

1993

**LEGISLATIVE ASSEMBLY
FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**SUPREME COURT (AMENDMENT) BILL
(No. 2) 1993**

EXPLANATORY MEMORANDUM

**Circulated by authority of
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Attorney General**

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OUTLINE

The *Supreme Court Act 1933* (the Principal Act) constitutes the Supreme Court of the Australian Capital Territory and its Judges, Master and officers. It sets out the Court's jurisdiction and specifies many procedural matters.

The Supreme Court (Amendment) Bill (No. 2) 1993 amends the Principal Act in relation to a wide range of matters. These relate chiefly to creation of a new class of acting Judge, the composition of the Court when it deals with legal profession disciplinary matters, the term of the Master of the Supreme Court and appointment of the officers of the Court.

FINANCIAL CONSIDERATIONS

There are no financial considerations.

DETAILS OF INDIVIDUAL CLAUSES

Formal clauses

Clauses 1, 2 and 3 are formal provisions relating to the short title of the Bill, its commencement on a date notified in the Gazette and defining the term "Principal Act" to mean the *Supreme Court Act 1933*.

Interpretation

Clause 4 inserts a new definition of the term "Judge" and includes new definitions relating to an "acting Judge" and a "resident Judge".

An "acting Judge" is a judge appointed by the Executive under new section 4A (clause 6 refers).

The term "resident Judge" means the Chief Justice or another Judge appointed under subsection 4(1). In effect, the term applies to a Judge who is based in Canberra and whose judicial duties principally relate to the work of the Supreme Court. The present resident Judges were appointed by the Governor-General before the Court became an A.C.T. responsibility.

The three current resident Judges are also Judges of the Federal Court of Australia. Their judicial duties with that Court mainly involve appeals from the A.C.T. Supreme Court.

By contrast, an "additional Judge" is also a Judge of another Court whose judicial duties are principally exercised within that Court, but who on occasion undertakes judicial duties in the A.C.T. Supreme Court. The present additional Judges are members of the Federal Court of Australia.

Future appointments of resident and additional Judges will be by the Executive under amendments made to section 4 of the Act at the time the Court became an A.C.T. responsibility.

Composition of the Supreme Court

Clause 5 will substitute a new subsection 3(3) of the Principal Act to provide that the Supreme Court consists of the Chief Justice and the other Judges, thus including resident, additional and acting Judges. The present provision that there shall be only 2 resident Judges in addition to the Chief Justice is removed.

Clause 6 will insert a new section 4A to enable the Executive to appoint as an acting Judge either a former Judge of a superior court (of the Commonwealth, State or a Territory), or a person who has been a legal practitioner for not less than 5 years. The maximum period of such appointment, as specified in the Executive's commission, is not to exceed 12 months

Clause 7 will substitute a new subsection 5(2) and add new subsections 5(3) to 5(6) relating to the seniority of the three categories (resident, additional and acting) of Judges.

Subsection 5(2) will provide that resident Judges are senior to additional Judges and acting Judges, and subsection 5(3) will provide that additional Judges are senior to acting Judges.

Under subsection 5(4), the seniority of resident Judges, as between themselves, is determined from the dates on which their respective commissions took effect. If the commissions of 2 or more Judges took effect on the same day, their relative seniority will be as assigned by the respective commissions. Similar provisions apply to additional Judges in subsection 5(5), and to acting Judges in subsection 5(6).

Exercise of jurisdiction - legal practitioners

Clause 8 will amend section 11. The only substantive change is to enable a single Judge to make findings of fact in proceedings relating to the professional behaviour of a barrister and solicitor (subsection 11(4)).

Full Court decisions

Clause 9 will substitute a new paragraph 14(b) to provide, in relation to a matter heard by 3 or more Judges sitting together, that if those Judges are divided in opinion, the opinion of the senior Judge sitting is to prevail. This provision is a consequence of the new seniority arrangements in clause 7.

Prohibition against Judges holding other judicial offices

Clause 10 will substitute a new subsection 16(2) which will prohibit, in the absence of the Executive's approval in writing, a resident or an acting Judge from engaging in remunerative employment except in relation to the exercising of judicial office or any office, appointment or commission held by that Judge in the Defence Force of the Commonwealth. A similar prohibition will apply to the acceptance of appointment to another judicial office under a law of the Territory, the Commonwealth the State or another Territory.

Subsection 16(3) already provides that the Executive must consult with the Chief Justice before giving the approval. Subsection 16(4), which excludes the application of the present subsection 16(2) to an additional Judge, will be repealed because the wording of new subsection 16(2) makes it unnecessary.

Remuneration of Judges

Clause 11 provides for the remuneration and allowances of acting Judges. New subsection 17(2) will enable the remuneration and allowances of an acting Judge to be prescribed by regulation unless, under subsection 17(3), there is a subsisting determination of the Commonwealth Remuneration Tribunal relating to the remuneration and allowances of acting Judges, in which case that determination will apply.

This arrangement parallels section 73 of the *Australian Capital Territory Self-Government Act 1988* (Cth) which governs the remuneration of *inter alia* the Chief Justice, Judges and Master of the Supreme Court.

