

1993

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

ACTS REVISION (POSITION OF CROWN) BILL 1993

EXPLANATORY MEMORANDUM

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Outline

At common law the Crown is not ordinarily bound by legislation. The present rule, as it applies in the ACT is complex and uncertain. In short, the Crown is not ordinarily bound by an Act of Parliament.

This rule will be changed if the Interpretation (Amendment) Bill (No.2) 1993 is passed. That Bill proposes to change the law so that the Crown will be bound by all statutes unless an Act has an express provision to the contrary.

The Acts Revision (Position of Crown) Bill 1993 makes consequential changes to various Acts to take account of the fact that the Crown will ordinarily be bound by legislation after the commencement of the Interpretation (Amendment) Bill (No.2) 1993.

The consequential changes that are made by the Acts Revision (Position of Crown) Bill 1993 come within one of the following two categories:

1. Certain Acts are amended to take account of the new rule that the Crown will ordinarily be bound by statute law; and
2. Specific provisions in Acts already dealing with binding the Crown are repealed.

This Bill should be considered in conjunction with the Interpretation (Amendment) Bill (No.2) 1993.

Financial Considerations

Nil

Formal Clauses - Clauses 1 & 2

Clauses 1 and 2 are formal clauses. **Clause 1** sets out the short title for the Bill and **Clause 2** provides for this Bill to commence on the same date as the Interpretation (Amendment) Act 1993.

Amendments to Acts - Clause 3 and Schedule 1

Some Acts have provisions which are capable of binding the Crown but do not need to bind the Crown or require some amendment to take account of the proposed new rule that the Crown will ordinarily be bound by statute law. These Acts are amended by **clause 3** of the Bill as set out in **Schedule 1**. None of the amendments in Schedule 1 give a blanket immunity to the Crown. Instead, where the Crown is given an immunity it is only from particular provisions within an Act.

The changes to be made to existing Acts are set out in **Schedule 1** and can be explained as follows:

Building Act 1972

This Act presently binds the Crown in relation to many activities by virtue of section 6A. When the Interpretation (Amendment) Bill (No.2) 1993 is passed, all provisions of the Building Act will extend to the Crown and so the present section 6A will become redundant. Consequently, section 6A, in its present form can be repealed.

However, where the Territory Crown carries out work on unalienated Territory Land the Territory Crown should not need to comply with the provisions of the Act other than those which are already binding upon it. To provide otherwise would cause unnecessary duplication of supervision by government. The Territory Crown would still be bound by the Act as a whole where it occupies land or buildings under a sublease or tenancy.

The new section 6A will take account of these factors.

The Crown in right of all jurisdictions (except the Commonwealth) will be bound by the Building Act by virtue of the new section 7 of the Interpretation

Act. However, the Territory Crown will not be bound by the Building Act in relation to buildings, or specialised systems in buildings, on unalienated Territory Land or building work carried out on unalienated Territory Land [section 6A(1)], except to the extent that the Territory Crown is already bound by the Building Act [section 6A(2)].

Cotter River Act 1914

Section 2 of this Act prohibits a person from taking fish from the Cotter River Reservoir. The section provides as follows:

Cotter River Reservoir

2. (1) Any person who fishes for any fish or uses any device for taking fish in the Cotter River Reservoir being the waters stored or impounded for water supply purposes by the weir constructed across the Cotter River shall be guilty of an offence.

Penalty: Twenty dollars.

(2) In this section the word "taking" includes catching and all other means by which fish may be procured from the water.

Various Territory officers are required to take fish from the Cotter River for monitoring and research purposes and so this section should not bind the Crown. Section 2 will be amended to provide an immunity from the section for the Territory Crown.

Credit Act 1985

Subsection 4(1) of the Credit Act 1985 provides that this Act binds the Crown unless there is an express provision to the contrary. This subsection will become redundant after the passing of the Interpretation (Amendment) Bill (No.2) 1993 and should therefore be removed.

