

# NORTHERN TERRITORY OF AUSTRALIA

## LAW OF PROPERTY ACT

As in force at 15 July 2001

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# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 15 July 2001

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## LAW OF PROPERTY ACT

**An Act 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*.

#### 2 Commencement

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

#### 3 Act binds Crown

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.

***appropriate form*** has the same meaning as 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 as to title*** has the same meaning as 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** has the same meaning as in 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 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** has the same meaning as in section 4 of the *Land Title Act*.

**Land Titles Office** has the same meaning as 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*.

**local government body** has the same meaning as in section 4 of the *Land Title 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 or through 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 or through 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** has the same meaning as 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** has the same meaning as in section 4 of the *Land Title Act*.

**statutory charge** has the same meaning as in section 4 of the *Land Title Act*.

**trustee company** has the same meaning as in 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 effect of invalidating a disposition by will;
- (b) affects an interest validly created before the commencement of this Act;
- (c) affects the law relating to part performance; or
- (d) 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 etc. 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 *Residential Tenancies 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 etc.**

- (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.

**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 on or after 8 February 1971:
  - (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) Subject to the Corporations Act 2001, 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, but for 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 appropriate (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 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.
- (11) In this section, **intestate** has the same meaning as in 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) Subsection (1) does not apply 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 7 years or more, 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 just.
- (4) If, as a consequence of a 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,

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 a 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 interests: co-ownership and partition**

### **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 and 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 of 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 person admitted to an approved treatment facility as a voluntary or involuntary patient under the *Mental Health and Related Services 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 after that commencement; 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 after that commencement.

#### **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 one or more of the chattels in respect of which the application is made be sold and the remaining chattels (if any) be divided amongst the persons entitled to them,



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

#### **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 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 49, 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 corporation 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 Act 2001* 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 negated**

- (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 negated, 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 that 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 persons 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).
- (2) A contract or other transaction made in accordance with subsection (1):
- (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 is 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 Act 2001 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 etc.**

- (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;
  - (b) has effect despite any term to the contrary in the contract or instrument; and
  - (c) has effect subject to the appearance of a contrary intention in an Act or an instrument of a legislative or administrative character.
- (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 etc. 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 as to 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 or conveyancing agent 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:

**bank** includes an authorised deposit taking institution within the meaning of the *Banking Act 1959* of the Commonwealth, the Chief Executive Officer (Housing) established by the *Housing Act*, the Territory Insurance Office and any other prescribed person.

**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 for the sale of land made after the commencement of this Act; and
- (b) has effect despite any term of a contract for the sale of land 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 etc.**

### **73 Application of Division**

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

**deposit** means an amount:

- (a) not exceeding 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 sold or 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.

Penalty: 50 penalty units.

- (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) Section 142 of the *Land Title Act* does not apply to a caveat referred to in subsection (1).
- (3) The caveat lapses on completion of the instalment contract.

#### **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 appropriate, 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 as to 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 as to 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 as to 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 or charge of property under the *Mining Act*, *Petroleum Act* or *Petroleum (Submerged Lands) 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            Amendment of mortgage**

- (1) A mortgage evidenced by an instrument of mortgage may be amended by a memorandum of amendment 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 to amend a mortgage under this section is in addition to any other power to amend a mortgage 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 as to 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 the 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 the 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 as to 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 total amount advanced under the mortgagee's mortgage at any time does not exceed the maximum amount specified in the loan agreement or mortgage as the maximum amount that may be secured by the mortgage.
- (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 mortgagee 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.
- (6) 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 appropriate, 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 appropriate;
- (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 contract is to be completed within 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 an instrument of mortgage.
- (2) Sections 86 and 87:
  - (a) apply to an instrument of mortgage 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 prescribed notice.
- (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 a law in force in the Territory that relates 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 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 registered mortgage, if any, if the mortgagee entitled to the benefit of the mortgage has concurred in the sale and has executed a discharge of the 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 the mortgaged property in priority to the first-mentioned person's mortgage, 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 the other person.

