

THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

LAND TITLES (AMENDMENT) BILL 1995

EXPLANATORY MEMORANDUM

Circulated by the authority of

**Gary Humphries MLA
Attorney-General**

LAND TITLES (AMENDMENT) BILL 1995

Outline

This Bill amends the *Real Property Act 1925*, referred to in the amending Bill as the Principal Act. That Act has operated to regulate the administration of land titles in the ACT for many years without substantial review.

Review of the *Real Property Act 1925* has been divided into stages. The first stage, already completed, involved the computerisation of the land titles Register. The next stage, covered by this amending Bill, involves "housekeeping" and non-controversial changes. It is intended that, at a later stage, other amendments will be introduced which will address more complex issues currently being considered.

The Registrar-General's Office, which administers the *Real Property Act 1925*, has received many suggestions over a number of years about changes which the conveyancing industry would like to see made.

A number of the proposed changes will effectively bring the Act into line with NSW. This should prove beneficial to those members of the conveyancing industry in the ACT who also practise in NSW and to those ACT residents who purchase property in NSW.

While many of the proposed amendments in this Bill are technical in nature or are designed to improve administrative efficiency, there are a few notable amendments, particularly in relation to caveats and easements. These bring the ACT legislation more into line with that in other jurisdictions.

Advantage has also been taken of the opportunity to replace sexist language with gender neutral language.

Revenue/cost implications

Changes to the list of items for which fees may be charged will allow for more efficient charging procedures and for the sale of new services available as a result of computerisation of the land titles Register.

Formal clauses

Clauses 1, 2, 3, 4 and 5 are formal clauses. They give the short title of the Bill; the commencement dates for the various provisions of the Bill; and the name, long and short titles of the Principal Act. The short title of the Principal Act is amended (clause 5) in order to reflect more accurately the purpose of the Act as indicated in the amended long title (clause 4). Strictly speaking, the Act does not deal with real property - all property in the ACT being leasehold land.

Interpretation

Subclause 6 (a) amendment is necessary because **paragraph 6 (1) (b)** of the Principal Act is omitted. Parliamentary Counsel's Office practice is to use the lower case in defining terms - in this instance the term "caveator".

Subclause 6 (b) broadens the definition of "instrument" to include documents produced under Commonwealth and Territory legislation as there is now a number of Commonwealth Acts which require documents to be registered with State and Territory land titles offices.

Subclause 6 (c) uses more easily understood words.

Subclause 6 (d) provides extra definitions for drafting convenience only. **Schedule 2** to the Bill identifies those documents which must be in "approved form".

Subclause 6 (e) replaces the unfamiliar phraseology of **paragraph (1) (b)** of the Principal Act with more modern English. The phrase "seised of" (fourth line) means having formal legal ownership as opposed to mere possession or beneficial interest.

Subclause 6 (f) should be read in conjunction with **clause 13, proposed subsection 48 (4)** which says that "instruments lodged for registration shall be registered in the order of time in which they are lodged in registrable form". It is therefore important to know when an instrument is in registrable form. **Subclause 6 (f)** clarifies this matter. Thus, pursuant to **proposed paragraph 6 (f) (3) (c)** a person who wishes to lodge a transfer may be asked to produce the certificate of title before the Registrar-General is obliged to register the transfer.

Proposed paragraph (3) (b) of **subclause 6 (f)** includes the words "if any" to cover any instruments for which there are no approved forms.

Powers of Registrar-General

Subclause 7 (a) and **clause 62** deal with **proposed substituted sections 160, 161 and 162A**. The proposed amendments clarify the powers of the Registrar-General to correct accidental errors in the Register, the power of the Supreme Court to order corrections of the Register and the power of the Registrar-General to amend or alter the name or address of a person whose name is entered in the Register.

Subclause 7(c) omits **subsections 14 (2), (4) and (5)** of the Principal Act because they are no longer required following the **proposed substituted sections 160, 161 and 162A**.

Crown grants and certain Crown leases under the Act

Clause 8 should be read in conjunction with clause 60 which inserts a proposed amended section 139 of the Principal Act which groups together all the matters requiring the determination of a fee. This avoids specifying the requirement in each relevant provision.

Land brought under the Act

Clause 9 should be read in conjunction with clause 59 which inserts a proposed section 138C which groups together all the matters requiring the approval of a form, rather than specifying the requirement in each relevant provision.

Parties interested may enter caveat

Clauses 10 removes words no longer needed as Schedule 2 to the Bill identifies documents which must be in "approved form". "A "caveat" under subsection 30 (1) of the Principal Act is one such document. The words "in a form approved by the Registrar-General" are to be omitted wherever they occur in the Principal Act.

