EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

IMPERIAL ACTS (SUBSTITUTED PROVISIONS) ORDINANCE 1986

No 19, 1986

INTRODUCTION.

This Ordinance repeals certain Acts of the United Kingdom that are in force in the A.C.T. and makes provisions in substitution for them.

The Ordinance implements in part the recommendations of the Law Reform Commission of the Australian Capital Territory furnished in its Report on Imperial Acts in Force in the Australian Capital Territory (1972) and Supplementary Report (1973).

The Commission recommended that the Imperial Acts specified in Appendix 1 Part B of the Report be repealed and replaced. The Ordinance gives effect to this recommendation. The Commission also recommended that the Imperial Acts specified in Appendix 1 Part A of the Report be preserved in their existing form because of their major constitutional and historical significance. A subsequent Ordinance will give effect to the recommendation concerning Acts of constitutional and historical significance and some other Acts that are to continue in force in their existing form.

The Ordinance is a significant law reform measure. It has become increasingly difficult to identify those Imperial Acts that apply in the A.C.T. either because they extended, by

reason of their own express provisions or by necessary intendment, throughout the dominions of the Crown, or because they were in force in New South Wales on 1 January 1911, by reason that they came into force in that State when it was founded as a British Colony or by reason of section 24 of the Australian Courts Acts, 1828.

Texts of Imperial Acts in force in the A.C.T., in the form in which they are so in force, are not readily available in the Territory because many are no longer in force in the United Kingdom, and thus are not printed in recent editions of the Laws of the United Kingdom, or because they have been amended in the United Kingdom by Acts that are not in force in the Territory and are printed in those editions in their amended forms.

The Ordinance clears away those difficulties in respect of 26 Imperial Acts that regulated important matters of private law in the A.C.T.

The proposed Ordinance does not attempt to make reforms of a substantial nature in the provisions drafted to replace these 26 Imperial Acts. Substantive reforms of the law covered by the substituted provisions should appropriately be made by separate Ordinances dealing with the subjects covered by these provisions. However, in drafting these substituted provisions, regard has been had to suggestions made by the Commission, corresponding provisions in the laws of the States and the provisions of recent Acts of the United Kingdom that replace the Acts specified in Schedule 1 of the Ordinance.

Background

Section 6 of the Seat of Government Acceptance Act 1909 provides that all laws in force in the Territory immediately before 1 January 1911 should, so far as applicable, continue

in force until other provision is made. The laws so continued in force included those Imperial Acts in force in New South Wales on 31 December 1910 that -

(a) had come into force in N.S.W. at common law on the foundation of the colony;

(b) had come into force in N.S.W. by virtue of section 24 of the Australian Courts Act, 1828, on 25 July 1828 by reason that they were in force in the United Kingdom on that date and were capable of being applied in N.S.W; or

(c) had been expressly adopted by a N.S.W. Act.

In addition, certain Imperial Acts continued in force in the A.C.T. because they applied, by express provision or necessary intendment, throughout the dominions of the Crown. Moreover, certain Imperial Acts passed after 31 December 1910 and before the Statute of Westminster applied to the Commonwealth on 3 September 1939 also are in force in the A.C.T. because they so applied throughout the dominions of the Crown.

The Law Reform Commission of the Territory has reviewed all these Imperial Acts and, as mentioned above, has recommended that some be replaced by provisions in modern form and that others be continued in force in the Territory in their existing form. The Law Reform Commission of the Territory considered, in preparing its report, a report prepared by the Law Reform Commission of New South Wales in 1967 on the Application of Imperial Laws. Subsequently to the preparation of the Report of the Law Reform Commission of the Territory, a report was prepared in 1975 by Gretchen Kewley on the Imperial Acts Application Act, 1922, of Victoria and by the Law Reform Commission of Queensland and the Law Reform Committee of South Australia on Imperial laws in force in those States.

The Ordinance has been prepared after careful consideration of all those Reports. For reasons set out below, it does not contain all the provisions recommended by the Commission and it contains a few provisions that were not included in those recommended by the Commission.