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

- (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) unless 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            Foreclosure**

**97            Exercise of mortgagee's right of foreclosure**

A mortgagee may not exercise the mortgagee's right of foreclosure unless the mortgagee does so in accordance with this Division or section 72 of the *Land Title Act*.

**98            Sale by Registrar-General**

- (1) If:
  - (a) a mortgagor has defaulted in paying the principal money or interest and the default has continued for at least 6 months;
  - (b) notice requiring payment of the amount that constitutes the default has been served on the mortgagor in accordance with section 89(1)(a);
  - (c) the mortgagee has, within the immediately preceding 2 years, exercised the mortgagee's power of sale and offered the property for sale at public auction;
  - (d) the amount of the highest bid at the auction was less than the amount of money owing to the mortgagee and the costs, charges and expenses incident to that exercise of the power of sale;

- (e) notice in writing of the mortgagee's intention to apply for an order for foreclosure has been served on the mortgagor and each person who has a registered interest in the mortgaged property subsequent to the interest of the mortgagee,

the mortgagee may, in a form approved by the Registrar-General, apply to the Registrar-General to offer the mortgaged property for sale by private contract.

- (2) On receiving an application under subsection (1), the Registrar-General must publish once in each of 3 successive weeks a notice in a newspaper circulating in Darwin and, if the mortgaged property is outside Darwin, in a newspaper circulating in the district where the property is located offering the property for sale by private contract.
- (3) The Registrar-General's notice is to specify the date after which the mortgagee may apply to the Court for an order for foreclosure if the property does not sell.
- (4) The date is to be at least one month after the date of the edition of the newspaper in which the notice is first published.
- (5) The mortgaged property is not to be sold under this section unless its sale will realise an amount equal to or more than the amount of money owing to the mortgagee and the costs, charges and expenses incident to the sale, including the costs and expenses incurred by the Registrar-General.
- (6) Subject to this section, sections 91, 92, 93, 94 and 95 apply to the extent necessary to and in relation to a sale of mortgaged property under this section as if a reference in those sections to a mortgagee exercising his or her power of sale of a mortgaged property were a reference to the Registrar-General selling a mortgaged property under this section.

## **99            Order for foreclosure**

- (1) If:
- (a) the Registrar-General has published a notice under section 98(2) offering the property for sale by private contract;
- (b) the date specified in the Registrar-General's notice has passed; and
- (c) the mortgaged property has not sold,

the mortgagee may apply to the Court for an order for foreclosure.

- (2) Before making the order for foreclosure the Court must:
- (a) be satisfied that:
    - (i) the mortgagor has defaulted in paying the principal money or interest and the default has continued for at least 6 months;
    - (ii) notice requiring payment of the amount that constitutes the default has been served on the mortgagor in accordance with section 89(1)(a);
    - (iii) the mortgagee has, within 2 years before making the application to the Registrar-General under section 98(1), exercised the mortgagee's power of sale and offered the property for sale at public auction;
    - (iv) the amount of the highest bid at the auction was less than the amount of money owing to the mortgagee and the costs, charges and expenses incident to the sale;
    - (v) notice in writing of the mortgagee's intention to apply for an order for foreclosure has been served on the mortgagor and each person who has a registered interest in the mortgaged property subsequent to the interest of the mortgagee;
    - (vi) the Registrar-General has published a notice under section 98(2) offering the property for sale by private contract;
    - (vii) the date specified in the Registrar-General's notice has passed; and
    - (viii) the mortgaged property has not sold;
  - (b) determine the market value of the mortgaged property;
  - (c) determine the market value of each registered interest in the mortgaged property that has priority to the interest of the mortgagee; and
  - (d) determine the value of each registered interest in the mortgaged property subsequent to the interest of the mortgagee that represents the proportion that the value of that interest is in relation to the amount of the market value of the mortgaged property less the money owing to the mortgagee, the amount of the market value of any prior registered interests and the costs, charges and expenses of the

mortgagee in exercising the mortgagees right of foreclosure and selling the property; and

- (e) identify any other interests in the mortgaged property.
- (3) On complying with subsection (2), the Court:
- (a) may make the order for foreclosure; and
  - (b) if the Court makes the order for foreclosure:
    - (i) must make the orders it considers just to ensure that the mortgagee will either pay to each person who has a registered subsequent interest the amount representing the value of the interest established by the Court under subsection (2)(d) or offer the person security for the repayment of that amount; and
    - (ii) must make the orders it considers just in relation to the other interests in the mortgaged property and the payment of the costs, charges and expenses of the mortgagee in exercising the mortgage's right of foreclosure.

