

1993

**THE LEGISLATIVE ASSEMBLY OF THE AUSTRALIAN CAPITAL
TERRITORY**

**JURISDICTION OF COURTS (CROSS-VESTING) BILL 1993
EXPLANATORY MEMORANDUM**

**Circulated by the authority of the Attorney General
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Outline

The purpose of this Bill is to provide for ACT participation in the national cross-vesting scheme on the same basis as the States and the Northern Territory.

Currently the ACT participates in the cross-vesting scheme through the operation of the Commonwealth *Jurisdiction of Courts (Cross-vesting) Act 1987*, hereafter called the Commonwealth Act. Since the ACT acquired self governing status, and particularly since responsibility for the ACT Supreme Court has been transferred to the ACT, this is no longer appropriate.

The essence of the cross-vesting scheme, as provided for in the Commonwealth Act and the complementary State and Northern Territory legislation, is that the State and Territory Supreme Courts are vested with the civil jurisdiction (except certain industrial and trade practices jurisdiction) of the federal courts (at present the Federal Court and the Family Court) and the federal courts are vested with the full jurisdiction of the State and Territory Supreme Courts.

The reasons for the scheme are that litigants have occasionally experienced inconvenience and have been put to unnecessary expense as a result of:

- (a) uncertainties as to the jurisdictional limits of federal, State and Territory courts particularly in the areas of trade practices and family law; and
- (b) the lack of power in these courts to ensure that proceedings which are instituted in different courts, but which ought to be tried together, are tried in the one court.

The primary objective of the cross-vesting scheme is to overcome these problems by vesting the federal courts with State and Territory jurisdiction and by vesting State and Territory courts with federal jurisdiction so that no action will fail in a court through lack of jurisdiction, and that as far as possible no court will have to determine the boundaries between federal, State and Territory jurisdictions.

The cross-vesting scheme seeks to cross-vest jurisdiction in such a way that federal, State and Territory courts, by and large, keep within their "proper" jurisdictional fields. To achieve this end, the Commonwealth Act and complementary State and Northern Territory legislation make detailed and comprehensive provision for transfers between courts which should ensure that proceedings begun in an inappropriate court, or related proceedings begun in separate courts, will be transferred to an appropriate court.

The provisions relating to cross-vesting need to be applied only in those exceptional cases where there are jurisdictional uncertainties and where there is a real need to have matters tried together in the one court. The successful operation of the cross-vesting scheme depends very much upon courts approaching the legislation in accordance with its general purpose and intention as indicated in the preamble to the Commonwealth, State and Territory legislation.

Under the cross-vesting scheme no court needs to decide whether any particular matter is truly within federal, State or Territory jurisdiction since in any event the court will have the same powers and duties. This is because, in any particular proceedings, in so far as the matters involved are within federal jurisdiction the powers and duties are conferred and imposed by the Commonwealth Act, and in so far as the matters are not within federal jurisdiction, the powers and duties are conferred by complementary State and Territory legislation.

Provision is made in the Bill (clauses 3, 6 and 7) to recognise the special role of the Federal Court in matters in which it now has, apart from the jurisdiction of the High Court, exclusive original or appellate jurisdiction.

Financial implications

The legislation has no financial implications.

NOTES ON CLAUSES

Preamble

The preamble to the Bill refers to the inconvenience and expense which has occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts. The preamble then explains how the system of cross-vesting as provided for in the Bill is intended to overcome these jurisdictional limitations without detracting from the existing jurisdiction of any court.

Clauses 1 and 2: Short title and Commencement

The first two clauses of the Bill state the short title of the proposed Act and provide for the commencement of the legislation. The legislation will, with minor exceptions, commence on the same day as complementary amendments to the Commonwealth *Jurisdiction of Courts (Cross-Vesting) Act 1987* commence.

Clause 3: Interpretation

Sub-clause 3(1) contains definitions. Significant words or phrases used in the legislation are detailed below:

"Proceeding" is defined not to include a criminal proceeding.

"Special federal matter" is defined to have the same meaning as in the Commonwealth Act, that is to say:

- (a) a matter arising under Part IV of the Commonwealth *Trade Practices Act 1974* (other than section 45D or 45E);
- (ab) a matter arising under section 60AA of the Commonwealth *Family Law Act 1975* in a court other than the Family Court of Western Australia or the Supreme Court of the Northern Territory;

- (b) a matter involving the determination of questions of law on appeal from a decision of, or of questions of law referred or stated by, a tribunal or other body established by a Commonwealth Act, or a person holding office under a Commonwealth Act, not being a matter for determination in an appeal or a reference or case stated to the Supreme Court of a State or Territory under a law of the Commonwealth that specifically provides for such an appeal, reference or case stated to such a court;
- (c) a matter arising under the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*;
- (d) a matter arising under section 32 of the Commonwealth *National Crime Authority Act 1984*; or
- (e) a matter that is within the original jurisdiction of the Federal Court by virtue of section 39B of the Commonwealth *Judiciary Act 1903*.

