

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA
HOUSE OF REPRESENTATIVES

A.C.T. SUPREME COURT (TRANSFER) BILL 1992

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
The Hon. Michael Duffy MP)



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OUTLINE

The Australian Capital Territory Supreme Court (Transfer) Bill 1992 (the Bill) provides for the transfer of the Australian Capital Territory Supreme Court to the Australian Capital Territory Government on 1 July 1992. Under the provisions of the *Australian Capital Territory (Self-Government) Act 1988* (the Self-Government Act), the Assembly is to have power to legislate in relation to the establishment of courts from that date.

2. The Bill provides for the amendment of the *Australian Capital Territory (Self-Government) Act 1988*, the *Australian Capital Territory Self-Government (Consequential Provisions) Act 1988*, the *Australian Capital Territory Supreme Court Act 1933*, the *Federal Court of Australia Act 1976*, the *Judges (Long Leave Payments) Act 1979* and the *Judges' Pensions Act 1968*.

FINANCIAL IMPACT

3. The Bill will have no financial impact on Commonwealth expenditure.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1: Short Title

4. This clause provides for the short title of the Act. The short title is *Australian Capital Territory Supreme Court (Transfer) Act 1992*.

Clause 2: Commencement

5. The Act commences on 1 July 1992.

PART 2: AMENDMENTS TO THE AUSTRALIAN CAPITAL
TERRITORY (SELF-GOVERNMENT) ACT 1988**Clause 3: Principal Act**

6. In Part 2, the Principal Act, which is amended by this Part, is the *Australian Capital Territory (Self-Government) Act 1988*, (the Self-Government Act).

Clause 4: Definitions

7. This clause defines words and expressions used in the Act. The principal definitions are:

‘Attorney-General of the Territory’ means the Territory Minister who is responsible for the administration of justice in the Territory;

‘judicial commission’ means a body or authority established by the Assembly, having the function of investigating and reporting to the Assembly on allegations or complaints

concerning the conduct or physical or mental capacity of a judicial officer.

- 'judicial officer' means, the Chief Justice of the Supreme Court, a Judge of the Supreme Court but not an additional judge, the Master, the Chief Magistrate, Magistrates (not including Special Magistrates) and any other judicial office holder specified in an enactment relating to the establishment of a judicial commission for the Territory;
- 'Supreme Court' means the the Supreme Court which exists at the time of transfer and which continues to exist after 1 July 1991.

Clause 5: Power of Assembly to make laws

8. Section 22 of the Self-Government Act gives the Assembly power to make laws for the peace, order and good government of the Territory. Section 22 is amended by this clause to provide that the legislative power of the Assembly is subject to Part VA, which deals with the Judiciary.

Clause 6: Matters excluded from power to make laws

9. Section 23 of the Self-Government Act lists the matters in relation to which which the Assembly is excluded from making laws. The section is amended by deleting paragraphs 23(1)(b) and (f) and subsections 23(3) and (4), to provide that the Assembly has power to make laws with respect to:

- the establishment of courts; and
- the admission of persons to practice as legal practitioners and the regulation of persons so admitted.

10. The deletion of paragraph 23(1)(b) and subsections 23(3) and (4) is made because the amendments in this Bill achieve the transfer of legislative power in respect of courts by a different means - contained in new Part VA.

11. The Assembly already has power to legislate in relation to the legal profession because regulations (SR 1989 No 87) for the purposes of subsection 23(2) of the Act have been made in relation to that subject. The deletion of paragraph 23(1)(f) is therefore a drafting amendment.

Clause 7: Certain laws converted into enactments

12. Section 34 of the Self-Government Act provides that certain Commonwealth Acts do not become ACT enactments until 1 July 1992, or earlier if regulations are made. Subsection 34(3) is amended by this clause to confirm that the Acts do not become enactments until 1 July 1992. The amendment of subsection 34(3) is a drafting amendment.

Clause 8: Part VA-THE JUDICIARY

13. New Part VA provides for the Judiciary of the ACT. The provisions of the new Part deal with the powers of the ACT Assembly and the ACT Executive in relation to the jurisdiction and powers of the Australian Capital Territory Supreme Court; the retirement ages of Judges and the Master; the establishment of a Judicial Commission; the removal of a judicial officer from office; and the remuneration of judicial officers.