#### **100        Effect of order for foreclosure**

On the registration of an order for foreclosure, the mortgaged property vests in the mortgagee free of all of the interest of the mortgagor, including all right and equity of redemption, and any other person's interest in the property other than:

- (a) a lease, easement or restrictive covenant to which the mortgagee has consented in writing or to which the mortgagee is a party; or
- (b) a mortgage, statutory charge, easement or other right that is binding on the mortgagee.

#### **101        Co-existing rights of mortgagee under prior mortgage**

- (1) In this section, *prior mortgagee* means a mortgagee who is entitled to the benefit of a mortgage that has priority over the mortgage in respect of which the mortgagee exercises his or her right of foreclosure.
- (2) Until an order for foreclosure is registered, a prior mortgagee of the property the subject of the order has the same rights and remedies at law and in equity that the prior mortgagee would have had if the legal estate in the property was vested in the prior mortgagee and

the mortgagor had a right of quiet enjoyment of the property for as long as the mortgagor does not default in the payment of an amount of principal money or interest or in the observance or fulfilment of another provision contained in the mortgage document or implied by this or another Act.

- (3) Nothing in this section:
- (a) affects the right of a prior mortgagee to exercise the mortgagee's right of foreclosure in accordance with this Division;
  - (b) until the registration of an order for foreclosure – has the effect of making a prior mortgagee of property the subject of the order that is leased land liable for the payment of rent under the lease or the observance or fulfilment of any other term of the lease; and
  - (c) affects the rights or liabilities of a prior mortgagee after the registration of the order for foreclosure.

## **102        Application of Division**

- (1) This Division applies:
- (a) to mortgages made before and after the commencement of this Act; and
  - (b) only in respect of a mortgagor's default in the payment of principal money or interest that occurs after the commencement of this Act.
- (2) To avoid doubt, on the commencement of this Act sections 140, 141 and 142 of the *Real Property Act*, as in force immediately before the commencement of the *Land Title Act*, continue to apply in respect of a mortgagor's default in the payment of principal money or interest that occurs before the commencement of that Act.

## **Division 4        Miscellaneous**

### **103        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.

#### **104            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 a 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.

#### **105 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 just and, in doing so, may stay any proceedings brought by the mortgagee or otherwise or may grant relief on the terms it thinks just 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).

**106            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.

**107        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.

**108            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.

**109            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 just, 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:
    - (i) the dissent of a person other than a person referred to in that subsection to the sale of the mortgaged property; or
    - (ii) that 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 just;
  - (b) give the conduct of the sale to a defendant; and
  - (c) give the directions it thinks just 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 encumbrances;
  - (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.

#### **110        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,

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.

**111        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 (1) is:

- (a) for the purposes of the mortgage and section 112, 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.

**112        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 requires) a reference to any of those contingencies that have become incapable of occurring.

**113            Subsequent mortgagees may redeem prior mortgages etc.**

- (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        Application**

**114            This Part applies subject to *Housing Act, Commercial Tenancies Act and Residential Tenancies Act***

- (1) If a provision of or under this Part and a provision of or under the *Housing Act*, the *Commercial Tenancies Act* or the *Residential Tenancies Act* are capable of applying to or in relation to a lease or tenancy, the provision of or under the *Housing Act*, *Commercial Tenancies Act* or the *Residential Tenancies Act* applies, and the provision of or under this Part does not apply, to or in relation to the lease or tenancy.
- (2) To avoid doubt:
  - (a) sections 115, 120, 121, 122, 123(1), (2) and (5), 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 139, 140, 141, 142 and 143 apply to tenancies within the meaning of the *Residential Tenancies Act*;



- (b) sections 116, 117, 118, 119, 123(3) and (4), 134, 137, 144, 145, 146, 147, 148, 149, 150, 151 and 152 do not apply to tenancies within the meaning of the *Residential Tenancies Act*;
- (c) sections 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 137, 139, 140, 141, 142, 143 and 151 apply to leases within the meaning of the *Commercial Tenancies Act*; and
- (d) sections 144, 145, 146, 147, 148, 149 and 150 do not apply to leases within the meaning of the *Commercial Tenancies Act*.

