# THE PROPERTY LAW ACT 2023 INTRODUCES MAJOR REFORMS

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**Australia Real Estate and Tax Alert**

## KEY POINTS

The *Property Law Act 2023* (the New Act) was passed on 25 October 2023. It will likely receive Royal Assent in the next week and will commence on a date set by proclamation (to be announced soon).

The New Act will replace the current *Property Law Act 1974* (QLD) (the Current Act) and modernise Queensland's property laws, better facilitating e-conveyancing and electronic transactions.

Important changes include:

- The introduction of a statutory seller disclosure scheme (Seller Disclosure Scheme);
- Rules relating to leases will be updated, introducing additional protections for current and former lessees;
- Limitation period for actions brought based on a deed is reduced from 12 years to six years;
- The abolition of the rule against perpetuity for trusts over land in Queensland and the introduction of a fixed perpetuity period of 125 years; and
- Various other changes and simplifications to rules relating to instalment contracts, adverse events under property contracts, and other matters.

## THE NEED FOR MODERNISED PROPERTY LAWS

Since the Current Act commenced in December of 1975, technology and legal practice has changed significantly, including most notably:

- The introduction of e-conveyancing;
- The shift to in-house stamping of most documents and transactions; and
- The move to electronic filing and records retention.

The New Act is intended to modernise Queensland's property laws to reflect these changes. It is drafted broadly in line with the recommendations of the “Final Report: Property Law Act 1974” prepared by the Commercial and Property Law Research Centre at the Queensland University of Technology in 2018.

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## SELLER DISCLOSURE SCHEME

The most notable and immediate impact of the New Act may arguably be the Seller Disclosure Scheme. Unlike some other Australian jurisdictions, Queensland does not currently have any formal Seller Disclosure Scheme like the one set out in the New Act. Instead, Queensland has traditionally (subject to certain discrete exceptions) been a caveat emptor (or "buyer beware") jurisdiction—purchasing a property in Queensland has often meant erring on the side of caution, with prudent buyers requiring due diligence periods within which to satisfy themselves about the property prior to committing to the acquisition. On the other hand, sellers of property in Queensland have to comply with various and scattered common law, statutory, and contractual obligations in terms of disclosure.

The New Act serves to make the process more transparent for buyers (while also reducing complexity for sellers) by combining all of the common law, statutory, and contractual seller disclosure obligations into a single statutory Seller Disclosure Scheme.

### What Does the Seller Disclosure Scheme Apply to?

The statutory Seller Disclosure Scheme as enacted in the New Act will be applicable to sales of all freehold land, including sales by auction, subject to several exemptions.

### What Will Need to Be Disclosed?

The seller will be required to provide the buyer with a disclosure statement and any prescribed certificates (the Disclosure Documents) pertaining to the lot. The disclosure statement needs to be in the approved form, include all information prescribed by regulation, be completed with information that is true at the time it is given to the buyer, and be signed by the seller. Prescribed certificates are to include any certificates applicable to the lot, and they may be any document that is required to be given to the buyer under another act. See the link below to the draft of the approved form for the disclosure statement.

### When Will the Disclosure Documents Need to Be Given?

The Disclosure Documents will need to be given by the seller to the buyer before the buyer signs the contract for the purchase of the relevant lot.

### How Do the Disclosure Documents Need to Be Given?

The Seller Disclosure Scheme allows the seller to provide the Disclosure Documents to the buyer either physically or electronically. This is an expected but welcome feature given the shift towards e-conveyancing.

### What Happens if I Do Not Comply With the Statutory Disclosure Scheme?

The Seller Disclosure Scheme gives the buyer the right to terminate the contract for sale *at any time before settlement* if the seller fails to provide any of the Disclosure Documents at the relevant time or provides Disclosure Documents that are inaccurate or incomplete regarding a material matter.

## CHANGES IMPACTING LEASES

The New Act makes several changes to the common law position regarding leasing, in an effort to make the rules more simple, reasonable, and transparent. A few of these changes are outlined below.

