AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

LAW REFORM (MISCELLANEOUS PROVISIONS) (AMENDMENT) BILL 1995

EXPLANATORY MEMORANDUM

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AUSTRALIAN CAPITAL TERRITORY

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OUTLINE

This Bill amends the Law Reform (Miscellaneous Provisions) Act 1955 following a recommendation arising out of the Law Review Program conducted by the Attorney Generals Department.

Short title, Commencement and Principal Act
Clauses 1, 2 and 3

Clauses 1, 2 and 3 are formal requirements. They refer to the short title of the Bill, the commencement of the Bill, which is to be on the day on which it is notified in the Gazette and the definition of 'Principal Act'.

Addition
Clause 4

This clause amends the Law Reform (Miscellaneous Provisions) Act 1955 by adding a new Part XI dealing with the jurisdiction of Courts with respect to foreign land.

The proposed amendment abrogates, in part, a law of law sometimes called the *Mocambique* rule. The *Mocambique* rule stems from the decision of the House of Lords in the *British South Africa Co Inc v. Companhia de Mocambique* [1893] AC 602. This decision is authority for two propositions.

Determination of Title
section 34(2)

The first part of the rule affirms that the courts of the forum have no jurisdiction to entertain an action for the determination of title to, or the right to possession of, land or other immovables situated outside the territory of the forum. This is a rule founded on common sense and is expressly retained in proposed section 34(2) of the Principal Act.

Personal actions
section 34(1)

The second part of the rule denies jurisdiction to entertain a personal action merely because foreign land is incidently involved. For example, jurisdiction would be denied in an action for the recovery of damages for trespass to foreign land even if title to that land is not in issue.

The logic for this rule stems from the medieval period Taken out of this medieval context, the second part of the rule has been severely criticised. It has been said to result in anomalous and arbitrary decisions, the injustice of possibly denying a plaintiff a venue for the hearing of the case, and illogical operation.

The abolition of the second part of the rule is provided for in proposed section 34(1) of the Principal Act. 11. This formulation is consistent with the approach of the High Court in Voth v Manildra Flour Mills Pty Ltd. (1990) 171 CLR 538.

'Inappropriate forum'
section 35

In *Oceanic Sun Line Special Shipping Co Inc v Fay,* Justice Deane decided that Court has the ability to accept jurisdiction to hear a matter so long as that Court is not an inappropriate forum. The onus of showing that the Court is an inappropriate forum rests on the defendant, who must show that a determination in that Court would be oppressive and vexatious to him or her and that there is another forum to whose jurisdiction the defendant is amenable and that would entertain the particular proceedings at the suit of the plaintiff. Such an approach has been adopted by the High Court in the Voth case.

Section 35 reflects the reasoning of the majority on judges in the Voth case in providing that a Court should use the 'inappropriate forum' test rather than the 'more appropriate forum' test.

Application
Clause 5

This clause provides that the amended Act applies to both proceedings pending before the Court or those instituted after the Commencement of the Act.