit of the principal that the power be confirmed wholly or in part,the Court may by order confirm the power wholly or in part as the case requires.
- (6) Where the Court makes an order under this section confirming a power of attorney wholly or in part, an act within the scope of the power to the extent so confirmed, done after the order takes effect by an attorney under the power, shall be as good for all purposes and between all persons as if at the time when the order takes effect the principal were of full capacity and in due form confirmed the power of attorney to the extent of the order of confirmation.
- (7) Subsection (5) applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

### **163F Supervening unsoundness of mind**

- (1) A power of attorney is effective so far as concerns any act within its scope, being an act of a nature which is not, at the time of the act, beyond the understanding of the principal through unsoundness of mind.

(2) Where:

- (a) a power of attorney is, in the instrument creating the power, expressed to be given with the intention that it will continue to be effective notwithstanding that, after the execution of the instrument, the principal suffers loss of capacity through unsoundness of mind,
- (b) the execution of the instrument is attested by a prescribed person (not being an attorney under the power), and
- (c) there is endorsed on, or annexed to, the instrument a certificate by that prescribed person stating that the prescribed person explained the effect of the instrument to the principal before it was executed,

the power of attorney is effective so far as concerns any act within its scope, notwithstanding that the act is of a nature which is, at the time of the act, beyond the understanding of the principal through unsoundness of mind.

- (3) This section does not save a power of attorney from being or becoming ineffective by reason of any matter other than an unsoundness of mind of the principal arising after the execution of the instrument creating the power.
- (4) This section applies only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.

**163G Judicial control in certain circumstances**

(1) This section applies to:

- (a) a protected power of attorney, and
- (b) a power of attorney the principal under which is for the time being incommunicate.

(2) Where, on application by the principal under a power of attorney, it appears to the Court to be for the principal's benefit, the Court may, on the principal's behalf, by order:

- (a) remove a person from office as attorney,
- (b) appoint a person to fill a vacancy in the office of attorney,
- (c) with the consent of the attorney and of any other interested person:
  - (i) alter the scope of the power,
  - (ii) otherwise alter the instrument creating the power, or



- (iii) alter the rights and duties of the principal and the attorney between themselves,
  - (d) direct an attorney to furnish accounts and other information to the Court or to a person approved by the Court, or
  - (e) revoke the power.
- (3) For the purposes of subsection (2) (b), a vacancy in the office of attorney occurs in any of the following events:
  - (a) renunciation of the power by an attorney,
  - (b) removal of an attorney by the principal or with the principal's authority, or by the Court under subsection (2),
  - (c) disability of an attorney,
  - (d) death of an attorney,
  - (e) where an attorney is a corporation, liquidation or dissolution of the corporation,
  - (f) other event personal to an attorney whereby the attorney's authority is terminated.
- (4) Where the Court makes an order directing an attorney to furnish accounts or other information under subsection (2) (d), the Court may make further orders for:
  - (a) preventing unnecessary disclosure of the attorney, and
  - (b) inquiry and report on the conduct of the attorney.
- (5) The Court may revoke a power of attorney under subsection (2) (e) notwithstanding anything in the instrument creating the power, but otherwise subsections (2), (3) and (4) apply only if and so far as a contrary intention is not expressed in the instrument creating the power, and shall have effect subject to the terms of the instrument creating the power.
- (6) A removal, appointment, alteration or revocation under subsection (2) (a), (b), (c) and (e) shall have effect as if done in due form by the principal, and as if the principal were of full capacity and were, so far as necessary, authorised to do the thing in question by the instrument creating the power.
- (7) This section has effect subject to section 160.

**163H Procedure where principal incommunicate**

- (1) Where the principal under a power of attorney is incommunicate:
  - (a) proceedings under this Division by the principal:

- (i) may be commenced and carried on as prescribed by rules of court, or
  - (ii) subject to rules of court, may be commenced and carried on as if the principal were of unsound mind, and
- (b) subject to rules of court, all persons shall, in relation to the proceedings, be as nearly as may be in the like position in law as if the principal were of unsound mind.
- (2) Subsection (1) does not limit the rule-making powers conferred by the *Supreme Court Act 1970*.

## **Part 17 Purchasers: when affected by notice**

### **164 Restriction on constructive notice**

- (1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless:
- (a) it is within the purchaser's own knowledge, or would have come to the purchaser's knowledge, if such searches as to instruments registered or deposited under any Act of Parliament, inquiries, and inspections had been made as ought reasonably to have been made by the purchaser, or
  - (b) in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of the purchaser's counsel as such, or of the purchaser's solicitor or other agent as such, or would have to come to the knowledge of the purchaser's solicitor or other agent as such, if such searches, inquiries, and inspections had been made as ought reasonably to have been made by the solicitor or other agent.
- (1A) Omission to search in any register or list kept by, or filed with, the Corporate Affairs Commission or the National Companies and Securities Commission, whether within New South Wales or elsewhere, shall not of itself affect a purchaser of land with notice of any mortgage or charge.
- (2) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, condition, provision, or restriction contained in any instrument under which the purchaser's title is derived, mediately or immediately, and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.
- (3) A purchaser shall not by reason of anything in this section be affected by notice in any case where the purchaser would not have been so affected if this section had not been enacted.
- (4) This section applies to purchases made either before or after the commencement of

this Act, save that where an action is pending at the commencement of this Act the rights of the parties shall not be affected by this section.

### **165 Stamping of documents not to give notice of trust or written contract**

When an instrument is marked by the Commissioner or Assistant Commissioner of Stamp Duties as duly stamped, as fully stamped, or as sufficiently stamped, a purchaser or the Registrar-General or the Crown Solicitor shall not by reason only of the stamp borne by the instrument, or of its being so marked as aforesaid, be deemed to have notice of any trust or of any written contract of sale or other document affecting the title of the property to which the instrument refers; but notwithstanding anything in this section the Registrar-General may, if the Registrar-General thinks fit, require production of any such document.

### **166, 167 (Repealed)**

## **Part 18 Verification of instruments: statutory declarations**

### **168 Verification of instruments executed out of New South Wales**

- (1) Every instrument (other than a will) heretofore or hereafter appearing to have been duly executed out of New South Wales shall, so far as regards the execution thereof, be without further proof thereof admissible in evidence in any Court of justice in New South Wales, and before any officer or person having by law or consent of parties authority to hear, receive, and examine evidence in New South Wales, if such instrument purports to be attested in any of the following ways, that is to say:
  - (a) where the instrument is executed in any part of the British dominions other than New South Wales, then by any judge, or notary public, or any justice of the peace for New South Wales, or any commissioner for taking affidavits for New South Wales, or the mayor or chief officer of any municipal or local government corporation in such part, or the Governor, Government Resident, or Chief Secretary of such part, or a British Consular Officer or Australian Consular Officer exercising his or her functions in that part, or such other person as the Chief Justice may appoint,
  - (b) where the instrument is executed in any foreign country, then by a British Consular Officer or Australian Consular Officer exercising his or her functions in that country, and sealed with his or her seal of office (if any) or by such other person as the Chief Justice may appoint, or if there is indorsed thereon or annexed thereto a declaration of the due execution thereof purporting to be made by an attesting witness thereto before any such Consular Officer as aforesaid, and sealed as aforesaid, or before such other person as the Chief Justice may appoint.
- (2) It shall be presumed that any seal or signature impressed, affixed, appended, or subscribed on or to any document tendered in evidence under this section is genuine, and that the person appearing to have attested any such document had in fact

authority to attest the same in the character in which the person purports so to do, unless the party objecting to the admission of the document proves the contrary.

- (3) A register of all appointments made by the Chief Justice under this section shall be kept in the office of the Registrar-General.
- (4) Attestation in accordance with this section may be taken as sufficient proof of the execution of any dealing under the [Real Property Act 1900](#).
- (5) In this section:

**Australian Consular Officer** means a person appointed to hold or act in any of the following offices (being an office of the Commonwealth of Australia) in a country or place outside the Commonwealth of Australia, namely, Ambassador, High Commissioner, Minister, Head of Mission, Commissioner, Chargé d'Affaires, Counsellor or Secretary at an Embassy, High Commissioner's Office or Legation, Consul-General, Consul, Vice-Consul, Trade Commissioner and Consular Agent and includes a person appointed to hold or act in the Office of Counsellor, Official Secretary or Assistant Official Secretary at the Australian Commissioner's Office in Singapore or of Secretary at the Australian Military Mission in Berlin or of Agent-General in London of the State of New South Wales or of Secretary, New South Wales Government Offices, London.

**British Consular Officer** includes a British Ambassador, Envoy, Minister, Chargé d'Affaires, Secretary of Embassy or Legation, Consul-General, Acting Consul-General, Consul, Acting Consul, Vice-Consul, Acting Vice-Consul, Proconsul, Consular Agent and Acting Consular Agent.

#### **168A Verification of instruments executed out of New South Wales by persons engaged on war service**

- (1) Every instrument (other than a will) appearing to have been duly executed outside New South Wales by a person who, at the time of the execution thereof, was engaged on war service shall, so far as regards the execution thereof, be without further proof admissible in evidence in any Court of justice in New South Wales, and before any officer or person having by law or consent of parties authority to hear, receive and examine evidence in New South Wales if such instrument purports to be attested by an officer as defined in the [Defence Act 1903-1939](#) of the Parliament of the Commonwealth.
- (2) It shall be presumed that any signature appended or subscribed on or to any document tendered in evidence under this section is genuine, that any person who is described in any such document as engaged on war service was, in fact, so engaged at the time of the execution by the person of the document, and that the person appearing to have attested any such document had in fact authority to attest the same in the character in which the person purports so to do, unless the party objecting to the admission of the document proves the contrary.

- (3) For the purpose of this section a person shall be deemed to be “engaged on war service” if being a member of His Majesty’s naval, military or air forces the person is bound to continuous service with such forces for the duration of the present war between His Majesty and Germany and her Allies, whether or not the person has agreed to serve or does serve beyond the limits of the Commonwealth of Australia and those of any territory under the authority of the Commonwealth.
- (4) (Repealed)
- (5) Attestation in accordance with this section may be taken as sufficient proof of the execution of any dealing under the *Real Property Act 1900*.
- (6) Nothing in this section shall be construed as limiting any power, authority, privilege or immunity conferred or given by Part 2 of the *Trustee and Wills (Emergency Provisions) Act 1940*.

## **169 Statutory declarations**

- (1) Any statutory declaration required by this Act or the *Real Property Act 1900* or by the practice of conveyancers to be made for the proof in New South Wales of any fact may be taken or made:
  - (a) in any place in the said State before any justice of the peace, commissioner for affidavits, or notary public, or other person having authority to administer an oath in New South Wales,
  - (b) in any place out of the said State in which there is a local statutory provision enabling statutory declarations to be made for use in such place, then under and in pursuance of such provision,
  - (c) in any place out of the said State in which there is no such statutory provision, then under and in pursuance of the Imperial *Declarations Act 1835*, or any other Imperial Act in that behalf.
- (2) The provisions of sections 21, 25, and 26 (A) of the *Oaths Act 1900* shall apply to declarations made under this section.
- (3) Any person before whom any declaration under this section is made shall state in the attestation thereof at what place and on what date the declaration was made.

## **Part 19 Service of notices**

### **170 Regulations respecting notices**

- (1) Any notice required or authorised by this Act to be served shall be in writing, and shall be sufficiently served:
  - (a) if delivered personally,

- (b) if left at or sent by post to the last known residential or business address in or out of New South Wales of the person to be served,
  - (b1) in the case of a mortgagor in possession or a lessee, if left at or sent by post to any occupied house or building comprised in the mortgage or lease,
  - (b2) in the case of a mining lease, if left at or sent by post to the office of the mine,
  - (c) if delivered to the facilities of a document exchange of which the person on whom it is to be served is a member, or
  - (d) in such manner as the Court may direct.
- (1A) In the case of service by delivery to the facilities of a document exchange, the notice is, unless the contrary is proved, to be taken to have been served on the second business day following the day of delivery of the notice to those facilities.
- (2) Any notice required or authorised by this Act to be served on a lessee or mortgagor shall, if served otherwise than by post, be sufficient although addressed to the lessee or mortgagor by that designation only, without the name of the lessee or mortgagor, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.
- (2A) The provisions of this section extend to notices required to be served by any instrument affecting property (including any dealing under the [Real Property Act 1900](#)) executed, made or coming into operation after the commencement of the [Conveyancing \(Amendment\) Act 1930](#), unless a contrary intention appears in the instrument or dealing or in the [Real Property Act 1900](#).
- (3) This section does not apply to notices served in proceedings in any court.
- (4) This section applies only if and so far as a contrary intention is not expressed in any instrument, and shall have effect subject to the provisions of such instrument.
- (5) In this section, **business day** means any day except Saturday or Sunday or a day that is a public or bank holiday throughout the State.

