

**2005**

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL  
TERRITORY**

**CIVIL LAW (PROPERTY) BILL 2005**

**EXPLANATORY STATEMENT**

**Circulated by the authority of  
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## CIVIL LAW (PROPERTY) BILL 2005

### Explanatory Statement

This explanatory statement relates to the Bill as introduced into the ACT Legislative Assembly.

### Overview of Bill

The Civil Law (Property) Bill 2005 consolidates the law of property in the ACT into one easily accessible body of law. The bill repeals:

- the *Conveyancing Act 1919* of the State of New South Wales (No. 6) 1919 which comprises the *Conveyancing Act 1919* as applied and modified in the Australian Capital Territory by the *Conveyancing Act 1951*; the *Trustee Act 1957* and the *Law of Property (Miscellaneous Provisions) Act 1958* (now repealed);
- the *Conveyancing and Law of Property Act 1898* which was passed by the New South Wales Parliament in 1898 with the stated objective of consolidating the statutes relating to conveyances, assignments and titles to lands in NSW. This law was in force in the Australian Capital Territory before 1 January 1911 and was therefore continued in force by the *Seat of Government Acceptance Act 1909* of the Commonwealth;
- the *Forfeiture and Validation of Leases Act 1905* of the State of NSW (No. 8, 1905) which was also one of the laws in force in the Australian Capital Territory before 1 January 1911 and was therefore continued in force by the *Seat of Government Acceptance Act 1909* of the Commonwealth. The objective of this Act was to grant relief against the exercise of rights of re-entry and forfeiture under leases and against defects invalidating certain leases; to amend the *Forfeiture of Lease Act 1901* and for other purposes;
- the *Forfeiture of Leases Act 1901* – Form 1 AF2002-18;
- the *Landlord and Tenant Act 1899* which consolidated the law relating to landlord and tenant. It facilitated the preparation of leases, proceedings for ejectment, waiver of breaches of a lease and licence provisions; and
- the *Law Reform (Miscellaneous Provisions) Act 1955* which was introduced by the Commonwealth in 1958. It adopted a number of provisions of the *Conveyancing Act 1919-54* into the ACT.

The *Seat of Government (Administration) Act 1910* (Cwlth) converted most former NSW laws in force in the ACT into ACT enactments. The *Australian Capital Territory (Self-Government) Act 1988* (Cwlth) converted most former NSW laws in force in the ACT into ACT enactments. This allowed the ACT Legislative Assembly to amend and repeal the laws.

The Civil Law (Property) Bill 2005 re-enacts the provisions of the above statutes in a consolidated law of property. The aim of the consolidation is to simplify the law of property by placing all relevant provisions in one statute and modernise and standardise the language and drafting format utilised by the legislation.

It is intended that the *Civil Law (Sale of Residential Property) Act 2003* will also be repealed at a later date and its provisions re-enacted in this statute.

This Bill is the first step involving a consolidation of the various statutes relating to property (in its broadest sense, not just land). The second step will involve reform of some of the law of property after wide consultation with the ACT Law Society and the community, particularly the commercial and retail interests that may be affected.

## **Outline of Provisions**

### **CHAPTER 1 Preliminary**

#### **Clause 1 Name of Act**

This clause sets out the name of the Act as the *Civil Law (Property) Act 2005*.

#### **Clause 2 Commencement**

The Act will commence on a day fixed by the Minister by written notice.

#### **Clause 3 Dictionary**

This clause explains that the dictionary at the end of the Act is part of the substantive provisions of the Act.

#### **Clause 4 Notes**

This clause makes it clear that the notes in the Act are explanatory only and do not form part of the substantive provisions of the Act. By contrast, where the Act includes an example, the example is part of the substantive provisions of the Act having regard to section 132 of the *Legislation Act 2001*.

#### **Clause 5 Application of Act**

This clause provides that the proposed Bill does not apply to leasehold land under the *Land Titles Act 1925* to the extent that there is an inconsistency with that Act. The clause also makes clear that where a provision of the proposed Bill is stated to apply to land under the *Land Titles Act 1925*, the provision does not apply exclusively to land of that kind, unless the contrary intention appears. The clause also makes clear that the proposed Bill is subject to various pieces of legislation.

Subclauses (1) and (2) were formerly section 6 of the *Conveyancing Act 1919*.

### **CHAPTER 2 Conveyancing**

#### **PART 2.1 Conveyancing - preliminary**

##### **Clause 200 What is a *settlement*?**

This clause defines a settlement as an instrument or number of instruments under which land is held in various circumstances, and cites a will as an example of a settlement.

This clause was formerly section 7 of the *Conveyancing Act 1919*.

## **PART 2.2            General rules about property**

### **Division 2.2.1        Rules of law on certain points**

#### **Clause 201    Instruments required to be in writing**

This clause provides that an interest in land cannot be created or disposed of unless it is in writing signed by the person or their properly appointed agent or by the person's will or by operation of law. The clause also provides that a declaration of trust by a person in relation to an interest in land or a disposition of an equitable interest or trust existing at the time of the disposition must be in writing signed by the person or their properly appointed agent or made by the person's will.

The clause makes clear that the section does not affect the creation or operation of a resulting, implied or constructive trust and is subject to the provisions of clause 202.

This clause was formerly section 51 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

#### **Clause 202    Creation of interests in land by word of mouth**

This clause applies to interests in land created by word of mouth that are not put into writing by the person creating the interest or by their properly appointed agent. An interest in this situation is an interest at will only, regardless of whether consideration was given for the interest.

This clause was formerly section 52 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

#### **Clause 203    Exceptions to s 201 and s 202**

This clause provides that clauses 201 and 202 do not affect the creation of a lease by word of mouth where that lease is at the base rent reasonably obtainable without taking a fine and takes effect for a period of no more than three years without a right for the lessee to extend the term of the lease; or, where there is a right to extend the term, the period of the lease and the period of the extension do not total longer than three years. The clause also provides that sections 201 and 202 do not invalidate a disposition by a will, do not affect an interest validly created before 26 June 1986, and do not affect the operation of the law about part performance.

This clause was formerly section 53 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

#### **Clause 204    Proceedings do not lie on certain unwritten agreements**

This clause provides that a right to bring proceedings will not arise in relation to a contract for the sale, or other disposition, of land unless the agreement in relation to which the proceedings are brought, or a note or memorandum of the agreement, is in writing signed by the person or by their properly appointed agent.

This clause applies to contracts whenever they are made, land under the *Land Titles Act 1925*, and does not affect the operation of the law about part performance.

This clause was formerly section 54 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

### **Clause 205 Assignments of debt and things in action**

This clause provides that an absolute assignment of a debt or thing in action (including debts, money held at a bank, shares, rights under a trust, copyright and the right to sue for breach of contract) which is in writing and signed by the assignor, will be effective at law if written notice is given to the debtor, trustee or other person (the liable person) from whom the assignor would have been entitled to receive or claim the debt or thing in action.

The transfer will be effective from the day the notice is given. The assignee may recover or enforce the debt or thing in action without involving the assignor. The transfer is subject to all equities that would have been entitled to priority over the right of the assignee.

This clause was formerly section 12 of the *Conveyancing Act 1919*.

### **Clause 206 Merger**

This clause provides that an estate in land is merged in another estate by operation of law only if the beneficial interest in the estate is merged or extinguished in equity.

This clause was formerly section 10 of the *Conveyancing Act 1919*.

