FOREWORD

In April 2016, the School of Law at the University of Canterbury hosted the 13th Australasian Property Law Teachers Conference.

The Conference, which ran over two days, brought together property law academics from New Zealand, Australia, Canada and Singapore to discuss a wide range of contemporary issues in property law. The opening address, two plenary sessions and general paper presentations resulted in lively and stimulating debate.

The Conference organisers acknowledge the generous financial support from the New Zealand Law Foundation. The Foundation paid all the expenses for our keynote speaker and provided funding for scholarships to students from all six New Zealand universities to attend. Selection was competitive and we were delighted to welcome the students. Their presence added an exciting dimension to our discussions throughout the two days.

This publication comprises eight papers from the Conference. The papers cover a wide range of topics and provide a very valuable resource for all those interested in this area of law.

Audrey Loeb LSM, BA, LLB, LLM, Associate Counsel at Miller Thomson LLP, a major Toronto law firm, gave the keynote address. Her topic, "Apartment Living – the importance of good legislation in establishing a well-run environment for apartment dwellers" –was both highly informative and entertaining. The paper addressed the buying, selling and living in condominiums in Ontario and provided very valuable comparisons with our regime under the Unit Titles Act 2010. The topic is highly relevant in today's housing environment and New Zealand has much to learn from cities world-wide. Residential condominiums, which account for one out of every three new homes built in Ontario, can be either high-rise or low-rise apartment style units, townhouses (some known as freehold condominiums), detached houses or stacked townhouses. Non-residential condominiums can be industrial, commercial or retail. The complex legislative framework sets out how owners will share the ownership of the property, while retaining individual ownership of parts of the property, which constitute their units. Sophisticated legislation is imperative. As the paper points out, condominium ownership is complicated and owners must decide whether the lifestyle will be suitable.

Linda Widdup explores the fraud exception to the principle of indefeasibility of title in our Torrens legislation and compares it with personal property security (PPS) legislation which does not contain a specific carve out for fraud. While the more established Canadian and New Zealand PPS legislation imposes a good faith standard of conduct, whereby a failure to meet that standard could potentially alter statutory priorities, Australia's comparative legislation does not have this requirement. She advocates that Australia's PPS legislation should have a provision enabling statutory priorities to be overridden where justified by fraud or dishonest conduct.

Teo Keang Sood's paper looks at the applicability of English land law and general equitable principles in the context of the Malaysian Torrens system. Notwithstanding s 6 of the Civil Law Act 1956 and some observations to the contrary in case law, he argues that relevant aspects of English land law may continue to apply. As for general equitable principles, their application is supported by statutory provisions and case law. This is subject to their application not being in conflict with the principle of indefeasibility and the caveat system provided in the Malaysian Torrens statutes.

Jeremy Finn, Ben France-Hudson and Elizabeth Toomey explore some of the problems that occur where there is shared ownership on a single title of land. In New Zealand, these models comprise cross leases, unit titles and retirement homes. Problems with the cross lease model were exacerbated after the Canterbury earthquakes and these may have been avoided if the warnings from the Law Commission had been heeded in 1999. The ability of each flat owner to have his or her own insurer and mortgagee adds to the complexity. There is much public angst over the effectiveness of the Unit Titles Act 2010 (NZ). While s 74 of that Act provides a pragmatic tool for resolving disputes about how to conduct a remediation project, that provision is not always applicable and this leads to complex issues, perhaps the most contentious being insurance entitlement. Who to sue when things go wrong, the role of the Earthquake Commission (EQC) and whether an owner should take some blame for a problem are often part of a litigator's brief.

In their paper, David Mullan and Lesa Parker attempt to bring Indigenous Australian concepts of property to bear on the new area of wealth accumulation, the company share and its subsidiary financial products. The narrative research method and discourse analysis in their paper produce a unique insight into the ownership of company shares in Australia. The paper draws out the parallels between the critiques of those interviewed and the earlier critiques of academics. They examine the shortcomings in the existing theory and taxonomy of shares as a property right. These shortcomings are placed within their human-property relationship and are examined as potential liberators of Australian conceptions of property law.

Pieter Badenhorst examines the effect of a recent decision given by the South African Constitutional Court. In *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport,* petroleum products were provided to Wilson, an owner of a truck business, by an unregistered credit provider, Chevron. In terms of the National Credit Act 34 of 2005 (ZA) (NCA), an agreement by an unregistered credit provider is void. In addition, s 89(5)(b) of the NCA requires a court to order an unregistered credit provider to refund all money paid by the consumer to the credit provider. This exposed Chevron to repay R33 million in payments made by Wilson in the years since the NCA came into effect on 1 June 2006. The Court considered whether that provision was inconsistent with the Constitution of the Republic of South Africa, 1996 (ZA) "on the basis that it permits arbitrary deprivation of property in contravention of s 25(1) of the Constitution". In terms of s 25(1), property is protected against

arbitrary deprivations by law. At issue was also whether the provision was reasonable and justifiable in terms of s 36(1) of the Constitution which limits fundamental rights only in terms of a "law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". The Court decided and confirmed that s 89(5)(b) of the NCA is constitutionally invalid as it is inconsistent with ss 25(1) and 36(1) of the Constitution. It was also decided that the availability of an enrichment claim (restitution), namely the *condictio ob turpem causam*, to the credit provider did not ameliorate the arbitrariness of the deprivation. The author discusses the Court's conception of property for purposes of s 25(1) of the Constitution, the issue of whether an arbitrary deprivation of property took place and the non-availability of an enrichment claim, and comments on the decision's implications.

Eileen Webb and Teresa Somes examine Assets for Care arrangements between elder people and their adult children. This paper considers whether these arrangements can be assimilated within the existing Australian real property framework. It also examines whether real property law is an appropriate vehicle to adjudicate these transactions or would doing so unacceptably undermine the rationale of the Torrens System. The discussion comprises two parts. First they examine the shortcomings of the present Australian legal regime for the protection of the rights of older persons entering into such arrangements and propose a number of alternative suggestions as to how recognised principles of property law may be reconsidered in order to strengthen an older party's legal position. They then consider "three party" situations where an interest in land that is involved in an Assets for Care arrangement is mortgaged or transferred to a third party. This additional step can further undermine the position of an older person in such arrangements because the third party will, in most cases, obtain an indefeasible interest pursuant to the mortgage or the transfer. The paper recommends preventative measures including utilising the caveat system or by introducing procedures to note such interests on the title. In circumstances where the third party has obtained a registered interest, the paper considers the circumstances – albeit rare – where the transaction could be set aside or postponed.

Ian Stevens and Francina Cantatore explore the way in which flowcharts and mind mapping techniques can assist learning in statute-based law and use the Australian PPSA legislation as a case study for implementing a visual learning experience in the form of an applied flowchart. Their paper also proposes a model for integrating mind mapping techniques into the teaching of other property law subjects.

They suggest that these aids to visual learning provide a methodology of understanding the law and its elements in such a way that the information imparted will be retained by students and able to be applied in the future. They also allow students to think in a lateral and creative manner, thereby significantly enhancing their enjoyment of, and autonomy over, challenging law subjects such as property law.

I acknowledge with gratitude the help of my co-organisers of this conference, Dr Ben France-Hudson and Mr Henry Holderness, and of Mrs Fiona Saunders who accommodated our many requests.

Professor Elizabeth Toomey
Conference Convenor