## **Part 20 Procedure: orders: execution**

### **171 Effect of payment into court**

Payment of money into court under the provisions of this or any other Act shall effectually exonerate therefrom the person making the payment.

### **172 (Repealed)**

### 173 Orders of court conclusive

- (1) An order of the Supreme Court made or purporting to be made under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or want of any party concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

Provided that:

- (a) an order made or purporting to be made in pursuance of the *Settled Estates Act 1886*, or Part 4 of the *Conveyancing and Law of Property Act 1898*, shall not by this section be validated as against any estate or interest claimed otherwise than under or through the settlement in relation to which the order was made, and
  - (b) an order made in proceedings for partition shall not by this section be validated as against any estate or interest which is not an undivided share or an estate or interest in an undivided share of the entire estate or interest which the order purports to affect, and
  - (c) an order made in proceedings for foreclosure or otherwise at the suit of a mortgagee or chargee as such shall not by this section be validated as against any estate or interest not claimed under or through the person by whose act or default the mortgage or charge in relation to which the order was made was created, or as against any estate or interest having priority to such mortgage or charge, and
  - (d) an order in any other case shall not by this section be validated against a person not a party to, and not apart from this section, otherwise bound by the proceedings in which the order was made, if the effect of the order or of anything done in pursuance of the order or the combined effect of the order and anything done in pursuance of the order, but for this proviso, would be to deprive such person of an estate or interest and prevent such person from receiving the whole or any part of the proceeds of any transaction carried out in pursuance of the order, and
  - (e) in any case an order to the extent to which it expressly excludes any person from its operation shall not by this section be validated against that person.
- (1A) In subsection (1), **charge** means a charge imposed on land under section 88F.
- (2) This section shall have effect with respect to any lease, sale, or other act under the authority of such Court and purporting to be in pursuance of the *Settled Estates Act 1886*, or Part 4 of the *Conveyancing and Law of Property Act 1898*, notwithstanding any exceptions in either of those Acts.
- (3) This section applies to all orders made before or after the commencement of this Act except any order which has, before the commencement of this Act, been set aside or determined to be invalid on any ground, and except any order as regards which any

action, suit, or other proceeding is, at the commencement of this Act, pending for having it set aside or determined to be invalid.

#### **174 Invalidity of writ not to affect sale**

No purchase of any property of a judgment debtor at any sale made in pursuance of any writ of execution issued by the Supreme Court, the District Court or a Local Court shall be affected by the invalidity of any such writ, but the person at whose instance the writ was issued shall be liable to indemnify any person prejudiced by the sale.

#### **175 Property subject to power may be sold in execution**

- (1) The person to whom is directed a writ that authorises the taking in execution and sale of property of a judgment debtor may take in execution and sell property over which the judgment debtor has a power of appointment that is exercisable by the judgment debtor for his or her own benefit without the assent of any other person.
- (2) Where, under subsection (1), property the subject of a power of appointment is taken in execution and sold, the assurance to the purchaser operates as an exercise of the power.
- (3) This section applies to land under the provisions of the [Real Property Act 1900](#).

### **Part 21 Adoption of Act**

#### **176 Protection of solicitors, licensed conveyancers, trustees etc**

- (1) It is hereby declared that the powers given by this Act to any person, and the covenants, provisions, stipulations, and words which under this Act are to be implied in any instrument, or are by this Act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words to be given by, or to be contained in, any such instrument, or to be adopted in connection with, or applied to, any such contract or transaction; and a solicitor or licensed conveyancer shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his or her omitting, in good faith, in any such instrument, or in connection with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof in any case where the provisions of this Act would allow of his or her doing so.
- (2) But nothing in this Act shall be taken to imply that the insertion in any such instrument, or the adoption in connection with, or the application to, any contract or transaction of any further or other powers, covenants, provisions, stipulations, or words, is improper.
- (3) Where the solicitor or licensed conveyancer is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.



- (4) Where such persons are acting without a solicitor or licensed conveyancer, they shall also be protected in like manner.

## Part 22 Miscellaneous

### 177 Duty of care in relation to support for land

- (1) For the purposes of the common law of negligence, a duty of care exists in relation to the right of support for land.
- (2) Accordingly, a person has a duty of care not to do anything on or in relation to land (the **supporting land**) that removes the support provided by the supporting land to any other land (the **supported land**).
- (3) For the purposes of this section, **supporting land** includes the natural surface of the land, the subsoil of the land, any water beneath the land, and any part of the land that has been reclaimed.
- (4) The duty of care in relation to support for land does not extend to any support that is provided by a building or structure on the supporting land except to the extent that the supporting building or structure concerned has replaced the support that the supporting land in its natural or reclaimed state formerly provided to the supported land.
- (5) The duty of care in relation to support for land may be excluded or modified by express agreement between a person on whom the duty lies and a person to whom the duty is owed.
- (6) Any such agreement:
- (a) has effect in relation to any agent of the person on whom the duty lies, and
  - (b) has effect in relation to any successor in title of the supported land if the agreement is embodied in a registered easement for removal of support relating to that land.
- (7) The right to agree to the removal of the support provided by supporting land to supported land is a right of the kind that is capable of being created by an easement.
- (8) Any right at common law to bring an action in nuisance in respect of the removal of the support provided by supporting land to supported land is abolished by this section.
- (9) Any action in negligence that is commenced after the commencement of this section in relation to the removal of the support provided by supporting land to supported land may be wholly or partly based on something that was done before the commencement of this section. However, this subsection does not operate to extend any period of limitation under the [Limitation Act 1969](#).

- (10) This section extends to land and dealings under the *Real Property Act 1900*.
- (11) This section does not apply in relation to any proceedings that were commenced before the commencement of this section.
- (12) A reference in this section to the removal of the support provided by supporting land to supported land includes a reference to any reduction of that support.
- (13) This section binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

**178 No way by user against Crown etc**

No dedication or grant of a way shall be presumed or allowed to be asserted or established as against:

- (a) the Crown, or
- (b) persons holding lands in trust for any public purposes,

by reason only of user, and this whether in proceedings instituted by or on behalf of the Crown or not, and whether such user commenced before or after the eighteenth day of October, one thousand eight hundred and sixty-one (being the day of the commencement of the *Crown Lands Alienation Act of 1861*).

**179 Right to light or air not deemed to exist by reason only of enjoyment or presumption of lost grant**

From and after the first day of December, one thousand nine hundred and four (being the day of the commencement of the *Ancient Lights Declaratory Act 1904*), no right to the access or use of light or air to or for any building shall be deemed to exist, or to be capable of coming into existence by reason only of the enjoyment of such access, or use, for any period, or of any presumption of a lost grant based upon such enjoyment.

**180 Sale under power not to be avoided by reason of mistaken payment to tenant for life**

- (1) Where, under a power of sale, a bona fide sale is made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life, or any other party to the transaction, is by mistake allowed to receive for his or her own benefit a portion of the purchase money as the value of the timber or other articles, the Court, upon any claim or application as the case may require or permit, may declare that upon payment by the purchaser or the claimant under that purchaser of the full value of the timber and articles at the time of sale, with such interest thereon as the Court directs, and the settlement of the said principal moneys and interest under the direction of the Court upon such parties as in the opinion of the Court are entitled thereto, the sale ought to be established.

- (2) Upon such payment and settlement being made accordingly the Court may declare that the sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed.
- (3) The costs of the application as between solicitor and client shall, unless the Court otherwise orders, be paid by the purchaser or the claimant under that purchaser.

### **181 Construction of expressions used in deeds and other instruments**

- (1) In all deeds, contracts, wills, orders, and other instruments (whether relating to property or not), and in any rules or regulations under this Act executed or made after the commencement of the *Conveyancing (Amendment) Act 1930*, unless the contrary intention appears:
  - (a) The masculine includes the feminine and vice versa.
  - (b) The singular includes the plural and vice versa.
  - (c) **Person** includes a corporation.
  - (d) **Month** means calendar month.
- (1A) For the purposes of any deed, contract, will, order or other instrument (whether relating to property or not and whether made before or after the commencement of the *Minors (Property and Contracts) Act 1970*) a person attains an age in years at the beginning of the person's birthday for that age, unless the contrary intention appears.
- (2) This section extends to dealings under the *Real Property Act 1900*.

### **181A Construction of expressions used to create easements**

- (1) In an instrument executed or made after 1 January 1931 (the commencement of the *Conveyancing (Amendment) Act 1930*) and purporting to create a right-of-way the expressions **right of carriage way** and **right of footway** have the same effect as if there had been inserted in lieu thereof respectively the words contained in Part 1 or Part 2 of Schedule 8.
- (1A) In an instrument executed or made after 15 June 1964 (the commencement of the *Local Government and Conveyancing (Amendment) Act 1964*) and purporting to create a drainage easement the expressions **easement to drain water** and **easement to drain sewage** have the same effect as if there had been inserted in lieu thereof respectively the words contained in Part 3 or Part 4 of Schedule 8.
- (2) In an instrument which takes effect after the commencement of Schedule 1 [16] to the *Property Legislation Amendment (Easements) Act 1995* and purports to create an easement of the following kind, the following expressions have effect as if the words attributed in Schedule 8 to those expressions were inserted instead:

easement for repairs  
easement for batter  
easement for drainage of sewage  
easement for drainage of water  
easement for electricity purposes  
easement for overhang  
easement for services  
easement for water supply  
easement to permit encroaching structure to remain  
right of access

(2A) In an instrument that takes effect after the commencement of section 177 (as inserted by Schedule 1 [1] to the *Conveyancing Amendment (Law of Support) Act 2000*) and purporting to create an easement for removal of support, the expression ***easement for removal of support*** has effect as if the words attributed in Part 15 of Schedule 8 to that expression were inserted instead.

(3) The meaning given to an expression by this section and Schedule 8 may be varied (whether by way of addition, exception, qualification or omission), and is taken to have always been capable of being varied, by the instrument in which the expression is used.

(3A) In Schedule 8:

(a) a lot includes any other distinct piece or parcel of land (such as an island, a portion of a Parish or a Section), and

(b) an owner of a lot benefited includes:

- any person entitled to possession of the whole of the lot benefited or any person authorised by such a person, and
- any person entitled to possession of any part of that lot which is capable of benefiting from the easement or any person authorised by such a person.

(4) This section extends to dealings under the *Real Property Act 1900*.

### **181B Construction of expression “party wall” in assurances of land**

(1) Where in an assurance of land made by a person entitled to assure or create easements in respect of a wall built or to be built on the common boundary of that

land and adjoining land so that the boundary passes longitudinally through the wall, the wall is described as a **party wall**, that expression means (unless a contrary intention appears) a wall severed vertically and longitudinally with separate ownership of the severed portions, and with cross-easements entitling each of the persons entitled to a portion to have the whole wall continued in such manner that each building supported thereby shall have the support of the whole wall, and the assurance shall operate to create such easements accordingly.

(2) This section applies only to:

- (a) assurances executed or made after the commencement of the *Conveyancing (Amendment) Act 1930* and before the commencement of section 88BB, and
- (b) assurances executed or made after the commencement of section 88BB but that assure land in a deposited plan that:
  - (i) shows a boundary of that land and other land in the plan as a party wall, and
  - (ii) was registered or recorded under Division 3 of Part 23 before the commencement of section 88BB.

(3) This section extends to dealings under the *Real Property Act 1900*.

### **182 Saving clause as to acknowledgments endorsed on mortgages previously to 1893**

In the case of an acknowledgment to the effect that a mortgage has been satisfied which was endorsed on such mortgage and signed previously to the thirteenth day of December, one thousand eight hundred and ninety-three, nothing contained in this Act, or in any Act hereby repealed, shall invalidate or affect any estate, right, or interest which has been acquired subsequent to such signing, or any other act or thing that would have been valid if this Act had not been passed.

### **183 Punishing of vendor for fraudulent concealment of deeds or falsifying pedigree**

- (1) Any seller or mortgagor of any property conveyed or assigned to a purchaser or mortgagee, or the solicitor or agent of any such seller or mortgagor, who, after the commencement of this Act, conceals any settlement, deed, will, or other instrument material to the title, or any incumbrance from the purchaser or mortgagee, or falsifies any pedigree upon which the title does or may depend, in order to induce the purchaser or mortgagee to accept the title offered or produced to the purchaser or mortgagee, with intent in any of such cases to defraud, shall be guilty of an indictable offence, and, being found guilty, shall be liable, at the discretion of the Supreme Court, to suffer such punishment by fine or imprisonment for any time not exceeding two years or by both, as the Court awards, and shall also be liable to proceedings for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser, or mortgagee, for any loss sustained by them, or either or any of them, in consequence of the settlement, deed, will, or other instrument or incumbrance so

concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree.