Form of certificate of title

Clause 11 replaces little used words with simpler language.

One certificate may be issued for lands not contiguous

Clause 12 replaces the rather cumbersome provisions of section 45 of the Principal Act with a "plain English" provision.

Instruments - registration and priority

Clause 13 clarifies and makes explicit what was implicit in the repealed section 48 of the Principal Act. It also includes some new provisions.

Proposed subsection 48 (1) requires an instrument to be in registrable form before it can be registered. This was implied, but not stated explicitly in the repealed section 48. "Registrable form" is defined in subclause 6 (f) - see above.

Proposed subsection 48 (1) is important because, in the case of several instruments (eg a transfer and a mortgage), there is no express provision requiring or even permitting the Registrar-General to register them.

Proposed subsection 48 (2) uses the expression "class of" instruments to avoid the possibility of the provision being interpreted as not applying to all documents in a given class.

Proposed subsection 48 (3) repeats what was in the repealed section 48 of the Principal Act but states it more succinctly.

Proposed subsections 48 (4), (5) and (6) are new. They are intended to remove any doubt or uncertainty as to the order of priority to be followed in the registration of instruments.

Under **proposed subsection 48 (5)** the Registrar-General may unilaterally register documents in the order which he believes gives effect to the intentions of the parties.

The reference to "notice" in **proposed subsection 48 (6)** underlines the indefeasibility of the Register.

Proposed subsection 48 (7) ensures that the record of registration is completed. This is important if a member of the public wishes to consult the Register.

Proposed subsection 48 (8) gives added solemnity to an instrument once it is registered by deeming it to have the effect of a deed. The effect is that, as a general rule, the party whose instrument is registered becomes conclusively bound by what the party is stated in the instrument to be effecting, undertaking or permitting.

Proposed subsection 48 (9) is necessary as, without it, the provisions regarding priorities in the rest of the **proposed section 48** would not apply to caveats.

Proposed sections 48 A, B and C have been added for greater clarity for purpose of registration.

Issue of duplicate when document lost or destroyed and Instruments not to be registered

Clauses 14, 15 are tidying up provisions. The omissions are superfluous to the meaning of the sections in question.

Certificate of title as evidence that land duly brought under Act

Clause 16 corrects what was a possible error in the omitted subsection 52 (1) which said that the certificate of title was conclusive evidence that the person named in the certificate is seised or possessed of or entitled to the land. The **proposed subsection** clarifies the limitation of a certificate of title - that it is conclusive evidence that the property comprised in the certificate has been brought under the Act.

Evidence as to title

Clause 17 establishes the Register as conclusive evidence of title to what is on the Register.

Joint tenants and tenants in common

Clause 18 uses the above legal terms. Their meaning is as follows:

joint tenants : the ownership of land in common held by several people where there is a right of survivorship, i.e. where, on the death of one joint owner, the land as a whole vests in the survivors, and can only be disposed of by will by the last surviving owner. Every joint tenant is possessed of the joint property by every part and by the whole.

tenants in common : where two or more persons are entitled to land in such a manner that they have an undivided possession but several freeholds, that is, no one of them is entitled to the exclusive possession of any part of the land, each being entitled to occupy the whole in common with the others. It is distinguished from joint tenancy by the fact that on the death of of any one of them her/his share passes, not to the survivors, but to her/his devisee, who then becomes a tenant in common with the survivors.

The purpose of the clause is to provide a clear and complete provision dealing with the subject of co-ownership. Note that the rights of co-owners are protected by having their interests entered in the Register - they do not have to hold relevant certificates of title to protect those rights.

Survivor of joint tenants

Clause 19 aligns the wording of section 55 of the Principal Act with the proposed amendment to section 54 of the Principal Act - see clause 18 above. The word "tenant" is the more correct and consistent expression.

Instrument not effectual until entry in the Register

Clause 20 amends section 57 of the Principal Act to take account of proposed section 60.

Estate of registered proprietor paramount

Clause 21 amends section 58 of the Principal Act by removing the protection for unregistered year-to-year tenancies.

Protection as to notice of transferee before registration

Clause 22 is an important new provision. It has the same effect as section 43A of the *NSW Real Property Act 1925*. Section 43A has been interpreted as giving a person on settlement a legal interest in the land rather than an equitable interest. It is designed to protect a purchaser or lender from notice of prior interests if that notice was not obtained until after money has been handed over at settlement. In other words, it bridges the gap between settlement and registration.

Combining or dividing grants or certificates of title

Clause 23 allows the Registrar-General flexibility in making the necessary entries in the Register. The omitted subsections 61 (2) and (3) of the Principal Act were specific as to what the Registrar-General had to do in the circumstances.