### **Clause 207 Equitable Waste**

This clause provides that a tenant for life holding without impeachment of waste is liable at common law as well as equity for equitable waste unless the express right to commit such waste is given in the instrument creating the estate.

This clause was formerly section 9 of the *Conveyancing Act 1919*.

## **Division 2.2.2 Property generally**

### **Clause 208 Person may assure property to self or self and others**

This clause provides that a person may assure property to themselves or to him or herself and any other person.

This clause was formerly section 24 of the *Conveyancing Act 1919*.

### **Clause 209 Power for corporations to hold property as joint tenants**

This clause provides that a corporation can acquire and hold property in joint tenancy as if it were an individual. The ability of a corporation to hold property as a joint tenant is subject to the conditions and restrictions that apply to the acquisition and

holding of property by a corporation in severalty. If a corporation that is a joint tenant is dissolved, the property devolves on the other joint tenant.

This clause was formerly section 25 of the *Conveyancing Act 1919*.

### **Clause 210 Interpretation of conveyance etc of property to 2 or more people together**

Where a beneficial interest in property is conveyed to, or for, two or more people together beneficially, it is taken to be made to, or for, them as tenants in common and not as joint tenants. This provision will not apply to people who are executors, administrators, trustees or mortgagees under the terms or tenor of an instrument, or where an instrument expressly provides that they are to take the property as joint tenants. This clause applies to the interpretation of an instrument commencing after 8 May 1958.

This clause was formerly section 26 of the *Conveyancing Act 1919*.

### **Clause 211 Tenants in common of equitable estate acquiring legal estate**

This clause applies if two or more people are beneficially entitled as tenants in common to an equitable estate in property who are, or become, entitled to the legal estate and their legal estate is equal and coextensive to their equitable estate in the property. In this situation, both the legal and equitable estates in the property are held by the parties as tenants in common, unless the parties agree otherwise.

This clause was formerly section 27 of the *Conveyancing Act 1919*.

### **Clause 212 People taking who are not parties**

This clause provides that a person who is not a party to the assurance or other instrument may take an immediate or other interest in land or other property or the benefit of a condition, right of entry, covenant or agreement over or in relation to land or other property. The provision also provides that the person may sue and is entitled to all rights and remedies in relation to the land or other property as if the person had been a party to the assurance or other instrument.

This clause was formerly section 36C of the *Conveyancing Act 1919*.

### **Clause 213 Presumption of survivorship**

This clause provides that, for purposes affecting title to land, if two or more people die at the same time or where the order of death is uncertain, the deaths are taken to have happened in order of seniority and the younger is deemed to have survived the elder. This clause is subject to Part 3B of the *Administration and Probate Act 1929*. This clause was formerly section 119 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 214 Provisions about supplemental instruments**

This clause sets out the rules in relation to supplemental instruments and provides that an instrument that is expressed to be supplemental to another previous instrument is to be read as far as practicable, and have effect, as if the supplemental instrument

contained a full recital of the previous instrument. This provision does not operate to give a right to production of the previous instrument. The clause also provides that a purchaser may accept the same evidence that the previous instrument does not affect title as the purchaser could have accepted if it had only been mentioned in the supplemental instrument.

This clause was formerly section 36D of the *Conveyancing Act 1919*.

### **Division 2.2.3          Ending life interests**

#### **Clause 215    Meaning of *life interest* for div 2.2.3**

This clause defines the meaning of *life interest* for the purposes of Division 2.2.3.

#### **Clause 216    Wrongful holding over of life interest etc**

This clause applies where a person entitled to a life interest in property holds over or continues in possession of the property, rents, profits or income of the property after the life interest ends, without the express consent of the person next entitled to the property, rents, profits or income of the property.

The clause provides that the holder of the life interest is liable in damages, or to account for the rents, profits or income derived from the property or both to the person entitled to the property after the life interest ends.

This clause was formerly section 49 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

#### **Clause 217    Vesting of interests on end of life interest – evidence of death**

This clause provides that where an interest in property is to vest in possession on the death of one or more people and the person entitled to the interest believes that the relevant person has died, the person entitled to the interest may apply to the court for the appropriate orders in relation to the property and give the court evidence of the death of the relevant person. The court may make the appropriate orders in relation to the property, if satisfied that the relevant person has died.

The clause also provides that if evidence is given that the relevant person has remained outside Australia or absent from the place within Australia where they might be expected to be found for seven years or more, the court may order that the relevant person is taken to have died and make the appropriate orders. This power cannot be exercised if it is proven to the court's satisfaction that the person is still alive.

The clause also provides that if judgment is given against the applicant and the applicant then later begins proceedings in a court in which they claim the relevant person has died, the court in which the later proceeding is begun may order that the proceeding be stayed for a stated time; until a further court order is made; or permanently.

This clause was formerly section 50 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

**Clause 218 Vesting orders made in error**

This clause provides that where the holder of a life interest has been evicted from the property or deprived of the interest on the basis that the interest has ended, and a later court proceeding is satisfied that the interest has not ended or had not ended at the time the order was made, the court hearing the later proceeding may grant appropriate relief.

This clause was formerly section 50 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

**PART 2.3 General rules about deeds and documents of corporations****Division 2.3.1 Deeds and their effect****Clause 219 Signature and attestation of deeds**

This clause sets out the requirements for deeds and provides that a deed must be signed and sealed, and attested by at least one witness who is not a party to the deed. Any form of words may be used for the attestation. The clause also provides that indenting is not required and that an instrument signed and sealed in accordance with this provision executed after 1 July 1920, is taken to be sealed, if the instrument is expressed to be an indenture or deed or to be sealed.

The clause also establishes that the same evidentiary requirements apply to a deed executed and attested under this provision as a deed not required by law to be attested. The clause also provides that the provision does not affect the execution of a deed by a corporation or a deed executed before 1 November 1951.

This clause was formerly section 38 of the *Conveyancing Act 1919*.

**Clause 220 Receipt in deed sufficient**

This clause provides that a receipt for consideration in the body of a deed is a discharge for the consideration, even though a receipt is not endorsed on the deed.

This clause was formerly section 39 of the *Conveyancing Act 1919*.

**Clause 221 Receipt in deed or endorsed evidence for subsequent purchaser**

This clause provides that a receipt for consideration in the body of the deed or endorsed on the deed is evidence of the giving of all the consideration where a subsequent purchaser does not have notice that all or part of the consideration has not been given.

This clause was formerly section 40 of the *Conveyancing Act 1919*.

**Clause 222 How powers of appointment are to be exercised**

This clause applies if a power of appointment by an instrument other than a will is exercised by a deed executed and attested in accordance with this Act, or the



*Corporations Act 2001*, or an instrument under the *Land Titles Act 1925*, executed and attested in accordance with that Act. The provision provides that the deed or instrument is, in relation to the execution and attestation, a valid exercise of the power even where the instrument creating the power requires an additional or another form of execution and attestation.

This clause was formerly section 41 of the *Conveyancing Act 1919*.

### **Division 2.3.2            Operation of deeds**

#### **Clause 223    Limitations may be made by direct conveyance without uses**

This clause provides that a limitation that may be made by use under this Act may be made by a direct conveyance without the intervention of uses.

This clause was formerly section 44 of the *Conveyancing Act 1919*.

#### **Clause 224    In conveyance use of word grant unnecessary**

This clause provides that it is not necessary in a conveyance to use the word ‘grant’ to convey land; rather, any words indicating an intention to convey the land will be sufficient.