The above-mentioned matters are not designated special federal matters in those cases where the relevant Supreme Court would have had jurisdiction apart from the Commonwealth *Jurisdiction of Courts (Cross-Vesting) Act 1987*.

"State" is defined to include the Australian Capital Territory and the Northern Territory.

"Territory" is defined not to include the Australian Capital Territory or the Northern Territory.

Sub-clause 3(2) provides that a reference in the Act, other than a reference in sub-clause 4(3), to the Supreme Court of a State includes, if there is a State Family Court of that State, a reference to that Family Court.

Clause 4: Vesting of additional jurisdiction in certain courts

Sub-clauses 4(1), (2), (3) and (4) invest the Federal Court, the Family Court, the Supreme Courts of the other States and Territories and State Family Courts with original and appellate jurisdiction with respect to ACT matters.

Sub-clause 4(5) provides that the preceding subclauses do not confer jurisdiction on courts with respect to criminal proceedings.

The Commonwealth Act invests State and Territory Supreme Courts with the civil jurisdiction of the Federal Court and Family Court that is not already invested in these courts. It also invests the Federal Court, the Family Court and the State Supreme Courts (including the ACT and Northern Territory Supreme Courts) with the civil jurisdiction of the Supreme Court of each Territory (excluding the ACT and the Northern Territory).

The Commonwealth Act (subsection 4(4)) excludes from the operation of the cross-vesting scheme matters arising under the Commonwealth *Conciliation and Arbitration Act 1904* and sections 45D and 45E of the Commonwealth *Trade Practices Act 1974*.

Clause 5: Transfer of proceedings

Under sub-clause 5(1), where proceedings are pending in the Supreme Court and the Federal Court or the Family Court (the latter two courts being federal courts) has jurisdiction with respect to any of the matters in the proceedings, the Supreme Court is required to transfer the whole proceeding to the relevant federal court if it appears to the Supreme Court that—

- (a) the proceeding arises out of, or is related to, another proceeding in a federal court and it is more appropriate that the proceeding be determined by that court; or

(b) the relevant federal court is the more appropriate court, having regard to:

- (i) whether, in the opinion of the Supreme Court, the proceeding, apart from the cross-vesting legislation, would have been incapable of being wholly or substantially instituted in the Supreme Court and capable of being wholly or substantially instituted in the relevant federal court;
- (ii) the extent to which, in the opinion of the Supreme Court, the matters in the proceeding are matters arising under, or involving questions as to the application, interpretation or validity of, a law of the Commonwealth and are not within the jurisdiction of the Supreme Court apart from the cross-vesting legislation (this provision is designed to enable the Supreme Court to transfer to the relevant federal court all proceedings that, because of the nature and extent of their "Commonwealth" content, ought to have been instituted in that federal court); and
- (iii) the interests of justice; or

(c) it is otherwise in the interests of justice that the proceeding be determined by the relevant federal court.

The necessary federal jurisdiction is given by subsection 4(3) of the Commonwealth Act where it would not otherwise exist.

Corresponding provisions, with appropriate omissions and modifications, are made by other provisions in clause 5 concerning the transfer of proceedings-

- from the Supreme Court to the Supreme Court of another State or Territory (sub-clause 5(2));
- from the Supreme Court of another State or Territory to the Supreme Court (sub-clause 5(3));

- from the Federal Court or the Family Court to the Supreme Court (sub-clause 5(4)); and
- from the Federal Court to the Family Court or vice versa (sub-clause 5(5)).

Sub-clause 5(6) provides for the transfer of related proceedings so that all the related proceedings can be heard and determined in the one court. The provision is needed because proceedings related to proceedings transferred under sub-clauses 5(1) to 5(5) inclusive might not themselves satisfy the criteria for transfer under those sub-clauses.

Sub-clause 5(7) provides that a proceeding may be transferred on the application of a party, of the court's own motion or on application by an Attorney-General.