- (2) In estimating such damages where the estate is recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them, or either or any of them, in improvements on the land.
- (3) No prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of His Majesty's Attorney-General or Solicitor-General.
- (4) No such sanction shall be given without previous notice of the application for leave to prosecute to the person intended to be prosecuted in such form as the Attorney-General or the Solicitor-General directs.

#### **184 (Repealed)**

### **Part 23 Registration**

#### **Division 1 General Register of Deeds**

##### **184A Registration copies**

A reference in this Division to a registration copy of an instrument is a reference to a copy of the original instrument that is made or provided as prescribed by the regulations.

##### **184B Application of Division to certain instruments**

- (1) Without affecting anything in the *Real Property Act 1900*, and subject to subsection (2), an instrument which is registered or required to be registered under the provisions of the *Real Property Act 1900* may be registered under this Division, unless it is an instrument that is registrable under the *Real Property Act 1900* and relates only to land under that Act.
- (2) Section 184G does not apply to an instrument registered, or required to be registered, under the *Real Property Act 1900*.

##### **184C General Register of Deeds**

- (1) The Registrar-General shall cause a General Register of Deeds to be maintained for the purposes of this Division.
- (2) The General Register of Deeds shall be comprised of:
  - (a) the General Register of Deeds kept pursuant to the *Registration of Deeds Act 1897*,
  - (b) registration copies of instruments registered under this Division,

- (c) instruments of a prescribed class,
  - (d) records required by the regulations to be kept as part of the General Register of Deeds,
  - (e) a record of registrations made under Division 2 after the amendment of that Division by the *Conveyancing (Amendment) Act 1992*,
  - (f) a record of registrations of resumptions and rescissions of resumptions made under section 196A after the amendment of that section by the *Conveyancing (Amendment) Act 1992*,
  - (g) instruments registered under the *Liens on Crops and Wool and Stock Mortgages Act 1898* after the commencement of the *Liens on Crops and Wool and Stock Mortgages (Amendment) Act 1992*,
  - (h) instruments registered under the *Bills of Sale Act 1898* after the commencement of the *Bills of Sale (Amendment) Act 1992*, and
  - (i) memoranda of covenants registered under Division 5 of Part 6.
- (2A) The General Register of Deeds is also comprised of:
- (a) entries under Division 2 that constituted the register of causes, writs and orders affecting land immediately before the amendment of that Division by the *Conveyancing (Amendment) Act 1992*,
  - (b) recordings of resumptions, and of rescissions of resumptions, that constituted the Register of Resumptions under section 196A immediately before the amendment of that section by the *Conveyancing (Amendment) Act 1992*,
  - (c) each register kept for the purposes of a provision of the *Liens on Crops and Wool and Stock Mortgages Act 1898* immediately before the amendment of the provision by the *Liens on Crops and Wool and Stock Mortgages (Amendment) Act 1992*, and
  - (d) each filing, recording or registration that, immediately before the repeal or amendment of a provision of the *Bills of Sale Act 1898* by the *Bills of Sale (Amendment) Act 1992*, was a filing, recording or registration for the purposes of the provision.
- (3) The General Register of Deeds may be maintained in or upon any medium or combination of mediums capable of having information recorded in or upon it or them.
- (4) The Registrar-General may, from time to time, vary the manner or form in which the whole or any part of the General Register of Deeds is maintained.

#### **184D Registration of instruments**

- (1) The Registrar-General may receive and register any instrument whatever, whether affecting or relating to land or not, unless the instrument is registrable under the *Real Property Act 1900* and relates only to land under that Act.
- (2) Except as provided by this Act or any other Act, registration of an instrument under this Division has effect for the purposes of record only.
- (3) The Registrar-General may:
  - (a) refuse to accept an instrument for registration in the General Register of Deeds, or
  - (b) refuse to register an instrument in the General Register of Deeds, or
  - (c) reject an instrument lodged for registration in the General Register of Deeds, if the instrument is not accompanied by a certificate that is in an approved form setting out particulars of or relating to the instrument and that is signed as prescribed.
- (4) A person who signs such a certificate knowing that it is false or misleading in a material particular is guilty of an offence.  
Maximum penalty: 10 penalty units.
- (5) Liability for, or recovery of, a penalty under this section does not preclude the recovery of damages in an action based on a false or misleading certificate signed for the purposes of this section.
- (6) The Registrar-General is not required to be satisfied as to the accuracy of a certificate provided under this section, except to the extent of ensuring that it appears on its face to comply with the requirements of this section.
- (7) Proceedings for an offence under this section are to be taken before a Magistrate sitting as a Local Court.

#### **184E Method of registration**

- (1) Registration of an instrument in the General Register of Deeds after the commencement of the *Conveyancing (Amendment) Act 1992* is effected by the Registrar-General allocating a distinctive reference to the instrument in accordance with the regulations in order to signify registration of the instrument. This subsection does not apply to a trader's bill of sale.
- (1A) Registration of a trader's bill of sale in the General Register of Deeds is effected as provided by section 5F of the *Bills of Sale Act 1898*.
- (2), (3) (Repealed)



- (4) The Registrar-General may refuse to register an instrument in the General Register of Deeds if:
- (a) the original instrument or registration copy does not comply with any relevant provision of this Division or with any relevant requirement prescribed by the regulations, or
  - (b) any other relevant requirements prescribed by the regulations in relation to the registration of instruments under this Division are not complied with.
- (4A) If an instrument purports to vest an estate or interest in land, or to effect a change in the name of a person in whom an estate or interest in land is vested, the Registrar-General may:
- (a) refuse to accept the instrument for registration in the General Register of Deeds, or
  - (b) refuse to register the instrument in the General Register of Deeds, or
  - (c) reject the instrument if it is lodged for registration in the General Register of Deeds,
- if the instrument is not accompanied by a fully completed notice in the approved form.
- (5) Instruments (other than traders' bills of sale) are registered under this Division in the order in which the distinctive references referred to in subsection (1) are allocated to the instruments.
- (6) Notwithstanding subsection (5), instruments registered under the *Registration of Deeds Act 1897* shall be taken to have been registered in the order determined by reference to the time endorsed on the copy pursuant to that Act.
- (7) (Repealed)
- (8) Except in so far as the context or subject-matter otherwise indicates or requires, a reference (however expressed) in this or any other Act, in any instrument made under this or any other Act or in any other instrument of any kind, to registration in, or an instrument registered in, the General Register of Deeds shall be read and construed as, or as including, a reference to registration under, or an instrument registered under, this Division.

#### **184F Destruction of documents**

- (1) The Registrar-General may destroy a document forming part of the General Register of Deeds unless this section prohibits its destruction.
- (2) The Registrar-General is not to destroy such a document if under a duty to deliver or issue it to any person.

- (3) Instead of destroying such a document, the Registrar-General may deliver it to a person who, in the opinion of the Registrar-General, intends to preserve it for historical reasons.
- (4) The Registrar-General is not to destroy or dispose of a document under this section unless a copy of the document is captured and retained by the Registrar-General in a manner that enables the document to be reproduced.
- (5) The Registrar-General is to retain each document that forms part of the General Register of Deeds and is not destroyed or disposed of under this section.
- (6) This section does not authorise a failure to comply with, or a contravention of, any Act or other law and does not prevent the destruction of a document under the authority of an Act other than this Act.
- (7) In this section, a reference to a document includes a reference to any certificate referred to in section 184D that is on, or accompanies, the document.

**184G Instruments affecting land to take effect according to priority of registration**

- (1) All instruments (wills excepted) affecting, or intended to affect, any lands in New South Wales which are executed or made bona fide, and for valuable consideration, and are duly registered under the provisions of this Division, the *Registration of Deeds Act 1897*, or any Act repealed by the *Registration of Deeds Act 1897*, shall have and take priority not according to their respective dates but according to the priority of the registration thereof only.
- (2) No instrument registered under the provisions of this Division or the *Registration of Deeds Act 1897* shall lose any priority to which it would be entitled by virtue of registration thereunder by reason only of bad faith in the conveying party, if the party beneficially taking under the instrument acted bona fide, and there was valuable consideration given therefor.

**184H Mistakes in registration**

No registration of any instrument under this Division, or intended to be in pursuance of this Division, shall be defeated or made ineffectual by reason of any omission, misdescription or error in any case where the identity of the instrument in evidence with the one alleged to have been registered is established, and the substantial requirements of this Division and the regulations have been complied with.

**184I Correction of Register**

- (1) The Registrar-General may, subject to this section and upon such evidence as appears to the Registrar-General to be sufficient, correct errors and omissions in the General Register of Deeds.

- (2) This section does not authorise an alteration to be made to a registration copy of an original instrument except to bring the copy into conformity with the original instrument.
- (3) This section does not authorise an alteration to be made to an original instrument.
- (4) Where it appears to the Registrar-General that an alteration has been made to an original instrument after its registration under this Division, this section does not authorise an alteration to be made to the registration copy of the original instrument to bring the copy into conformity with the original instrument in that respect.

#### **184J Provisions respecting certain Crown grants**

Registration under this Division of a grant by the Crown of lands or other hereditaments in New South Wales alienated before 1 January 1863, which has not been already enrolled in the Supreme Court or recorded in the office of the Registrar-General shall have the same effect as if the grant had been recorded under section 6 (II) of the [Registration of Deeds Act 1897](#), and that Act had not been repealed.

### **Division 2 Registration of causes, writs, and orders affecting land**

#### **185 (Repealed)**

#### **186 Writs and orders under judgments or relating to legal proceedings**

- (1) There may be registered in the General Register of Deeds:
  - (a) any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, order, statute, or recognisance, whether obtained on behalf of the Crown or otherwise including any order appointing a receiver or sequestrator of land, and
  - (b) any current legal proceedings.
- (2) The registration of a writ, order, or current legal proceedings under this section shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed in the prescribed manner from time to time, and if renewed shall have effect for five years from the date of the renewal.
- (3) Registration under this section shall not operate to extend the time for which the writ or order would remain in force if not so registered.
- (4) In this section, **recognisance** includes bail agreement within the meaning of Part 7A of the [Bail Act 1978](#).

#### **187 Orders affecting land**

There may also be registered in the General Register of Deeds in the prescribed manner:

- (a) any order affecting the title to land, or restricting the right of dealing with or the use of land or any buildings thereon or creating a charge over land, made by any court,
- (b) any charge upon land (not being in respect of a rate or tax) imposed by or under the provisions of any Act of Parliament for securing to any person either the moneys spent by the person (with or without interest) or the costs, charges, and expenses incurred by the person under such Act, or the moneys advanced by the person (with or without interest) for repaying the moneys spent and the costs, charges, and expenses incurred by any other person or the Crown under the authority of an Act of Parliament, and
- (c) any order, award, determination, or notification made under the provisions of any Act of Parliament of the State or Commonwealth by any local or other authority restricting the right of dealing with land or the use of land, or any buildings thereon, or prescribing any act to be done thereon or in relation thereto.

**188 Protection of purchasers against non-registered writs etc**

- (1) Every such writ issued or renewed, and every such order, award, determination, notification, or charge, and every proceeding thereunder, shall be void against, and current legal proceedings shall not bind a person who becomes a purchaser of the land affected thereby without notice of the writ, order, award, determination, notification, charge, or current legal proceedings unless the same is registered in the General Register of Deeds so that such registration has effect at the time of the purchase, and is so indexed that the purchaser ought reasonably to have found the entry on search.
- (2) No purchaser shall be affected with notice of any such writ, order, award, determination, notification, charge, or any proceeding thereunder or of any current legal proceedings by reason of omission to make any inquiry or any search other than search in the General Register of Deeds.
- (3) This section does not apply, and shall be deemed never to have applied, in respect of land under the provisions of the *Real Property Act 1900*.

**189 Judgments etc not to be a charge on land until writ or order registered**

- (1) No judgment, statute, or recognisance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this Act, shall operate as a charge on land, or on the unpaid purchase money for any land, unless and until the writ or order for the purpose of enforcing it is registered in the General Register of Deeds.
- (2) This section shall apply to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date in like manner as it applies to a judgment.

- (3) In this section, **recognisance** includes bail agreement within the meaning of Part 7A of the *Bail Act 1978*.

#### **190 Charge on land to include expenses of registration**

Any charge on land registered under this Division shall extend to and include the expenses of registration thereof.

#### **190A Vacation of registration of causes, writs and orders**

- (1) The Registrar-General may vacate any registration made under this Division if the registration has expired or has otherwise ceased to have effect.
- (2) The Registrar-General may vacate such a registration whether it was made before, or is made after, the commencement of this section.
- (3) Application for vacation of a registration under this Division is to be made as prescribed and is to be accompanied by such evidence, if any, as the Registrar-General may require.

