

1992

AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY

CROWN PROCEEDINGS BILL 1992

EXPLANATORY MEMORANDUM

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INTRODUCTION

Under the common law there is no "right" to sue the Crown. However, all States and Territories have legislation that allows citizens to sue the Crown of that particular State or Territory. In the ACT, the relevant legislation is the Crown Suits Act 1989. Generally, these Acts do not allow a person to sue the Crown of other States or Territories. To illustrate, suppose Victoria operates a Tourist Bureau in the ACT and breaches an ACT law. An ACT resident probably cannot sue the Bureau in the ACT.

Until recently this has not been a problem. State and Territory Governments have not engaged in significant activities outside their own jurisdiction. However, as Government functions have expanded, this has changed.

The Solicitors General of Australia noted this problem and suggested there should be similar legislation throughout the States and Territories on the topic of suing the Crown. In 1991, they developed a model Bill for the States and Territories. It was their intention that the model Bill would replace existing laws on the topic. The Standing Committee of Attorneys-General accepted the model Bill in October 1991.

The Crown Proceedings Bill 1992 is an adaptation of the model Bill for the ACT. It shall replace the existing Crown Suits Act 1989.

FINANCIAL CONSIDERATIONS

None.

DISCUSSION

The following discussion of the clauses of the Crown Proceedings Bill are covered under four headings. Each heading and the clauses discussed under it are set out below:

Heading	Clauses discussed
1. Provisions that are similar to the existing law	5, 8, 9, 13, 14 and 16
2. Changes effected by the Crown Proceedings Bill	3, 4, 6, 7, 10, 11 and 17
3. Modifications of the model Bill for the ACT	3, 8, 12, 13, 16 and 17
4. Other Provisions	1, 2, 15, 18, 19, 20, 21 and 22

Clauses are considered in numerical order within each heading. Clause numbers are highlighted for ease of reference.

1. Provisions that are similar to the existing law

In many respects, the Crown Proceedings Bill is similar to the Crown Suits Act that it replaces.

Clause 5 of the Crown Proceedings Bill replaces section 8 of the Crown Suits Act. The Crown used to enjoy certain privileges in Court but these privileges have largely been removed by Acts of Parliament. Clause 5, like the present section 8 of the Crown Suits Act, ensures that the Crown has no greater rights in Court than an ordinary person. However, section 8 of the Crown Suits Act only applied to the government of the ACT. In clause 5, unlike section 8, the "Crown" includes the governments of all the States, the Northern Territory and the Australian Capital Territory.

In addition, clause 5 directs a person to bring proceedings against the Crown under a certain name. It provides that proceedings against the ACT should be under the name "Australian Capital Territory". For other States and Territories it is necessary to refer to the Crown Proceedings legislation of the State or Territory.

There are certain rules relating to the confidentiality of information that need to be preserved regardless of who appears in Court. Thus, clause 9 provides that the Crown Proceedings Bill (in particular clause 5) will not affect rules of confidentiality where this would be detrimental to the public interest. (Note: clause 6 also limits the application of clause 5. It is discussed under the heading "Changes effected by the Crown Proceedings Bill.")

Clause 8 of the Bill will replace section 5 of the Crown Suits Act. Both provisions allow a Court to grant an injunction against the Crown. Very briefly, an injunction as used here, is an order of the Court that someone must not do something.

Clause 8 also refers to mandatory injunctions. A mandatory injunction is a Court order that requires someone to do something. A Court can make this kind of order against the ACT under the *Administrative Decisions (Judicial Review) Act 1989*. A Court will not be able to grant a mandatory injunction against the ACT in other circumstances. A Court will not be able to grant a mandatory injunction against the Crown of another jurisdiction in any circumstances. (Note: Clause 8 is also discussed under the heading "Modifications to the model Bill for the ACT").