## **Division 2            Rights, powers and obligations**

### **115            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) a term for less than a year;
  - (b) a term for a year, or years, and a part of a year; and
  - (c) a term from year to year.

#### **116 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.

#### **117 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.

#### **118        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.

**119        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, a local government body 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 137, 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 continues for not less than 2 months, or the

repairs required by a notice under paragraph (a) are not completed within the time specified in the notice,

the lessor may re-enter 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.

## **120 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 would 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 it were 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.

## **121 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 117 and 120 do not apply to imply in the lease the obligation specified opposite the form of words in Column 2 of the Schedule.

**122        Lessee to give notice of ejection 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 or lessor's agent 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.

**123        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 137 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 lapsed 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.

#### **124        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.

**125            Abolition of replevin and distress for rent**

The actions of replevin and distress for rent are abolished.

**Division 3            Surrenders, assignments and waiver**

**126            Head leases may be renewed without surrendering under-leases**

- (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 underleases as if the original lease under which the underleases 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 underlease 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*.

**127            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.

**128        When reversion on lease is surrendered etc. next estate is to be taken to be 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*.

## 129        **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.

- (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.

**130        Rent and benefit of lessee's covenants to run with 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.

**131            Obligation of lessor's covenants to run with 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.

**132            Waiver of covenant etc. 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 who has the benefit of the covenants, obligations or conditions of the lease.

**133            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.

**134            Provisions as to covenants not to assign etc. 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 under-lessee 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.

**135 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 4 Relief from forfeiture**

**136 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.



**137 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 served under this section is to be in the 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 not exceeding 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.

### **138 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 137 and to any other circumstances it thinks appropriate, grant or refuse relief as it thinks just.
- (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 just.

(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 137(2) has occurred;
- (b) notice has been served on the lessee under section 137(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.

**139 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 just; 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 just.
- (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.

#### **140 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 138.

#### **141 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.

**142 Right to exercise option in lease 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 143; and
  - (b) the appearance of a contrary intention in a lease.

### 143 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) **notice** means a written notice 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 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 just 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 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 just.

(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 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 just 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 lessee's 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, within the meaning of 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 5            Termination of tenancies**

### **144            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.

### **145            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 146 and 147; and
  - (b) be given in sufficient time so that it complies with section 148, 149, 150 or 151, as the case may be.
- (2) Subject to section 144, 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 146 and 147.
- (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.

### **146            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.

#### **147 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 a daily newspaper circulating in the district where the premises is located.
- (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.

#### **148 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.

#### **149 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.

**150 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.

**151 Notice to terminate other tenancies**

- (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 subsection (1), **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.
- (3) Notice to terminate a tenancy to which section 148, 149 or 150 or subsection (1) does not apply is to be given for a reasonable period.
- (4) Subsection (3) does not apply to a tenancy for which a period of notice has, expressly or impliedly, been agreed to by the parties.
- (5) In subsection (3):

**reasonable period** means a reasonable period in the circumstances of the tenancy to which the notice relates, including the nature of the tenancy, the circumstances surrounding the creation of the tenancy, the terms (if any) of the tenancy and the proper implications from the agreement of the parties (if any) in respect of the tenancy.

**tenancy** includes a tenancy at will other than a tenancy at will arising because of the abolition of the implication of a tenancy from year to year under section 144.

## **Division 6            Holding over leased premises**

### **152            Tenants etc. 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**

#### **153            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**

### **154            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 155.

**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.

### **155            Easement in gross**

A person may create an easement without dominant land in favour of another person.

### **156            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, within the meaning of section 4 of that Act, and an instrument of easement or easement of gross under Subdivision 2 of that Division; or
- (c) an instrument lodged with the Registrar-General under section 19(2) of the *Crown Lands Act*.

