
Northern Territory Law Reform Committee

Report on the law of property

Report No 18

October 1998

30 October 1998

The Hon Shane Stone MLA
Attorney-General
GPO Box 3146
DARWIN NT 0801

My Dear Attorney,

REPORT ON THE LAW OF PROPERTY

I have pleasure in presenting you with the Committee's Report dealing with the law of property.

Yours sincerely

**Hon Austin Asche AC QC
PRESIDENT**

The Northern Territory Law Reform Committee

The members of the Committee as at the date of this report are:

Hon Austin Asche, AC QC, Darwin

Max Horton, Solicitor, Alice Springs

Hugh Bradley, Chief Magistrate, Darwin

Peter Boyce, Ombudsman, Darwin

Jim Campbell, Executive Officer, NT Law Society, Darwin

Sally Gearin, Barrister, Darwin

Dirk de Zwart, Solicitor, Darwin

Nicolina Babic, Solicitor, Darwin

Richard Bruxner, Barrister, Darwin

Georgia McMaster, Solicitor, Northern Territory Police

Brett Midena, Solicitor, Northern Land Council, Darwin

John Hughes, Solicitor, Northern Australian Aboriginal Legal Aid,
Darwin

Stephen Gray, Lecturer, Northern Territory University

In addition the Attorney-General, the Chief Executive Officer of the Northern Territory Attorney-General's Department and the Solicitor-General are ex officio members of the Committee.

The Executive Officer is Robert Bradshaw

The Parliamentary Counsel who has provided considerable assistance in the preparation of the Bill is Victoria Aitkins.

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INTRODUCTION BY THE PRESIDENT OF THE LAW REFORM COMMITTEE

The Northern Territory Law Reform Committee at the direction of the Attorney-General established in 1994 a sub-committee to produce a draft Bill dealing with the property law of the Northern Territory.

In September 1998 Mr Chris Griffiths, the Chairman of the Subcommittee, provided a report to the Committee. This Report and a draft bill forms the bulk of this report.

The Committee adopts the Sub-committee's report and strongly supports the key recommendations that accompany it to the effect that there is very desirable that the draft Bill be exposed for public comment for a period of 6 months prior to enactment and that enactment be followed by a further period of 6 months until commencement.

The Committee also noted concerns raised by Mr Peter Walker concerning the following issues:

- Policy issues which amount to "an infringement on commerciality" in particular relating to auction contracts and whether there is a need to regulate instalment contracts of sale of land; and
- Style issues relating to whether it is possible to draft this legislation in a plainer style.

The Committee accepts that there are policy issues that are yet to be resolved. However, the Committee takes the view that these should be dealt with by the Government as part of the process of public consultation on the Bill that ought to be able to occur in the six month period following the release of this Report.

In respect of style issues the Committee takes the view that there is little practical possibility of being able to successfully convert into readily understandable modern day language and concepts many of the provisions of the Bill. Accordingly the Committee adopts the subcommittee's position - namely that the best approach is to select the most modern of the current sections enacted elsewhere in the common law world.

I also draw to your attention the fact that the draft Bill contains provisions dealing with tenancies. The Committee and the sub-committee have taken the view that their roles did not include any consideration of a reform of the laws governing residential or retail tenancy.

In the main this view was taken because the Committees have assumed that their main task was to prepare a property law Act that codified and consolidated common law and already existing statute law with some liberty

to adopt modern views in areas of the law untouched by other review processes. In addition during much of the time that the Committees have been involved in this project they were aware that the Government was considering the tenancy report prepared by a specialist group. For these reasons the provisions in the Bill are stated to operate subject to the *Tenancy Act* and are restricted to being, in general terms, a consolidation and clarification of current law.

The Committee notes that the Government's intention is to enact a modern Torrens Land Title Registration Act at the same time as a Law of Property is enacted. In regard to the relationship between the two Acts the Committee considers that in either the Law of Property Act or the Land Title Registration Act there should be a general clause stating that the Law of Property Act applies to registered land subject to the provisions of the Land Title Act. However, the Committee suggests that, as far as is practicable, substantive legal principles relating to land should be in the Law of Property Act rather than in the Land Title Act.

Finally, the Committee expresses its sincere appreciation for the work of the members of the Sub-committee and, in particular, the work of the Chairmen, Mr Justice Mildren QC and Mr Chris Griffiths, and the Parliamentary Counsel, Ms Victoria Aitkin.

Austin Asche

Terms of Reference

I, the Honourable Frederick Arthur Finch, refer to the Northern Territory Law Reform Committee for examination and report reform of the law of property, and in particular the following matters:

- General Rules Affecting Property
- Freehold estates
- Future Interests
- Concurrent interests - Co-Ownership
- Deeds, covenants, Instruments and Contracts
- Mortgages
- Leases and Tenancies
- Incorporeal Hereditaments
- Encroachment and Mistake
- Rights of Way
- Equitable Interests and Things in Action
- Powers of Appointment
- Corporations
- Voidable Dispositions
- Apportionment
- Unregistered Land
- Procedure in Cases of Bona Vacantia
- Repeal or Reform of obsolete laws of Imperial or South Australian law applying to the Northern Territory.

I request the Committee to produce its final report to me in the form of a draft Bill prepared with the assistance of Parliamentary Counsel.

Dated thus 23rd day of August 1994

(Signed)
ATTORNEY-GENERAL

**REPORT OF THE PROPERTY LAW SUBCOMMITTEE ON ITS REVIEW OF
PROPERTY LAW IN THE NORTHERN TERRITORY**

BACKGROUND

After Queensland enacted its *Property Law Act* in 1974, the Northern Territory possessed probably the most antiquated general property law of any common law jurisdiction. Much of Northern Territory property law is based on English property law in force in 1836 which was received into the colony of South Australia. That law became the law of the Territory when the Territory became a territory of South Australia in 1863. This property law was acknowledged to be in need of reform even at the time of reception. Property law in England and that law received into the Australian States and the ACT has now been reformed.

The Queensland Act, which is the latest Australian property law reform Act, was considered to be the most advanced property law Act in Australia. Soon after Northern Territory self government on 1 July 1978 there were proposals to base a Territory Law of Property Act on the then recently commenced Queensland Act. Between 1981 and 1982, Dean Mildren Q.C., as he then was, wrote a Commentary on a draft Territory Law of Property Bill based on the Queensland Act. No further work was carried out although there were sporadic attempts to revive the project over the next 10 years but with little success until 1994.

On 23 August 1994 the then Attorney-General, the Hon Fred Finch, MLA, referred the topic of property law review to the President of the Law Reform Committee.

The terms of reference requested that the Law Reform Committee produce its final report to the Attorney-General in the form of a draft Bill prepared with the assistance of Parliamentary Counsel.

The Law Reform Committee referred the matter to the Property Law Subcommittee ("the Subcommittee") in September 1994. Mr Justice Mildren, the then President of the Law Reform Committee, was appointed Chairman of the Subcommittee.

The members who have served on the Subcommittee are:

Chris Griffiths (Northern Territory Attorney-General's Department)
Robert Bradshaw (Northern Territory Attorney-General's Department)
John George (Cridlands, Solicitors)
Sally Gearin (Darwin Bar)

Jim Dorling (Parliamentary Counsel) - replaced by Victoria Aitken August 1995

Michael Spargo (Darwin Bar) - resigned June 1997

Sue Philip (Northern Territory University) - resigned June 1997

Peter Walker (Ward Keller, Solicitors) appointed June 1997

Guy Riley (Clayton Utz, Solicitors) - appointed June 1997

Philip Timney, the Registrar-General, has attended as an observer since 1996.

Mr Justice Mildren resigned as Chairman in May 1997 when Mr Chris Griffiths was appointed Chairman.

The Subcommittee met on 33 occasions between 20 April 1995 and 5 August 1998.

In view of the fact that the Queensland legislation was the latest and most advanced property law legislation, that considerable work had already been undertaken in a consideration of the Act and that the terms of reference referred to the various Parts of the Queensland Act, the Subcommittee decided to base a Territory Bill on the Queensland Act; although there was some initial discussion of proceeding with a more radical approach.

On 5 August 1998 the Subcommittee completed its review and resolved to:

- submit the draft Bill prepared by Parliamentary Counsel to the Law Reform Committee,
- identify in its report to the Law Reform Committee any dissenting views of members in respect of provisions in the draft Bill,
- recommend that the Bill be tabled only and lie before the Legislative Assembly for 6 months prior to its introduction and when passed not be commenced for a further period of 6 months.

DISCUSSION OF THE BILL

Part 1 - Preliminary issues

The draft Law of Property Bill is a Bill to amend, consolidate and reform the law relating to all land and interests in land. The Bill is subject to the provisions of Acts affecting land and interests in land such as the *Crown Lands Act*, the *Real Property Act* and the *Mining Act*. The Bill may, in certain circumstances, where a contrary intention does not appear, apply to personal property.

It places, in one readily accessible statute, virtually all of the main tenets of the land law of the Territory; reformed and expressed in more modern language.

Many provisions simply replace and modernise the language of well established statutory rules of law. This permits the repeal of 47 Imperial Acts dating from 1266 and several South Australian Acts. Other provisions restate existing rules of law developed by the common law and places them in statutory form. Other provisions are identical to provisions to be found in Law of Property Acts in the UK and the Australian States which overcome particular problems or inconvenient rules of law which have developed in particular cases. Some provisions are entirely new, modernising the law and bringing the Territory's law in to line with other jurisdictions. Very few provisions are truly innovative; the main exception being the provisions in respect of Covenants.

Part 2 - General Rules Affecting Property

Sections such as 6, 7, and 8 (and some other sections in other Parts of the Bill e.g. section 29) have little utility in the Territory as it is considered that all land alienated from the Crown is registered land. However, it is considered preferable that the underlying land law is reformed, made clear and placed in modern language in one readily accessible statute. Other sections in this Part replace and modernise the language of established rules of law, for example, sections 9 to 11 replace provisions in the *Statute of Frauds 1677*. Sections 12 to 16 are provisions to be found in other Law of Property Acts and are considered to be overdue reforms. Section 17 overcomes the inconvenient decision in *McQuades* case 1927.

Part 3 - Freehold Estates

Section 18 provides that the only estates capable of being created at law are estates in fee simple and estates for life or lives.

The law of the Territory still recognises estates tail, quasi entails and escheat. Sections 20, 22 and 23 abolish estates tail, quasi entails and escheat. Sections 21, 24 and 26 are simplified forms of the *Statute Quia Emptores 1290*, the *Statute of Marlborough 1267* and the *Cestui Que Vie Acts 1666 and 1707* respectively. Section 27 is a modern form of section 1 of the *Landlord and Tenant Act 1730*. Section 28 abolishes the rule in *Shelley's* case although it is most unlikely that the rule would have any application in the Territory; however, theoretically it could still arise.

Part 4 - Future interests

Section 30 is a necessary corollary to section 6 (the repeal of the Statute of Uses) and is consistent with the proposed Land Title Act (despite the wording of subsection (3)). Section 31 largely replaces, in modern form, existing statutory provisions in the *Law of Property Act 1852*. Section 32 is found in U.K, Queensland, New South Wales and Victorian property legislation.

Part 5 - Co-ownership

This Part abolishes tenancy by entireties and co-parceny, more for the avoidance of doubt rather than for any necessity. It does change the law in one important respect viz: persons holding jointly are to hold as tenants in common and not as joint tenants unless there is provision to the contrary. This is in line with reforms in other jurisdictions and the provisions in the proposed Land Title Bill complement this reform. The mechanics of partition and sale are made clear and understandable. This provision enables the repeal of old Acts and takes into account the provisions of the *Planning Act*.

Part 6 - Deeds and Covenants

Sections 46 - 49 bring about another important, and overdue, change in the law viz: the need for the sealing of deeds is abolished. This provision modernises the law and brings the Territory in line with other jurisdictions. Section 52 overcomes an inconvenient common law rule. Section 55 provides that joint contractors are deemed to contract jointly and severally which also brings the Territory in line with reforms in other jurisdictions. Section 56 provides for contracts for the benefit of third parties which follows statutory reforms in Queensland and Western Australia as well as reforms in other common law jurisdictions. Other provisions are consolidating and modernising provisions.

Part 6 - Sales of Land

These provisions in the main consolidate existing statutory and common law principles and conveyancing practice. Section 63 follows similar legislation in UK and the States. Section 70 abolishes the rule in *Bain v. Fothergill* 1874; abolished in other jurisdictions but still applicable in the Territory.

Part 6 - Instalment Sales of Land

This is an innovation in the law of the Territory. Similar legislation exists in the UK, Queensland, New South Wales and Western Australia although not all States legislation covers the same field. The Division does not bind the Crown.

Part 7 - Mortgages

The Part generally applies to mortgages over land as well as to chattels and choses in action although some provisions are restricted to mortgages of land only. Many of the provisions are a restatement, in modern language, of old statutes (notably the South Australian 1862 Act) and common law principles. In particular, they define the powers and duties of mortgagees, the power of sale, application of proceeds of sale. Other sections such as sections 84, 89,

97 - 107 follow reforms introduced elsewhere, note particularly section 84 (tacking and further advances). Section 90 is considered to be a particularly useful reform. Section 102 abolishes a particularly inconvenient rule of law relating to the consolidation of mortgages.

Provisions now in Part XII of the *Real Property Act* are transferred to the Bill in modified form.

Part 8 - Leases

This Part provides that the provisions of the *Tenancy Act* are to prevail. Accordingly, it has very limited application in respect of the termination of tenancies. Elsewhere, the Part abolishes the common law rule of *interesse termini* which is still in effect in the Territory but outdated and not in effect in other common law jurisdictions. Sections 123 to 125 and 265 of the *Real Property Act* are transferred to the Bill in modified form.

Many provisions re-enact, in modern language, the law now contained in such Imperial Acts as the *Grantees of Reversions Act* 1540 the *Statute 4 and 5 Anne*, the *Landlord and Tenant Act* 1730, the *Distress for Rent Act* 1737, the *Property Act* 1860 and the *Common Law Procedure Act* 1862. Section 123 overcomes the inconvenient rule in *Dumpors* case (1603).

The Part does introduce some reforms, for example, Power of Court to Protect Underlessee on Forfeiture of Superior Lease, Relief against Notice to Effect Decorative Repairs, Relief against Option to Renew or Extend Leases, and Not to Assign without Consent. These follow reforms in the States.

Part 9 - Incorporeal Hereditaments

There are no similar provisions to be found in other Law of Property Acts. Many of the provisions in respect of easements have been taken from Part 3, Division 4 of the *Crown Lands Act* which Division will be repealed. Section 146 provides that easements in gross may be created in favour of any person and not restricted to the Territory, a Municipality or a Statutory Authority. The persons having the benefit and burden of easements are made clear. The provisions in respect of Statutory Rights of User (sections 157 - 160) are new and follow the Queensland provisions.

The provisions in respect of covenants are novel. A covenant is defined as an obligation whether positive or negative. The Part provides for covenants in gross although these are limited to creation by the Territory, a Municipality or a Statutory Authority. There are provisions dealing with the benefit and burden of easements and covenants, liability for contravention, extinguishment of covenants after 20 years.

Easements and covenants can be created by instrument or registration of a plan of subdivision (estate covenants and easements). These provisions will complement provisions in the proposed Land Title Bill. There are provisions for the modification and extinguishment by the court of easements and covenants.

Part 10 - Things in Action

This replaces section 70 of the *Supreme Court Act*.

Part 11 - Perpetuities

This incorporates and replaces the provisions of the *Perpetuities Act*.

Parts 12 to 14 - Powers of Appointment, Voidable Interests and Apportionment

These follow the provisions of the *Queensland Act*. The provisions generally restate, in modern language, what, in many cases, is already part of the law of the Northern Territory eg: the *Property Law Act* 1860 (Powers of Appointment) and the *Fraudulent Conveyances Acts* 1571 and 1584 (Voidable Interests). The provisions consolidate statutory provisions and much case law and follow similar legislation introduced in all Australian States.

The following matters, referred to in the terms of reference, were considered by the Subcommittee but it was resolved not to include them in the draft Bill for the reasons stated below.

<u>Matter</u>	<u>Reason</u>
Encroachment and Mistake	The <i>Encroachment of Buildings Act</i> is considered satisfactory but may be reviewed separately some time in the future. Upon any review of this Act, the Act could be transferred to a Law of Property Act as a Part.
Rights of Way	Prescription is not relevant in the Territory
Corporations	The practical relevance of the sections in the Queensland

Act is considered to be non-existent or at most tenuous.

Unregistered Land

Not relevant in the Territory

An Explanatory Note in respect of each clause of the draft Bill is set out in the Explanatory Memorandum that forms part of this report.

While many issues were extensively argued throughout the Subcommittee's deliberations, all decisions had been unanimous. However, at the last meeting of the Subcommittee, Mr Peter Walker raised concerns in respect of provisions of the draft Bill that had been discussed and agreed to at meetings prior to his appointment as a member. The Subcommittee resolved at the meeting not to re-open the consideration of the provisions but to place his concerns before the Law Reform Committee.

The draft Bill should be read having regard to the intention of the Northern Territory Government to introduce a Land Title Bill to replace the *Real Property Act* at the same time as a Law of Property Bill is enacted. It is also hoped to introduce a Communal Titles Bill to replace the *Unit Titles Act* and *Real Property (Unit Titles) Act* at this time.

The *Real Property Act* is being re-written for the purpose of modernising the language, structure and content of the Act. A Land Title Bill is being prepared, based on the Queensland Act of 1994, a modern and simply worded Torrens statute which has sympathy with the Law of Property Bill. It is considered necessary to introduce the Land Title Bill at the same time as the Law of Property Bill due to various cross referencing in the Bills and the complementary nature of some parts of the Bills most notably easements and covenants. This has meant that the cross references in the Law of Property Bill are worded as cross references to Land Titles Bill that does not yet formally exist. The generality of the proposed contents of the cross references provisions are summarised in the Explanatory Memorandum.

The private practitioners on the Subcommittee raised concerns over the time required for practitioners and others to consider the Bills. There were commercial concerns arising out of changes to the law contained in the draft Bill, for example, the provisions relating to Sales of Land, Instalment Sales of Land, insurance and the abolition of the need to consent to second and subsequent mortgages and tacking. The Subcommittee therefore resolved to recommend to the Law Reform Committee that the Bill be tabled for 6 months prior to its introduction to enable practitioners, conveyancing agents, Banks, the Law Society, the Bar Association and others to comment on the provisions of the Bill.

The private practitioners on the Subcommittee were further of the view that when the Bill was passed, and the final form of the legislation known, that the

Bill not commence for another period of 6 months. This period was considered necessary for practitioners, conveyancing agents, Banks and others to amend such documents as the Law Society's contract for sale, the Conveyancing Agents contract for sale, Bank forms and procedures etc. Such a period was also considered necessary to enable practitioners, conveyancing agents, Banks and others to become acquainted with the various forms and practices required under the Land Title Bill.

Chris Griffiths

**LAW OF PROPERTY BILL
EXPLANATORY MEMORANDUM
PART 1 - PRELIMINARY**

Clause 1 **Short Title**

Clause 2 **Commencement**

Clause 3 **Crown to be bound**

Clause 4 **Definitions**

Clause 5. **Application of sections 9, 10, 11 and 62**

The clause saves the matters referred to in the clause from the provisions of clauses 9, 10, 11 and 62 (which deal with requirement of writing). These matters relate to disposition by a will, interests validly created before the commencement of the Act, interests arising from possession, part performance and sales by order of the Court).

PART 2 - GENERAL RULES AFFECTING PROPERTY

Clause 6. **Effect of repeal of Statute of Uses**

The *Statute of Uses 1535* is still in force in the Territory. It necessitates the use of certain words in conveyances of land to trustees. As the effect of the repeal would revive the pre 1535 doctrine of resulting uses or trusts on a voluntary conveyance, it is necessary to expressly preclude the implication of a resulting trust (subclause(3)). After the enactment of this subclause, a resulting trust cannot arise merely from the omission of the words “unto and to the use of”. The section only has relevance to unregistered land. It is extremely doubtful if there is any old system land in the Territory.

Clause 7. **Lands lie in grant only**

As all alienated land in Territory is registered, the clause is unlikely to have any utility except in the most unusual circumstances e.g. where an estate, such as an easement, is created for which no form in the *Real Property Act* exists. It is included for completeness.

- Clause 8. **Reservation of easement etc. in conveyances of land**
This clause deals with certain reservations in conveyances of land. As all alienated land in the Territory is registered, the clause is unlikely to have any utility in the Territory.
- Clause 9. **Conveyance of land to be in writing**
This is a re-enactment of section 3 of the *Statute of Frauds 1677*. It permits conveyances to be made not only by deed but also by any writing which is an innovation. Subclause (2) sets out exceptions.
- Clause 10. **Instruments required to be in writing**
This is a re-enactment of sections 7,8 & 9 of the *Statute of Frauds 1677*. Its object is to prevent fraud.
- Clause 11. **Creation of interests in land by parol**
This is a re-enactment of sections 1 and 2 of the *Statute of Frauds 1677*. It operates subject to section 61 of the *Tenancy Act* (which deals with certain periodic tenancies and holding over after the expiry of a fixed term tenancy).
- Clause 12. **Persons taking who are not parties**
Under the general law a person who was not named as a party in the parties clause of a deed could not enforce any covenants purporting to be made with him or her or any immediate disposition made in his or her favour by another person who was named as a party to the deed and executed it. The clause is limited to conveyances and contracts in respect of land only. The clause follows reforms in the Australian States.
- Clause 13. **Conveyances by a person to the person etc.**
At common law a person could not convey directly to him or herself an interest in property which he or she owned and which he or she could convey to a third person. Joint tenants were regarded as a single owner at common law. The clause follows reforms in Australian States.

Clause 14. **Rights of husband and wife**

The clause ensures that a conveyance and to husband and wife and third parties, conveys to the husband and wife separate shares and not merely one share.

Clause 15. **Presumption that parties are adults**

The clause has utility in respect of property other than land e.g. shares in a company. In respect of registered land, a minor's date of birth is to be recorded on the land register under the proposed Land Title Bill.

Clause 16. **Merger**

The clause prevents merger at law where there would be none in equity. There is a presumption in equity against merger. In equity there must be an intention that there should be merger. There are equivalent provisions in all Australian States.

Clause 17. **Restrictions on operation of conditions of forfeiture**

This clause is intended to reverse the inconvenient decision of the High Court in *McQuade v Morgan* (1927) which held that a charge over a future interest which had not vested resulted in the interest being forfeited even though the charge had been released before the interest vested. There are similar provisions in NSW and Queensland.

PART 3 - FREEHOLD INTERESTS

Clause 18. **Freehold estates capable of creation**

The law in the Territory still recognises Estates Tail as an estate of freehold. This is an estate which exists for as long as the original tenant or any of his heirs survived. The clause provides that the only estates of freehold capable of creation are a fee simple or estate for life or lives.

Clause 19. **No incidents of tenure on grant in fee simple**

This restates, in modern language, the provisions of the *Tenures Abolition Act 1660*. There is very little likelihood of there being any Crown Grants reserving a monetary quit rent in the Territory.

Clause 20. **Abolition of escheat**

This clause abolishes escheat (forfeiture to the Crown) which still exists to some extent in the Territory, e.g. realty of dissolved corporations not incorporated under the Corporations Law. Property that formerly escheated to the Crown will pass as bona vacantia under rules set out in the schedule 1 to the Bill.

Clause 21. **Alienation in fee simple**

This is a re-enactment, in modern form, of *the Statute Quia Emptores 1290* which is still force in the Territory. The Statute ensured the alienability of land and prohibited the creation of new tenures except by the Crown.

Clause 22. **Abolition of estates tail**

This clause abolishes the estate in fee tail - a form of inheritance which passes to lineal descendants of the donee. It is doubtful whether any such estates now exist in the Territory.

Clause 23. **Abolition of quasi-entails**

This clause abolishes a form of estate that ceases to exist when the life by which the estate depended, ceased. It is unlikely that such an estate has ever been created in the Territory.

Clause 24. **Liability of life tenant for voluntary waste**

This clause incorporates, in modern language, the provisions of the *Statute of Marlborough 1267*. The doctrine of waste was developed to prevent a person with a limited interest, such as a life tenant, from damaging the land to the detriment of those persons who held the reversionary interest or an interest in remainder. Voluntary waste

encompasses the commission of positive acts which result in damage to the land.

Clause 25. **Equitable waste**

Equitable waste constitutes acts of wanton destruction of a far more serious kind than voluntary waste. The clause restates section 6 of the *Supreme Court Act 1878*.

Clause 26. **Recovery of land on determination of a life or lives**

This is a modern form of the *Cestui que Vie Act 1666* and 1707. The object of the clause is to allow remaindermen to prove the death of the life tenant in order that they may show that they are entitled to possession. Subclause (1) declares that any person having a life estate who holds over or remains in possession shall be liable not only in damages but also to account for rents and profits during the period of the holding over.

Clause 27 **Penalty for holding over by life tenant**

This clause is a modern form of section 1 of the *Landlord and Tenant Act 1730*. It is designed to discourage life tenants, or persons in possession through collusion with life tenants, who wilfully hold over after the termination of the life tenancy and after demand in writing has been made by the remainderman, reversioner or his or her agent.

Clause 28. **Abolition of rule in *Shelley's case***

This clause abolishes the rule in *Shelleys case* (1581). The rule is one of complexity involving the use of the words "heirs" or "heirs of the body" in a conveyance after the disposition of a life interest. The rule defeated the natural meaning of the words used denying a reversionary interest to heirs. It is most unlikely that the rule would have any application in the Territory as there is no known old system land although it could still theoretically arise in certain circumstances e.g. a disposition by will.

Clause 29. **Words of limitation**

Care must be taken in the use of words of disposition used in a conveyance of old system land e.g. at common law a conveyance to “A in fee simple” created only a life interest. While modernising the underlying land law, it has no utility in the Territory in respect of registered land.

PART 4 - FUTURE INTERESTS

Clause 30. **Creation of future interests in land**

The clause provides that future interests can only take effect as equitable and not legal interests. The technical contingent remainder rules and the rule in *Purefoy v Rogers* (1671) therefore will cease to apply.

The Land Title Bill is to provide that the Register-General may record in the land register an interest in a lot for life and an interest in remainder in the way the Registrar considers appropriate.

Clause 31. **Power to dispose of all rights and interests in land**

The clause re-enacts and places section 5 of the *Law of Property Act* 1852. The clause is necessary as future interests and possibilities cannot be transferred at common law. They occur rarely in practice.

Clause 32. **Restriction on executory limitations**

The purpose of this provision is to overcome an inconvenient rule that a person who received an estate “To A, but if he dies without issue, to B” would never know during his lifetime if the gift to B would take effect. The clause provides that if any issue to A attains 18 years during his lifetime, the gift to B ceases.

PART 5 - CONCURRENT INTERESTS CO-OWNERSHIP

Division 1 - General Rules

Clause 33. **Forms of co-ownership**

At common law there were four forms of co-ownership; tenancy in common, joint tenancy, tenancy by entireties and coparcenary. Tenancies by entireties were abolished by the *Married Women's Property Act* 1884. Coparcenary, a form of tenancy which may arise out of an estate tail, is abolished consistent with the abolition of estates tail (s.23).

Clause 34. **Power of body corporates to hold property as joint tenants**

At common law, a corporation is incapable of holding land or other property as joint tenant with another. The clause permits corporations to hold land or other property as joint tenants or tenants in common.

Clause 35. **Construction of dispositions of property to two or more persons together**

At common law, the presumption was that a disposition of property to two or more persons created a joint tenancy (a presumption which simplified conveyancing procedures).

Under a joint tenancy the survivor took the whole, There are many cases where this presumption gives rise to inequity and many de facto relationships favour a tenancy in common. The clause now provides for a presumption in favour of a tenancy in common which follows Queensland and New South Wales legislation. It is subject to a contrary intention being expressed.

Clause 36. **Tenants in common of equitable estate acquiring the legal estate**

If persons beneficially entitled as tenants in common become entitled to a joint tenancy or tenancy in common at law, they hold as tenants in common at law unless they agree otherwise.

Division 2 - Partitions, Statutory Trusts, Sale and Division

Clause 37. **Interpretation**

An interpretation clause. The clause contains definitions and provides that that the Division is expressly subject to the *Planning Act* concerning the partitioning of land.

Clause 38. **Encumbrancee to consent to partition**

The clause provides that the encumbrancee (mortgagee or lienee) must consent to any partition.

Clause 39. **Purchaser no obligation under this Part**

The clause provides that the purchaser of property affected by the Division is not required to see or inquire as to whether there has been compliance with the provisions of the Division.

Clause 40. **Statutory trusts for sale or partition of property held in co-ownership**

Partition is the act of dividing land or other property held in co-ownership among the co-owners in severalty, each taking a distinct part.

Partition is effected in the Territory under the *Statute of Westminster* (1285), the *Administration of Justice Act* 1706 and the *Partition Act* 1881. Under the clause a co-owner may apply to the Court for the appointment of trustees to sell or partition the property. The clause modernises the procedure and follows legislation in the United Kingdom and the Australian States.

Clause 41. **Trustee on statutory trusts for sale or partition to consult persons interested**

This clause provides for consultation by trustees with persons beneficially entitled to income of the property the subject of the trust for sale.

- Clause 42. **Rights of co-owners to bid at sale under statutory power of sale**
The clause provides that the Supreme Court may allow any of the co-owners to purchase the property on terms the Court thinks reasonable.
- Clause 43 **Sale or division of chattels**
There is no power under the common law for a Court to order the sale or division of co-owned chattels at the suit of one of the co-owners. The clause provides a similar procedure for dealing with chattels to that for other property except that the clause is much briefer and there is no statutory trust - the Supreme Court orders sale and/or division directly.
- Clause 44. **Powers of Court**
The purpose of the clause is to give the Supreme Court more flexibility in deciding whether they should determine questions of fact and direct inquires or whether they should adjourn until the issues between the parties are determined in other proceedings (which is the position at present).
- Clause 45. **Liability of co-owner to account**
At common law, one co-owner of property had no action to force another co-owner to account for rents and profits except in exceptional cases. The section replaces section 27 of the *Administration of Justice Act 1706*.

PART 6 - COVENANTS, INSTRUMENTS AND CONTRACTS

Division 1 - Deeds and Covenants

- Clause 46. **Description and form of deeds**
This clause replaces and modernises section 4 of the *Law of Property Act 1852* which itself overcomes an inconvenient common law rule.

Clause 47. **Formalities of deeds executed by natural persons**

This clause effects necessary and long overdue changes to the law in the Territory. The Territory is the only jurisdiction in Australia which still requires the physical sealing of deeds. If a document is expressed to be a deed or to be sealed, signature is sufficient execution without sealing.

Clause 48. **Execution of instruments by or on behalf of corporations**

A wide variety of sealing formalities are in existence in respect of corporations and the view of the law that a person dealing with a corporation is constructively aware of these formalities is both unrealistic and inconvenient in commercial and property dealings. The clause sets out a procedure for the execution of instruments by a corporation upon which persons dealing with the corporation can rely on as valid execution. The clause is subject to the provisions of the Corporations Law.

Clause 49. **Delivery of deeds**

An instrument does not become binding as a deed upon the person making it until it is delivered. Delivery is constituted by the intention of the person making the deed to be bound by it and does not require physical delivery. The purpose of this clause is to change the common law presumption that a deed was presumed to be delivered - an inconvenient rule, especially if the execution was intended to be an escrow. One of the effects of the clause is that the deed itself will now usually decide whether it becomes legally binding without a formal delivery eg. if it states "signed, sealed and delivered" it will be binding on execution. If it states "signed and sealed", it will not be binding until physical delivery.

Clause 50. **Construction of expressions used in deeds and other instruments**

This is a word saving provision as the provisions are commonly contained in deeds and other documents. For example, at common

law, a “month” means a lunar month whereas this clause provides that, subject to a contrary intention “month” means “calendar month”

Clause 51. **Implied covenants may be negated**

The clause provides that implied covenants may be enforced as if set out in the instrument and that implied covenants may be negated or varied in the instrument or in another instrument.

Clause 52. **Covenants and agreements entered into by a person with himself or herself and another or others.**

Under the common law, a person can not enter into a covenant or agreement with him or her self nor with himself or herself and another or others jointly, nor could he or she jointly with another or others enter into a covenant or agreement with himself/herself and another or others jointly. This is most inconvenient e.g. in the case of two partnerships with a common partner. The clause overcomes the problem.

Clause 53. **Receipt in instrument sufficient**

A receipt in the body of a deed was conclusive at law. However, in equity such a receipt was not conclusive between the parties and the equitable rule now prevails. The clause overcomes this practical difficulty and follows the law in the Australian States.

Clause 54. **Receipt in instrument or endorsed evidence sufficient in favour of purchaser**

Under the common law, the absence of an endorsed receipt in a deed or instrument operates as constructive notice where the receipt has not in fact occurred. The clause provides protection for a purchaser where there is a receipt in the body of the deed or instrument.

Division 2 - General rules affecting contracts

Clause 55. **Effect of joint contracts and liabilities**

This clause reforms the law relating to the presumption that liability between joint contractors is joint and not joint and several. The provisions are “subject to this and any other Act” and do not affect other statutory provisions which may provide for joint liability e.g. *Partnership Act*.

Clause 56. **Contracts for the benefit of third parties**

There are two model provisions in Australia relating to contracts for the benefit of third parties; the Western Australian model and the Queensland model. This clause follows the Queensland model.

Until the High Court decision in *Trident General Insurance Co Ltd v McNeill Bros. Pty. Ltd.* in 1988, a third party beneficiary could not enforce a contract which had been made expressly for his or her benefit. The Court allowed enforcement in the particular case but the exact circumstances in which enforcement will be allowed must await further determination by the Courts. Until the principles are finally settled, the clause will provide a means by which a third party may enforce a promise made for his or her benefit.

Clause 57. **Corporate contracts and transactions not under seal**

At common law the general rule was that acts of a corporation, and in particular its contracts, must be effected under its corporate seal to be valid. This rule has no application in respect of companies incorporated under the *Corporations Law* which now contains express provisions in respect of the execution of documents. Additionally, trading corporations are exempt from the rule. However, it is considered that non-trading corporations and, possibly, corporations sole could be caught by the rule. The clause ensures that the rule does not apply to such corporations.

Clause 58. **Guarantees to be in writing**

This clause is a re-enactment, in modern form, of section 4 of the *Statute of Frauds 1677*. Its purpose is to prevent fraud.

Clause 59. **Provisions as to conclusiveness of certificates etc**

The clause provides that where a contract or instrument provides that a statement or opinion of a person is to be received as conclusive evidence of a fact, it is to be received as prima facie evidence of the fact only.

Clause 60. **Effect of Act or statutory instrument**

The purpose of the clause is to overcome the possible result of the application of the decision in *Chitts v Allaine* (1982) to contracts generally. In that case a Council by-law prohibited the entry of a party into a contract for sale of premises without a certificate of fitness. It was held that the contract was void and unenforceable.

This clause provides that in these kinds of cases the contract will not be void and unenforceable unless the statutory instrument provides for that outcome.

