

EXPLANATORY STATEMENT

AUSTRALIAN CAPITAL TERRITORY

NEW SOUTH WALES ACTS APPLICATION ORDINANCE 1985

No. 25 of 1985

The purpose of this Ordinance is to -

- . omit from certain New South Wales Acts that are in force in the A.C.T. such parts of those Acts as are unnecessary, obsolete or incapable of operating in the A.C.T., or as are inconsistent with other laws in force in the A.C.T.;
- . make clear the manner in which those Acts operate in the A.C.T.;
- . make available definitive texts of those Acts in the form in which they are to have effect in the A.C.T.; and
- . provide that, with the exceptions mentioned below, only the New South Wales Acts specified in Schedule 1 to the New South Wales Acts Application Ordinance 1984 or in Schedule 1 to this Ordinance shall continue to apply in the A.C.T. by virtue of section 6 of the Seat of Government Acceptance Act 1909.

Section 6 of the Seat of Government Acceptance Act 1909 provides that all laws in force in the Territory immediately before 1 January 1911 shall, as far as applicable, continue in force until other provision is made. The laws so continued in

force included New South Wales Acts in force on 31 December 1910.

The Seat of Government Acceptance Act, and later Acts, give only general guidance on how New South Wales Acts are to operate in the Territory and, in particular, as to which authorities of the Commonwealth or the Territory are to exercise powers and perform functions conferred by those Acts on New South Wales authorities.

The Law Reform Commission of the Australian Capital Territory made several Reports concerning the New South Wales Acts in force in the Territory. In those Reports, it made detailed recommendations for -

- . the omission of provisions not, in its opinion, applicable in the Territory;
- . the omission of provisions inconsistent with later laws and, therefore, impliedly repealed by these later laws; and
- . the amendment of provisions referring to New South Wales authorities to refer to the relevant Commonwealth or Territory authorities.

The Ordinance is the second of two Ordinances (largely based on the Report on the Review of New South Wales Acts in force in the Australian Capital Territory by the Law Reform Commission of the Territory in 1974 and other Reports of that Commission insofar as they deal with the continuation of New South Wales laws in force in the A.C.T.) which are intended to achieve these aims. The first of these Ordinances, the New South Wales Acts Application Ordinance 1984, was made on 2 August 1984.

This Ordinance deals with (by amending or repealing) all New South Wales Acts continued in force in the A.C.T. on 1 January 1911 and still in force in the A.C.T. except:

- . those New South Wales Acts dealt with by the New South Wales Acts Application Ordinance 1984;
- . the Crimes Act 1900;
- . the Lunacy Act 1898;
- . the Inebriates Act, 1900 and the Inebriates (Amendment) Act, 1909;
- . the Married Women's Property Act 1901; and
- . Private Acts continued in force in the Territory.

The Crimes Act 1900 of New South Wales as amended by Ordinances of the Territory and in force in the Territory has been reprinted following a number of amendments made in 1983. The Crimes Act is now being reviewed with a view to its being replaced by an Ordinance.

Most of the Lunacy Act 1898 ceased to be in force in the Territory by virtue of sub-section 3(1) of the Mental Health Ordinance 1983. The remaining provisions of the Lunacy Act are to be replaced by other Ordinances.

The Inebriates Act, 1900 and the Inebriates (Amendment) Act, 1909 will cease to be in force in the A.C.T. by virtue of sub-section 3(2) of the Mental Health Ordinance 1983 when that sub-section comes into force.

The Married Women's Property Act 1901 is to be reviewed and replaced by an Ordinance.

The Law Reform Commission stated in its Report on the Review of New South Wales Acts in force in the Australian Capital Territory that it had not attempted to deal fully with Private Acts of New South Wales that could be in force and have practical utility in the A.C.T. It added that it would be quite impracticable to identify those Acts and recommended that the Ordinance should exclude them from its operation. The Ordinance does not attempt to identify them and does not affect their continued operation in the A.C.T.

Two of the New South Wales Acts included in the Ordinance adopted and applied in New South Wales the provisions of two Imperial Acts. The effect of continuing these New South Wales Acts in force in the Territory was to continue the Imperial Acts adopted by them in force in the Territory. For convenience of reference, the texts of these Imperial Acts, modified as mentioned below, have been set out in Schedule 4 to the Ordinance. The modifications made by the Ordinance to these Imperial Acts are similar to the modifications made by the Ordinance to the New South Wales Acts printed in Schedule 2.

