

1998

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

SUPREME COURT (AMENDMENT) BILL (No. 3) 1998

EXPLANATORY MEMORANDUM

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BACKGROUND

Prior to the transfer of responsibility for the Supreme Court from the Commonwealth to the Territory in 1992, the resident Judges of the Court were also appointed as Judges of the Federal Court and received their remuneration and allowances as Judges of the Federal Court. The *Supreme Court Act 1933* does not specifically provide in respect of the remuneration and allowances to be paid to resident Judges who are not also Federal Court Judges, however, under the *Remuneration Tribunal Act 1995*, a determination may be made in respect of such Judges

The Supreme Court (Amendment) Bill (No. 3) 1998 will amend the *Supreme Court Act 1933* to provide for the remuneration, allowances and entitlements of resident Judges who are not also Federal Court Judges and will also provide the Supreme Court with a capacity to declare a person a vexatious litigant.

OVERVIEW OF THE BILL

The key amendments which will be implemented by the Bill are:

- the provision in the *Supreme Court Act* for the remuneration, allowances and entitlements of a person appointed as a resident Judge while another resident Judge holds office as a Judge of the Federal Court to be the same as those to which a Federal Court Judge is entitled from time to time;
- the consequential amendment of the *Remuneration Tribunal Act 1995*; and
- the provision in the *Supreme Court Act* for the Court to declare a person to be a vexatious litigant.

FINANCIAL IMPLICATIONS

The amendments to be made by the Bill will give rise to the Territory incurring a financial obligation in respect of judicial pensions

DETAILS OF THE BILL

SHORT TITLE

Clause 1 is a formal provision and will provide for the short title of the amending Act to be the *Supreme Court (Amendment) Act (No 3) 1998*.

COMMENCEMENT

Clause 2 will provide for the commencement of the Act. Clauses 4, 5 and 7, which relate to the remuneration, allowances and entitlements of Judges, will be taken to have commenced on 29 September 1997, the date of appointment to the Supreme Court of the first resident Judge appointed by the Territory after assuming responsibility for the Court. The remaining provisions of the Act will commence upon notification of the Act in the *Gazette*.

PRINCIPAL ACT

Clause 3 will define the term 'Principal Act' as used in the Bill to mean the *Supreme Court Act 1933*.

TERMS AND CONDITIONS OF JUDGES

REPEAL AND INSERTION

Clause 4 will repeal section 17 of the Supreme Court Act which deals with some aspects of judicial remuneration and allowances

Clause 5 will insert a new "Part IIA - Terms and Conditions of Judges" into the Supreme Court Act

Clause 7 will revoke an interim determination in respect of resident Judges.

Clause 8 will make amendments to the *Remuneration Tribunal Act 1995* consequent upon the amendments to be made to the Supreme Court Act

The provisions to be inserted by **clause 5** are described below

Interpretation

Section 37E will define the term 'entitlements' for the purposes of the Part

Resident Judges

Section 37F

A resident Judge is one whose primary or sole responsibility is to constitute the Supreme Court. Supreme Court resident Judges were appointed to both the Supreme and Federal Courts prior to the transfer of administrative responsibility for the Court from the Commonwealth to the Territory in 1992. Resident Judges therefore received remuneration and allowances in their capacity as Federal Court Judges

The Territory, in 1997, made the first appointment of a resident Judge to the Court since assuming responsibility for it. Subsection 73(2) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth) provides that specified office holders, including a Judge, are to be paid such remuneration and allowances as are determined or specified by or under an ACT law or, in any other case, as are determined by the Commonwealth Remuneration Tribunal. While a determination may be made by the ACT Remuneration Tribunal under the Remuneration Tribunal Act, the Supreme Court Act does not specifically provide for the setting of remuneration, allowances and entitlements of resident Judges.