Lost grant or certificate

Clause 24 uses clearer and simpler wording than that of the repealed section 62 of the Principal Act while leaving the procedure with regard to the replacement of lost or destroyed certificates of title intact.

Power of Registrar-General to issue new certificate

Clause 25 removes an unnecessary provision as the matters in respect of which fees are payable are identified in Schedule 3 to the Bill.

Registrar-General may require map to be deposited

Clause 26 through the proposed subsection 64 (1A) allows the Registrar-General to supply stationery and to charge a fee for doing so. Previously the Registrar-General did not have the power to issue stationery.

The omitted subsection 64 (1A) of the Principal Act is replaced by proposed section 138C (clause 59 below) which provides for the approval by the Registrar-General of forms to be used in connection with the Act.

Certified copies of the Register

Clause 27 omits subsection 65 (2) of the Principal Act which is no longer necessary following the conclusive evidentiary provisions in clause 17.

Issue of uncertified copies

Clause 28 authorises the Registrar-General to provide, for a fee, an uncertified copy of any information stored on the Register.

Registration of extension of term of Crown lease

Clause 29 facilitates the registration of a grant of a fresh lease under the *Land (Planning and Environment) Act 1991*.

Memorandum of transfer

Clause 30 expresses in "plain English" what was said in the repealed sections 73 and 74 of the Principal Act, and frees up the law in this area by allowing a solicitor to accept a transfer on behalf of the transferee.

Transferee - interests and obligations

Clause 31 expresses in simpler language what was said in the repealed section 77 of the Principal Act. Proposed subsection 77 (3) differs from proposed subsection 77 (2) in that, in the case of a person who has a Crown lease and who transfers that lease, any obligations which that person had in respect of the lease before the transfer shall remain with him.

Transfer of mortgage or lease - right to sue

Clause 32 removes from subsection 78 (1) of the Principal Act words which were potentially confusing as well as being unnecessary since equitable interests have no place under the Torrens system of land tenure. With the removal of subsection 78 (1) of the Principal Act subsection 78 (2) becomes unnecessary.

Form of lease

Subclause 33 (a) replaces subsection 82 (1) of the Principal Act with a proposed subsection which allows greater flexibility in regard to the term for which a lease may be registered. The term of the lease need no longer be for more than 3 years. The amendment also cures the previous uncertainty about the registration of a lease.

Subclause 33 (b) expands upon subsection 82 (3) of the Principal Act by the addition of the words "with or without amendment".

Subclause 33 (c) is a necessary consequence of the amendment introduced by subclause 33 (b).

Certain unregistered leases valid, but not rights of purchase or renewal thereunder

Clause 34 removes the protection previously given to tenancies from year to year. It thus brings the section into line with section 58 of the Principal Act.

Surrender of lease

Subclause 35 (c) introduces a **proposed subsection** to **section 86** of the Principal Act, one dealing with the situation when a lease subject to a registered mortgage is surrendered with a view to a re-grant of the lease.

Proposed subsection 86 (6A) clarifies the position in regard to a registered mortgage when a lease is surrendered and a re-grant is made. Note in particular **proposed paragraph 6(A) (b) (iii)** which is linked with **proposed paragraph 90A (g) (c)** - **clause 38** below. These amendments have been made at the suggestion of the Law Society.

Extension or variation of lease

Clause 36 is a new provision permitting registration of an extension or variation of a registered lease.

Lessee may sub-let

Clause 37 brings **subsection 88 (1)** of the Principal Act into line with the **proposed amendment to subsection 82 (1)** of the Principal Act on leases - see **clause 33** above.

Surrender of a lease without prejudice to sub-lease or mortgage

Subclause 38 (a) clarifies the old **subsections 90A (1)** and **(2)** and corrects an error in **subsection 90A (2)** which provided that "the new lease shall operate as if all sub-leases or mortgages derived out of the surrendered lease had been surrendered before the surrender of that lease was effected".

The purpose of **subclauses 38 (b) to (g)** is to distinguish between the treatment of sub-leases and mortgages. **Proposed paragraph 90A (g) (c)** provides the greatest flexibility when the Government, as Crown lessor, the mortgagor and the mortgagee are satisfied with the new leasing arrangements and the carrying forward of the mortgage. The Law Society was particularly keen to have this flexibility written into the legislation.

Land - how mortgaged or encumbered

Subclauses 39 (a) is tidying up exercise relating to approved forms.

Subclause 39 (b) is consistent with the **proposed amendment to subsection 82 (3)** of the Principal Act by **subclause 33 (b)** above relating to the form of leases.