This clause was formerly section 46 of the *Conveyancing Act 1919*.

#### **Clause 225    Rights of entry etc**

This clause provides that certain specified rights in property may be conveyed by deed. This clause was formerly section 50 of the *Conveyancing Act 1919*.

#### **Clause 226    Certain conveyance etc void**

This clause provides that a conveyance of a present right of entry on land, or an agreement to convey, are void as against the person in possession of land (the first person) or those claiming under that person, unless that person (the second person) conveying or agreeing to convey or the person through whom the second person claims, has been in possession of the land within one year of the conveyance or agreement to convey.

This clause was formerly section 50 of the *Conveyancing Act 1919*.

### **Division 2.3.3            Documents of corporations**

#### **Clause 227    Execution of documents by or on behalf of corporations**

This clause sets out the requirements for the execution of documents by or on behalf of a corporation and applies to deeds or other documents executed after 8 May 1958. The provision does not limit the ways in which a company may execute a document or deed and any other method of execution authorised by law or practice, or by the instruments establishing the company or regulating the affairs of the corporation will be as effective as if this provision had not been enacted.

The clause also provides that a document will have been properly executed if the seal of the corporation is affixed and the fixing of the seal is attested by one of the listed persons. If it is purported that a document has been executed in accordance with subclause (1), an honest or bona fide purchaser may assume the document has been executed in accordance with the requirements of that subclause.

The clause also provides that an agent may be appointed to execute documents for the corporation, sets out who may appoint such an agent and how the appointment may be accomplished. Subclause (4) establishes how a person authorised to assure property for a corporation may make that assurance.

Where a corporation aggregate is authorised to assure property for someone else, subclause (5) provides that an officer or employee may be appointed to assure the property for the other person. Subclause (6) provides that an assurance will be taken, for an honest or bona fide purchaser, to have been made by a properly appointed officer or employee, in the situation where an assurance is made by an officer or employee who purports to have been appointed under subclause (5).

This clause was formerly section 51A of the *Conveyancing Act 1919*.

#### **Division 2.3.4 Powers of appointment**

##### **Clause 228 Application - div 2.3.4**

This clause provides that Division 2.3.4 applies to appointments made after 26 June 1986 under powers created before, on or after that day.

This clause was formerly section 63 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

##### **Clause 229 Appointments to be valid despite exclusion of object**

This clause provides that an appointment made under a power to appoint property among two or more objects is not invalid only because one or more objects of the power is not to take a share in the property. This provision does not affect a provision of an instrument creating the power that declares a share in the property from which an object of the power is not to be excluded.

This clause was formerly section 64 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

### **PART 2.4 Sales and other transactions**

#### **Division 2.4.1 Dispositions on trust for sale or with power of sale**

##### **Clause 230 Meaning of *purchaser* for div 2.4.1**

This clause defines the meaning of *purchaser* for the purposes of Division 2.4.1.

This clause was formerly section 66 of the *Conveyancing Act 1919*.

**Clause 231 Consents to execution of trust for sale etc**

This clause provides that where the consent of three or more people is required by a disposition for the execution of a trust for sale of property, or to exercise a power of sale of property under a trust, then, for a purchaser, the consent of two of these people will be sufficient.

If a person whose consent is required under subclause (1) is under a legal disability, the person's consent is, for a purchaser, taken not to be required. However, the trustees must obtain the consent of the parent or guardian of the child, the manager of the person's property under the *Guardianship and Management of Property Act 1991*, or where there is no parent, guardian or manager, the consent of the Supreme Court.

This clause was formerly section 66A of the *Conveyancing Act 1919*.

**Clause 232 Purchaser not to be concerned with trusts of proceeds of sale**

This clause provides that a person who purchases property from a trustee for sale need not be concerned with any trust affecting the proceeds of the sale or the income of the property until sale, whether or not the trusts were created by the same instrument that created the trust for sale or the power of sale.

This clause was formerly section 66B of the *Conveyancing Act 1919*.

**Clause 233 Settlements of personal property invested in land**

This clause provides that where land is purchased in the exercise of a power to invest money in the purchase of land under an instrument of settlement, the land is to be held by the trustees on trust for sale and the net rents and profits from the land, minus costs and outgoings, must be paid or applied in the same way as income from investments other than land, would be paid or applied. This provision will apply unless the settlement provides for the contrary. This provision applies only to instruments of settlement commencing after 1 December 1957.

This clause was formerly section 66C of the *Conveyancing Act 1919*.

**Clause 234 Powers given to trustees for sale**

This clause provides that where a disposition on trust for sale includes land, the trustees may take possession of, hold and manage the land until it is sold, unless the disposition provides to the contrary.

This clause was formerly subsection 66D(1) of the *Conveyancing Act 1919*.

**Clause 235 Application of income of land under trust for sale**

This clause provides that the net rents and profits from land under a disposition on trust for sale, minus costs and outgoings, must be paid or applied in the same way as income from investments other than land would be paid or applied. This provision will apply unless the disposition or the settlement of proceeds of sale under the disposition contains a contrary intention.

This clause was formerly subsection 66D(2) of the *Conveyancing Act 1919*.

**Clause 236 Partition of land under trust for sale**

This clause sets out the rules relating to the partition of land under a disposition on trust for sale.

This clause was formerly subsections 66D(3) – (6) of the *Conveyancing Act 1919*.

**Clause 237 Powers of Supreme Court if trustees for sale decline to exercise powers**

This clause provides that where a trustee for sale declines to sell or exercise any of the powers given under clauses 234 and 236 and an agreement cannot be reached, an interested person may apply to the Supreme Court for a vesting or other order to give effect to the proposed transaction or an order directing the trustees to exercise any of their powers.

This clause was formerly section 66E of the *Conveyancing Act 1919*.

**Division 2.4.2 Voidable dispositions****Clause 238 Meaning of purchaser for div 2.4.2**

This clause defines *purchaser* for the purposes of Division 2.4.2.

This clause was formerly section 48 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

**Clause 239 Voluntary dispositions to defraud creditors voidable**

This clause provides that a disposition of property is voidable where it is made with the intent to defraud creditors prejudiced by the disposition. The clause does not apply to an interest in property disposed of to an honest or bona fide purchaser who did not have notice of the intent to defraud creditors at the time of the disposition. The clause applies to a disposition of property made before or after the commencement of this section.

This clause was formerly sections 42 and 43(b) of the *Law Reform (Miscellaneous Provisions) Act 1955*.

**Clause 240 Voluntary dispositions of land – how far voidable against purchasers**

This clause provides that a disposition of property is voidable where it is made with the intent to defraud a subsequent purchaser. If a voluntary disposition of land is registered before a subsequent purchase of the land, the voluntary disposition is not taken to have been made with intent to defraud only because the disposition was not made for valuable consideration or only because of the subsequent purchase. The clause applies to a disposition of land made before or after the commencement of this section.

This clause was formerly sections 44 and 45 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

**Clause 241 Acquisitions of reversions at under value**

This clause provides that an acquisition of a reversionary interest in property honestly made for money or moneys worth must not be set aside only because it was made for less than full value.

This clause was formerly sections 46 and 47 of the *Law Reform (Miscellaneous Provisions) Act 1955*; and section 30 of the *Conveyancing and Law of Property Act 1898*.

**PART 2.5 Partition****Clause 242 Definitions - pt 2.5**

This clause defines a number of words and phrases for the purposes of Part 2.5.

This clause was formerly section 66F of the *Conveyancing Act 1919*.

