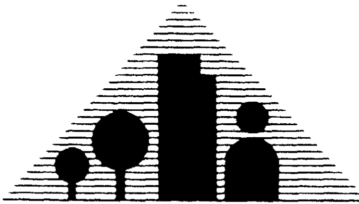

GENERAL PRACTICE SECTION

LAW COUNCIL OF AUSTRALIA

POSITION PAPER

PROPERTY LAW GROUP

GENERAL PRACTICE SECTION, LAW COUNCIL OF AUSTRALIA

UNIFORMITY OF PROPERTY LAWS AND PROCEDURES

PREAMBLE

We are aware of the sensitivities in this area. Each of the six Australian states and two territories regulates the area of property laws and procedures. The native title debate highlights how zealously they seek to preserve this domain. We have no intention of getting caught in a political debate about states' rights. This is not in issue. Rather, we want to analyse the existing systems of property laws and procedures and see whether greater co-operation between the states and territories, with the goal of greater uniformity in these areas, would be beneficial. We will do this under the following headings:

1. **Background**
2. **Advantages of the present system**
3. **Disadvantages of the present system**
4. **What areas in particular could benefit from change**
5. **Difficulties of change**
6. **Does the cost outweigh the benefit**
7. **How might change be implemented and who might be involved**
8. **Conclusion**

At its meeting in Hobart in September 1993 the Executive of the Law Council passed a unanimous resolution agreeing in principle to the Property Group's proposal to prepare a position paper on uniformity of property law. A draft position paper was prepared and sent to all of the Law Council's constituent bodies in December 1993 seeking comments. All constituent bodies have now responded and their comments have been considered by us in finalising this paper.

This paper has been prepared by the Property Group in response to that response to that resolution and for the purpose of consultation with the constituent bodies of the Law Council.

1. Background

1.1 Australian property laws have developed not only over 200 year of European settlement but also, as can be seen since the Mabo decision, during the occupation by Aboriginal persons over many previous millenniums. During colonial days, each of the six colonies development an elaborate system of land laws. On Federation in 1901, land law was not a head of power ceded to the Commonwealth government and its regulation remained with the states.

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1.2 Since Federation there has been a substantial change in trade and commerce with the need for accompanying change in the industries which service it. Notably trade and commerce have become more national and international. A significant number of organisations operate in more than one state or territory. Many operate in every state and territory.

Investment by foreign interests in Australia has increased dramatically since World War II. This has led to a number of service industries, such as law, accounting and engineering, becoming national.

1.3 With the globalisation of trade there have been changes in other countries. The European Economic Community and the North America Free Trade Association are some examples.

1.4 The communications revolution has further broken down barriers.

1.5 Politically there have been significant changes. The public are becoming both more aware and more demanding. They are aware of differences between the systems and in particular the costs and difficulty of doing a transaction in one jurisdiction in comparison with another. Governments have responded. The Trade Practices Commission inquiry into conveyancing is one example. The mutual recognition legislation is another. The business community's expectation that systems should become more streamlined is very high, particularly as most lobby groups are now nationally based.

1.6 The time is ripe to consider whether existing property laws and procedures are appropriate or at least whether differences in the various systems are appropriate. The trend towards breaking down unnecessary barriers and simplifying the system is very evident. This is highlighted in the address by the Federal Attorney General, Mr Michael Lavarch, given at the Australian Legal Convention in Hobart in September 1993. Mr Lavarch said:

> "Now is the time, I believe, to look at the fundamentals of our system - to take stock of basic premises, and to make reform where necessary ... How seriously can we expect to be taken in an internationalised legal services market when we can't even break down the remaining barriers to a truly national profession here? ... The challenge of creating one Australian profession cannot be only partly met. Australia cannot continue to be eight separate jurisdictions with eight separate regulatory systems."

The significant impact of legislation on mutual recognition of interstate standards for goods and services is already evident, as illustrated in articles such as that in the **Australian Financial Review** on 27 September 1993. This article reports that mutual recognition legislation is being used by business to slash red tape and break open interstate markets. For example, eggs packaged for the Sydney market are being sold in Brisbane without having to comply with Queensland's unique date-stamping laws. Wallaby meat from Tasmania is being sold in Melbourne restaurants, despite laws preventing the sale of meat from Victorian wallabies. Agricultural economists, who have battled against the protectionist attitudes of State marketing boards, have welcomed mutual recognition. Grading requirements for interstate fruit and vegetables imported into Queensland are under threat as is the two-price scheme in the dried fruits industry (based in Victoria, South Australia and New South Wales), which costs consumers about $18 million a year.