### **157            Description of certain easements etc.**

- (1) Subject to section 161, 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 161, 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 because of the entitlement to the use or benefit of a registered easement or easement in gross 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 commences.

**158        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.

**159        Burden of easements and easements in gross**

An easement or easement in gross binds each person who has an interest in the servient land.

**160        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.

### **161        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.

### **162        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**

### **163        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 within the meaning of section 3 of the *Crown Lands Act*;
  - (b) an estate in fee simple owned by the Commonwealth;
  - (c) reserved or dedicated lands; or
  - (d) Aboriginal land within the meaning of section 3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* of the Commonwealth.

#### **164 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 Division or otherwise have notice of the order.

#### **165 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 164.
- (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.

## 166 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 Division;
- (c) may order a person to produce to another person specified in the order any certificate as to 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 section 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

### 167 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) that is created for the benefit of other land (dominant land).

**covenant in gross** means a covenant referred to in section 168.

**dominant land** means land having the benefit of a covenant.

**plan of subdivision** has the same meaning as in section 4 of the *Land Title Act*.

**servient land** means land the use, ownership or maintenance of which is authorised or restricted by a covenant or covenant in gross.

**168        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, a local government body, a statutory corporation or a prescribed person.

**169        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) an instrument lodged with the Registrar-General under section 19(2) of the *Crown Lands Act*.

**170        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 local government body, the statutory corporation or the prescribed person who or which has the benefit of the covenant in gross.

**171        Burden of covenants and covenants in gross**

- (1) Subject to subsection (2), 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.

### **172 Intention of original parties to prevail**

Sections 170, 171 and 173 apply subject to the appearance of a contrary intention in an instrument of covenant or covenant in gross.

### **173 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 by another person of an act prohibited by the covenant or covenant in gross (whether or not the other 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) the person is a mortgagee in possession; or

- (b) a receiver, appointed by the person, is acting in respect of the person's interest as mortgagee of the land.

**174        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, within the meaning of 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.

**175        Declaration as to nature etc. 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**

### **176            Definitions**

In this Division:

***easement*** includes an easement in gross.

***covenant*** includes a covenant in gross.

### **177            Modification or extinguishment 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.

## **178 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.

**179        Effect of order**

An order made under section 177 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 178.

**180        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 181.
- (2) Unless the Court orders otherwise, an application under subsection (1) operates to stay the proceedings for enforcement of the easement or covenant.

**181        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 as to 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**

### **182            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 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.

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## Part 11 Perpetuities

### 183 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** has the same meaning as in the *Trustee Act*.

**trustee** has the same meaning as 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.

### 184 Application

- (1) This Part applies in relation to a settlement taking effect before or after 1 August 1994.

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- (2) This Part applies in relation to a settlement exercising a power of appointment taking effect after 1 August 1994, 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 1 August 1994 but taking effect after that date if the provision would not have infringed the rule against perpetuities had the *Perpetuities Act 1994* or this Act not been enacted and the will taken effect when it was executed.

### **185 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.

### **186 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.

### **187 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.

### **188 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 widower;
    - (v) the death of his widow or her widower; or
    - (vi) the happening of a contingency during the lifetime of his widow or her widower.

### **189 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

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- (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 just 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.

## **190 Wait-and-see**

- (1) If a provision of a settlement that creates an interest would, but for this section and section 189, 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

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(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 197.

### **191 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,



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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 190 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.

### **192 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 190;
- (b) section 191(1);
- (c) section 191(4).

### **193 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.

### **194 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.

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**195 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 1 August 1994.

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**196**      **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.

**197**      **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.

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**198      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.

**199      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.

**200      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.

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- (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 1 August 1994.

## **201 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 on or after 1 August 1994.

## **202 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 purpose 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**

### **203 Application of Part**

This Part applies to powers of appointment created or arising before and after the commencement of this Act.

### **204 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 Title 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.

### **205 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.

**206 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.

**207 Disclaimer etc. 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**

### **208                    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.

### **209                    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.



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**210 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****211 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.