Clause 61. **Insurance money from burnt building**

This is a restatement, in modern form, of section 83 of the *Fires Prevention (Metropolis) Act 1774*, a section designed to prevent insurance fraud. The clause purports to put persons who insure buildings against destruction or damage by fire under a statutory obligation to spend the insurance moneys in re-instatement or repair so far as it will go, if requested to do so by any person interested except in the circumstances set out in paragraphs (a) and (b) of the clause.

Division 3 - Sales of Land

Clause 62. **Contracts for sale etc of land to be in writing**

The clause is a further restatement of section 4 of the *Statute of Frauds 1677*. The effect is to render a contract for the sale or other

disposition of land or any interest in land unenforceable if it does not comply with the requirements of the section.

Clause 63. **Sales of land by auction**

This clause follows similar legislation in UK, NSW, Victoria and Queensland. It provides for the circumstances in which a vendor or the representative of the vendor of land can bid at an auction of land being sold by the vendor. There may need to be a consequential amendment to section 15 of the *Auctioneer's Act* (which creates an offence for the vendor to conduct such a bid without notification).

Clause 64. **Conditions of sale of land**

The clause is a word saving provision is designed to insert, in the absence of a contrary intention, certain standard clauses into contracts for the sale of registered land.

Clause 65. **Provisions not of the essence of the contract**

The clause replaces section 6 VII of the *Supreme Court Act 1878*. At common law, time has always been regarded as essential. Time was not however essential in equity except where: -

- (a) time cannot be disregarded without injustice to the parties,
- (b) the parties have stipulated that time should be of essence, and
- (c) there is something in the nature of the property or the surrounding circumstances, which would render it inequitable to treat the stipulation as a non-essential term.

Clause 66. **Application of insurance money on completion of a sale or exchange**

This clause is an amplification of the *Real Property (Insurance Moneys Section) Act 1975* and follows similar legislation in UK, Victoria and Queensland. The covers the situation of money payable under a vendor's insurance policy after the exchange of contracts or sale relating to the insured property.

- Clause 67. **Right to rescind on destruction of or damage to dwelling house**
The clause provides for the rescission of certain contracts where a dwelling house is destroyed or damaged prior to both completion or possession. It applies only to dwelling houses and applies despite any term to the contrary in the contract for the sale of the dwelling house.
- Clause 68. **Receipt in instrument or endorsed authority for payment**
The purpose of the clause is to ensure that where the purchaser has paid over the money on the faith of such a receipt to a legal practitioner or banker who does not account properly to his or her client or customer for the money, the purchaser will not be liable to pay again.
- Clause 69. **Restriction on vendor's right to rescind on purchaser's objection**
The clause provides, for contracts made after the commencement of the Act, that the vendor must give a purchaser 7 days notice of intention to rescind on the ground of a requisition or objection made by the purchaser.
- Clause 70. **Damages for breach of contract to sell land**
The purpose of this clause is to abolish the rule in *Bain v Fothergill* (1874), which restricts the purchaser's damages to the purchaser's expenses in investigating title, where the vendor is unable to make good title and gave no express undertaking to do so. It places the rules as to damages in this case in exactly the same position as the general law provides for breach of contract. The rule may not, in any case, have any application to registered land.
- Clause 71. **Rights of purchaser where vendor's title defective**
The clause refers only to the situation where specific performance is refused a vendor because of a defect or doubt in the vendor's title and where such defect or doubt would not entitle the purchaser to rescind the contract. It does not apply expressly to an action where the purchaser is merely seeking to recover his deposit. It will be of

limited application to registered land as defects or doubts as to title will only rarely arise.

Clause 72. **Applications to Court by vendor and purchaser**

The clause follows legislation in the UK, Victoria and Queensland and provides for the determination by summons of most questions arising out of a valid contract for sale in a speedy and inexpensive manner. The only substantive limitation is that questions affecting the validity or existence of the contract may not be entertained in the procedure, nor may questions generally concerned with the formation of the contract.

Division 4 - Instalment sales of land etc

Clause 73. **Application of Division**

This Division regulates the sale of land where the purchaser pays in instalments with the vendor retained ownership of the land until all of the payments are made.

Clause 73 sets out definitions and applies the Division to only those instalment contracts entered into after the commencement of the Act and notwithstanding any terms of the contract to the contrary. Similar legislation exists in NSW, Victoria, Western Australia and Queensland.

Clause 74. **Restriction on vendor's right to rescind**

The clause places a severe restriction on the vendor's right to rescind by reason only of default on the part of the purchaser in the payment of any instalment or sum of money. However, failure to pay the deposit or any part of it will give the vendor a right to rescind as it constitutes a fundamental breach of contract. This principle is unrestricted by the clause.

Clause 75. **Land not to be mortgaged by vendor**

The clause places a positive obligation on the vendor in an instalment contract to seek the purchaser's consent to a sale or mortgage of the land subject to the instalment contract.

Clause 76. **Right of purchaser to lodge caveat**

The clause provides that a caveat lodged to protect a purchaser's interest only lapses on completion of the instalment contract and may only be removed by application to the Registrar-General or to the Court. The provisions of the *Land Title Bill* in respect of lapse and removal of caveats are not to apply.

Clause 77. **Right to require conveyance**

The clause gives a purchaser under an instalment contract the right to require a transfer of the land to him or her, with a mortgage back to the vendor, upon the following conditions being met:

- (a) that the purchaser is not in default under the contract;
- (b) that the vendor receives notice in writing from the purchaser of the purchaser's requirement.

The vendor is given a correlative right under the same conditions to require the purchase to accept a conveyance conditionally upon the purchaser executing a mortgage in favour of the vendor or such other person as the vendor may direct to secure repayment of the purchase moneys.

Clause 78. **Deposit of title documents and conveyance**

The clause allows a purchaser to direct a vendor to deposit the certificate of title and a duly executed instrument of transfer in favour of a purchaser in escrow with the Public Trustee or a person prescribed by the Minister pending the discharge of the contract by performance or breach. A vendor who fails to comply with the direction will be deemed to be in breach of condition and the purchaser is put to his or her election whether or not to terminate the contract and seek a remedy.

PART 7 - MORTGAGES

Clause 79 **Definitions**

This contains definitions of “instrument of mortgage” and “principal money”. Instrument of mortgage is defined so as to include mortgages of certain interests held under the *Mining Act*.

Clause 80. **Implied obligations in mortgages**

The clause implies a covenant currently contained in the *Real Property Act* with the addition of a covenant to pay the principal money and interest.

Clause 81. **Variation of mortgage**

The clause provides that mortgages can be varied.

Clause 82. **Inspection and production of instruments**

Subclause (1) provides that the mortgagor (land owner) has certain rights of access to documents held by the mortgagee (creditor). The sub clause has limited application in respect of registered land.

Subclauses (2) to (6) give a mortgagor a statutory right to compel the mortgagee to produce the title for registration of a second mortgage.

Some mortgages contain a covenant preventing the mortgagor from granting a second mortgage without the mortgagee’s consent. Subclause (7) enables mortgagors to grant second or subsequent mortgages without committing a breach of a prior mortgage or incurring any penalty or other disadvantage.

Clause 83. **Actions for possession by mortgagors**

This clause provides the mortgagor with certain rights if the mortgagee has taken possession or receipts without giving appropriate notice. The clause re-enacts the substance of section 6v of the *Supreme Court Act 1878*.

Clause 84. **Mortgagee of leasehold land coming into possession of rent and profits**

This clause provides for the payment in certain situations of rent by the lessee to the mortgagee. It will replace section 139 of the *Real Property Act*.

Clause 85. **Tacking and further advances**

Tacking is a legal doctrine applying where property is successively mortgaged and the third mortgagee “tacks” his mortgage on to the first mortgage thereby squeezing out the second mortgage. The object of this clause is to abolish the right to tack except in the 3 circumstances specifically permitted. Subclause (3) preserves the rights of banks which have granted mortgages to secure a current account.

Clause 86 . **Powers incident to interest of mortgages/power of sale**

The clause replaces (in part) section 10 of Act No. 7 of 1862. It is a word saving provision and such powers of the mortgagee are commonly inserted in all mortgages.

Clause 87 **Powers incident to interest of mortgages/power of sale**

The clauses replaces (in part) section 10 of Act No. 7 of 1862. It is a word saving provision and such powers of the mortgagee when selling land are commonly inserted in all mortgages

Clause 88. **Application of sections 86 and 87**

This provides that that the powers of mortgagees referred to in sections 86 and 87 may be varied.

Division 2 - Exercise of Power of Sale

Clause 89. **Regulation of exercise of power of sale**

The clause deals with the processes that must be followed when a mortgagee is exercising a power of sale. It will replace and extend

section 12 of Act No. 7 of 1862, sections 132 and 133 of the *Real Property Act* and Regulation 6(4) of the Real Property Regulations concerning sales under statutory charges.

Clause 90. **Duty of mortgagee as to sale price**

The clause imposes a duty on a mortgagee that he must act not only in good faith but must also take reasonable precautions to ensure that the property is sold at market value. A purchaser is protected if the mortgagee is in breach of his duty. This section will replace Regulation 6(4) of the Real Property Regulations concerning sales under statutory charges.

Clause 91. **Effect of conveyance on sale**

This clause provides that where land is sold by a mortgagee the purchaser takes the land subject only to those interests that had priority to the mortgage under which the land has been transferred. The clause replaces section 14 of Act No. 7 of 1862 and section 136 of the *Real Property Act*.

Clause 92. **Protection of purchasers**

This clause protects the purchaser from a mortgagee against the possible consequences of a procedural or other failures in the exercise of the mortgagee's power of sale.

When express powers of sale began to be inserted in mortgage instruments, it became common to include a purchaser's protection clause. This type of clause was copied into the Property Law Acts of the UK and the Australian States. The clause is in standard form. The person whose land has been sold may have remedies against the mortgagee.

Clause 93. **Application of proceeds of sale**

The clause sets out what happens with the monies that are received following the exercise of the mortgagee's power of sale. It replaces section 135 of the *Real Property Act*.

Clause 94. **Provisions as to exercise of power of sale**

The clause extends, replaces and modernises section 15 of Act No 7 of 1862. It sets out, in statutory form, incidents relative to the exercise of the power of sale and follows similar provisions in the UK and the Australian States.

Clause 95. **Mortgagee's receipts, discharges, etc**

The clause extends and modernises section 11 of Act No. 7 of 1862 and provides protection for a mortgagor or other person in making payment to the mortgagee. It also imposes a duty on the mortgagee to apply monies received by a mortgagee from a person other than the mortgagor or purchaser under a statutory power of sale in the same way as monies received pursuant to the exercise of a power of sale.

Clause 96. **Appointment, powers, remuneration and duties of receiver**

The clause provides for the appointment of receivers. It replaces and expands on sections 16-22 of the Act No. 7 of 1862. It follows similar legislation in the UK and the Australian States.

Division 3 - Miscellaneous

Clause 97. **Effect of advance on joint account**

The purpose of the clause is to enable surviving co-mortgagees to give a complete discharge for the mortgage money which is not the case at common law. It follows similar legislation in the UK and the Australian States.

Clause 98. **Obligation to transfer instead of discharging mortgage**

This clause gives a mortgagor, where entitled to redeem the mortgage, the right to require the mortgagee to transfer the mortgage to a third party rather than discharging the mortgage. It follows similar legislation in the UK and the Australian States.

Clause 99. **Relief against provision for acceleration of payment**

Under the existing law, a mortgagor has no redress against a clause imposing payment of an accelerated sum for default except to discharge the mortgage. The Supreme Court has no power in equity to intervene. Under the clause a mortgagor can obtain relief in the circumstances set out in the subclauses (2) and (3). It follows similar legislation in the UK and Queensland.

Clause 100. **Mortgagee accepting interest on overdue mortgage not to call up without notice**

Traditionally mortgages contained a provision to repay the principal six months after the date of the mortgage. Both parties to the transaction knew and intended that the principal would not in fact be paid on the due date. However, after the six months elapsed without payment of the principal, the mortgagee was entitled to call up the principal without any period of notice to the mortgagor and even sue for it without any notice at all; and the acceptance of interest by the mortgagee after due date for payment of the principal was not a waiver of the mortgagee's right to sue for the principal.

The clause grants relief to a mortgagor by requiring the mortgagee to give 30 days notice to call in the mortgage. There are similar provisions in NSW, Queensland and New Zealand.

Clause 101. **Interest of mortgagor not seizable on judgment for mortgage debt**

The clause prevents mortgaged land being seized by the creditor in execution of a judgment obtained by a creditor. It is based on similar provisions in NSW, Queensland and New York.

The High Court case of *Simpson v Forrester* (1973) clearly demonstrates that where a mortgagee is entitled to purchase the mortgaged property at a sale by the Sheriff in execution of a judgment against the mortgagor based on her or his personal obligation to the mortgagee, it can result in serious financial detriment to the mortgagor.

Clause 102. **Abolition of consolidation of mortgages**

This clause abolishes an inconvenient rule of law whereby a mortgagee, holding separate mortgages on different properties, originally created by the same mortgagor, is entitled to demand that the mortgagor who is default must, if he wishes to redeem, redeem all the mortgages. The rule has been abolished in the UK and the Australian States.

Clause 103. **Sale of mortgaged property in proceedings for redemption or foreclosure**

At common law, the Court has no right to order the sale of mortgaged property in foreclosure, redemption or other proceedings. This lack of power could be a source of difficulty and injustice to the mortgagor or mortgagee (depending on whether the value of the mortgaged property is more or less than the mortgage debt). The clause provides the Supreme Court with very wide powers to order a sale of mortgaged property. The clause follows similar legislation in the UK and the Australian States.

Clause 104. **Realisation of equitable charges by the Court**

This clause is ancillary to clause 103. It enables the Supreme Court, on ordering a sale relating to an equitable mortgage, to vest the title in the mortgagee so that a sale can take place. The clause is found in the UK, Victoria, South Australia, Western Australia and Queensland.

Clause 105. **Payment of mortgage money to Public Trustee in case of absent or unknown mortgagees**

This clause permits the payment to the Public Trustee of monies due to mortgagors who cannot be found. It will replace section 146 of the *Real Property Act*.

Clause 106. **Discharge of mortgage by Public Trustee**

This clause permits the Public Trustee to discharge mortgages where monies are paid as referred to in clause 105. It replaces section 147 of the *Real Property Act*.

Clause 107. **Subsequent mortgagees may redeem prior mortgages etc**

This clause permits mortgagees, in specified circumstances, to make payments due under other mortgages. The clause replaces section 131 of the *Real Property Act*.

PART 8 - LEASES AND TENANCIES

Division 1 - Rights Powers and Obligations

Clause 108. **Tenancy Act to prevail**

The *Tenancy Act* has specific provisions relating to business and residential tenancies. Part 8 has application to all tenancies but where inconsistent with the *Tenancy Act*, the *Tenancy Act* prevails.

Clause 109. **Abolition of interesse termini as to reversionary leases and leases for lives**

The common law rule is that prior to actual entry into possession, a lessee acquires only a right of entry or interesse termini. This falls short of an actual estate in land and prevents the creation of an effective reversionary leases (i.e. a lease to commence on the expiry of an existing lease). The clause abolishes the rule and a lessee has an estate from the date fixed for commencement of the term without actual entry.

Subclause (3) provides that any term limited to take effect more than 21 years from the date of commencement of the instrument purporting to create it, shall be void. There are similar provisions in the UK, NSW and Queensland.

Clause 110. **Voluntary waste**

This clause provides that a lessee must not commit voluntary waste. The clause is a modern version of the *Statute of Marlborough 1267*.

Clause 111. **Obligations of lessee**

This clause implies covenants to pay rent, lease abatement and to keep and yield up the premises in good repair. The clause replaces and section 124 of the *Real Property Act* which only relates to registered leases. Clause 111 is wider than section 124 because it covers abatement of rent and because it is applicable to most registered and unregistered leases.

Clauses 112. **Obligations in short leases**

The clause only applies to leases for a term of three years or less where the premises are leased for the purpose, or principally for the purpose, of human habitation.

It places upon the lessor an obligation to provide and maintain such premises in a condition reasonably fit for human habitation.

Clause 113. **Powers of lessor**

This clause provides for standard terms for leases in respect of entering premises, repairs and re-entry. It replaces, in more detailed terms, section 125 of the *Real Property Act*.

Clause 114. **Short forms of covenants and obligations of lessees**

This clause provides for various standard covenants and obligations on the part of lessees. The clause replaces, in modern form, section 265 and the 16th schedule of the *Real Property Act*.

The clause does not apply to leases made prior to the commencement of the Act.

Clause 115. **Cases in which statutory obligations or powers not implied**

Clause 115 provides that clauses 111 and 114 do not apply where it is clear that the provisions implied by those clauses have been physically struck out.

Clause 116. **Lessee to give notice of ejection to lessor**

This clause provides that the lessee must advise the lessor of various legal proceedings served on the leased premises. The purpose of this clause is to ensure that the lessor receives notice of any process served on the premises for their recovery so that the lessor may properly defend those proceedings.

Clause 117. **Provisions as to covenants to repair**

Subclause (1) restricts the amount of damages recoverable on a breach of a covenant to keep or put premises in good repair during the lease or leave or put the premises in good repair at the end of the lease to the amount by which the value of the reversion in the premises is diminished.

Subclause (2) provides that damages are not recoverable where the premises might or would be pulled down or would have been structurally altered after termination of the lease.

Subclauses (3)-(4) provide that there is no right of re-entry unless certain procedural requirements are followed.

Subclause (5) provides that the clause applies to leases created before or after the commencement of the Act.

Clause 118. **No seizure of goods to recover unpaid rent**

Distress for rent has been abolished in the Territory. See clause 119. This clause, for the sake of clarifying the effect of the abolition, states a plain language version of what is meant by “distress for rent”.

Clause 119. **Abolition of replevin and distress for rent**

This clause replaces section 30 of the *Law Reform (Miscellaneous Provisions) Act*. Section 30 was enacted by Act 31, 1990. Previous provisions (now repealed) in residential tenancy legislation had, to some extent, already abolished “distress for rent”.

Division 2 - Surrenders, assignments and waiver

Clause 120. **Head leases may be renewed without surrendering under leases**

If a lessee for a term, who had sub-let for a lesser term, surrendered his or her term to the lessor, this surrender of the head lease destroyed the reversion of the underlease and the underlessee’s liability for rent ceased.

This clause allows a lessee to surrender his lease for a new lease without surrender of any underlease. The clause has its origins in section 6 of *the Landlord and Tenant Act 1730* and there are similar provisions in the UK, NSW and Queensland.

Clause 121. **Provision as to attornment as to tenants**

Attornment was an acknowledgement by a lessee that the lessee was the tenant to another person who was the landlord and this acknowledgement created the relationship of landlord and tenant. Prior to 1709 an attornment was necessary where the lessor assigned his or her reversion in order to complete the title of the reversioner.

This clause renders obsolete sections 9 and 10 of the Statute 4 & 5 Anne 1709 and section 11 of the *Distress for Rent Act 1737*.

Clause 122. **When reversion on lease is surrendered etc, next estate is to be taken to be the reversion**

The purpose of this clause is to ensure that where the head lease has been surrendered or has merged, the covenants of the underlease will be preserved for the benefit of the reversioner or his or her grantee thus obviating the common law rule that merger or surrender destroyed all the incidents to the reversion.

Clause 123. **Apportionment of conditions on severance**

This clause has application to a situation where part of the land the subject of a lease is transferred so that the reversion, which previously vested solely in the original lessor, now vests partly in one person and partly in another.

The purpose of this clause is to obviate the common law rule laid down in *Dumpro's Case* 1603, that conditions, unlike covenants, are incapable of severance and hence that rights of re-entry dependent upon conditions are not apportionable if the reversion is severed. There are similar provisions in the UK, NSW, Victoria, Western Australia, Tasmania and Queensland.

Clause 124. **Rent and benefit of lessee's covenants to run with the reversion**

This clause enables assignees of reversions, whether of the whole or of a part, to sue on such of the lessee's covenants as touch and concern the land. It is a re-statement of the provisions of the *Grantees of Reversions Act* 1540. It follows legislation in the UK, NSW and Queensland.

Clause 125. **Obligations of lessor's covenants to run with reversion**

This clause is complementary to clause 124 and is directed to ensuring that the burden as well as the benefit of the covenants in the lease pass to the assignee of the reversion. As with clause 124, it is a re-statement of the *Grantees of Reversions Act* 1540 and follows legislation in the UK, NSW and Queensland.

Clause 126. **Waiver of a covenant in a lease**

This clause overcomes a further consequence of the rule in *Dumpro's Case* (1603) (see clause 123), to the effect that waiver of a condition was treated as a waiver of all future breaches. The clause limits the effect of actual waiver by a lessor to that breach to which it specifically relates. It follows similar legislation in the UK, NSW, and Queensland.

Clause 127. **Effect of licences granted to lessee**

A licence to a lessee to do any act which would otherwise constitute a breach of covenant or condition does not, by this clause, prevent a lessor from taking action for the future breach of that covenant or condition unauthorised by the licence. Thus, against subsequent breach of covenant or condition not authorised specifically by the licence, the full powers of the lessor remain in force.

Sub-clause (3) refers specifically to the power to re-entry upon the lessee's assigning or subletting in breach of covenant. At common law, a single licence to assign or sublet, whether general or particular, operated as a total waiver of the condition in the lease against assigning or subletting. It was considered that the condition was entire and any partial waiver or release, for example, in favour of one or two lessees only, destroyed the effect of the condition. The section overcomes the common law rule. The clause has equivalents in all Australian States except South Australia.

Clause 128. **Provisions as to covenants not to assign etc without licence or consent**

The clause is intended to alter the common provisions contained in leases which prohibit assignment or underletting without consent. The provisions are quite often absolute while others are qualified by the requirement that consent shall not be unreasonably withheld. The onus of proving unreasonableness remains on the tenant. Similar provisions appear in legislation in the UK and all Australian States except South Australia and Tasmania.

Clause 129. **Involuntary assignment no breach of covenant**

The clause deals with cases where an assignment takes place without any act on the part of the lessee, for example, in the case of bankruptcy or insolvency. It saves such assignments from constituting a breach of covenant.

Division 3 - Relief from Forfeiture

Clause 130. **Application and interpretation**

Division 3 governs the circumstances in which leases may be forfeited. Clause 130 contains relevant definitions and also provides that the provisions do not apply to various types of crown leases, mining leases and underleases of crown and mining leases.

Clause 131. **Restriction on forfeiture**

The clause prevents a lessor from exercising a right of re-entry unless authorised by an order of the Supreme Court or the lessee has abandoned or voluntarily given up possession of the leased premises. The clause requires a lessor seeking to re-enter premises to serve a notice in the lessee prior to Court action.

Clause 132. **Relief against Forfeiture**

Provisions relating to relief from forfeiture were previously contained in sections 5 to 10 of the *Property Act 1860* and sections 1 to 3 of the *Common Law Procedure Act 1862*. These provisions only had limited operation and in many respects a lease remained liable for forfeiture without relief for even the most trivial breaches of covenant. This can lead to most serious injustice, especially in the case of long leases where considerable improvements may have been effected by a lessee who may have had to pay a heavy premium for the lease.

The proposed provision follows similar legislation in the UK, NSW and Queensland. The intent of the provision is to confer on the Supreme Court a complete discretion as to whether relief should be granted and if so, upon what terms.

Clause 133. **Power of court to protect under-lessee on forfeiture of superior leases**

The clause protects under-lessees whose estates may be threatened upon forfeiture of the head lease for any reason. It basically provides that the underlessee may take over the balance of the sublessors term on terms and conditions set by the Supreme Court.

Clause 134. **Costs and expenses**

The purpose of this clause is to ensure that any expense involved in the Supreme Court gaining relief against forfeiture is borne by the defaulting lessee.

Clause 135. **Relief against notice to effect decorative repairs**

This clause is intended to enable the Supreme Court to relieve a lessee from liability to effect decorative repairs if such repairs are unreasonably required by the lessor. It refers only to internal decorative repairs. Its aim is to prevent lessors taking advantage of lessees (who perhaps only have a short term, or if a long term, a short period remaining before expiry) by forcing them, under threat of forfeiture, to undertake decorative repairs improving the capital value of the premises. It follows UK and Queensland legislation.

Clause 136. **Options to renew leases**

There is some legal doubt whether an option in a lease can be exercised after the end of the lease but before the end of any lawful holding over period. The better view is that it can be so exercised but the clause makes the position clear.

Clause 137. **Relief against loss of lessee's option**

Options for renewal or extensions of leases or for the purchase of the reversion are commonly conferred in or in conjunction with leases. Usually the exercise of such options is made dependent or conditional upon the due performance and observance by the lessee of the conditions and covenants in the lease. The rule is that such

options are strictly construed and will be lost to the lessee by reason of even the most trivial breach on his part e.g. a single late payment of rent.

The clause alters this outcome by permitting the Supreme Court to make such orders as it thinks fit for the purpose of granting relief.

This clause applies to leases granted before or after the commencement of the Act and whether there is an intention to the contrary in the lease.

Division 4 - Termination of Tenancies

The terminations of business and residential tenancies are covered by the provisions of the *Tenancy Act*. The Division therefore only has application to the termination of other leases e.g. sports grounds, race-tracks, agricultural sub leases, pastoral subleases etc. See clause 108.

Clause 138. **Abolition of yearly tenancies arising by implication of law**

The clause reduces the length of notice from six months to one month expiring at any time in respect of a tenancy which has no agreement as to duration.

Clause 139. **Notice of termination of tenancy**

Clause 138 is a general clause describing the notice requirements for the termination of periodic and other tenancies.

Clause 140. **Form and content of notices**

Clause 140 states the general rules as to the form of the giving of notice. Such notices can be given orally or in writing.

Clause 141. **Manner of giving notice**

Clause 141 states the general rules as to the manner of the giving of notice.

Clause 142. **Notice to terminate weekly tenancy**

Clause 142 provides for the determination of the time by which notice of termination of a weekly tenancy must be given.

Clause 143. **Notice to terminate monthly tenancy**

Clause 143 provides for the determination of the time by which notice of termination of a monthly tenancy must be given.

Clause 144. **Notice to terminate yearly tenancy**

Clause 144 provides for the determination of the time by which notice of termination of a yearly tenancy must be given

Clause 145. **Notice to terminate other periodic tenancy**

Clause 145 provides for the determination of the time by which notice of termination of periodic tenancies (other than weekly, yearly or monthly) must be given.

Division 5 - Holding over Leased Premises

Clauses 146. **Tenants etc holding over to pay double market rent**

The clause has its origin in the *Landlord and Tenant Act 1730* and is intended to discourage tenants from holding over after the determination of their term and after proper demand and notice in accordance with the section have been made.

It renders such tenants liable to the person so excluded from possession, to pay at the rate of double the market rent for the period of the holding over. The holding over must be wilful. The clause also applies where a tenant gives notice to quit at a specified time and does not quit at that time.

PART 9 - INCORPOREAL HEREDITAMENTS AND APPURTENANT RIGHTS

Division 1 - Application

Clause 147. **Saving of existing law**

This clause makes clear that the law relating to easements in force prior to the commencement of this Act continues to apply to them. However where that law is inconsistent with this Act the provisions of this Act will prevail.

Division 2 - Easements

Clause 148. **Definitions**

This clause provides definitions of “easement”, “easement in gross”, “dominant land” and “servient land”.

Clause 149. **Easement in gross**

Under the *Crown Lands Act*, an easement in gross may only be created in favour of the Territory, the council of a municipality or a prescribed public authority. The clause alters the common law position and will permit an easement in gross to be created in favour of any person.

Clause 150. **Manner of creating easements and easements in gross**

The clause ensures uniformity with the Land Title Bill provisions relating to the creation of easements and easements in gross.

The relevant provisions of the Land Title Bill will provide that easements and easements in gross can be granted by instrument, by reserved out of the title at the time of grant of title by the Crown or by creation by a registered subdivision plan under the *Planning Act*.

Clause 151. **Description of certain easements etc**

This clause provides for short form descriptions of certain standard types of easements. It replaces section 65 of the *Crown Lands Act* and section 65 of the *Planning Act*. It applies to easements and

easements in gross created after the commencement of this Act. Easements and easements in gross created by reference to section 65 of the *Crown Lands Act* and section 65 of the *Planning Act* shall continue to be governed by the provisions in force at the time of registration.

Clause 152. **Benefit of easements and easements in gross**

The common law and equity had developed somewhat complex rules as to the benefit and burden of easements. This clause sets out clearly who can enforce easements and easements in gross.

Clause 153. **Burden of easements and easements in gross**

The clause is complementary to clause 152 and sets out clearly who is bound by easements and easements in gross.

Clause 154. **Powers of others in relation to easements in gross**

This clause is ancillary to clause 151 and replaces section 66 of the *Crown Lands Act* and section 65(8) of the *Planning Act*.

Clause 155. **Conditions of easements**

The clause spells out that the rights under an easement are subject to compliance with conditions applying to the exercise of those rights.

Clause 156. **Right to support of land and building**

The clause attaches an obligation upon neighbouring owners not to do anything which will withdraw support from any land or specifically from any building, structure or erection placed on it.

Division 3 - Statutory Rights of User

Clauses 157. **Definitions and application**

The clause provides definitions of “owner”, “dominant land”, “servient land”, “statutory right of user”, “utility”.

The clause also provides that the provisions dealing with statutory rights of user are not to apply to crown land and aboriginal land.

Clause 158. **Imposition of statutory right of user in respect of land**

Sometimes it is necessary, to enable a proper use of land, or to enable the full enjoyment of land, for the owners of that land to have access to it over adjoining land for particular purposes such as drainage, electricity, telephone or a general right of way. The object of the clause is to enable an owner in that position to have a means of forcing her or his neighbours to grant these rights subject to appropriate safeguards.

Clauses 159. **Modification or extinguishment of statutory right of user**

The clause is complementary to clause 158 and enables an owner of servient or dominant land to apply to the Supreme Court for an order modifying or extinguishing the statutory right of users imposed on the land under clause 158.

Clause 160. **Powers of Court**

The clause is complementary to clauses 158 and 159 and sets out the powers of the Supreme Court in respect of an application under clause 159.

Division 4 - Covenants

Clause 161. **Definitions**

This clause contains definitions of “covenant”, “covenant in gross”, “dominant land”, “plan of subdivision” and “servient land”.

Clause 162. **Covenants in gross**

A covenant in gross is a statutory creation. It does not exist at common law. The clause creates such an interest but provides that it may only be created in favour of the Territory, the council of a municipality or a statutory corporation or a person prescribed by the Minister by notice in the Gazette.

Clause 163. **Manner of creating covenants and covenants in gross**

There has been doubt whether restrictive covenants, other than restrictive covenants created under the *Crown Lands Act*, were registrable under the *Real Property Act*. Positive covenants were not registrable. Under the Land Title Bill, positive and restrictive covenants and covenants in gross are registrable. The clause provides for uniformity with the Land Title Bill provision relating to the manner of creation of covenants and covenants in gross.

Clause 164. **Benefit of covenants and covenants in gross**

As with easements, the rules as to who could enforce covenants and who was bound by covenants were somewhat complex. The clause sets out clearly who can enforce covenants and covenants in gross. The clause enables owners of properties in a subdivision to enforce restrictive covenants imposed by a developer. As positive covenants have never “run with the land”, the clause will not apply to positive covenants created prior to the commencement of the Act.

This clause operates subject to clause 166.

Clause 165. **Burden of covenants and covenants in gross**

The clause is complementary to clause 164. All persons who have an interest in the land burdened by the covenant or covenant in gross are bound. Restrictive and access covenants bind occupiers also. This is because such covenants are not onerous (no positive action or expenditure of money is involved) and they will be ineffective if any single person fails to comply with them.

Subclause (2) is designed to prevent the burden of performance of what may be an onerous covenant being unfairly imposed on persons whose interest in the servient land consists of a lease for 21 years or some lesser interest. The owner of the burdened estate in the servient land even if it is a very short leasehold interest and a mortgagee will always be bound.

As with clause 164, the clause does not apply to positive covenants that may have been sought to have been created prior to the commencement of the Act.

This clause operates subject to clause 166.

Clause 166. **Intention of original parties to prevail**

This clause provides that the clauses dealing with the operation of covenants operate subject to intentions to the contrary that may be contained in the instrument that created the covenant.

Clause 167. **Liability for non compliance with covenants**

This clause deals with persons who, being bound by a covenant, are liable for a particular contravention of it. In the case of restrictive and access covenants, they are only enforceable against a person bound by the obligation to the extent that the conduct of that person amounts to the doing an act (or permitting or suffering an act to be done) which is prohibited by the covenant. This is because contravention of restrictive and access obligations can (unlike other covenants) only arise through the taking of positive action. Those who neither contravene the covenant nor permit it to be contravened should not be liable for the contravention. A mortgagee not in possession or who has not appointed a receiver will not usually be in a position to monitor the observance and performance of covenants.

This clause operates subject to clause 166.

Clause 168. **Extinguishment of covenants by fluxion of time**

Covenants are often imposed by developers who may leave the Northern Territory or go into liquidation. Over a period of time the covenants may lose their utility but still appear on titles to property in the development. This clause places a time limit of 20 years on the covenant. The covenant ceases to have effect after that time unless a person having the benefit of the covenant lodges an instrument at

the Land Titles Office renewing the covenant. The section does not apply to the covenants referred to in subclause (3).

The clause only applies to covenants created after the commencement of the Act.

Clause 169. **Declaration as to nature etc of covenant**

The clause provides that an interested person may apply to the Supreme Court for a declaration on the nature and enforceability of covenants.

Division 5 - Modification and Extinguishment

Clauses 170. **Definitions**

This clause contains definitions of “easement” and “covenant”.

Clause 171. **Modification or extinguishment of easements and covenants**

Many circumstances may arise over the course of time which change the use and enjoyment of land which render an easement or covenant unsuitable, inappropriate or obsolete. The person having the benefit of the easement or covenant may be absent from the Northern Territory or otherwise unwilling to agree to a modification or extinguishment. The clause gives any person interested in the land a right to apply to the Supreme Court for an order modifying or extinguishing an easement or covenant in enumerated circumstances. In assessing whether or not such easements or covenants should be modified or extinguished, the Court must not only consider the subjective situation of the parties, but must consult the general public benefit. There is similar legislation in the UK, NSW, Victoria and Queensland.

Clause 172. **Court Proceedings**

This clause provides for the Supreme Court to direct that notice of applications under clause 171 be given to persons (including planning authorities) who may have an interest.

Clause 173. **Effect of order**

This clause provides for the effect of orders made by the Supreme Court under clause 171.

Clause 174. **Application may be made in other proceedings**

This clause provides a power for the Supreme Court to make appropriate orders under this Division where other proceedings have commenced regarding a covenant.

Clause 175. **Powers of Court**

This clause sets out the powers of the Supreme Court in proceedings under this Division.

PART 10 - THINGS IN ACTION

Clause 176. **Assignment of thing in action**

This clause re-enacts and replaces section 60 of the *Supreme Court Act*. The clause sets out rules governing priorities in the assignment of debts and choses in action.

PART 11 - PERPETUITIES

Part 11 is a re-enactment of the provisions currently contained in the *Perpetuities Act 1994*.

Clause 177 **Interpretation**

This clause contains definitions of “power of appointment”, “settlement”, “rule against perpetual trusts”, “trust”, “trustee” and “will”.

