

2001

**THE LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

SUPREME COURT AMENDMENT BILL 2001

EXPLANATORY MEMORANDUM

**Circulated by authority of
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This is a Bill to establish an ACT Court of Appeal.

The ACT judicial hierarchy (for the superior courts) presently has three levels:

- **"Trial" court level:** The ACT Supreme Court discharges the function of trial court in the ACT, conducting hearings into the most significant criminal and civil matters at first instance. The Court is established by the ACT *Supreme Court Act 1933* and Judges of the Court are appointed by the ACT Executive. The Court has "all the original and appellate jurisdiction that is necessary for the administration of justice in the Territory" (section 48A *Australian Capital Territory (Self-Government) Act 1988*). The Court has a similar jurisdiction and range of work of other State and Territory Supreme Courts.
- **Intermediate appeal court level:** The Federal Court presently discharges this function in the ACT, hearing appeals from the ACT Supreme Court (section 24 *Federal Court of Australia Act 1976*). The Federal Court is established by Commonwealth legislation to hear a range of matters concerning specialised federal jurisdictions as well as appeals from the ACT Supreme Court. The Commonwealth appoints Judges to that court. In the other States and Territory, this function is performed by an appeal court established under State or Territory legislation.
- **Final appeal court level:** This function is discharged by the High Court (as in relation to appeals from all intermediate appeal courts in Australian jurisdictions).

This Bill establishes a new ACT intermediate appeal court to be known as the Court of Appeal. Complementary Commonwealth legislation will remove the jurisdiction of the Federal Court in relation to appeals from the ACT Supreme Court and allow appeals from the new ACT Court of Appeal directly to the High Court.

The principal role of the Court of Appeal will be to hear appeals against decisions of the Supreme Court. The Court will operate as a division of the existing Supreme Court and will comprise all ACT Supreme Court Judges (which may include interstate and retired Judges). Provision is made for the appointment of the President of the Court of Appeal, who is charged with ensuring the orderly and expeditious discharge of the business of the Court.

The Court will normally be constituted by three Judges (with the most senior resident sitting Judge presiding – note that the Chief Justice is the most senior Judge, followed by the President and, then, other resident Judges). A single Judge may hear and determine various procedural or preliminary matters. A

Judge cannot hear a matter on appeal from a decision he or she gave in the Supreme Court.

The Bill provides that decisions are to be made by majority of the Judges sitting as the Court of Appeal. Judgments of the Court of Appeal may be delivered by one Judge (and may be in writing). Where a Judge is no longer able to continue hearing an appeal, two Judges may continue hearing the appeal as long as the parties consent (but if they are divided in opinion about the decision, it must be reheard).

The Bill also retains a number of provisions already applicable to appeals from the ACT Supreme Court in the Federal Court. These include provisions dealing with the Court of Appeal's power to receive further evidence, the effect of bail on a prison sentence and provision for new trials (see sections 27, 29A and 30 of the *Federal Court of Australia Act 1976* respectively). The Bill also allows the Rules of Court to set the time of initiating appeals and determine how they are instituted.

Financial impact

\$163,000 has been included in the 2001-02 budget to support the establishment of the Court of Appeal. A similar amount is foreshadowed in following years.

Notes on Provisions

Clause 1 Name of Act

Formal.

Clause 2 Commencement

Formal, provides for the commencement of the Act. Note that standard provisions for the automatic commencement of provisions will not apply to these amendments, as the precise date of commencement of some provisions is dependent on the commencement of Commonwealth legislation.

Clause 3 Act Amended

Formal.

Clause 4 Seniority of Judges New section 5(1A)

The effect of this provision is that, as in other jurisdictions, the Chief Justice is the most senior Judge, followed by the President and, then, other Judges.

Clause 5 Section 5(4)

Consequential to the amendment made by clause 4.

Clause 6 Section 5

Formal.

Clause 7 Arrangement of business of court Section 7

Consequential to the amendment made by clause 13 (new section 37G).

Clause 8 Exercise of that jurisdiction - Sections 8(1) and (2)

Drafting amendment: simplifies the drafting of section 8 and makes consequential provision to the amendment made by clause 13 (new section 37J).

Clause 9 Exercise of jurisdiction by master - Section 9(2)(b)

Provides that appeals from a decision of the master that presently go to the Full Court shall instead go to the Court of Appeal. The amendments only apply to decisions of the master made after the commencement of the relevant paragraph in new section 37E(2)(a)(i) (clause 13), earlier decisions will continue to go to the Full Court (section 41, *Interpretation Act 1967*).

Clause 10 Section 9(3) and (4)

Consequential to the amendment made by clause 9.

Clause 11 Rules of Court - Section 36(2)(g)

Consequential to the amendment made by clause 12.

Clause 12 New section 36(2)(h)

Allows the Rules of Court to set the time of initiating appeals and determine how they are instituted.

Clause 13 New part 2A

Inserts a new Part 2A dealing with the Court of Appeal.

Part 2A Court of Appeal

Appellate jurisdiction - New section 37E

New subsection 37E(1) provides that, when exercising appellate jurisdiction under new Part 2A, the Supreme Court is called the Court of Appeal.