**Clause 243 Court may order partition of land held in co-ownership**

This clause provides that if two or more people hold an interest in land as co-owners, the Supreme Court may, on application by one or more of those people, order the partition of the land and make any further orders and give any consequential directions.

This clause was formerly section 37 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

**Clause 244 Power of Supreme Court to order sale instead of partition**

This clause provides that in an action for partition, the Supreme Court may order the sale of the property and the distribution of the proceeds of sale, rather than ordering the partition of the property, where the court is of the opinion that sale would be more beneficial than partition. The court may appoint trustees to receive and apply the proceeds of the sale and may make any consequential directions it considers appropriate.

This clause was formerly section 66G of the *Conveyancing Act 1919*.

**Clause 245 Authority for interested person to bid**

This clause provides that the Supreme Court may allow an interested party to bid at the sale of the property on conditions the court considers appropriate.

This clause was formerly section 66H of the *Conveyancing Act 1919*.

**Clause 246 Parties to partition proceedings**

This clause provides that a person who, apart from this part, may have brought a proceeding for partition of property, may bring the proceeding against any interested person without serving any other interested person.

This clause was formerly section 66I of the *Conveyancing Act 1919*.

**Clause 247 Several sales in same partition proceeding**

This clause applies in circumstances where two or more sales of property are made in a proceeding for partition and a person is excluded from participation in the proceeds of any of the sales. The provision provides that where the excluded person establishes their claim to take part in the proceeds of the sale from which they are excluded, the shares of the other parties will be reduced by the amount by which their shares were increased, due to the exclusion of the excluded person.

This clause was formerly section 66J of the *Conveyancing Act 1919*.

**PART 2.6 Apportionment****Clause 248 Definitions - pt 2.6**

This clause defines a number of words for the purposes of part 2.6.

This clause was formerly section 142 of the *Conveyancing Act 1919*.

**Clause 249 Application of pt 2.6 to dividends of companies**

This clause applies to the accrual of divisible revenue as mentioned in clause 248, definition of dividend, paragraph (b). For the purposes of this part, divisible revenue is taken to have accrued by equal daily increments during the period in relation to which the payment out of revenue is declared or expressed to be made.

This clause was formerly section 143 of the *Conveyancing Act 1919*.

**Clause 250 Income apportionable in relation to time**

This clause provides that all rents, annuities, dividends and other periodical payments in the nature of income are taken to accrue from day-to-day, and must be apportioned in relation to time accordingly.

This clause was formerly section 144 of the *Conveyancing Act 1919*.

**Clause 251 Time when apportioned part is payable**

This clause provides that an apportioned part of a payment as mentioned in clause 250 is payable or recoverable, if the payment is a continuing one, when the entire portion from which the apportionment is made becomes payable, or if the payment is terminated by re-entry, death or otherwise, when the next entire portion of the payment would have become payable, if it had not been terminated.

This clause was formerly section 144 of the *Conveyancing Act 1919*.

**Clause 252 Recovery of apportioned parts**

This clause provides that where a person is entitled to an apportioned part of a payment mentioned in clause 250, they may recover that part, when it becomes payable, in the same way as the person could recover the entire payment if entitled to it. Subclause (3) provides, however, that the apportioned part of a payment of rent for

land is not recoverable from the person liable to pay the rent, but may be recovered from the lessor after the lessor has recovered from the person liable to pay the rent.

The clause defines the words *person* and *lessor* for the purposes of this section.

This clause was formerly section 144 of the *Conveyancing Act 1919*.

### **Clause 253 Exceptions and application**

This clause provides that Part 2.6 does not make apportionable an annual amount payable under a policy of assurance and does not apply to any case in which it is expressly stipulated that apportionment is not to take place.

This clause was formerly section 144 of the *Conveyancing Act 1919*.

## **PART 2.7 Children and children's property**

### **Clause 254 Receipts by certain children**

This clause provides that a child in a domestic partnership may give valid receipts for all income to which the child is entitled as if the child were an adult.

This clause was formerly section 151B of the *Conveyancing Act 1919*.

### **Clause 255 Management of land during childhood**

This clause provides that if a person entitled to a beneficial interest in land is a child, the trustees of the interest may take possession of, hold and manage the land for the child. The clause does not apply so far as a contrary intention appears from the settlement that created the beneficial interest of the child.

This clause was formerly section 151C of the *Conveyancing Act 1919*.

### **Clause 256 Power to appoint trustees of child's property**

This clause will only operate where a child is absolutely entitled by will or intestacy to a devise or legacy, or the residue of an estate, or to share in an estate, and the devise, legacy, residue or share is not, under a will, devised or bequeathed to trustees for the child.

The clause sets out how the trustees (whether corporate or individual) may be appointed for the child. It provides that on appointment of a trustee/s the *Trustee Act 1925*, section 9 applies to the vesting in the trust of the devise, legacy, residue or share; the personal representatives of the deceased person are discharged from further liability in relation to the devise, legacy, residue or share; the rights of the child in relation to the devise, legacy, residue or share are restricted to the property vested in the trustees and the devise, legacy, residue or share may be kept in its existing form or converted to money and the money invested.

The clause provides that the registrar-general must make an entry in the register of the vesting of land or enter or withdraw caveats as appropriate, where land held under the *Land Titles Act 1925* is affected by a registered deed. However, the registrar-general

is not required to comply with subclause (6) unless the person in whom the land is to be vested makes a written request for the entry to be made, provides evidence supporting the request and gives any notices required by the registrar-general.

This clause was formerly section 151D of the *Conveyancing Act 1919*.

### **Clause 257 Powers and duties of guardian**

This clause sets out the powers of a guardian of a child who owns real and personal property, other than property held under a trust. The guardian of the child may manage the child's property and hold the child's property on trust for the child, and bring proceedings to protect the guardian's powers under this clause. The guardian is responsible for accounting to the child for the guardian's management of the child's property when the child becomes an adult. This clause does not apply in circumstances where the *Children and Young People Act 1999*, Chapter 2 applies or where there is a testamentary guardian of a child.

This clause was formerly section 36 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

## **PART 2.8 Rights-of-way**

### **Clause 258 No right-of-way by user against Territory etc**

This clause provides that a right-of-way cannot be created only by continuous use against the Territory or the Commonwealth or a person holding land for a public purpose.

This clause was formerly section 178 of the *Conveyancing Act 1919*.

## **CHAPTER 3 Mortgages**

### **PART 3.1 Powers in relation to mortgages**

#### **Clause 300 Application - pt 3.1**

This clause provides that Part 3.1 applies to mortgages made to secure an amount advanced, or to be advanced, as a loan or to secure an existing or future debt. The powers given in this Part are subject to anything provided in the mortgage. The powers given by this Part are limited to the same effect as express powers to the same effect in the mortgage would have had and no more.

This clause was formerly section 90A of the *Conveyancing and Law of Property Act 1898*.

#### **Clause 301 Powers incidental to mortgages**

This clause sets out the incidental powers of a mortgagee if a mortgage is made in writing. The mortgagee has the power to sell all or any part of the mortgaged property; appoint a receiver of the income of the property; or insure the property from loss or damage and add the premiums paid for the insurance to the principal secured at the same rate of interest.



