

1995

**THE LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY**

LAW REFORM (ABOLITION AND REPEALS) BILL 1995

EXPLANATORY MEMORANDUM

Circulated by authority of

**Mrs Kate Carnell MLA
Chief Minister**

EXPLANATORY STATEMENT

The Law Reform (Abolitions and Repeals) Bill 1995 removes unnecessary legislation from the ACT statute book and repeals unused and outdated common law rules.

Section 1. Short Title

This section gives the short title of the Bill the *Law Reform (Abolitions and Repeals) Bill, 1995*.

Section 2. Commencement

Section 2, states that the Bill commences on the day on which it is notified in the Gazette.

Section 3. Abolition of Estate

This section abolishes the common law rule of *Estates pur autre vie*.

An estate *pur autre vie* is an estate granted for the life of a person other than the actual tenant. Life estate were estates of freehold but were not estates of inheritance.

While life estates have some continuing operation in the ACT there is no need to retain the estate *pur autre vie* as it is archaic. The estate was well suited to the old strict settlements of the nineteenth century and has no apparent scope for operation in the modern ACT system of landholding.

Section 4. Certain common law misdemeanours are abolished

Section 4 abolishes the common law misdemeanours of criminal, blasphemous, seditious and obscene libel.

In the course of its research in relation to defamation reform, the Community Law Reform Committee noted a number of older common law offences that remain law in the ACT. These offences (the common law misdemeanours of criminal, blasphemous, seditious and obscene libel) are no longer appropriate in the ACT. These common law offences have been superseded by statutory offences.

The Committee recommended (in its Report Number 10, Defamation) that the offences should be abolished.

Section 5. Abolition of distress for rent

Section 5 explicitly abolishes the common law right in distress for rent. It has not been possible to exercise this right in the Territory for over 50 years. The Landlord and Tenant Act 1949, Section 40, states: "notwithstanding the provisions of any other law, a person shall not levy or make any distress for rent".

Section 6 Repeal of Acts

Section 6 repeals the Acts listed in the Schedule. The laws and explanations follow.

Schedule

(1285) 13 Edw.1 c.22: Waste by tenant in common.

This Act is obsolete. The provision formed part of the Imperial Statute *13 Edw 1 St 1 (1285)*, commonly known as the *Statute of Westminster 2 (1285)*.

This provision is very obscure; it is probably one of several types of writs of waste, probably a very specific procedural enactment giving a right of action to undivided co owners, being limited to the tenancy of co parceny, where waste is committed by one of the undivided co owners.

The Statute appears to have no operation.

The Law Reform Commission of the Australian Capital Territory in its "Report on Imperial Acts in force in the Australian Capital Territory and Supplementary Report" dismissed the provision as being obsolete. The Law Reform Commission of New South Wales thought likewise.

The Act has been repealed in NSW, Queensland, Victoria, New Zealand and the United Kingdom. In South Australia and Western Australia the Act has been recommended for repeal but with preservation of the position of co owners.

The retention of the law of waste serves no practical purpose. The retention of savings provisions which will never be used simply adds unnecessarily to the burden of complex and unused provisions in conveyancing law.

(1575) 18 Eliz.1 c.5: Common Informers

This Act provides for common informers. As there are no Territory laws dealing with common informers, the law has no continuing operation.

(1623) 21 Jas.1 c.16: Actions for trespass and slander.

This Act is obsolete. Section 6 of the Imperial Act *21 Jas. 1 c. 16 (1623)* was an early attempt to discourage actions for slander.

In the course of its research in relation concerning Defamation reform, the Community Law Reform Committee considered the retention of the Act. It concluded that this Act was no longer appropriate in the ACT.

Acts Revision Act 1937

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision Act 1938

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision Act 1959

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision Act 1977

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision Act 1978

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Administrative Arrangements) Act 1976

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Administrative Arrangements) Act 1977

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Administrative Arrangements) Act 1978

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Age of Majority Act) 1974

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Decimal Currency) Act 1966

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Health Commission) Act 1975

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Metric Conversion) Act 1977

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Acts Revision (Penalties Act) 1979

This Act is spent, changes to law are preserved by virtue of Section 37 of the *Interpretation Act 1967*.