Clause 178. **Application**

The clause provides that the Act applies retrospectively as well as prospectively to powers of appointment or trusts whenever created.

Clause 179. **Settlements by Crown not bound**

This clause provides that the settlements made by the Crown are not affected by the rule against perpetuities or the rule against perpetual trusts.

Clause 180. **Powers of appointment**

This clause defines special and general powers of appointment.

Clause 181. **Perpetuity period**

This clause provides that, for the purposes of the rule against perpetuities, the perpetuity period is a life in being plus 21 years, or 80 years, whichever is specified in the instrument.

Clause 182. **Unborn husband or wife**

The clause provides that an unborn husband or wife is to be treated as a life in being.

Clauses 183. **Presumptions and evidence as to future parenthood**

This clause provides rebuttable presumptions that a male of female under 12 years of age or a female over 55 years of age cannot conceive.

Clause 184. **Wait- and- see**

This clause provides that the rule of perpetuities is not to be a rule of initial certainty but a rule of wait and see.

Clause 185. **Reduction of age and exclusion of class members**

This clause provides that the Supreme Court may reduce the age at which a person takes an interest for exclude members of a class for the purposes of saving a gift.

Clause 186. **Order of application of remedial provisions**

This clause provides for the order in which the rules created by clauses 184 and 185 are to be applied.

Clause 187. **Administrative powers of trustees**

This clause provides that the rule against perpetuities does not invalidate a power an administrative power.

Clause 188. **Remuneration of trustees**

This clause provides that the rule against perpetuities does not invalidate a power to remunerate a trustee.

Clause 189. **Superannuation and other funds**

This clause provides that the rule against perpetuities does not invalidate a superannuation or similar fund.

Clause 190. **Determinable interests**

This clause provides technical rules for ascertaining when one interest ends and another is created

Clause 191. **Options**

This clause provides that the rule does not apply to certain options.

Clause 192. **Trusts for purposes that are not charitable**

This clause provides that the rule does not apply to certain non charitable trusts..

Clause 193. **Dependent interests**

This clause provides that the rule does not invalidate a dependent interest that is otherwise valid..

Clause 194. **Mitigation of rule of remorseless construction**

This clause provides that the rule does not invalidate a gift is one construction can save a gift..

Clause 195. **Abolition of double possibility rule**

This clause abolishes the double possibility rule.

Clause 196. **Accumulation of income**

This clause provides for the accumulation of income. The *Accumulations Act 1800 (30 and 40 Geo.3.c.98)* of the United Kingdom was repealed by the *Perpetuities Act 1994*.

Part 12 - Powers of appointment

Clause 197. **Application of Part**

This clause applies the new statutory provisions to existing powers of appointment.

Clause 198. **Mode of exercise of powers**

The clause repeats, in more modern language, the provisions of section 13 of the *Property Law Act 1860*. The provision ensures that instruments are not invalidated merely because they do not comply with certain formalities in the instrument of appointment.

Clause 199. **Validation of appointments if objects are excluded or take illusory shares**

Apart from statute, the rule was that an appointment under a non exclusive power, that is, one authorising the donee of a power to prescribe merely the shares or proportions in which the objects of the

power might take, was void unless there was an appointment to each object of a share no matter how trivial. The clause repeats, in more modern language, the provisions of the *Illusory Appointment Act* 1830.

Clause 200. Protection of purchasers claiming under certain void appointments

An appointment may amount to a fraudulent exercise of power on any of three grounds namely:

- (a) where it was made with a corrupt purpose;
- (b) where it was made with a purpose foreign to the power;
- (c) where it was made in pursuance of a bargain to benefit a person who is not a proper object of the power.

The effect of fraud in any of the above forms is that even if the fraud affects only part, the entire appointment is bad unless the fraudulent part is clearly severable from the rest. This has the effect that a purchaser for value, even without notice of the fraud, of an equitable interest in the subject matter appointed, does not acquire title thereto since the appointment is void and his right is subsequent in time to that of the person entitled.

This clause operates to validate certain appointments that might otherwise be invalid under these rules. The clause operates in respect of appointments made before or after the commencement of the Act.

Clause 201. Disclaimer etc of powers

A collateral power, that is, a power given to a person who has no interest in the property of the subject of the power and a power coupled with an interest, cannot be released or disclaimed or otherwise extinguished by the donee of the power. Legislation has been introduced in the UK and all the States but there has never been any legislation in the Northern Territory dealing with this.

This clause provides the machinery for disclaiming in these circumstances.

PART 13 - VOIDABLE DISPOSITIONS

Clause 202. **Voluntary conveyances to defraud creditors voidable**

The clause is derived from the *Fraudulent Conveyances Act* 1570. It makes statutory provision for avoiding voluntary conveyances made with intent to defraud creditors. A right to avoid is conferred upon any person prejudiced by the conveyance.

Clause 203. **Voluntary disposition of land voidable at instance of purchaser**

The clause is based on the *Fraudulent Conveyances Act* 1585 as interpreted by the Courts.

Clause 204. **Acquisitions of reversions at under value**

The object of the clause is to protect those expectant heirs who may be under some duress or coercion to sell their reversionary interests without knowledge or full appreciation of the value of those interests.

PART 14 - APPORTIONMENT

Clause 205. **Definitions**

This clause provides for definitions of “annuities”, “dividends” and “rents”.

Clause 206. **Rents etc apportionable in respect of time**

It is necessary to apportion rent when one of the parties to a lease transfers or loses his interest between the dates when rent is payable or when one party transfers or loses his interest in the lease. At common law, there was no apportionment in respect of time since rent only become due at the expiration of the period in respect of which it was reserved. Subclause (1) provides that rent and other periodical payments are apportionable generally in respect of time.

Subclause (2) declares that the apportioned part of any payment only becomes due and payable when the entire portion becomes due and

payable. In the case of the determination of rent by re-entry or an annuity by death, the apportioned part becomes payable only when the next entire portion would have been payable in ordinary circumstances.

By subclause (3) all persons, have the same remedies for recovering such apportioned parts as they did for recovering entire portions.

Subclause (4) applies as against a tenant whose liability for rent ceases between two rent days. A tenant's liability for rent may cease by operation of law when he or she becomes insolvent or is bankrupted, or in the case of company, goes into liquidation. The proportionate part is recoverable against the tenant the day after the entire portion would have fallen due.

Clause 207. **Exceptions and application**

This clause provides that Part 14 operates subject to a contrary intention the instrument of appointment and that Part 15 does not apply to render apportionable an annual sum payable under a policy of assurance.

PART 15 - MISCELLANEOUS

Clause 208. **Protection of legal practitioner etc**

The Bill grants powers to persons and implies covenants, conditions, terms and words in instruments or are made applicable to a contract for sale or other transaction. The section provides that such powers and covenants and terms are in law proper powers and a legal practitioner, conveyancing agent or trustee or executor or other person acting in a fiduciary position is not to be taken to be negligent if he omits, in good faith, to negative any of those powers, covenants, conditions or terms.

Clause 209. **Service of notices**

The clause deals with how notices required or authorised under the Act are to be served.

Clause 210. **Regulations**

The clause provides for the making of regulations.

Clause 211. **Repeals**

The clause provides for the repeal of certain Imperial Acts, South Australian Acts that still apply in the Northern Territory and Territory Acts. Separate legislation is to deal with consequential amendments.

Schedule 1. **Procedure for bona vacantia (clause 20(9))**

This schedule deals with the procedure to be followed with potential bona vacantia property.

Schedule 2. **Short forms of covenants in leases (clause 114)**

The schedule sets out the long forms for leases described by references to short forms of words.

Schedule 3. **Easements and easements in gross (clause 151)**

This schedule sets out the long forms for easements described by references to short forms of words.

Schedule 4. **Acts Repealed (clause 211)**

This schedule sets out the Acts to be repealed.

Clause 211. **Repeals**

NORTHERN TERRITORY LAW REFORM COMMITTEE

LAW OF PROPERTY BILL 1998

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**BILL PREPARED BY THE NORTHERN TERRITORY LAW REFORM COMMITTEE
WITH THE ASSISTANCE OF THE NORTHERN TERRITORY OFFICE OF
PARLIAMENTARY COUNSEL¹**

to consolidate, amend and reform the law
relating to conveyancing, property and contract,
and for related purposes

PART 1 — PRELIMINARY

1. SHORT TITLE

This Act may be cited as the *Law of Property Act 1998*.

2. COMMENCEMENT

This Act comes into operation on the date fixed by the Administrator by notice in the *Gazette*.

3. CROWN TO BE BOUND

Unless the contrary intention appears, this Act binds the Crown not only in right of the Territory but, to the extent that the legislative power of the Legislative Assembly permits, in all its other capacities.

4. DEFINITIONS

In this Act, unless the contrary intention appears —

"adult" means a person who is aged 18 years or more;

¹ The Committees acknowledge the fact that the Parliamentary Counsel has drafted the basic Bill. However, some small amendments have been made by or on the request of members of the subcommittee. Accordingly the Committee takes responsibility for way in which the Bill has been drafted. The Committee accepts that Parliamentary Counsel may re-draft provisions of the Bill at the time of enactment.

- "appropriate form" means an appropriate form as defined in section 4 of the *Land Title Act*;
- "approved form" means a form approved by the Minister;
- "bankruptcy" includes any act or proceeding in law having under an Act or an Act of the Commonwealth effects or results similar to those of bankruptcy, and includes the winding-up of an insolvent company;
- "certificate of title" means a certificate of title as defined in section 4 of the *Land Title Act*;
- "conveyance" includes a transfer of an interest in land and an assignment, appointment, lease, settlement and any other assurance of property by instrument except a will;
- "conveyancing agent" means a conveyancing agent within the meaning of section 5 of the *Agents Licensing Act*;
- "Court" means the Supreme Court;
- "deed" includes any instrument having under a law in force in the Territory the effect of a deed;
- "disposition" includes a conveyance, vesting instrument, declaration of trust, disclaimer, release and a release, devise, bequest, or an appointment of property contained in a will;
- "easement" means an easement or easement in gross within the meaning of Division 2 of Part 9;
- "encumbrance" includes a mortgage in fee or for a lesser interest, a trust for securing money, a lien and a charge of a portion, annuity or other capital or annual sum;
- "encumbrancee" has a meaning corresponding with that of encumbrance and includes every person entitled to the benefit of an encumbrance or to require payment to or satisfaction of an encumbrancee;
- "fine" includes a premium, foregift and a payment, consideration or benefit in the nature of a fine, premium or foregift;
- "Imperial Act" means a statute of England in force in the realm of England on or immediately before 28 December 1836;
- "income", in relation to land, includes rents and profits;
- "instrument" includes a deed, will and Act;
- "interest" includes an estate in land and a right;
- "land" includes an interest in land;

"land register" means the land register as defined in section 4 of the *Land Title Act*;

"Land Titles Office" means the Land Titles Office as defined in section 4 of the *Land Title Act*;

"Law Society" means the Law Society of the Northern Territory constituted under section 7 of the *Legal Practitioners Act*;

"minor" means a person who is aged less than 18 years;

"mortgage" includes —

- (a) a charge on property for securing —
 - (i) a debt; or
 - (ii) the payment of an annuity, rent charge or sum of money in favour of a person; and
- (b) a statutory charge or an overriding statutory charge;

"mortgagee" includes a person deriving title to a mortgage under the original mortgagee;

"mortgagee in possession" means a mortgagee who in right of a mortgage has entered into and is in possession of the mortgaged property;

"mortgage-money" means money or money's worth secured by a mortgage;

"mortgagor" includes a person who —

- (a) derives title to the equity of redemption under the original mortgagor; or
- (b) is entitled to redeem a mortgage,
according to the mortgagor's interest in the mortgaged property;

"notice" includes constructive notice;

"order" includes a judgment and decree of a court;

"overriding statutory charge" means an overriding statutory charge as defined in section 4 of the *Land Title Act*;

"possession", in relation to land, includes the receipt of income from land;

"property" includes an interest in real or personal property and a thing in action;

"prescribed" means prescribed by the Minister by notice in the *Gazette*;

"Public Trustee" means the Public Trustee for the Northern Territory appointed under the *Public Trustee Act*;

"purchaser" means a purchaser for valuable consideration and includes a lessee, mortgagee, or other person who for valuable consideration acquires an interest in property;

"registered" means registered under the *Land Title Act*;

"registration" means registration under the *Land Title Act*;

"rent" includes a yearly or other rent, toll, duty and royalty and any other reservation of rent by the acre, hectare, the ton, tonne or otherwise;

"sale" means the exchange of property for money;

"securities" include stocks, funds and shares;

"short lease" means a short lease as defined in section 4 of the *Land Title Act*;

"statutory charge" means a statutory charge as defined in section 4 of the *Land Title Act*;

"trustee company" means a trustee company within the meaning of the *Companies (Trustees and Personal Representatives) Act*;

"unregistered land" means land that is not registered;

"valuable consideration" includes marriage.

5. APPLICATION OF SECTIONS 9, 10, 11 AND 62

Nothing in section 9, 10, 11 or 62 —

- (a) has the affect of invalidating a disposition by will;
- (b) affects an interest validly created before the commencement of this Act;
- (c) affects the right to acquire an interest in land because of taking possession;
- (d) affects the law relating to part performance; or
- (e) affects a sale by order of the Court.

PART 2 — GENERAL RULES AFFECTING PROPERTY

6. EFFECT OF REPEAL OF STATUTE OF USES

(1) Subject to subsection (2), on the commencement of this Act an equitable interest in land is only capable of being validly created if an equivalent

equitable interest in real or personal property could have been validly created before the commencement.

(2) An interest in land that could, under the Statute of Uses, have been created as a legal interest is, on the commencement of this Act, capable of being created as an equitable interest only.

(3) If a voluntary conveyance is executed after the commencement of this Act, a resulting trust for the grantor is not to be implied only because the property is not expressed to be conveyed for the use or benefit of the grantee.

7. LANDS LIE IN GRANT ONLY

(1) All land and all interests in land lie in grant and are not capable of being conveyed by —

- (a) livery of seisin;
- (b) feoffment;
- (c) bargain and sale; or
- (d) lease and release.

(2) A conveyance of an interest in land may operate to pass the possession or the right of possession of an interest in land without actual entry but subject to all prior rights to the land.

(3) The use of the word "grant" is not necessary to convey land or to create an interest in land.

8. RESERVATION OF EASEMENTS, &C., IN CONVEYANCES OF LAND

(1) In a conveyance of land a reservation of an easement, right, liberty or privilege not exceeding in duration the estate conveyed in the land operates, without an execution of the conveyance or a re-grant by the grantee of the land out of which the reservation is made, to —

- (a) create the easement, right, liberty or privilege; and
- (b) vest the easement, right, liberty or privilege in possession in the person for whose benefit the reservation was made (whether or not the person is the grantor).

(2) Subsection (1) applies only to reservations made after the commencement of this Act.

9. CONVEYANCE OF LAND TO BE IN WRITING

(1) No conveyance of land is valid to pass an interest at law unless made by deed or in writing signed by the person making the conveyance.

- (2) Subsection (1) does not apply to —
 - (a) a disclaimer made under a law relating to bankruptcy whether in force before or after the commencement of this Act or a disclaimer not required to be evidenced in writing;
 - (b) a surrender by operation of law, including a surrender which may be lawfully effective without writing;
 - (c) a lease or tenancy or other conveyance not required by law to be made in writing;
 - (d) a vesting order; or
 - (e) a conveyance taking effect under an Act or an Act of the Commonwealth.

10. INSTRUMENTS REQUIRED TO BE IN WRITING

- (1) Subject to this Act —
 - (a) no interest in land can be created or disposed of except —
 - (i) by writing signed by the person creating or conveying the interest or by the person's agent lawfully authorised in writing;
 - (ii) by will; or
 - (iii) by operation of law;
 - (b) a declaration of trust in respect of land must be manifested and proved —
 - (i) by some writing signed by a person who is able to declare the trust; or
 - (ii) by will; and
 - (c) a disposition of an equitable interest or trust subsisting at the time of the disposition, must be manifested and proved —
 - (i) by some writing signed by the person disposing of the interest or trust or by the person's agent lawfully authorised in writing; or
 - (ii) by will.

(2) Subsection (1) does not affect the creation or operation of resulting, implied or constructive trusts.

11. CREATION OF INTERESTS IN LAND BY PAROL

(1) Subject to the *Tenancy Act*, an interest in land created by parol and neither put in writing nor signed by the person creating the interest, or by the

person's agent lawfully authorised in writing, is to have, whether or not consideration has been given for the interest, the force and effect of an interest at will only.

(2) Nothing in this Act affects the creation by parol of a lease taking effect in possession for a term not exceeding 3 years (including any term of renewal of the lease by the exercise of a right of renewal under the lease which together with the term would not exceed 3 years).

12. PERSONS TAKING WHO ARE NOT PARTIES

(1) In respect of a conveyance or other instrument executed after the commencement of this Act, a person may take —

- (a) an immediate or other interest in land; or
- (b) the benefit of any condition, right of entry, covenant or agreement over or in respect of land,

even though the person may not have executed the conveyance or other instrument, may not be named as a party to the conveyance or other instrument or may not have been identified or in existence at the date of execution of the conveyance or other instrument.

(2) A person referred to in subsection (1) may sue, and is entitled to all rights and remedies in respect of the conveyance or other instrument, as if the person had been named as a party to and had executed the conveyance or other instrument.

13. CONVEYANCES BY A PERSON TO THE PERSON, &C.

(1) In conveyances and leases made after 28 December 1836, personal property, including chattels real, may be conveyed or leased by a person to the person jointly with another person by the same means by which the property might be conveyed or leased by the person to another person.

(2) In conveyances or leases made after the commencement of this Act, freehold land or a thing in action may be conveyed or leased by a person to —

- (a) the person jointly with another person; and
- (b) to the person's spouse alone or jointly with another person,

by the same means by which the land or thing in action might be conveyed or leased by the person to another person.

(3) On the commencement of this Act a person may convey or lease land to, or vest land in, the person except for an estate in fee simple absolute in the land.

(4) If property is vested in two or more persons jointly (including as trustees or personal representatives) the persons may convey or lease, and are to be taken to have always been capable of conveying or leasing, the property to any one or more of themselves by the same means as if they were conveying or leasing the property to a third party.

(5) If a person in whose favour a conveyance or lease is made is, because of a fiduciary relationship or otherwise, precluded from validly carrying out the transaction, the conveyance or lease is liable to be set aside.

14. RIGHTS OF HUSBAND AND WIFE

A person and the person to whom he or she is legally married are to be treated as 2 persons for the purposes of an acquisition of an interest in property under a disposition made or coming into operation after the commencement of this Act.

15. PRESUMPTION THAT PARTIES ARE ADULTS

The persons expressed to be parties to a conveyance are, until the contrary is proved, to be presumed at the date of the conveyance to be adults or to have attained the other lesser age at which the parties have capacity to give effect to the conveyance.

16. MERGER

If the beneficial interest in an estate would not be taken to be merged or extinguished in equity, the estate is not to merge by operation of law only.

17. RESTRICTIONS ON OPERATION OF CONDITIONS OF FORFEITURE

(1) If a person is entitled to income (including an annuity or other periodical income) or any other property subject to a condition of forfeiture on alienation, whether voluntary or involuntary and whether with or without words of futurity —

- (a) unless the instrument containing the condition expressly provides to the contrary — no alienation (whether by way of charge or otherwise) of the income or other property made or occurring before the person becomes entitled to receive payment of the income or to call for a conveyance or delivery of the other property is to operate to create forfeiture under the condition unless the alienation is in operation at the time the person becomes entitled to the income or property; and
- (b) despite any provision to the contrary in the instrument containing the condition — no voluntary alienation made by the person in accordance with an order of the Court authorising the alienation is to operate to create forfeiture under the condition.

(2) Subsection (1) applies whether the condition of forfeiture is contained in an instrument executed, made or coming into operation before or after the commencement of this Act, but only if —

- (a) the person becomes entitled to receive payment of the income or to call for a conveyance or delivery of the other property; or
- (b) the income or other property is alienated,

after that commencement.

PART 3 — FREEHOLD ESTATES

18. FREEHOLD ESTATES CAPABLE OF CREATION

On the commencement of this Act, the following estates of freehold are capable of being created and, subject to this Act, of subsisting in land:

- (a) an estate in fee simple;
- (b) an estate for life or lives.

19. INCIDENTS OF TENURE ON GRANT IN FEE SIMPLE

(1) On the commencement of this Act, any tenure created by the Crown on granting an estate in fee simple is to be taken to be in free and common socage without any incident of tenure for the benefit of the Crown.

(2) If any quit rent issues to the Crown out of land, or the residue of any quit rent issues to the Crown out of land in respect of which quit rent has been apportioned or redeemed, the land or residue is released from quit rent.

20. ABOLITION OF ESCHEAT

(1) In respect of the property of a person dying intestate after the commencement of the *Administration and Probate Act* —

- (a) escheat is abolished; and
- (b) all the property, whether real or personal, is, subject to this section and the *Administration and Probate Act*, to be distributed in the manner and to the person or persons provided by that Act.

(2) The property of a corporation that is dissolved after the commencement of this Act is not to escheat, but the Crown is entitled to take as *bona vacantia* all the property, whether real or personal, that would apart from this Act be liable to escheat or pass to the Crown as *bona vacantia*.

(3) Despite this section, if the Crown, or it appears to the Minister that the Crown, has a right to any property by escheat or devolution or as *bona vacantia* on the death intestate of a person (whether the death occurred before or after the commencement of this Act), the Minister, on application being made for the waiver of that right, may, if he or she considers it reasonable to do so, by notice in the *Gazette* waive that right on the terms he or she thinks fit (which may include the payment of money) in favour of any of the following persons, whether belonging to the same or a different class:

- (a) dependants, whether kindred or not, of the intestate;
- (b) persons for whom the intestate might reasonably have been expected to make provision;
- (c) persons to whom the Crown would, if the Crown's title had been duly proved by inquisition, have the power to grant the property;

- (d) any other persons having, in the opinion of the Minister, a just claim to the grant of the property;
 - (e) trustees of persons referred to in paragraphs (a) to (d) inclusive.
- (4) Subject to subsection (8), on a right of the Crown being waived under subsection (3), the right vests in the person or persons in favour of whom the waiver is made.
- (5) For the purpose of giving effect to a waiver under subsection (3) the Minister may, by notice in the *Gazette* —
- (a) appoint a person the Minister considers suitable to be administrator of the property of the person who has died intestate ("the deceased");
 - (b) appoint a person to execute a conveyance or other document for the purpose of conveying, under the terms of the waiver, the property the subject of the waiver to the person or persons in whose favour the waiver is made; or
 - (c) specify the terms of the waiver and give the directions that the Minister considers necessary or desirable to give effect to the waiver (which terms and directions are to be complied with).
- (6) The person appointed under subsection (5)(a) to be administrator may apply to the Court for a grant of letters of administration of the property of the deceased, and the letters of administration may be granted accordingly.
- (7) For the purposes of the grant of the letters of administration and the administration under the grant, the property in respect of which the right of the Crown has been waived is to be taken to form part of the estate of the deceased to be administered under the terms of the waiver for the benefit of the person or persons in favour of whom the waiver is made.
- (8) A waiver under subsection (3) is to have the effect of a grant of the land or other property that is the subject of the waiver to the administrator appointed under this section or, if no administrator is appointed, to the person or persons in favour of whom the waiver is made.
- (9) This section is subject to Schedule 1 and all proceedings that may be brought under that Schedule.
- (10) Despite this section and the Crown's right, because of the death intestate of a person before the commencement of this Act, to any property of the person by escheat or devolution or as *bona vacantia*, the Public Trustee has and is to be taken to always have had (in addition to the powers of the Public Trustee under section 67A of the *Public Trustee Act*) the same power —
- (a) to obtain from the Court or otherwise under the *Administration and Probate Act* authority to administer the estate of the person; and
 - (b) to deal in due course of administration with the estate of the person,

as the Public Trustee has in a case where the Crown has no right by escheat or devolution or as *bona vacantia*.

(13) In this section, "intestate" means intestate within the meaning of Division 4 of Part III of the *Administration and Probate Act*.

21. ALIENATION IN FEE SIMPLE

Land held of the Crown for an estate in fee simple may be conveyed in fee simple without licence and without fine, and the person taking under the conveyance is to hold the land in the same manner as the land was held before the conveyance took effect.

22. ABOLITION OF ESTATES TAIL

(1) A limitation in an instrument coming into operation after the commencement of this Act that, but for this section, would create an estate tail (legal or equitable) in any land in favour of a person is to be taken to create an estate in fee simple (legal or equitable, as the case may be) in that land in favour of the person to the exclusion of —

- (a) all estates or other interests limited to take effect after the determination or in defeasance of the estate tail; and
- (b) all estates or other interests in reversion on the estate tail.

(2) If, after the commencement of this Act, a person is entitled, or would but for subsection (1) be entitled, to an estate tail (legal or equitable, and whether in possession, reversion, or remainder) in any land, the person is, subject to subsection (3), to be taken to be entitled to an estate in fee simple (legal or equitable, as the case may be) in the land to the exclusion of —

- (a) all estates or other interests limited to take effect after the determination or in defeasance of the estate tail; and
- (b) all estates or other interests in reversion on the estate tail.

(3) If a person referred to in subsection (2) is a minor and the interest in the land would pass to another person in the event of the death of the minor before he or she attains the age of 18 and he or she is without issue, then the minor is to be taken to take an estate in fee simple with an executory limitation over the interest on the happening of that event in favour of the other person.

(4) In this section, "estate tail" includes —

- (a) an estate in fee into which an estate tail is converted where the issue in tail are barred but persons claiming estates by way of remainder or otherwise are not barred; and
- (b) an estate in fee voidable or determinable by the entry of the issue in tail,

but does not include the estate of a tenant in tail after possibility of issue extinct.

(5) The Registrar-General may, on the lodgement of a request to him or her in the appropriate form, record the particulars in the land register that he or she considers necessary to give effect to this section.

23. ABOLITION OF QUASI-ENTAILS

A limitation in an instrument coming into operation after the commencement of this Act that, but for this section, would create in favour of a person a quasi-entail (legal or equitable) in respect of an estate for life or lives of another or others is to be taken to create in favour of the person an estate (legal or equitable, as the case may be) for the life or lives of the other or others.

24. LIABILITY OF LIFE TENANT FOR VOLUNTARY WASTE

(1) A tenant for life or lives must not commit voluntary waste.

(2) Nothing in subsection (1) applies to an estate or tenancy without impeachment of waste or affects a licence or other right to commit waste.

(3) A tenant who infringes subsection (1) is liable in damages to the tenant's person in remainder or reversioner, but this section imposes no criminal liability.

25. EQUITABLE WASTE

An estate for life without impeachment of waste does not confer, and is not to be taken to have conferred, on the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer the right expressly appears in the instrument creating the estate.

26. RECOVERY OF LAND ON DETERMINATION OF A LIFE OR LIVES

(1) A person having an interest in land determinable on a life or lives who, after the determination of the life or lives and without the express consent of the person next immediately entitled on or after the determination, holds over or continues in possession of the interest in the land or of the income of the land is liable in damages or to an account for the income to the person entitled after the determination of the life or lives to the interest in the land or the rents, profits or income, as the case may be.

(2) If a reversion, remainder or other interest in land is expectant on the determination of a life or lives, the reversioner, person in remainder or other person entitled to the reversion, remainder or interest may, in a proceeding claiming relief on the basis that a life or lives has or have determined, adduce evidence of the belief that the life or lives has or have determined and of the grounds on which the belief was formed.

(3) In proceedings referred to in subsection (2) —

(a) the Court may in its discretion order that, unless the person or persons on whose life or lives the reversion, remainder or other interest is expectant is or are —

(i) produced in court; or

(ii) otherwise shown to be living,

the person or persons are for the purposes of the proceedings to be accounted as dead and relief may be given accordingly;

(b) if a person in respect of whom it is material that the person be shown to be living or not is shown to have —

(i) remained beyond Australia; or

(ii) otherwise absented himself or herself from the place in which the person if in Australia might be expected to be found,

for a continuous period of not less than 7 years, that person, if not proved to be living, is for the purposes of the proceedings to be accounted as dead, and relief may be given accordingly; or

(c) if judgment has been given against the plaintiff and afterwards the plaintiff brings subsequent proceedings on the basis that a life has determined, the Court may make an order staying the proceedings —

(i) permanently;

(ii) until a further order is made; or

(iii) for any other period it thinks fit.

(4) If, as a consequence of the judgment given in proceedings under this section, a person having an interest in land determinable on a life or lives has been evicted from or deprived of land or an interest in the land, and afterwards it appears that the person or persons on whose life or lives the estate or interest depends is or are living or was or were living at the time of the eviction or deprivation, the Court may give the relief it thinks appropriate in the circumstances.

27. PENALTY FOR HOLDING OVER BY LIFE TENANT

(1) If a tenant for life or lives, or a person who is in or comes into possession of land by, from or under the tenant or by collusion with the tenant, wilfully holds over any land after —

(a) termination of the tenancy; and

(b) demand has been made and written notice given by the person to whom the remainder or reversion of the land belongs or the person's agent lawfully authorised for the delivery of possession of the land,

then, the person holding over is liable to pay to the person kept out of possession of the land rent at the rate of double the market rent for the land detained for and during the time the person holds over or keeps the person entitled out of possession.

(2) Rent payable under subsection (1) is recoverable by proceedings in a court of competent jurisdiction.

28. ABOLITION OF RULE IN *SHELLEY'S CASE*

If, by an instrument coming into operation after the commencement of this Act, an interest in land is expressed to be given to the heir, heirs or issue, or a particular heir or a class of heirs or issue, of a person in words which, but for this section would, under the rule of law known as the Rule in *Shelley's Case* and despite section 22, have operated to give to that person an estate in fee simple or an entailed estate, the words operate as words of purchase and not of limitation and are to be construed and have effect accordingly.

29. WORDS OF LIMITATION

(1) A disposition of freehold land to a person without words of limitation or an equivalent expression passes to the donee the whole interest which the donor has power to dispose of in the land.

(2) A disposition of freehold land to a corporation sole without the word "successors" passes to the corporation the whole interest which the donor had power to dispose of in the land.

(3) This section applies —

- (a) to dispositions made after the commencement of this Act; and
- (b) subject to a contrary intention appearing in a disposition.

PART 4 — FUTURE INTERESTS

30. CREATION OF FUTURE INTERESTS IN LAND

(1) A future interest in land validly created after the commencement of this Act takes effect as an equitable, not a legal, interest.

(2) An interest in remainder created after the commencement of this Act must not be registered in the land register.

(3) Subsection (2) has effect despite anything to the contrary in the *Land Title Act*.

(4) This section does not apply to any future interest —

- (a) created before the commencement of this Act whether that interest arose or arises before or after the commencement of this Act; or
- (b) created or arising because of section 22.

(5) In this section "future interest" means

- (a) a legal contingent remainder; or
- (b) a legal executory interest.

31. POWER TO DISPOSE OF ALL RIGHTS AND INTERESTS IN LAND

- (1) All rights and interests in land, including —
 - (a) a contingent, executory or future interest in land or a possibility coupled with an interest in land, whether or not the object of the gift or limitation of the interest or possibility is ascertained; and
 - (b) a right of entry into or on land whether immediate or future and whether vested or contingent,

may be disposed of.

(2) All rights of entry affecting a legal estate that are exercisable on condition broken or for any other reason may, on the commencement of this Act, be made exercisable by a person and the persons deriving title under that person, except that in the case of an estate in fee simple (not being a rent charge held for a legal estate) the rights may be made exercisable only within the period authorised by the rule relating to perpetuities.

32. RESTRICTION ON EXECUTORY LIMITATIONS

- (1) If there is a person entitled to —
 - (a) land or an equitable interest in land for an estate in fee simple or any lesser interest; or
 - (b) any other property or an interest in any other property,

with an executory limitation over on default or failure of all or any of the person's issue, whether or not within or at a specified period of time, the executory limitation becomes void and incapable of taking effect if, and as soon as, there is issue living who is an adult and has the capacity of the class on default or failure of which the limitation over was to take effect.

(2) Subsection (1) does not apply if the executory limitation is contained in an instrument which came into operation before the commencement of this Act.

PART 5 — CONCURRENT INTEREST CO-OWNERSHIP

Division 1 — General Rules

33. FORMS OF CO-OWNERSHIP

- (1) Property and interests in property (legal or equitable) may be held by 2 or more persons —
 - (a) as joint tenants; or
 - (b) as tenants in common.

(2) Two or more persons acquiring land after the commencement of this Act in circumstances in which, but for this Act, they would have acquired the land as coparceners acquire the land as tenants in common and not as coparceners.

34. POWER OF BODY CORPORATES TO HOLD PROPERTY AS JOINT TENANTS

(1) A body corporate is capable of acquiring and holding property as a joint tenant in the same manner as if it were a natural person.

(2) If a body corporate and a natural person or 2 or more bodies corporate become entitled to property under circumstances or because of an instrument that would, if the body corporate had been a natural person, have created a joint tenancy, they are entitled to the property as joint tenants.

(3) The acquisition and holding of property by a body corporate in joint tenancy is subject to the same conditions and restrictions that attach to the acquisition and holding of property by a body corporate in severalty.

(4) If a body corporate holds property as a joint tenant, on its dissolution the property devolves on the other joint tenant.

(5) This section applies to the acquisition or holding of property occurring after the commencement of this Act.

35. CONSTRUCTION OF DISPOSITIONS OF PROPERTY TO 2 OR MORE PERSONS TOGETHER

(1) A disposition of the beneficial interest in any property, whether with or without the legal interest, to or for 2 or more persons together beneficially is to be construed as made to or for them as tenants in common not joint tenants.

(2) Subsection (1) does not apply —

(a) in relation to persons who, by the terms or tenor of the disposition, are executors, administrators, trustees or mortgagees;

(b) if the disposition provides that persons are to take as joint tenants; or

(c) to a disposition for the purposes of a partnership in favour of the partners (in their capacity as partners).

(3) Subject to the *Partnership Act*, a disposition for the purposes of a partnership of an interest in property in favour the partners (as partners) is, subject to the appearance of a contrary intention, to be construed as —

(a) a disposition of the legal interest (if any) to those persons as joint tenants; and

(b) a disposition of the beneficial interest (if any) to those persons as tenants in common.

(4) This section only applies to dispositions made after the commencement of this Act.

(5) In this section, "disposition" includes a disposition which is wholly or partly oral.

36. TENANTS IN COMMON OF EQUITABLE ESTATE ACQUIRING THE LEGAL ESTATE

If 2 or more persons, who are entitled beneficially as tenants in common to an equitable estate in property, are or become entitled, whether as joint tenants or tenants in common, to the legal estate in the property equal to and coextensive with the equitable estate, both the legal and equitable estates are held by them as tenants in common unless the persons otherwise agree.