Sub-clause 5(8) provides for barristers and solicitors involved in transferred proceedings to have the same entitlement to practise in relation to those proceedings as if they were proceedings in a federal court exercising federal jurisdiction (Cf. *Commonwealth Judiciary Act 1903*, s. 55B). The right to practise also extends to any other proceeding that arises out of or is related to the transferred proceeding and that is to be heard together with the transferred proceeding.

Clause 6: Special federal matters

"Special federal matter" is defined in sub-clause 3(1) and includes matters of special Commonwealth concern, being matters that, apart from the cross-vesting scheme, are within the exclusive jurisdiction of the Federal Court.

Sub-clauses 6(1) and (3) require the Supreme Court to transfer proceedings involving special federal matters unless the court is satisfied that there are special reasons for the court to hear the matter in the particular circumstances of the case. The convenience of the parties is not a reason justifying the non-transfer of the proceedings.

Sub-clause 6(2) provides that where proceedings are to be transferred, those involving the seeking of leave for step-parent adoptions are to be transferred to the Family Court, the Family Court of Western Australia or the Supreme Court of the Northern Territory, as appropriate. All other proceedings involving special federal matters are to be transferred to the Federal Court.

Before making an order not to transfer proceedings, the Supreme Court, under sub-clause 6(4), must be satisfied that reasonable notice of the proceeding is given to the Attorneys-General of both the Commonwealth and the ACT to enable them to consider whether to put submissions to the court on the transfer issue. To comply with this requirement the Supreme Court may adjourn the proceedings (sub-clause 6(5)).

Sub-clause 6(6) provides that the Supreme Court in considering whether to transfer proceedings involving a special federal matter, must have regard to the general rule that special federal matters should be heard by the Federal Court or the courts referred to in connection with step-parent adoptions, whichever is appropriate. The submissions of an Attorney-General on the transfer issue must also be taken into account.

Sub-clause 6(7) enables the Supreme Court to grant urgent interlocutory relief notwithstanding non-compliance with Clause 6.

Sub-clause 6(8) provides that if the Supreme Court proceeds through inadvertence to determine a proceeding involving a special federal matter, its decision in the proceeding is not invalidated by the failure to comply with clause 6.

Clause 7: Institution and hearing of appeals

But for clause 7, the full cross-vesting of federal, State and Territory jurisdictions between the relevant courts at the appellate levels as well as at first instance could, for example, result in an appeal being taken from a single judge of a State Supreme Court to the Full Federal Court in matters that, apart from the cross-vesting legislation, would have been entirely outside the jurisdiction of the Federal Court.

Similarly, the full cross-vesting could result in appeals being taken from a single judge of the Federal Court or Family Court to the Full Supreme Court of a State. Cross-vesting could also give rise to appeals from the Federal Court to the Full Family Court. Clause 7 is designed to prevent the cross-vesting from giving rise to any such appeals except where a matter in an appeal from a single judge of the Supreme Court is a matter arising under a Commonwealth Act specified in the Schedule to the Commonwealth Act. In such a case, the whole appeal will lie only to the Full Federal Court. The scheduled Acts are Acts, such as the *Bankruptcy Act 1966* and the *Commonwealth Electoral Act 1918*, under which the Full Federal Court now has exclusive appellate jurisdiction.

Clause 8: Orders by Supreme Court

Where a proceeding is pending in a court of the ACT other than the Supreme Court, or pending in a tribunal of the ACT, it may be appropriate to have it determined together with a proceeding that is pending in the Federal Court or the Family Court or the Supreme Court of another State or Territory or a State Family Court. Clause 8 of the Bill enables the Supreme Court to remove the proceeding from the other court or tribunal into the Supreme Court so that it can then be transferred to the Federal Court or other relevant court, or so that it may be determined in the Supreme Court itself together with proceedings transferred to it from the Federal Court or other relevant court.

Clause 9: Exercise of jurisdiction pursuant to cross-vesting laws

The cross-vesting scheme is intended to operate as a complementary Commonwealth, State and Territory exercise and requires for its operation both Commonwealth, State and Territory legislation. Clause 9 of the Bill confirms that the Supreme Court may exercise cross-vested jurisdiction and hear and determine proceedings transferred under any law relating to cross-vesting of jurisdiction. The Commonwealth Act also provides that nothing in the Commonwealth Act is intended to override or limit the operation of State or Territory law relating to cross-vesting of jurisdiction.