1.7 Government departments (such as land titles offices and stamp offices are giving active consideration to the issue of uniformity. For example, at their conference held in October 1993 the Registrars of Land Titles resolved to establish a committee whose function it was to Report to the next Registrar's Conference (to be held in October 1994) on the benefits, expected results and cost of uniformity in respect of Australian Torrens laws and practice. That committee has prepared an issues paper, a copy of which is at tab 1.

The Registrars have invited the Property Group (representing the Law Council) to participate in that conference. It is clear that the Registrars are taking seriously the issue of uniformity and certain other aspects which could be significant for national practice. This is apparent from the letter dated 17 August 1994 from the Tasmanian Recorder of Titles to the chairman of the Property Group, a copy of which is at tab 2.

2. Advantages of the present system

Arguments in favour of the present system of Australian property laws and procedures would probably include:

2.1 It works pretty well, by and large, and nothing but a bit of fine tuning from time to time won't fix any problems.

2.2 By world standards it's not too bad and we are actually selling bits of it abroad.

2.3 The people know and understand it, particularly those who work closely with it such as lawyers, estate agents, financiers and government officials.

2.4 It is easier and quicker to change the present system if there is no need to confer with others in other jurisdictions in order to have a uniform system. Innovation is not hampered in a particular jurisdiction by the need for uniformity and initiatives adopted in one jurisdiction which seem to work may be adopted elsewhere.

2.5 The local residents can identify more with a local product and it is likely to be more responsive to any specific local requirements.

3. Disadvantages of the present system

These would appear to include:

3.1 It is another barrier to trade and commerce if each jurisdiction has different laws and procedures.

3.2 It adds to the cost of doing business as you can't standardise. One Australian retail chain has estimated that a lack of uniformity costs it in excess of $1 million each year. Another area where costs are increased is cross-border borrowing where a number of law firms will need to be engaged.

3.3 Australia, being a comparatively small market of 18 million people, needs to attract investment from overseas and should therefore be seen to operate as one system rather than nine.

3.4 Lack of co-operation between the states means some have better systems than others.

3.5 It is incompatible with changes made in much larger and more internally diverse regions such as the European Economic Community.

3.6 It is incompatible with the one national ethos.

3.7 The differences are not so great that the difficulty posed by changes to uniformity is exceeded by the benefits inherent in a uniform system.

3.8 It is anachronistic and is rooted in the horse and buggy age rather than one of instant communications and sophisticated technology.

3.9 In their issues papers (see tab 1), the Registrars also canvass the benefits and problems in moving towards uniformity of the Torrens system. In this they refer extensively to a number of papers presented at conferences arranged by the Property Group. These are:

(a) An address by Associate Professor Peter Butt at the Property Group lunch held during the 1991 Australian legal Convention in Adelaide (see tab 3);

(b) A paper by Professor Marcia Neave presented to the Second Biennial Conference of th General Practice Session in October 1992 in Melbourne (see tab 4);

(c) A paper by Mr Edward Kerr presented at that Melbourne conference (see tab 5);

(d) A paper by Ms Susan MacCallum presented at that Melbourne conference (see tab 6); and

(e) A paper by Mr Robert Bradshaw presented at that Melbourne conference (see tab 7).

4. What areas in particular could benefit from change?

4.1 We have identified a number of areas where we think greater uniformity of laws and procedures would be beneficial. These include:

The power of attorney.

Retail tenancies.

Land titles offices' practices and procedures.

The Torrens system.

Property law legislation such as the Conveyancing Act in NSW and its counterparts in other jurisdictions.

There are other areas where we believe greater uniformity would be desirable. However those that deal with sensitive, revenue raising matters are not dealt with in this paper. At the forefront of these areas is stamp duty. We are aware that various state revenue offices are looking into uniformity and we welcome those initiatives. In addition other areas, not dealt with specifically in this paper, have been identified as benefitting from uniformity including wills, probate and administrative, strata titles, cluster titles, community titles and retirement villages.

In addition a move towards uniformity of property laws complements at least one of the major thrusts of the Trade Practices Commission's recent report on the Study of the Professions-Legal.

We now deal with each of the areas identified above.