Division 2 — Partitions, Statutory Trusts,

Sale and Division

37. INTERPRETATION

(1) In this Division —

"co-owner" has a corresponding meaning to co-ownership and includes an encumbrancee of the interest of a joint tenant or tenant in common;

"co-ownership" means ownership, whether at law or in equity, in possession by 2 or more persons as joint tenants or as tenants in common;

"intellectual disability" means a disability resulting from an illness, injury, congenital disorder or organic deterioration, or of unknown origin, and by reason of which the person appears to be unable to make reasonable judgements or informed decisions relevant to daily living;

"intellectually disabled person" means a person with an intellectual disability;

"patient" means a patient admitted to hospital under the *Mental Health Act* and includes a voluntary patient within the meaning of that Act;

"statutory trust for partition" means a trust to partition the property held on trust, and to —

(a) provide (by way of mortgage or otherwise) for the payment of equality money; and

(b) on the partitioning of the property becoming effective, give effect to the partition by assuring the partitioned property in severalty (whether or not subject to a mortgage created for raising equality money) to the persons entitled under the partition;

"statutory trust for sale" means a trust to sell the property held on trust and to hold the —

(a) net income derived from the property until the sale after payment of costs, expenses, rates, cost of insurance, repairs properly paid out of income and other outgoings of the trust; and

- (b) net proceeds of the sale after payment of the costs and expenses of the sale.

(2) Property held on trust under this Division is, subject to this Division, held on trust subject to the powers and provisions that may be necessary to give effect to the rights of the co-owners of the property.

(3) This Division, in applying to and in relation to statutory trusts for partition, is subject to the *Planning Act*.

38. ENCUMBRANCEE TO CONSENT TO PARTITION

If property becomes subject to a statutory trust for partition, the trustees must not partition the property unless the encumbrancee of the entirety, if any, consents to the partition.

39. PURCHASER NO OBLIGATION UNDER THIS PART

A purchaser of property held on a statutory trust under this Division is not required to see or inquire whether this Division has been complied with.

40. STATUTORY TRUSTS FOR SALE OR PARTITION OF PROPERTY HELD IN CO-OWNERSHIP

(1) Despite any other Act but subject to subsection (3), if property (other than chattels personal) is held in co-ownership, the Court may, on the application of any of the co-owners, appoint trustees of the property and vest the property in the trustees, subject to encumbrances affecting the entirety but free from encumbrances affecting any undivided shares, to be held by them on a statutory trust for sale or on a statutory trust for partition.

(2) In proceedings referred to in subsection (1) in respect of a statutory trust for partition for which consent is required under the *Planning Act* to effect the partition, the Court may authorise a co-owner to apply to the consent authority (within the meaning of that Act) for the consent for and on behalf of the co-owners, or any of them, despite the wishes of any other co-owner.

(3) The Court must not vest property in trustees to be held by the trustees on a statutory trust for partition unless consent for the partition has been given under the *Planning Act*.

(4) If the entirety of the property is vested in trustees or personal representatives, those trustees or personal representatives are to, unless the Court otherwise determines, be appointed trustees under subsection (1) but subject, in the case of personal representatives, to their rights and powers for the purposes of administration.

(5) If the entirety of the property is vested at law in co-owners the Court may appoint —

- (a) the Public Trustee or a trustee company, either alone or with one or 2 natural persons (who may be co-owners of the property); or

- (b) not less than 2 and not more than 4 natural persons (who may be co-owners of the property),

to be trustees of the property on either of the statutory trusts.

(6) On the appointment of trustees under subsection (5), the property vests in the trustees.

(7) If, on an application for the appointment of trustees on a statutory trust for sale, a co-owner who satisfies the Court that partition of the property would be more beneficial than sale of the property for the co-owners whose interests in the property comprise not less than one half of the value of the property, the Court may, with the consent of the encumbrancee of the entirety (if any), appoint trustees of the property on a statutory trust for partition or on a statutory trust for partition as to part of the property and on a statutory trust for sale as to the remainder.

(8) If trustees for partition have prepared a scheme of partition, they must serve notice in writing of the scheme on all the co-owners who are adults and a co-owner who is dissatisfied with the scheme may, within one month after service of the notice on the co-owner, apply to the Court for a variation of the scheme.

(9) If a co-owner is an intellectually disabled person, the notice is to be served on the person charged by law with the management and care of the property of the intellectually disabled person or, if there is no such person, on the Public Trustee.

(10) If a co-owner is a person —

- (a) who is a minor;
- (b) who cannot be found or ascertained; or
- (c) as to whom it is uncertain whether the person is living or dead,

the trustees may act on behalf of the person and retain land or other property to represent the person's share.

(11) In proceedings in relation to the sale or partition of property held on a statutory trust, the Court may by order alter the statutory trust, and the trust so altered is to be taken to be the statutory trust in relation to that property.

(12) Without limiting the power of the Court to alter a statutory trust under subsection (11), the Court may alter a statutory trust for partition to provide that —

- (a) an encumbrance which, prior to the appointment of the trustees, affected an undivided share is to continue to extend and apply to the share; and
- (b) a mortgage created for raising equality money ranks in priority after an encumbrance referred to in paragraph (a).

(13) If property becomes subject to a statutory trust for sale —

- (a) land is to be taken to be converted on the appointment of the trustees for sale unless the Court otherwise directs; and
 - (b) in the case of joint tenancy — severance of the tenancy is not effected by sale under the trust alone.
- (14) This section applies to property which came or comes to be held in co-ownership before or after the commencement of this Act.
- (15) This section does not apply to —
- (a) property in respect of which a subsisting contract for sale is in force immediately before the commencement of this Act and the contract is completed in due course; or
 - (b) land in respect of which proceedings for partition are pending immediately before that commencement and an order for a partition or sale is subsequently made in the proceedings.

41. TRUSTEE ON STATUTORY TRUSTS FOR SALE OR PARTITION TO CONSULT PERSONS INTERESTED

To the extent that it is reasonably possible, trustees on a statutory trust for sale or a statutory trust for partition, must —

- (a) consult with the —
 - (i) adults not subject to a disability who are for the time being beneficially entitled to income of the property until sale or partition; and
 - (ii) Public Trustee or other person charged by law with the management and care of the property of an intellectually disabled person, patient or protected person who is for the time being beneficially entitled to income of the property until sale or partition; and
- (b) subject to the general interest of the trust, give effect to the wishes of the persons consulted under paragraph (a) who are —
 - (i) interested in more than half of the income of the property until sale or partition; or
 - (ii) if there is a dispute — in agreement and are interested in more than half of the income of the property until sale or partition.

42. RIGHT OF CO-OWNERS TO BID AT SALE UNDER STATUTORY POWER OF SALE

(1) On a sale under a statutory trust for sale the Court may allow any of the co-owners of the property to purchase the property or a part of the property, whether at auction or otherwise, on terms as to —

- (a) non-payment of deposit;
- (b) setting off or accounting for the purchase money or a part of the purchase money instead of paying the money or the part of it; or
- (c) any other matter,

as the Court thinks reasonable.

(2) A co-owner with a right to purchase is not, without the leave of the Court, entitled to act as trustee in connection with the sale.

43. SALE OR DIVISION OF CHATTELS

If a chattel belongs or chattels belong to 2 or more persons jointly or in undivided shares, any of the persons may apply to the Court for an order that —

- (a) a chattel in respect of which the application is made be sold and the proceeds of sale distributed among the persons entitled to them under their interests in the chattel;
- (b) the chattels in respect of which the application is made be divided amongst the persons entitled to them; or
- (c) any of the chattels in respect of which the application is made be sold and the remainder be divided amongst the persons entitled to them,

and the Court may make the order and give the consequential directions it thinks fit.

44. POWERS OF COURT

In proceedings under section 40 or 43 the Court may on the application of a party to the proceedings or on its own motion —

- (a) determine any question of fact arising (including questions of title) in the proceedings or give directions as to how the questions are to be determined; or
- (b) direct that inquiries are to be made and accounts are to be taken as necessary for the purpose of ascertaining and adjusting the rights of the parties.

45. LIABILITY OF CO-OWNER TO ACCOUNT

(1) A co-owner is, in respect of the receipt by the co-owner of more than the co-owner's just or proportionate share according to the co-owner's interest in the property, liable to account to the other co-owners of the property.

(2) In subsection (1), "co-owner" means a joint tenant or a tenant in common, whether at law or in equity, of any property.

PART 6 — DEEDS, COVENANTS, INSTRUMENTS AND CONTRACTS

Division 1 — Deeds and Covenants

46. DESCRIPTION AND FORM OF DEEDS

(1) A deed between parties has, in effecting its objects, the effect of an indenture although not indented or expressed to be indented.

(2) A deed, whether or not being an indenture, may be described as a deed or as a conveyance, deed of exchange, vesting deed, trust instrument, settlement, mortgage, charge, transfer of mortgage, appointment, lease or otherwise according to the nature of the transaction intended to be effected.

47. FORMALITIES OF DEEDS EXECUTED BY NATURAL PERSONS

(1) If a natural person executes a deed, sealing alone is not sufficient and the natural person must either sign or place his or her mark on the deed.

(2) An instrument expressed —

(a) to be an indenture or a deed; or

(b) to be sealed,

is, if it is signed and attested by at least one witness who is not a party to the instrument, to be taken to be sealed and, subject to section 49, to have been duly executed.

(3) No particular form of words are requisite for the attestation.

(4) In any proceedings, a deed executed and attested under this section may be proved in the manner in which it would be proved if no attesting witness were alive.

(5) Nothing in this section affects —

(a) the execution of deeds by corporations;

(b) the validity of an instrument executed under the *Land Title Act*, the *Instruments Act*, the *Powers of Attorney Act* or any other Act; or

(c) a deed executed before the commencement of this Act.

48. EXECUTION OF INSTRUMENTS BY OR ON BEHALF OF CORPORATIONS

- (1) In favour of a purchaser —
 - (a) a deed is to be taken to have been duly executed by a corporation aggregate if its seal is affixed to the deed in the presence of and attested by its clerk, secretary or other permanent officer, or his or her deputy, together with a member of the board of directors, council or other governing body of the corporation; and
 - (b) if a seal purporting to be the seal of a corporation aggregate has been affixed to a deed attested by persons purporting to be persons holding the offices referred to in paragraph (a), the deed is, subject to section 50, to be taken to have been executed under the requirements of this section and to have taken effect accordingly.

(2) The board of directors, council or other governing body of a corporation aggregate may, by resolution or otherwise, appoint an agent, either generally or for a particular case, to execute on behalf of the corporation an agreement or other instrument not under seal made in relation to a matter within the powers of the corporation.

(3) If a person is authorised under a power of attorney or under a statutory or other power to convey an interest in property in the name or on behalf of a corporation sole or aggregate, the person may execute the conveyance as attorney —

- (a) by signing the person's name in such a way as to show that the person does so as attorney of the corporation in the presence of at least one witness; or
- (b) in the case of a deed, by executing the deed in accordance with section 47,

and the conveyance takes effect and is valid as if the corporation had executed the conveyance.

(4) If a corporation aggregate is authorised under a power of attorney or under a statutory or other power to convey property in the name or on behalf of another person (including another corporation), an officer appointed for that purpose by the board of directors, council or other governing body of the corporation, whether by resolution or otherwise and whether generally or for a particular case, may execute the deed or other instrument in the name of the other person and, if an instrument appears to be executed by an officer so appointed, it is, in favour of a purchaser, to be taken to have been executed by an officer duly authorised.

- (5) Subsections (1), (2), (3) and (4) apply to —
 - (a) transactions effected before or after the commencement of this Act; and
 - (b) deeds and instruments executed after the commencement of this Act,

and, in the case of a power or an appointment of an agent or officer of a corporation, those subsections apply whether the power was conferred or the appointment was made before or after the commencement of this Act or under this Act.

- (6) This section —
 - (a) authorises a manner of execution or attestation which may be used in stead of any manner of execution or attestation authorised by any other law in force in the Territory or by practice or by the charter, memorandum or articles, deed of settlement or other instrument constituting a corporation or regulating the affairs of the corporation; and
 - (b) does not affect how instruments are validly executed under the *Land Title Act*, the *Instruments Act*, the *Powers of Attorney Act*, the Corporations Law or any other law in force in the Territory.

(7) In this section, "purchaser" includes the Registrar-General and any other person who has a power or function under an Act to register or record instruments, including instruments executed by corporations.

49. DELIVERY OF DEEDS

- (1) On the commencement of this Act —
 - (a) execution of an instrument —
 - (i) in the form of a deed; or
 - (ii) in a manner provided for in section 47 or 48, does not of itself import delivery; and
 - (b) delivery is not to be presumed from the fact of execution only unless it appears that execution of the document was intended to constitute delivery of the document.

(2) Subject to subsection (1), delivery may be inferred from any fact or circumstance, including words and conduct, indicative of delivery.

(3) In this section, "delivery" means the intention to be legally bound either immediately or subject to fulfilment of a condition.

50. CONSTRUCTION OF EXPRESSIONS USED IN DEEDS AND OTHER INSTRUMENTS

(1) In all deeds, contracts, wills, orders and other instruments executed, made or coming into operation after the commencement of this Act, unless the contrary intention appears —

- (a) "month" means calendar month;
- (b) "person" includes a natural person and a body corporate;
- (c) words indicating a gender include each other gender; and

(d) words in the singular include the plural and words in the plural include the singular.

(2) A covenant, power or other provision implied in a deed or other instrument under an Act is to be construed in accordance with subsection (1).

51. IMPLIED COVENANTS MAY BE NEGATIVED

(1) Subject to this Act, a covenant, power or other provision implied under an Act has the same force and effect and may be enforced in the same manner as if it was set out in the instrument in which it is implied.

(2) A covenant, power or other provision referred to in subsection (1) may, subject to a provision to the contrary in an Act, be negatived, varied, or extended —

(a) expressly in the instrument in which it is implied; or

(b) by another instrument.

(3) A covenant, power or other provision that is varied or extended in accordance with subsection (2) operates, to the extent that it may, in the like manner and with all the like incidents, effects and consequences as if the variation or extension was implied under the Act that implied the covenant or power.

52. COVENANTS AND AGREEMENTS ENTERED INTO BY A PERSON WITH HIMSELF OR HERSELF AND ANOTHER OR OTHERS

(1) A covenant, whether express or implied, or an agreement entered into by a person with the person and one or more other persons is to be construed and may be enforced as if the covenant or agreement had been entered into by the person with the other person or persons only.

(2) Subsection (1) applies to —

(a) covenants or agreements entered into before or after the commencement of this Act; and

(b) in the case of a person who conveys an interest in property or is expressed to convey an interest in property to the person and one or more other persons — covenants implied by or under an Act,

but without prejudice to any order of the Court made before the commencement of this Act.

53. RECEIPT IN INSTRUMENT SUFFICIENT

(1) A receipt for consideration money or other consideration in the body of a deed or other instrument is sufficient discharge for the payment or giving of the consideration without any further receipt being endorsed on the deed or instrument.

(2) Subsection (1) applies only to deeds or instruments executed after the commencement of this Act.

54. RECEIPT IN INSTRUMENT OR ENDORSED EVIDENCE SUFFICIENT IN FAVOUR OF PURCHASER

(1) In favour of a subsequent purchaser not having notice that the money or other consideration acknowledged to be received was not in fact paid or given wholly or in part, a receipt for consideration money or other consideration in the body of a deed or instrument or endorsed on the deed or instrument is sufficient evidence of the payment or giving of the whole amount of the money or other consideration.

(2) Subsection (1) applies to deeds or instruments executed or endorsements made before or after the commencement of this Act.

Division 2 — General Rules Affecting Contracts

55. EFFECT OF JOINT CONTRACTS AND LIABILITIES

(1) Subject to this and any other Act —

(a) a promise made by 2 or more persons is, unless a contrary intention appears, to be construed as a promise made jointly and severally by each of those persons; and

(b) liability which is joint (but not joint and several) is not to be discharged, nor is a cause of action in respect of the liability to be extinguished, because of a fact, event or matter unless and to the extent only that the liability would be discharged or extinguished because of the fact, event or matter if the liability were joint and several.

(2) In this section, "promise" includes a —

(a) promise under seal;

(b) covenant that is express or implied under this Act; and

(c) bond or other obligation under seal.

(3) This section applies only to a promise, liability or cause of action coming into existence after the commencement of this Act.

56. CONTRACTS FOR THE BENEFIT OF THIRD PARTIES

(1) A promisor who, for valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary is, on acceptance by the beneficiary, subject to a duty enforceable by the beneficiary to perform that promise.

(2) Prior to acceptance by a beneficiary referred to in subsection (1), the promisor and promisee may, without the consent of the beneficiary, vary or discharge the terms of the promise and any duty arising from it.

- (3) On acceptance by a beneficiary referred to in subsection (1) —
- (a) the beneficiary is entitled in the beneficiary's own name to the remedies and relief that are just and convenient for the enforcement of the duty of the promisor and relief by way of specific performance, injunction or otherwise is not to be refused only on the ground that, as against the promisor, the beneficiary may be a volunteer;
 - (b) the beneficiary is bound by the promise and subject to a duty enforceable against the beneficiary in the beneficiary's own name to do or refrain from doing any act that is required of the beneficiary by the terms of the promise;
 - (c) the promisor is entitled to the remedies and relief that are just and convenient for the enforcement of the duty of the beneficiary; and
 - (d) the terms of the promise and the duty of the promisor or the beneficiary may be varied or discharged with the consent of the promisor and the beneficiary.
- (4) Subject to subsection (1), a matter that, in proceedings not brought in reliance on this section —
- (a) would render a promise void, voidable or unenforceable, whether wholly or in part; or
 - (b) is available by way of defence to enforce a promissory duty arising from a promise,

renders the promise void, voidable or unenforceable or is available by way of defence to enforce the promissory duty in like manner and to the like extent as if in proceedings for the enforcement of a duty to which this section gives effect.

(5) To the extent that a duty to which this section gives effect may be capable of creating and creates an interest in land, the interest is, subject to section 11, capable of being created and of subsisting in land under an Act (but subject to that Act).

(6) In this section —

"acceptance" means an assent by words or conduct communicated by or on behalf of the beneficiary to the promisor, or to some person authorised on the promisor's behalf, in the manner (if any) and within the time specified in the promise or, if no time is specified, within a reasonable time of the promise coming to the notice of the beneficiary;

"beneficiary" means a person who is not the promisor or promisee and includes a person who, at the time of acceptance of a promise is identified and in existence although that person may not have been identified or in existence when the promise was made or given;

"promise" means a promise in writing that —

- (a) is or appears to be intended to be legally binding; and
- (b) creates or appears to be intended to create a duty enforceable by a beneficiary;

"promisee" means a person to whom a promise is made or given;

"promisor" means a person by whom a promise is made or given.

(7) Nothing in this section affects any right or remedy which exists or is available apart from this section.

(8) This section applies only to promises made after the commencement of this Act.

57. CORPORATE CONTRACTS AND TRANSACTIONS NOT UNDER SEAL

(1) A corporation may make or effect a contract or other transaction —

- (a) in the case of a contract or transaction which if made or effected by or between individuals is required by law to be in writing and signed by the person making or effecting it — in writing and signed by a person with its authority (whether express or implied authority); or
- (b) in the case of a contract or other transaction which if made or effected by or between individuals may be made by parol — by parol by a person acting with its authority (whether express or implied authority).

(1) — (2) A contract or other transaction made in accordance with subsection

(a) is valid in law;

(b) binds —

- (i) the corporation and its successors; and
- (ii) all other parties to the contract or transaction; and

(c) may be varied or discharged in the same manner as it was made.

(3) Nothing in this section prevents a corporation making a contract or other transaction under its seal.

(4) This section —

(a) applies to the making, effecting, variation or discharge of a contract or other transaction after the commencement of this Act (whether the

corporation authorised the person making the contract or transaction before or after that commencement); and

- (b) applies subject to the Corporations Law and any other Act which prescribes the manner and form by which a contract or other transaction may be made or effected for or on behalf of a corporation.

58. GUARANTEES TO BE IN WRITING

(1) No proceeding may be commenced on a promise to guarantee a liability of another unless the promise on which the proceeding is commenced, or some memorandum or note of the promise, is —

- (a) in writing; and
- (b) signed by the party to be charged, or by some other person lawfully authorised by the party.

(2) A promise in writing, or a memorandum or note of a promise, is not to be treated as insufficient for the purpose of this section only because the consideration for the promise does not appear in writing or by necessary inference from a written document.

59. PROVISIONS AS TO CONCLUSIVENESS OF CERTIFICATES, &C.

(1) A provision in a contract or instrument to the effect that a certificate, statement or opinion of a person is, or is to be received as, conclusive evidence of a fact contained in the certificate, statement or opinion is to be construed to mean only that the certificate, statement or opinion is, or is to be received as, prima facie evidence of that fact.

- (2) Subsection (1) does not apply to —
 - (a) a certificate, statement or opinion of a person who, in making the certificate or statement or in forming the opinion, is bound to act judicially or quasi-judicially or as an arbitrator or quasi-arbitrator; or
 - (b) a provision in a contract or instrument agreed to after a dispute has arisen relating to a fact referred to in subsection (1).

(3) This section —

- (a) applies only to a contract made, or an instrument executed, after the commencement of this Act; and
- (b) has effect despite any term to the contrary in the contract or instrument.

(4) In this section, "fact" includes any matter, thing, event, circumstance or state of affairs.

60. EFFECT OF ACT OR STATUTORY INSTRUMENT

(1) A statutory instrument does not have the effect of rendering void or unenforceable a contract or dealing concerning property that is made, entered into or effected contrary to the statutory instrument unless it expressly provides that such a contract or dealing is void or unenforceable, as the case may be.

(2) If an Act or statutory instrument requires that a certificate, consent or approval relating to a contract or a dealing with property (by sale, lease, mortgage or otherwise) be obtained or tendered before or at the time the contract is entered into or the time of the dealing, in the absence of greater particularity as to that time in the Act or instrument it is sufficient compliance with the requirement if the certificate, consent or approval is obtained or tendered as required at or immediately before —

- (a) in the case of a sale, settlement;
- (b) in the case of a lease, the lessee's entry into possession under the lease;
- (c) in the case of a mortgage, the mortgagor's accepting liability under the mortgage; and
- (d) in the case of any other dealing, its finalisation.

(3) This section applies to and in relation to an Act or statutory instrument whether coming into operation before or after the commencement of this Act.

(4) In this section, "statutory instrument" includes an instrument of a legislative or administrative character.

61. INSURANCE MONEY FROM BURNT BUILDING

(1) If a building is destroyed or damaged by fire, a person who has granted a policy of insurance for insuring it against fire —

- (a) may; or
- (b) if requested by a person interested in or entitled to the building, must,

cause the money for which the building is insured to be laid out and expended to the extent that its value will go towards rebuilding, reinstating or repairing the building.

- (2) Subsection (1) does not apply if —
 - (a) the person claiming the insurance money gives, within 30 days after the person's claim is adjusted, sufficient security to the person who has granted the policy that the insurance money will be laid out and expended in accordance with subsection (1); or
 - (b) the insurance money is, within the 30 day period referred to in paragraph (a), settled and disposed of to and amongst the contending parties to the satisfaction and approbation of the person who has granted the policy of insurance.

Division 3 — Sales of Land

62. CONTRACTS FOR SALE, &C., OF LAND TO BE IN WRITING

No proceeding may be commenced on a contract (wherever made) for the sale or other disposition of land unless the contract on which the proceeding is commenced, or some memorandum or note of the contract, is in writing and signed by the party to be charged or by a person lawfully authorised by the party.

63. SALES OF LAND BY AUCTION

- (1) In the case of a sale of land by auction —
 - (a) a right to bid may be expressly reserved by or on behalf of the vendor and, if so, the vendor or a person on behalf of the vendor may, subject to paragraph (b), bid at the auction;
 - (b) if the sale is not notified in the conditions of sale to be subject to a right to bid on behalf of the vendor, the vendor is not entitled to bid or to employ a person to bid at the sale and the auctioneer is not entitled to take a bid from the vendor or the person;
 - (c) a sale that contravenes or does not comply with paragraph (b) may be treated as fraudulent by the purchaser; and
 - (d) a sale may be notified in the conditions of sale to be subject to a reserved or upset price.

(2) Subsection (1) applies to sales of land by auction effected after the commencement of this Act.

64. CONDITIONS OF SALE OF LAND

- (1) Under a contract for the sale of registered land the purchaser is entitled, at the cost of the vendor, to —
 - (a) receive from the vendor sufficient particulars of title to enable the purchaser to prepare the appropriate instrument to give effect to the contract;
 - (b) receive from the vendor a true copy of an instrument, forming part of the vendor's title, in respect of which a caveat has been registered;
 - (c) have the relevant certificate of title or other document of title lodged by the vendor in the Land Titles Office to enable the instrument referred to in paragraph (a) to be registered; and
 - (d) have an objection to the registration of that instrument removed by the vendor.
- (2) If there is an objection to the registration of the instrument which —
 - (a) the purchaser ought to have raised on the particulars or true copy or on the investigation of the title; or

- (b) arises from the purchaser's own act, default or omission,

the purchaser is not entitled to have the objection removed except at the purchaser's own cost.

- (3) Under a contract for the sale of land there is implied a term that —

- (a) payment or tender of money payable under the contract may be made by cheque drawn by a bank;

- (b) an obligation on the part of the vendor to execute and deliver a conveyance of the subject land or documents of title to the land free of encumbrances is satisfied if the vendor, on completion of the contract, will be able to discharge and in fact does discharge existing encumbrances out of the purchase money payable under the contract by the purchaser; and

- (c) unless otherwise agreed by the parties, their legal practitioners or conveyancing agents, settlement of the contract must take place at the office of the Land Titles Office at which the documents relating to the conveyance may be lodged that is nearest to the land.

(4) If, in a contract for the sale of land, the date for payment of the purchase money or a part of the purchase money is to be ascertained by reference to a period of time expiring on a day that is a Saturday, a Sunday or a public holiday, unless the contract designates the day as a Saturday, a Sunday or by the name of the public holiday completion is to take place —

- (a) on another day as agreed to by the parties, their legal practitioners or conveyancing agents; or

- (b) in default of an agreement, on the day, other than a Saturday, Sunday, or public holiday, next following the day on which the period of time expires.

- (5) This section —

- (a) applies only if and to the extent that a contrary intention is not expressed in the contract; and

- (b) has effect subject to the terms of the contract.

65. PROVISIONS NOT OF THE ESSENCE OF THE CONTRACT

A term of a contract as to time or otherwise which under rules of equity is not to be taken to be or to have become of the essence of the contract is to be construed and have effect at law under rules of equity.

66. APPLICATION OF INSURANCE MONEY ON COMPLETION OF A SALE OR EXCHANGE

(1) If, after the date of a contract for the sale or other exchange of property, money becomes payable under a policy of insurance maintained by the

vendor in respect of damage to or destruction of property included in the contract, the money —

- (a) on completion of the contract, is to be held or is receivable by the vendor on behalf of; and
- (b) on completion of the sale or exchange, or as soon after the sale or exchange when the money is received by the vendor, is to be paid to,

a person entitled to the money because of an encumbrance over or in respect of the land and, in the case of the balance remaining (if any), the purchaser.

(2) For the purpose of this section, cover provided by a policy referred to in subsection (1) extends until the date of completion and money does not cease to become payable to the vendor merely because the risk has passed to the purchaser.

(3) This section applies only to contracts for the sale or exchange of property made after the commencement of this Act and has effect subject to —

- (a) a term of a contract for the sale or exchange of property to the contrary; or
- (b) the payment by the purchaser of the proportionate part of the premium from the date of the contract.

(4) This section applies to a sale or exchange of property by an order of court as if a reference to —

- (a) the vendor is a reference to the person bound by the order;
- (b) the completion of the contract for the sale or exchange is a reference to the payment of the purchase or equality money (if any) into court; and
- (c) the date of the contract for the sale or exchange is a reference to the time when the contract becomes binding.

67. **RIGHT TO RESCIND ON DESTRUCTION OF OR DAMAGE TO DWELLING HOUSE**

(1) In a contract for the sale of a dwelling house if, before the date of completion or possession (whichever first occurs), the dwelling house is so destroyed or damaged that it is unfit for occupation as a dwelling house, the purchaser may, at the purchaser's option, rescind the contract by notice in writing given to the vendor or the vendor's legal practitioner not later than that date of completion or possession.

- (2) On rescission of a contract under this section —
 - (a) money paid by the purchaser is to be refunded to the purchaser; and
 - (b) documents of title or transfer are to be returned to the vendor,

and the vendor alone is entitled to the benefit of a insurance policy relating to the destruction or damage of the dwelling house, subject to the rights of a person entitled to the insurance policy because of an encumbrance over or in respect of the land.

- (3) In this section, "sale of a dwelling house" means the sale of —
 - (a) improved land the improvements on which consist wholly or substantially of a dwelling house; or
 - (b) a unit within the meaning of the *Unit Titles Act*.
- (4) This section —
 - (a) applies only to contracts for the sale of dwelling houses made after the commencement of this Act; and
 - (b) has effect despite any term of a contract for the sale of a dwelling house to the contrary.

68. RECEIPT IN INSTRUMENT OR ENDORSED AUTHORITY FOR PAYMENT

- (1) If a banker, a legal practitioner or a conveyancing agent produces —
 - (a) an instrument that has in the body of it or endorsed on it a receipt for consideration money or other consideration and that is executed, or the endorsed receipt is signed, by the person entitled to give a receipt for that consideration; or
 - (b) a duly executed instrument in respect of registered land,

the instrument is sufficient authority to the person liable to pay or give the consideration or land for the person's paying or giving the consideration or land to the banker, legal practitioner or conveyancing agent without the banker, legal practitioner or conveyancing agent producing any separate or other direction or authority in that behalf from the person who executed or signed the instrument or receipt.

- (2) In this section —
 - "banker" means a person acting in the person's official capacity as a general manager or manager of a bank and includes an agent of the banker;
 - "conveyancing agent" includes an agent of the conveyancing agent;
 - "instrument" includes a discharge of mortgage;
 - "legal practitioner" includes an agent of the legal practitioner.

69. RESTRICTION ON VENDOR'S RIGHT TO RESCIND ON PURCHASER'S OBJECTION

- (1) In a contract for the sale of land, the vendor is not entitled to exercise a right to rescind the contract, whether given by the contract expressly or otherwise,

on the ground of a requisition or objection made by the purchaser unless the vendor gives the purchaser 7 days notice of the vendor's intention to rescind (to enable the purchaser to withdraw or waive the requisition or objection).

- (2) Subsection (1) —
 - (a) applies only to contracts made after the commencement of this Act; and
 - (b) has effect despite any term of a contract to the contrary.

70. DAMAGES FOR BREACH OF CONTRACT TO SELL LAND

(1) A vendor who, in breach of contract, fails to perform a contract for the sale of land is liable by way of damages as compensation for the loss sustained by the purchaser in the sum that at the time the contract was made was reasonably foreseeable as the loss liable to result, and which does result, from the failure of the vendor to perform the contract.

(2) Unless a contract provides otherwise, a vendor referred to in subsection (1) is not relieved, wholly or in part, from the liability for damages measured under that subsection only because of the vendor's inability to make title to the land the subject of the contract of sale, whether or not the vendor's inability was occasioned by the vendor's own default.

(3) This section does not affect a right, power or remedy under any other law in force in the Territory that is available to a purchaser in respect of the failure of a vendor to show or make good title or otherwise perform a contract for the sale of land.

- (4) This section —
 - (a) does not apply to contracts for the sale of unregistered land; and
 - (b) applies only to contracts for the sale of land entered into after the commencement of this Act.

71. RIGHTS OF PURCHASER IF VENDOR'S TITLE DEFECTIVE

(1) If specific performance of a contract would not be enforced against the purchaser of land by the Court because of a defect in or doubt as to the vendor's title to the land but the defect or doubt does not entitle the purchaser to rescind the contract, the purchaser is nevertheless entitled to —

- (a) recover the purchaser's deposit and any instalments paid under the contract; and
- (b) be relieved from all liability under the contract,

unless the contract discloses the defect or doubt and contains a provision precluding the purchaser from objecting to the defect or doubt.

(2) If a defect or doubt referred to in subsection (1) is not disclosed by the contract but is one which is known or ought to have been known to the vendor at

the date of the contract, the purchaser is also entitled to recover the purchaser's expenses of investigating the title.

- (3) This section applies —
 - (a) only to contracts made after the commencement of this Act; and
 - (b) despite any term of a contract to the contrary.

72. APPLICATIONS TO COURT BY VENDOR AND PURCHASER

A vendor or purchaser of land, or their respective representatives, may apply to the Court in respect of —

- (a) a requisition or objection;
- (b) a claim for compensation; or
- (c) any other question arising out of or connected with a contract for the sale or exchange of land (except a question affecting the existence or validity of the contract),

and the Court may make the orders on the application as the Court thinks just including how and when and by whom all or any of the costs of and incidental to the application are to be borne and paid.

Division 4 — Instalment Sales of Land, &c.

73. APPLICATION OF DIVISION

- (1) This Division does not bind the Crown.
- (2) In this Division —

"deposit" means an amount —

- (a) not more than 10% of the purchase price payable under an instalment contract;
- (b) paid or payable in one or more amounts; and
- (c) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser;

"instalment contract" means an enforceable executory contract for the sale of land under which the purchaser is bound to make a payment or payments (other than as a deposit) without becoming entitled to receive a conveyance in exchange for the contract;

"mortgage" includes an encumbrance or charge other than a charge attaching by the operation of an Act of the Commonwealth or a State or a Territory of the Commonwealth;

"purchaser" includes a person from time to time deriving an interest under an instalment contract from the original purchaser under the contract;

"sale" includes an agreement for sale and an enforceable option for sale;

"vendor" includes a person to whom the rights of a vendor under an instalment contract have been assigned.

(3) If a contract for the sale of land may, at the election of the purchaser, be performed in a manner which would constitute an instalment contract, the contract is presumed to be an instalment contract unless the purchaser elects to perform it in some other manner.

(4) This Division applies —

(a) only to instalment contracts entered into after the commencement of this Act; and

(b) despite any term of an instalment contract to the contrary.

74. RESTRICTION ON VENDOR'S RIGHT TO RESCIND

(1) An instalment contract is not to be determinable or determined because of default on the part of the purchaser in payment of an instalment or amount of money (but not a deposit or a part of a deposit) due and payable under the contract until the expiration of 30 days after service on the purchaser of a notice in the approved form by the vendor or the vendor's agent.

(2) A purchaser on whom a notice is served under subsection (1) may, within the period referred to in that subsection, pay or tender to the vendor or the vendor's agent the amount (including the amount in respect of which the default was made) that would, but for the default, have been due and payable under the contract at the date of making the payment or tender.

(3) On payment or tender of an amount under subsection (2), a right or power of the vendor to determine the contract because of the default specified in the notice ceases and the purchaser is to be taken not to be in default under the contract.

(4) A notice served under subsection (1) that is not in the approved form is to be taken to have the effect as if it were if it is reasonably sufficient to fully and fairly apprise the purchaser of the purchaser's default and of the effect of the purchaser's failure to remedy the default within the time specified in this section.

75. LAND NOT TO BE MORTGAGED BY VENDOR

(1) A vendor under an instalment contract must not, unless with the consent of the purchaser, sell or mortgage the land the subject of the contract.

(2) If land is mortgaged in contravention of subsection (1), the instalment contract is voidable by the purchaser any time before completion of the contract.

(3) Nothing in this section affects the operation of the *Land Title Act*.