Subclause 39 (c) clarifies and states more succinctly what was contained in the omitted subsections.

Mortgage or encumbrance - postponement of priority

Subclause 40 (a) provides for the re-arrangement of priorities in respect of mortgages.

Subclause 40 (b) removes an unnecessary provision.

Mortgage or encumbrance - effect

Clause 41 removes redundant words.

Power to sell

Subclause 42 (a) alters the opening words of **subsection 94 (6)** of the Principal Act to clarify that a transfer under **sections 94 and 95** of the Principal Act is registered by using a memorandum of transfer in a form approved by the Registrar-General.

Sale by mortgagee - vesting

Clause 43 repeats the provision of **section 95** of the Principal Act but in more easily understood language. It also covers (**proposed paragraph 95 (2) (c)**) the situation where a mortgage or encumbrance was registered before the registration of the interest of the mortgagor or encumbrancer, as may happen under a memorandum of variation of priority of mortgage or encumbrance under **section 92A**. For example, A buys land from B for \$100,000 but pays B only \$90,000, thus creating a first mortgage of \$10,000 over the land in favour of B. This first mortgage is registered. B then creates a second mortgage over the land by borrowing \$80,000 from C. This second mortgage is also registered and is given priority over B's mortgage, with the consent of B. A defaults in his payments to C who then sells the land to D under **section 94**. D takes free of not only the mortgage in favour of C but also that in favour of B.

Proposed subsection 95 (3) is consonant with **proposed paragraph 104 (1C) (c)** on caveats - see **clause 48**.

Default, entry and possession - action for recovery

Subclause 44 (a) removes a provision for recovery action no longer considered appropriate.

Subclause 44 (b) replaces obscure terminology with more easily understood language.

Discharge of mortgages and encumbrances

Clause 45 makes clear that there are three situations in which a mortgage or encumbrance may be discharged in whole or in part. This was not clear from the section repealed.

The purpose of proposed subsection 101 (4) is to clarify the effect of registration of a discharge of a mortgage or encumbrance.

Variation of mortgages

Clause 46 simplifies what was contained in the omitted subsection.

Registration of memoranda of provisions

Clause 47 requires that a memorandum of provisions be in registrable form.

Division 3B - Easements and other incorporeal rights

Clause 48, dealing with easements, is new and is one of the more important amendments in the Bill.

In general terms, an easement is a right enjoyed by the owner of land over the lands of another : such as rights of way, rights of light, rights to a flow of air or water. An easement must exist for the accommodation and better enjoyment of the land to which it is attached. The land benefited by the easement is known as the dominant tenement, and the land burdened by the easement is known as the servient tenement.

Easements - registration

Proposed section 103 B provides for the particulars necessary for the registration of easements.

Easements in gross - registration, transfer and extinguishment

Proposed section 103 C provides for the registration, transfer or extinguishment of an easement in gross (that is, an easement which does not benefit any land).

Easements - same owner of benefited and burdened land

Proposed section 103 D alters a principle of the Common Law which says a person cannot have an easement over his own land, since an easement connotes rights exercisable against the land of another. This amendment is in line with the law in NSW.

Extinguishment of easement

Proposed section 103 E ensures that, when an easement is to be extinguished, the Registrar-General can make all the necessary entries in the Register.

Easements - variation

Proposed subsection 103 F (2) is taken mostly from **section 91 (2)** of the *Queensland Land Title Act 1994*. The rationale behind the subsection is that the variations, if made, would be the equivalent of creating a new easement.

Incorporeal rights - registration and extinguishment

Proposed sections 103 G and H are necessary to fill the gap, created by the repeal of **section 74**, in the legislation in respect of other incorporeal rights which may not be otherwise provided for.

Caveats

Clauses 49 to 52 contain important amendments to the Principal Act in relation to caveats.

Clause 49 - Lodging of caveat

Proposed paragraph 104 (1) (a) covers the case where the settlor of a trust may wish to protect the beneficiaries of the trust (eg the settlor's minor children) against possible wrongdoing by the trustee in the management of the trust. The settlor might otherwise be considered unable to lodge a caveat on the grounds that he or she did not have an "interest" in the land as required under **proposed paragraph 104 (1) (b)**, having surrendered both legal and equitable rights on setting up the trust.

Proposed subsection 104 (1A) establishes the effect of registering a caveat.

Proposed subsection 104 (1B) allows the effect of a caveat to be qualified.

Proposed subsection 104 (1C) establishes the limitations on the exercise of a caveat.