The power of sale includes the power to sell the property by public auction or private contract on any reasonable conditions the mortgagee considers appropriate; the power to rescind or vary contracts for sale; and, the power to buy in and resell the property with all the powers of sale given by this clause. A mortgagee must not, however, exercise the power to sell or the power to appoint a receiver until one year after the day the principal becomes payable under the mortgage or the interest on the principal has been in arrears for longer than six months. A mortgagee may exercise the power to insure where the mortgagor has failed to pay a premium of insurance that the mortgagor is obliged to pay.

This clause was formerly section 91 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 302    Receipt for purchase money sufficient discharge**

This clause provides that a receipt for purchase money given by a mortgagee exercising the power of sale given under Part 3.1 is sufficient discharge to the purchaser. The purchaser need not be concerned with the application of the purchase money.

This clause was formerly section 92 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 303    Notice of sale**

This clause requires the mortgagee to give the person, or one of the people, entitled to the property, six months notice in writing before exercising the power of sale.

This clause was formerly section 93 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 304    Purported exercise of power of sale**

The clause provides that where a sale is made under a purported exercise of the powers provided under Part 3.1, the buyer will receive good title despite there having been no circumstances under which a sale may be permitted or the failure to provide the notice required under clause 303. A person who suffers loss due to an unauthorised sale under this Part may recover damages from the mortgagee.

This clause was formerly section 93A of the *Conveyancing and Law of Property Act 1898*.

### **Clause 305    Application of purchase money by mortgagee**

This clause sets out how the proceeds from a sale under Part 3.1 must be applied by the mortgagee and the order of application of those proceeds.

This clause was formerly section 94 of the *Conveyancing and Law of Property Act 1898*.

**Clause 306 Property that may be transferred to purchaser**

This clause provides that a mortgagee exercising a power of sale over property under Part 3.1 may transfer to the purchaser, in writing, all the interest in the property that the mortgagor could dispose of.

This clause was formerly section 95 of the *Conveyancing and Law of Property Act 1898*.

**Clause 307 Mortgagee may call for documents relating to property**

This clause gives the mortgagee (at any time after the power of sale becomes exercisable) the power to obtain every document relating to the property that a purchaser under the power of sale would have been entitled to demand and recover from the person (other than a person having an interest in the property that has priority over the mortgage).

This clause was formerly section 96 of the *Conveyancing and Law of Property Act 1898*.

**Clause 308 Appointment of receiver**

This clause provides that where a mortgagee is empowered to appoint a receiver under Part 3.1, they may appoint or have the receiver appointed under the provisions of this section. Where the mortgage documents nominate the person who is to be appointed as receiver, the mortgagee may appoint that person. Where the mortgage documents do not nominate the person to be appointed receiver, the mortgagee may, by written notice to the person/s entitled to the property, require that person/s to appoint an appropriate person as receiver within ten days of receipt of the notice.

A notice under subclause (2) may be given to the person/s entitled to the property or by attaching the notice to a conspicuous part of the mortgaged property. Where the person served with a notice fails to appoint a receiver not later than the ten day period, the mortgagee may appoint a person they consider appropriate to be the receiver.

This clause was formerly section 97 of the *Conveyancing and Law of Property Act 1898*.

**Clause 309 Receiver taken to be agent of mortgagor**

This clause creates an agency relationship between a receiver appointed under Part 3.1 and the mortgagor who is solely responsible for any act or omission of the receiver, unless the mortgage documents provide otherwise.

This clause was formerly section 98 of the *Conveyancing and Law of Property Act 1898*.

**Clause 310 Powers of receiver**

This clause sets out the powers of a receiver. A receiver appointed under Part 3.1 may demand and recover all the income of which s/he is appointed receiver, by proceeding or otherwise, in the name of either the mortgagee or the mortgagor to the full extent of

the interest the mortgagor could dispose of. The receiver may give valid receipts for this income.

This clause was formerly section 99 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 311 Ending appointment of receiver etc**

This clause clarifies that the power to appoint a receiver under Part 3.1 includes the power to end the appointment and appoint another person. The power to end the appointment and appoint another person is exercisable in the same way and under the same conditions as the power to make the original appointment. The clause excludes the operation of Part 19.3 of the *Legislation Act 2001* in relation to the appointment of a receiver.

This clause was formerly section 100 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 312 Commission to receiver**

This clause sets out the entitlements of a receiver. A receiver appointed under Part 3.1 is entitled to a commission on the money received, but is not entitled to the payment of costs, charges or expenses. The commission to which the receiver is entitled is the amount, not more than eight per cent of the gross amount of all money received, stated in the receiver's appointment, or if no amount is stated, four per cent of the gross amount.

This clause was formerly section 101 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 313 Receiver to insure if required**

This clause provides that a mortgagee may, in writing, direct a receiver to insure and keep insured from loss or damage all or part of the property included in the mortgage so far as it is insurable, and the receiver must comply with the direction.

This clause was formerly section 102 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 314 Application of amounts received by receiver**

This clause sets out how the amounts received by a receiver must be applied and the order of application of those amounts.

This clause was formerly section 103 of the *Conveyancing and Law of Property Act 1898*.

## **PART 3.2                      Mortgages – other provisions**

### **Clause 315    Effect of repayment on ejectment by mortgagee**

This clause applies in a situation where a proceeding for ejectment is brought by a mortgagee for possession of mortgaged premises and no proceeding is pending for foreclosure of the mortgagor's equity of redemption or redemption of the mortgaged premises. Where a mortgagor appears as a defendant in the proceedings and pays the outstanding amount, either to the mortgagee or into court, the amount paid is taken to be full satisfaction and discharge of the mortgage.

On payment of the outstanding amount each mortgagor or defendant is discharged from liability for the amount and the court must order the mortgagee, at the mortgagor's cost, to give the mortgagor a discharge of the mortgage under the *Land Titles Act 1925* or transfer the interest of the mortgagee in the property to the mortgagor, and hand over all documents of title in the possession or control of the mortgagee to the mortgagor. This section does not affect a subsequent mortgage or encumbrance.

An *outstanding amount* for the purposes of this section is defined to be the principal amount of the mortgage that has not yet been repaid, any interest payable and the reasonable costs and expenses of the mortgagee in the proceedings for ejectment.

This clause was formerly section 106 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 316    Section 315 not to apply in certain cases**

This clause provides that clause 315 does not apply if before the outstanding amount is paid, the mortgagee asserts in writing, given to the mortgagor, that the mortgagor does not have the right of redemption, or that the mortgaged property is chargeable with a principal different from that stated in the mortgage or admitted by the mortgagor, or there is a dispute between defendants about the right of redemption.

This clause was formerly section 107 of the *Conveyancing and Law of Property Act 1898*.

### **Clause 317    Redemption if mortgagee absent or unknown**

This clause applies if a person entitled to receive payment of all or part of a debt secured by mortgage is out of the ACT, cannot be found, is unknown or it is uncertain who is entitled to receive all or part of the debt secured by a mortgage.

On an application by the person entitled to redeem the mortgaged property, the Supreme Court may order the amount of the debt secured by mortgage, or part of it, to be worked out in a way the court directs and direct that this amount be paid into the court. A certificate from the registrar of the Supreme Court that an amount that has been paid into Court may be registered with the registrar-general and on registration the amount paid is a discharge of the mortgage debt, or part of it, to the extent of the amount paid. Should an amount be shown to be owing in addition to that paid into court, this additional amount continues to be a debt owing on the mortgage.

The court may order an amount paid into court to be paid to the person entitled to the debt on an application by that person. This payment must not be made until the registrar of the Supreme Court is satisfied the mortgage document and all title documents that were given by the mortgagor to the mortgagee have been given to the person who paid the amount into court.