76. RIGHT OF PURCHASER TO LODGE CAVEAT

(1) A purchaser under an instalment contract for the sale of registered land may, by a caveat lodged under the *Land Title Act*, prevent the registration of any instruments affecting the land.

(2) Sections 135, 136 and 137 of the *Land Title Act* do not apply to a caveat referred to in subsection (1).

(3) The caveat lapses on completion of the instalment contract.

(4) A person who has an interest or a right to register an instrument that is affected by the caveat may apply to the Registrar-General to remove the caveat or to the Court for an order for the removal of the caveat.

(5) On an application being made under subsection (4), the Registrar-General may remove, or the Court may make an order for the removal of, the caveat if satisfied that —

- (a) the caveat has lapsed;
- (b) the purchaser has consented to the removal of the caveat;
- (c) the instalment contract has been rescinded, determined or discharged; or
- (d) another ground exists that justifies the removal of the caveat

77. RIGHT TO REQUIRE CONVEYANCE

(1) A purchaser who is not in default under an instalment contract may serve on the vendor a notice in writing requiring the vendor to convey the land to the purchaser conditionally on the purchaser at the same time executing a mortgage in favour of the vendor, or any other person specified by the vendor, to secure payment of all money that, but for the execution of the mortgage, remains payable by the purchaser under the instalment contract.

(2) A vendor who is not in default under an instalment contract may serve on a purchaser a notice in writing requiring the purchaser to accept conveyance of the land from the vendor conditionally on the purchaser at the same time executing a mortgage, or (if it is a reasonable requirement) mortgages, in favour of the vendor or any other person or persons specified by the vendor, to secure payment of all money that, but for the execution of the mortgage or mortgages, remains payable by the purchaser under the instalment contract.

(3) A vendor who requires a purchaser to accept conveyance under subsection (2) is obliged to advance to the purchaser —

- (a) an amount equal to the duty (if any) payable on the conveyance by the purchaser under the *Stamp Duty Act*; and
- (b) an amount equal to the legal costs of preparation, execution and registration of the conveyance payable by the purchaser,

but only if the purchaser agrees to the amount so advanced being added to the principal sum secured by the mortgage or, if more than one mortgage, the mortgage specified by the vendor.

- (4) A mortgage executed under this section is to —
 - (a) contain all terms, powers and covenants on the part of the mortgagor as agreed by the vendor and the purchaser and is to accord with and provide for observance of all obligations of the purchaser under the instalment contract;
 - (b) subject to subsection (7), in the case of the purchaser requiring the vendor to convey the land under subsection (1) — be prepared and registered at the expense of the purchaser; and
 - (c) subject to subsection (7), in the case of the vendor requiring the purchaser to accept conveyance of the land under subsection (2) — be prepared and registered at the expense of the vendor.

(5) Duty under the *Stamp Duty Act* and the legal costs of preparation, execution and registration of the conveyance of the land to the purchaser are payable by the party or parties in the same way as if the land were being conveyed to the purchaser in consequence of payment in full of the purchase price or other performance of the contract by the purchaser.

- (6) In the event of the vendor and the purchaser failing to agree —
 - (a) on the terms, covenants and powers to be contained in the mortgage or mortgages; or
 - (b) whether it is reasonable on the part of the vendor to require the purchaser to execute more than one mortgage,

the President of the Law Society, on application by the legal practitioner or conveyancing agent of the vendor or purchaser, is to appoint an independent legal practitioner or conveyancing agent to —

- (c) settle the mortgage or mortgages and the terms, covenants or powers to be contained in the mortgage or mortgages; or
- (d) determine the number of mortgages and the land to be made subject to each mortgage,

and the mortgage or mortgages settled or determined by the legal practitioner or conveyancing agent, as the case may be, is or are to be taken to have been agreed on by both the vendor and the purchaser.

(7) The reasonable costs of settling or determining a mortgage under subsection (6) are to be borne by the vendor and the purchaser in the proportions (if any) as the President of the Law Society thinks fit, and the costs are recoverable by the legal practitioner or conveyancing agent in those proportions from the vendor and the purchaser respectively in a court of competent jurisdiction.

(8) A person liable for costs because of subsection (7) is entitled to require those costs to be taxed under the *Supreme Court Act*.

(9) If —

(a) a notice in writing has been served under this section on a vendor by a purchaser or on a purchaser by a vendor; and

(b) the vendor or purchaser fails without lawful excuse to convey or to accept conveyance of the land or to execute an instrument requisite for giving effect to this section,

the vendor or purchaser is to be taken to have broken a condition of the contract, and the purchaser or vendor is entitled to all civil remedies accordingly, as the case may be.

78. DEPOSIT OF TITLE DOCUMENTS AND CONVEYANCE

(1) A purchaser who is not in default under an instalment contract may, any time after the contract has been entered into, direct the vendor, at the cost of the purchaser, to deposit with the Public Trustee or a person prescribed by the Minister by notice in the *Gazette* —

(a) the certificate or certificates of title, or other documents of title, relating to the land the subject of the contract; and

(b) a duly executed conveyance of the land in favour of the purchaser.

(2) On deposit of the conveyance with the Public Trustee or a person prescribed under subsection (1), the conveyance is taken to be delivered by the vendor in escrow pending discharge of the contract by performance or otherwise.

(3) A vendor who fails to comply with a direction given under subsection (1) is to be taken to have broken a condition of the contract and the purchaser is entitled to all civil remedies accordingly.

(4) If a certificate of title or other document of title and a conveyance have been deposited with the Public Trustee or a person prescribed under subsection (1), the Public Trustee or the person —

(a) must hold the certificate of title or other document of title and the conveyance in trust and must not, except for the purpose of safekeeping, deliver the certificate or other document and the conveyance to any person until —

(i) the time for performance of the contract arrives;

(ii) the contract is discharged by performance or otherwise; or

(iii) the Court, on the application of the Public Trustee or the person prescribed under subsection (1), the vendor, the purchaser or any other interested person, orders otherwise; and

- (b) may receive money payable by the purchaser under the contract to be held on trust for the vendor.

(5) Nothing in this section applies to an instalment contract if, at the time the contract is made, the land the subject of the contract is subject to an existing mortgage.

PART 7 — MORTGAGES

Division 1 — General

79. DEFINITIONS

In this Part —

"instrument of mortgage" includes an instrument or memorandum of mortgage registered under the *Land Title Act* and a mortgage of a mining tenement under the *Mining Act*;

"principal money" includes any principal money, annuity, rent charge, statutory charge and overriding statutory charge secured or charged by an instrument of mortgage registered under the *Land Title Act*.

80. IMPLIED OBLIGATIONS IN MORTGAGES

(1) In every instrument of mortgage there is implied on the part of the mortgagor the obligation that the mortgagor will pay the principal money and interest secured according to the rate and at the times specified in the mortgage without any deduction.

(2) In every instrument of mortgage of land there is also implied on the part of the mortgagor the obligation that —

- (a) the mortgagor will keep all buildings and other improvements erected and made on the land in as good and substantial repair as they were in at the date of the mortgage; and

- (b) the mortgagor will permit the mortgagee, with or without agents, to enter on the land at all convenient times until the mortgage is redeemed to view and inspect the state of repair of the buildings and other improvements.

(3) If a mortgage is by deed, an obligation implied by this section takes effect as a covenant on the part of the mortgagor.

(4) This section —

- (a) applies only to the extent that a contrary intention is not expressed in the instrument of mortgage; and

- (b) has effect subject to the tenor and terms of the instrument of mortgage.

81. VARIATION OF MORTGAGE

(1) A mortgage evidenced by an instrument of mortgage may be varied by a memorandum of variation to —

- (a) increase or reduce the rate of interest payable in respect of the debt or obligation secured by the mortgage;
- (b) increase or reduce the amount secured by the mortgage;
- (c) shorten, extend or renew the term or currency of the mortgage; or
- (d) vary any condition, covenant or other provision of the instrument of mortgage.

(2) The power of variation under this section is in addition to any other power of variation existing under a law in force in the Territory.

82. INSPECTION AND PRODUCTION OF INSTRUMENTS

(1) While a mortgagor's right to redeem subsists, the mortgagor is entitled —

- (a) at reasonable times;
- (b) on making a request;
- (c) at the mortgagor's own cost; and
- (d) on payment or tender (by the mortgagor or the mortgagor's legal practitioner or conveyancing agent) of the mortgagee's proper costs and expenses,

to inspect and to make or be supplied with copies or abstracts of, or extracts from, the documents of title or other documents relating to the mortgaged property in the possession, custody or power of the mortgagee.

(2) If a mortgagor in respect of a mortgage of land executes, subsequent to the mortgage, an instrument or other document in relation to —

- (a) an authorised dealing with the land; or
- (b) a second or subsequent mortgage,

the mortgagee or other person holding the certificate of title, instrument of lease or other documents of title in respect of the land is —

- (c) on being requested in writing to do so by the mortgagor or a person entitled to the benefit of the subsequent instrument or document;
- (d) at the cost of the person making that request; and
- (e) on payment or tender to that mortgagee or other person of the mortgagee's or other person's proper costs and expenses,

to produce the document or documents of title for lodgment in the Land Titles Office so that the subsequent instrument or document may be registered.

(3) If the mortgagee or other person fails to comply with a request made under subsection (2), the mortgagor or other person entitled to the benefit of the subsequent instrument or document concerned may make application to the Court for an order directed to that mortgagee or other person to appear before the Court and show cause why the document or documents of title should not be produced under that subsection.

(4) If the mortgagee or other person fails to appear before the Court at the time appointed in the order, the Court may issue a warrant to arrest the mortgagee or other person and to detain him or her until he or she is brought before the Court for examination.

(5) On the appearance before the Court of a person under subsection (3) or (4) and after examining that person on oath, the Court may —

- (a) order the person to deliver up the document or documents of title; or
- (b) order the Registrar-General to dispense with production of the document or documents of title to enable the subsequent instrument or document to be registered.

(6) If a certificate of title, an instrument of lease, or other document of title referred to in subsection (2) is lodged in the Land Titles Office, it is —

- (a) when the dealing or mortgage referred to in that subsection has been registered — to be redelivered to the mortgagee or other person authorised by the mortgagee to take delivery of the dealing or mortgage; and
- (b) while lodged in the Land Titles Office — not to be used or available for the purpose of registering any instrument, dealing or mortgage other than those referred to in subsection (2).

(7) The execution or attempted execution of a second or subsequent mortgage does not —

- (a) constitute a breach of a term, covenant, condition or proviso for re-entry contained in a prior mortgage;
- (b) occasion any forfeiture or penalty; or
- (c) render payable or accelerate the time for payment of a sum that, if the second or subsequent mortgage had not been executed or the attempt to execute that mortgage had not been made, would not have been payable or would not have been payable at that time.

(8) A mortgagee whose mortgage is surrendered, discharged or otherwise extinguished is not liable by reason of delivering documents of title in the mortgagee's possession to the person not having the best right to the mortgage unless the mortgagee has notice of the right or claim of a person having a better right.

- (9) This section —
 - (a) applies only to mortgages made after the commencement of this Act; and
 - (b) has effect despite any term of a mortgage to the contrary.

83. ACTIONS FOR POSSESSION BY MORTGAGORS

(1) If a mortgagor is entitled to the possession of land or receipt of the rents and profits of land, and the mortgagee takes possession or enters into receipt of the rents and profits of the land without having given notice of his or her intention to do so, the mortgagor may sue, in the mortgagor's own name only —

- (a) for possession, or for the recovery of the rents or profits; or
- (b) to prevent or recover damages in respect of any trespass or other wrong relating to the land,

unless the cause of action arises on a lease or other contract made by the mortgagor jointly with another person.

(2) Nothing in this section prejudices the power of a mortgagor under any other law in force in the Territory to take proceedings in the mortgagor's own name only, whether in right of a legal estate vested in the mortgagor or otherwise.

(3) This section applies to mortgages made before and after the commencement of this Act.

84. MORTGAGEE OF LEASEHOLD LAND COMING INTO POSSESSION OF RENT AND PROFITS

If a mortgagee of leasehold land or a person claiming the land from or under the mortgagee is in possession of the land or is in receipt of the rents and profits of the land, the mortgagee or other person is, to the extent that the rents and profits may be received by him or her, subject and liable to the lessor of the land or a person entitled to the lessor's estate or interest in the land or to receive the rent reserved to the lessor to the same extent as the lessee was liable before the mortgagee or person claiming from or under the mortgagee took possession of the land or entered into receipt of the rents and profits.

85. TACKING AND FURTHER ADVANCES

(1) On the commencement of this Act, a prior mortgagee has a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable) if —

- (a) an arrangement has been made to that effect with the subsequent mortgagees;
- (b) the mortgagee had no notice of the subsequent mortgages at the time when the further advance was made by the mortgagee; or

(c) the mortgagee's mortgage imposes on the mortgagee an obligation to make further advances.

(2) Nothing in subsection (1) affects the right of a prior mortgagee to rank in priority to subsequent mortgagees in respect of expenses properly incurred in preserving the mortgaged property.

(3) A mortgagee in respect of a mortgage that was made expressly for securing a current account or other further advances is, in relation to the making of further advances after the commencement of this Act, not to be taken to have notice of another mortgage by reason only that the other mortgage was registered under an Act providing for registration of mortgages or deeds unless it was registered under that Act at the time when the first-mentioned mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, whichever last occurred.

(4) Other than as provided in subsection (3), the right to tack is abolished.

(5) Nothing in this Act affects any priority acquired before the commencement of this Act —

(a) by tacking;

(b) in respect of further advances made without notice of a subsequent mortgage; or

(c) by arrangement with a subsequent mortgagee.

(7) This section applies to mortgages of land made before and after the commencement of this Act.

86. POWERS INCIDENT TO INTEREST OF MORTGAGEE

If a mortgage is made by instrument, the mortgagee has the following powers to the like extent, but not further, as if they are conferred by terms contained in the instrument of mortgage:

(a) subject to section 89, a power to sell, or to concur with any other person in selling, the mortgaged property or a part of the mortgaged property, and all the interest of the mortgagor in the property or part whether subject to prior charges or not and whether together or in lots or in subdivision or otherwise, by public auction or by private contract and for a sum payable either in one sum or by instalments, subject to the conditions with respect to title, evidence of title or other matters as the mortgagee thinks fit, and with power to vary any contract for sale, buy in at an auction or rescind any contract for sale and to resell, without being answerable for any loss occasioned by the exercise of the power, with power to make the roads, streets and passages and grant the easements of right of way or drainage over the mortgaged property as the circumstances may require and the mortgagee thinks fit;

- (b) a power, at any time after the date of the instrument of mortgage, to insure and keep insured against loss or damage by fire, flood, lightning, storm, tempest and earthquake a building or any effects or property of an insurable nature, whether affixed to freehold land or not, being or forming part of the property which or an interest in which is mortgaged, and the premiums paid for the insurance are a charge on the mortgaged property or interest in addition to the mortgage money and with the same priority and with interest at the same rate as the mortgage money;
- (c) subject to section 96, a power to appoint a receiver of the income of the mortgaged property or a part of the mortgaged property or, if the mortgaged property consists of an interest in income, a rent charge or an annual or other periodical sum, to appoint a receiver of that property or a part of that property;
- (d) a power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting and not planted or left standing for shelter or ornament, to sever and sell a chattel affixed to the property or to contract for the cutting, severing or sale of timber, other trees or a chattel which is to be completed not later than 12 months after the making of the contract;
- (e) a power (on default) to enter into possession of the land and receive the rents and profits of the land or from time to time let the land for a term not exceeding 12 months;
- (f) a power (on default) to commence proceedings for recovery of the land either before or after entering into the receipt of the rents and profits of the land or selling the land under the power of sale;
- (g) subject to section 89, a power to sell an easement, right or privilege of any kind over or in relation to the mortgaged property.

87. POWERS INCIDENT TO POWER OF SALE

A mortgagee's power of sale includes the following powers as incident to the sale:

- (a) a power to impose or reserve or make binding, to the extent that the law permits, by covenant, condition or otherwise, on the unsold part of the mortgaged property or a part of it, or on the purchaser and any property sold, a restriction or reservation with respect to building on or any other user of land;
- (b) a power to sell the mortgaged property, or a part of it —
 - (i) with or without a grant or reservation of rights of way, rights of water, easements and rights and privileges for or connected with building or other purposes in relation to the property remaining in mortgage or a part of it or to any property sold;
 - (ii) with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage and

other powers, easements and rights and privileges for or connected with mining purposes in relation to the property remaining unsold or a part of it or to any property sold; and

- (iii) with or without covenants by the purchaser to expend money on land sold.

88. APPLICATION OF SECTIONS 86 AND 87

(1) A provision of this Act that relates to or regulates the exercise of the powers mentioned in sections 86 and 87 may be varied or extended by the instrument of mortgage.

(2) Sections 86 and 87 —

- (a) apply to instruments of mortgage of land executed before and after the commencement of this Act;
- (b) apply only to the extent that a contrary intention is not expressed in the instrument of mortgage; and
- (c) has effect subject to the tenor and terms of the instrument of mortgage.

Division 2 — Exercise of Power of Sale

89. REGULATION OF EXERCISE OF POWER OF SALE

(1) A mortgagee must not exercise the mortgagee's power of sale (whether conferred by an Act or an instrument of mortgage) unless —

- (a) default has been made in the payment of the principal money or interest (or a part of it) secured by the instrument of mortgage, notice requiring the payment of the amount that constitutes the default has been served on the mortgagor and the default has continued for 30 days (or any other period of not less than one day as agreed) after the service of the notice; or
- (b) default has been made on the part of the mortgagor or of some other person concurring in the making the mortgage in the observance or fulfilment of a provision contained in the instrument of mortgage or implied by this or another Act, notice requiring the default to be remedied has been served on the mortgagor and the default has continued for 14 days after the service of the notice.

(2) A notice under subsection (1) is to be in the approved form.

(3) This section applies —

- (a) despite section 51 or any provision in a mortgage to the contrary;
- (b) to mortgages made before and after the commencement of this Act; and

- (c) only if the power of sale is exercised because of a default that occurs after the commencement of this Act.

90. DUTY OF MORTGAGEE AS TO SALE PRICE

(1) It is the duty of a mortgagee, in exercising the power of sale (whether conferred by an Act or an instrument of mortgage), to take reasonable care to ensure that the property is sold at its market value.

(2) Not later than 28 days after completion of the sale the mortgagee must give to the mortgagor, or a subsequent mortgagee or encumbrancer in respect of the property, the notice approved for the purposes of this section.

(3) The title of the purchaser is not impeachable on the ground that the mortgagee has committed a breach of a duty imposed by this section but a person who suffers loss or damage because of the breach of duty has a remedy in damages against the mortgagee exercising the power of sale.

(4) An agreement or a term of an agreement is void to the extent that it relieves, purports to relieve, or has or might have the effect of relieving a mortgagee from a duty imposed by this section.

(5) Nothing in this section affects the operation of any law in force in the Territory relating to the duty of the mortgagee to account to the mortgagor.

(6) This section applies in relation to mortgages made before or after the commencement of this Act but only if the power of sale is exercised because of a default that occurs after the commencement of this Act.

91. EFFECT OF CONVEYANCE ON SALE

(1) A mortgagee exercising the power of sale conferred by this Act has, in the case of unregistered land, power by deed or instrument in writing to convey to and vest in the purchaser the property sold for all the interest (including the legal interest) in it that the mortgagor had power to dispose of freed from all interests and rights to which the mortgage has priority but subject to all interests and rights that have priority to the mortgage.

(2) If a mortgagee exercising the power of sale conferred by this Act registers a transfer of the property sold under the *Land Title Act*, the interest of the mortgagor in the property passes to the transferee freed and discharged from the mortgage and from all interests and rights to which the mortgage has priority but subject to all estates, interests and rights that have priority to the mortgage.

92. PROTECTION OF PURCHASERS

(1) If a conveyance is made in the exercise of the power of sale conferred by this Act the title of the purchaser is not impeachable on the ground that

- (a) no case had arisen to authorise the sale;
- (b) due notice was not given;

- (c) leave of the Court, if required, was not obtained; or
- (d) the power was otherwise improperly or irregularly exercised.

(2) A purchaser is not, either before or on conveyance, to be concerned to see or inquire whether the power of sale referred to in subsection (1) is authorised or properly or regularly exercised but a person who suffers loss or damage by the power has a remedy in damages against the person exercising the power.

93. APPLICATION OF PROCEEDS OF SALE

(1) The proceeds from the sale of land by a mortgagee entitled to the benefit of an overriding statutory charge are to be —

- (a) first — applied in payment of the costs, charges and expenses properly incurred by the mortgagee as incident to the sale;
- (b) secondly — applied in payment of any money owing to a person entitled under a law of the Commonwealth to priority over an overriding statutory charge;
- (c) thirdly — applied in payment of any money owing to a mortgagee entitled to the benefit of a prior overriding statutory charge having priority;
- (d) fourthly — applied in payment of the money owing to the mortgagee entitled to the benefit of the overriding statutory charge; and
- (e) further — in accordance with subsection (2)(b), (c), (d), (f) and (g) (in that sequence).

(2) The proceeds from the sale of land received by the mortgagee in any other case are to be —

- (a) first — applied in payment of the costs, charges and expenses properly incurred by the mortgagee as incident to the sale;
- (b) secondly — applied in payment of money owing to a person entitled under a law of the Commonwealth to priority over a statutory charge;
- (c) thirdly — applied in payment of money owing to a mortgagee entitled to the benefit of a registered overriding statutory charge;
- (d) fourthly — applied in payment of a prior mortgage, if any, if the mortgagee entitled to the benefit of the mortgage has concurred in the sale and has executed a discharge of their mortgage;
- (e) fifthly — applied in payment of the money owing to the mortgagee;
- (f) sixthly — applied in payment of any subsequent mortgages in order of their priority; and

- (g) seventhly — in the case of any residue of the proceeds, paid to the person entitled to receive or give receipts for the proceeds of sale of the land.

94. PROVISIONS AS TO EXERCISE OF POWER OF SALE

(1) The power of sale conferred by this Act may be exercised by any person entitled to receive and give a discharge for the mortgage money.

(2) The power of sale conferred by this Act does not affect the right of foreclosure.

(3) Subject to section 90, the mortgagee is not answerable for any involuntary loss that happens in connection with the exercise or execution of —

- (a) the power of sale conferred by this Act;
- (b) a trust relating to the sale of the mortgaged property; or
- (c) a power or provision contained in the instrument of mortgage that relates to the exercise of the power of sale.

(4) At any time after the power of sale conferred by this Act has become exercisable, the person entitled to exercise the power may demand and recover from another person, who is not a person who has an interest in priority to the mortgage in the mortgaged property, all the deeds and documents relating to the property or to the title to the property which a purchaser under the power of sale would be entitled to demand and recover from that other person.

95. MORTGAGEE'S RECEIPTS DISCHARGES, &C.

- (1) The written receipt of a mortgagee is sufficient discharge for —
 - (a) any money realised under the exercise of the power of sale conferred by this Act; or
 - (b) any money or securities secured by the mortgagee's mortgage,

and a person paying or transferring the money or securities to the mortgagee is not to be concerned to inquire whether any money remains due under the mortgage or to see to the application of the money or securities paid or transferred.

(2) Money received by a mortgagee under a mortgage or from the proceeds of securities comprised in the mortgage are to be applied in the like manner as if it was money received by the mortgagee arising from a sale under the power of sale conferred by this Act except that the costs, charges and expenses payable are to be the costs, charges and expenses properly incurred in recovering and receiving the money or securities and in converting securities into money instead of those incurred as incident to sale.

96. APPOINTMENT, POWERS, REMUNERATION AND DUTIES OF RECEIVER

(1) A mortgagee who is entitled to appoint a receiver must not appoint a receiver —

(a) until the mortgagee has become entitled to exercise the power of sale conferred by an Act; and

(b) other than by writing.

(2) A receiver is to be taken to be the agent of the mortgagor and the mortgagor alone is responsible for the receiver's acts or defaults unless the instrument of mortgage provides otherwise.

(3) A person paying money to the receiver is not to be concerned to inquire whether the receiver is authorised to act.

(4) A mortgagee may, by writing, remove the receiver and appoint a new receiver.

Division 3 — Miscellaneous

97. EFFECT OF ADVANCE ON JOINT ACCOUNT

(1) If —

(a) in a mortgage or an obligation for payment of money, or a transfer of the mortgage or obligation, the sum or a part of the sum advanced or owing is expressed to be advanced by or owing to one or more persons out of money or as money belonging to them on a joint account; or

(b) a mortgage or an obligation for the payment of money, or a transfer of the mortgage or obligation, is made to one or more persons jointly,

the mortgage money or other money or money's worth due to those persons on the mortgage or obligation, is, as between them and the mortgagor or obligor, to be taken to be and to remain money or money's worth belonging to those persons on a joint account.

(2) Despite any notice to the payer of a severance of the joint account, the receipt in writing of the survivors or last survivor of the persons referred to in subsection (1), or of the personal representative of the last survivor, is a complete discharge for all money or money's worth.

(3) This section —

(a) applies only to mortgages made or obligations created after the commencement of this Act;

(b) applies only to the extent that a contrary intention is not expressed in a mortgage, obligation or transfer of a mortgage or obligation; and

(c) has effect subject to the terms of the mortgage, obligation or transfer.

(3) If a mortgage is registered under an Act and that Act provides for registration of a record of death or of a record of transmission by or on death, this section has effect only if the record is registered as provided by that Act.

98. OBLIGATION TO TRANSFER INSTEAD OF DISCHARGING MORTGAGE

(1) If a mortgagor is entitled to redeem, the mortgagor has power to require the mortgagee, instead of discharging, to transfer the mortgage to a third person (as the mortgagor directs) on the terms on which the mortgagee would be bound to discharge.

(2) The mortgagee must comply with the requirement of the mortgagor.

(3) The right of the mortgagor conferred by this section belongs to and is capable of being enforced by each mortgagee or the mortgagor despite any intermediate mortgage, but a requisition of an mortgagee prevails over a requisition of the mortgagor and a requisition of a prior mortgagee prevails over a requisition of a subsequent mortgagee.

(4) This section does not apply —

(a) in the case of a mortgagee being or having been in possession; or

(b) in the case of a mortgage which contains —

(i) a valid and enforceable covenant or condition in favour of the mortgagee in restraint of the trade or business of the mortgagor; or

(ii) any other collateral benefit or advantage in favour of the mortgagee.

(5) This section —

(a) applies to mortgages made before or after the commencement of this Act; and

(b) has effect despite any term of a mortgage to the contrary.

99. RELIEF AGAINST PROVISION FOR ACCELERATION OF PAYMENT

(1) If default has taken place —

(a) in the payment of an instalment of principal or interest due under a mortgage; or

(b) in the observance of a covenant or obligation in a mortgage,

and under the terms of the mortgage an accelerated sum may or has because of the default or of the exercise on default of an option or election conferred by the

mortgage become due and payable, the mortgagor is entitled to relief under this section.

(2) A mortgagor who, at any time before sale by the mortgagee or before the commencement of proceedings to enforce the rights of the mortgagee —

- (a) performs the covenant or obligation in respect of which default has taken place; or
- (b) tenders to the mortgagee, who accepts payment of, the amounts of the instalment in respect of which default has taken place and the reasonable expenses incurred by the mortgagee,

is relieved from the consequences of the default.

(3) A mortgagor who, in any proceedings brought to enforce the rights of the mortgagee or brought by the mortgagor —

- (a) gives an undertaking to the Court to perform a covenant or an obligation; or
- (b) tenders or pays into Court the amount of an instalment;

in respect of which default has taken place, may apply to the Court for relief from the consequences of the default.

(4) If a mortgagor makes an application for relief, the Court may grant or refuse relief as the Court having regard to the conduct of the parties and all other circumstances thinks fit and, in doing so, may stay any proceedings brought by the mortgagee or otherwise or may grant relief on the terms it thinks fit including the payment of any reasonable expenses of the mortgagee and the payment of costs.

(5) If in granting relief under subsection (4) the Court has stayed proceedings for the enforcement of the rights of the mortgagee, the Court may, on application, remove the stay of proceedings if the mortgagor defaults in carrying out an undertaking referred to in subsection (3).

(6) This section —

- (a) applies to mortgages made before or after the commencement of this Act;
- (b) applies only to a default occurring after the commencement of this Act; and
- (c) has effect despite any term of a mortgage to the contrary.

(7) In this section, "accelerated sum" means the whole or part of principal or interest secured by a mortgage other than an instalment referred to in subsection (1)(a).

100. MORTGAGEE ACCEPTING INTEREST ON OVERDUE MORTGAGE NOT TO CALL UP WITHOUT NOTICE

- (1) If —
 - (a) the mortgagor has made default in payment of the principal sum at the expiry of the term of the mortgage or a period for which it has been renewed or extended;
 - (b) the mortgagee has accepted payment of interest on the sum for a period of not less than 3 months after the default was made; and
 - (c) the mortgagor continues to perform and observe all covenants expressed or implied in the mortgage other than the covenant for payment of the principal sum,

the mortgagee is not entitled to —

- (d) take proceedings to compel payment of the sum or for foreclosure;
- (e) enter into possession; or
- (f) exercise a power of sale,

without giving to the mortgagor not less than 30 days notice of the mortgagee's intention to do so.

(2) No purchaser from a mortgagee exercising the mortgagee's power of sale is to be concerned to inquire whether the mortgagee has accepted interest because of a default referred to in subsection (1).

- (3) This section —
 - (a) applies to mortgages made before or after the commencement of this Act;
 - (b) applies only if default has occurred after the commencement of this Act; and
 - (c) has effect despite any term of a mortgage to the contrary.

101. INTEREST OF MORTGAGOR NOT SEIZABLE ON JUDGMENT FOR MORTGAGE DEBT

(1) If a court gives judgment in favour of a creditor for a debt secured by mortgage, the interest of the mortgagor in the mortgaged property is not to be taken in execution of the judgment.

- (2) This section applies —
 - (a) to the execution of a judgment given before or after the commencement of this Act; and
 - (b) despite any term of a mortgage to the contrary.

102. ABOLITION OF CONSOLIDATION OF MORTGAGES

(1) A mortgagor seeking to redeem a mortgage is entitled to do so without paying any money due under another mortgage (whether made by the mortgagor or a person through whom the mortgagor claims) of property not subject to the mortgage which the mortgagor seeks to redeem.

(2) This section —

(a) has effect despite any term of a mortgage to the contrary; and

(b) applies only if the mortgages referred to in subsection (1) are, or one of them is, made after the commencement of this Act.

103. SALE OF MORTGAGED PROPERTY IN PROCEEDINGS FOR REDEMPTION OR FORECLOSURE

(1) If a person who is entitled to redeem mortgaged property commences proceedings for redemption alone, for sale alone, or for sale or redemption in the alternative, the Court may make an order for sale instead of redemption.

(2) In proceedings for foreclosure, redemption, sale or for the raising and payment in any manner of mortgage money, the Court may, on the request of the mortgagee or a person interested either in the mortgage money or in the right of redemption, direct a sale of the mortgaged property on the terms, subject to subsection (4), as it thinks fit, including the deposit in the Court of a reasonable sum fixed by the Court to meet the expenses of sale and to secure performance of the terms.

(3) Subsection (2) applies —

(a) despite that —

(i) a person other than a person referred to in that subsection dissents to the sale of the mortgaged property; or

(ii) the mortgagee or person interested in the mortgage money or the right of redemption does not appear in the proceedings; and

(b) without requiring the Court to allow time for redemption or for payment of any mortgaged money.

(4) In proceedings brought by a person interested in the right of redemption and seeking a sale, the Court may —

(a) on the application of a defendant — direct the plaintiff to give security for costs as the Court thinks fit;

(b) give the conduct of the sale to a defendant; and

(c) give the directions it thinks fit in respect of the costs of a defendant.

- (5) In any case where this section applies, the Court may —
- (a) direct a sale without previously determining the priorities of encumbrancees;
 - (b) make an order in favour of a purchaser —
 - (i) vesting the mortgaged property; or
 - (ii) appointing a person to convey the property, whether or not subject to an encumbrance; or
 - (c) in the case of an equitable mortgage, create and vest a legal interest in the mortgagee to enable the mortgagee to carry out a sale of the mortgaged property as if the mortgage had been made by deed or instrument by way of legal mortgage.

(6) This section applies to actions brought before or after the commencement of this Act.

(7) In this section, "mortgaged property" includes the interest which a mortgagee would have power to convey if the mortgagee was exercising the power of sale conferred by this Act.

104. REALISATION OF EQUITABLE CHARGES BY THE COURT

(1) If an order for sale is made by the Court in relation to an equitable mortgage of land, the Court may, in favour of a purchaser, make an order —

- (a) vesting the land;
- (b) appointing a person to convey the land; or
- (c) creating and vesting in the mortgagee a legal interest in the land to enable the mortgagee to carry out the sale,

as the case may require, in like manner as if the mortgage had been created by instrument or deed by way of legal mortgage, but without prejudice to an encumbrance having priority to the equitable mortgage unless the encumbrancee consents to the sale.

(2) This section applies to equitable mortgages made or arising before or after the commencement of this Act.

105. PAYMENT OF MORTGAGE MONEY TO PUBLIC TRUSTEE IN CASE OF ABSENT OR UNKNOWN MORTGAGEES

(1) The Public Trustee may receive money on behalf of a mortgagee or the estate of a mortgagee who —

- (a) is dead;
- (b) cannot be found; or

(c) is incapable of executing a discharge of the mortgage.

(2) The Public Trustee may require a person at whose instance the Public Trustee proposes to exercise the Public Trustee's power under subsection (1) to undertake to indemnify the Public Trustee in respect of the costs or liabilities incurred in connection with or by reason of the exercise of the power.

(3) Money received by the Public Trustee under subsection (2) is —

(a) for the purposes of the mortgage and section 106, to be taken to have been paid to the mortgagee; and

(b) to be held by the Public Trustee on trust for the mortgagee or other person entitled to the money.

106. DISCHARGE OF MORTGAGE BY PUBLIC TRUSTEE

(1) If all the money secured by a mortgage has been paid by the mortgagor, and the mortgagee —

(a) is dead;

(b) cannot be found; or

(c) is incapable of executing a discharge of the mortgage,

the Public Trustee may execute a discharge of the mortgage.

(2) The Public Trustee may require a person at whose instance the Public Trustee proposes to exercise his or her power under subsection (1) to undertake to indemnify the Public Trustee in respect of the costs or liabilities incurred in connection with or by reason of the exercise of the power.

(3) A discharge executed under subsection (1) has the same effect as a discharge executed by the mortgagee except that it is not to operate as a discharge of the personal covenants of the mortgage.

(4) In the case of a mortgage to secure contingent liabilities or to secure both the payment of money and contingent liabilities, the reference in subsection (1) to all the money secured by a mortgage that has been paid is or includes (as the case may require) a reference to any of those contingencies that have become incapable of occurring.

107. SUBSEQUENT MORTGAGEES MAY REDEEM PRIOR MORTGAGES, &C.

(1) If the money secured by a mortgage falls due and the mortgagee requires payment of the money, it is lawful for any other mortgagee of the same property to tender and pay to the mortgagee requiring the payment the money due on the mortgage.