**212 Rents etc. 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.

### **213 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 Presumptions of death and survivorship**

### **214 Application**

- (1) This Part applies in respect of:
- (a) all property that devolves on the death or presumed death of a person according to a law of the Territory; and
- (b) all appointments of trustees that are made according to a law of the Territory.

- (2) This Part applies to and in relation to:
- (a) deaths of persons who die after the commencement of this Act; and
  - (b) presumed deaths of persons who are presumed after the commencement of this Act to be dead,
- whether the deaths or presumed deaths occur in the Territory or elsewhere.

### **215 Presumption of death**

- (1) For the purposes of sections 216 and 217, a person:
- (a) whose death is not established;
  - (b) who has been absent for a continuous period of 7 years during which he or she has not been heard from; and
  - (c) whose absence is not satisfactorily explained after diligent search or inquiry,
- is presumed to be dead.
- (2) No will, trust, settlement, disposition, appointment or other instrument by which property devolves on the death of a person referred to in subsection (1) takes effect unless a court of competent jurisdiction of the Commonwealth or a State or Territory of the Commonwealth has made a finding that has the effect of presuming the person to be dead for not less than 7 years.

### **216 Devolution of property in cases where order of death uncertain**

- (1) This section applies subject to the appearance of a contrary intention in a will, trust, settlement, disposition, appointment or any other instrument.
- (2) If 2 or more persons die or are presumed dead or 1 or more persons die and one or more persons are presumed dead in circumstances which give rise to reasonable doubts as to which of those persons survived the other or others of them:
- (a) subject to this section – the property of each of those persons is to devolve as if he or she had survived the other or others of them and had died immediately afterwards;
  - (b) a donatio mortis causa made by any of those persons to another of those persons is void and of no effect;

- (c) in any case where any of those persons life is insured under a policy of life or accident insurance and another or others of them would, on surviving the insured person, be entitled (other than under a will or on the intestacy of a person) to the proceeds or a part of the proceeds payable under the policy, the proceeds are to be distributed as if the insured person had survived the other or each of the others and had died immediately afterwards;
- (d) any property that is owned jointly and exclusively by any 2 or more of those persons is to devolve as if it were owned by them as tenants in common in equal shares when they died;
- (e) subject to subsection (3) – in any case where under a will or trust or other disposition property would have passed (whether as the consequence of the operation of section 40 of the *Wills Act* or otherwise) to any of 2 or more possible beneficiaries (who are from amongst those persons who die or are presumed dead) if any of the possible beneficiaries could be shown to have survived the other or others of them, the devise or bequest or disposition takes effect as if the property were given to the possible beneficiaries as tenants in common in equal shares, and the property is to devolve accordingly;
- (f) subject to subsection (4) – in any case of a power of appointment which could have been exercised in respect of any property by any 2 of more of those persons who die or are presumed dead if any of them could be shown to have survived the other or others of them, the power may be exercised as if an equal share of that property had been set apart for appointment by each of those persons and as if each of those persons had the power of appointment in respect of the share of that property set apart for appointment by him or her, and that share is to devolve in default of appointment by him or her in the manner in which the property would have devolved in default of appointment by him or her if he or she had survived the other or others;
- (g) in any case where:
  - (i) property is devised or bequeathed or appointed by will or other testamentary instrument to the survivor of 2 or more of the testator's children or other issue; and
  - (ii) all or the last survivors of those children or other issue are from amongst those persons who die or are presumed dead,

that provision applies as if the devise or bequest or appointment were in equal shares to those survivors who leave a child or children who survives or survive the testator; and

- (h) in any case where those persons who die or are presumed dead include a testator and one or more of his or her issue (however remote) and section 40 of the *Wills Act* applies, the testator is to be taken to have survived all of his or her issue who die or are presumed dead and to have died immediately afterwards and, accordingly, a devise or bequest by the testator to any of his or her issue who die or are presumed dead or who had already died during the testator's lifetime:
  - (i) lapses unless any of the donee's issue, other than those persons who die or are presumed dead, survives the testator; or
  - (ii) if any of the issue referred to in subparagraph (i) survives the testator – takes effect in accordance with that provision.
- (3) Subsection (2)(e) does not apply in any case to which subsection (2)(c) or (f) applies.
- (4) Subsection (2)(f) does not apply in any case to which subsection (2)(c) applies.