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One key change concerns the liability of an assignor of a lease and any guarantor of that assignor upon subsequent assignment of the lease. Under the common law, if Tenant A assigns a lease to Tenant B who then assigns the lease to Tenant C, Tenant A can be made liable for Tenant C's breaches of the lease that occur during the lease term. The New Act removes this ongoing liability for breaches committed by any subsequent assignee (despite any agreement to the contrary). However, it is important to keep in mind that, under the New Act, in the absence of an express release (or operation of a statute) to the contrary, while not liable for the breaches of Tenant C, Tenant A (and its guarantor(s)) will still be liable for the breaches of Tenant B.

Another key change is to the requirements for obtaining consent to an assignment of lease or other dealings with the lease or leased premises. As per section 121 of the Current Act, in leases containing a covenant requiring the lessee to obtain the lessor's consent to an assignment or other dealing, the lessor is not entitled to unreasonably withhold that consent. The New Act retains this requirement and imposes further requirements comprising:

- A statutory time frame within which the lessor is required to give the lessee notice of its decision regarding its consent, being one month after receiving full particulars of the lessee's request; and
- The lessee being given the express right to apply to the court for damages where, the lessor fails to provide its decision regarding its consent, the lessee believes that the lessor has unreasonably withheld consent or a condition attached to the lessor's consent is unreasonable, unnecessary, or onerous.

Finally, the New Act simplifies and clarifies the enforceability of covenants under a lease after assignment by the tenant or sale of the reversion by the landlord (in other words, after a party to the lease changes). The New Act provides that, subject to some exceptions (e.g., where the provision is expressed to be personal to a particular party or the parties agree to the contrary), an assignee of a lease is bound by each term and entitled to the benefit of all terms in the lease (as opposed to only those covenants that touch and concern the land, which was the position prior to the New Act).

## TIME LIMITATIONS FOR ACTIONS ON DEEDS

Currently, the limitation period for actions based upon a deed (as opposed to a contract) will be reduced from 12 years to six years. This brings it in line with the limitation period for actions based upon a contract, and it brings parity on this point between these two different kinds of commercial agreements. For context, in some other Australian jurisdictions, the limitation period for actions based on deeds is 15 years.

## TRUSTS AND THE ABOLITION OF THE COMMON LAW RULE AGAINST PERPETUITIES

The common law rule against perpetuities provides that an interest in property must vest earlier than 21 years after the death of a person alive at the time the interest was created. This rule is modified under the Current Act to provide an option to set a perpetuity period of up to 80 years. For a trust, this means that property can only be held on trust for up to 80 years from the date of disposition of the property to the trust.

The New Act goes further by abolishing the common law rule and introducing a new fixed perpetuity period of 125 years (which is the same as the United Kingdom). This 125-year period commences from the date of the

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disposition of the property to the person under the trust. It will be possible to set a shorter perpetuity period in a trust deed.

Existing trusts will be able to "opt in" to the new fixed perpetuity period. If the terms of a trust provide the trustee with the power to amend the vesting date, the trustee can extend the date to 125 years. If the trustee does not have the power to vary the vesting date, all of the beneficiaries under the trust can execute a deed to vary the vesting date and set it at 125 years.

We note that if trustees or beneficiaries are considering making variations to existing trust arrangements in light of the amendments, care should be taken to fully consider any tax or duty implications that may arise.

## USEFUL LINKS

- *Property Law Bill 2023*
- *Property Law Bill 2023* with amendments following second reading
- *Explanatory Memorandum for the Property Law Bill 2023*
- *Property Law Act 1974* (QLD)
- *Legal Affairs and Safety Committee report into the Property Law Bill 2023*
- Draft approved form of Disclosure Statement

## HOW WE CAN HELP

Our Real Estate, Finance, and Tax teams will continue to monitor this reform. If you have any queries, please speak with any of our key contacts listed below.

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