(2) On the payment of money under subsection (1), the mortgagee making the payment is entitled to a transfer of the interest of the mortgagee requiring the payment.

PART 8 — LEASES AND TENANCIES

Division 1 — Rights, Powers and Obligations

108. TENANCY ACT TO PREVAIL

In the event of an inconsistency between a provision of or under this Part and a provision of or under the *Tenancy Act*, the provision of or under the *Tenancy Act* prevails to the extent of the inconsistency.

109. ABOLITION OF *INTERESSE TERMINI* AS TO REVERSIONARY LEASES AND LEASES FOR LIVES

(1) The doctrine of *interesse termini* is abolished.

(2) On the commencement of this Act, all terms of years absolute are, whether the interest is created before or after that commencement, capable of taking effect at law or in equity, according to the interest or powers of the grantor, from the date fixed for commencement of the term without actual entry.

(3) On the commencement of this Act, a term at a rent or granted in consideration of a fine that is limited to take effect more than 21 years from the date of the instrument purporting to create it is void.

(4) A contract made after the commencement of this Act for the purpose of creating a term referred to in subsection (3) is void.

(5) Subsections (3) and (4) do not apply to a term that —

(a) takes effect in equity under a settlement; or

(b) is created out of an equitable interest under a settlement or under an equitable power for mortgage, indemnity or other like purpose.

(6) Nothing in subsections (1) and (2) —

(a) prejudicially affects the right of a person to —

(i) recover rent; or

(ii) enforce or take advantage of any covenants or conditions; or

(b) in the case of terms or interests created before the commencement of this Act — operates to vary statutory or other obligations imposed in respect of those terms or interests.

(7) The rule of law that a legal term, whether or not being a mortgage term, may be created to take effect in reversion expectant on a longer term is confirmed and nothing in this Act affects the operation of that rule.

(8) In this section "term of years" includes a term —

(a) for less than a year;

- (b) for a year, or years, and a part of a year; or
- (c) from year to year.

110. VOLUNTARY WASTE

- (1) A lessee must not commit voluntary waste.
- (2) Nothing in subsection (1) —
 - (a) applies to a lease without impeachment of waste; or
 - (b) affects a licence or other right to commit waste.
- (3) A lessee who contravenes or fails to comply with subsection (1) is liable in damages to the reversioner but this section imposes no criminal liability.
- (4) This section does not affect the manner in which a tenancy at will may be determined.

111. OBLIGATIONS OF LESSEE

(1) Subject to this Act, unless otherwise agreed there is, in every lease of land made after the commencement of this Act, implied the following obligations by the lessee with the lessor:

- (a) that the lessee will pay the rent reserved at the time mentioned in the lease;
 - (b) that, if during the term of the lease and as often as it occurs, the leased premises or a part of the leased premises are destroyed or damaged by fire (without fault on the part of the lessee), flood, lightning, storm, or tempest so that the premises is rendered unfit for the occupation and use of the lessee, the rent reserved, or a proportionate part of the rent according to the nature and extent of the damage sustained, abates and all remedies for recovery of the rent or the part of the rent are suspended until the leased premises is rebuilt or made fit for the occupation and use of the lessee;
 - (c) that the lessee is to, at all times during the term of the lease, keep and, at the termination of the lease, yield up the leased premises in good and tenantable repair having regard to their condition at the commencement of the lease, damage from fire, flood, lightning, storm and tempest and from reasonable wear and tear being excepted.
- (2) The obligation specified in subsection (1)(c) is not implied in the case of a short lease of premises for the purpose, or principally for the purpose, of human habitation.
- (3) In the case of a lease by deed, an obligation implied by this section takes effect as a covenant.

112. OBLIGATIONS IN SHORT LEASES

- (1) In a lease of premises that is a short lease there is an obligation —
 - (a) on the part of the lessor of premises leased for the purpose, or principally for the purpose, of human habitation — to provide and maintain the premises, or the part of the premises that is let for that purpose, in a condition reasonably fit for human habitation; and
 - (b) on the part of the lessee —
 - (i) to care for the leased premises in the manner of a reasonable tenant; and
 - (ii) to repair damage caused by the lessee or by persons coming on the premises with the lessee's permission.
- (2) This section applies —
 - (a) to leases made after the commencement of this Act; and
 - (b) despite anything in this Act or any term of an agreement to the contrary.

113. POWERS OF LESSOR

- (1) Unless otherwise agreed, there is in every lease of land made after the commencement of this Act implied the following powers in the lessor:
 - (a) that the lessor may, by the lessor or the lessor's agents, during the term of the lease at a reasonable time of the day, on giving to the lessee 2 days previous notice in writing of the lessor's intention to do so, enter on the leased premises and view the state of repair of the leased premises, and may serve on the lessee, or leave at the lessee's last known place of residence in the Territory or on the leased premises, a notice in writing of a defect requiring the lessee, within a reasonable time, to repair the defect in accordance with the covenants or obligations expressed or implied in the lease;
 - (b) that, if the lessee fails to repair a defect in accordance with a notice under paragraph (a), the lessor may enter the leased premises and execute the required repair or repairs;
 - (c) that the lessor may, by the lessor or the lessor's agents, at all reasonable times during the term of the lease, with workpersons and others and all necessary materials and appliances, enter the leased premises or a part of them for the purpose of —
 - (i) complying with an Act or an instrument of a legislative or administrative character affecting the premises, or a notice served on the lessor or lessee by a licensing body, an organisation performing local government functions or any other competent authority involving the removal or destruction of noxious weeds or animals or the carrying out of repairs,

alterations or works of a structural character which the lessee may not be bound, or if bound may fail, to do; or

- (ii) exercising the powers and authorities of the lessor under the lease;
- (d) that, subject to section 131, if —
- (i) the rent or a part of it is in arrears for not less than one month (although no formal demand has been made for its payment); or
 - (ii) default is made in the fulfilment of a covenant, obligation, condition, or other term of the lease, expressed or implied, to be performed or observed on the part of the lessee, and the default continues for not less than 2 months, or if the repairs required by a notice under paragraph (a) are not completed within the time specified in the notice,

the lessor may re-enter on the leased premises (or a part of the premises in the name of the whole) and determine the estate of the lessee in the premises.

(2) The removal or destruction of noxious weeds or animals or the repairs, alterations, and works referred to in subsection (1)(c) are to be carried out by the lessor without undue interference with the occupation and use of the leased premises by the lessee.

(3) The operation of subsection (1)(d) does not exempt the lessee from liability in respect of the breach or non-observance of a covenant, obligation, condition or other term referred to in that paragraph.

114. SHORT FORMS OF COVENANTS AND OBLIGATIONS OF LESSEES

(1) If a lease that expressly refers to Schedule 2 contains a form of words specified in Column 1 of the Schedule, the form of words is to be taken to imply and to be read as implying in the lease the obligation by the lessor or lessee with the lessee or lessor, as the case may be, specified opposite the form of words in Column 2 of the Schedule.

(2) A form of words specified in Column 1 of Schedule 2 may be varied, qualified or made subject to a limitation by the addition or omission of words.

(3) If a lease contains a form of words specified in Column 1 of Schedule 2 that is varied, qualified or subject to a limitation, the words that give effect to the variation, qualification or limitation are to be taken to be added to or omitted from the obligation specified opposite in Column 2 of the Schedule and the obligation is to be read as if varied, qualified or limited in the corresponding manner.

(4) In the case of a lease by deed, an obligation implied by this section takes effect as a covenant.

(5) This section applies only to leases made after the commencement of this Act.

115. CASES IN WHICH STATUTORY OBLIGATIONS OR POWERS NOT IMPLIED

If on the face of a lease it appears that a form of words contained in Column 1 of Schedule 2 has been struck out, sections 111 and 114 do not apply to imply in the lease the obligation specified opposite the form of words in Column 2 of the Schedule.

116. LESSEE TO GIVE NOTICE OF EJECTMENT TO LESSOR

(1) A lessee —

(a) to whom there is delivered a writ, originating summons or other process for the recovery of premises leased to or held by the lessee; or

(b) who knows that a writ, originating summons or other process for the recovery of the premises has been served,

must immediately give notice to the lessor or the lessor's agent of the delivery or service of the process.

(2) If the lessee fails to give notice to the lessor under subsection (1), the lessee is liable to the person from whom the lessee holds the land for any damages sustained by the person because of the lessee's failure to give notice.

(3) Damages recoverable under subsection (2) may be recovered by proceedings in a court of competent jurisdiction.

117. PROVISIONS AS TO COVENANTS TO REPAIR

(1) Subject to subsection (2), damages for breach of a covenant, obligation or agreement, whether express or implied or general or specific, to —

(a) keep or put premises in good repair during the currency of a lease; or

(b) leave or put premises in good repair at the termination of a lease,

are not to exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of the covenant, obligation or agreement.

(2) Damages are not recoverable for a breach of a covenant, obligation or agreement to leave or put premises in good repair at the termination of a lease if it is shown that at or shortly after the termination of the lease —

(a) the premises, in whatever state of repair they might be, would be or have been pulled down; or

(b) structural alterations would be or have been made to the premises that would render valueless the repairs covered by the covenant, obligation or agreement.

(3) A right of re-entry or forfeiture for a breach of a covenant, obligation or agreement referred to in subsection (1) or (2) is not enforceable unless the lessor proves that —

(a) a notice has been served on the lessee in accordance with section 131 and the service of the notice was known at the time of or shortly after the service of the notice by —

(i) the lessee;

(ii) an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee; or

(iii) the person who last paid the rent due under the lease either on the person's own behalf or as agent for the lessee or under-lessee; and

(b) a period of time reasonably sufficient to enable the execution of the repairs has elapsed from the time when the fact of the service of the notice became known to the lessee, under-lessee or person and the exercise of the right of re-entry or forfeiture.

(4) If a notice referred to in subsection (3)(a) is sent by post in a registered letter addressed to a person at the person's last known place of residence in or out of the Territory and the letter is not returned through the post office undelivered, the person is, for the purposes of that provision, unless the contrary is proven, to be taken to have had knowledge of the fact that the notice had been served from the time when the letter would have been delivered in the ordinary course of post.

(5) This section applies to leases whether created before or after the commencement of this Act.

118. NO SEIZURES OF GOODS TO RECOVER UNPAID RENT

(1) If, on the commencement of this Act, a lessee is in arrears with the rent, the lessor is not entitled to enter onto the leased premises and seize goods of the lessee for the purpose of recovering unpaid rent.

(2) This section applies —

(a) in relation to leases made before or after the commencement of this Act; and

(b) despite any term of a lease to the contrary.

119. ABOLITION OF REPLEVIN AND DISTRESS FOR RENT

The actions of replevin and distress for rent are abolished.

Division 2 — Surrenders, Assignments and Waiver

120. HEAD LEASES MAY BE RENEWED WITHOUT SURRENDERING UNDERLEASES

- (1) Subject to this section, if —
 - (a) a lease is surrendered for the purpose of being renewed; and
 - (b) a new lease is granted by the lessor under the surrendered lease in respect of the premises held under that lease,

the new lease is, without the surrender of the underleases derived out of the surrendered lease (if any), as good and valid for all intents and purposes as if those underleases had been surrendered on or before the making of the new lease.

(2) A person in whom an estate for life or lives or for years is vested because of the renewal of a lease, or the person's executor or administrator, is entitled to the rents, covenants, obligations and duties and has the remedies for the recovery of the rents, covenants, obligations and duties, and the under-lessees (if any) hold and enjoy the premises leased under the respective under-leases as if the original lease under which the under-leases were derived continues to have effect.

(3) If a lease is renewed, the head landlord is entitled to the same remedy of entry in and on the premises comprised in an under-lease for the rents and duties reserved by the new lease (so far as those rents and duties do not exceed the rents and duties reserved in the lease out of which the under-lease was derived) as the head landlord would have had if the former lease had continued to have effect or the under-lease had been renewed under the new lease.

(4) In the case of a registered lease of registered land, this section has effect subject to the *Land Title Act*.

121. PROVISION AS TO ATTORNMENTS AS TO TENANTS

- (1) If land is subject to a lease, the —
 - (a) conveyance of a reversion in the land expectant on the determination of the lease; or
 - (b) grant or conveyance of a rent charge to issue or issuing out of the land,

is valid without an attornment of the lessee.

- (2) Nothing in subsection (1) —
 - (a) affects the validity of a payment of rent by the lessee to the person making the conveyance or grant before notice of the conveyance or grant is given to the lessee by the person entitled under the conveyance or grant; or
 - (b) renders the lessee liable for a breach of covenant to pay rent because of the lessee's failure to pay rent to the person entitled to

receive the rent under the conveyance or grant before notice of the conveyance or grant is given to the lessee.

(3) An attornment by the lessee in respect of land to a person claiming to be entitled to the interest of the lessor in the land is void unless made with the consent of the lessor.

(4) Subsection (3) does not apply to an attornment —

(a) made under an order of a court of competent jurisdiction;

(b) to a mortgagee by a lessee holding under a lease from the mortgagor if the right of redemption is barred; or

(c) to a person rightfully deriving title under the lessor.

122. WHEN REVERSION ON LEASE IS SURRENDERED, &C., NEXT ESTATE IS TO BE TAKEN TO BE THE REVERSION

(1) If the reversion expectant on a lease of land is surrendered or merges, the estate that for the time being confers the next vested right to the land as against the lessee under the lease is to be taken to be the reversion expectant on the lease for the purpose and to the extent of preserving incidents to and obligations on the reversion that, but for the surrender or merger of the lease, would have subsisted.

(2) This section—

(a) applies to leases made after the commencement of this Act;

(b) applies to leases made before the commencement of this Act that are surrendered or merge after that commencement; and

(c) in the case of a registered lease — has effect subject to, and to the extent only that it is consistent with, the provisions of the *Land Title Act*.

123. APPORTIONMENT OF CONDITIONS ON SEVERANCE

(1) Despite the —

(a) severance by conveyance, surrender or otherwise of the reversionary estate in land comprised in a lease; or

(b) avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised in the lease,

every condition or right of re-entry of the lease is to —

(c) be apportioned;

(d) remain annexed to the severed parts of the reversionary estate; and

- (e) be in force in respect of the term on which each severed part is reversionary or the term in the part of the land in respect of which the term has not been surrendered, avoided or otherwise ceased,

in the manner as if the land comprised in each severed part, or in respect of which the term remains subsisting, had alone originally been comprised in the lease, as the case may be.

(2) In subsection (1), "right of re-entry" includes a right to determine the lease whether by notice to quit or otherwise.

(3) If notice to quit leased land is served by a person entitled to a severed part of the reversion that extends to part only of the land, the lessee may, within 1 month of the service of the notice, determine the lease in relation to the remaining part or parts of the land by giving to the owner of the reversionary estate in the remaining part or parts of the land a counter notice expiring at the same time as the original notice.

(4) This section applies to —

- (a) leases made after the commencement of this Act; and
- (b) leases made before the commencement of this Act if, after that commencement —
 - (i) the reversionary estate in leased land is severed; or
 - (ii) there is an avoidance or cesser of the term as to part only of the leased land.

124. RENT AND BENEFIT OF LESSEE'S COVENANTS TO RUN WITH THE REVERSION

(1) Rent reserved by a lease, the benefit of every covenant, obligation or term of the lease touching and concerning the land to be observed or performed on the lessee's part and every condition of re-entry and other condition contained in the lease is to be annexed and incident to and to go with the reversionary estate in the land or any part of the reversionary estate in the land immediately expectant on the term granted by the lease.

(2) Subsection (1) applies despite severance of the reversionary estate in the land and without prejudice to any liability affecting a covenantor or the covenantor's estate.

(3) Any rent, covenant, obligation or term referred to in subsection (1) is capable of being recovered, received, enforced and taken advantage of by the person from time to time entitled to the income of the whole or a part of the leased land.

(4) If a person becomes entitled to the income of land by conveyance or otherwise, the rent, covenant, obligation or term referred to in subsection (1) may be recovered, received, enforced or taken advantage of by the person even though the person has become entitled to the income after the condition of re-entry or forfeiture has become enforceable.

(5) Subsection (4) does not render a condition of re-entry or any other condition waived or released enforceable before the person is entitled to the income of the land.

(6) This section applies to —

- (a) leases made after the commencement of this Act; and
- (b) leases made before the commencement of this Act if, after that commencement —
 - (i) accrued rent is due; or
 - (ii) a breach of a covenant, condition, obligation or term of a lease is committed and the condition of re-entry or forfeiture is enforceable.

125. OBLIGATION OF LESSOR'S COVENANTS TO RUN WITH THE REVERSION

(1) The obligation under a condition or of a covenant or other obligation entered into by a lessor touching and concerning the land —

- (a) is, if and to the extent that the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, to be annexed and incident to and to go with the reversionary estate; and
- (b) may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law or otherwise.

(2) The obligation referred to in subsection (1) may, if and to the extent that the lessor has power to bind the person from time to time entitled to the reversionary estate, be taken advantage of and enforced against that person.

(3) This section applies to —

- (a) leases made after the commencement of this Act; and
- (b) a lease made before the commencement of this Act if, after that commencement, a breach of a condition, covenant or obligation of the lease is committed.

(4) This section has effect without prejudice to any liability affecting a covenantor or the covenantor's estate.

126. WAIVER OF A COVENANT IN A LEASE

If the waiver by a lessor or a person deriving title under the lessor of the benefit of a covenant, obligation or condition of a lease is proven to have taken place in a particular instance, the waiver is not to be taken to —

- (a) extend to an act or omission or matter, or to a breach of a covenant, obligation or condition of the lease, unless the waiver authorises that act, omission, matter or breach; or
- (b) operate as a general waiver by the lessor or person of the benefit of the covenants, obligations or conditions of the lease.

127. EFFECT OF LICENCES GRANTED TO LESSEE

(1) Subject to the express terms of a licence that is granted to a lessee to do an act, the licence extends only to —

- (a) the permission actually given;
- (b) the specific breach of a term or covenant referred to; or
- (c) any other matter specifically authorised to be done by the licence,

and the licence does not prevent a proceeding for a subsequent breach unless otherwise specified in the licence.

(2) Despite the grant of a licence referred to in subsection (1) —

- (a) all rights under covenants, obligations and powers of re-entry in the lease remain in full force and are available against a subsequent breach of a covenant, obligation, condition or other matter not specifically authorised or waived by the licence in the same manner as if no licence had been granted; and
- (b) except for and in relation to the particular matter authorised by the licence, the covenant, obligation, condition, other matter or right of entry remains in force as if the licence had not been granted.

(3) If there is a power or condition of re-entry on the lessee assigning, subletting or doing any other specified act without a licence, and a licence is granted to —

- (a) if there is more than one lessee — only one of the lessees to do an act or to deal with the lessee's equitable share or interest; or
- (b) the lessee or, if there is more than one lessee, only one of the lessees to assign or underlet part only of the leased premises or to do any other act in respect of part only of the leased premises,

the licence does not operate to extinguish the right of entry for a breach of a covenant, obligation or condition by the co-lessees in respect of the other shares or

interests in the premises or by the lessee or lessees of any other part or parts of the premises in respect of the other shares or interests or other part or parts of the premises, as the case may be.

128. PROVISIONS AS TO COVENANTS NOT TO ASSIGN, &C., WITHOUT LICENCE OR CONSENT

(1) In a lease that contains a covenant, condition or agreement against assigning, underletting, charging or parting with the possession of the premises leased or a part of the premises leased unless a licence or other consent to do so is granted, the covenant, condition or agreement —

- (a) despite any express term of the lease to the contrary, is to be taken to be subject —
 - (i) to a qualification that has the effect that the licence or consent is not to be unreasonably withheld; and
 - (ii) if the lease is for more than 40 years and is made in consideration wholly or partially for the erection or the substantial improvement, addition or alteration of buildings — to a limitation or qualification that, in the case of an assignment, underletting, charging or parting with the possession (whether by the holders of the lease or an underlessee and whether immediate or not) effected more than 7 years before the end of the term, no consent or licence is required if notice in writing of the transaction is given to the lessor not later than 6 months after the transaction is effected; and
- (b) unless an express term of the lease provides to the contrary — is to be taken to be subject to a qualification that has the effect that no fine or sum of money in the nature of a fine is payable for or in respect of the licence or consent.

(2) In a lease that contains a covenant, condition or agreement against the making of improvements without a licence or consent, the covenant, condition or agreement is, despite any express term in the lease to the contrary, to be taken to be subject to the qualification that the licence or consent is not to be unreasonably withheld.

(3) In a lease that contains a covenant, condition or agreement against the alteration of the user of the leased premises without a licence or consent, the covenant, condition or agreement is, if the alteration does not involve any structural alteration of the premises and despite any express term of the lease to the contrary, to be taken to be subject to a qualification that no fine or sum of money in the nature of a fine, whether by way of an increase of rent or otherwise, is payable for or in respect of the licence or consent.

(4) A qualification referred to in subsection (1)(a)(i) or (b) does not preclude the right of the lessor to require the payment of a reasonable sum in respect of legal or other expenses properly incurred by the lessor in connection with the licence or consent.

(5) A qualification referred to in subsection (2) does not preclude the right of the lessor to require, as a condition of the licence or consent —

- (a) the payment of a reasonable sum in respect of legal or other expenses properly incurred by the lessor in connection with the licence or consent;
- (b) the payment of a reasonable sum in respect of any damage to, or diminution in the value of, the premises or any neighbouring premises belonging to the lessor; or
- (c) in the case of an improvement that does not add to the letting value of the premises and if the requirement is reasonable — an undertaking on the part of the lessee to reinstate the premises in the condition in which they were before the improvement was executed.

(6) A qualification referred to in subsection (3) does not preclude the right of the lessor to require —

- (a) the payment of a reasonable sum in respect of legal or other expenses properly incurred by the lessor in connection with the licence or consent; or
- (b) the payment of a reasonable sum in respect of any damage to, or diminution in the value of, the premises or any neighbouring premises belonging to the lessor.

(7) If a dispute as to the reasonableness of a sum referred to in subsection (4), (5) or (6) is determined by a court of competent jurisdiction, the lessor is bound to grant the licence or consent concerned on payment of the sum that the court determined to be reasonable.

(8) In this section, "lease" means a lease, whether made before or after the commencement of this Act, for a term of not less than one year.

129. INVOLUNTARY ASSIGNMENT NO BREACH OF COVENANT

A breach of a covenant, condition or agreement that precludes the assigning, underletting, parting with the possession or disposing of leased premises is not committed by the —

- (a) assignment or underletting of a lease by a trustee of a bankrupt or a liquidator on behalf of a company (other than a liquidator in a voluntary winding up of a solvent company);
- (b) sale of a lease under an execution; or
- (c) bequest of a lease.

Division 3 — Relief from Forfeiture

130. APPLICATION AND INTERPRETATION

- (1) This Division —
 - (a) does not apply to leases of land held from the Crown under the *Crown Lands Act*, the *Pastoral Lands Act*, the *Special Purposes Leases Act* and the *Mining Act*; and
 - (b) does apply to under-leases from the holder of land referred to in paragraph (a).
- (2) In this Division —

"lease" includes an original or derivative under-lease, a grant at a fee-farm rent, the securing of rent by condition and, if a lessee becomes entitled under an agreement for a lease to have the lease granted, the agreement;

"lessee" includes an original or derivative under-lessee, a grantee under a grant at a fee-farm, a person entitled under an agreement for a lease to have the lease granted and the executors, administrators, and assigns of a lessee;

"lessor" includes an original or derivative under-lessor, a grantor under a grant at a fee-farm, a person bound to grant a lease under an agreement for a lease and the executors, administrators and assigns of a lessor;

"under-lease" includes an agreement for an under-lease if the under-lessee has become entitled to have the under-lease granted;

"under-lessee" includes any person deriving title through or from an under-lessee.

131. RESTRICTION ON FORFEITURE

- (1) A lessor must not exercise a right of re-entry and forfeiture under a lease unless —
 - (a) the lessor is authorised to do so by an order of the Court made under subsection (3); or
 - (b) the lessee has abandoned or voluntarily given up possession of leased premises.
- (2) If a lessee breaches a covenant, obligation, condition or agreement (whether express or implied) in the lease that gives rise to a right of re-entry or forfeiture on the part of the lessor and the lessor wishes to enforce the right, the lessor must serve on the lessee a notice that —
 - (a) specifies the particular breach complained of;

- (b) if the breach is capable of remedy — requires the lessee to remedy the breach; and
- (c) if the lessor claims compensation in money for the breach — requires the lessee to pay the compensation.

(3) If notice has been served on a lessee under subsection (2) and the lessee fails within a reasonable time after service of the notice to comply with the notice, the lessor may apply to the Court for an order for possession of the leased premises.

(4) If an application is made to the Court and the Court is satisfied that the lease has been terminated, the Court may make an order for possession of the premises.

(5) A notice approved prescribed form.

(6) For the purposes of this section, a lease limited to continue for only as long as the lessee does not commit a breach of a covenant, obligation, condition or agreement in the lease takes effect as if it is a lease that —

- (a) is for any term for which it may lawfully be in force; and
- (b) contains a term giving the lessor a right of re-entry or forfeiture for breach of a covenant, obligation, condition or agreement in the lease.

(7) This section —

- (a) applies to leases made before or after the commencement of this Act;
- (b) applies despite there being a term giving the lessor a right of re-entry or forfeiture implied in the lease by operation of another Act; and
- (c) has effect despite any term of a lease to the contrary.

(8) In this section —

- (a) a reference to a lease does not include a reference to a lease or tenancy for a term of not more than 1 year; and
- (b) if a breach of a lease has occurred before the commencement of this Act — a reference to a covenant, condition, or agreement does not include a reference to a covenant, condition or agreement in the lease against the assigning, underletting, parting with the possession or disposing of the premises leased.

132. RELIEF AGAINST FORFEITURE

(1) If a lessor —

- (a) commences proceedings to enforce a right of re-entry or forfeiture under the lease; or

- (b) has re-entered the leased premises without commencing proceedings,

the lessee may, in the lessor's or other proceedings (if any) or in proceedings commenced by the lessee, apply to the Court for relief.

(2) If a lessee makes an application for relief under subsection (1), the Court may, having regard to the proceedings, the conduct of the parties under section 131 and to any other circumstances it thinks fit, grant or refuse relief as it thinks fit.

(3) The Court may grant relief on the terms as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any similar breach in the future, as the Court in the circumstances of each case thinks fit.

(4) If a lessee commences proceedings referred to in subsection (1), the institution of the proceedings is not of itself to be construed as an admission on the part of the lessee that —

- (a) a breach referred to in section 131(2) has occurred;
- (b) notice has been served on the lessee under section 131(2); or
- (c) a right of or cause for re-entry or forfeiture has accrued or arisen under the lease,

and the Court may grant relief without making a finding or final determination that the breach has occurred, the notice has been served or the right has accrued or cause arisen.

(5) The rights and powers conferred by this section are in addition to and not in derogation of any other right to relief or power to grant relief against forfeiture.

- (6) This section —
 - (a) applies to leases made before or after the commencement of this Act; and
 - (b) has effect despite any term of a lease to the contrary.

133. POWER OF COURT TO PROTECT UNDER-LESSEE ON FORFEITURE OF SUPERIOR LEASES

- (1) If a lessor commences proceedings —
 - (a) to enforce a right of re-entry or forfeiture under a covenant, obligation or term in a lease made before or after the commencement of this Act; or
 - (b) for non-payment of rent,

the Court may, on application by a person claiming as under-lessee of an interest or a part of an interest in the property held under the lease, make an order —

- (c) staying the lessor's or other proceedings on the terms the Court thinks fit; and
- (d) vesting, for the whole term of the lease or a lesser term, the property held under the lease or an interest or part of an interest in the property in a person entitled as under-lessee to an interest in the property.

(2) The Court may make an order vesting property under subsection (1)(d) on the conditions as to execution of a deed or other document, giving security, payment of proper and reasonable rent, costs, expenses, damages, compensation or otherwise as the Court, having regard to the circumstances of each case including the consent or otherwise of the lessor to the creation of the interest claimed by the under-lessee, thinks fit.

(3) Subsection (1) does not apply to entitle an under-lessee to require a lease to be granted to the under-lessee for a larger area of land or for a longer term than the under-lessee had under the original under-lease.

(4) An order referred to in subsection (1) may be made in proceedings brought by a person claiming as under-lessee or, if the lessor has commenced proceedings in the Court, in those proceedings.

134. COSTS AND EXPENSES

(1) A lessor is entitled to recover as a debt due to the lessor from a lessee all reasonable costs and expenses properly incurred by the lessor in respect of a breach giving rise to a right of re-entry or forfeiture that is, at the request of the lessee, waived by the lessor or from which the lessee is relieved under this Act.

(2) A lessor is entitled to recover costs and expenses under subsection (1) —

- (a) in addition to any claim for damages on the part of the lessor against the lessee; and
- (b) whether or not the lessee has rendered forfeiture unenforceable against the lessee under section 132.

135. RELIEF AGAINST NOTICE TO EFFECT DECORATIVE REPAIRS

(1) If a notice is served on a lessee relating to the internal decorative repairs to a structure, the lessee may apply to the Court for relief.

(2) If a lessee makes an application to the Court under subsection (1) and the Court is, having regard to all the circumstances of the case (including in particular the length of the lessee's term or interest remaining unexpired), satisfied that the notice is unreasonable, the Court may, by order, wholly or partially relieve the lessee from liability for the repairs.

- (3) This section does not apply —
 - (a) if the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;
 - (b) to any matter necessary or proper —
 - (i) for putting or keeping the property in a sanitary condition; or
 - (ii) for the maintenance or preservation of the structure;
 - (c) to any statutory liability to keep a structure reasonably fit for human habitation; or
 - (d) to a covenant or term of a lease to yield up the structure in a specified state of repair at the end of the term.

- (4) This section —
 - (a) applies whether the notice referred to in subsection (1) is served before or after the commencement of this Act; and
 - (b) has effect despite any term of the lease to the contrary.

(5) The rights and powers conferred by this section are in addition to and not in derogation of any right to relief or any power to grant relief under any other law in force in the Territory.

136. RIGHT TO EXERCISE OPTION IF IN LAWFUL POSSESSION

(1) On the commencement of this Act, if after the term of a lease has determined the lessee continues in possession of the leased premises with the consent of the lessor, the lessee has a right to exercise any option contained in the lease for as long as the lessee's holding over of the premises is lawful.

(2) In subsection (1), "option" means an option to purchase the reversion expectant on the lease or to require the lessor to grant a renewal or extension of the lease or to grant a further lease of the leased premises or part of the leased premises.

- (3) This section applies subject to —
 - (a) section 137; and
 - (b) the appearance of a contrary intention in a lease.

137. RELIEF AGAINST LOSS OF LESSEE'S OPTION

- (1) In this section —
 - (a) a reference to an option in a lease is a reference to a right on the part of the lessee to require the lessor to —

- (i) sell, or offer to sell, to the lessee the reversion expectant on the lease; or
- (ii) grant, or offer to grant, to the lessee a renewal or extension of the lease or a further lease of the leased premises or a part of the leased premises,

whether the right is conferred by the lease or by an agreement collateral to the lease;

- (b) a reference to a breach by the lessee of an obligation of the lessee under a lease containing an option is a reference to a breach of the obligation by an act done or omitted to be done before or after the commencement of this Act to the extent that the act or omission would constitute a breach of the obligation if there were no option contained in the lease; and
- (c) "prescribed notice" means a written notice (in a form prescribed by Regulation) served by a lessor on a lessee that —
 - (i) specifies an act or omission; and
 - (ii) states that, subject to an order of the Court made under subsection (5), the lessor proposes to treat the act or omission as precluding the lessee from exercising an option contained in the lease.

(2) If an act or omission that constitutes a breach by a lessee of an obligation of the lessee under a lease containing an option would, but for this section, have the effect of precluding the lessee from exercising the option, the act or omission is to be taken not to have that effect if the lessee purports to exercise the option unless, not later than 14 days after the purported exercise of the option, the lessor serves on the lessee a prescribed notice in respect of the act or omission and —

- (a) neither the lessor nor lessee applies to the Court for an order for relief against the effect of the breach in relation to the purported exercise of the option before the expiry of one month after service of the notice on the lessee; or
- (b) if the lessor or lessee applies to the Court for an order for relief and —
 - (i) the relief is not granted; or
 - (ii) the relief is granted subject to the lessee complying with conditions specified in the order (one of which is to be the time within which the lessee must comply with the conditions) and the lessee fails to comply with the conditions.

(3) A lessor or lessee may apply to the Court for an order for relief referred to in subsection (2) —

- (a) in proceedings instituted for that purpose;

- (b) in proceedings concerning the existence of an alleged breach by the lessee of the lessee's obligations under the lease; or
- (c) in proceedings concerning the effect of the breach in respect of which relief is sought.
- (4) In proceedings referred to in subsection (3), the Court may —
 - (a) make the orders it thinks fit that will grant relief; or
 - (b) make an order refusing to grant relief,

and may make any consequential or ancillary order it considers necessary to give effect to the order or orders.

(5) In making an order granting relief or refusing to grant relief, the Court may consider —

- (a) the nature of the breach complained of;
- (b) the extent that the lessor was prejudiced by the breach at the date the proceedings were instituted;
- (c) the conduct of the lessor and the lessee, before and after the service of the prescribed notice;
- (d) the rights of persons other than the lessor or lessee;
- (e) the operation of subsection (7); and
- (f) any other matter the Court considers relevant.

(6) An order under subsection (4) may include terms as to costs, damages or compensation as the Court thinks fit.

(7) Subject to an order made under subsection (4) and to subsections (8) and (9) —

- (a) if —
 - (i) an option is contained in a lease;
 - (ii) the lessee exercises or purports to exercise the option; and
 - (iii) the lease would, but for this paragraph, terminate before the expiry of 14 days after the exercise or purported exercise of the option,

the lease is to be taken to continue in force until the expiry of 14 days after the exercise or purported exercise of the option;

- (b) if —
 - (i) a notice (in a form prescribed by Regulation) is served on a lessee; and
 - (ii) the lease to which the notice relates would, but for this paragraph, terminate before the expiry of one month after service of the notice on the lessee,

the lease is to be taken to continue in force until the expiry of 1 month after the service of the notice; or
- (c) if a lessee referred to in paragraph (b) applies to the Court for relief under this section, the lease is to be taken to continue in force until —
 - (i) the Court makes an order refusing to grant relief; or
 - (ii) the Court makes the orders it thinks fit granting relief and effect is given to the orders to the extent that they affect the lessor or relate to a conveyance to the lessee.
- (8) Subsection (7)(c) does not —
 - (a) apply to or in relation to a lease that, but for that paragraph, would continue in force for a longer period than it would be in force by virtue of the operation of that paragraph; and
 - (b) if the lessee fails to comply with an order of the Court made under this section, operate to continue the lease in force after the failure to comply.
- (9) If a lease is continued in force by operation of subsection (7) after the day on which, but for that subsection, it would terminate —
 - (a) the lease continues in force subject to the terms, provisions, covenants and conditions of the lease, except those relating to the term of the lease and the option contained in the lease, without prejudice to the rights or remedies of the lessor or lessee in relation to the lease; and
 - (b) if the lease is of registered land and the lessee is in possession of the land, the lessee has the protection given by the *Land Title Act* to —
 - (i) in the case of a registered lease — the registered proprietor, as defined in section 4 of the *Land Title Act*, of the land; or
 - (ii) in the case of an unregistered lease — the interest of a lessee under a short lease.
- (10) If a lease that is continued in force by operation of subsection (7) is renewed or a new lease is granted under the option contained in it —
 - (a) the period for which the lease was continued in force is to be taken to be part of the term of the renewed lease or the new lease; and

- (b) subject to subsection (11), in the case of the grant of a new lease — the new lease is to state that it commenced on the date that the lease continued in force by operation of subsection (7) would, but for that subsection, have terminated.