#### **191 Application of Division to land under *Real Property Act 1900***

- (1) The provisions of this Division shall in the case of land under the provisions of the *Real Property Act 1900* extend only to such orders, awards, determinations, notifications, and charges as would be effective against the land without any recording in the Register kept under that Act.
- (2) No current legal proceedings or registration of current legal proceedings shall affect or be deemed to have affected the right of any person to obtain the registration of any dealing under the *Real Property Act 1900*, or shall deprive or be deemed to have deprived any person dealing under that Act of the benefit of section 43 or of any other section of the Act.

#### **192 Writs, orders etc to which Division applies**

- (1) This Division, except where otherwise expressly provided, applies only to writs issued or renewed, or orders, awards, determinations, notifications and charges made or brought into effect after the commencement of this Act.
- (2) A reference in any other Act or other instrument to entry in, or to registration in, the register of causes, writs and orders affecting land, however expressed, is taken to be a reference to registration in the General Register of Deeds.

#### **193 Legal proceedings to which Division applies**

This Division applies to all legal proceedings in existence at, or coming into existence after the commencement of this Act.

## 194 Crown bound by Division

This Division shall apply to and bind the Crown.

## Division 3 Plans

### 195 Definitions

(1) In this Division:

***miscellaneous plan*** means a plan that shows one or more of the following matters:

- (a) the site of an interest in land in the nature of an easement, profit à prendre or restrictive or positive covenant, being an interest that is to be created, by some other instrument, after the plan is registered,
- (b) survey information in relation to land the subject of some other plan,
- (c) such other matters relating to land as are prescribed by the regulations,

but does not include a plan of subdivision, a plan of consolidation or a plan of identification.

***plan of consolidation*** means a plan that shows the consolidation of 2 or more existing lots into a single lot, where there is no simultaneous redivision of them into 2 or more new lots, whether or not the plan also shows one or more of the matters referred to in paragraph (a), (b) or (c) of the definition of ***miscellaneous plan***.

***plan of identification*** means:

- (a) a plan supporting a primary application to bring one or more existing lots under the provisions of the [Real Property Act 1900](#), including a surround plan (being a plan that defines the external boundaries of a number of existing lots but merely refers to the existence of, and does not define the boundaries between, those lots), or
- (b) a redefinition plan (being a plan that redefines the boundaries between the lots referred to in a surround plan along the same general lines as those that defined the boundaries between those lots immediately before they were brought under the provisions of the [Real Property Act 1900](#), as referred to in paragraph (a)), or
- (c) a delimitation plan (being a plan prepared for the purposes of section 28V of the [Real Property Act 1900](#)), or
- (d) a plan that is registered for the purpose of showing the boundaries of land for which a folio of the Register kept under the [Real Property Act 1900](#) has been created as a result of the correction of a misdescription of land, or
- (e) a plan redefining the boundaries of an existing lot, or

- (f) a plan defining the boundaries of land that has been acquired by compulsory process, or the boundaries of the residue of an existing lot of which part has been so acquired, or
- (g) a plan defining the boundaries of land that has been dedicated as a public road by means of a notice referred to in section 10, 11 or 12, or a proclamation referred to in section 13, of the [Roads Act 1993](#), or the boundaries of the residue of an existing lot of which part has been so dedicated, or
- (h) a plan supporting a transaction or proposed transaction referred to in section 23G, or
- (i) a plan of a kind prescribed by the regulations for the purposes of this definition, whether or not the plan also shows one or more of the matters referred to in paragraph (a), (b) or (c) of the definition of **miscellaneous plan**.

**plan of subdivision** means a plan that shows:

- (a) the division of an existing lot into 2 or more new lots, or
- (b) the consolidation of 2 or more existing lots and their simultaneous redivision, along new boundaries, into 2 or more new lots, or
- (c) the dedication of an existing lot as a public road under section 9 of the [Roads Act 1993](#) or as a public reserve under section 49 of the [Local Government Act 1993](#), or
- (d) the setting aside of an existing lot as a drainage reserve under section 49 of the [Local Government Act 1993](#),

whether or not the plan also shows one or more of the matters referred to in paragraph (a), (b) or (c) of the definition of **miscellaneous plan**, and includes a plan of subdivision for lease purposes (within the meaning of section 23H) and any other plan that shows the division of land, but does not include a plan of consolidation or a plan of identification.

**signature of a person** includes, in relation to a corporation, the seal of the corporation.

**subdivision certificate** means a subdivision certificate endorsed on a plan of subdivision under Part 4A of the [Environmental Planning and Assessment Act 1979](#).

- (2) In this Division, a reference to a plan includes a reference to:
  - (a) a community plan, a community plan of consolidation or a community plan of subdivision, or
  - (b) a neighbourhood plan, a neighbourhood plan of consolidation or a neighbourhood

plan of subdivision, or

(c) a precinct plan, a precinct plan of consolidation or a precinct plan of subdivision, within the meaning of the *Community Land Development Act 1989*, but does not include a reference to a strata plan, a strata plan of consolidation or a strata plan of subdivision within the meaning of the *Strata Schemes (Freehold Development) Act 1973* or the *Strata Schemes (Leasehold Development) Act 1986*.

#### **195A Lodgment of plans with Registrar-General**

- (1) Where a plan of the division of land is required by law to be registered, that plan shall, unless the contrary intention appears, be lodged in the office of the Registrar-General for registration under this Division.
- (2) Any person who effects or intends to make a lawful division of land, a plan of which is not required by law to be registered, may lodge in the office of the Registrar-General a plan of the division of the land for registration under this Division.
- (3) The Registrar-General may accept lodgment of a plan, other than a plan referred to in subsection (1) or (2), whether or not it complies with section 195C.

#### **195B Refusal to accept lodgment**

The Registrar-General may refuse to accept lodgment of:

- (a) a plan of land under the provisions of the *Real Property Act 1900* that, in the Registrar-General's opinion, illustrates without material change a lot shown in a current plan, or
- (b) a plan of land not under the provisions of the *Real Property Act 1900*, unless it is a plan of the division of land or is lodged for the purposes of a primary application under that Act, or
- (c) a plan which does not comply with a requirement made with respect to the plan by or under this or any other Act.

#### **195C Form and certification of plans**

- (1) A plan lodged under this Division shall:
  - (a) be prepared in the prescribed manner,
  - (b) contain all prescribed particulars,
  - (c) be certified, in the form prescribed under the *Surveyors Act 1929*, by a surveyor registered under that Act, unless the Registrar-General dispenses with the certificate, and



(d) contain a statement showing:

(i) which roads (if any) shown on the plan are intended to be dedicated to the public, and

(ii) whether any public reserve or drainage reserve shown on the plan is intended to be created by registration of the plan, and

(e) in the case of a plan of subdivision, be endorsed, in accordance with the regulations, with a subdivision certificate.

(2) Subsection (1) (e) does not apply to a plan of subdivision that is filed or lodged by or on behalf of the Crown in right of the Commonwealth.

### **195D Signatures and consents**

(1) The Registrar-General shall not register or record a plan lodged under this Division (other than a plan referred to in paragraph (b), (c) or (d) of the definition of **Registered plan** in section 7 (1)) which, if it were registered or recorded in the office of the Registrar-General, would become a current plan, or which bears a statement of intention:

(a) to dedicate specified land as a public road (including a temporary public road) under section 9 of the [Roads Act 1993](#),

(b) to dedicate land as a public reserve or to set land aside as a drainage reserve under section 49 of the [Local Government Act 1993](#),

(c) (Repealed)

(d) to create an easement, a profit à prendre, a restriction on the use of land or a positive covenant, or to release an easement or profit à prendre, as referred to in section 88B (2),

unless the plan is signed:

(e) where the plan relates to land under the provisions of the [Real Property Act 1900](#):

(i) by the registered proprietor of the land, and

(ii) by every mortgagee, chargee or covenant chargee under a mortgage, charge or covenant charge recorded in the folio of the Register kept under that Act relating to the land, or

(f) where the plan relates to land which is not under the provisions of that Act, by the persons who appear to the Registrar-General, on consideration of the last registered deed relating to the land and of such further evidence as may be tendered to the Registrar-General, to be:

- (i) the owner of the land, and
  - (ii) a mortgagee, incumbrancee or covenant chargee of the land.
- (2) Without limiting the effect of subsection (1), the Registrar-General may refuse to register or record a plan referred to in that subsection unless consents in writing to the registration or recording of the plan signed by (or by an agent authorised by) such of the following persons as the Registrar-General may determine:
- (a) where the plan relates to land under the provisions of the *Real Property Act 1900*:
    - (i) the lessee under any lease, or the judgment creditor under any writ, recorded in the folio of the Register kept under that Act relating to the land,
    - (ii) the caveator under a caveat affecting any estate or interest in that land, or
  - (b) where the plan relates to land which is not under the provisions of that Act, the persons who appear to the Registrar-General, on consideration of the last registered deed relating to the land and of such further evidence as may be tendered to the Registrar-General, to be:
    - (i) the lessee under any lease, or the judgment creditor under any writ, relating to that land, or
    - (ii) a person having or claiming any other estate or interest in that land,
- are lodged in the office of the Registrar-General.
- (3) In relation to any particular plan lodged for registration or recording as referred to in subsection (1), the Registrar-General may, without giving notice to any person, dispense with the requirement for a person mentioned in that subsection to sign the plan.
- (4) Nothing in this section affects or prejudices the enforcement by any person of any remedy which the person may have because of the registration or recording of a plan which has not been signed (or the registration or recording of which has not been consented to) by every person having an estate or interest in the land to which the plan relates.
- (5) Where a remedy referred to in subsection (4) is an action in damages and:
- (a) the person against whom the remedy may be available ceases to be liable for the payment of damages, or
  - (b) the person liable to pay damages has died, is bankrupt or insolvent or cannot be found within the jurisdiction,
- damages with costs may be recovered from the Consolidated Fund by action against such person as the Governor may appoint as nominal defendant.

**195E Recording of plans which are not to be registered**

- (1) On lodgment of a type of plan which the Registrar-General is not by law required to register, the Registrar-General may record the plan and may do so in such manner as the Registrar-General thinks appropriate.
- (2) The Registrar-General may refuse to record and may reject a plan lodged pursuant to section 195A (3) or the lodgment of which might have been refused under section 195B even though the Registrar-General accepted lodgment of the plan.

**195F Certain plans to be in registrable form**

- (1) The Registrar-General shall not register and may reject a plan lodged under this Division for registration if the Registrar-General is not satisfied that the plan is in registrable form.
- (2) For the purposes of subsection (1), a plan is not in registrable form if:
  - (a) the plan does not comply with a requirement made with respect to the plan by or under this or any other Act, or
  - (b) any boundary shown on the plan that existed before the plan was prepared is not correctly defined on the plan.

**195G Registration of plans**

- (1) Where the Registrar-General is satisfied that a plan lodged under section 195A (1) or (2) is in registrable form, the Registrar-General shall register the plan by affixing the Registrar-General's seal to the plan and, where land comprised in the plan is under the provisions of the *Real Property Act 1900*, may create such folios of the Register kept under that Act as the Registrar-General considers appropriate.
- (2) The Registrar-General may refuse to register and may reject a plan lodged under this Division and relating to land under the provisions of the *Real Property Act 1900*:
  - (a) if any relevant grant or certificate of title has not been lodged for the purpose of enabling the plan to be registered, or
  - (b) where the grant or certificate of title is already in the custody of the Registrar-General, if:
    - (i) written notice has been given to such persons as the Registrar-General thinks fit of the Registrar-General's intention to use the grant or certificate of title for the purpose of registering the plan, and
    - (ii) any of those persons, within the time limited in the notice for the purpose, notifies the Registrar-General in writing of the person's refusal to permit the grant or certificate of title to be so used.

### **195H Amendment of plans**

- (1) The Registrar-General may, on the application of any person with an interest in any land to which a plan registered or recorded under this Division relates, or without any such application, and on such evidence and after such notices (if any) as appear to the Registrar-General to be necessary, amend the plan for the purpose of correcting any error in or supplying any omission from the plan.
- (2) An amendment to a plan:
  - (a) shall not render original words or symbols illegible,
  - (b) shall bear the date of the amendment on the plan, and
  - (c) shall be initialled by the Registrar-General or a person authorised by the Registrar-General.
- (3) Except as provided by subsection (4), an amendment shall take effect as if the error corrected or omission supplied had not been made.
- (4) An amendment made under the authority of this section does not affect the construction of any instrument made or entered into before the amendment so as to prejudice any person claiming under that instrument.

### **195I Conveyance of land in plans**

A conveyance of land comprised in a plan registered or recorded under this Division may be effected by reference to the plan.