Fishing Act 1967

Sections 10, 13, 16 and 30 of this Act prohibit a number of activities (in particular, the removal of fish from water) which Environment Protection officers and ACT Parks and Conservation officers are required to carry out for monitoring and scientific purposes. Accordingly, the Fishing Act will be amended to extend an immunity to the Crown from these sections. Sections 10, 13, 16 and 30 are set out below.

Open season

10. A person shall not take fish in trout fishing waters or trout or fresh water bass in any waters except during the period commencing on the Saturday nearest to the first day of October in any year and ending on the Sunday nearest to the thirtieth day of April in the following year or during any other period specified by the Minister by notice in the *Gazette* in waters so specified.

Fishing in open fishing waters

13. (1) A person is authorised to take fish in open fishing waters by means of not more than two set lines to each of which is affixed a tag measuring at least three inches by one inch and indicating the name and address of that person, whether or not he also takes fish in those waters by means of—

- (a) a rod and line held in the hand; or
- (b) a line held in the hand.

(2) A person shall not take fish in open fishing waters otherwise than as authorised by the last preceding subsection.

Penalty: Fifty dollars.

(3) Nothing in this section prevents a person from using a landing net or gaff with the rod and line, the line held in the hand or the set lines.

Removal or liberation of fish

16. A person shall not, without the permission in writing of the Minister, remove fish from one water to another or liberate in waters of the Territory or Jervis Bay Territory fish obtained from outside either of those Territories.

Prohibition of fishing in specified waters

30. (1) Notwithstanding anything contained in this Act, the Minister may, by notice in the *Gazette*, prohibit the taking of fish in waters specified in the notice.

(2) A person shall not take fish in waters specified in a notice in pursuance of the last preceding subsection.

Section 35 provides for various articles used in contravention of the Act to be forfeited to the Territory. It would be a nonsense to require the Territory to forfeit something to the Territory and so this provision will not bind the Crown.

Forfeiture of fish etc.

35. Boats, equipment and other articles used, or in the possession of a person, and fish taken, contrary to this Act are forfeited to the Territory.

Forfeiture and Validation of Leases Act 1905 (NSW) as it applies in the ACT

The Forfeiture and Validation of Leases Act 1905 is being reviewed by the Community Law Reform Committee. Until the completion of that review, it is desirable to maintain the status quo in relation to tenancy law. Accordingly, a new section 5A will be inserted into the Act to provide that Part III of the Act does not bind the Crown. When the Community Law Reform Committee makes its recommendations regarding the position of the Crown under this Act, this provision will be reconsidered.

Lakes Act 1976

Sections 12, 16, 17, 18, 19, 20(2), 24, 25, 29(2) and 32 of this Act prohibit a number of activities that Environment Protection officers and ACT Parks and Conservation officers may occasionally be required to undertake as part of their water monitoring duties and other functions in relation to lakes. Accordingly, a new section 4B will be inserted into the Lakes Act to grant an exemption from these sections to the Territory Crown. Sections 12, 16-20, 24, 25, 29(2) and 32 are set out below:

Unauthorised taking of water

12. (1) A person shall not take water from a lake unless—

- (a) he or she has been authorized in writing by the Minister so to do; and
- (b) the taking is in accordance with the conditions and requirements, if any, specified in the authority given to him or her by the Minister.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$2,500.

(2) A person shall not take water from a river, stream or creek flowing into a lake unless—

- (a) the taking of the water is in pursuance of a right acquired by him or her by or under this Act or any other law in force in the Territory; or
- (b) he or she has been authorized in writing by the Minister so to do and the taking is in accordance with the conditions and requirements, if any, specified in the authority given to him or her by the Minister.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$2,500.

Prohibitions relating to boats etc.