The Ordinance does not alter the law contained in the New South Wales Acts set out in Schedule 2 or the law contained in the Imperial Acts set out in Schedule 4 except to clarify the manner in which they operate in the Territory. The Ordinance does not attempt to re-state those Acts in modern language or form, but formal drafting changes have been made.

Details of the Ordinance are set out below.

Section 1 provides that the Ordinance may be cited as the New South Wales Acts Application Ordinance 1985.

Section 2 defines:

- . a continued State Act to mean a New South Wales Act that was continued in force in the Territory by section 6 of the Seat of Government Acceptance Act 1909, as it had effect in the Territory immediately before the commencement of this Ordinance, that is to say, as amended in New South Wales before 1 January 1911 or by a law of the Territory after that date;
- . a continued Imperial Act to mean an Imperial Act, specified in Schedule 3 that was adopted as a law of New South Wales by a New South Wales Act specified in that Schedule, that was continued in force in the Territory by section 6 of the Seat of Government Acceptance Act 1909, being that Imperial Act as amended in New South Wales before 1 January 1911; and
- . an amendment of a continued State Act or a continued Imperial Act as the modification of the Act by the repeal, omission, substitution, insertion or addition of a provision.

Section 3 provides that every New South Wales Act continued in force in the Territory by section 6 of the Seat of Government Acceptance Act 1909 and so in force immediately before the commencement of this Ordinance ceases to be in force in the Territory, except:

- . those Acts specified in Schedule 1 to the New South Wales Acts Application Ordinance 1984;
- . those Acts specified in Schedule 1 to this Ordinance;

- . the Crimes Act, 1900;
- . the Lunacy Act, 1898;
- . the Inebriates Act, 1900 and the Inebriates (Amendment) Act, 1909;
- . the Married Women's Property Act 1901;
- . Private Acts; and
- . the provisions of any New South Wales Acts that amended any of the Acts referred to above before 1 January 1911.

Section 4 amends the 13 New South Wales Acts specified in Schedule 1 to the extent necessary for them to have effect in the Territory in the terms set out in Schedule 2.

Sub-section 4(2) preserves the operation of any provisions of an Act specified in Schedule 1 that are not printed in the text of that Act in Schedule 2 if those provisions merely amended another Act specified in Schedule 1 and those amendments have been incorporated in the text of that other Act in Schedule 2. This is consistent with the principles on which consolidated reprints of Acts are prepared.

The purpose of this section is to make it unnecessary to set out all the textual changes in detail. However, notes at the foot of the text of each Act in Schedule 2 refer to sections and sub-sections that have been omitted in full or substituted.

Section 5 amends the two Imperial Acts specified in Schedule 3, as continued in force in the Territory, to the

extent necessary for them to have effect in the Territory in the terms set out in Schedule 4.

The purpose of the section is to make it unnecessary to set out the textual changes in detail. However, notes at the foot of the text of each of those Acts in Schedule 4 refer to sections and sub-sections that have been omitted or substituted.

Section 6 makes it clear that the New South Wales Acts in Schedule 2 and the Imperial Acts in Schedule 4 continue to have the same effect in the Territory as they have had in the past, that is to say, effect as New South Wales Acts in force in the Territory, or effect as Imperial Acts adopted by New South Wales Acts in force in the Territory, respectively, and not as Ordinances of the Territory.

Section 7 preserves the existing situation whereby the New South Wales Acts and Imperial Acts apply only to the extent to which they are not inconsistent with later laws of the Territory. The section makes it clear that any law of the Territory made after 1 January 1911 that is inconsistent with a provision of a New South Wales Act set out in Schedule 2, or with an Imperial Act set out in Schedule 4, will prevail. While any provisions of those Acts clearly inconsistent with laws of the Territory have been omitted, there may be other provisions which a Court will decide are inconsistent with later laws.