### **195J Effect of registration or of rejection of plans**

- (1) The validity of:
  - (a) a plan that has been registered under this Division, or
  - (b) any instrument intended to affect or evidence the title to any land to which such a plan relates,may not be called into question in any proceedings before a court or tribunal on any ground whatever, including the ground that the requirements of this or any other Act or law have not been duly complied with in relation to the plan.
- (2) Where a plan lodged under this Division is rejected, the Registrar-General may retain all of the fees paid in respect of the plan or such proportion of those fees as the Registrar-General determines.

### **196 Presumptions relating to plans**

- (1) The Registrar-General is entitled to assume that a person who lodges a plan under

this Division has authority from all persons having an interest in the land comprised in the plan:

- (a) to lodge the plan with the Registrar-General,
- (b) to uplift the plan for amendment or to withdraw it from registration or recording and, in either case, to give a receipt for the plan, and
- (c) to attend to all other matters which may arise in connection with the registration or recording of the plan.

(2) Where a plan lodged or consent given under this Division purports to have been signed under a power of attorney or under any other power or authority, whether statutory or not, the Registrar-General may assume that the plan was so signed and that there was sufficient power or authority for its being signed.

(3) Where:

- (a) a seal purporting to be the seal of a corporation, whether sole or aggregate, has been affixed to a plan lodged or a consent given under this Division, and
- (b) the affixing of the seal purports to have been attested by a person or persons holding office in the corporation or by a person or persons authorised to attest the affixing of the seal,

the Registrar-General may assume:

- (c) that the seal and attestation are genuine and were lawfully affixed to, or subscribed on, the plan or consent, and
- (d) that the person or persons purporting to have attested the affixing of the seal had sufficient authority to attest the affixing of the seal in the capacity in which the person or persons purported to do so.

(4) If a plan is registered or recorded under this Division by the Registrar-General, the plan shall be deemed to have been sufficiently signed for the purposes of this Division.

(5) The Registrar-General is entitled to assume that a subdivision certificate that is endorsed on a plan lodged under this Division has been duly endorsed on the plan and that all conditions precedent to the endorsement of the certificate have been duly complied with.

#### **196AA Power of Registrar-General to serve notice of proposed action**

(1) The Registrar-General may, before taking any action under this Division involving:

- (a) the registration or recording of a plan (including a plan on which any easement, profit à prendre, restriction or positive covenant is indicated in accordance with

section 88B (2)), or

(b) the amendment of any such plan,

give notice of the proposed action to any person that the Registrar-General considers should be notified of it.

- (2) If the Registrar-General gives notice under this section, the Registrar-General:
- (a) may refuse to take the action until after the expiration of a period specified in the notice, and
  - (b) may proceed to take the action at or after the expiration of the period so specified unless the Registrar-General is first served with, or with written notice of, an order of the Supreme Court restraining the Registrar-General from so doing.
- (3) If a person given notice under this section does not within the time limited by the notice serve on the Registrar-General or give the Registrar-General written notice of an order of the Supreme Court restraining the Registrar-General from taking the action, no action by that person or by any person claiming through or under that person may be instituted against the Registrar-General in respect of the taking of the action specified in the notice.
- (4) No action may be instituted against the Registrar-General for failure to give a notice under this section.

## Division 3A Registration of resumptions

### 196A Registration of resumptions

- (1) In this section, **resumption** means the acquisition of land by compulsory process in accordance with the [Land Acquisition \(Just Terms Compensation\) Act 1991](#) or any other Act.
- (2) (Repealed)
- (3) Where land is resumed, the Crown or other authority by which the land is resumed shall forthwith:
- (a) where the resumed land is not under the provisions of the [Real Property Act 1900](#)—send to the Registrar-General notice on the prescribed form of the resumption, or
  - (b) where the resumed land is under the provisions of the [Real Property Act 1900](#), and the Registrar-General has not recorded the resumption in the Register kept under that Act—lodge with the Registrar-General a resumption application within the meaning of that Act.

- (3A) Where a resumption is rescinded, the Crown or other authority that rescinds the resumption shall forthwith lodge with the Registrar-General notice of the rescission that, in so far as the resumption rescinded related to land under the provisions of the *Real Property Act 1900*, is in the form approved by the Registrar-General under that Act.
- (4) Upon receipt of a notice of resumption of land that is not under the provisions of the *Real Property Act 1900*, or notice of rescission of such a resumption, the Registrar-General shall register the notice in the General Register of Deeds.
- (4A) Upon receipt of a notice of rescission of a resumption of land under the provisions of the *Real Property Act 1900*, the Registrar-General shall:
- (a) make, in the Register kept under that Act, such recordings, and
  - (b) create such folios of that Register,
- as the Registrar-General considers appropriate.
- (4B) A reference in any Act or other instrument to entry in, or to registration in, the Register of Resumptions, however expressed, is taken to be a reference to registration in the General Register of Deeds.
- (5) With such modifications as may be necessary, this section applies to and in respect of the compulsory acquisition of land under an Act of the Parliament of the Commonwealth and so applies as if:
- (a) such an acquisition were a resumption, and
  - (b) the words “shall forthwith” were omitted from subsections (3) and (3A) and the word “may” were inserted in lieu thereof.
- (6) This section applies only to resumptions (including resumptions under any Act of the Commonwealth) made after the commencement of the *Conveyancing (Amendment) Act 1930*.

## Division 4 Official searches

### 197 Official searches

- (1) Where a requisition that complies with the regulations made under this Act is lodged in the office of the Registrar-General for a search to be made in respect of matters registered or recorded in that office pursuant to any provision of this Act, affecting or relating to the title to any land (other than land subject to the provisions of the *Real Property Act 1900*), the Registrar-General shall, if the records kept by the Registrar-General enable the Registrar-General to comply with the requisition:
- (a) cause the required search to be made,

(b) cause to be made and filed in the Registrar-General's office a certificate specifying full and correct particulars of the result of the search, and

(c) issue an office copy of that certificate to the person who lodged the requisition.

(2) (Repealed)

(3) Where:

(a) a person purchases or disposes of land in reliance on the correctness of an office copy issued under subsection (1) (c), and

(b) as a result of an error in, or omission from, that office copy (other than an error or omission which occurred in a certificate provided to the Registrar-General under section 184D) the person suffers loss or damage in so acting,

the person may recover compensation in proceedings against the Crown under the [Crown Proceedings Act 1988](#).

(4) Where a solicitor or licensed conveyancer acts for a person referred to in subsection (3) and in so acting relies on the correctness of an office copy so referred to, that person has no cause of action against the solicitor or licensed conveyancer for any loss or damage suffered as a result of an error in, or omission from, that office copy if it is not an error or omission which occurred in a certificate provided by the solicitor to the Registrar-General under section 184D.

(5) A person employed in the office of the Registrar-General is guilty of an offence and liable to a penalty not exceeding 10 penalty units:

(a) if the person commits, or is party or privy to, any fraudulent act in relation to a certificate or office copy referred to in subsection (1), or

(b) if the person is wilfully negligent in the making of, or otherwise in relation to, such a certificate or office copy.

(6) Notwithstanding anything in this section, a person may make any search in the office of the Registrar-General that the person could have made if this section had not been enacted.

(7) Where an office copy of a certificate is issued under subsection (1) (c), or was issued under the section that this section replaces, the Registrar-General may, without keeping any copy or record thereof, destroy the certificate, and any document that relates to the certificate, after six years have elapsed since the issue of the office copy of the certificate.

(8) A prosecution for an offence under subsection (5) may be heard and determined before a Local Court constituted by a Magistrate sitting alone.



## **Division 5 General**

### **198 Index to registers**

- (1) The Registrar-General is to keep an index of the registers kept under this Act.
- (2) The Registrar-General may, on payment of the prescribed fee, provide a copy, or permit the inspection, of the whole or a part of the index.
- (3) The Registrar-General does not incur any liability for an error in, or omission from, a copy provided, or matter inspected, under this section if the error or omission occurred in a certificate provided to the Registrar-General under section 184D.
- (4) The Registrar-General may correct errors in the index.

### **199 Registers to be public records**

Any register kept in pursuance of this Act shall be a public record and information therein shall be made available at the prescribed times, in the prescribed manner and upon payment of the prescribed fee, if any.

### **200 Vacation of entries**

- (1) Any registration under this Act may be vacated pursuant to an order of the Supreme Court.
- (2) The Registrar-General may upon the filing with the Registrar-General of an application in the prescribed form vacate any registration under this Act.

### **201 Vacation of entry of legal proceedings**

Any registration of current legal proceedings under this Part may be vacated pursuant to an order of the Supreme Court, and such order may be made after the determination of the legal proceedings, or, in case the Court is satisfied that the litigation is not being prosecuted bona fide, during the pendency thereof, and in any case, if the Court thinks fit, without the consent of the person who caused the same to be registered.

### **202 General rules under this Part as to registration and fees**

- (1) The Governor may make regulations:
  - (a) prescribing the manner and form of registering instruments under this Act or any other Act (except the *Real Property Act 1900*), and the requirements with which documents lodged or delivered for registration thereunder are to comply,
  - (b) prescribing forms and contents of requisitions and certificates under Division 4,
  - (c) regulating the practice of the office of the Registrar-General under this Act or any other Act (except the *Real Property Act 1900*),

(d) prescribing the fees to be taken in such office for any matter or thing to be done therein under this or any other Act (except the *Real Property Act 1900*), and

(e) prescribing anything to be prescribed under this Act.

(1A) (Repealed)

(2) **Prescribed** in this Act in relation to any of the aforesaid matters means prescribed under the provisions of this section.

(3) The fees prescribed in any such regulations shall be the fees payable for all matters therein mentioned, notwithstanding anything contained in any other Act or regulation (except the *Real Property Act 1900* and the regulations made thereunder) prescribing the payment of fees, or limiting the amount thereof.

(4) A regulation may create an offence punishable by a penalty not exceeding 5 penalty units.

(5) Proceedings for an offence against a regulation shall be dealt with summarily before a Local Court constituted by a Magistrate sitting alone.

(6) A provision of a regulation may:

(a) apply generally or be limited in its application by reference to specified exceptions or factors,

(b) apply differently according to different factors of a specified kind, or

(c) authorise any matter or thing to be from time to time determined, applied or regulated by any specified person or body,

or may do any combination of those things.

(7) (Repealed)

#### **202A Savings, transitional and other provisions**

Schedule 9 has effect.

#### **203 Repeal**

(1) (Repealed)

(2) The *Registration of Deeds (Amending) Act 1918* is hereby repealed.

#### **204 (Repealed)**

### **Part 24 Central Register of Restrictions**

## 205 Definitions

In this Part:

**information agreement** (see section 212).

**participating party** means a person who is a party to an information agreement that provides for the recording in the Central Register of information on behalf of the person.

**the Central Register** means the Central Register of Restrictions established and maintained under this Part.

## 206 Establishment of the Central Register

- (1) The Registrar-General is to establish and maintain a register to be called the Central Register of Restrictions.
- (2) The Central Register is to be kept in such form as the Registrar-General considers appropriate.

## 207 Recording information in the Central Register

- (1) The following kinds of information can be recorded in the Central Register:
  - (a) information concerning a proposal that affects land, the use of land or the alienation of land or an interest in land,
  - (b) such other information with respect to land or an interest in land as the Registrar-General considers appropriate,
  - (c) such information as may be prescribed by the regulations.
- (2) Information can be recorded in the Central Register by the Registrar-General either on behalf of the Registrar-General or on behalf of a participating party and is to be recorded in such manner and in accordance with such procedures as the Registrar-General determines from time to time.
- (3) The Registrar-General may permit a participating party access to the Central Register for the purpose of enabling the participating party to record information in the Central Register as information recorded on behalf of the participating party.

## 208 Access to information in the Central Register

- (1) The Registrar-General may provide a person with information recorded in the Central Register, in such manner and on such terms and conditions as the Registrar-General determines. Information can be provided in such form as the Registrar-General determines.
- (2) Information recorded in the Central Register on behalf of a participating party must

not be provided to a person under this section except as permitted by the information agreement applicable to the information.

- (3) The Registrar-General must not use, permit the use of or permit access to information recorded in the Central Register on behalf of a participating party except as permitted by the information agreement applicable to the information.

### **209 Providing information on behalf of participating party**

- (1) An application for information to be provided by a participating party (whether in the form of a certificate, an answer to an inquiry or otherwise) can, in the case of information recorded in the Central Register on behalf of the participating party, be made to the Registrar-General as agent for the participating party. The application is taken to have been made to the participating party.
- (2) When the Registrar-General provides information in response to such an application, the Registrar-General provides the information as agent for and on behalf of the participating party and the information is, for all purposes, taken to have been provided by the participating party.
- (3) The information can be provided in the form of a statement or certificate or in such other form as may be appropriate to the nature of the application.