The Ordinance does not deal with any Imperial laws expressly adopted by a NSW Act since all NSW Acts which adopted such laws have ceased to be in force in the Territory.

Substituted Provisions Recommended but not Included in Ordinance

The Commission recommended the inclusion of provisions to replace the following Acts, but, for reasons set out below, the Ordinance does not include such provisions:

5 Ric.2 St.1 c.7 8 Hen.6 c.9 31 Eliz.c.11 21 Jas.1.c.15	Forcible entry on land
4 Hen.8 c.20	Collusive actions
5 and 6 Edw.6 c.4 1 Mary Sess.2 c.3 1 Eliz.c.2 1 Will and Mary c.18 52 Geo.3 c.155	Disturbance of religious worship
24 Geo.2 c. 44	Constables
14 Geo.3 c. 48	Insurable Interests
41 Geo.3 c.79	Notaries public
1 Anne c.2 6 Anne c.41 1 Edw.7 c. 5	Demise of the Crown
8 and 9 Will.3 c.11 4 and 5 Anne c.3	Procedure of Supreme Court

The statutes relating to forcible entry onto land ceased to be in force in the Territory by reason of section 12 of the Crimes (Amendment) Ordinance (No.4) 1985.

The Commission recommended that 4 Hen.8 c.20 be replaced because it deals with actions by common informers and section 6 of the Constitution provides for actions by common informers against a person who sits as a member of the House of Representatives while disqualified. Since the Commission made its report, the Commonwealth Parliament has enacted the Common Informers (Parliamentary Disqualification) Act 1975. The Imperial Act is no longer appropriate and no substitute provision is required.

The Acts relating to disturbance of public worship were enacted at various times to deal with political troubles that caused disturbances at public worship of the established Church at the time. The Commission recommended repealing and replacing them by a modern provision pending the enactment of a comprehensive Criminal Code for the Territory. The Attorney-General's Department has taken the view that the provisions of these Acts are obsolete and unnecessary.

The Commission recommended a substituted provision for section 6 of the Act 24 Geo.2 c.44 which indemnifies a constable acting under a justice's warrant. It also recommended that consideration be given to including a substituted provision for section 8 which imposes a 6 months time limit for bringing actions against constables for acts done in the course of their duties. Since the Commission made its report, the Australian Federal Police Act 1979 has been enacted and now regulates the operations of the police in the Territory. The Imperial Act has thus become obsolete.

The Commission recommended the replacement of 14 Geo.3 c.48 by a provision in modern form dealing with insurable interests. The Commonwealth has subsequently enacted the Insurance

Contracts Act 1984 which, by section 3 , repealed 14 Geo.3 c.48, in its application to a contract of insurance or proposed contract of insurance to or in relation to which that Act applies, in so far as it is part of the law of the Commonwealth. As there appears to be no scope for its operation in the Territory since the enactment of the Insurance Contracts Act, replacement provisions have not been included.

Act 41 Geo.3 c.79 dealt with notaries public. Since the Commission made its report, the Notaries Public Ordinance 1984 has come into operation and superseded the Imperial Act.

The Commission recommended the substitution of a modern provision for 3 Imperial Acts that deal with problems that have arisen on the death of the Sovereign. Because these Acts apply to Commonwealth officers and Courts as well as Territory officers and Courts, it is intended to continue them in force in the Territory in their existing form with the Acts of constitutional significance in the second Ordinance. This will ensure that the same law on these matters applies both to the Commonwealth and the Territory.

The Commission recommended that 8 and 9 Will 3 c.11 and 4 and 5 Anne c.3 continue in force until replaced by Rules of Court. This will be dealt with in a subsequent Ordinance.