The present subsection 17(2) relating to the accrual and payment of Judges' remuneration will be re-enacted, with a slight textual amendment, as subsection 17(3A).

New form of oath or affirmation of office for Judges

Clause 12 will substitute a new section 19 which will require a newly appointed Judge to take an oath or affirmation of office in accordance with Form 1 in the Schedule which will be added to the Act by clause 26.

Abolition of distinction between court and chambers

Clause 13 will substitute a new section 21 which will abolish the distinction between the business of the Supreme Court conducted in a courtroom and that conducted in a judicial officer's chambers. Business conducted in a courtroom or otherwise shall be taken to be conducted in court. However, the new provision will not affect the practice of the Court with respect to its business that may be conducted in chambers as distinct from in court.

Trial by jury in civil proceedings

Clause 14 will repeal subsection 22(3), so abolishing an obsolete reference to the Court's jurisdiction as it was on 1 January 1934 by reference to the then corresponding jurisdiction of the Supreme Court of New South Wales. The jurisdiction conferred by the existing provision is unlikely to be required by the Court, since it relates to appeal-type proceedings which are heard by the Federal Court. If such jurisdiction was necessary, the conferral of "all original and appellate jurisdiction that is necessary to administer justice in the Territory" by section 20(1)(a) of the Act is quite adequate.

Substitution of new provisions

Clause 15 will repeal existing sections 34 and 35 and substitute new sections, 34, 34A, 34B and 35, mainly to improve the clarity of the drafting.

Injunctions

The new section 34 confers on the Court power to grant an injunction to restrain the taking of action adverse to the applicant by another person, including actions involving threatened waste or trespass to land.

Receivers

New section 34A will enable the Court to appoint a receiver to administer property in dispute.

Prerogative remedies

New section 34B will set out the Court's powers in relation to the remedies available under the traditional prerogative writs. *Habeas corpus* requires a detained person to be brought before a court. Prohibition restrains an inferior court from exceeding its powers. *Mandamus* compels the exercise of a public duty. *Certiorari* is used to remove a case from an inferior to a superior court. The provision will enable the Court, if it thinks fit, to grant the relief or remedy sought by making an order instead of by the traditional form of writ.

Rules of practice and procedure - judicial discretion

New section 35 will enable the Court, where no provision about a matter of practice or procedure is made in the *Supreme Court Act 1933* or any other law of the Territory to give such directions as it thinks fit. This is more flexible than the present provision, which requires the Court in such cases to follow the procedures of the High Court or the NSW Supreme Court.

Rules of Court - commercial arbitration proceedings

Clause 16 will incorporate into the Act provisions that are presently found in the Commonwealth *Supreme Court (Arbitration) Ordinance 1990*. The Commonwealth is repealing that Ordinance. The Bill includes a savings provision for the existing Rules of Court made under the Ordinance.

Appointment and Term of office of Master of the Supreme Court

Clauses 17 and 18 will amend sections 40 and 41 to enable future appointments to the office of Master to be made to age 70, instead of the present limit of 65. This rationalises the retiring ages of Judges and Master.

Extension of the Master's term of office

Clause 19 will insert a new section 41A to enable the Executive to extend the term of office of the Master, provided that extended term does not extend beyond the date when the person would attain the age of 70.

Terms and conditions and oath of office of the Master of the Supreme Court

Clause 19 will also introduce new section 41B to provide that, in relation to matters not provided for by the Principal Act, the terms and conditions of the Master of the Supreme Court are as determined by the Executive; and new section 41C which will prohibit the Master from engaging in remunerative employment outside judicial office (except a Defence Force appointment) without the consent of the Executive. As is the case with a Judge, the Executive must consult with the Chief Justice before giving its approval.

Clause 19 will also insert a new section 42 which will require a newly appointed Master to take an oath or affirmation of office in accordance with Form 1 in the Schedule which will be added to the Act by clause 26. The amendment provides that the oath or affirmation for the Master is the same as that for a Judge, whereas at present it is the same as that for the Registrar.

Appointments

Subclause 20(1) will amend section 46 of the Principal Act in relation to appointments. At present the Registrar, the Sheriff and their Deputies are appointed by the Attorney-General. This power will be retained by the Attorney-General in the case of the Registrar and the Sheriff. However, their respective Deputies will now be appointed by these officers.

New subsection 46(5) provides that the Deputy Registrar, Deputy Sheriff and other officers appointed under new subsections 46(3) and 46(4) must be public servants.

Subclause 20(2) ensures that existing holders of the offices specified in subsection 46(1) continue in office once the new appointment arrangements are in force.

Acting appointments

Clause 21 will insert a new section 46A relating to acting appointments. New subsection 46A(1) will permit the Attorney General to appoint persons to act as Registrar and as Sheriff during a vacancy in either office or during the absence of either office holder. It is a 'standing acting' arrangement. This avoids the need for an acting appointment to be made every time a person acts in these positions. New subsection 46A(2) will impose a limit of one year on the period a person may act, while new subsection 46A(3) provides that the actions of a person acting in these capacities is not invalidated merely because of some formal defect in the appointment process. New subsection 46A(4) provides that an acting Sheriff has the rights, immunities and liabilities of the Sheriff.