Section 8 interprets various terms used in the New South Wales Acts set out in Schedule 2:

- . the Supreme Court, the Court of Petty Sessions and Magistrate mean those courts and magistrates of the Territory;
- . the Minister means the Minister administering the Act. Schedule 1 lists the Commonwealth Minister

- 6 -

administering each New South Wales Act set out in Schedule 2 and Schedule 3 lists the Commonwealth Minister administering each Imperial Act set out in Schedule 4;

the police and particular officers of police, mean the Australian Federal Police or those officers of the Australian Federal Police; and

the Registrar of Titles means the Registrar of Titles under the Real Property Ordinance of the Territory.

Section 9 states that the footnotes to the New South Wales Acts set out in Schedule 2, or to the Imperial Acts set out in Schedule 4, do not form part of those Acts or of the Ordinance. They are for information and guidance only.

Section 10 makes provision for a New South Wales Act specified in Schedule 1 to be administered, in its application as a law of the Territory, by the Commonwealth Minister specified in that Schedule and for an Imperial Act specified in Schedule 3 to be administered, in its application as a law of the Territory, by the Commonwealth Minister specified in that Schedule.

Section 11 provides that the proposed Ordinance, and the New South Wales Application Ordinance 1984, are to be administered by the Attorney-General except where the Ordinances otherwise provide.

Schedule 1 contains a list of the New South Wales Acts, the texts of which are set out in Schedule 2 and the Commonwealth Ministers responsible for their administration.

Schedule 2 - General Comments

Schedule 2 sets out the texts of 13 New South Wales Acts as now in force in the Territory, that is to say, as amended in New South Wales before 1 January 1911 and as amended by laws of the Territory (including this Ordinance) after 1 January 1911.

Sections of Acts that merely repealed pre-existing Acts, either with or without savings, have been omitted. By reason of sections 37, 38 and 39 of the Interpretation Ordinance, this omission will not revive the repealed Acts or affect any rights, privileges or liabilities arising under the repealed Acts, in the unlikely event that any such rights, etc., still exist. These omissions are not mentioned in detail in the following notes.

In the following notes, the Law Reform Commission of the Territory is referred to as the Commission and the proposed New South Wales Acts Application Ordinance 1985 is referred to as the Ordinance.

The Schedule is divided into Parts, each Act constituting a separate Part.

Comments on Acts

Part 1 - Partition Act 1900

This Act regulates the jurisdiction of the courts to order the partition of property among the persons entitled to it jointly.

The Commission recommended that it continue in force but with modifications set out in its Report.

Section 14, which deals with persons under disability (for example, mentally ill persons), has been altered to bring it

into line with the Rules of the Supreme Court. This change is not covered by the Commission's Report.

Part 2 - Pawnbrokers Act 1902

This Act regulates the operations of pawnbrokers in the Territory.

The Commission recommended that it continue in force but with modifications set out in its Report.

The former section 4 excluded from the application of the Act certain loans where the rate of interest does not exceed 10% per annum. On the instructions of the Department of Territories, this rate has been increased to 14%.

Section 19 of the Act required all pawned articles on which more than five shillings have been lent to be sold at auction if not redeemed. On the instructions of the Department of Territories, the minimum amount has been increased to \$10.

The Commission reported that section 39 was partly superseded by section 76 of the Police Offences Ordinance. The view has been taken that the two sections cover different circumstances and that section 39 should be retained, but modified to allow the Court of Petty Sessions to operate under it instead of Justices of the Peace.

Part 3 - Piracy Punishment Act 1902

This Act sets out the maximum penalties that may be imposed on conviction for the crime of piracy under certain Imperial Acts in force in the Territory.

The Commission recommended that it continue in force.

Part 4 - Public Gates Act 1901

This Act enables permission to be given to the occupier of land through which an unfenced public road passes to erect a gate across the road.

The Commission recommended that it continue in force but with modifications set out in its Report.

The modifications make it clear that it is the Commonwealth Minister administering the Act in its application in the Territory who may grant permission to erect gates. A new section 7 has been included preserving any permissions granted before these amendments come into force.

Part 5 - Public Instruction Act 1880

This Act regulated the provision of public education in the Territory until the Education Ordinance 1937 came into operation. Since then, the provisions of the Act and of the Ordinance have, together, regulated public education.

The Commission reported that most of the provisions of the Public Instruction Act 1880 have been superseded by, or have become unnecessary as a result of, that Ordinance. The Commission's Report was presented before the enactment of the Schools Authority Ordinance 1976. That Ordinance has superseded other sections of the Public Instruction Act 1880.