Additional Substituted Provisions Included in Ordinance

The Commission recommended that a provision along the lines of section 4 of the New South Wales Naturalization and Denization of Aliens Act 1898 be included in substitution for section 4 of 32 Hen.8 c.16 (which establishes the right of an alien to acquire property in the Territory). This provision is included in Part 5 of Schedule 2. Section 4 also deals with the right of an alien to succeed, by will or on intestacy, to

property and Part 5 follows this provision in this respect also. This matter is covered not by 32 Hen.8 c.16 but by 11 Will.3 c.6. Thus, Part 5 is expressed to be in substitution for both Imperial Acts. Part 5 also contains a substituted provision for section 9 of 32 Hen.8 c.16 which establishes that aliens are subject to the laws of the Territory. It seems desirable for the law of the Territory to cover this expressly.

The Commission did not refer in its Report to section 4 of 8 Anne c.18 which confers a right on a person entitled to rent under a lease for life to sue for arrears of rent during the life of the tenant for life. It appears that under the common law the rent could only be recovered on the death of the tenant for life. It seems desirable that this modification of the common law should continue to apply in the Territory and that it be done by a modern provision. The substituted provision is in Part 13 of Schedule 2.

The Commission recommended that 40 and 41 Vic c.59 be repealed. That is the Colonial Stock Act which enables colonial governments to establish a register of stock in the United Kingdom and for stock to be registered on that register and dealt with in the United Kingdom. The Commission regarded the Act as obsolete. However, there are still registers established in the United Kingdom under the Act for Commonwealth stock and stock issued by State Governments and, if the Territory were empowered to borrow by issuing stock, it could set up a register under the Act in the United Kingdom. Careful examination of the Act shows that it deals only with the registration and dealing with stock in the United Kingdom and, apart from sections 17 and 18, has no operation outside the United Kingdom. Sections 17 and 18 make a register and certain kinds of certificates evidence and these could be useful in proceedings in the Territory. Part 21 states these provisions in modern form and makes a register kept under the

Colonial Stock Act, a copy of such a register and a certificate issued under the Act evidence in proceedings in the Territory.

Notes on Clauses

Clause 1 provides that the Ordinance may be cited as the Imperial Acts (Substituted Provisions) Ordinance 1986.

Clause 2(1) defines-

> an applied Imperial Act as an Imperial Act that extends to the Territory of its own force or that was in force in New South Wales on 31 December 1910 and is in force in the Territory by virtue of section 6 of the Seat of Government Acceptance Act 1909;
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> commencing date as the date on which notice of the making of the Ordinance is published in the Gazette;
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> Imperial Act as a public Act of the United Kingdom in its various constitutional states enacted between 1235 and 1939; and
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> State as the State of New South Wales.

Clause 2(2) provides that where an applied Imperial Act that extends to the Territory of its own force had been amended before 3 September 1939 (the date on which the Statute of Westminster commenced to apply to Australia), then a reference to that Act shall be read as a reference to that Act as amended.

Clause 2(3) provides that references to an applied Imperial Act other than one that extends to the Territory of its own

force shall be read as a reference to that Act as amended in the United Kingdom before 25 July 1828, as amended between that date and 31 December 1910 by an Act of the United Kingdom that extended to New South Wales of its own force and as amended between 1 January 1911 and 3 September 1939 by a United Kingdom Act that applied to the Territory of its own force.

Clause 3 substitutes for the provisions specified in column 3 of the table in Schedule 1 of an applied Imperial Act specified in column 1 of that table the provisions set out in the Part of Schedule 2 specified in column 4 of that table. The applied Imperial Acts specified in Schedule 1 then cease to be in force in the Territory. The substituted provisions have effect, subject to the Ordinance, as laws of the Territory.

Clause 4 sets out the following rules for interpreting the substituted provisions in Schedule 2:

- Unless the context otherwise requires, the provisions are to be treated as if they were included in a consolidating Act that consolidates the provisions of the applied Imperial Act or Acts for which they are substituted; and

- Where a substituted provision is inconsistent with a law of the Territory (not being an applied Imperial Act), that law will prevail.