16. A person shall not—

- (a) place a boat in or take a boat from, or cause or permit a boat to be placed in or taken from, a lake except within an area specified under section 15 as a launching area;
- (b) moor a boat, or cause or permit a boat to be moored, on a lake except within an area specified under section 15, as a mooring area;
- (c) beach, clean or repair a boat, or cause or permit a boat to be beached, cleaned or repaired, within a lake area except within an area specified under section 15, as a beaching area;
- (d) embark or permit another person to embark on to, or disembark or permit another person to disembark from, a boat within an area specified under section 15, as an area within which embarkation on to, or disembarkation from, that boat is not permitted; or
- (e) land a boat, or cause or permit a boat to be landed, on the shore of a lake, or an island in a lake, within an area specified under section 15 as an area within which the landing of boats is not permitted.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$2,500.

Prohibitions relating to swimming etc.

17. A person shall not—

- (a) bathe or swim in, or dive into, a part of a lake that is directly underneath a bridge;
- (b) dive into the waters of a lake from a bridge; or
- (c) bathe or swim in, or dive into, a part of a lake that is within an area, specified by a sign erected, placed or displayed under section 15, as an area within which bathing or swimming in, or diving into, a lake is prohibited.

Penalty: \$500.

Interference with signs

18. A person shall not remove, move, damage, deface, obscure, cover up, or otherwise interfere with a sign erected, placed or displayed within a lake area under section 15 unless he or she is acting under the authority of the Minister.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$2,500.

Approved buoys, wharves and jetties

19. (1) The Minister may, upon application made to him or her in writing, and upon payment of the prescribed fee approve, subject to such conditions, if any, as he or she thinks necessary, the anchoring of a buoy in a lake or the erection of a wharf or jetty within a lake area.

(2) A person shall not, except with the approval of the Minister and in accordance with the conditions, if any, imposed by the Minister under subsection (1), anchor a buoy in a lake or erect or commence to erect a wharf or jetty within a lake area.

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$2,500.

(3) Subject to section 20, a person shall not moor a boat or permit a boat to be moored within an area specified under section 15 as a mooring area except to a buoy, the anchoring of which, or to a wharf or jetty, the erection of which, has been approved by the Minister under subsection (1).

Penalty:

- (a) in the case of a natural person—\$500; and
- (b) in the case of a body corporate—\$2,500.

Restrictions on mooring

20. (1) The Minister may, by a sign erected, placed or displayed on or near a wharf or jetty belonging to the Commonwealth within a lake area, restrict the mooring of boats to the wharf or jetty to boats of a kind specified in the sign.
- (2) Where a sign is, under subsection (1), erected, placed or displayed on or near a wharf or jetty, a person shall not moor, or cause or permit to be moored, to the wharf or jetty a boat other than a boat of a kind specified in the sign.

Anchoring of boats

24. (1) A person shall not anchor a boat on a lake between the hours of sunset and sunrise.

Penalty:

- (a) in the case of a natural person—\$500; and
 - (b) in the case of a body corporate—\$2,500.
- (2) It is a defence to a prosecution for an offence against subsection (1) if the defendant satisfies the court that the boat was anchored for the purpose of fishing by means of rod and line held in the hand and that he or she or another person was engaged in fishing by that means for the greater part of the time during which the boat was anchored.

Mooring of boats

25. (1) The Minister may, on payment of the prescribed fee, grant to a person a permit to moor a boat on a lake.

(1A) A permit issued under this section remains in force for such period, not exceeding one year, as is specified in the permit and may be renewed on payment of the prescribed fee.

- (2) A person shall not moor a boat on a lake unless—

- (a) the boat is moored within an area specified under section 15 as a mooring area; and
- (b) the person is the holder of a permit issued under this section.

29(2) A person shall not use, or cause or permit to be used, a hovercraft within or above a lake area, unless—

- (a) he or she is the holder of a permit under subsection (1) with respect to that lake area; and
- (b) he or she complies with the conditions, if any, subject to which that permit was granted.

Camping etc.