Proposed subsection 104 (1D) clarifies the types of land dealings that cannot be prohibited by a caveat unless the caveat expressly provides otherwise.

Clause 50 - Entering a caveat in the Register

Proposed section 104A takes account of the fact that a caveat is not an instrument that can be registered. A caveat does not establish any rights in law - it is merely a warning to prevent a certain step being taken without previous notice to the person entering the caveat.

Withdrawal of caveats

Proposed section 104 (B) widens the range of people who may withdraw a caveat.

Notice of caveat

Clause 51 modifies and widens the provisions relating to notices to be served on the caveator.

Clause 52 - Caveat lapsing

Proposed section 106 clarifies the effect when a caveat lapses.

Removal of caveat

Proposed section 107 allows the Registrar-General to remove caveats in certain circumstances.

Effect on dealings

Proposed paragraph 107A (1) (b) allows a caveator to consent to the registration of a particular document without removing the caveat.

Proposed paragraph 107(A) (2) prevents a caveator from prohibiting the registration of a prior document lodged in registrable form.

Removal of caveat by Registrar

Proposed section 107B allows the Registrar-General a discretion to remove a caveat when it is of no more practical use.

Successive caveats

Proposed section 107C is intended to prevent frivolous or vexatious caveats.

Fees not payable

Clause 53 ensures that no fee is charged for lodgment of an application to change a name or address in the Register.

Repeal

Clause 54 repeals sections 126, 127 and 129 - the first two because (apart from their lack of clarity) they relate to equitable obligations which should not be dealt with under the Torrens system of legislation, the third because it relates to bringing or defending an action of ejectment which is now obsolete. There is a transitional provision (**clause 68**) to preserve the effect of sections 126 and 127 for any titles for which the sections have been used.

Revocation of power of attorney

Clause 55 explains how the power of attorney is revoked. This was not clear in the old section.

Transmission on death of proprietor

Clause 56 clarifies and simplifies the provisions on transmission by death. The repealed provisions were unnecessarily complicated and verbose. The list of supporting evidence for an application to be registered as the proprietor was also too narrow and restrictive. The new provisions give the Registrar-General much more flexibility dealing with applications in this area, thus following section 93 of the *NSW Real Property Act 1900*.

Registration of declaration by executor

Clause 57 removes words rendered unnecessary by Schedule 3 to the Bill.

Heading to Part XV

Clause 58 inserts additional words in order to cover adequately what the part deals with.

Approved forms and determined fees

Clauses 59 and 60 are added in order to provide for approved forms and determined fees in Schedules 2 and 3.

Clause 61 is an in-house tidying up clause.

PART XVII - CORRECTIONS AND ALTERATIONS

Clause 62 clarifies the powers of the Registrar-General to correct accidental errors in the Register and the power of the Court to order correction of the Register. It also gives the Registrar-General flexibility in correcting minor errors.

Proposed paragraph 160 (2) (b) (i) makes it clear that the Registrar-General is not restricted to making the change on the 14th day.

Proposed section 162A repeats what was said in **repealed subsection 178(5)**. It is inserted here for the sake of clarity.

Registrar-General may hold instrument for safekeeping

Clause 63 is a new provision allowing the Registrar-General to hold documents on behalf of registered proprietors.

Attesting of instruments

Clause 64 replaces the **repealed sections** of the Principal Act, which were outdated, with the Tasmanian alternative which simplifies the procedure.

Clause 65 deals with Service of notices and Regulations

Services of notices

Proposed section 178 has been drafted in the light of **sections 17A and 18** of the *Interpretation Act 1967*. **Section 17A** explains what is meant by the expression "serve", "give" or "send", while **section 18** deems service to have been effected by properly addressing and posting (under prepaid post) the notice as a letter. However, because the *Interpretation Act 1967* does not give the Registrar-General any power to take alternative action or to proceed without notice **proposed subsection 178 (2)** has been added (which is a rewrite of **repealed subsection 178 (7)** of the Principal Act).

Regulations

Proposed section 179 is the standard regulations provision. The **repealed section** was redundant as no regulations are made under the Act.

Schedules

Clauses 66 and 67 deal with the Schedules 2 and 3 as set out under Schedule 1 (of the Principal Act). Schedule 2 is new. It identifies those documents which must be in "approved form". Schedule 3, in identifying matters subject to determination of fees, amends Schedule 2 (of the Principal Act).

"FURTHER AMENDMENTS" under Schedule 2 is basically a tidying up exercise.

Savings

Clause 68 is necessary as sections 126 and 127 have been repealed by clause 54.

Schedule 2 allows, by reason of item 31, forms to be approved for any miscellaneous documents that are not otherwise covered.