Subsections 37F(1) and (2) will have the effect of providing that any resident Judge appointed while another resident Judge holds office as a Federal Court Judge will be entitled to the same remuneration, allowances and entitlements to which a Judge of the Federal Court is entitled, including any variations of those matters from time to time. The remuneration, allowances and entitlements of a resident Judge appointed while another resident Judge holds office as a Federal Court Judge will continue notwithstanding that the Court ceases to have any resident Judges who hold a commission on the Federal Court. These provisions will not apply to those resident Judges of the Supreme Court who were on the Court at the time of its transfer to the Territory and who hold commissions as Federal Court Judges.

Subsection 37F(3) will provide that, for the purpose of subsection 37F(2), the *Judges' Pensions Act 1968* (Cth) and the *Judges (Long Leave Payments) Act 1979* (Cth), as in force from time to time, will apply, to the extent that they can, as if they were Territory laws

and as if the relevant persons were Judges of the Federal Court immediately before retirement or death. The Judges' Pensions Act provides in respect of pension benefits payable on retirement, invalidity or death to federal Judges and certain other Judges, including persons who were Judges of the Supreme Court on transfer of responsibility for the Court to the Territory. The Long Leave Payments Act provides in respect of leave payments for lengthy service as a Judge.

Acting Judges

Subsections 17(2) and (3) of the Supreme Court Act provide, in effect, that an acting Judge shall be paid such remuneration and allowances as are determined by the Remuneration Tribunal but if there is no such subsisting determination the remuneration and allowances as are prescribed by regulation.

Subsection 37G(1) will provide that the remuneration and allowances of an acting Judge shall be as prescribed by regulation. The present capacity of the Remuneration Tribunal in relation to acting Judges will be removed by **clause 8**.

Subsections 17(2) and (3) do not address the entitlements to be received by an acting Judge. Subsection 37G(2) will provide for an acting Judge to receive the same entitlements, other than an entitlement to a pension or leave, as those received by a resident Judge. Pension and leave entitlements are not relevant because acting Judges are paid a daily sitting fee in respect of the services they provide.

Dual appointments

Subsections 17(5) and (6) of the Supreme Court Act address the situation of Judges holding dual appointments. They provide that a Judge is not entitled to remuneration and allowances if the Judge concurrently holds an appointment as a Judge of another superior court of record and is entitled to receive remuneration and allowances under that appointment. However, where a Judge who holds a dual appointment would receive more generous remuneration or allowances in his or her capacity as a Supreme Court Judge, the Judge is entitled to receive the additional amount. Neither subsection deals with entitlements.

Subsections 37H(1) and (2) will replicate subsection 17(5) but will provide also in respect of entitlements. These provisions prevent a Judge who holds office in another superior court and receives remuneration, allowances or entitlements because of that office from receiving a second entitlement to remuneration, allowances or entitlements by virtue of proposed subsection 37F(2).

Subsection 37H(3) will replicate subsection 17(6) of the Supreme Court Act. It will entitle a Judge who receives remuneration and allowances by virtue of holding another superior court office but which are less than those to which he or she would have been entitled to as a Supreme Court Judge, to receive an amount equal to the difference.

Subsection 37H(4) will provide that where a Judge who holds another superior court office would have received, if that other office wasn't held, entitlements of a type not provided for in respect of that other office or entitlements of a better quality the Judge is entitled to receive entitlements of that type or quality.

Subsection 37H(5) will clarify the intended scope of section 37H by ensuring that it does not apply to an acting Judge of the Court.

Accrual and appropriation of remuneration and allowances

Subsection 37I(1) is based on subsection 17(3A) of the Supreme Court Act and will provide that the remuneration and allowances to which a Judge is entitled accrue from day to day. The requirement that remuneration and allowances are payable monthly in subsection 17(3A) is not replicated in the new provision.

Subsection 37I(2) will replicate subsection 17(4) of the Supreme Court Act and will provide that, to the extent to which it is necessary, the public money of the Territory (see the *Financial Management Act 1996*) is appropriated for the payment of Judges' remuneration and allowances.

Clause 7 will revoke the interim determination made by the Chief Minister in respect of resident Judges which was made at the time of the first appointment of a resident Judge by the Territory since assuming responsibility for the Supreme Court.