### **210 Fees**

- (1) When an application for information is made to the Registrar-General as agent for a participating party, any fee payable to the participating party in respect of the application is instead payable to the Registrar-General on behalf of the participating party.
- (2) The Registrar-General is entitled to deduct and retain from any such fee such amount by way of service fee or commission:
  - (a) as may be authorised to be retained by, or as may be required to be paid to, the Registrar-General (as commission or otherwise) under the relevant information agreement, or
  - (b) in the absence of any such authority or requirement in the information agreement, as may be determined by the Registrar-General following consultation with the participating party.
- (3) The Registrar-General is to pay the balance of the fees received on behalf of a participating party to the participating party. The relevant information agreement may provide for the method and frequency of payment of the balance of fees to the participating party.

### **211 Protection from liability**

- (1) Nothing done or omitted to be done in good faith by the Registrar-General, or a person acting under the authority of the Registrar-General, for the purpose of executing this Part subjects the Registrar-General or a person so acting, the Minister or the Crown to any action, liability, claim or demand.
- (2) This section does not affect any liability (whether by way of indemnity or otherwise) that the Registrar-General or the Minister may have to a participating party under an information agreement.
- (3) This section does not affect any liability of a participating party in respect of any act or omission by the Registrar-General, or a person acting under the authority of the Registrar-General, on behalf of the participating party.

### **212 Agreements**

- (1) The Registrar-General may enter into an agreement for the purposes of this Part with a person on such terms and conditions as the Minister approves. Such an agreement is referred to in this Part as an **information agreement**.
- (2) An information agreement may make provision for or with respect to the following:
  - (a) the information to be recorded in the Central Register on behalf of the person,
  - (b) the obligations of the parties with respect to the accuracy of information recorded in the Central Register,
  - (c) rights of indemnity between the parties,
  - (d) any matter that a provision of this Part contemplates will be provided for by such an agreement,
  - (e) such other matters as the parties consider necessary or desirable.

### **213 Rights and responsibilities of participating parties**

- (1) It is the responsibility of a participating party to ensure that the information recorded in the Central Register on behalf of the participating party is accurate and up to date.
- (2) The recording of information in the Central Register on behalf of a participating party does not confer any right of property in respect of the information on the Registrar-General or any other person and does not affect any right or responsibility of the participating party as custodian or manager of the information.

### **214 Consultation with participating parties**

The Registrar-General must consult with participating parties before changing:

- (a) the form in which the Central Register is kept, or
- (b) the manner in which and the procedures in accordance with which information is to be recorded in the Central Register, or
- (c) the manner in which information recorded in the Central Register on behalf of a participating party is to be provided to a person, or
- (d) the form in which information recorded in the Central Register is to be provided in response to an application for information made to the Registrar-General on behalf of a participating party.

## 215 Application to Real Property Act land

This Part applies to land under the provisions of the *Real Property Act 1900*.

## Schedule 1

(Section 3)

Reference to Act	Subject or short title	Extent of repeal
<b>A Imperial Acts</b>		
32 Henry VIII, c 9	Pretenced Titles	Sections 2 and 4, so far as the same apply to New South Wales.
4 Anne, c 16 (c 3)	Attornment by lessees	Sections 9 and 10, so far as the same apply to New South Wales.
4 Geo II, c 28, s 6	<i>Landlord and Tenant Act 1730</i>	Section 6, so far as the same applies to New South Wales.
11 Geo II, c 19	<i>Distress for Rent Act 1737</i>	Section 11, so far as the same applies to New South Wales.
39 & 40 Geo III, c 98	Thellusson Act (Accumulations of Income)	Whole Act, so far as the same applies to New South Wales.
<b>B New South Wales Acts</b>		
1897 No 22	<i>Registration of Deeds Act 1897</i>	Section 9.
1898 No 13	<i>Wills, Probate and Administration Act 1898</i>	Section 56.
1898 No 17	<i>Conveyancing and Law of Property Act 1898</i>	Sections 29, 30, 34 to 36 inclusive; 91 to 105 inclusive; 108 to 120 inclusive.
1899 No 18	<i>Landlord and Tenant Act of 1899</i>	Sections 3 to 6 inclusive; 57 to 61 inclusive; Schedules B and C.
1900 No 25	<i>Real Property Act 1900</i>	Sections 67, 77, 78, 79, 80, subsection (4), 109, and 113.

1900 No 38	<i>Administration (Validating) Act 1900</i>	Section 4. Repealed in part. See section 155.
1901 No 24	<i>Equity Act 1901</i>	Section 12.
1901 No 37	<i>Conveyancing and Law of Property (Supplemental) Act 1901</i>	Sections 5 to 14 inclusive.
1901 No 45	<i>Married Women's Property Act 1901</i>	Section 24, subsection 1.
1901 No 66	<i>Forfeiture of Leases Act of 1901</i>	Whole Act.
1902 No 46	<i>Dedication by User Act 1902</i>	Whole Act.
1903 No 16	<i>Ancient Lights Declaratory Act 1904</i>	Whole Act.
1905 No 2	<i>Apportionment Act 1905</i>	Whole Act.
1905 No 8	<i>Forfeiture and Validation of Leases Act 1905</i>	Whole Act.
1906 No 4	<i>Dower Abolition Act 1906</i>	Whole Act.
1918 No 4	<i>Registration of Deeds (Amendment) Act 1918</i>	Whole Act.

## Schedule 2

(Section 43)

### Conveyance of old system land

This deed, made the \_\_\_\_\_ day of \_\_\_\_\_, one thousand nine hundred and \_\_\_\_\_, between A.B., of Sydney, in New South Wales, merchant, of the one part, and C.D., of the same place, carpenter, of the other part [*Recital, if any*]: (Now this deed) witnesseth that, in consideration of the sum of two hundred dollars paid by the said C.D. to the said A.B. (the receipt whereof is hereby acknowledged) the said A.B., as beneficial owner [*if it is not intended to include the usual covenants for title, omit words "as beneficial owner"*] doth hereby convey unto the said C.D. in fee simple [*or as the case may be*] all that piece of land [*describing particularly the situation, boundaries, and measurements, and if comprised in a registered plan quoting the lot and section number and number of plan.*]

[*Special provisions, if any.*]

In witness whereof the said A.B. hath hereunto subscribed his/her name [*and affixed his/her seal.*]

A.B.

[Seal]

Signed [*sealed*] and delivered by the above-named A.B. in the presence of:

E.F.,

[*Place of abode and description.*]

## Schedule 3

(Section 60)

### Conditions of sale

- 1** This contract is made subject to the provisions of the [Conveyancing Act 1919](#).
- 2** The land is sold subject to the conditions and reservations other than quit rent in the Crown grants under which the land is held.
- 3** The vendor shall within twenty-one days after the date of the contract deliver to the purchaser or his or her solicitor or licensed conveyancer:
  - (a) as to land under the [Real Property Act 1900](#), or held under any Acts relating to Crown lands (except conditionally purchased land), or held under the [Mining Act 1992](#) or the [Offshore Minerals Act 1999](#), particulars of title sufficient to enable the purchaser to prepare his or her transfer, and
  - (b) as to land conditionally purchased under the Crown Lands Acts, and all other land, a complete abstract of his or her title.
- 4** The purchaser shall within twenty-eight days after the delivery of such particulars of title or abstract deliver to the vendor or his or her solicitor or licensed conveyancer a statement in writing of his or her objections and requisitions (if any) to or on the title as shown by such particulars of abstract, and in this respect time shall be of the essence of the contract. In default of or subject only to any such objections and requisitions so made the purchaser shall be taken to have accepted the title.
- 5** No error or misdescription of the land shall annul the sale, but a compensation, if demanded in writing before the proper time for completion, shall be made to or given by the purchaser, as the case may be, the amount to be settled in case of difference in accordance with the provisions of the [Arbitration Act 1902](#).
- 6** All rates, taxes, and annual outgoings shall be paid by the vendor up to the proper time for completion, from which time they shall be paid by the purchaser, and for the purpose of this condition such rates, taxes, and outgoings shall be apportioned.

## **Schedule 4 Short forms of covenants in mortgages and leases**

(Sections 81 and 86)

### **Direction as to the forms in this Schedule**

- 1** Parties who use any of the forms in the first column in this Schedule may substitute for the words "lessee" or "lessor," "mortgagee," or "mortgagor," any name or names, and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.
- 2** Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this Schedule, and corresponding changes shall be taken to be made in the corresponding forms in the



second column.

- 3** Such parties may fill up the blank spaces left in the forms in the first column of this Schedule so employed by them with any words or figures and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.
- 4** Such parties may introduce into or annex to any form in the first column any addition to, exception from, or qualification of the same, or may strike out or omit any words of or from such column; and a proviso which would give effect to the intention indicated by such addition, exception, qualification, striking out, or omission shall be taken to be added to the corresponding form in the second column.
- 5** The covenants in the second column shall be taken to be made with and apply to the lessor or lessee or mortgagor or mortgagee as the case may be, his or her executors, administrators, and assigns, unless otherwise stated.

**Column 1**

**Column 2**

## Part 1—Mortgages

- 1** That the mortgagor covenants with the mortgagee to keep all buildings or other improvements in repair.
- 1** That the mortgagor will keep all buildings or other improvements erected and made upon the land in as good and substantial repair as the same were in at the date of the mortgage, and that the mortgagee, the mortgagee's executors, administrators, and assigns, may at all convenient times, until such mortgage is redeemed, be at liberty, with or without surveyors or others, to enter into, and upon, such land to view and inspect the state of repair of such buildings and improvements.
- 2** And to insure in the name of the mortgagee.
- 2** That the mortgagor, the mortgagor's executors, administrators, and assigns, will insure, and so long as any money shall remain secured by this mortgage, keep insured against loss or damage by fire in the name of the mortgagee, or the mortgagee's executors, administrators, or assigns, in some public insurance office to be approved of by the mortgagee or the mortgagee's executors, administrators or assigns all buildings which shall for the time being be erected on the said land, and which shall be of a nature or kind capable of being so insured to the amount either of the principal money hereby secured, or of the full value of such buildings, and will when required deposit with the mortgagee, or the mortgagee's executors, administrators, or assigns, the policy of such insurance, and within seven days after each premium shall become payable, the receipt for such premium. And that the moneys which shall be received on account of such insurance shall, at the mortgagee's or the mortgagee's executor's, administrator's or assign's option, be applied either in or towards satisfaction of the moneys secured by this mortgage, or in rebuilding or reinstating, under the superintendence of the mortgagee's or their surveyor, the buildings destroyed or damaged. And that on any breach or non-observance of this covenant the mortgagee or the mortgagee's executors, administrators or assigns shall be at liberty to effect such insurance and continue the same for such period as may be deemed fit, and the costs and expenses paid on account thereof shall be a charge upon the said land and bear interest at the same rate as if principal money overdue.

## Part 2—Leases

- |                 |  |
|-----------------|--|
| <p><b>1</b></p> | <p><b>1</b></p> <p>And the said lessee doth hereby for himself or herself and for his or her heirs, executors, administrators, and assigns, covenant with the said lessor that the lessee, the lessee's executors, administrators or assigns, will, during the said term, pay unto the said lessor, the lessor's executors, administrators, or assigns the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever, other than any deduction which the lessee is by any Act of Parliament entitled to make.</p>   |
| <p><b>2</b></p> | <p><b>2</b></p> <p>Provided that in case the demised premises, or any part thereof, shall at any time during the continuance of the lease be destroyed or damaged by fire, flood, lightning, storm, or tempest, or shall suffer war damage so, in any such event as to render the same unfit for the occupation and use of the lessee, then, and so often as the same shall happen, the rent hereby reserved, or a proportionate part thereof, according to the nature and extent of the damage sustained shall abate, and all or any remedies for recovery of the rent or such proportionate part thereof shall be suspended until the demised premises shall have been rebuilt or made fit for the occupation and use of the lessee, and in case of difference under this proviso the same shall be referred to arbitration under the provisions of the <a href="#">Commercial Arbitration Act 1984</a>.</p> |
| <p><b>3</b></p> | <p><b>3</b></p> <p>And also that the lessee will pay all taxes, rates, and assessments whatsoever, whether municipal, local government, parliamentary, or otherwise which are at any time during the term charged upon the demised premises, or upon the lessor, on account thereof, except taxes for local improvements or works assessed upon the property benefited thereby.</p>  |
| <p><b>4</b></p> | <p><b>4</b></p> <p>And also that the lessee will during the term, when, where, and so often as the need shall be, but having regard to the condition of the demised premises at the commencement of the lease and excepting reasonable wear and tear, war damage, and damage by fire, lightning, flood and tempest, occurring within the term:</p> <p>(a) well and sufficiently maintain, amend, and keep, and</p> <p>(b) at the expiration or sooner determination of the term peaceably surrender and yield up unto the lessor,</p> <p>in good and substantial repair the demised premises, including all appurtenances, buildings, erections and fixtures belonging to the demised premises, or at any time within the term lawfully made or erected by the lessor upon or within the demised premises.</p>   |

**5 (Repealed)**

**6**

And that the lessor may enter and view state of repair, and that the lessee will repair according to notice in writing, and that in default the lessor may repair.