## **217 Presumption of survivorship**

In any other case affecting the title to property or the appointment of trustees not referred to in this Part:

- (a) if:
  - (i) 2 or more persons die;
  - (ii) 2 or more persons are presumed dead; or
  - (iii) one or more persons die and one or more persons are presumed dead; and
- (b) the circumstances of those person's deaths or presumed deaths gives rise to reasonable doubts as to which of those persons survived the other or others,

the deaths or presumed deaths or deaths and presumed deaths are presumed to have occurred in order of seniority and, accordingly, the younger is presumed to have survived the elder.

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**218 Nothing in this Part prevents making of Re Benjamin orders**

Nothing in this Part prevents the distribution of the estate of a deceased person in the case where a beneficiary cannot be found and there is no evidence that the beneficiary predeceased the testator.

**Part 16 Miscellaneous****219 Service of notices**

- (1) A notice required or authorised by this Act to be served on or given to a person or a notice served on, or given to a person under an instrument or agreement that relates to property, may be served on or given to the 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 served on or given to the person's personal representative as specified in subsection (1).
- (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.

## **220 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 17 Repeal**

### **221 Repeal**

- (1) The Acts specified in Schedule 4 are repealed.
- (2) The repeal of the *Real Property (Insurance Money Application) Act* does not affect the operation of that Act in respect of a contract entered into before the commencement of this Act.

## **Schedule 1 Procedure in cases of bona vacantia**

section 20(9)

### **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 Short forms of covenants in leases

section 120

### 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

1. That the lessee covenants with the lessor to pay rent.

#### Column 2

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.

2. Provided that in the event of damage by fire, lightning, flood, or tempest, rent is to abate until the premises are restored.

3. And to pay taxes, except for local improvements.

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.

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, 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 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 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 view the state of repair, and that the lessee will repair according to notice in writing, and that in default the lessor may repair.

5. That the lessor, may, by himself 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.

8. And to paint outside every ( ) year.

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.

9. And to paint and paper inside every ( ) year.

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.

10. And to fence.

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.

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|---|---|
| 11. And to keep up fences.  | 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.   |
| 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.

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## Schedule 3 Easements and easements in gross

section 157

**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**

<b>Description</b>	<b>Purpose</b>	<b>Powers</b>
1. Sewerage easement	Supplying a sewerage service to or conveying a sewerage service under, through 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 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 land at any time (with or without a vehicle or equipment) to do so.
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	To: <ol style="list-style-type: none"> <li>(a) break the surface of, dig, open up and use the servient land;</li> </ol>

through, under, on, above or across 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 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 To:

(a) break the surface of, dig, open up and use the servient land;

(b) construct, lay under the surface of the servient land and use ducts, pipes, conductors, cables wires and other works;

(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

- (d) inspect, take up, maintain, repair, alter, remove, relay or replace works referred to in paragraphs (a), (b) or (c),

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.

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.

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.

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 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

To do any thing and take any action on the servient land that is described in this Column at items 1 to 6 inclusive.

liquid fuels capable  
of conveying  
energy.

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**Schedule 4 Acts repealed**

section 221

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Number and Year	Short Title or Subject Matter
IMPERIAL ACTS	
51 Hen. 3, St.4 of 1266	Distress for rent
52 Hen. 3,c.23 of 1267	Statute of Marlborough (waste)
3 Edw. 1,c.16 of 1275	Distress for rent
13 Edw. 1,st.1,c.1 of 1285	De Donis Conditionalibus
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	Quia Emptores
17 Edw. 2,St.1,c.6 of 1324	De Prerogativa Regis
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