Clause 13 of the Bill will replace section 9 of the Crown Suits Act. Both provisions require judgements against the ACT to be transmitted to the Chief Minister. The Chief Minister then arranges for the judgement to be paid. Section 9 only refers to judgements against the ACT. Where a Court gives judgement against the Crown of a State or the Northern Territory the new clause 13 requires the Court to transmit a copy of the judgement to the Governor or Administrator of the relevant State or Territory. The Governor or Administrator will then arrange for payment of the judgement according to that State or Northern Territory's laws. (Note: Clause 13 is also discussed under the heading "Modifications to the model Bill for the ACT").

Clause 14 of the Bill and section 10 of the Crown Suits Act allow the Crown to enforce a judgement against a citizen. The Crown can recover judgements awarded to it in the same manner as in proceedings between subjects.

Clause 16 of the Bill is similar to section 7 of the Crown Suits Act. Those provisions provide for service of documents on the Territory to be served on the Chief Solicitor for the ACT. However, clause 16 allows for other means of service in certain circumstances. Firstly, when the Government Solicitor is not acting for the Crown, documents may be served on the solicitor who is acting for the Crown. Secondly, clause 16 does not apply if the Bill provides for another means of service. This ensures that clause 16 does not apply to service of subpoenas under clause 17.

2. Changes effected by the Crown Proceedings Bill

The Crown Proceedings Bill provides for a number of changes to the existing law:

(i) Corresponding Laws

Clauses 4 & 7 of the Bill enable a person to sue the Crown in right of any State or Territory in any jurisdiction that enacts the model Bill. At present, the *Crown Suits Act 1989* has no provisions enabling a person to sue the Crown in right of another State or Territory.

Clause 4 provides for the Crown of each State and Territory to be bound by this law. Clause 7 binds the ACT to the "corresponding laws" of other States and the Northern Territory.

In short, any law based on the model Bill can be a "corresponding law". The Executive can declare a law to be a "corresponding law" under clause 3. For instance, the ACT Executive may make a regulation naming the South Australian *Crown Proceedings Act 1992* as a "corresponding law". Eventually, each jurisdiction will enact a corresponding law. It will then be possible for each State and Territory to be bound by its own and all other Crown Proceedings Acts. These provisions are intended to overcome any constitutional difficulties there may be in binding the Crown of one jurisdiction to the laws of a different jurisdiction.

(ii) Crown immunities

The ACT Executive has adopted a general policy that all legislation should bind the Crown. Steps are being taken to enshrine this principle in

legislation. However, occasionally there are exceptions to this rule. For instance, Parks and Conservation officers are required to take samples of water from lakes for occasional testing. They should not be bound by a law that makes it illegal to remove water from lakes. Clause 6 of the Bill ensures that the Crown will not be bound by a law that contains express words to the contrary. It will also ensure that any statutory limitation on the Crown's liability will be maintained.

(iii) Attorneys-General

Clause 10 of the model Bill allows Attorneys-General to represent their respective jurisdictions in the Courts of any jurisdiction that enacts the model Bill. Clause 10 does not apply to the ACT Attorney-General as this is dealt with in the Law Officer Act 1992.

Clause 11 allows the Attorneys-General of all States, the Northern Territory and the ACT to intervene on behalf of their Crown in certain proceedings. At present, Attorneys-General can probably only intervene in proceedings in their own jurisdictions.

(iv) Serving Subpoenas on Ministers of the Crown

Clause 17 sets out a procedure for serving subpoenas and other documents on Ministers of the ACT Crown. Presently, there is no set procedure in the ACT.

Under this clause, the Chief Solicitor will arrange for service of a subpoena, or other process on the Minister. If the Chief Solicitor is unable to effect service within a "reasonable time" then the Chief Solicitor must inform the Court.

A "reasonable time" will vary with circumstances. For example, suppose the Minister is inter-state for an undetermined time and the Chief Solicitor cannot contact her or him. If the document requires the Minister to appear in two days, then a reasonable time may be only a few hours. That is, the time it takes to ascertain that the Minister cannot have sufficient notice to appear. However, suppose the document requires the Minister to appear in a month's time. If, under the Rules of Court, only two days notice of the document needs to be given, then it would be reasonable to allow a much longer time to elapse before notifying the Court. The Minister may arrive back during that

month. (See also the reference to clause 17 under the heading "Modifications to the model Bill for the ACT").