**7**

And that the lessor may enter and carry out requirements of public authorities, and repair under the lease.

**5 (Repealed)**

**6**

That the lessor, the lessor's executors, administrators and assigns, or an agent of the lessor or of the lessor's executors, administrators or assigns, may, twice in every year during the term at a reasonable time of the day upon giving to the lessee two days previous notice, enter upon the demised premises and view the state of repair thereof, and may serve upon the lessee, the lessee's executors, administrators, or assigns, or the last or usual place of abode in New South Wales of the lessee or the lessee's executors, administrators, or assigns, or upon the demised premises, a notice in writing of any defect, requiring the lessee or the lessee's executors, administrators or assigns, within a reasonable time, to repair same in accordance with any covenant expressed or implied in the lease, and that in default of the lessee's or the lessee's executors, administrators or assigns' so doing it shall be lawful for the lessor, the lessor's executors, administrators, or assigns from time to time to enter and execute the required repairs.

**7**

That the lessor, the lessor's executors, administrators and assigns, or an agent of the lessor or of the lessor's executors, administrators or assigns, may, at all reasonable times during the term, with workmen and others, and all necessary materials and appliances, enter upon the demised premises, or any part thereof, for the purpose of complying with the terms of any present or future legislation affecting the said premises, and of any notices served upon the lessor or lessee by the Secretary of the Department of Health, licensing, municipal, or other competent authority, involving the control of noxious weeds on land or the destruction of noxious animals, or the carrying out of any repairs, alterations, or works of a structural character, which the lessee may not be bound, or if bound may neglect to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease; provided that such control, destruction, repairs, alterations, and works shall be carried out by the lessor without undue interference with the occupation and use of the demised premises by the lessee.

- 8**  
And to insure from fire in the joint names of the lessor and the lessee.
- 8**  
And also that the lessee will forthwith insure the demised premises to the full insurance value thereof in some insurance office approved by the lessor in the joint names of the lessor and the lessee, and keep the same so insured during the continuance of the lease, and will upon the request of the lessor show to the lessor the receipt for the last premium paid for such insurance, and as often as the demised premises shall be destroyed or damaged by fire all and every the sum or sums of money which shall be recovered or received for or in respect of such insurance, shall be laid out and expended in building or repairing the demised premises or such parts thereof as shall be destroyed or damaged by fire as aforesaid.
- 9**  
And to paint outside every [ ] year.
- 9**  
And also that the lessee will, in every year during the continuance of the lease, paint all the outside woodwork and ironwork belonging to the demised premises now or usually painted with two coats of proper oil colours, in a skillful manner.
- 10**  
And to paint and paper inside every [ ] year.
- 10**  
And also that the lessee will, in every year, paint the inside wood, iron and other works now or usually painted, with two coats of proper oil colours, in a workmanlike manner, and also will repaper with paper of a quality as at present such parts of the premises as are now papered, and also wash, stop, whiten, or colour such parts of the demised premises as are now plastered.
- 11**  
And to fence.
- 11**  
And also that the lessee will, during the continuance of the lease, erect and put up on the boundaries of the demised land or upon such boundaries upon which no substantial fence now exists a good and substantial fence.
- 12**  
And to keep up fences.
- 12**  
And also will, from time to time, during the continuance of the lease, keep up the fences and walls of or belonging to the demised premises, and make anew any parts thereof that may require to be new-made in a good and husband-like manner and at proper seasons of the year.
- 13**  
And to cultivate.
- 13**  
And also that the lessee will at all times during the continuance of the lease cultivate, use, and manage all such parts of the land as are or shall be broken up or converted into tillage in a proper and husband-like manner, and will not impoverish or waste the same.

**14**

That the lessee will not cut timber.

**14**

And also that the lessee will not cut down, fell, injure, or destroy any growing or living timber or timber-like trees standing and being upon the demised land, without the consent in writing of the lessor.

**15**

That the lessee will not without consent use premises otherwise than as a private dwelling-house.

**15**

And also that the lessee or any sub-tenant will not convert, use, or occupy the demised premises or any part thereof into or as a shop, warehouse, or other place for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose or otherwise than as a private dwelling-house, without the consent in writing of the lessor.

**16**

And will not assign or sublet without leave; no fine to be taken.

**16**

And also that the lessee or any sub-tenant will not, during the continuance of the lease, assign, transfer, demise, sublet, or part with the possession or by any act or deed, procure the demised premises, or any part thereof, to be assigned, transferred, demised, sublet unto or put into the possession of any person or persons, without the consent in writing of the lessor, but such consent shall not be refused in the case of a proposed respectable and responsible assign, tenant or occupier: Provided further, that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent, but this proviso shall not preclude the right of the lessor to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to such licence or consent.

**17**

That the lessee will not carry on any offensive trade.

**17**

That the lessee or any sub-tenant will not at any time during the continuance of the lease use, exercise, or carry on, or permit or suffer to be used, exercised, or carried on in or upon the demised premises or any part thereof, any noxious, noisome, or offensive art, trade, business, occupation, or calling, and no act, matter, or thing whatsoever shall, at any time during the continuance of the lease, be done in or upon the said premises or any part thereof which shall or may be or grow to the annoyance, nuisance, grievance, damage, or disturbance of the occupiers or owners of any neighbouring premises.

- 18** That the lessee will carry on the business of a hotelkeeper and conduct the same in an orderly manner.
- 18** And also that the lessee, or the sub-tenant for the time being, will at all times during the continuance of the lease, use, exercise, and carry on, in and upon the demised premises, the trade or business of a licensed victualler or hotelkeeper, and keep open and use the buildings upon the demised land as and for a hotel, and manage and conduct such trade or business in a quiet and orderly manner, and will not do, commit, or permit, or suffer to be done or committed any act, matter, or thing whatsoever whereby or by means whereof any licence shall or may be forfeited or become void or liable to be taken away, suppressed, or suspended in any manner howsoever; and will comply in all respects with the requirements of the Liquor Acts for the time being in force.
- 19** And will apply for renewal of licence.
- 19** And also that the lessee, or the sub-tenant for the time being, will from time to time, during the continuance of the lease at the proper times for that purpose, apply for and endeavour to obtain at the lessee's or sub-tenant's own expense all such licences as are or may be necessary for carrying the said trade or business of a licensed victualler or hotelkeeper in and upon the demised premises, and keeping the buildings open as and for a hotel.
- 20** And will facilitate the transfer of licence.
- 20** And also that the lessee, or the sub-tenant for the time being, will at the expiration or other sooner determination of the lease sign and give such notice or notices, and allow such notice or notices of a renewal or transfer of any licence as may be required by law to be affixed to the demised premises, to be thereto affixed and remain so affixed during such time or times as shall be necessary or expedient in that behalf, and generally to do and perform all such further acts, matters, and things as shall be necessary to enable the lessor, or any person authorised by the lessor, to obtain the renewal of any licence or any new licence, or the transfer of any licence then existing and in force.
- 21** The said (lessor) covenants with the said (lessee) for quiet enjoyment.
- 21** And the lessor doth hereby covenant with the lessee that he or she paying the rent hereby reserved, and performing the covenants hereinbefore on his or her part contained, shall and may peaceably possess and enjoy the demised premises for the term hereby granted, without any interruption or disturbance from the lessor or any other person or persons lawfully claiming by, from, or under him or her.

22

And that the lessee may remove the lessee's fixtures.

22

And also that the lessee may at or prior to the expiration of the lease take, remove, and carry away from the demised premises all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes, or other articles upon the demised premises in the nature of trade or tenants' fixtures brought upon the demised premises by the lessee, but the lessee shall in such removal do no damage to the demised premises, or shall forthwith make good any damage which the lessee may occasion thereto.

## **Schedule 4A Easements in gross**

(Section 88A)

### **Part 1 Right of carriage way**

Full and free right for the body in whose favour this easement is created, and every person authorised by it, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both over the land indicated herein as the servient tenement.

### **Part 2 Right of footway**

Full and free right for the body in whose favour this easement is created, and every person authorised by it, to go, pass and repass on foot at all times and for all purposes without animals or vehicles over the land indicated herein as the servient tenement.

### **Part 3 Easement to drain water**

Full and free right for the body in whose favour this easement is created, and every person authorised by it, from time to time and at all times to drain water (whether rain, storm, spring, soakage, or seepage water) in any quantities across and through the land herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining water or any pipe or pipes in replacement or in substitution therefor and where no such line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement and together with the right for the body in whose favour this easement is created and every person authorised by it, with any tools, implements, or machinery, necessary for the purpose, to enter upon the servient tenement and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, or renewing such pipe line or any part thereof and for any of the aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the body in whose favour this easement is created and the persons authorised by it will take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and will restore that surface as nearly as practicable to its original condition.

### **Part 4 Easement to drain sewage**

Full and free right for the body in whose favour this easement is created, and every person authorised by it, from time to time and at all times by means of pipes to drain sewage and other waste material and fluid in any quantities across and through the land herein indicated as the servient tenement,



together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining sewage or any pipe or pipes in replacement or in substitution therefor and where no such line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement and together with the right for the body in whose favour this easement is created and every person authorised by it, with any tools, implements, or machinery, necessary for the purpose, to enter upon the servient tenement and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, or renewing such pipe line or any part thereof and for any of the aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the body in whose favour this easement is created and the persons authorised by it will take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and will restore that surface as nearly as practicable to its original condition.

## **Part 5 Easement for repairs**

**1** The body having the benefit of this easement may:

- (a) at the expiration of at least one week's notice served on the owner or occupier of a lot burdened, use the lot for the purpose of carrying out necessary work on any structure used by that body which cannot otherwise reasonably be carried out, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened.

**2** In exercising those powers, the body having the benefit of this easement must:

- (a) ensure all work on any structure used by that body is done properly and carried out as quickly as is practicable, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 6 Easement for drainage of sewage**

**1** The body having the benefit of this easement may:

- (a) drain sewage, sullage and other fluid wastes in pipes through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and

- using any existing line of pipes, and
- carrying out works, such as constructing, placing, repairing or maintaining pipes and equipment.

**2** In exercising those powers, the body having the benefit of this easement must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 7 Easement for drainage of water**

**1** The body having the benefit of this easement may:

- (a) drain water from any natural source through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - using any existing line of pipes, and
  - carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches and equipment.

**2** In exercising those powers, the body having the benefit of this easement must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 8 Easement for electricity purposes**

**1** The body having the benefit of this easement may:

- (a) transmit electricity through each lot burdened, but only within the site of this easement, and

(b) do anything reasonably necessary for that purpose, including:

- entering the lot burdened, and
- taking anything on to the lot burdened, and
- carrying out work, such as constructing, placing, repairing or maintaining poles, wires, conduits and equipment.

**2** In exercising those powers, the body having the benefit of this easement must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 9 Easement for services**

**1** The body having the benefit of this easement may:

- (a) provide domestic services supplied by that body through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - carrying out work, such as constructing, placing, repairing or maintaining pipes, poles, wires, cables, conduits, structures and equipment.

**2** In exercising those powers, the body having the benefit of this easement must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

**3** For the purposes of this easement, ***domestic services*** includes supply of water, gas, electricity,

telephone and television and discharge of sewage, sullage and other fluid wastes.

## **Part 10 Easement for water supply**

- 1** The body having the benefit of this easement may:
  - (a) run water in pipes through each lot burdened, but only within the site of this easement, and
  - (b) do anything reasonably necessary for that purpose including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work, such as constructing, placing, repairing or maintaining pipes and equipment.
- 2** In exercising those powers, the body having the benefit of this easement must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
  - (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
  - (d) restore the lot burdened as nearly as is practicable to its former condition, and
  - (e) make good any collateral damage.

## **Part 11 Right of access**

- 1** The body having the benefit of this easement may:
  - (a) by any reasonable means pass across each lot burdened, but only within the site of this easement, for the purpose of exercising or performing any of its powers, authorities, duties or functions, and
  - (b) do anything reasonably necessary for passing across each such lot, including:
    - entering the lot burdened, and
    - taking anything on to the lot burdened, and
    - carrying out work within the site of this easement, such as constructing, placing, repairing or maintaining trafficable surfaces, driveways or structures.
- 2** In exercising those powers, the body having the benefit of this easement must:
  - (a) ensure all work is done properly, and
  - (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and





G.H.,

X.Y., Mortgagor.

[Place of abode and description.]

Witness to signature of C.D.:

K.L.,

Accepted. C.D., Assignee.

[Place of abode and description.]