The only sections of the Act that are still applicable are sections 7, 17, 18, 39 and 40. These require education in government schools to be "non-sectarian", but permit persons authorized by the churches to provide religious education for pupils unless their parents or guardians object.

The Department of Education has asked that the sections continue in force as modified in the Ordinance.

Part 6 - Public Roads Act 1902

This Act regulates the opening, closing, alteration and improving of public roads.

The Commission recommended that those provisions not obsolete and not superseded by laws of the Territory be continued in force with such modifications as were necessary. It indicated in its Report provisions that, in its view, were obsolete or had been superseded and the kind of modifications required.

The Commission recommended the omission of sections 25 and 35 as being inapplicable. They make administrative provision for the re-marking of the boundaries of roads and notification in the Gazette of the new boundaries. These sections have been retained, but modified to apply to the Territory Administration.

Part 7 - Real Property (Limitation of Actions) Act 1837

This Act adopted the Imperial Act 3 and 4 Will 4 c.27 which imposes time limitations on the bringing of actions to recover land.

The Commission recommended that it continue in force.

The Act, as enacted in New South Wales, did not contain a short title. It has been given a short title by the addition of a new section 2. The text of the Imperial Act 3 and 4 Will 4 c.27 is set out in Part 1 of Schedule 4 to the Ordinance.

Part 8 - Second-hand Dealers and Collectors Act 1906

This Act provides for the licensing of dealers in second-hand articles and collectors of second-hand articles

who collect them for sale to dealers.

The Commission recommended that the Act continue in force but with modifications set out in its Report.

The fee in the Act for a second-hand dealer's licence was \$2 and the fee for a collector's licence was 10s. On the instructions of the Department of Territories, these fees have been increased to \$25.

At the request of the Department of Territories, the relevant parts of the New South Wales Regulations that were in force under this Act in New South Wales on 1 January 1911 have been incorporated in the text of the Act as set out in Part 10 of Schedule 2.

Part 9 - Stock Act 1901

This Act deals with stock diseases and the registration of brands of horses and cattle. Part VI deals with the registration of brands.

The Commission reported that the Act, apart from Part VI, appeared to have been superseded by Territory legislation, particularly the Stock Ordinance 1934 and the Stock Diseases Ordinance 1933. It recommended that Part VI continue in force.

The Part has been modified to cover the registration of brands by the Territory Administration.

Part 10- Supreme Court Act 1841

Only sections 30 and 39 to 41, inclusive, remained in force in New South Wales on 1 January 1911. These sections imposed time limitations on the bringing of actions to recover debts.

The Commission reported that section 30 had been superseded by the Law Reform (Miscellaneous Provisions) Ordinance 1955 and recommended that sections 39 to 41 continue in force.

The New South Wales Act, as in force on 1 January 1911, did not contain a short title. This Ordinance inserts a new section 1 to give it a short title.

This Ordinance also modifies sections 39 to 41 to reflect modern concepts, for example, the reduction of the age of majority from 21 years to 18 years.

Part 11 - Truck Act 1900

This Act prohibits the payment of wages otherwise than in money.

The Commission recommended that it continue in force but with modifications set out in its Report.

Section 10 was amended in New South Wales by the Truck Act Amendment Act 1901 but the amendment applied only in a part of New South Wales which did not include what is now the A.C.T. The Ordinance omits the amendment as being inapplicable in the Territory.

The Commission recommended an amendment of section 11. That section confers power on Justices to deal with the recovery of penalties. The section is unnecessary and has been omitted as the Court of Petty Sessions has general power to impose penalties for contraventions of laws of the Territory.

The Ordinance also brings up to date the definition of "money" in section 12. This was not covered by the Commission's Report.

Part 12 - Trust Property Act 1862

The only sections that were in force in New South Wales on 1 January 1911 were sections 24, 36 and 71. Sections 24 and 36 impose time limitations on re-entering onto land or bringing an action for the recovery of mortgaged land or a share of the estate of a person dying intestate. Section 71 contains the short title.

The Commission recommended that these sections continue in force.