3. Modifications of the model Bill for the ACT

When Attorneys-General were considering the model Bill they did not envisage that each jurisdiction would enact identical legislation. The model Bill was to serve as a basis for legislation subject to local adaptation. A copy of the model Bill is attached as Schedule 1.

The model Bill was prepared for South Australia and accordingly it uses terminology appropriate for South Australia. These terms have been changed as appropriate for the ACT.

Clause 3 of the Crown Proceedings Bill provides definitions for the terms "Chief Solicitor" and "Government Solicitor" that are the corresponding terms for the position of "Crown Solicitor" in South Australia. The appropriate references to Chief Solicitor or Government Solicitor are made throughout the ACT Bill in place of the term Crown Solicitor in the model Bill. Thus, in clause 16 that provides for service, the term "Chief Solicitor" has been used for the person on whom process can be served and the term "Government Solicitor" has been used as the solicitor ordinarily acting for the Crown.

A definition for Attorney-General has also been included in clause 3 as the Attorney-General for the Territory is not appointed in the same way as the Attorneys-General of other jurisdictions.

Various clauses in the model Bill refer to the "State Crown" or the "State". These have been changed to the "Territory Crown" and the "Territory" in the Crown Proceedings Bill.

Clause 13 of the model Bill provides that judgements against the Crown in right of any jurisdiction cannot be executed in the usual manner but must be served on the Governor or Administrator of the State or Territory. As there is no Governor or Administrator in the ACT the Chief Minister was thought to be the most suitable replacement. Representations have been made to all States and Territories to include the appropriate reference to the Chief Minister in their own legislation.

The model Bill included a clause that purported to deny a person suing the Crown from obtaining mandatory injunctions against the Crown. However, in the ACT, under the Administrative Decisions (Judicial Review) Act 1989, a mandatory injunction would be available against the ACT Crown in some situations. Accordingly, sub-clause 8(2), dealing with mandatory injunctions has been made subject to the provisions of the Administrative Decisions (Judicial Review) Act 1989 in the ACT Bill. The intention is, that a subject's rights under section 17 of the Administrative Decisions (Judicial Review) Act 1989 should not be limited by this law.

Clause 12 of the Crown Proceedings Bill has been slightly altered from the model Bill. It provides that the ACT Crown is not required to pay any Court fee or charge. The model Bill referred only to the "Crown" in its equivalent provision, but it was not clear whether the "Crown" meant each Crown or only the South Australian Crown. The legislation finally enacted in South Australia only exempts the South Australian Crown from the payment of Court fees. The Crowns of the States and other Territories are required to pay fees and charges. Similarly, in the ACT, only the ACT Crown will be exempt from the payment of Court fees. This is because the Crown would simply be paying money to itself - an unnecessary administrative task. The ACT Crown does not gain any advantage. The Crowns of the States and other Territories are required to pay fees and charges.

The model Bill contains a choice of two provisions dealing with service of Subpoenas on Ministers. The first of those choices was adopted in clause 17 of the Crown Proceedings Bill. The alternative provision required an applicant to seek the leave of the Court before serving a subpoena on a Minister. This would have put Ministers in an advantaged position compared to citizens. Consequently, the Government did not consider this alternative satisfactory.

4. Other Provisions

Clauses 1 and 2 are standard formal provisions. They deal with citation and commencement. The substantive provisions of this law shall commence when notified by the Attorney-General in the Gazette.

Clause 15 allows the Executive to prescribe that certain information should be endorsed or annexed to originating proceedings. Originating proceedings are the documents by which a legal action is begun. A failure to comply with the prescribed requirements does not mean that the proceedings are of no effect.

Clauses 18, 19 and 20 are machinery provisions.

Clause 21 provides for the repeal of the existing law covering proceedings against the Crown.

Clause 22 allows the Executive to make regulations as necessary under this law.