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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	<i>Tenures Abolition Act</i>
17 Car. 2,c.7 of 1665	Distress for Rents
18 & 19 Car. 2,c.11 of 1666	<i>Cestui que Vie Act, 1666</i>
29 Chas. 2,c.3 of 1677	<i>Statute of Frauds, 1677</i>
2 Wm. & Mary, Sess.1,c.5 of 1689	<i>Distress for Rent Act, 1689</i>
4 & 5 Anne, c.16(orc.3) of 1705	<i>Administration of Justice Act</i>
6 Anne, C.72 (or c.18) of 1707	<i>Cestui que Vie Act, 1707</i>
8 Anne, C.18 (or c.14) of 1709	<i>Landlord and Tenant Act, 1709</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>
14 Geo 3.c78	<i>Fires Prevention (Metropolis) Act, 1774</i>
54 Geo. 3,C.145 of 1814	<i>Corruption of the Blood Act, 1814</i>
56 Geo. 3,c.16 of 1816	<i>Receiver of Crown Rents Act</i>
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 *Illusory Appointments Act 1830*  
1830

#### ACTS OF THE STATE OF SOUTH AUSTRALIA

No. 15 of 1843	Ordinance to facilitate the Conveyances of Real Estate
No. 15 of 1845	An ordinance to render effectual conveyances by married women and to declare the effect of certain deeds in relation to dower
No. 25 of 1852	An Act to amend the Law of Real Property
No. 6 of 1860	The <i>Real Property Act of 1860</i>
No. 7 of 1862	An Act to give certain trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages and wills
No. 142 of 1879	An Act to amend the Law relating to Sales of Reversions
No. 182 of 1880	The Settled Estates Act 1880
No. 228 of 1881	The Estates Tail Act, 1881
No. 203 of 1881	The Partition Act, 1881
No. 459 of 1889	The Settled Estates Act Amendment Act
898, 1905	Apportionment Act, 1905

#### ACTS OF THE NORTHERN TERRITORY

No. 42 of 1965	<i>Supreme Court Ordinance Repeal Ordinance 1965</i>
No. 7 of 1975	<i>Real Property (Insurance Money Application) Act 1975</i>
No. 31 of 1994	<i>Perpetuities Act 1994</i>



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**ENDNOTES**
**1****KEY**

Key to abbreviations

**amd = amended**  
**app = appendix**  
**bl = by-law**  
**ch = Chapter**  
**cl = clause**  
**div = Division**  
**exp = expires/expired**  
**f = forms**  
**Gaz = Gazette**  
**hdg = heading**  
**ins = inserted**  
**lt = long title**  
**nc = not commenced**

**od = order**  
**om = omitted**  
**pt = Part**  
**r = regulation/rule**  
**rem = remainder**  
**renum = renumbered**  
**rep = repealed**  
**s = section**  
**sch = Schedule**  
**sdiv = Subdivision**  
**SL = Subordinate Legislation**  
**sub = substituted**

**2****LIST OF LEGISLATION*****Law Of Property Act 2000 (Act No. 1, 2000)***

Assent date 14 March 200  
 Commenced 1 December 2000 (*Gaz G38, 27 September 2000, p 2*)

***Law of Property (Consequential Amendments) Act 2000 (Act No. 46, 2000)***

Assent date 12 September 2000  
 Commenced 1 December 2000 (s 2, s 2 *Law of Property Act 2000 (Act No. 1, 2002)* and *Gaz G38, 27 September 2000, p 2*)

***Law of Property Amendment Act (No. 2) 2000 (Act No. 61, 2000)***

Assent date 14 November 2000  
 Commenced 1 March 2001 (s 2, s 2 *Wills Act 2000 (Act No. 59, 2000)* and *Gaz G48, 16 December 2000, p 3*)

***Corporations Reform (Consequential Amendments NT) Act 2001 (Act No. 17, 2001)***

Assent date 29 June 2001  
 Commenced 15 July 2001 (s 2, s 2 *Corporations Act 2001 (Cth Act No. 50, 2001)* and *Cth Gaz S285, 13 July 2001*)

**3****LIST OF AMENDMENTS**

s 79 amd No. 46, 2000, s 3  
 s 20 amd No. 17, 2001, s 21  
 s 48 amd No. 17, 2001, s 21  
 s 57 amd No. 17, 2001, s 21  
 s 93 amd No. 46, 2000, s 3  
 s 216 amd No. 61, 2000, s 3  
 s 221 amd No. 46, 2000, s 3  
 sch 4 amd No. 46, 2000, s 3