Part 13 - Written Memorandum Act 1834

This Act as in force in New South Wales on 1 January 1911 had the effect of adopting sections 1, 3 and 4 of the Imperial Act 9 Geo. 4 c.14, which make it necessary for certain promises to be in writing if they are to be binding. The promises concerned are acknowledgements of debts and promises to pay debts.

The Commission recommended that the Act continue in force.

Section 1 has been modified to state expressly that only sections 1, 3 and 4 of Imperial Act 9 Geo 4 c.14 are adopted as law of the Territory. This makes it unnecessary to continue in force the several laws of New South Wales that achieved this result without expressly amending section 1.

The Act, as in force on 1 January 1911, did not contain a short title. The Ordinance adds a new section 2 giving it a short title.

Schedule 3 contains a list of the two Imperial Acts adopted by New South Wales Acts included in Schedule 2 and the Commonwealth Ministers responsible for their administration.

Schedule 4 contains the texts of the Imperial Acts specified in Schedule 3 as modified by the Ordinance and in force in the Territory.

The Schedule is divided into Parts, each Imperial Act constituting a separate Act.

Part 1 - Real Property (Limitation of Actions) Act (Imperial) 1833

This Imperial Act was adopted as a law of New South Wales by the Real Property (Limitation of Actions) Act 1837 (see Part 8 of Schedule 2 to the Ordinance). It imposes time limitations on the bringing of actions to recover lands.

The Commission recommended that it continue in force.

The Ordinance omits sections 15, 19, 30, 31, 32, 33, 37, 38, 41, 43, 44 and 45 as being of a transitional nature and their operation exhausted or as being inapplicable because they apply to things in or of the United Kingdom that have no counterpart in the Territory.

The Act did not have a short title. A new section 43 inserted by this Ordinance gives it a short title.

Part 2 - Written Memorandum Act (Imperial) 1828

This Imperial Act was adopted as a law of New South Wales by the Written Memorandum Act 1834 (see Part 15 of Schedule 2 to this Ordinance). It requires an acknowledgement of a debt or a promise to pay a debt to be in writing. Sections 2, and 5 to 10, inclusive, ceased to apply in New South Wales before 1 January 1911 and have, therefore, never been in force in the Territory.

The Commission recommended that sections 1, 3 and 4 continue in force.

The Imperial Act did not have a short title. A new section 5 gives it a short title.

Acts repealed by the Ordinance

The Law Reform Commission recommended that the following Acts should continue in force in the Territory, but, for reasons set out below, these Acts will cease to be in force in the Territory upon the commencement of this Ordinance:

Masters and Servants Act, 1902
Minimum Wage Act, 1908
Roman Catholic Relief Act, 1829
Sheriff Act, 1900
Smoke Nuisance Abatement Act, 1902
Trade Union Act, 1881
Wine Adulteration Act, 1902
Wesleyan Methodist Act, 1838

Masters and Servants Act, 1902

The Commission reported that parts were obsolete and should be repealed and that section 10, which confers remedies for non-payment of wages, confers a "curious mixture of civil and criminal proceedings which is contrary to modern procedural principles". If the Commission's recommendations were adopted, the only substantive sections that would be continued in force would be sections 7 and 8, which confer a special criminal jurisdiction on the Court of Petty Sessions for the recovery of wages not exceeding \$100. As that Court, and other courts, have civil jurisdiction to deal with claims for wages, the Department of Employment and Industrial

Relations regards the sections as obsolete or unnecessary and has recommended that the Act should cease to be in force in the Territory.

Minimum Wage Act, 1908

The Commission reported that the Act was largely obsolete and the only sections that should continue in force were sections 5 and 14. Section 5 prohibited the taking of a premium for engaging any female in a business of preparing, working on, dealing with or manufacturing articles of clothing or wearing apparel for trade. Section 14, if it had any operation in the Territory, excluded the operation of section 5 if all employees in the business are related to the employer. The Department of Employment and Industrial Relations has requested that the Act should cease to apply in the Territory in view of its extremely limited application. The matter dealt with by the Act could be dealt with under the Conciliation and Arbitration Act if the need to do so should arise.

Roman Catholic Relief Act, 1829

The Commission reported that this Act adopted the Imperial Act 10 Geo.4 c.7 but that most of the Imperial Act was quite inapplicable as part of the law of the Territory. It recommended that sections 10, 11, 15 and 16 continue in force in the Territory.