Clause 5 provides that a substituted provision has effect in the Territory on and after the commencing date whether or not the Imperial Act it replaces was in force in the Territory before that date. The clause has been included to avoid the possibility that the provision for which the substituted

provision is substituted has never been in force in the Territory. The clause does not alter the pre-existing law of the Territory or anything done before the commencing date.

Clause 6 provides for references in Ordinances to the applied Imperial Acts specified in Schedule 1 to be read as references to the substituted provisions in Schedule 2.

Clause 7 contains savings provisions, corresponding with section 38 of the Interpretation Ordinance 1967, saving things done, rights acquired and liabilities incurred under an applied Imperial Act that ceases to be in force in the Territory by virtue of the Ordinance. It continues the Statute of Frauds, 1677 in force in relation to promises and agreements made before the commencing date (that Act required certain kinds of promises or agreements to be in writing or to be covered by a written memorandum). The ceasing of an applied Imperial Act to be in force is not to affect any rule of law or equity applying in the Territory apart from that Act. Where provisions of an applied Imperial Act that ceases to be in force repealed, confirmed, revived or perpetuated another applied Imperial Act that continues in force, that repeal, confirmation, revivor or perpetuation is not affected.

Clause 8 provides that the headings to a Part of Schedule 2, or to a clause in such a Part, do not affect the construction of the Part or clause.

Clause 9 provides that a substituted provision in a Part of Schedule 2 shall be administered by the Minister specified in column 4 of Schedule 1 opposite to the citation of the Act in that Schedule for which the provision is substituted.

Clause 10 provides for the substituted provisions in Schedule 2 to be read subject to the Constitution and so as not to exceed the legislative power in respect of the Territory. It

also provides that nothing in sections 3 or 4, by which Acts for which substituted provisions are included in Schedule 2 cease to be in force in the Territory, affects the operation of an Imperial Act in the Territory as a law of the Commonwealth applying throughout Australia.

Clause 11 provides that the Ordinance shall be administered by the Attorney-General.

Schedule 1 contains a list of the Imperial Acts that cease to be in force in the Territory and are replaced by the substituted provisions in Schedule 2. It lists the Parts of Schedule 2 where the respective substituted provisions are printed and the respective Ministers by whom the substituted provisions will be administered.

Schedule 2 contains the texts of the substituted provisions. Notes on these provisions follow.

Notes on Substituted Provisions in Schedule 2

Part 1 This replaces a statute of 1267 that ensures that a landlord has a right, apart from contract, to recover damages from a tenant who does harm to the reversion. As the Imperial Act applied only to leasehold interests between subjects of the Crown, express provision has been made to exclude its operation to leases under the various leasing Ordinances of the Territory.

Part 2 This continues in force the fundamental principle of the law of real property that freehold land may be conveyed without licence of or fee to the Crown.

Part 3 This continues in force a fundamental principle of probate law under which there is a chain of representation whereby on the death of the executor or last surviving

executor of an estate that is not fully administered, the executor of that executor, or of that last surviving executor, automatically becomes responsible for continuing the administration of that estate.

Part 4 This part continues the principle of probate law that rights and liabilities of an administrator of an intestate estate are the same as those of an executor.

Part 5 This part replaces statutes of 1540 and 1698 in relation to the rights and liabilities of persons who are not Australian citizens. It continues the principles established by those statutes by providing:

(a) that such persons may acquire, hold and dispose of real and personal property; and

(b) that such persons may derive title to property in succession to other persons who are not Australian citizens.

It continues the exceptions in the old Acts relating to holding offices, owning British ships, becoming enrolled and privileges expressly conferred on citizens. It also continues the principle that persons who are not Australian citizens are bound by the laws of the Territory.

Part 6 This continues the principle of land law that covenants in a lease run with the reversion and bind, and may be enforced by, the person for the time being holding the reversion.

Part 7 This part replaces 2 statutes passed in 1571 and 1585 to deal with fraudulent conveyances of property with intent to defraud creditors or a subsequent purchaser. It continues the principle that such conveyances are voidable, but only so long as action is taken before the property passes to a bona fide purchaser in good faith for value without notice of the fraud.