Clause 10: Transfer of matters arising under Division 1 or 1A of Part V of the Trade Practices Act

Occasionally cases involving relatively small claims under Divisions 1 and 1A of Part V of the Commonwealth *Trade Practices Act 1974* (consumer protection matters) have been brought in the Federal Court, but would more appropriately be determined by a District or County Court or other inferior court of a State or Territory. With the enactment of the cross-vesting legislation such cases will also be able to be brought in State and Territory Supreme Courts. Furthermore, there are occasions when such claims would more appropriately be heard together with claims in some other court. Accordingly, clause 10 of the Bill provides for the transfer of proceedings from a specified court to a court of a State or Territory other than the Supreme Court.

The Commonwealth *Trade Practices Act 1974* vests State and Territory courts with jurisdiction concurrent with that of the Federal Court in relation to civil proceedings under Divisions 1 and 1A of Part V of the *Trade Practices Act* (but not including civil proceedings initiated by the Commonwealth Minister or the Trade Practices Commission). This enables such proceedings to be commenced in an appropriate State or Territory Court.

Clause 11: Conduct of proceedings

Clause 11 deals with the questions of which laws, and which rules of evidence and procedure, should be applied in a case involving cross-vested jurisdiction.

Sub-clause 11(1)(a) provides that where a court will be, or will be likely to be, exercising cross-vested jurisdiction the court shall apply the law in force in the State or Territory in which the court is sitting (including the choice of law rules of that State or Territory). Sub-clause 11(1)(a) is subject to the requirement that where the matter for determination is a right of action arising under a written law of another State or Territory, the court shall apply the written and unwritten law of that other State or Territory (sub-clause 11(1)(b)). Both sub-clause 11(1)(a) and sub-clause 11(1)(b) are subject to sub-clause 11(1)(c) which enables the court to apply such rules of evidence and procedure as the court considers appropriate in the circumstances, being rules that are applied in a superior court in Australia or in an external Territory.

Sub-clause 11(2) relates to the operation of sub-clause 11(1)(a) in the case of a cross-vested action in the Federal Court or Family Court. Since the Federal Court and the Family Court can conduct hearings in more than one State or Territory, it is necessary to fix one place for the purposes of sub-clause 11(1)(a). The provision fixes on the first State or Territory in which a matter for determination in the proceeding was commenced in the federal court or transferred to the federal court. This will in practice require counsel making application for transfer of a proceeding to the Federal Court or Family Court to specify the State or Territory to which he or she wishes the proceeding to be transferred.

Sub-clause 11(3) provides that where a proceeding is transferred the court receiving those proceedings, the transferee court, is to deal with them as if steps taken in relation to those proceedings in the court transferring the proceedings had instead been taken in the transferee court.

Clause 12: Orders as to costs

Clause 12 provides for the making of orders as to costs in relation to transferred proceedings.

Clause 13: Limitation on appeals

Clause 13 provides that no appeal lies from a decision under the cross-vesting legislation as to whether a proceeding should be transferred to or removed from a court, or as to which rules of evidence or procedure are to be applied in transferred proceedings.

Clause 14: Enforcement and effect of judgments

Clause 14 provides that a judgment of a federal court given in the exercise of any State or Territory jurisdiction may be enforced by the relevant federal court in the ACT as if it were a judgment given entirely in federal jurisdiction and that any judgment of the Supreme Court given in the exercise of cross-vested State or Territory jurisdiction is enforceable in the ACT as if it were a judgment in the exercise of the Supreme Court's own non-cross-vested ACT jurisdiction.

Clause 14 also provides that a thing done by a State or Territory court in the exercise of cross-vested jurisdiction has the same effect for the purposes of any ACT laws (other than laws concerning the enforcement of judgments) as if done by the relevant State or Territory court in the exercise of its corresponding non-cross-vested jurisdiction.

Clause 15: Suspension or cessation of operation of Act

Sub-clauses 15(1) and (2) provide that the Executive, after at least 6 months notice to the Commonwealth and each State and the Northern Territory, may by notice in the *Gazette* suspend the operation of the ACT Act. Sub-clause 15(3) provides for the revocation of any such notice.

Sub-clause 15(4) provides for the Act to cease to be in force, on a day (at any time after the commencement of the Act) specified in a notice in the *Gazette*, if the Executive is satisfied that any of the cross-vesting legislation is ineffective to confer jurisdiction on the relevant courts.

Sub-clause 15(5) provides for the Act to cease to be in force in relation to the Commonwealth, a State or Territory, on a day specified in a notice in the *Gazette*, if the Executive is satisfied that the Commonwealth's, State's or Territory's cross-vesting legislation has been repealed, rendered inoperative, suspended or altered in a substantial manner. Sub-clause 15(6) empowers the Executive to "revive" the Act if the Executive is satisfied that a substantially corresponding Act of the Commonwealth, State or Territory is again in force.