Where an amount is paid into court under this clause and then paid under an order of the court to the person mentioned in the order, the order operates as a discharge of mortgage of any land subject to the mortgage. An order mentioned in subclause (7) takes effect as a discharge only when it has been registered by the registrar-general.

This clause was formerly section 108 of the *Conveyancing and Law of Property Act 1898*.

## **CHAPTER 4                      Leases**

### **PART 4.1                      Leases - general provisions**

#### **Division 4.1.1                Lessee's and lessor's obligations**

#### **Clause 400                    Lessee's obligations attach to reversion**

This clause provides that the rent provided for by a lease, the benefit of every provision of the lease relating to the subject matter of the lease that is to be complied with by the lessee and every condition of re-entry and other condition of the lease, is attached to, and goes with, the reversionary estate in the land immediately expectant on the term granted by the lease, despite any severance of the reversionary estate.

Any rent, provision or condition may be recovered, received, enforced or taken advantage of by the person entitled to the income of the whole or part of the land leased, subject to the term granted by the lease. This may occur even though the person becomes entitled to the reversionary interest after the condition of re-entry or forfeiture becomes enforceable. This clause does not make enforceable a condition of re-entry or forfeiture or any other condition that had been waived or released before the person became entitled to enforce the condition.

The clause applies to a lease granted on or after 26 June 1986 and a lease granted before 26 June 1986, but only in relation to rent accruing on or after that day and to the benefit of a condition of re-entry or forfeiture for a breach of a provision of the lease committed on or after that day.

This clause was formerly section 40 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

#### **Clause 401                    Lessor's obligations to run with reversion**

This clause provides that for leased land, the obligation imposed on the lessor by a provision of the lease relating to the subject matter of the lease is, so far as the lessor has the power to bind the reversionary estate, expectant on the term granted by the lease, attached to and goes with the reversionary estate in the land and may be enforced or taken advantage of by the person in whom the term is vested and may, so

far as the lessor has power to bind the person entitled to the reversionary estate, be enforced and taken advantage of, against a person so entitled.

This clause applies to a lease granted on or after 26 June 1986 and a breach committed on or after 26 June 1986 of a provision in a lease granted before that day. This clause was formerly section 41 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

#### **Clause 402 Lessee to give notice of ejectment to lessor**

This clause applies to a lessee of premises against whom a proceeding for ejectment has commenced. The lessee is required to immediately give notice of the writ to the lessor or the lessor's agent. A lessee who does not give this notice is liable to the lessor for any damage suffered by the lessor because of this failure.

The clause does not apply to a lessee who holds premises leased under the *Residential Tenancies Act 1997* or the *Leases (Commercial and Retail) Act 2001* or bind the Territory (despite the operation of section 121 of the Legislation Act).

This clause was formerly section 7 of the *Landlord and Tenant Act 1899*.

### **Division 4.1.2 Renewal of headlease without surrender of sublease**

#### **Clause 403 Renewal of headlease**

This clause applies to a lease from which subleases have been derived and provides that the renewal of a headlease without the surrender of one or more of the subleases will not invalidate the grant of the new lease.

This clause was formerly section 55 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

#### **Clause 404 Rights on renewal**

This clause sets out the rights of a person when a new lease is granted on the surrender of the original lease. A sublessee under a sublease derived from the original lease is entitled to all the rights of the original lease. The head lessor is also entitled to the same remedies by way of entry on the lands sublet by a sublease derived from the original lease, for rents payable or for breaches of the obligations and duties imposed by the new lease, as the head lessor would have if the original lease had not been surrendered, but had remained in force or if each sublease derived from the original lease had been surrendered and regranted under the new lease.

This clause was formerly section 56 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

### **PART 4.2 Leases to and for children and for absent lessors**

#### **Clause 405 Leases for children**

This clause provides that if a child is entitled to a lease of premises, the Supreme Court may, on application by or for the child, authorise a nominated person to

surrender the lease or accept instead a lease of the premises to be held by the nominated person on behalf of the child.

A lease mentioned under subclause (1)(b) must be held on the same terms as the surrendered lease would have been held (except so far as the court orders otherwise) and for the same purposes and subject to the same trusts, charges, encumbrances, dispositions and arrangements as the surrendered lease would have been held.

This clause was formerly section 82 of the *Conveyancing and Law of Property Act 1898*.

#### **Clause 406 Costs of lease authorisation application for child**

This clause provides that if a lease is made under subclause 405(2), the costs of the order must be paid from the property of the child as the Supreme Court orders. The costs of an order include the cost of the application, the cost of surrendering the lease the child was entitled to and the cost of obtaining the substitute lease, including any fine, premium or other amount paid for the lease.

This clause was formerly section 83 of the *Conveyancing and Law of Property Act 1898*.

#### **Clause 407 Renewal of leases by children**

This clause applies where a child could under a lease, agreement or arrangement, be compelled to renew a lease if s/he were not a child. If applicable, the Supreme Court may on application by or for the child or by a person entitled to the renewal of the lease, authorise a nominated person to renew the lease for the child and where necessary for a renewal, accept the surrender of an existing lease.

The renewal of a lease under a Supreme Court order must be in accordance with the right of renewal, except so far as the Supreme Court orders otherwise.

This clause was formerly section 85 of the *Conveyancing and Law of Property Act 1898*.

#### **Clause 408 Renewal of leases for people not amenable to process**

This clause applies where a person who is outside of the ACT, or not amenable to the process of the Supreme Court, could be compelled to renew a lease if that person were in the ACT and amenable to the process of the court. The court may on an application by the person entitled to the renewal of the lease authorise a nominated person to renew the lease, and where necessary for this purpose, accept the surrender of an existing lease.

This clause was formerly section 86 of the *Conveyancing and Law of Property Act 1898*.

**Clause 409 Preconditions for grant or renewal of lease to be satisfied**

This clause provides that a lease must not be granted or renewed under Part 4.2 until any fine or amount required to be paid for the grant or renewal of the lease has been paid and anything required to be done before the lease is granted or renewed has been done. A lease or renewal of a lease granted under Part 4.2 must be properly executed by the lessee.

This clause was formerly section 87 of the *Conveyancing and Law of Property Act 1898*.

**Clause 410 Application of amounts paid for lease renewal under pt 4.2**

This clause provides that an amount paid for the renewal of a lease under clauses 407 and 408 must be applied as is directed by the Supreme Court, after deducting the costs payable for the renewal.

This clause was formerly section 88 of the *Conveyancing and Law of Property Act 1898*.

**Clause 411 Validity of surrenders and leases under pt 4.2**

This clause provides that a lease or other disposition or the surrender of a lease, granted, made or accepted under Part 4.2 is as valid as if the person by or for whom it was granted, made or accepted had been an adult without a disability who had personally granted, made or accepted it.

This clause was formerly section 89 of the *Conveyancing and Law of Property Act 1898*.

**Clause 412 Costs of applications under pt 4.2**

This clause gives the Supreme Court power to order that the costs or expenses of an application made under Part 4.2 be raised from the premises or leasehold interest in relation to which the application is made, as the Court considers appropriate.

This clause was formerly section 90 of the *Conveyancing and Law of Property Act 1898*.

**PART 4.3 Breach of insurance provisions****Clause 413 Application - pt 4.3**

This clause provides that Part 4.3 applies to a lease for a fixed term, whether or not the lease may be terminated before the end of the fixed term, and a lease for the life of the lessee.