32. A person shall not camp, or permit a caravan to stand, within a lake area between the hours of sunset and sunrise.

Landlord and Tenant Act 1899

The Landlord and Tenant Act 1899 is being reviewed by the Community Law Reform Committee. Until the completion of that review, it is desirable to maintain the status quo in relation to tenancy law. Accordingly, a new section 2 will be inserted into the Act to provide that the Act does not bind the Crown. When the Community Law Reform Committee makes its recommendations regarding the position of the Crown under this Act, this provision will be reconsidered.

Limitation Act 1985

Section 7 of this Act will be amended. Section 7 currently provides:

The Crown

7. (1) Subject to subsections (3) and (4), this Act binds the Crown and the Crown has the benefit of this Act.
(2) For the purposes of this Act an action by an officer of the Crown as such or a person acting on behalf of the Crown is an action by the Crown.
(3) This Act does not apply to an action by the Crown—
 (a) for the recovery of a penalty, tax or duty or of interest on a penalty, tax or duty;
 or
 (b) in respect of the forfeiture of a ship.
(4) This Act does not affect the prerogative right of the Crown to mineral rights.

Subsection 7(1) provides for the Crown to be bound by this Act. After the commencement of the new rule making the Crown ordinarily bound by statute law, subsection 7(1) will become redundant. Consequently, this subsection will be repealed.

Subsections 7(3) and (4) of the Limitation Act 1985 currently contain references to the "Crown". These references should be limited to the Territory Crown. After the commencement of the Interpretation (Amendment) Bill (No.2) 1993, the term "Crown" will include the Crown in right of all jurisdictions. The Acts Revision (Position of the Crown) Bill will change these references from the "Crown" to the "Territory Crown".

Mining Act 1930

After the commencement of the Interpretation (Amendment) Bill (No.2) 1993, the term "the Crown" will include the Crown in right of all jurisdictions. Consequently, the definition of "Crown lands" in section 5 of the Mining Act 1930, though not inaccurate, is too wide. The Executive would be unable to grant an estate or interest in Commonwealth land unless that land was defined as Territory land within the terms of the Australian Capital Territory (Planning and Land Management) Act 1988. Accordingly, section 5(a) will be amended to limit Crown land to Territory land. In addition the drafting in section 5(b) will be tidied up. Section 5 presently defines "Crown Lands" as follows:

- "Crown lands" means lands vested in the Commonwealth and includes—
(a) lands reserved, dedicated, appropriated or resumed for public purposes; and
(b) lands under any river or creek,

but does not include lands alienated in fee simple or in process of alienation in fee simple from the Crown, or lawfully contracted to be granted in fee simple by the Crown;

Similarly, sections 12 and 13 which specify the rights enjoyed by a miner "except as against the Crown", are both amended to limit the reference to the "Crown" to the "Territory Crown".

Under section 29 of the Australian Capital Territory (Planning and Land Management) Act 1988, the management of "Territory land" is granted to the ACT Executive. Section 29(1) of the Australian Capital Territory (Planning and Land Management) Act 1988 provides as follows:

Administration of Territory Land

29. (1) The Executive, on behalf of the Commonwealth:

- (a) has responsibility for the management of Territory Land; and
- (b) subject to section 9 of the *Seat of Government (Administration) Act 1910*, may grant, dispose of, acquire, hold and administer estates in Territory Land.

It is therefore likely that a Minister alone could not validly grant a right under section 8 of the Mining Act or a lease under section 20 of the Mining Act. Consequently, sections 8 and 20 will be amended to confer power on the Executive to grant a right (under section 8) or a lease (under section 20).

Motor Traffic Act 1936

Subsection 5(1) of this Act provides that the Crown is bound by the Act. When the Interpretation (Amendment) Bill (No.2) is enacted and commenced, this provision will be redundant and so it should be removed.