4.2 **The power of attorney**

A paper prepared by Don MacCallum a member of the National Committee of the Property Group highlighting the discrepancies between the various jurisdictions has been prepared and is attached (see tab 8).

A significant number of transactions now involve companies having their central management in different jurisdictions. This leads to the common use of documents being signed under power of attorney. In turn this causes practical difficulties. For example, a New South Wales company which executes a dealing by its attorney relating to land in Tasmania must arrange for the power of attorney to be registered in Tasmania before the document can be signed. We believe there is no legal or commercial justification for this position.

We suggest that a power of attorney which is valid in the jurisdiction of the donor should be effective in every other jurisdiction. Further, formalities such as registration and notarising would not appear to serve any useful purpose, at least in commercial transactions, other than to add cost and time to transactions. In this area we believe that simplicity should prevail. It is up to the parties to be satisfied that the attorney has sufficient power. State and territory regulation, particularly non-uniform regulation, in fact adds to the confusion without giving any corresponding protection or benefit.

We are pleased to note that the issue of the power of attorney has been placed on the agenda for consideration by the Standing Committee of Attorney's General ("**SCOAG**"). We have had discussions with the departmental officer appointed by SCOAG to investigate the position. A copy of relevant correspondence appears at tab 9. We are also aware that the Trustee Companies Association of Australia has prepared a standard uniform power of attorney and is keen to promote greater uniformity in this area.

4.3 **Retail tenancies**

There is mish mash of systems Australia wide. Some jurisdictions are unregulated, others have varying forms of legislation. This is highly undesirable and has lead to a call by the Building Owners & Managers Association ("**BOMA**") for a uniform system. Mr Roger Fairweather, the Chairman of the Australian Council of Shopping Centres (NSW) and a member of the Executive Committee of BOMA, has said that is 'absurd' that each State varies in the way retail leases are dealt with. He says that "it is time that the $95 billion industry pulls together to create a standard system Australia-wide rather than continuing to work with a haphazard, piecemeal approach." (**The Weekend Australian,** 14-15 August 1993).

Mr Fairweather recently repeated these concerns at the First National Property Lawyers Conference held on 24 August 1994 and which was convened by the Property Group. A copy of Mr Fairweather's paper and the commentary of Mr Campbell Paine (a member of the National Committee of the Property Group) on that paper appear at tab 10.

Given that:

* the aim of regulation of retail tenancies is to make the relationship between landlord and tenant fairer; and

* an increasing number of both landlords and tenants operate in more than one jurisdiction and many in every jurisdiction

we believe that a strong case can be made for having only one system. It is up to each state and territory then to decide whether or not to regulate. If it decides to regulate, it should go with one accepted system rather than a number. Unfortunately there appears to be little regard being given to uniformity in this area with New South Wales having recently enacted the Retail Leases Act 1994 with different legislation pending in the Australian Capital Territory.

4.4 Land titles offices practices and procedures

As can be seen from what we have said already we have established a dialogue with most of the Australian land titles offices. We are aware of the real attempts they are making towards a more uniform system. However much still needs to be done. Anyone who has dealt with the various land titles offices will be struck by the different requirements, costs, efficiencies and approach to customer service. Solicitors are major customers of most of the land titles offices. As such they are entitled to question these differences.

The Registrars have kindly made available to us a data matrix for Land Titles Offices. This sets out comparative information for the eight Australian Land Titles offices. A copy of the matrix appears at tab 11. The Registrars gave us permission to publish the matrix and it appears in the latest edition of Australian Legal Practice.

4.5 The Torrens system

We are not seeking uniform land management but believe that management should be in accordance with more uniform laws and procedures.

We have the benefit of a significant number of papers by distinguished commentators which highlight the anomalies which have crept in since 1860 when the first Torrens statute was enacted in South Australia. These include:

* Indefeasibility of title and caveats.

* Protection of unregistered leases.

* Easements.

* Adverse possession.

This has lead to different practices in various jurisdictions. For example, in Victoria where protection is given to unregistered tenancies, it is rare to register a lease.

The differences also make it more difficult to prepare one document which can be used Australia wide without change. This is particularly important for mortgages and leases which are a significant part of national commerce.

We also believe that it would help Australia to sell the Torrens system abroad if it could be seen that the same one has been adopted by every Australian state and territory. A solicitor who has been involved in selling the Torrens system in Vietnam has said "Trying to explain to the Vietnamese why we had a different Torrens system in each state was not easy."

