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LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Law Reform (Miscellaneous Provisions) Amendment Bill 2002

EXPLANATORY MEMORANDUM

Circulated by authority of the
Attorney General
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Outline

This Act abolishes common law offences and torts concerning the doctrines of maintenance, champerty and being a common barrator. These doctrines are:

- Maintenance: assisting or encouraging a party to take a legal action (eg, providing legal assistance free of any charge). Originally a crime punishable by fine or imprisonment, it later became recognised as a civil wrong and a means for setting contracts aside.
- Champerty: a type of maintenance, in which the person encouraging the action also receives something of value in return for the assistance given (eg, providing legal assistance on the basis that the costs would be met from the outcome of the action).
- Being a common barrator: a common law offence of habitually moving, exciting or maintaining suits or quarrels (eg, suggesting to someone on a number of occasions that they should sue another person).

Doctrines equivalent to maintenance, champerty and being a common barrator have been part of the law since ancient times. While originally aimed at feudal abuses within the legal system, today, these common law doctrines have now fallen into disuse.

The law in this area originally developed during feudal times as a response to perceived abuse of the judicial process, whereby the powerful assisted actions by unrelated persons to oppress particular individuals. Worthless claims were sometimes pursued simply to beggar a defendant.

For some time, these policy concerns have waned in the face of modern concerns about access to justice. In *Magic Menu Systems Pty Ltd v AFA Facilitation Pty Ltd (1997) 72 FCR 261* at 267-268, the Federal Court summed up the development of the law over the past century noting that:

> "concerns expressed earlier this century, as to the potential for the maintenance of actions to give rise to an increase in litigation, might now be considered of lesser importance than the problems which face the ordinary litigant in funding litigation and gaining access to the Courts."

Originally, courts were prepared to make inroads into the law of maintenance on a case by case basis. For example, in *Ram Coomar Coondoo v Chunder Canto Mookerjee (1876) 2 AC 186* at 210 the Privy Council observed:

> " a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, per se, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner."

By mid-century, the courts had started to state the change of approach in positive form. In *Martell v Consett Iron Co Ltd [1955] 1 Ch 363*, Danckwerts J observed that support of legal proceedings based upon a bona fide common interest, financial or philosophical, must be permitted if the law itself was not to operate as oppressive. This change has followed the

development of procedural safeguards (such as rules that regulate fees or provide for the discipline of lawyers).

Both the offence and tort of maintenance, and of champerty, were formally abolished in the United Kingdom in 1967 following a report to the Parliament by The Law Commission ("Proposals for Reform of the Law Relating to Maintenance and Champerty") in 1966. They were abolished in Victoria in 1969 and in South Australia in 1992. Together with the common law offence of being a common barrator, they were abolished in New South Wales in 1995 (in NSW by the *Maintenance, Champerty and Barratry Abolition Act 1993*).

In its landmark 1996 decision in *Re Robb and Rees 134 FLR 294*, the Full Court of the ACT Supreme Court set out new rules of conduct in speculative actions on the basis that maintenance and champerty had ceased to have relevance in the ACT as either a criminal offence or a tort (without prejudice to questions of public policy). In their place, the Court set out comprehensive rules concerning the conduct of solicitors undertaking “speculative actions” in the area of personal injury litigation.

Financial Implications

Nil.

Clause Notes

Clause 1 – Name of Act – states the title of the Act.

Clause 2 – Commencement – states when the Act commences.

Clause 3 – Act amended – provides that the Act amends the *Law Reform (Miscellaneous Provisions) Act 1955*.

Clause 4 – Formal – provides a more meaningful heading for existing Part 13.

Clause 5 – Inserts a new Part 14 into the Act that:

- abolishes the common law offences of maintenance, champerty, and being a common barrator; and
- abolishes the torts of maintenance and champerty.

The abolition of these doctrines is not intended to affect other areas of the law:

- The abolition does not affect any rule of law about the illegality or avoidance of contracts that are tainted with maintenance or are champertous. In particular, it does not affect the power of a court to strike down an assignment of a bare cause of action (contract or tort, legal or equitable) to a person who does not have a genuine and substantial interest in the action (eg, "trafficking in litigation"). The courts have held that an agreement to assign such actions are champertous and unenforceable (*Trendtex Trading Corporation v Credit Suisse [1982] AC 679* per Lord Wilberforce at 694-695 and Lord Roskill at 703). The rule is subject to certain exceptions (particularly in the area of the subrogation of insurance rights).
- The abolition does not affect any rule of law relating to the misconduct of a legal practitioner. In 1996 the Full Court of the ACT Supreme Court in *Re Robb and Rees 134 FLR 294* set out rules of conduct for ACT legal practitioners in relation to speculative actions. In developing this area of its inherent jurisdiction, the Court noted that:

  > "the recognition by the courts and by the legal profession itself of the propriety of the speculative action by no means requires or justifies a relaxation of the standards of professional conduct on the part of lawyers who are prepared to act for plaintiffs on a speculative basis. The conflicts of interest remain, and the need for the solicitor to act, aware of the conflicts and astute to the fiduciary role, is not diminished."

Having regard to the decision in *Re Robb and Rees*, it is unlikely that an ACT court would allow undesirable US practices to develop in the ACT (following United Kingdom decisions in *Grovewood Holdings PLC v James Capel & Co Ltd [1995] Ch 80 and McFarlane v EE Caledonia (No 2) [1995] 1 WLR 366* - which proceed upon the basis that such agreements are prima facie unlawful). New clauses 70 and 71 are intended to preclude barren arguments about the effect of the abolition and are intended to lend emphasis to the Supreme Court's decision in *Re Robb and Rees*.