Ancient Lights Declaratory Act 1904 of the State of New South Wales in its application in the Territory

The *Ancient Lights Declaratory Act 1904* of the State of New South Wales was one of the laws in force in the Australian Capital Territory before 1 January 1911 and was therefore continued in force by the *Seat of Government Acceptance Act 1909* of the Commonwealth. The text of the *Ancient Lights Declaratory Act 1904* of the State of New South Wales in its application in the Territory comprised Part 1 of Schedule 2 to the *New South Wales Acts Application Act 1984*.

At common law in England owners or occupiers of a building had the right to prevent a neighbour obstructing or obscuring light coming to the building. To overcome certain legal difficulties the courts developed the doctrine of "lost modern grant" under which juries presumed the existence of a written grant which had been lost. The Parliament of New South Wales passed the *Ancient Lights Declaratory Act* to extinguish existing and future easements for light resulting from the enjoyment of this right for any period of time arising from the presumption of a lost grant based upon this enjoyment.

The Act has no further operation in the Territory.

Crown Lands Act 1884 of the State of New South Wales in its application in the Territory

This Act is obsolete. The *Crown Lands Act 1884* of the State of New South Wales was one of the laws in force in the Australian Capital Territory before 1 January 1911 and was therefore continued in force by the *Seat of Government Acceptance Act 1909* of the

Commonwealth. The *New South Wales Application Act 1984* repealed the bulk of this Act apart from Section 4, which is a definition section, and section 111.

Section 111 is a statutory implied grant of an easement over land retained by the Crown in favour of land that has been alienated by the Crown. Section 111 extends the implied grant past its normal confines to the situation where the Crown is granting land which was either unoccupied by European settlement or was the subject of limited occupation and use by the Crown. Its effect was to provide access to private property across Crown land.

The Act is unnecessary following the passage of section 216 of the Land (Planning and Environment) Act 1991.

Egg Industry Act 1975

Egg Industry (Amendment) Act 1979

Egg Industry (Amendment) Act 1982

These three Acts are obsolete because the national industry regulatory regime to which they refer has lapsed.

IMPERIAL ACT (SUBSTITUTED PROVISIONS) ACT 1986, SCHEDULE 2, PARTS 1, 2 9, 13, 16 AND 20.

Schedule 2, Part 1: 52 Hen 3 c23 (1267)

This law, the second oldest written law continuing to apply in the ACT, is commonly referred to as the *Statute of Marlborough* (or Marlbridge). This Statute formed part of the law brought into New South Wales on foundation of the colony and formed part of the law of the ACT. The whole Statute was repealed by the *Imperial Acts (Substituted Provisions) Act 1986* and is now found in substituted form in Schedule 2 Part 1 of that Act.

In the ACT, under the law of waste, a tenant may not, without proper authorisation, make a deliberate and active change to the property which is injurious to the person who is entitled to take occupation of the property at some later stage, either by diminishing the value of the estate, increasing the burden on the estate or impairing the evidence of title. However, a tenant is probably not liable for a passive omission or failure to do what ought to be done to repair or to maintain the property in good working order allowing the property to fall into disrepair. The common law concerning waste may continue to apply to other forms of property in the Territory. The relevance of this area of law has been diminished by express provisions included specifically or by implication in ACT leases and subleases.

At common law the law of waste performed the essential function of restricting the manner in which a life tenant could use the land, so that the value of the land to the person having the reversion or remainder was not unduly depreciated.

The retention of the *Statute of Marlborough* itself serves no practical purpose. The retention of the provisions or the old law of waste itself simply adds to the burden of complex and unused provisions in conveyancing law.

***Imperial Act (Substituted Provisions) Act 1986,
Schedule 2, Part 2: 18 Edw 1 St1 c1 (1290)***

This law replaces tenancies of the feudal period created by "subinfeudation". Subinfeudation refers to a series of tenancies (of vassals) which owed obligations to grantors (lords), up to the monarch (mesne lord), who was the ultimate owner of all land. After 18 Edw 1 St1 c1 (1290) "every conveyance of land in fee simple by a subject after 1290 was bound to be an out-and-out transfer and could not create the relationship of lord and tenant between the parties." (quoted from Megarry and Wade: *The Law of Real Property*).