This clause was formerly section 110 of the *Conveyancing and Law of Property Act 1898*.



**Clause 414 Relief against forfeiture for failure to insure**

This clause enables the Supreme Court to grant the lessee relief against forfeiture of the lease where the lessee has failed to insure the leased property against loss or damage if no loss or damage to which the insurance would have applied has happened, and appropriate insurance is in effect at the time of the application. The court may grant conditional relief.

This clause was formerly section 111 of the *Conveyancing and Law of Property Act 1898*.

**Clause 415 Record of relief granted**

This clause enables the Supreme Court to order that a record of the relief granted under clause 414 be endorsed on the lease or be made in some other way.

This clause was formerly section 112 of the *Conveyancing and Law of Property Act 1898*.

**Clause 416 Limit on relief**

This clause limits the power of the Supreme Court to grant relief to a person under Part 4.3 if the court has already granted relief to the person in relation to the same provision of the lease, or a forfeiture of the lease under the same provision has already been waived for the person other than in a court proceeding.

This clause was formerly section 113 of the *Conveyancing and Law of Property Act 1898*.

**Clause 417 Noncomplying insurance**

This clause provides that a person entitled to the benefit of insurance provisions of a lease or mortgage of a lease has the same rights in relation to noncomplying insurance of any of the leased property, as the person would have in relation to complying insurance of the property.

This clause was formerly section 114 of the *Conveyancing and Law of Property Act 1898*.

**Clause 418 Protection of purchaser of leasehold against forfeiture**

This clause provides that a bona fide or honest purchaser of the leasehold interest under the lease is not liable to forfeiture for damages or any other breach of the insurance provision that happened before completion of the purchase if the purchaser was given the written receipt of the person entitled to receive the rent for the last payment owing before completion of the purchase, and there was at the time of the completion of the purchase, insurance that met the insurance provision.

This clause was formerly section 115 of the *Conveyancing and Law of Property Act 1898*.

## **PART 4.4                      Restriction of effect of licence or waiver by lessor**

### **Clause 419    Application - pt 4.4**

This clause provides that Part 4.4 applies to a lease for a fixed term, whether or not the lease may be terminated before the end of the fixed term, and a lease for the life of the lessee. Part 4.4 does not apply to a residential tenancy agreement under the *Residential Tenancies Act 1997* or bind the Territory (despite the operation of section 121 of the Legislation Act).

This clause was formerly section 61 of the *Landlord and Tenant Act 1899*.

### **Clause 420    Effect of licence given to lessee**

This clause provides that where a lessee is given a licence to do something that contravenes a provision of the lease, the licence extends only to the permission actually given, or the particular breach of the provision, or anything else specifically authorised to be done by the licence. The licence does not prevent a proceeding for a later breach of a provision of the lease, unless expressly authorised by the licence. Despite the licence, all rights under the lease remain in force against a subsequent breach of the lease not authorised or waived by the licence and the provision of the lease in relation to which the licence was given remains in force, as if the licence had not been given, except where a particular thing was authorised to be done.

This clause was formerly section 57 of the *Landlord and Tenant Act 1899*.

### **Clause 421    Operation of partial licences**

This clause applies where a licence gives a power of re-entry on a lessee assigning, subletting or doing another specified act without licence, and the licence is given to one of two or more lessees to assign or sublet the lessee's share or interest, or the doing of a prohibited act without licence; or to a lessee or one of two or more lessees to assign or sublet part only of the property, or to do an act prohibited without licence in relation to part only of the property. In these circumstances, the licence does not extinguish the right of entry for a breach of the lease by co-lessees of the other shares or interests in the property or by the lessee or lessees of the rest of the property. The right of entry remains in force in relation to the shares, interests or property subject to the licence.

This clause was formerly section 58 of the *Landlord and Tenant Act 1899*.

### **Clause 422    Apportionment of conditions of entry on severance**

This clause applies where the reversion of a lease is severed and the rent or other reservations under the lease are apportioned among the reversionary interests. In these circumstances, the assignee of a part of the reversion is entitled to the benefits of all the powers of re-entry for non-payment of the rent or failure to render the other reservation in the same way as if the powers of re-entry had been given to the assignee.

This clause was formerly section 59 of the *Landlord and Tenant Act 1899*.

**Clause 423 Waiver of benefit of lease provision**

This clause provides that in circumstances where a lessor waives the benefit of a provision of the lease, the waiver will not extend to an instance or breach of a provision of the lease, other than to which the waiver specially relates or to operate as a general waiver of the benefit of the provision.

This clause was formerly section 60 of the *Landlord and Tenant Act 1899*.

**PART 4.5 Forfeiture of leases****Clause 424 Definitions - pt 4.5**

This clause defines a number of words for the purposes of Part 4.5.

This clause was formerly section 2 of the *Forfeiture and Validation of Leases Act 1905*.

**Clause 425 Application - pt 4.5**

This clause notes that this Part applies to a lease despite any provision of the lease to the contrary, but does not apply to a residential tenancy agreement under the *Residential Tenancies Act 1997*.

This clause was formerly section 3 of the *Forfeiture and Validation of Leases Act 1905*.

**Clause 426 Restrictions on re-entry or forfeiture**

This clause restricts a lessor's right of re-entry or forfeiture under a lease by proceeding or otherwise for breach of a provision of the lease unless the lessor complies with specified lessee notice requirements. The clause also gives the Supreme Court power to grant or refuse relief on conditions it considers appropriate. The clause also excludes a number of specific leases.

This clause was formerly section 4 of the *Forfeiture and Validation of Leases Act 1905*.

**Clause 427 Notices under s 426(1)**

This clause prescribes various requirements for a notice under clause 426(1), but does not limit the operation of any other Territory law that allows service in another way.

This clause was formerly section 4A of the *Forfeiture and Validation of Leases Act 1905*.

**Clause 428 Protection of sublessees**

This clause makes provision for a sublessee to apply to the Supreme Court for relief where the lessor seeks to enforce by proceeding or otherwise, a right of re-entry or forfeiture under the lease for breach of a provision of the lease.

This clause was formerly section 5 of the *Forfeiture and Validation of Leases Act 1905*.

## **PART 4.6 Leases invalidly granted under powers**

### **Clause 429 Pt 4.6 does not bind the Territory**

This clause notes that Part 4.6 does not bind the Territory and has effect despite the operation of section 121 of Legislation Act.

This clause was formerly section 5A of the *Forfeiture and Validation of Leases Act 1905*.

### **Clause 430 Leases taken to be granted in intended exercise of power**

This clause provides that where a valid power of leasing is vested in or may be exercised by a person granting a lease, and the lease cannot have effect, or continue to have effect, according to its terms independently of the power, the lease is taken to be granted in the intended exercise of the power, even though the power is not mentioned in the lease.

This clause was formerly section 6 of the *Forfeiture and Validation of Leases Act 1905*.

### **Clause 431 Certain invalid leases taken to be agreements to lease**

This clause applies where a lease granted is invalid against the person entitled to the reversionary interest in the property at the end of the interest of the person granting the lease or anyone else who, subject to a lease validly granted under the power, would have an interest in the property, and the lease is invalid for failure to comply with the terms of the power, and the lease is honestly granted, and the lessee or a person claiming under the lease has entered into possession of the property. In these circumstances, an invalid lease is taken in equity to be a valid lease in the same terms as the invalid lease apart from any changes necessary to comply with the terms of the power. Anyone bound by the invalid lease is bound in equity by the valid lease. But no-one is entitled under the valid lease to obtain a variation of the lease, if the other people bound by the valid lease are willing to confirm the lease without variation.