Perpetuities and Accumulations Act 1985

Section 4(1) of this Act currently provides:

Crown

4. (1) Except as provided by subsection (2) or by any other law of the Territory, the rule against perpetuities, the rule against perpetual trusts and this Act bind the Crown.

This provision will be tidied up by the Acts Revision (Position of the Crown) Bill 1993. The Act as a whole will bind the Crown when the Interpretation (Amendment) Act 1993 commences. Consequently, the words "and this Act" can be removed. This will necessitate a further minor change, namely, to insert "and" after perpetuities in place of the existing ",".

Plant Diseases Act 1934

Sections 10 and 13 of the Plant Diseases Act 1934 currently contain references to the Crown. They provide as follows:

Default by owner or occupier etc.

10. (1) Where any person fails to comply with the requirements of any notice given under this Act, the Minister may authorize an inspector to take such measures to carry out the requirements of the notice as the Minister thinks fit.

(2) The cost of taking any such measures may be recovered from that person as a debt due to the Crown.

(3) Any amount recoverable under this section shall include a proportionate part of the salary or wages of any person taking the measures, having regard to the time occupied by him in taking the measures and in travelling for that purpose, and the necessary expenses in connexion with the travelling.

Recovery of fees and expenses

13. (1) The fees prescribed under this Act shall be a debt due to the Crown and shall be paid by the owner or importer of the plants, soil or goods, or the grower of the plants, as the case may be.

(2) Any debts due to the Crown in pursuance of this Act may be sued for and recovered by action instituted by an inspector in the Magistrates Court as a civil debt recoverable summarily.

The references should now be limited to the Territory Crown. After the commencement of the Interpretation (Amendment) Bill (No.2) 1993, the term "the Crown" will include the Crown in right of all jurisdictions. Consequently, the Acts Revision (Position of the Crown) Bill will change references to the "Crown" in these sections to the "Territory Crown".

Protection of Lands Act 1937

Sections 3(1), 6A(3) and 7 (1) of this Act restrict people from pursuing certain activities on Crown Lands. Those sections provide:

Sand, gravel etc. not to be taken without permit

3. (1) A person shall not, without a permit in that behalf issued under this Act, take from any lands any stone, shell, sand, gravel, clay or earth.

6A. (3) Any person who takes any stone, shell, sand, gravel, clay or earth from any sand and gravel pit without paying the charges, and complying with the conditions set out in a notice referred to in the last preceding subsection shall be guilty of an offence and liable to a penalty of Forty dollars and, in addition to any penalty that may be imposed, the Court may order the defendant to pay the charges payable under this section in respect of any such substance so taken and the like proceedings may be taken upon the order as if the order had been a judgment of the Court in favour of the Territory.

Substances etc. not to be placed on lands

7. (1) A person shall not, without the authority of the Minister or an authorized officer (proof whereof shall lie upon the person accused), deposit, or cause to be deposited, on any unleased lands, any substance, material or thing.

The very nature of these provisions is to regulate the activities of subjects on land belonging to the Crown. Officers of the Crown often need to do those things restricted by the Act eg. removing stones or dirt from Crown Land. Accordingly, these provisions will not bind the Crown.

Under the proposed new section 7 of the Interpretation Act, if the Crown is not bound by a provision, then an agent of the Crown will also be immune from the provision while carrying out his or her duties.

Roads and Public Places Act 1937

Sections 6 and 7 of this Act are concerned with damage to public areas by water from adjacent land and damage by persons to structures on public land. Crown officers may be required to cause such damage to Crown property in the normal course of their work. A new section 2A will be inserted into this Act to give an immunity to the Territory Crown in respect of sections 6 and 7.

Sale of Motor Vehicles Act 1977

This Act is presently being reviewed by the Consumer Affairs Bureau in consultation with interested parties. A discussion paper has been circulated on the review of this Act. One issue to be considered by the Bureau in the context of that Review is whether to bind the Crown to the Act or any replacement Act. Until the review is completed the status quo will be maintained by inserting a new section 3A which provides that the Act will not apply to dealings in motor vehicles by the Territory.