The other effect of the abolition of subinfeudation by *Statute 18 Edw 1 St1 c1 (1290)* was that no new estate in fee could be created except by the Crown.

The law of tenure is of no value in solving problems about rights over land. In practical terms, title depends on principles of possession and that owners can transfer no greater interest than they have.

In New South Wales the Statute *18 Edw 1 St1 c1 (1290)* was repealed by the *Imperial Acts Application Act 1969*. The effect of the Statute was preserved by Section 36 of that Act as the provision is of continuing relevance in that State.

In its application in the ACT, the Act was repealed by the *Imperial Acts (Substituted Provisions) Act 1986* and now exists in modified form in Part 2 Schedule 2 of that Act.

The Law Reform Commission of the Australian Capital Territory stated that *18 Edw 1 St1 c1 and 3:-*

"Provides a fundamental principle of the law of real property which must be preserved so long as there is any freehold land in the Australian Capital Territory. We recommend a replacement provision in the same terms as s36 of the *Imperial Acts Application Act 1969 (NSW)* since it is not known when freehold will finally disappear from the Australian Capital Territory.

The Act of 1290 should be repealed"

In the ACT there is now no remaining freehold land in private ownership with the last freehold acquired by the Territory on behalf of the Commonwealth in 1993. The fee simple of all land is now held by the Commonwealth. The ACT in turn alienates Crown land under a leasehold Torrens system. There are no rights which subsist from before 1 January 1911 which would compel either the Commonwealth or the ACT to issue an estate in freehold. There is no subsisting law in the ACT which would permit the

Commonwealth or the ACT to issue an estate in freehold. As a result neither the Commonwealth or the ACT can create an estate in freehold under the existing law. As *18 Edw 1 St 1 c 1* applies only to fee simple it has no continuing application in the ACT.

In the ACT the right of transfer of leasehold interests is provided for under the lease. Despite the historical importance of *18 Edw 1 St 1 c 1* there is no continuing role for this Statute in the ACT.

***Imperial Act (Substituted Provisions) Act 1986,
Schedule 2, Part 9: 12 Chas. 2 c. 24 (1660)***

This Act is sometimes called the *Tenures Abolition Act 1660*. The Statute *12 Chas. II. C. 24(1660)* formed part of the law of the ACT. Sections 8 and 9 dealing with guardianship of infants were repealed by the *Testamentary Guardianship Act 1984*. The remainder of the Act was repealed by the *Imperial Acts (Substituted Provisions) Act 1986*. The effect of Sections 1 and 4 now exist in substituted form in Schedule 2 Part 9 of that Act.

The Statute *12 Chas. 2. C.24 (1660)* marks the end of the strictly feudal period of English land law.

The Law Reform Commission of the Australian Capital Territory stated:

"12 Chas. 2 C 24-The Tenures Abolition Act 1660.

Sections 1 and 4 which deal with tenures, should be repealed and replaced by a modern provision which also takes into account the Statute of Quia Emptores 1290 (qv). Section 37 of the *Imperial Acts Applications Act 1969 (NSW)* is for some reason limited to grants made after the commencement of the Act. We can see no reason why the provision should not have a retrospective effect. It is inconceivable that any freehold land in the Australian Capital Territory should be burdened with any of the incidents of any tenure other than socage tenure. The provision should be to the effect that all lands in fee simple should be deemed to be held, and to have been held since 1 January 1911, in free and common socage without any incident of tenure for the benefit of the Crown or of the Commonwealth.

We understand that in the Australian Capital Territory there is still some land held on 'conditional purchase' terms which were accepted before 1911, and theoretically, therefore, there may be some grants in fee simple yet to be made. We do not think that any special provision is required beyond that which we have recommended above."

While the recommendations of the Law Reform Commission appear to have been acted upon in drawing the substituted provisions in Schedule 2 Part 9 of the *Imperial Acts (Substituted Provisions) Act 1986* the recommendations have been rendered redundant by the acquisition of all remaining freehold land in the Territory. The terms on which

Torrens title leasehold land is held in the ACT is now determined by the conditions and covenants of the lease.