(11) Subsection (10)(b) does not apply to a lease that provides for the commencement of a new lease granted under an option contained in the lease on a date after the date that the new lease would have commenced under that paragraph.

(12) This section —

(a) applies to and in respect of —

- (i) leases granted before or after the commencement of this Act; and
- (ii) an obligation contained in a lease referred to in subparagraph (i); and

(b) has effect despite any term of a lease to the contrary.

Division 4 — Termination of Tenancies

138. ABOLITION OF YEARLY TENANCIES ARISING BY IMPLICATION OF LAW

(1) On the commencement of this Act, no tenancy from year to year is to be implied by payment of rent.

(2) A tenancy without agreement as to its duration is to be taken to be a tenancy determinable at the will of either of the parties by one month's notice in writing (which is not required to be one calendar month's notice).

(3) This section does not apply if there is a tenancy from year to year which has arisen by implication before the commencement of this Act.

(4) On the commencement of this Act, if a landlord or a tenant seeks to terminate a tenancy in respect of which the date of its creation is unknown, the tenancy is, subject to an express agreement to the contrary, determinable by 6 months notice in writing expiring not earlier than the day immediately before the first anniversary of that commencement.

139. NOTICE OF TERMINATION OF TENANCY

(1) Subject to this Division, a weekly, monthly, yearly, or other periodic tenancy may be terminated by either the landlord or the tenant on notice to the other that, unless otherwise agreed, is to —

(a) comply with the requirements of sections 140 and 141; and

(b) be given in sufficient time so that it complies with section 142, 143, 144 or 145, as the case may be.

(2) Subject to section 138, a tenancy that is not referred to in subsection (1) and that is determinable on notice may, unless otherwise expressly agreed, be terminated in accordance with sections 140 and 141.

(3) In this section, a reference to a "yearly tenancy" is a reference to a tenancy from year to year other than a tenancy from year to year arising by implication before the commencement of this Act.

140. FORM AND CONTENTS OF NOTICE

(1) A landlord or a tenant may give notice to terminate the tenancy either orally or in writing.

(2) A written notice referred to in subsection (1) is to —

- (a) be signed by the person giving the notice or by the person's agent;
- (b) identify the premises in respect of which the notice is given; and
- (c) state either that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice or the date of that day.

(3) If —

- (a) a notice referred to in subsection (1) states that the tenancy is to terminate on the last day of the period of the tenancy next following the giving of the notice and also purports to state the date of that day; and
- (b) the date on which the tenancy is to terminate is incorrectly stated,

the notice is effective to terminate the tenancy on the last day of the period of the tenancy next following the giving of the notice.

(4) A notice given under this section may be given in the approved form.

141. MANNER OF GIVING NOTICE

(1) Notice to terminate a tenancy may be given by being delivered personally to the tenant or to the landlord or the landlord's agent, as the case may be.

(2) If the tenant is absent from the premises, or is evading service, notice to terminate may be given to the tenant by —

- (a) delivering it to an adult who appears to be residing on or in occupation of the premises;
- (b) if the person by whom the rent is usually paid appears to be an adult — delivering it to that person;
- (c) posting it up in a conspicuous place on a part of the premises; or

(d) sending it by registered post to the tenant at the tenant's usual or last known place of residence or business.

(3) If a tenant has died and probate or letters of administration of the tenant's estate have not been granted, it is sufficient to give notice to terminate —

(a) if one or more persons appear to be residing on or in occupation of the premises — personally to any one of those persons who appears to be an adult; or

(b) by publishing, on not less than 2 days, the notice in of a daily newspaper circulating in the district in which the premises is situated.

(4) If proceedings for the recovery of the possession of premises are commenced in reliance on a notice to terminate given in the manner specified in subsection (3)(a), an occupier of the premises or another person claiming an interest in the premises is entitled to appear in the proceedings.

(5) The appearance of an occupier or other person claiming an interest in a proceeding referred to in subsection (4) is not of itself to be regarded as an act of administration, as intermeddling in the estate of the deceased tenant or as constituting the person so contesting the proceeding as an executor *de son tort* of the deceased tenant.

(6) Nothing in this section affects the right of a landlord to give notice to terminate in a manner that is not in accordance with this section.

142. NOTICE TO TERMINATE WEEKLY TENANCY

(1) A notice to terminate a weekly tenancy is to be given on or before the last day of a week of the tenancy to be effective on the last day of the week of the tenancy next following.

(2) In this section, "week of the tenancy" means the weekly period on which the tenancy is based and, unless otherwise expressly agreed, the week is to be taken to begin on the day on which the rent is payable.

143. NOTICE TO TERMINATE MONTHLY TENANCY

(1) A notice to terminate a monthly tenancy is to be given on or before the last day of a month of the tenancy to be effective on the last day of the month of the tenancy next following.

(2) In this section, "month of the tenancy" means the monthly period on which the tenancy is based (which may not be a calendar month) and, unless otherwise expressly agreed, the month is to be taken to begin on the day on which the rent is payable.

144. NOTICE TO TERMINATE YEARLY TENANCY

(1) A notice to terminate a yearly tenancy is to be given on or before the first day of a period of 6 months that ends with the last day of a year of the tenancy to be effective on that day.

(2) In this section, "year of the tenancy" means the yearly period on which the tenancy is based (which may not be a calendar year) and, unless otherwise expressly agreed, the year is to be taken to begin on the day, or the anniversary of the day, on which the tenant first became entitled to possession.

145. NOTICE TO TERMINATE OTHER PERIODIC TENANCY

(1) A notice to terminate a periodic tenancy other than a weekly, monthly, or yearly tenancy is to be given on or before the last day of a period of the tenancy to be effective on the last day of the period of the tenancy next following.

(2) In this section, "period of the tenancy" means the period on which the tenancy is based and, unless otherwise expressly agreed, the period is to be taken to begin on the day on which the rent is payable.

Division 5 — Holding Over Leased Premises

146. TENANTS, &C., HOLDING OVER TO PAY DOUBLE MARKET RENT

(1) If a person —

(a) holds over leased premises after the lease or term in respect of the premises has determined and demand has been made and notice in writing has been given to the person for the delivery of possession of the premises by the lessor, landlord or person (or the person's lawfully authorised agent) to whom the remainder or reversion of the premises belongs; or

(b) having given notice of intention to quit the premises at a specified time, does not deliver up possession of the premises at the specified time,

the person is liable to pay to the person kept out of possession of the premises rent at the rate of double the market rent payable in respect of the premises for and during the time the person holds over.

(2) Rent payable under subsection (1) is recoverable by proceedings in a court of competent jurisdiction.

PART 9 — INCORPOREAL HEREDITAMENTS AND
APPURTENANT RIGHTS

Division 1 — Application

147. SAVING OF EXISTING LAW

(1) This Part applies without derogation to the law relating to easements and covenants in force in the Territory before the commencement of this Act.

(2) In the event of an inconsistency between this Part and the law relating to easements and covenants referred to in subsection (1), this Part prevails.

Division 2 — Easements

148. DEFINITIONS

In this Division —

"easement" means a right annexed to land (the dominant land) to use other land (the servient land) in a particular manner or to prevent that other land from being used in a particular manner but does not include a right to take the soil or produce of other land;

"easement in gross" means an easement referred to in section 149;

"dominant land" means land to which the right to the use or benefit of an easement is annexed;

"servient land" means land the use of which is authorised or restricted by an easement or an easement in gross.

149. EASEMENT IN GROSS

A person may create an easement without dominant land in favour of another person.

150. MANNER OF GRANTING EASEMENTS AND EASEMENTS IN GROSS

An easement or an easement in gross is created by the registration of —

- (a) a deed of grant or an instrument of easement or easement in gross under Subdivision 1 of Division 4 of Part 6 of the *Land Title Act*;
- (b) a plan of subdivision, as defined in section 4 of that Act, and an instrument of easement or easement of gross under Subdivision 2 of that Division;
- (c) an instrument or grant as referred to in section 19(2) of the *Crown Lands Act*.

151. DESCRIPTION OF CERTAIN EASEMENTS, &C.

(1) Subject to section 155, a person who is entitled to the use or benefit of a registered easement or easement in gross of a right of way is to be taken to have the rights specified in Part A of Schedule 3.

(2) Subject to section 155, a person who is entitled to the use and benefit of a registered easement or easement in gross described in Column 1 of Part B of Schedule 3 has —

- (a) the use or benefit of the easement or easement in gross for the purpose specified opposite in Column 2 of Part B of the Schedule; and
- (b) whether by the person or by his or her agents or employees, the

powers specified opposite in Column 3 of Part B of the Schedule.

(3) Subsections (1) and (2) do not limit the powers a person has under any other law in force in the Territory.

(4) In establishing the ownership of a pipe, duct, wire, pole or other thing to which an easement or an easement in gross referred to in subsection (2) relates and that is attached to or constructed through, under, on, across or above land for a purpose specified in Column 2 of Part B of Schedule 3, the pipe, duct, wire, pole or other thing is not to be taken to be a fixture of the land.

(5) This section applies to easements and easements in gross created after this Act.

152. BENEFIT OF EASEMENTS AND EASEMENTS IN GROSS

(1) An easement may be enforced by —

(a) a person who has the estate in the dominant land to which the right to the benefit of the easement is annexed; and

(b) any person claiming under or through him or her.

(2) An easement in gross may be enforced by any person who has the use or benefit of the easement in gross.

153. BURDEN OF EASEMENTS AND EASEMENTS IN GROSS

An easement or easement in gross binds each person who has an interest in the servient land.

154. POWERS OF OTHERS IN RELATION TO EASEMENTS IN GROSS

(1) A person who is granted the use or benefit of an easement in gross may permit another person (whether by the other person or the other person's agents or employees) to enter land to which the easement in gross relates and carry out the work on the land that the first-mentioned person is authorised to do.

(2) The owner or occupier of the land must not hinder or obstruct a person entering and carrying out work on the land with the authority of the person who is granted the use or benefit of the easement in gross.

155. CONDITIONS OF EASEMENTS

The enjoyment of the rights conferred by an easement or easement in gross is subject to the conditions, if any, specified in the instrument of the easement or easement in gross.

156. RIGHT TO SUPPORT OF LAND AND BUILDING

All land is subject to the obligation that nothing is to be done on the land that will withdraw support from other land or from a building, structure or erection on other land.

Division 3 — Statutory Rights of User

157. DEFINITIONS AND APPLICATION

(1) In this Division —

"owner" includes a person interested (whether presently, contingently or otherwise) in land;

"dominant land" means land to which the right of a statutory right of user is or will be annexed;

"servient land" means land the use of which is or will be authorised by a statutory right of user;

"statutory right of user" includes —

- (a) a right of way or a right in the nature of a right of way over land;
- (b) a right of access to land;
- (c) a right of entry onto land; and
- (d) a right to carry and place a utility on, over, across, through, above or under land;

"utility" includes an electricity, gas, power, telephone, water, drainage, sewerage and other service pipe or line, together with all facilities and structures reasonably incidental to the utility.

(2) This Division does not apply to —

- (a) Crown lands as defined in section 3 of the *Crown Lands Act*;
- (b) land owned by the Commonwealth of Australia;
- (c) reserved or dedicated lands; or
- (d) Aboriginal land as defined in section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* of the Commonwealth.

158. IMPOSITION OF STATUTORY RIGHT OF USER IN RESPECT OF LAND

(1) Subject to this section, if, for the purposes of using land in a reasonable manner, it is necessary that there should be a statutory right of user annexed to the land, the Court may, on the application of the owner of the land, impose on other land or the owner of the other land an obligation of user that is a statutory right of user or an obligation to permit a statutory right of user in accordance with the order.

(2) A statutory right of user imposed by the Court may take the form of an easement, licence or otherwise.

(3) The Court must not make an order referred to in subsection (1) unless the Court is satisfied that —

- (a) the proposed use of the dominant land is reasonable;
- (b) it is in the public interest to use the dominant land in the proposed manner;
- (c) the owner of the servient land can be adequately recompensed in money for any loss or disadvantage which the owner may suffer from the imposition of the obligation; and
- (d) either —
 - (i) the owner of the servient land has refused to agree to accept the imposition of the obligation and the owner's refusal is in all circumstances unreasonable; or
 - (ii) no person can be found who possesses the necessary capacity to agree to accept the imposition of the obligation.

(4) An order made under this section —

- (a) is to provide for payment by the applicant to a person specified in the order of an amount by way of compensation or consideration as appears to the Court to be just;
- (b) may specify any other terms and impose any other conditions as the Court considers just including —
 - (i) the person (and whether or not by his or her agents or employees) who may exercise the statutory right of user;
 - (ii) the manner in which and the occasions when the statutory right of user may be exercised;
 - (iii) that the statutory right of user is exercisable in perpetuity, for some fixed period or until a date certain;
- (c) is, unless the Court orders otherwise, to be registered; and
- (d) is, if registered, binding on all persons who have an interest or who will acquire an interest in the dominant land or the servient land, whether an adult or otherwise having capacity and whether they were parties to proceedings referred to in this Subdivision or otherwise have notice of the order.

159. MODIFICATION OR EXTINGUISHMENT OF STATUTORY RIGHT OF USER

(1) The owner of dominant land or servient land may apply to the Court for an order modifying or extinguishing the statutory right of user imposed in respect of the land under section 158.

- (2) Where the Court is satisfied that —
- (a) the statutory right of user the subject of an application, or some aspect of it, is no longer necessary for the purposes of the reasonable use of the dominant land; or
 - (b) some material change in the circumstances has taken place since the order imposing the statutory right of user was made,

the Court may make an order modifying or extinguishing the statutory right of user.

160. POWERS OF COURT

In proceedings under this Division, the Court —

- (a) may direct that a survey is to be made of land and a plan of survey is to be prepared in respect of the land;
- (b) may order a person to execute an instrument, in a registrable or other form, that is necessary to give effect to an order made under this Subdivision;
- (c) may order a person to produce to another person specified in the order any certificate of title of the land or any other document relating to the land;
- (d) may give directions for the conduct of proceedings;
- (e) subject to paragraph (f), may make orders in respect of the costs of any of the matters referred to in this subsection or the proceedings generally; or
- (f) must not, except in exceptional circumstances, make an order for costs against the owner of servient land.

Division 4 - Covenants

161. DEFINITIONS

In this Division —

"covenant means an obligation (whether positive or negative) in respect of the use, ownership or maintenance of particular land (servient land) and made for the benefit of other land (dominant land);

"covenant in gross" means a covenant referred to in section 162;

"dominant land" means land having the benefit of a covenant;

"plan of subdivision" means a plan of subdivision, as defined in section 4 of the *Land Titles Act*;

"servient land" means land the use, ownership or maintenance of which is authorised or restricted by a covenant or covenant in gross.

162. COVENANTS IN GROSS

Notwithstanding any other law in force in the Territory, on the commencement of this Act a covenant may be created without dominant land in favour of the Territory, the council of a municipality within the meaning of the *Local Government Act*, a statutory corporation or a prescribed person.

163. MANNER OF CREATING COVENANTS AND COVENANTS IN GROSS

A covenant or covenant in gross is created by the registration of —

- (a) a deed of grant or an instrument of covenant or covenant in gross under Subdivision 1 of Division 5 of Part 6 of the *Land Title Act*;
- (b) a plan of subdivision and an instrument of covenant or covenant in gross under Subdivision 2 of that Division; or
- (c) a grant of title under section 19(2) of the *Crown Lands Act* reserving a covenant.

164. BENEFIT OF COVENANTS AND COVENANTS IN GROSS

(1) A covenant may be enforced by —

- (a) a person who has the estate in the dominant land that has the benefit of the covenant; and
- (b) any person claiming under or through him or her.

(2) Subsection (1) does not apply to a covenant that is a positive obligation created before the commencement of this Act.

(3) A covenant in gross may be enforced by the Territory, the council, the statutory corporation or the prescribed person who or which has the benefit of the covenant in gross.

165. BURDEN OF COVENANTS AND COVENANTS IN GROSS

(1) Subject to subsection (2) and to the *Land Title Act*, a covenant or covenant in gross binds —

- (a) each person who has an interest in the land subject to the burden of the covenant or covenant in gross; and
- (b) if it is a restrictive or access covenant or covenant in gross that is capable of being enforced by a person — each person not referred to in paragraph (a) who is in occupation of the burdened land or a part of it other than by virtue of a right derived (by contract or otherwise) from a person who was not bound by the covenant or covenant in gross at the time the right was granted.

(2) A covenant or covenant in gross, other than a restrictive or access covenant or covenant in gross, is not binding on a person referred to in subsection (1)(a) unless the person's interest in the land —

- (a) is the burdened estate or the estate of a mortgagee; or
- (b) confers on the person a right to possess the land for more than 21 years.

(3) This section does not apply to a covenant that is a positive obligation created before the commencement of this Act.

166. INTENTION OF ORIGINAL PARTIES TO PREVAIL

Sections 164, 165 and 167 apply subject to the appearance of a contrary intention in an instrument of covenant or covenant in gross.

167. LIABILITY FOR NON-COMPLIANCE WITH COVENANT

(1) A covenant or covenant in gross that is not a restrictive or access covenant is enforceable in respect of a contravention of the covenant or covenant in gross against every person who is at the time of the contravention bound by it.

(2) A restrictive or access covenant or covenant in gross is only enforceable against a person who is bound by the covenant or covenant in gross in respect of conduct by the person that consists of —

- (a) doing an act prohibited by the covenant or covenant in gross; or
- (b) permitting or suffering the doing of an act prohibited by the covenant or covenant in gross by another person (whether or not that person is bound by the covenant or covenant in gross).

(3) Despite subsections (1) and (2), a covenant or covenant in gross is enforceable in respect of a contravention of it against a person who is at the time of the contravention bound by the covenant or covenant in gross by reason only of being mortgagee of the subservient land or a part of the subservient land if —

- (a) he or she is a mortgagee in possession; or
- (b) a receiver, appointed by him or her, is acting in respect of his or her interest as mortgagee of the land.

168. EXTINGUISHMENT OF COVENANTS BY FLUXION OF TIME

(1) Subject to subsection (2), a covenant ceases to have effect —

- (a) on the date specified in the instrument or plan of subdivision creating the covenant; or
- (b) 20 years after the date the covenant was registered,

whichever first occurs.

- (2) Where —
 - (a) no date of expiration is specified in an instrument or plan of subdivision creating a covenant or the date specified occurs after the expiry of the 20 year period referred to in subsection (1)(b); and
 - (b) the registered proprietor, as defined in section 4 of the *Land Title Act*, of the estate in the dominant land having the benefit of a covenant lodges an instrument in the appropriate form at the Land Titles Office before the date the 20 year period referred to in subsection (1)(b) expires,

the covenant is to continue to have effect for a further 20 years after that date.

- (3) This section does not apply to —
 - (a) covenants made in favour of the Commonwealth, the Territory or a prescribed authority for defence or aviation purposes;
 - (b) covenants made for a prescribed purpose; or
 - (c) covenants in gross.

(4) This section applies only to covenants made after the commencement of this Act.

169. DECLARATION AS TO NATURE, &C., OF COVENANT

The Court may, on application by an interested person, declare —

- (a) whether or not land is affected by a covenant or covenant in gross in the circumstances specified in the application; or
- (b) on the construction of an instrument imposing or purporting to impose the burden of a covenant or covenant in gross on land —
 - (i) whether the instrument imposes a covenant or covenant in gross in respect of the land;
 - (ii) what the nature and extent of the covenant or covenant in gross is;/*
 - (iii) whether or not the covenant or covenant in gross is enforceable; or
 - (iv) if it is enforceable, who may enforce it and against whom.

Division 5 — Modification and Extinguishment

170. DEFINITIONS

In this Division —

"easement" includes an easement in gross;

"covenant" includes a covenant in gross.

171. MODIFICATION OR EXTINGUISH*//MENT OF EASEMENTS AND COVENANTS

(1) Where land is subject to the burden of an easement or a covenant, the Court may, on application by a person who has an interest in the land, make an order modifying or wholly or partially extinguishing the easement or covenant.

(2) The Court may not make an order under subsection (1) unless it is satisfied that —

(a) because there has been a change in the user of the land having the benefit of the easement or covenant, in the character of the area in the vicinity of the land or in any other circumstance that the Court considers material, the easement or covenant is obsolete;

(b) the continued existence of the easement or covenant would impede the reasonable user of the land or that the easement or covenant, in impeding that user, is —

(i) no longer necessary or advantageous to the person or persons entitled to the benefit of the easement or covenant; or

(ii) contrary to the public interest,

and each person who suffers loss or disadvantage from the modification or extinguishment of the easement or covenant can be adequately compensated in money for his or her loss or disadvantage;

(c) each adult who is entitled to the use or benefit of the easement or the covenant and who has capacity to do so —

(i) has agreed to the modification or extinguishment of the easement or covenant; or

(ii) by his or her acts or omissions may reasonably be considered to have abandoned the easement or to have waived the benefit of the covenant in whole or in part; or

(d) the proposed modification or extinguishment will not substantially injure the persons entitled to the use or benefit of the easement or covenant.

(3) In determining whether to make the order, the Court must take into account the operation of the *Planning Act* and in particular the control plan, within the meaning of that Act, applying to the land.

(4) The power of the Court to make an order modifying an easement or covenant includes power to amend the instrument creating the easement or covenant to include new terms as to the use, ownership or maintenance of the servient land.

(5) In making an order under subsection (1), the Court may also make an order directing the applicant to pay a person entitled to the use or benefit of the easement or covenant the amount that appears to the Court to be just to award consideration for either —

- (a) any loss or disadvantage suffered as a consequence of the modification or extinguishment; or
- (b) any reduction in any compensation received for the land affected by the easement or covenant when it was created that is attributable to its imposition.

172. NOTICE OF APPLICATION

Where an application is made for the modification or extinguishment of an easement or covenant, the Court may, if it thinks just, direct that the applicant must give notice of the application in the manner and to the consent authority, within the meaning of the *Planning Act*, or any other person it specifies in the direction.

173. EFFECT OF ORDER

An order made under section 171 is binding on all persons, whether or not adults or otherwise having capacity, who are or become entitled to the use or benefit of the easement, or are or become interested in enforcing the covenant, and whether or not they were parties to the proceedings under that section or were served with notice under section 172.

174. APPLICATION MAY BE MADE IN OTHER PROCEEDINGS

(1) Where a person commences proceedings to enforce an easement or covenant or rights arising out of a breach of a covenant, a person against whom the proceedings are instituted may apply in the proceedings to the Court for an order or a direction under section 175.

(2) Unless the Court orders otherwise, an application under subsection (1) operates to stay the proceedings for enforcement of the easement or covenant.

175. POWERS OF COURT

In proceedings under this Division the Court may —

- (a) direct that a survey is to be made of land and a plan of survey is to be prepared in respect of the land;
- (b) order a person to execute an instrument, in registrable or other form, that is necessary to give effect to an order made under this Division;
- (c) order a person to produce to another person specified in the order any certificate of title or other document relating to land;
- (d) make an order declaring whether or not land is or would in specified circumstances be affected by an easement or covenant and —
 - (i) what the nature and extent of the easement or covenant is;

- (ii) whether or not the easement or covenant is enforceable; or
- (iii) if it is enforceable, who may enforce it and against whom.
- (e) give directions for the conduct of proceedings; or
- (f) make orders in respect of the costs of any of the matters referred to in this section and of the proceedings generally.

PART 10 - THINGS IN ACTION

176. ASSIGNMENT OF THING IN ACTION

(1) An absolute assignment of a debt or other legal thing in action, whether made before or after the commencement of this Act —

- (a) that is by writing under the hand of the assignor;
- (b) that does not purport to be by way of charge only; and
- (c) of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim the debt or other thing in action,

is, subject to any equities having priority over the right of the assignee, effectual to pass and transfer from the date of that notice —

- (d) the legal right to that debt or other thing in action;
- (e) all legal and other remedies for the debt or other thing in action; and
- (f) the power to give a good discharge for the debt or other thing in action without the concurrence of the assignor.

(2) If the debtor, trustee or other person liable in respect of the debt or other thing in action has notice —

- (a) that the assignment is disputed by the assignor or any person claiming under him or her; or
- (b) of any other opposing or conflicting claims to the debt or other thing in action,

he or she may, if he or she thinks fit, either call on the person disputing the assignment or making an opposing or conflicting claim to interplead concerning the dispute or claim or to pay the debt or other thing in action into court under and in conformity with the provisions of the law relating to relief of trustees.

PART 11 - PERPETUITIES

177. INTERPRETATION

(1) In this Part, unless the contrary intention appears -

"power of appointment" includes a discretionary power to make a disposition;

"settlement" includes -

- (a) a will;
- (b) an instrument, testamentary or otherwise, exercising a power of appointment, whether general or special; and
- (c) any other instrument, transaction or dealing whereby a person makes a disposition,

but does not include an Act or an instrument of a legislative or administrative character;

"rule against perpetual trusts" means the common law rule that invalidates a trust (not otherwise invalid) for a purpose which is not charitable if the duration of the trust will or may exceed the perpetuity period;

"trust" and "trustee" have the same meanings respectively as they have in the *Trustee Act*;

"will" includes a codicil.

(2) For the purposes of this Part, a disposition in a will is to be taken to take effect on the death of the testator.

(3) For the purposes of this Part, a person is to be treated -

- (a) as a member of a class if the person satisfies, each and every condition identifying a member of the class; and
- (b) as a potential member of a class if the person satisfies only one or some of the conditions identifying a member of the class but there is a possibility that the remainder of those conditions will in time be satisfied.

178. APPLICATION

(1) This Part applies in relation to a settlement taking effect either before or after the commencement of this Act.

(2) This Part applies in relation to a settlement exercising a power of appointment taking effect after the commencement of the *Perpetuities Act 1994t*, whether general or special and whether or not it applies in relation to the settlement creating the power of appointment.

(3) This Part does not apply to render invalid an interest created by a provision of a will executed before the commencement of the *Perpetuities Act 1994* but taking effect after that commencement if the provision would not have infringed the rule against perpetuities had this Act and that Act not been enacted and the will taken effect when it was executed.

179. SETTLEMENTS BY CROWN NOT BOUND

Nothing in the rule against perpetuities, in the rule against perpetual trusts or in this Part affects a settlement made by the Crown.

180. POWERS OF APPOINTMENT

(1) For the purposes of the rule against perpetuities, a power of appointment is at a particular time to be treated as a special power unless, at that time, the appointor has, by the settlement creating the power, unconditional authority at his or her own discretion to exercise the power by appointing the interest the subject of the power to himself or herself.

(2) Notwithstanding subsection (1), an appointment of an interest made by will under a power of appointment that would, but for the fact that it was made exercisable only by will, have been a general power is to be treated as a general power for the purposes of determining whether the appointment of the interest infringes the rule against perpetuities.

(3) For the purposes of this section, an authority is unconditional notwithstanding a formal condition relating to the mode of exercise of the power.

181. PERPETUITY PERIOD

(1) For the purposes of the rule against perpetuities but subject to subsection (3), the perpetuity period applicable to an interest created by a settlement is —

- (a) a life in being plus 21 years; or
- (b) 80 years from the date on which the settlement takes effect,

whichever is specified in the settlement.

(2) Subject to subsection (3), if no perpetuity period is specified in the settlement, the perpetuity period is taken to be 80 years from the date on which the settlement takes effect.

(3) If an appointment of an interest is made under a special power of appointment, the perpetuity period is reckoned from the date on which the settlement creating the power takes effect.

182. UNBORN HUSBAND OR WIFE

The widow or widower of a person who is a life in being for the purposes of the rule against perpetuities must be treated as a life in being for the purpose of the application of the rule to —

- (a) a disposition in favour of that widow or widower; and
- (b) a disposition in favour of —
 - (i) a charity that attains;
 - (ii) a person who attains; or
 - (iii) a class the members of which attain,
according to the terms of the disposition, a vested interest on or after —
 - (iv) the death of the survivor of a person who is a life in being and his widow or her widow;
 - (v) the death of his widow or her widow; or
 - (vi) the happening of a contingency during the lifetime of his widow or her widow.

183. PRESUMPTIONS AND EVIDENCE AS TO FUTURE PARENTHOOD

(1) If, in the application of the rule against perpetuities to a disposition or in determining the right of a person to put an end to a trust or an accumulation, there arises a question that depends on the capacity of a person to procreate a child at a future time -

- (a) it is presumed, subject to paragraph (b), that —
 - (i) a male person who has attained the age of 12 years can procreate a child (but not if under that age); and
 - (ii) a female person who has attained the age of 12 years can procreate a child (but not if under that age or if she has attained the age of 55 years); but
- (b) in the case of a living person, evidence may be given in any proceedings to show that he or she is or will or is not or will not be capable of procreating a child at the time in question.

(2) If, by virtue of subsection (1), a person is treated as incapable of procreating a child at a particular time but he or she in fact procreates a child, the Supreme Court may make the order it thinks fit for placing the persons interested in the property comprised in a disposition as far as reasonably possible in the position they would have held if the person was treated as capable of procreating a child in applying subsection (1) to the disposition, trust or accumulation concerned.

(3) Subject to an order under subsection (2), if, in proceedings relating to a disposition, a person is treated by virtue of subsection (1) as capable or incapable of procreating a child at a particular time, the person must be treated as likewise capable or incapable of procreating a child for the purpose of determining a question that might arise in the application of the rule against perpetuities to the same disposition in subsequent proceedings.

(4) This section, except subsection (1)(b), has effect in relation to the possibility that a person may at any time become a parent of another person by adoption or the operation of a law, whether or not in force in the Territory.

184. WAIT-AND-SEE

(1) If a provision of a settlement that creates an interest would, but for this section and section 183, infringe the rule against perpetuities, the interest is treated until the time (if any) it becomes certain that it must vest (if at all) after the end of the perpetuity period as if the provision did not infringe the rule and it becoming certain that it does infringe the rule does affect the validity of a thing previously done in relation to the interest.

(2) No limitation in a provision of a settlement that creates a contingent interest is to be treated as or declared to be invalid because it infringes the rule against perpetuities by reason only of there being a possibility of the interest vesting after the end of the perpetuity period.

(3) Every contingent interest in a provision of a settlement capable of vesting before or after the end of the perpetuity period is to be presumed valid until events establish that the interest is incapable of vesting —

- (a) before the end of the perpetuity period, in which case the interest is to be treated as or declared to be void; or
 - (b) after the end of the perpetuity period, in which case the interest is to be treated as or declared to be valid.
- (4) This section does not affect the operation of section 191.

185. REDUCTION OF AGE AND EXCLUSION OF CLASS MEMBERS

- (1) If -
- (a) a provision of a settlement creates an interest and the vesting of the interest depends on a person attaining a specified age; and
 - (b) it becomes apparent that the provision would not infringe the rule against perpetuities if the specified age had been a lesser age,

the interest is, for all purposes, treated as if, instead of its vesting depending on the person attaining the specified age, its vesting depended on the person attaining the greatest age that, if substituted in place of the specified age, would save the provision from infringing the rule.

(2) If an interest to which subsection (1) applies is subsequent to any other interest created by the settlement, the other interest is not defeated or otherwise adversely affected by the operation of subsection (1).

(3) If, in relation to an interest created by a provision of a settlement, different ages are specified in relation to different persons -

- (a) the reference in subsection (1) to the specified age is construed as a reference to all the specified ages; and

- (b) subsection (1) operates to reduce each age specified so far as is necessary to save the provision from infringing the rule against perpetuities.

(4) If a provision of a settlement creates an interest which is to be taken by members of a class and it becomes apparent that the inclusion of a particular member of the class or an unborn person who at birth would become a member or potential member of the class would, but for this subsection —

- (a) cause the provision to infringe the rule against perpetuities; or
- (b) prevent subsection (1) from operating to save the provision from infringing the rule,

the person is, unless the exclusion of the person would exhaust the class, treated in relation to the interest as if the person were not a member of the class and, if subsection (1) applies, that subsection has effect accordingly.

(5) If this section has effect in relation to a provision to which section 182 applies, the operation of this section does not affect the validity of a thing previously done in relation to the interest created by the provision.

186. ORDER OF APPLICATION OF REMEDIAL PROVISIONS

For the purposes of the rule against perpetuities, the following provisions are to be applied in the following order:

- (a) section 184;
- (b) section 185(1);
- (c) section 185(4).

187. ADMINISTRATIVE POWERS OF TRUSTEES

(1) In this section, "administrative power" means a power of a trustee other than a power to appoint, pay, transfer, advance, apply, distribute or otherwise deal with trust property in or towards satisfaction of the interest of a beneficiary under the trust or in or towards satisfaction of a purpose of the trust.

(2) The rule against perpetuities does not invalidate an administrative power in relation to trust property during the subsistence of a beneficial interest in the trust property.

(3) This section applies to an administrative power that takes effect or is exercised before or after the commencement of this Act.

188. REMUNERATION OF TRUSTEES

(1) The rule against perpetuities does not invalidate a power or other provision for remunerating a trustee for the trustee's services.

(2) This section applies to a power or other provision for remunerating a trustee taking effect before or after the commencement of this Act.

189. SUPERANNUATION AND OTHER FUNDS

(1) In this section -

"employee" includes a director, officer, servant and employee of an employer;

"fund" means —

(a) a provident, superannuation, retirement, sickness, accident, assurance, unemployment, pension or co-operative benefit fund, scheme, arrangement or provision; or

(b) a fund, scheme, arrangement or provision for the education of children, for payments based on employment service or for long service leave (if money is taken in lieu of leave) and includes any like fund, scheme, arrangement or provision;

"self-employed person" includes a person engaged in a lawful profession, trade, occupation or calling.

(2) The rule against perpetuities does not invalidate a fund established by a settlement for the benefit of —

(a) employees;

(b) self-employed persons;

(c) spouses, children, grandchildren, parents, dependants or legal personal representatives of employees or self-employed persons; or

(d) persons duly selected or nominated for that purpose by employees or self-employed persons in pursuance of the provisions of the settlement.

(3) The rule against perpetuities does not invalidate a trust established by a settlement and used for investing the assets of a fund referred to in subsection (2) (whether or not it is also used for investing other assets).

(4) Subsection (3) does not affect the generality of subsection (2).

(5) This section applies to settlements taking effect before or after the commencement of this Act.

190. DETERMINABLE INTERESTS

(1) In this section —

"determinable interest" means an interest created by a settlement that is determinable on a contingency provided for in a provision of the settlement;

"subsequent interest", in relation to a determinable interest, means an interest, whether vested or contingent —

- (a) created by the settlement that created the determinable interest or remaining undisposed of by the settlement or taking effect by way of reverter, resulting trust, residuary gift or otherwise on a possibility arising under the settlement; and
- (b) in relation to which the determinable interest is a prior interest.