Sheriff's assistants

Subclause 22(1) will insert a new subsection 53(1) enabling the Sheriff (instead of the Attorney-General) to appoint persons to assist in the performance of the Sheriff's functions. Such persons must be public servants. Existing subsection 53(4), which relates to the remuneration of Sheriff's assistants who are not public servants, will be repealed.

Subclause 22(2) will protect the appointments of persons holding appointments under the present provision.

Completion of part-heard matters - expiration of term of office

Clause 23 will insert a new section 60A, subsections (1) to (3) of which will enable a Judge or Master who has ceased to hold office to continue to exercise the jurisdiction of the Court in order to finalise outstanding proceedings. New subsection 60A(4) protects the validity of a judgment

given by that person. Subsection 60A(5) provides that this section does not apply where a Judge or the Master is removed from office.

Oaths and affirmations

Clause 24 will substitute a new section 67, subsection (1) of which will permit forms of oath or affirmation for court proceedings to be prescribed by the Rules of Court made by the Judges of the Court. New subsection 67(2) enables a person to make an affirmation instead of an oath in court proceedings.

Regulations

Clause 25 will repeal the existing section 75 which Schedule 2 re-enacts as section 52. In its place is substituted a new section 75 which is a standard provision to enable the Executive to make regulations.

Oaths and affirmations of office

Clause 26 includes a new Schedule to the Act. It contains the oaths and affirmations of office for the judicial officers (Chief Justice, Judges and Master) and the Registrar of the Supreme Court.

Formal amendments

Clause 27 makes formal amendments of a miscellaneous and technical nature which are outlined below. Schedule 2 amends the Principal Act. Schedule 3 amends references to the Supreme Court and the Principal Act contained in other legislation.

Repeal of *Supreme Court Act 1952*

Clause 28 will repeal the *Supreme Court Act 1952*. Its subject matter (prerogative writs) is dealt with in new section 34B to be inserted by clause 15 of the Bill. The reference to "officer of the Territory" in subsection 3(2) of the Act of 1952 is now covered by the definitions of "public servant" and "Public Service" contained in the *Interpretation Act 1967*.

SCHEDULE 2

The amendments included in this Schedule are formal in nature and do not call for any special comment. For the most part, they are of a tidying up nature and involve such matters as the repeal of definitions of certain terms, which are now included in the *Interpretation Act 1967*, and the re-drafting of a substantial amount of text in accordance with modern drafting practice.

Section 4, which empowers the Executive to appoint both resident and additional Judges, is redrafted more concisely. The term "resident Judge" is defined in clause 4(b) of the Bill.

Subsection 8(1) will be amended as a consequence of abolishing the distinction between court and chambers in clause 12.

The definition of "Full Court" inserted in section 2 by the Schedule will enable more economical drafting of a number of provisions, including sections 11, 12, 13 and 14.

Subsection 17(5) will be amended to deal with the possibility that an additional Judge appointed in future may be a Judge of a court other than the Federal Court, and to provide that such a Judge is not entitled to remuneration or allowances [other than those payable under subsection 17(6)] from the Supreme Court. At present, Federal Court Judges who are also additional Judges of the Supreme Court receive their remuneration and any allowances from the Federal Court. The intention is for that arrangement to continue. If an additional Judge was appointed from another Court, that Judge's remuneration and allowances [other than those payable under subsection 17(6)] would be paid by the Court of his or her primary commission.

Sections 26 to 33 and 50 to 52 relate to procedural and jurisdictional matters. They will be replaced by re-drafted provisions which re-state these matters in simpler language. No change of a substantive nature has been made.

The opportunity will be taken to include a specific reference to the Corporations Law in paragraph 36(1)(b).

Section 47 will be re-drafted in order to clarify and delineate the functions of the Registrar and the Deputy Registrar of the Supreme Court. In addition, subsection 49(3) will make it clear that a Deputy Registrar shall not exercise the Registrar's functions in relation to the winding-up of companies.

Obsolete references to New South Wales laws and offices of that State's Supreme Court have been removed.

The opportunity has also been taken to revise the Act in gender neutral terms.

SCHEDULE 3

Schedule 3 amends references to the Supreme Court and the Principal Act contained in other legislation. These changes are mainly a consequence of the transfer of the Supreme Court to the Territory and of the *Supreme Court Act 1933* becoming a Territory enactment. In particular, as part of the process of conversion of the Act from a Commonwealth Act to a Territory enactment, the Commonwealth *A.C.T. Supreme Court (Transfer) Act 1992* altered the Act's short title and re-numbered its provisions. This Schedule effects consequential changes to other legislation in light of these changes.

Other changes are a consequence of the new term "resident Judge" and the new class of "acting Judge".

The only other change is to simplify the definition of the term "Sheriff" in the *Juries Act 1967*.