Part 8 This Part replaces a statute of 1601 which imposed liability on a person who fraudulently intermeddled in the estate of a deceased person. The liability is the same as if the wrongful acts had been done by the executor.

Part 9 Sections 1 and 4 of 12 Chas.2 c.24 abolished the old feudal tenures on which land had been held from the Crown. After that Act, all land was held of the Crown in "free and common socage tenure". This part ensures that freehold land in the Territory, whether originally granted by the State of New South Wales or by the Commonwealth, is held and will continue to be held in free and common socage tenure.

Part 10 Acts, passed in 1666 and 1707, dealt with the difficulties that arise where land is held for a life or lives and the person entitled in reversion cannot establish that the life tenant is still alive. The Part will continue the principles established by those Acts -

(a) that a person wrongfully holding over after the termination of a life estate is liable to the person entitled in reversion in damages; and

(b) that a court can inquire whether a life tenant is still alive and make an order that the life tenant is to be presumed dead.

Part 11 This part replaces the sections of the Statute of Frauds, 1677 which required the creation or disposal of interests in land to be in writing or by a will.

Part 12 This Part continues the principle that where the personal representative of a deceased person damages the estate or converts it to his own use, damages can, after his death, be recovered from his estate by action against the executor or administrator of his estate.

Part 13 This Part replaces a section of an Act of 1709 that enabled arrears of rent to be recovered from a tenant for life during the life of the tenant. Previously, arrears could only be recovered on the termination of the life estate.

Part 14 This Part preserves a change in Imperial law made in 1730 which made it unnecessary , on renewing a lease before the expiration of the term, to obtain the surrender of any sub-leases in force. It sets out the rights and obligations of the parties to the lease and any sub-leases where the head lease is surrendered and renewed. Clause 3 provides that these provisions do not apply to land under the Real Property Ordinance 1925 because section 90A of that Ordinance already makes the same provision in respect of land under that Ordinance.

Part 15 This Part gives effect to the recommendation of the Law Reform Commission that, in an action for use and occupation of land, proof of a demise of the land should not be a defence to the action. The Imperial Act for which the Part is substituted altered the old law by allowing proof of a demise to be a defence if the demise was by deed, but not if it were by parol. The Part also allows evidence of the rent reserved on a demise of the land to be admitted as evidence of the quantum of damages.

Part 16 This Part preserves the change in the law effected by Fox's Libel Act of 1792, namely, that on a trial for publishing a libel the jury may return a general verdict of guilty or not guilty and cannot be required by the judge merely to answer a set of questions put to the jury.

Part 17 This Part preserves the reforms in the law of treason made in 1800 by abolishing the old and archaic special procedures governing trials for treason.

Part 18 This Part replaces an Imperial Act of 1812 which conferred general power on the Court to control the administration of charitable trusts. This jurisdiction is conferred on the Supreme Court of the Territory and the Commonwealth Attorney-General is a party, representing the public, to proceedings.

Part 19 This Part preserves the reform made in 1816 which enabled a court to inquire into the truth of the matters set out in the return of a writ of habeas corpus. Previously the Court could be frustrated by a return of a writ of habeas corpus stating that the prisoner was lawfully in custody for a stated reason because it could not verify that the reason justified continued custody.

Part 20 This Part replaces an Imperial Act of 1819 which conferred powers on a court to order the seizure of papers publishing a blasphemous, obscene or seditious libel upon the conviction of a person for publishing the libel. It deals with custody of the papers upon seizure and their destruction or, if the conviction is quashed, their return to the person entitled to them.

Part 21 This Part replaces sections 17 and 18 of the Colonial Stock Act, 1877 which made a register or a certified copy of a register kept under that Act in the United Kingdom, or a certificate issued under that Act, evidence in proceedings.

Authorised by the
Attorney-General.

1/86