New subsections 37E(2)-(4) set out the broad appellate jurisdiction of the Court of Appeal. The appellate jurisdiction is as broad as that jurisdiction exercised by the Federal Court in relation to the Supreme Court (see section 24 of the *Commonwealth Federal Court of Australia Act 1976*).

In particular, the Court of Appeal is to have an appellate jurisdiction in relation to the ACT Supreme Court, other than in relation to judgments of the registrar, the Full Court (when the Full Court is itself exercising an appellate jurisdiction) or the Court of Appeal itself. The appellate jurisdiction created by these amendments is distinguishable from the jurisdiction the Supreme Court currently exercises in relation to appeals from the Magistrates Court and the various tribunals. A single Judge of the Supreme Court exercises appellate jurisdiction over lower court and tribunal matters.

As at present, an appeal cannot be brought from a decision of the Supreme Court sitting as the Court of Disputed Elections (see subsection 24(1AA) *Federal Court of Australia Act 1976*). Appeals against interlocutory judgments can only be made with leave of the Court of Appeal (see subsection 24(1A) *Federal Court of Australia Act 1976*).

Appointment of President - New section 37F

New section 37F provides for the appointment of a President of the Court of Appeal.

Arrangement of business of Court of Appeal - New section 37G

New section 37G provides that the President of the Court of Appeal is responsible for ensuring the orderly and expeditious discharge of the business of the Court of Appeal.

Appeal bench - New section 37H

New section 37H provides that the Court of Appeal will ordinarily have three Judges, one of whom would ordinarily be a resident Judge. A Judge may not hear an appeal about which the Judge gave a decision.

Presiding Judge - New section 37I

New section 37I provides that the senior sitting resident Judge is the presiding Judge (see section 5 of the Act, as amended by clause 4).

Appeal court constituted by single Judge - New section 37J

New section 37J provides that a single Judge may constitute the Court of Appeal for specified preliminary or procedural matters. In such proceedings, the Rules of Court may provide for the oral hearing of incidental matters.

Decision making - New section 37K

New section 37K provides for majority decisions of the Court of Appeal.

Appeal Judge unable to continue sitting – New section 37L

New section 37L sets out rules that apply where, before a proceeding is decided, one of the Judges becomes unable to continue to sit on the appeal. Where a Judge is no longer able to continue hearing an appeal, two Judges may continue hearing the appeal as long as the parties consent (but if they are divided in opinion about the decision, it must be reheard).

Reserved judgments – New section 37M

New section 37M permits, in relation to a reserved decision of the court, a single Judge to deliver the decision of the court, either orally or in writing.

Evidence on appeal – New section 37N

New section 37N makes provision for what evidence the Court of Appeal must have regard to or may receive.

The Court must have regard to the evidence given at the trial court level but may draw inferences of fact from that evidence.

In addition, the Court may receive further evidence as specified in the section (including by oral examination or on affidavit). Subsection 37N(3) is not intended to be subject to section 54 (which deals with the ordinary manner of giving evidence before the Supreme Court). Paragraph 37N(3)(b) is not intended to be subject to section 55 (which deals with restrictions on the use of affidavit evidence). Similarly, a bail application in the Court of Appeal need not be necessarily by audio video link.

Judgment on appeal – New section 37O

New section 37O sets out the broad powers of the Court on appeal (including affirming, reversing or varying the judgment). In addition, the Court may set aside a judgment and remit it for rehearing and decision (subject to directions of the Court), set aside a verdict or judgment, or order a new trial.

New trials – New section 37P

New section 37P provides that the Court of Appeal may order the manner in which a new trial will be conducted (see section 30 of the *Federal Court of Australia Act 1976*).

Section 37Q

Note that these amendments do not contain a section 37Q (a separate amendment is proposed elsewhere).

Bail time on appeal does not count towards prison sentence – New section 37R

New section 37R provides that a person who was released on bail pending a decision by the Court of Appeal may not count the time on bail towards any prison sentence (see section 29A *Federal Court of Australia Act 1976*).

Reference appeal following acquittal on indictment – New section 37S

New section 37S provides that the Attorney-General or the Director of Public Prosecutions may apply to the Court to hear a question of law that arose where a person, tried on indictment, has been acquitted. The decision of the Court of Appeal does not alter the verdict or decision given at trial.

Clause 14 Section 60A(1)(b)

The effect of this amendment is that, where a judge's term of office expires before a proceeding is decided (unless the judge is removed from office, or is otherwise unable to continue to sit on the appeal), the judge continues to hold office for the purpose of the proceeding, and may continue to exercise the jurisdiction of the Court of Appeal for that purpose.

Clause 15 Acts amended consequentially – schedule 2

Formal.

Schedule One Consequential and technical amendments of the Supreme Court Act 1933

Schedule One contains various minor technical amendments to the Act. For example:

- it makes slight changes to terminology (eg 'own initiative' in substitution for 'own motion'; omitting 'the generality of'); and
- it recasts section 61 (which deals with reserved judgments of the Full Court) in line with the proposed new section 37K (which deals with reserved judgments of the Court of Appeal).

Schedule Two Consequential amendments of other Acts

Schedule Two contains various amendments to other Acts consequential on the establishment of the Court of Appeal.