Weapons Act 1991

The Weapons Act was drafted on the basis that the Crown would not be bound by the legislation. As a consequence, there is no real scope under the legislation as it presently exists for a government agency (or employees of that agency) to obtain a licence to possess and use a weapon.

Section 4

One of the key problems is that the existing provisions make no reference to government agencies. At present, bodies corporate and partnerships can apply for corporate dangerous weapons licences and are treated as corporate licencees. However, a number of provisions that apply to those bodies cannot be easily applied to a government agency. Furthermore, a number of provisions in the Act apply only to holders of dangerous weapons licences and not corporate dangerous weapons licences.

Accordingly, in section 4, the references to "corporate dangerous weapons licences" and "corporate licencees" will be removed. Instead, applicants who are granted a licence will receive a "dangerous weapons licence". There will be certain provisions that relate directly to "composite entities" and such entities will include government agencies as well as bodies corporate and partnerships.

Subsections 4 (6) and (7) will ensure that liability will attach to the composite entity where people acting on its behalf do something. Thus, a licence granted to a partner on behalf of a partnership, or an employee acting on behalf of a government agency, is taken to be granted to the partnership or government agency. Actions carried out on behalf of composite entity are taken to be carried out by the entity and a weapon owned by a State or Territory, is taken to be owned by the government agency.

Section 5

Section 5 will be amended to provide that a government agency is entitled to a licence where the employees in the agency reasonably require a weapon to carry out their duties.

Section 23 - 26

Sections 23 - 26 set out the steps for applying and being granted a licence. The amendment to section 23 will simplify that section and allow a government agency to apply for a licence under the Act.

The amendment to section 24 will oblige the Registrar to issue a corporate licence to a government agency if it meets the requirements of section 5 (discussed above). Section 25 will be amended to ensure that paragraph 1(a)

does not apply to the head of a government agency. The head of a government agency, such as the Secretary of a Department, will generally not have access to a weapon. The weapons will be kept by a particular section in the government agency and only used by persons holding individual dangerous weapons licences.

The amendment to section 26 of the Act will provide for a licence to a composite entity to be issued to the entity in the name of the entity. Previously, licences were issued in a particular person's name. This causes administrative difficulties because people change positions and occupations but the entities generally remain the same. This will also facilitate the application of the Act to government agencies, as the weapon can be registered in the name of the agency rather than any particular person.

Sections 28, 36 and 51(2)(c)

The amendment to sections 28, 36 and 51(2)(c) tidy up those provisions having regard to the fact that there will no longer be 'corporate' licences.

Subsection 51(2A)

Subsection 51(2A) is inserted to take account of the fact that it is irrelevant who obtains a licence for a government agency. Only the people actually using weapons - who have individual dangerous weapons licences - need to come under the scrutiny of the Registrar.

Section 51(3)

The amendment to section 51(3) corrects a drafting error in the present Act.

Sections 53, 64, 66, 67 and 77

The amendments to sections 53 and 64 take account of the fact that there will no longer be a class of 'corporate' licences.

The new section 65 will essentially achieve the same policy as the present section 65 but it has been reworded to take account of the new definition of 'composite entity' and the removal of references to 'corporate licencees'.

The amendments to sections 66, 67 and 77 take account of the fact that there is a new definition of 'composite entity' which includes a government agency and that all references to 'corporate licencees' need to be removed.

Provisions to be repealed - Clause 4 and Schedule 2

Some Acts have express provisions stating that the Crown is bound by that Act. Such provisions will become redundant after the commencement of the Interpretation (Amendment) Bill (No.2) 1993 because all Acts will automatically bind the Crown from that date. Accordingly, the Acts Revision (Position of Crown) Bill 1993 repeals such provisions - see **clause 4**. The particular provisions which are to be repealed are set out in **Schedule 2**.