(2) The rule against perpetuities applies to render invalid the provision of a settlement providing for determination of a determinable interest in the same manner as the rule would apply to render invalid a condition subsequent in the settlement for defeasance of the determinable interest on the same contingency.

(3) If the rule applies to a determinable interest —

- (a) the determinable interest is not determinable; and
- (b) a subsequent interest not itself rendered invalid by the rule shall be postponed or defeated to the extent necessary to allow the determinable interest to have effect free from the provision for determination.

(4) For the purposes of this section, an interest created by, or a provision in, an appointment or other exercise of a power in a settlement (except a general power of appointment) is not to be treated as an interest created by, or a provision in the settlement.

(5) Notwithstanding subsection (2), the rule against perpetuities does not apply to a gift over from one charity to another.

191. OPTIONS

The rule against perpetuities does not apply to —

- (a) an option to renew a lease of property; or
- (b) an option or right of pre-emption of a lessee to acquire a reversionary interest in property comprised in a lease.

192. TRUSTS FOR PURPOSES THAT ARE NOT CHARITABLE

(1) Subject to this section, this Act does not affect the operation of the rule against perpetual trusts for a purpose.

(2) For the purposes of the rule against perpetual trusts, if there is a disposition for a purpose by a settlement, the perpetuity period applicable to the disposition is a life in being plus 21 years or 80 years from the date on which the settlement takes effect, whichever is specified in the settlement.

(3) Despite subsection (2), if no perpetuity period is specified in the settlement, the perpetuity period is to be taken to be 80 years from the date on which the settlement takes effect.

(4) If there is a disposition for a purpose by a settlement and the disposition would, but for this Act, infringe the rule against perpetual trusts, the

disposition is to be treated, until that time (if any) that it becomes certain that the disposition must infringe the rule, as if it did not infringe the rule and the validity of a thing previously done in relation to the disposition is not affected by it becoming certain that it must infringe the rule.

(5) This section does not apply to a disposition for a purpose that is charitable.

193. DEPENDENT INTERESTS

(1) If a provision of a settlement creates an interest, the provision is not rendered invalid by the rule against perpetuities or the rule against perpetual trusts by reason only that the interest is subsequent to and dependent on an interest that is rendered invalid.

(2) If a provision of a settlement creates an interest that is subsequent to another interest and the other interest is rendered invalid by the rule against perpetuities or the rule against perpetual trusts, the acceleration of the vesting of the subsequent interest is not affected by reason only that the other interest is invalid.

194. MITIGATION OF RULE OF REMORSELESS CONSTRUCTION

(1) If a court construes a will or other instrument that makes a disposition of property, the court may have regard to the fact that under one possible construction the disposition would or might be void by virtue of the rule against perpetuities but under another possible construction it would or might be valid.

(2) In considering which of those constructions is to be preferred, the court may take into account that the testator would probably have intended the construction under which the disposition would be valid.

(3) In the application of this section a court must not —

(a) render a trustee or other person liable for an act done before the commencement of this Act for which the trustee or person would not have been liable if this Act had not come into operation; or

(b) enable a trustee or person to recover money distributed or paid under a trust, if the trustee or person could not have recovered the money but for subsection (1).

(4) This section applies to wills and other instruments making a disposition of property executed before or after the commencement of this Act.

195. ABOLITION OF DOUBLE POSSIBILITY RULE

(1) The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is abolished but without prejudice to any other rule relating to perpetuities.

(2) This section applies only in relation to dispositions or trusts created by an instrument coming into operation after the commencement of the *Perpetuities Act 1994*.

196. ACCUMULATION OF INCOME

(1) If property is settled or disposed of so that the income of the property may be or is directed to be accumulated wholly or in part, the power or direction to accumulate the income is valid only if the disposition of the accumulated income is or may be valid.

(2) Nothing in subsection (1) affects —

- (a) property settled or disposed of for a purposes that is charitable;
- (b) the power of a person to terminate an accumulation that is for his or her benefit;
- (c) the jurisdiction or power of the Supreme Court to maintain or advance out of accumulations; or
- (d) a power of a trustee under the *Trustee Act* or any other Act or law or an instrument creating a trust or making a disposition.

PART 12 — POWERS OF APPOINTMENT

197. APPLICATION OF PART

This Part applies to powers of appointment created or arising before and after the commencement of this Act.

198. MODE OF EXERCISE OF POWERS

(1) If a power of appointment by an instrument other than a will is exercised by deed, executed and attested under this Act, or, in the case of an instrument under the *Land Titles Act*, under that Act, the deed or instrument is, in respect of the execution and attestation of the instrument, a valid exercise of the power notwithstanding that some additional or other form of execution or attestation or solemnity is required by the instrument creating the power.

(2) This section does not operate to defeat a direction in an instrument creating a power of appointment that —

- (a) the consent of a particular person is necessary for there to be a valid execution of the instrument by which the power is exercised; or
- (b) in order to give validity to an appointment, an act is to be performed having no relation to the mode of executing and attesting the instrument.

(3) This section does not prevent the donee of a power of appointment from exercising the power by writing or other than by an instrument executed and attested as a deed, and if the power of appointment is exercised in that manner this section does not apply.

199. VALIDATION OF APPOINTMENTS IF OBJECTS ARE EXCLUDED OR TAKE ILLUSORY SHARES

(1) An appointment that is made pursuant to the exercise of a power to appoint property among 2 or more objects is not invalid on the ground that —

- (a) an unsubstantial, illusory or nominal share only is appointed to or left unappointed to devolve on any of the objects of the power; or
- (b) an object of the power is altogether excluded,

and is valid even if an object of the power is not to take a share in the property or is to take a share in the property in default of appointment.

(2) This section does not affect any provision in an instrument creating a power of appointment which declares the amount of a share from which an object of the power is not to be excluded.

(3) This section applies to appointments made before or after the commencement of this Act.

200. PROTECTION OF PURCHASERS CLAIMING UNDER CERTAIN VOID APPOINTMENTS

(1) An instrument purporting to exercise a power of appointment over property that, in default of and subject to any appointment, is held in trust for a class or number of persons including the appointee is not void on the ground of fraud on the power as against a purchaser in good faith.

(2) Notwithstanding subsection (1), if, having regard to any advances made in the appointee's favour and to any hotchpot provision, the interest appointed exceeds, in amount or value, the interest in property to which immediately before the execution of the instrument referred to in subsection (1) the appointee was presumptively entitled under the trust in default of appointment, the protection afforded by this section to a purchaser does not extend to the excess interest.

(3) A person deriving title under a purchaser entitled to the benefit of this section is entitled to the same benefit as the purchaser would have been.

(4) This section applies only to dealings effected after the commencement of this Act.

(5) In this section, "purchaser in good faith" means a person dealing with an appointee who is an adult for valuable consideration in money or money's worth and without notice of the fraud or any circumstances from which, if reasonable inquiries had been made, the fraud might have been discovered.

201. DISCLAIMER, &C., OF POWERS

(1) A person to whom a power of appointment, whether or not coupled with an interest, is given may by deed disclaim, release or contract not to exercise the power and after making the disclaimer, release or contract is not capable of exercising or joining in the exercise of the power.

(2) Subject to the expression of a contrary intention in the instrument creating a power of appointment, on the making of a disclaimer, release or contract referred to in subsection (1), the power may be exercised by any other person or persons or the survivor or survivors of any other person or persons to whom the power is given.

(3) If a power of appointment is exercisable by an instrument which may or is required to be registered under an Act, the power may be released or disclaimed by a memorandum in the approved form which may be registered under that Act.

(4) This section —

(a) does not apply to a power of appointment coupled with a duty; and

(b) applies to the exercise of a power of appointment created by an instrument coming into operation before or after the commencement of this Act.

PART 13 — VOIDABLE DISPOSITIONS

202. VOLUNTARY CONVEYANCES TO DEFRAUD CREDITORS VOIDABLE

(1) Subject to this section, every alienation of property made with intent to defraud creditors is voidable at the instance of any person prejudiced by the alienation of property.

(2) This section does not affect the operation of the law of bankruptcy.

(3) This section does not extend to an estate or interest in property conveyed for valuable consideration and in good faith to a person not having, at the time of the conveyance, notice of the intent to defraud creditors.

(4) This section applies to every alienation of property whether made before or after the commencement of this Act.

203. VOLUNTARY DISPOSITION OF LAND VOIDABLE AT INSTANCE OF PURCHASER

(1) Every voluntary alienation of land made with intent to defraud a subsequent purchaser is voidable at the instance of the purchaser.

(2) For the purposes of this section, no voluntary disposition, whenever made, is to be taken to have been made with intent to defraud only because a subsequent conveyance for valuable consideration is made after the commencement of this Act.

204. ACQUISITIONS OF REVERSIONS AT UNDER VALUE

(1) No acquisition of a reversionary interest in real or personal property for money or money's worth that is made in good faith, without fraud or unfair dealing, is liable to be opened or set aside only on the ground of under value.

(2) In subsection (1), "reversionary interest" includes an expectancy or possibility.

(3) This section does not affect the jurisdiction of the Court to set aside or modify unconscionable bargains.

PART 14 — APPORTIONMENT

205. DEFINITIONS

In this Part—

"annuities" includes salaries and pensions;

"dividends" includes all payments made by the name of dividend, bonus, or otherwise out of the revenue of a company or other body corporate incorporated under a statute and divisible between all or any of the members of the company or body corporate, whether the payments are usually made or declared at fixed times or otherwise;

"rents" includes rent service, rent charge and rent seck and all periodical payments or renderings instead of or in the nature of rent.

206. RENTS, &C., APPORTIONABLE IN RESPECT OF TIME

(1) All rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, are to be taken to be accruing from day to day like interest on money lent and to be apportionable in respect of time accordingly.

(2) The apportioned part of rent, an annuity, or other payment referred to in subsection (1) is payable or recoverable —

(a) in the case of a continuing rent, annuity, or any other payment — when the entire portion of which the apportioned part forms part becomes due and payable; or

(b) in the case of rent or an annuity or other payment determined by re-entry, death or otherwise — when the next entire portion of which the apportioned part forms part would have been payable if the rent, annuity or payment had not determined,

and not before.

(3) A person and his or her executor, administrator and assigns, and also the executor, administrator and assigns of a person whose interests determined with his or her death, has or have the same remedies at law and in equity for recovering the apportioned parts when payable (taking into account the proportionate parts of all just allowances and deductions) as they would respectively have had for recovering the entire portions if entitled to them.

(4) Notwithstanding subsection (3), if a person is liable to pay rent reserved out of or charged on land, the person and the land are not to be resorted to for an apportioned part forming part of an entire or continuing rent, but the entire or

continuing rent (including the apportioned part) is to be recovered and received by the person who, if the rent had not been apportionable under this section or otherwise, would have been entitled to the entire or continuing rent, and the apportioned part is recoverable from that person by proceedings by an executor, administrator or other party entitled to it under this section.

207. EXCEPTIONS AND APPLICATION

(1) Nothing in this Part renders apportionable an annual sum payable under a policy of assurance (however described).

(2) This Part does not apply if it is expressly stipulated that apportionment is not to take place.

PART 15 — MISCELLANEOUS

208. PROTECTION OF LEGAL PRACTITIONER, &C.

(1) The powers given by this Act to a person, and the covenants, provisions, conditions, terms and words which under this Act are to be taken to be included or implied in an instrument, or are by this Act made applicable to a contract for sale or other transaction, are and are to be taken to be in law proper powers, covenants, provisions, conditions and words to be given by or to be contained in the instrument, or to be adopted in connection with or applied to the contract or transaction, and a legal practitioner or conveyancing agent must not be taken to be negligent or in breach of duty, or be in any way liable, because the person omits, in good faith, to negative the giving, inclusion, implication or application of any of those powers, covenants, provisions, conditions or words in the instrument or in connection with the contract or transaction, or to insert or apply any others in their place if this Act allows the person to do so.

(2) Nothing in this Act is to be taken to imply that the insertion in an instrument, or the adoption in connection with or in application to a contract or other transaction, of any powers, covenants, provisions, conditions or words in addition to those included or implied under this Act is improper.

(3) If —

- (a) a legal practitioner or conveyancing agent is acting for trustees, executors or other persons in a fiduciary position; or
- (b) a trustee, executor or other person in a fiduciary position acting without a legal practitioner or conveyancing agent acts in a manner referred to in subsection (1) or (2),

each of those trustees, executors or other persons is protected under this section as if he or she is a legal practitioner or a conveyancing agent.

209. SERVICE OF NOTICES

(1) A notice required or authorised by this Act to be served on a person or a notice served on a person under an instrument or agreement that relates to property may be served on that person —

- (a) by delivering the notice to the person personally;
- (b) by leaving it for the person at the person's usual or last known place of residence or, if the person is in business as a principal, at the person's usual or last known place of business;
- (c) by posting it to the person by registered mail as a letter addressed to the person at the person's usual or last known place of residence or, if the person is in business as a principal, at the person's usual known place of business; or
- (d) in the case of a company, by leaving or posting it, as a letter addressed to the company at or to its registered office or principal place of business in the Territory

(2) Unless the contrary is shown, a notice posted as specified in subsection (1) is to be taken to have been served at the time when the notice would be delivered by the ordinary course of post.

(3) If the person is absent from the Territory, the notice may be delivered as specified in subsection (1) to the person's agent in the Territory.

(4) If the person is deceased, the notice may be delivered as specified in subsection (1) to the person's personal representative.

(5) If the person is not known, is absent from the Territory and has no known agent in the Territory or is deceased and has no known personal representative, the notice is to be served in the manner directed by the Court.

(6) Notwithstanding this section, the Court may make an order —

- (a) directing the manner in which a notice is to be served; or
- (b) dispensing with the service of a notice.

(7) This section does not apply —

- (a) to notices served in proceedings in the Court; or
- (b) if the person serving the notice prevents its receipt by the person on whom the notice is intended to be served.

(8) This section applies to the service of a notice under an instrument, agreement or Act unless the instrument, agreement or Act specifies another method of serving the notice.

210. REGULATIONS

The Administrator may make regulations, not inconsistent with this Act, prescribing matters -

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

PART 16 - REPEAL

211. REPEAL

The Acts specified in Schedule 4 are repealed.

SCHEDULES

SCHEDULE 1

Section 20(9)

PROCEDURE IN CASES OF BONA VACANTIA

1. Procedure in cases of escheat or other like cases

When a question arises as to the title of the Crown to land in a case of escheat or alleged escheat or of *bona vacantia* or alleged *bona vacantia*, or in any other case in which an inquest of office might have been held, the truth of the matter is to be ascertained as prescribed in this Schedule.

2. Writ of inquisition

In the event of a question referred to in clause 1, a writ called a writ of inquisition is to be issued from the Court on the fiat of a Law Officer to the Local Court, and is to command the Local Court to make diligent inquiry into the matter and to certify under his, her or its hand and seal the facts respecting the failure of the heirs or next of kin of an intestate, the alienage of a grantee or any other facts that are necessary to establish whether the Crown has title to the land.

3. Return of writ

The writ of inquisition and the certificate of the Local Court is to be returned to the Court as soon as reasonably possible, and any person aggrieved by the certificate is entitled to traverse or object to the writ or certificate in the manner and within the time provided by the Supreme Court Rules or, if the Rules do not make provision for the making of the objection, not later than 1 month after the return of the writ.

4. Writ to be returned before new grant made

No grant of any land alleged to be escheated or to have become *bona vacantia* is to be made until after the writ of inquisition and a certificate finding the title of the land has been returned into the Court and the time for traversing the writ or certificate has expired.

5. Effect of certificate

Subject to this Schedule or the Supreme Court Rules, the certificate is conclusive evidence of the facts stated in it.

6. Saving

Proceedings on a writ of inquisition do not prejudice any rights which, at the time of the death of the person that led to the issue of the writ, were vested in some other person.

7. Procedure when waiver by the Crown

(1) If, at a time not later than 2 months after an instrument waiving the title of the Crown to any property is made under section 20(3), a person claiming an interest in or to the property requests that a writ of inquisition in respect of the Crown's title be issued and gives security to the satisfaction of a Law Officer for the costs of the issue and execution of the writ, a writ may issue under this Schedule and the instrument waiving the right of the Crown ceases to have effect from the date the writ issues.

(2) If the title of the Crown to the property is established by a certificate returned under clause 3 of this Schedule, a further instrument waiving the right of the Crown may be made under section 20(3) after the time for traversing the writ and certificate has expired, but no further request for the issue of a writ may be made under this clause.

(3) If an instrument is made under section 20(3) waiving the right of the Crown to land, clause 1 is to be read subject to this clause with the exception that a writ of inquisition at the instance of the Crown may issue at any time.

8. Power to regulate procedure with respect to escheats to the Crown

The Court may make rules prescribing and regulating the procedure of the Court on and incidental to a writ of inquisition and consequential on the holding of inquiries under the writ.

9. Interpretation

In this Schedule, "Law Officer" means the Attorney-General, the Solicitor for the Northern Territory or the Solicitor-General of the Northern Territory.

SCHEDULE 2

Section 114

SHORT FORMS OF COVENANTS IN LEASES

DIRECTIONS AS TO THE FORMS IN THIS SCHEDULE

1. Parties who use a form of words in Column 1 may substitute for the words "lessee" or "lessor" the name or names of the lessee or lessor respectively and, if that is done, corresponding substitutions are to be taken to be made in the corresponding form of words in Column 2.
2. Parties may substitute one gender for another, or the plural number for the singular, in a form of words in Column 1 and corresponding changes are to be taken to be made in the corresponding form of words in Column 2.
3. Parties may complete the blank spaces left in a form of words in Column 1 with any words or figures and those words or figures are to be taken to be inserted in the corresponding blank spaces left in the corresponding form of words in Column 2.
4. Parties may introduce into or annex to a form in Column 1 any addition to, exception from or qualification of the form, or may strike out or omit any words from Column 1, and a form of words that would give effect to the intention indicated by the addition, exception, qualification, striking out or omission is to be taken to be added to the corresponding form in Column 2.
5. The covenants in Column 2 are to be taken to be made with or by and to apply to the lessor or lessee, as the case may be.

COVENANTS

Column 1

Column 2

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| <p>1. That the lessee covenants with the lessor to pay rent.</p> <p>2. Provided that in the event of damage by fire, lightning, flood, or tempest, rent is to abate until the premises are restored.</p> | <p>1. The lessee covenants with and promises to the lessor that the lessee will, during the term, pay to the lessor the rent reserved in the manner previously mentioned without any deduction other than a deduction which the lessee is entitled to make under an Act.</p> <p>2. Provided that if the leased premises, or a part of the leased premises, is during the term of the lease destroyed or damaged by fire without fault on the part of the lessee, flood, lightning, storm, or tempest, so as to render the leased premises unfit for the occupation and use of the lessee, then,</p> |
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and so often as that happens, the rent reserved, or a proportionate part of the rent, according to the nature and extent of the damage sustained, abates and the remedies for recovery of the rent or the proportionate part of the rent are suspended until the leased premises have been rebuilt or made fit for the occupation and use of the lessee.

3. And to pay taxes, except for local improvements.

3. And also that the lessee will pay all taxes, rates and assessments of any kind, whether imposed under the *Local Government Act* or another Act or otherwise, which are during the term charged on the leased premises or on the lessor on account of the leased premises except for taxes for local improvements or works assessed on the property benefited by them.

4. And to maintain and leave the premises in good repair (having regard to their condition at the commencement of the lease), reasonable wear and tear and damage by fire, lightning, flood and tempest excepted.

4. And also that during the term the lessee will, if and whenever the need arises, but having regard to the condition of the leased premises at the commencement of the lease and excepting reasonable wear and tear and damage by fire, lightning, flood and tempest occurring during the term —

(a) well and sufficiently maintain, repair, and keep; and

(b) at the expiration or sooner determination of the term peaceably surrender and yield up to the lessor,

the leased premises in good and substantial repair, including all appurtenances, buildings, erections and fixtures of or belonging to the leased premises or lawfully made or erected by the lessor on or within the leased premises during the term.

5. And that the lessor may enter and

5. That the lessor, may, by himself

view the state of repair, and that the lessee will repair according to notice in writing, and that in default the lessor may repair.

or herself or the lessor's agents, during the term at a reasonable time of the day and on giving to the lessee 2 days previous notice, enter on the leased premises and view the state of repair of the leased premises and may serve on the lessee or leave at the lessee's last or usual place of residence in the Territory or on the leased premises a notice in writing of a defect requiring the lessee, within a reasonable time, to repair the defect in accordance with a covenant expressed or implied in the lease, and that in default of the lessee so doing it is lawful for the lessor to enter and execute the required repairs.

6. And that the lessor may enter and carry out requirements of public authorities and repairs under the lease.

6. That the lessor may, by himself or herself or the lessor's agents, at all reasonable times during the term of the lease, with workers and others and all necessary materials and appliances, enter on the leased premises or a part of the leased premises for the purpose of complying with the terms of any present or future legislation affecting the premises and any notices served on the lessor or lessee by a licensing, local or other competent authority concerning the destruction of noxious weeds or animals or the carrying out of repairs, alterations or works of a structural character which the lessee may not be bound or, if bound, may fail to do, and also for the purpose of exercising the powers and authorities of the lessor under the lease.

However, the destruction, repairs, alterations or works are to be carried out by the lessor without undue interference with the occupation and use of the leased premises by the lessee.

7. And to insure from fire in the joint names of the lessor and the lessee.

7. And also that the lessee will immediately insure the leased premises to the full insurable value of the leased premises in an insurance office approved by the lessor in the joint names of the lessor and the lessee and keep the leased premises so insured during the

term of the lease, and will on the request of the lessor show to the lessor the receipt for the last premium paid for the insurance, and as often as the leased premises is destroyed or damaged by fire the whole of each sum or sums of money which is recovered or received for or in respect of the insurance is to be laid out and expended in building or repairing the leased premises or the parts of the leased premises that are destroyed or damaged by fire.

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| <p>8. And to paint outside every () year.</p> | <p>8. And also that the lessee will, in every () year during the term of the lease, paint, in a well executed manner, all the outside woodwork and ironwork of or belonging to the leased premises usually painted with 2 coats of proper paint.</p> |
| <p>9. And to paint and paper inside every () year.</p> | <p>9. And also that the lessee will, in every () year, in a well executed manner, paint the inside wood, iron and other works usually painted with 2 coats of proper paint and also will repaper the parts of the premises that are papered with paper of the same quality and wash, stop, whiten, or colour the parts of the leased premises that are plastered.</p> |
| <p>10. And to fence.</p> | <p>10. And also that the lessee will, during the term of the lease, erect and put up on the boundaries of the leased land, or on the boundaries on which no substantial fence exists, a good and substantial fence.</p> |
| <p>11. And to keep up fences.</p> | <p>11. And also that the lessee will during the term of the lease keep up the fences and walls of or belonging to the fences and walls of the leased premises and make anew the parts of the leased premises that may require to be renewed and at proper seasons of the year.</p> |

12. And to cultivate.

12. And also that the lessee will during the continuance of the lease cultivate, use, and manage all parts of the land that are or may be broken up or converted into tillage in a proper and careful manner, and will not impoverish or waste the land.

13. That the lessee will not cut timber.

13. And also that the lessee will not cut down, fell, injure, or destroy any growing or living timber or timber-like trees standing on the leased land without the consent in writing of the lessor.

14. That the lessee will not without consent use premises otherwise than as a private dwelling house.

14. And also that the lessee or any subtenant will not convert, use or occupy the leased premises or a part of the leased premises into or as a shop, warehouse or other place for carrying on a trade or business or otherwise than as a private dwelling house, or suffer the premises to be used for such a purpose, without the consent in writing of the lessor.

15. And will not assign or sublet without leave; no fine to be taken.

15. And also that the lessee or a subtenant will not, during the term of the lease, assign, transfer, demise, sublet or part with the possession of the leased premises or a part of the leased premises, or by any act or deed procure the leased premises or a part of the leased premises to be assigned, transferred, leased, sublet to or put into the possession of another person, without the licence or consent in writing of the lessor, but the lessor's licence or consent is not to be refused in the case of a proposed respectable and responsible assign, tenant or occupier.

Provided further, that no fine or sum of money in the nature of a fine is payable for or in respect of the licence or consent, but this proviso does not preclude the right of the lessor to require the payment of a reasonable sum in respect of any legal or other expenses incurred in relation to the licence or

consent.

16. That the lessee will not carry on any offensive trade.

16. That the lessee or a subtenant will not during the term of the lease use, exercise or carry on, or permit or suffer to be used, exercised or carried on in or on the leased premises or a part of the leased premises any noxious, noisome, or offensive art, trade, business, occupation or calling, and no act, matter or thing which is, may be or may grow to be the annoyance, nuisance, grievance, damage or disturbance of the occupiers or owners of a neighbouring premises is to be done in or on the leased premises or a part of the leased premises during the term of the lease.

17. That the lessee will carry on the business of a licensee within the meaning of the *Liquor Act* and conduct the same in an orderly manner.

17. And also that the lessee or a subtenant will during the term of the lease use, exercise and carry on in and on the leased premises the trade or business of a licensee within the meaning of the *Liquor Act*, and keep open and use the buildings on the leased land as and for a hotel, and manage and conduct his or her trade or business in a quiet and orderly manner, and will not do, commit or permit or suffer to be done or committed an act, matter or thing by which or by means of which a licence is or may be forfeited or become void or liable to be taken away, suppressed or suspended, and will comply in all respects with the requirements of the *Liquor Act*.

- 18.** And will apply for renewal of licence.
- 18.** And also that the lessee or a subtenant will during the term of the lease, at the proper time, apply for and endeavour to obtain at the person's own expense all licences that are or may be necessary for carrying on the trade or business of a licensee within the meaning of the *Liquor Act* in and on the leased premises and for keeping the buildings open as and for a hotel.
- 19.** And will facilitate the transfer of licence.
- 19.** And also that the lessee or a subtenant will, at the expiration or sooner determination of the lease, sign, give the notice or notices of a renewal or transfer of a licence required by law to be affixed to the leased premises and allow the notice or notices to be affixed and remain affixed during the time or times necessary or expedient in that behalf, and generally to do and perform all other acts, matters and things that are necessary to enable the lessor, or any person authorised by the lessor, to obtain the renewal of a licence or a new licence or the transfer of a licence.
- 20.** The (lessor) covenants with the (lessee) for quiet enjoyment.
- 20.** And the lessor covenants with the lessee that the lessee paying the rent reserved, and performing the covenants on the lessee's part, will peaceably possess and enjoy the leased premises for the term granted without any interruption or disturbance from the lessor or any other person or persons lawfully claiming by, from or under the lessor.
- 21.** And that the lessee may remove the lessee's fixtures.
- 21.** And also that the lessee may at or prior to the expiration of the lease take, remove and carry away from the leased premises all fixtures, fittings, plant, machinery, utensils, shelving, counters, safes or other articles on the leased premises in the nature of trade or tenants' fixtures bought on the leased premises by the lessee, but the lessee in

doing so must not damage the leased premises or must immediately make good any damage which the lessee may do to them.

SCHEDULE 3

Section 151

EASEMENTS AND EASEMENTS IN GROSS

Part A

Rights under a Right of Way

The person entitled to the use or benefit of an easement or easement in gross of a right of way may, for all purposes, enter on and pass along or over the servient land with or without a vehicle.

Part B

Purpose of and Powers under Other Easements
or Easements in Gross

Description	Purpose	Powers
1. Sewerage easement	Supplying sewerage service to or conveying a sewerage service under, through or across the servient land.	a To break the surface of, dig, open up and use the servient land to construct, lay down, take up, use, maintain, repair, relay or inspect pipes for the purpose of supplying or conveying a sewerage service and to enter the servient land at any time (with or without a vehicle or equipment) to do so.
2. Water supply easement	Supplying a water supply service to or conveying a water supply service through, under, on, above or across the servient land.	To break the surface of, dig, open up and use the servient land to construct, lay under, on or above the servient land, take up, use, maintain, repair, relay or inspect pipes for the purpose of supplying or conveying a water supply service and to enter the servient at any time (with or without a vehicle or equipment) to do so.

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| 3. Drainage easement | Draining water, sewerage or another effluent from, through, under or across the servient land. | To break the surface of, dig, open up and use the servient land to construct, lay down, take up, use, maintain, repair, relay or inspect drains or drainage pipes for the purpose of draining an effluent and to enter the servient land at any time (with or without a vehicle or equipment) to do so. |
| 4. Electricity supply easement | Supplying an electricity service to or conveying an electricity service through, under, on, above or across the servient land. | To —
(a) break the surface of, dig, open up and use the servient land;
(b) construct, lay under, on or above the surface of the servient land and use ducts, pipes, poles, conductors, cables wires and other works;
(c) construct, lay under on or above the surface of the servient land and use incidental or ancillary works for the transmission of electricity, including manholes and cable markers;
(d) erect on, under or above the servient land and use poles, equipment for transforming electricity and incidental or ancillary works, including walls or other structures;
(e) inspect, take up, maintain, repair, alter, remove, relay or replace works referred to in paragraphs (b), (c) or (d); and
(f) transmit electricity by means of works referred to in paragraphs (b), (c) or (d),

for the purpose of supplying or conveying an electricity service and to enter on and pass along or over the servient land (with or without a vehicle or equipment) to do so. |

5. Electronic communications easement	Supplying electronic communications service to or conveying an electronic communications service through, under, on, above or across the servient land.	an	<p>To —</p> <p>(a) break the surface of, dig, open up and use the servient land;</p> <p>(b) construct, lay under the surface of the servient land and use ducts, pipes, conductors, cables wires and other works;</p> <p>(c) construct, lay on or above the surface of the servient land and use incidental or ancillary works for the transmission of an electronic communications service, including manholes and cable markers; and</p> <p>(d) inspect, take up, maintain, repair, alter, remove, relay or replace works referred to in paragraphs (a), (b) or (c),</p> <p>for the purpose of supplying or conveying an electronic communications service and to enter on and pass along or over the servient land (with or without a vehicle or equipment) to do so.</p>
6. Energy supply easement	Supplying gas, liquid fuels, water or other liquids capable of conveying energy to or conveying gas, liquid fuels, water or other liquids capable of conveying energy through, under, on, above or across the servient land.		<p>To break the surface of, dig, open up and use the servient land to construct, lay under, on or above the surface of the servient land, take up, use, maintain, repair, relay or inspect pipes and incidental or ancillary works for the purpose of conveying gas, liquid fuels or liquids capable of conveying energy and to enter the servient land at any time (with or without a vehicle or equipment) to do so.</p>
7. General service easement	Supplying to or conveying through, under, on, above or across the servient land a sewerage service, water service, electricity service or communications		<p>To do any thing and take any action on the servient land that is described in this Column at items 1 to 6 inclusive.</p>

service by electronic means, to drain water, sewerage or other effluents from, through, under or across the servient land or to supply to or convey through, under, on, above or across the servient land gas, liquid fuels, water or other liquid fuels capable of conveying energy.

SCHEDULE 4

Section 211

ACTS REPEALED

Number and Year	Short Title or Subject Matter
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IMPERIAL ACTS

51 Hen. 3, St.4 of 1266	Distress for rent
52 Hen. 3,c.23 of 1267 (waste)	Statute of Marlborough
3 Edw. 1,c.16 of 1275	Distress for rent
13 Edw. 1,st.1,c.1 of 1285	<i>De Donis Conditionalibus</i>
13 Edw. 1,St.1,c.2 of 1285	Vexatious Replevins
13 Edw. 1,St.1,c.22 of 1285	Waste
13 Edw. 1,St.1,c.37 of 1285	Distress
18 Edw. 1,St.1 of 1290	<i>Quia Emptores</i>
17 Edw. 2,St.1,c.6 of 1324	<i>De Prerogativa Regis</i>

1 Edw. 3,St.2,c.12 of 1327	Fines on Alienation
1 Edw. 3,St.2,c.13 of 1327	Tenants in Capite
34 Edw. 3,c.15 of 1361	Confirmation of Grants
34 Edw. 3,c.16 of 1361	Statute of Non-claim
50 Edw. 3,c.16 of 1376	Fraudulent assurances
1 Ric. 3,c.7 of 1483	Statute of Fines
3 Hen. 7,c.4 of 1487	Deeds of gift of chattels
4 Hen. 7,c.24 of 1487	Statute of Fines
27 Hen. 8,c.10 of 1535	Statute of Uses
31 Hen. 8,c.1 of 1539	Statute of Partition
32 Hen. 8,c.9 of 1540	Pretenced Titles
32 Hen. 8,c.28 of 1540	Validation of leases
32 Hen. 8,c.31 of 1540	Recoveries
32 Hen. 8,c.32 of 1540	Statute of Partition
32 Hen. 8,c.34 of 1540	Grantees of Reversions
32 Hen. 8,c.36 of 1540	Statute of Fines
32 Hen. 8,c.37 of 1540	Executors to recover arrears of rent
1 & 2 Phill. & Mary,c,12 of 1554	Impounding of distress
13 Eliz. 1,c.5 of 1570	Fraudulent conveyances
14 Eliz. 1,c.8 of 1572	Recoveries
27 Eliz. 1,c.4 of 1585	Fraudulent conveyances
12 Car. 2,c.24 of 1660	Tenures Abolition Act
17 Car. 2,c.7 of 1665	Distress for Rents
18 & 19 Car. 2,c.11 of 1666	<i>Cestui que Vie Act,</i>

29 Chas. 2,c.3 of 1677	Statute of Frauds, 1677
9 Geo. 4,c.14 of 1828	Statute of Frauds Amendment Act, 1828
2 Wm. & Mary, Sess.1,c.5 of 1689	<i>Distress for Rent Act, 1689</i>
4 & 5 Anne, c.16(or.c.3) Act	<i>Administration of Justice</i> of 1705
6 Anne, C.18 (or c.14) of 1707	<i>Cestui que Vie Act, 1707</i>
8 Anne, C.18 (or c.14) of 1709	<i>Landlord and Tenant Act, 1730</i>
4 Geo. 2,c.28 of 1730	<i>Landlord and Tenant Act, 1730</i>
11 Geo. 2,c.19 of 1737	<i>Distress for Rent Act, 1737</i>
54 Geo. 3,C.145 of 1814	<i>Corruption of the Blood Act, 1814</i>
56 Geo. 3,c.16 of 1816	Receiver of Crown Rents Act
57 Geo. 3,c.93 of 1817	<i>Distress (Costs) Act, 1817</i>
1 Geo. 4,c.17 of 1820	Recovery of possession by landlords
7 & 8 Geo. 4,c.17 of 1827	<i>Distress (Costs) Act, 1827</i>
11 Geo. 4 and 1 Wm 4,c.46 of 1830	<i>Illusory Appointments Act</i> of 1830

ACTS OF THE STATE OF SOUTH AUSTRALIA

No. 142 of 1879	An Act to amend the Law relating to Sales of Reversions
No. 228 of 1881	The Estates Tail Act, 1881
No. 203 of 1881	The Partition Act, 1881

ACTS OF THE NORTHERN TERRITORY

Report on the Law of Property for the Northern Territory

No. 7 of 1975

*Real Property (Insurance Money Application)
Act 1975*

No. 31 of 1994

Perpetuities Act 1994