4.6 **Property law legislation**

In an era of national commerce, it does not make sense to have inconsistencies between jurisdictions on such matters as the giving of notice. The inconsistencies are particularly noticeable in interstate financing transactions.

Further, much of the contents of legislation relates to principles which are almost irrelevant to modern practice. It therefore makes sense to:

* Cull the existing legislation and only leave what is relevant,
* Do this using modern language and formatting.
* Do it on a national basis.

There does not appear to be a valid reason why property law principles between jurisdictions should not be the same. If this is so, it also makes sense that the legislation is uniform.

5. **Difficulties of change**

Change to an established system is inherently difficult. The difficulties which we have identified include:

5.1 Getting people to agree on what change should occur and when and how it should occur.

5.2 The cost of change.

5.3 The need to educate people about the change.

5.4 Some uncertainties.

5.5 Some solicitors will see that they may have less work if they are no longer called on for advice from interstate principals on legislation and procedures in their state. These solicitors might resist change.

5.6 Whether uniformity is a desirable end to be pursued.

6. **Does the cost outweigh the benefit?**

There can be no global answer to this. Each area where change is suggested needs to be considered separately.

Some points which we think are relevant (in economic rather than philosophical terms) include:

* The cost will depend on how the change is implemented (see 7 below).

* Many of the costs and benefits will be difficult if not impossible to calculate.

* Some of the costs will include initial education and learning curve experience.

* Care needs to be taken not to double count cost. For example, the cost of overhauling legislation which, regardless of uniformity, needs to be overhauled.

* There will be a saving in cost if jurisdictions co-operate and avoid the current duplication in "re-inventing the wheel".

* Regular meetings of members of co-ordinating committees living in different parts of Australia would be a cost.

* A simpler, uniform system would be a benefit.

* Lower costs could be passed onto consumers.

There is of course the philosophical issue that simpler, easy to understand laws have an intangible benefit for the members of society as a whole.

7. How might change be implemented

7.1 If change is to occur it will require the co-operation of the eight state and territory Governments. We see the Commonwealth Government as having a key role, both in providing support for change and contributing resources.

7.2 We think the first step is to identify the areas where we believe change is desirable. The next step is to determine what changes should occur. Here we believe the Standing Committee of Attorney's General ("SCOAG") has a vital role to play. If SCOAG determines that change is appropriate, then we believe that in relation to each area of change a central committee should be established of say four or five persons. One person could include a representative of SCOAG, there could be a representative of the Law Council of Australia or one of its constituents and representation would be given to the industries affected.

7.3 The committee appointed by SCOAG would be given the task of preparing the draft legislation. Resources of the Parliamentary Counsel may be required. The Commonwealth could be asked to contribute the whole or a significant part of the cost. Some of the cost might be contributed by industry.

7.4 It is vital that the committee receive input from all interested parties. State and territory Law Societies will have a large role to play as will other relevant industry bodies such as the Retail Traders Association and BOMA. Government officers will need to be involved, in particular those from the various titles offices.

7.5 The committee would then work up a model act on the basis that there would be a commitment from the states and territories to consider implementation of that act in good faith. In this regard, the Queensland Land Titles Act 1994 at least offers an interesting example of a Torrens statute drafted in modern language, although we do not intend to comment on its substantial legal content.

7.6 It should be noted that Victoria has a major review of property legislation taking place at present. For details see tab 12. We believe that there is scope for uniformity of approach and that the working groups should be liaising with uniformity as an objective.

8. Conclusion

We believe that the Law Council has an important role to play in the area of uniformity of laws as the national body representing Australian lawyers. One of the objects of the Property Group is the promotion of appropriate uniform property laws and procedures. Our goal is to promote uniform best practice Australia wide in property laws and procedures. Lawyers, acting for the people of Australia, are the main consumers of property services provided by the various state and territory governments. It is therefore natural that they should be seeking improvements on behalf of their clients.

What we are seeking is not radical. We are not advocating centralised land management. Rather we are seeking a rational approach to a problem which is becoming more common. We believe that greater uniformity of property laws and procedures will benefit Australia as a whole if the approach is based on best practices rather than ingrained systems. Further it is consistent with the drive in areas such as mutual recognition as well as the demands of business and the movement towards uniformity appearing in the land titles and revenue offices of the state and territories.

Property Group National Committee

12 September 1994