Sections 10 and 11 enabled Roman Catholics to hold certain civil and military offices of profit under the Crown upon taking the oath set out in section 2. The oaths to be taken by persons holding civil and military offices in the Territory are set out in Commonwealth or Territory legislation which contain no prohibition on the appointment of Roman Catholics or on the taking of the oaths so set out by Roman Catholics.

Section 10, if continued in force, would be inconsistent with this legislation.

Section 15 dealt with the right of a Roman Catholic who is a member of a lay body corporate to vote in an election or appointment of any person to an ecclesiastical benefice or office in the Church of England in the gift, patronage or disposal of that body corporate. It is not clear why the Commission recommended that it should continue in force, but there are no ecclesiastical benefices, offices or appointments in the Anglican Church of Australia in the Territory that are in the gift, patronage or disposal of such a body corporate.

Section 16 dealt with the holding of various offices in the Church of England. The Commission recommended that it continue in force in respect of offices in the Church of England in the Territory. The holding of these offices is regulated by or under the Australian Constitution of the Anglican Church of Australia and the Constitution of that Church for the Province of New South Wales. Section 16 appears to have been inapplicable.

The whole Act was repealed in New South Wales in 1976 without any savings to preserve its operation under any of these sections.

Sheriff Act, 1900

The Commission recommended that the Act continue in force in the Territory, except for sections 2, 7, 9, 10 and 13 to 17, inclusive, which it stated were obsolete or inconsistent with Territory legislation.

These sections dealt with the conditions of service of the Sheriff or the fees to be collected by the Sheriff. The conditions of service are inconsistent with the practice of

appointing an officer of the Commonwealth Public Service to be Sheriff. Fees are covered by other legislation.

The Act as a whole is obsolete or inconsistent with other legislation:

Smoke Nuisance Abatement Act 1902

The Commission recommended that the Act continue in force, but with modifications set out in its Report.

The Act regulated the construction and alteration of furnaces constructed before 1 July, 1866 in any town having not less than 2000 inhabitants or constructed after that date in the suburbs of such a town within boundaries determined by proclamation or in any city or town.

The Department of Territories requested that the Act should not continue in force as it has no practical value in the Territory. Smoke pollution is now covered by the Air Pollution Ordinance 1984.

Trade Union Act 1881

The Commission reported that sections 1 to 5 seemed to be applicable in the Territory but that it was doubtful whether the remaining sections, which dealt with registration of trade unions, were applicable. It recommended that sections 1 to 5 be continued in force and new provisions be added for registration by Territory officers.

The Department of Employment and Industrial Relations has requested that the Act should not continue in force in the

Territory as the provisions of the Conciliation and Arbitration Act 1904 adequately cover the registration of trade unions.

Wine Adulteration Act 1902

The Commission recommended that the Act continue in force in the Territory. The Act regulated the manufacture and sale of wine. The Capital Territory Health Commission (now the Australian Capital Territory Health Authority) requested that the Act be repealed as it is no longer required. The Act was repealed in New South Wales in 1955.

Wesleyan Methodist Act, 1838

The Commission reported that part of section 1, which required new Church buildings to be conveyed to trustees, might still be in force.

The Act deals with chapels and Ministers' dwellings erected for the denominations known in 1902 as the Wesleyan Methodists, the Independents and the Baptists.

The Act had only a very limited operation in that it applied only to buildings erected by trustees appointed under a repealed Act 7 Wm.4 No. 3 who were required to convey the premises to trustees upon trusts set out in a model deed registered at the Supreme Court of New South Wales. Moreover, it is doubtful whether it continued to apply to property of the Wesleyan Methodist Church on 1 January 1911 as the Wesleyan Methodist Church Property Act 1889 and the Methodist Union Act 1902 applied to the property of that Church on that date. These Acts ceased to be in force in the Territory by virtue of the Uniting Church in Australia Ordinance 1977.

To the extent, if any, to which any property in the Territory of the Wesleyan Methodist Church, the Independent Church or the Baptist Church are dealt with under trust deeds registered under this Act, that property will continue to be held on the terms of those deeds whether or not this Act is in force in the Territory.

Authorized by the
Attorney-General

74/83