CONSEQUENTIAL AMENDMENTS - *Remuneration Tribunal Act 1995*

Clause 8

Section 10 of the *Remuneration Tribunal Act 1975* provides for the Remuneration Tribunal to inquire into and determine the remuneration and allowances to be paid and other entitlements to be granted to, among others, the Chief Justice and the Judges of the Supreme Court.

Subclause 8(1) will make amendments to the Remuneration Tribunal Act consequent upon new sections 37F and 37G of the Supreme Court Act. Paragraph 8(1)(b) will amend section 10 by removing the Remuneration Tribunal's functions in respect of acting Judges and additional Judges. It will also remove the Tribunal's power to determine in respect of resident Judges to whom new section 37F will apply. New subsection 10(3) will preserve the capacity in the Tribunal to inquire into and determine additional remuneration and allowances to be paid and entitlements to be granted to the Chief Justice as Chief Justice and extend that capacity to determine in respect of future Chief Justices who may not also be Federal Court Judges. This capacity in the Tribunal allows it to determine additional benefits which recognise the Chief Justice's added responsibilities as Chief Justice.

Subclause 8(2) will preserve the operation of the Remuneration Tribunal's existing determination in respect of the Chief Justice.

Paragraph 8(1)(a) will make a technical amendment and will correct the reference to the Chief Executive Officer of the Legal Aid Commission in paragraph 10(1)(s) of the Remuneration Tribunal Act.

VEXATIOUS LITIGANTS

INSERTION

Clause 6 will insert section 67A into the Supreme Court Act. Section 67A will enable the Supreme Court to declare a person to be a vexatious litigant.

Subsections 67A(1) and (2)

A declaration that a person is a vexatious litigant will be able to be made by the Supreme Court, on application, where it is satisfied that a person frequently institutes proceedings to harass or annoy, to cause delay or for some other ulterior purpose or without reasonable grounds.

The proceedings which the Court may take into account in respect of an application may be proceedings of any kind before any court or tribunal.

An application for a declaration may be made by the Attorney-General or an aggrieved person. An "aggrieved person" will be defined by subsection 67A(1) to mean, in relation to proceedings, a person aggrieved by the institution of those proceedings. Subsection 67A(1) will also define the terms 'proceedings' and 'vexatious proceedings'

Subsections 67A(3) and (4)

A declaration may be expressed to apply only in respect of a particular type of matter and to be subject to such conditions as the Court thinks fit.

Subsection 67A(5)

The effect of a declaration will be that a person declared to be a vexatious litigant, or any person acting in concert with that person, will not be able to institute or continue any proceedings or, in the case of a declaration expressed to apply in respect of a particular type of matter, proceedings of that type, in any court or tribunal without the leave of the Supreme Court.

Where proceedings are pending at the time when a declaration is made those proceedings or, in the case of a declaration expressed to apply only in respect of a particular type of matter, proceedings of that type, will be stayed subject to any order of the Court in relation to those proceedings.

Subsections 67A(6) and (7)

Where the Court grants leave to institute or continue proceedings to a person who is the subject of a declaration or who is acting in concert with such a person, it may impose such conditions as it thinks fit. Conditions imposed may include conditions relating to security for costs and to specifying matters in relation to the issue of process in the proceedings.

Subsections 67A(8) and (9)

A declaration will remain in force until it is revoked unless it is expressed to expire on a specified date. The Court may vary a declaration that a person is a vexatious litigant

Subsection 67A(10)

Where the Court makes, varies or revokes a declaration the Registrar of the Supreme Court is, subject to any order of the Court, to notify this in the *Gazette*

Subsections 67A(11) and (12)

If proceedings are instituted in contravention of section 67A, the proceedings will be taken to have been permanently stayed. Where practicable, any documents filed or lodged with a court or tribunal in proceedings instituted in contravention of section 67A will be returned to the person.

Subsection 67A(13)

A person declared to be a vexatious litigant may, without the leave of the Court, apply to the Court for the revocation or variation of the declaration or of any of the conditions to which the declaration is subject