This clause was formerly section 7 of the *Forfeiture and Validation of Leases Act 1905*.

### **Clause 432 Certain leases validated**

This clause validates an invalid lease in circumstances where the person granting the lease could not lawfully grant it, and the person was 18 years of age at that time, and the person can at a later time lawfully grant the lease or a similar lease under the power. Part 4.6 applies to the lease.

This clause was formerly section 8 of the *Forfeiture and Validation of Leases Act 1905*.

**Clause 433 Acceptance of rent taken to be confirmation of lease**

This clause provides that acceptance of rent is taken to be confirmation of the lease if, under an invalid lease, a written receipt or note confirming the lease is signed by the person accepting the rent or by someone else authorised by that person.

This clause was formerly section 9 of the *Forfeiture and Validation of Leases Act 1905*.

**Clause 434 Lessee bound to accept confirmation**

This clause provides that where a person is in possession of land under an invalid lease, and someone else is entitled to possession of the land or its rents and profits, and the other person can confirm the lease without variation, the first person must accept confirmation of the lease by the other person. The confirmation may be made by a written note signed by the other person and the person accepting the confirmation. The confirmed lease will be valid from the time it was granted.

This clause was formerly section 10 of the *Forfeiture and Validation of Leases Act 1905*.

**Clause 435 Pt 4.6 does not affect certain other rights**

This clause provides that Part 4.6 does not affect the rights of anyone in relation to a breach of a provision of an invalid lease.

This clause was formerly section 11 of the *Forfeiture and Validation of Leases Act 1905*.

**PART 4.7 Recovery of leased premises****Clause 436 Application - pt 4.7**

This clause provides that Part 4.7 does not apply to a residential tenancy agreement to which the *Residential Tenancies Act 1997* applies or a lease under the *Leases (Commercial and Retail) Act 2001*.

**Clause 437 Who is an agent for pt 4.7?**

This clause defines the word *agent* for the purposes of Part 4.7  
This clause was formerly section 22 of the *Landlord and Tenant Act 1899*.

**Clause 438 Recovery of possession**

This clause applies in circumstances where the term of a lease has ended or a lease has been terminated by a notice to quit, or a demand for possession, and the lessee, or a person claiming under the lessee, who is occupying the leased premises or a part of the premises, fails to quit and give possession of the premises or a part of the premises to the lessor. In these circumstances, the lessor or their agent may apply to the Supreme Court or Magistrates Court for an order for recovery of possession of the premises. The court may issue a warrant authorising a police officer or someone else to enter (using reasonable force) the premises and give possession to the lessor or

their agent. The court may postpone the issue of a warrant or suspend the execution of the warrant for a time that it considers appropriate.

This clause was formerly section 23 of the *Landlord and Tenant Act 1899*.

## **CHAPTER 5**                      **Miscellaneous**

### **PART 5.1**                      **Debts charged on property of deceased person**

#### **Clause 500**                      **Charges on property of deceased person to be paid primarily out of property charged**

This clause applies if a person dies possessing or being entitled to, or, under a general power of appointment, disposes of by will, property that at the time of their death is charged with the payment of an amount, whether by legal mortgage, equitable charge or in some other way, or land for which an amount is owing at the time of the person's death under a contract of purchase. In these circumstances, unless the deceased person has by will, indicated a contrary intention, the property charged or land for which purchase money is owing is, as between the different people claiming through the deceased person, primarily liable for the payment of the charge or purchase money, and each part of the property that is subject to a charge must bear a proportionate part of the charge on the whole of the property; and each part of a parcel of land for which purchase money is owing must bear a proportionate part of the amount owing for the whole parcel.

A contrary intention is not taken to be indicated in circumstances where the deceased person's will provides a general direction for the payment of debts, or all debts, of the person out of the person's personal estate, residuary real and personal estate or the person's residuary real estate or by a charge in the deceased person's will of debts, or all debts of the person on any estate mentioned in subclause(3)(a).

However, a contrary intention is taken to be indicated by words in the deceased person's will expressly or by necessary implication indicating an intention that a general direction in the will of the kind mentioned in subclause (3)(a), or a charge in the will mentioned in subclause (3)(b), is to apply to a charge on property mentioned in subclause (1)(a) or an amount of unpaid purchase money mentioned in subclause (1)(b). This clause does not affect the right of a person entitled to a charge on property mentioned in subclause (1)(a), or to unpaid purchase money mentioned in subclause (1)(b), to obtain payment of the charge or purchase money out of other assets of the deceased person or in some other way.

This clause was formerly section 109 of the *Conveyancing and Law of Property Act 1898*.

### **PART 5.2**                      **Stipulations in contracts**

#### **Clause 501**                      **Stipulations not of the essence of contracts**

This clause provides that stipulations in a contract about time or anything else, that, in accordance with the rules of equity, are taken not to be, or not to have been, of the essence of the contract must be interpreted and have effect at law in accordance with those rules.

This clause was formerly section 67 of the *Law Reform (Miscellaneous Provisions) Act 1955*.

### **PART 5.3                    Miscellaneous – other provisions**

#### **Clause 502    Approved forms**

This clause provides that the Minister may, in writing, make approved forms for this Act.

#### **Clause 503    Regulation-making power**

This clause provides that the Executive may make regulations for the purposes of this Act.

### **PART 5.4                    Transitional**

#### **Clause 504    References to repealed Act**

This clause provides that any Act, instrument made under an Act or document, or reference to the repealed Acts, is taken to be a reference to the Bill.

#### **Clause 505    Transitional regulations**

This clause provides a regulation-making power for transitional matters necessary or convenient to be prescribed because of the enactment of the Bill and for the Executive to make regulations modifying this part in relation to anything that is not dealt with in this part, or not adequately dealt with in this part.

#### **Clause 506    Expiry of pt 5.4**

This clause explains that this part expires two years after the day it commences.

### **PART 5.5                    Repeals and consequential amendments**

#### **Clause 507    Legislation repealed**

This clause repeals the following legislation:

- *Conveyancing Act 1919* A1919-6;
- *Conveyancing and Law of Property Act 1898* A1898-17;
- *Forfeiture and Validation of Leases Act 1905* A1905-8;
- *Forfeiture of Leases Act 1901* – Form 1 AF 2002-18;
- *Law Reform (Miscellaneous Provisions) Act 1955* A1955-3; and the
- *Landlord and Tenant Act 1899* A1899-18.

The clause also notes that section 88 of the *Legislation Act 2001* applies to division 6.2 of the *Conveyancing Act 1919*; and sections 3 (Short forms) and 4 (Deed to include buildings etc); and schedules 1 and 2 of the *Landlord and Tenant Act 1899*; and part 14 (Abolition of maintenance, champerty and a form of barratry) of the *Law Reform (Miscellaneous Provisions) Act 1955*.

**Clause 508    Legislation amended – sch 1**

This clause provides that consequential amendments are made to the Acts mentioned in Schedule 1. These are the:

- *Administration and Probate Act 1929;*
- *Civil Law (Wrongs) Act 2002;*
- *Confiscation of Criminal Assets Act 2003;*
- *Court Procedures Act 2004;*
- *Law Reform (Miscellaneous Provisions) Act 1955;*
- *Legislation Act 2001;* and the
- *Trustee Act 1925.*