## Schedule 6

(Section 129 (8))

### Notice of breach of covenant

To

The lessee of [here describe premises with reasonable certainty, as for instance, "No. 369, George-street, Sydney.]

With reference to the lease of the abovementioned premises, dated the \_\_\_\_\_ day of \_\_\_\_\_ 1\_\_\_\_, from A.B. to C.D., and the \_\_\_\_\_ covenant by the lessee therein contained [here state concisely the nature of the covenant or covenants breach of which is complained of, as for instance, "to repair,"] and the breach by you of that covenant I hereby give you notice and require you to remedy that breach by [here set out the remedy as, for instance, "by putting the said premises in repair by doing and executing the repairs in and upon the said premises which are specified in the Schedule hereto annexed." Add if compensation is claimed.] And I further require you to pay to me the sum of \_\_\_\_\_, as compensation for the breach already committed.

Dated this \_\_\_\_\_ day of \_\_\_\_\_ 19\_\_\_\_.

Lessor.

#### Note—

The lessor will be entitled to re-enter or forfeit the lease in the event of the lessee failing to comply with this notice within a reasonable time—see section 129 of the [Conveyancing Act 1919](#).

## Schedule 7 General power of attorney

(Section 163B)

### Part 1

THIS POWER OF ATTORNEY is made on the ..... day of ..... 19 ..... by AB of

.....

- 1** I appoint CD of ..... to be my attorney to exercise, subject to any conditions and limitations specified in Part 2 of this instrument, the authority conferred on an attorney by section 163B of the [Conveyancing Act 1919](#), to do on my behalf anything I may lawfully authorise an attorney to do.
- \*2** In the exercise of the authority conferred on my attorney by section 163B of the [Conveyancing Act 1919](#), my attorney is authorised to execute an assurance or other document, or do any other act, whereby a benefit is conferred on my attorney.
- \*3** This general power of attorney is given with the intention that it will continue to be effective notwithstanding that after its execution I suffer loss of capacity through unsoundness of mind.

(\*Clause 2 or 3, or clauses 2 and 3, may be omitted.)

## **Part 2 Conditions and Limitations**

### **Schedule 8 Construction of certain expressions**

(Section 181A)

#### **Part 1 Right of carriage way**

Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass at all times and for all purposes with or without animals or vehicles or both to and from the said dominant tenement or any such part thereof.

#### **Part 2 Right of foot way**

Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, to go, pass and repass on foot at all times and for all purposes, without animals or vehicles to and from the said dominant tenement or any such part thereof.

#### **Part 3 Easement to drain water**

Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, from time to time and at all times to drain water (whether rain, storm, spring, soakage, or seepage water) in any quantities across and through the land herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining water or any pipe or pipes in replacement or in substitution therefor and where no such line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement, and together with the right for the grantee and every person authorised by the grantee, with any tools, implements, or machinery, necessary for the purpose, to enter upon the servient tenement and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, or renewing such pipe line or any part thereof and for any of the aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the grantee and the persons authorised by the grantee will take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and will restore that surface as nearly as practicable to its original condition.

#### **Part 4 Easement to drain sewage**

Full and free right for every person who is at any time entitled to an estate or interest in possession in the land herein indicated as the dominant tenement or any part thereof with which the right shall be capable of enjoyment, and every person authorised by that person, from time to time and at all times by means of pipes to drain sewage and other waste material and fluid in any quantities across and through the land herein indicated as the servient tenement, together with the right to use, for the purposes of the easement, any line of pipes already laid within the servient tenement for the purpose of draining sewage or any pipe or pipes in replacement or in substitution therefor and where no such



line of pipes exists, to lay, place and maintain a line of pipes of sufficient internal diameter beneath or upon the surface of the servient tenement, and together with the right for the grantee and every person authorised by the grantee, with any tools, implements, or machinery, necessary for the purpose, to enter upon the servient tenement and to remain there for any reasonable time for the purpose of laying, inspecting, cleansing, repairing, maintaining, or renewing such pipe line or any part thereof and for any of the aforesaid purposes to open the soil of the servient tenement to such extent as may be necessary provided that the grantee and the persons authorised by the grantee will take all reasonable precautions to ensure as little disturbance as possible to the surface of the servient tenement and will restore that surface as nearly as practicable to its original condition.

## **Part 5 Easement for repairs**

**1** The owner of the lot benefited may:

- (a) at the expiration of at least one week's notice served on the owner or occupier of a lot burdened, use the lot burdened for the purpose of carrying out necessary work on, or on any structure on, the lot benefited which cannot otherwise reasonably be carried out, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work on the lot benefited is done properly and carried out as quickly as is practicable, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 6 Easement for batter**

**1** The owner of the lot benefited may:

- (a) construct and maintain on the lot burdened, but only within the site of this easement, whatever batter or embankment is reasonably necessary to support the surface or subsurface of the lot benefited or any part of it, or any structure or works on the lot benefited, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and

- carrying out work.

**2** The owner of the lot burdened must not:

- (a) interfere with the batter or embankment or the support it offers, or
- (b) use the site of this easement, or any other part of the lot burdened, or any other land, in a way which may detract from the stability of or the support provided by the batter or embankment.

**3** If the owner of the lot burdened does or allows anything to be done which damages the batter or embankment or impairs its effectiveness, the owner of the lot benefited may serve not less than 14 days' notice on the owner of the lot burdened requiring the damage to be repaired or the impairment removed.

If the owner of the lot burdened does not comply with the notice, the owner of the lot benefited may enter and repair the damage or remove the impairment and may recover any reasonable costs from the owner of the lot burdened.

**4** In exercising those powers (whether or not after serving such a notice), the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 7 Easement for drainage of sewage**

**1** The owner of the lot benefited may:

- (a) drain sewage, sullage and other fluid wastes in pipes through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - using any existing line of pipes, and
  - carrying out works, such as constructing, placing, repairing or maintaining pipes and equipment.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and

- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 8 Easement for drainage of water**

### **1** The owner of the lot benefited may:

- (a) drain water from any natural source through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - using any existing line of pipes, and
  - carrying out work, such as constructing, placing, repairing or maintaining pipes, channels, ditches and equipment.

### **2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 9 Easement for electricity purposes**

### **1** The owner of the lot benefited may:

- (a) transmit electricity through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - carrying out work, such as constructing, placing, repairing or maintaining poles, wires,

conduits and equipment.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 10 Easement for overhang**

**1** The owner of the lot benefited:

- (a) may insist that the parts of the structure (***the overhanging structure***) on the lot benefited which, when this easement was created, overhung the lot burdened remain, but only to the extent they are within the site of this easement, and
- (b) must keep the overhanging structure in good repair and safe condition, and
- (c) may do anything reasonably necessary for those purposes, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - carrying out work.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) restore the lot burdened as nearly as is practicable to its former condition, and
- (d) make good any collateral damage.

**3** The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed.

**4** The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the overhanging structure.

## **Part 11 Easement for services**

**1** The owner of the lot benefited may:

- (a) use each lot burdened, but only within the site of this easement, to provide domestic services to or from each lot benefited, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - carrying out work, such as constructing, placing, repairing or maintaining pipes, poles, wires, cables, conduits, structures and equipment.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

**3** For the purposes of this easement, **domestic services** includes supply of water, gas, electricity, telephone and television and discharge of sewage, sullage and other fluid wastes.

## **Part 12 Easement for water supply**

**1** The owner of the lot benefited may:

- (a) run water in pipes through each lot burdened, but only within the site of this easement, and
- (b) do anything reasonably necessary for that purpose including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - carrying out work, such as constructing, placing, repairing or maintaining pipes and equipment.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and

(e) make good any collateral damage.

## **Part 13 Easement to permit encroaching structure to remain**

**1** The owner of the lot benefited:

- (a) may insist that the parts of the structure (***the encroaching structure***) on the lot benefited which, when this easement was created, encroached on the lot burdened remain, but only to the extent they are within the site of this easement, and
- (b) must keep the encroaching structure in good repair and safe condition, and
- (c) may do anything reasonably necessary for those purposes, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - carrying out work.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) restore the lot burdened as nearly as is practicable to its former condition, and
- (d) make good any collateral damage.

**3** The owner of the lot burdened may insist that this easement be extinguished when the structure on the lot benefited is removed.

**4** The owner of the lot burdened must not do or allow anything to be done to damage or interfere with the encroaching structure.

## **Part 14 Right of access**

**1** The owner of the lot benefited may:

- (a) by any reasonable means pass across each lot burdened, but only within the site of this easement, to get to or from the lot benefited, and
- (b) do anything reasonably necessary for that purpose, including:
  - entering the lot burdened, and
  - taking anything on to the lot burdened, and
  - carrying out work within the site of this easement, such as constructing, placing, repairing or maintaining trafficable surfaces, driveways or structures.

**2** In exercising those powers, the owner of the lot benefited must:

- (a) ensure all work is done properly, and
- (b) cause as little inconvenience as is practicable to the owner and any occupier of the lot burdened, and
- (c) cause as little damage as is practicable to the lot burdened and any improvement on it, and
- (d) restore the lot burdened as nearly as is practicable to its former condition, and
- (e) make good any collateral damage.

## **Part 15 Easement for removal of support**

**1** The owner of supporting land may:

- (a) remove the support provided by the supporting land to the supported land, and
- (b) do anything reasonably necessary for that purpose.

**2** An expression used in this easement that is defined for the purposes of section 177 of the [Conveyancing Act 1919](#) has the same meaning given to it in that section.

## **Schedule 9 Savings, transitional and other provisions**

(Section 202A)

### **Part 1 Preliminary**

#### **1 Regulations**

(1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:

[Conveyancing \(Amendment\) Act 1992](#)

[Environmental Planning and Assessment Amendment Act 1997](#)

[Carbon Rights Legislation Amendment Act 1998](#)

[Real Property and Conveyancing Legislation Amendment Act 1999](#)

[Conveyancing Amendment \(Central Register of Restrictions\) Act 2000](#)

(2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later day.

(3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication in the Gazette, the provision does not operate so as:

- (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or

- (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

## **Part 2 Provisions consequent on the enactment of the [Environmental Planning and Assessment Amendment Act 1997](#)**

### **2 Definitions**

In this Part:

**amending Act** means the [Environmental Planning and Assessment Amendment Act 1997](#).

**relevant repeal date** means the date on which the repeal of the repealed Act, or of the relevant provision of the repealed Act, takes effect.

**repealed Act** means the [Local Government Act 1919](#).

### **3 Subdivisions for lease purposes**

Section 289K of the repealed Act continues to apply to an application made under that section before the relevant repeal date as if that section had not been repealed.

### **4 Continuation of Part 12 of the repealed Act in relation to existing applications for subdivision approval**

Part 12 of the repealed Act continues to apply to an application made under Division 2 of that Part before the relevant repeal date as if that Part had not been repealed.

### **5 Securities for the execution of work**

- (1) An agreement referred to in section 328 (a) of the repealed Act (being an agreement that is in force immediately before the relevant repeal date) continues to have effect, according to its terms, as if that paragraph had not been repealed.
- (2) A security referred to in section 328 (b) or 331 (2A) of the repealed Act (being a security that continues in force after the registration in the office of the Registrar-General of the relevant plan referred to in section 327 (1) (e) or (2) (c) of that Act) is taken to be a security referred to in section 80A (6) of the [Environmental Planning and Assessment Act 1979](#).

## **Part 3 Provisions consequent on enactment of [Carbon Rights Legislation Amendment Act 1998](#)**

### **6 Definitions**

In this Part:



**amending Act** means the *Carbon Rights Legislation Amendment Act 1998*.

**existing forestry right** means any forestry right (within the meaning of section 87A of this Act as in force immediately before the commencement of Schedule 1 [3] to the amending Act) that is subsisting immediately before that commencement.

#### **7 Existing forestry rights preserved**

On the commencement on Schedule 1 [3] to the amending Act, any existing forestry right is taken to be a forestry right within the meaning of section 87A of this Act as amended by that Schedule.

#### **8 Application of new definitions of forestry right and forestry covenant**

Subject to this Part, an amendment made to this Act by Schedule 1 [1]–[4] to the amending Act applies only to an interest, right or obligation that arises on or after the commencement of the amendment.

### **Part 4 Provisions consequent on enactment of *Conveyancing Amendment (Central Register of Restrictions) Act 2000***

#### **9 Existing agreements continued**

An agreement in force immediately before the commencement of this clause that makes provision for or with respect to the matters for which an information agreement can make provision under Part 24 continues to operate after that commencement as an information agreement under that Part, subject to the following:

- (a) the agreement is taken to have been entered into by the Registrar-General rather than the Minister,
- (b) a reference to the Minister or to the Director of the Land Titles Office is taken to be a reference to the Registrar-General,
- (c) the agreement is of no effect to the extent (if any) that it is inconsistent with Part 24.