Schedule 2, Part 13:8 Anne c. 18 (1709)

In 1709 the above Statute, commonly known as the *Landlord and Tenant Act (1709)*, was enacted to provide "for the better Security of Rents, and to prevent Frauds committed by Tenants" under leases.

The Statute formed part of the law of New South Wales. In the ACT the Statute was repealed by the Imperial Acts (Substituted Provisions) Act 1986 and Section 4 was preserved in Schedule 2 Part 13 of that Act. The effect of this provision is the same as under the original Statute.

The Statute has been superseded. The Law Reform Commission of the Australian Capital Territory concluded that this provision is obsolete and should be repealed.

***Imperial Act (Substituted Provisions) Act 1986,
Schedule 2, Part 16: 2 Geo. 3 c. 60 (1792)***

This Act, commonly referred to as "Fox's Act", dealt with criminal procedure in trials for libel.

In the course of its research in relation to Defamation reform, the Community Law Reform Committee considered the retention of the Act. It concluded that this Act was no longer appropriate in the ACT.

***Imperial Act (Substituted Provisions) Act 1986,
Schedule 2, Part 20: 60 Geo. 3 and 1 Geo. 4 c. 8 (1819)***

The Imperial Act 60 Geo. 3 and 1 Geo. 4 c. 8 (1819) provided for the seizure of libellous papers.

In the course of its research in relation to Defamation reform, the Community Law Reform Committee considered the retention of the Act. It concluded that this Act was no longer appropriate in the ACT.

Landlord and Tenant Act 1949, Section 40

Section 40 of the *Landlord and Tenant Act, 1949* prevents the levy or making of any distress for rent. The abolition of the right in distress for rent by the present Bill makes this provision redundant. See also explanation above.

Leases (Wreck Bay Aboriginal Housing Company Limited) Act 1977

This Act imposes certain conditions on leases granted to the Wreck Bay Aboriginal Housing Company Limited. These conditions are inappropriate and unnecessary and the Act can be repealed.

Police Offences Act 1930

Police Offences Act 1934

Police Offences Act 1937

Police Offences Act 1939

Police Offences Act (No. 2) 1939

Police Offences Act 1948

Police Offences Act 1953

Police Offences (Amendment) Act 1980

Police Offences (Amendment) Act 1983

Police Offences (Amendment) Act 1984

Police Offences (Amendment) Act 1989

Police Offences (Amendment) Act 1991

All of these Police Offences Acts and amendment Acts refer to one offence. The offence is committed by a person who keeps a place of public resort "wherein provisions of liquor or refreshments of any kind are sold or consumed...who knowingly permits or suffers persons of notoriously bad character to meet together and remain therein".

The intent of this provision is adequately covered by the *Liquor Licence Act 1975* and other laws.

Real Property (Conversion of Titles) Act 1967

The Act seems to have no further operation in the Territory.

Returned Servicemens' Badges Act 1960

This Act makes it an offence to wear certain badges without authority of the Returned Sailors', Soldiers' and Airman's Imperial League of Australia. The Act is repealed in accordance with modern law review principles which states that laws relating to voluntary associations are inappropriate. Any offence is adequately covered by laws relating to fraud and imposition.

Rural Workers Accommodation Act 1938

Rural Workers Accommodation Act 1942

Rural Workers Accommodation Act 1951

Rural Workers Accommodation Act 1962

The Rural Workers Accommodation Act 1938 makes provision for construction of accommodation of rural workers (particularly shearers). The Rural Workers

Accommodation Regulations make detailed provision about the form of accommodation for farm workers (particularly shearers) and facilities which must be provided within the accommodation.

The policy reasons for this legislation have all but disappeared with better rural roads and a gradual move in working practice whereby workers commute from urban areas. The last appointment of an inspector under the Act took place on 17 April 1968 while the last inspection took place at the Yarralumla woolshed in the 1960's.

The operation of the Act appears to be exhausted.

Seat of Government (Designation) Act 1938

The operation of the Act is exhausted.

Walter Oswald Watt Memorial Fund Act 1938

Walter Oswald Watt Memorial Fund Act 1939

The Walter Oswald Watt Memorial Fund Acts 1938 and 1939 make particular provision in relation to the estate of Colonel Walter Oswald Watt.

The operation of the Act is exhausted and it can be repealed.