New Section 48A: Jurisdiction and powers of the Supreme Court

14. New subsection 48A(1) provides that the Supreme Court of the Australian Capital Territory is to have all original and appellate jurisdiction that is necessary for the administration of justice in the Territory.

15. New subsection 48A(2) provides that further jurisdiction may be conferred on the Supreme Court by a Commonwealth Act or an ACT enactment.

16. New subsection 48A(3) provides that the Supreme Court is not obliged to exercise jurisdiction when that jurisdiction might be more properly exercised by a subordinate court established under a law of the Territory.

New Section 48B: Retirement age of Judges

17. After 1 July 1992 the Assembly will have power to make a law that establishes a retiring age for Judges or the Master that is different from that which now applies. This clause provides that such a law has no effect in relation to a Judge or the Master who was appointed before the commencement of the Act, unless the Judge or the Master consents to the different law applying to him or her, in writing.

New Section 48C: Judicial commission

18. This clause provides for the establishment of a judicial commission by the Assembly. A judicial commission shall be constituted by persons who are, or have been judges of a superior court of record of the Commonwealth or of a State or Territory (other than serving Justices of the High Court of Australia and the ACT Supreme Court), who are appointed by the Executive. The commission may be a standing commission or established *ad hoc*.

19. A judicial commission is to have the function of investigating and reporting to the Assembly on allegations or complaints concerning the conduct or capacity of:

- (a) a Supreme Court Judge, other than an additional judge;
- (b) the Master of the Supreme Court;
- (c) a magistrate;
- (d) any other specified judicial officer or member of a tribunal,

referred to it by the Attorney-General and the Assembly.

New Section 48D: Removal of a judicial officer from office

20. New section 48D provides the grounds for removal of an ACT judicial officer, and requires that the removal procedure involve the making of findings of fact by a judicial commission and the ACT Assembly.

21. New paragraph 48D(a) requires that ACT legislation relating to the removal of a judge, magistrate or other judicial officer must provide that a person may only be removed from office if:

- (a) a judicial commission, appointed by the Executive to examine a complaint concerning a judicial officer, has submitted to the Territory Attorney-General a report that:
 - (i) sets out the facts found by the commission in relation to the subject matter of the allegation or complaint (paragraph 48D(a)(i)(A)); and
 - (ii) states that, in the commission's opinion, the facts could amount to misbehaviour or incapacity warranting removal from office (paragraph 48D(a)(i)(B)); and
- (b) the ACT Assembly:
 - (i) has itself determined that the facts found by the judicial commission amount to the misbehaviour or incapacity identified by the commission (paragraph 48D(a)(ii)(A)); and
 - (ii) passes a motion requiring the Executive to remove the officer from office on the ground of that misbehaviour or incapacity (paragraph 48D(a)(iii)).

22. New subsection 48D(b) provides that a judicial officer, as defined, may only be removed by the Executive in writing.

Clause 9: Remuneration and allowances

23. Subclause 9(a) amends section 73 of the Self-Government Act, which provides for remuneration and allowances payable to the holders of certain ACT offices to be determined by the Commonwealth Remuneration Tribunal, to provide for the remuneration of the Chief Justice, the Judges, the Master, the Chief Magistrate and Magistrates of the Australian Capital Territory.

24. Subclause 9(b) amends subsection 73(2) of the Self-Government Act by making that section subject to new subsection 3A of the Self-Government Act and new section 29A(2) of the *Australian Capital Territory Self-Government (Consequential Provisions) Act 1988*. The effect of this provision is that the Remuneration Tribunal must determine entitlements for Judges that are no less favourable than those determined for Judges of the Federal Court of Australia and cannot diminish the remuneration of the Judges or magistrates.

25. New section 3A provides that remuneration of a Judge or magistrate is not to be diminished while the person holds office.

26. New subsection 29A(2) of the *ACT Self-Government (Consequential Provisions) Act 1988* provides that the Chief Justice and Judges (other than additional judges) continue to hold office on terms no less favourable than those of the Judges of the Federal Court of Australia.

PART 3-AMENDMENTS OF THE AUSTRALIAN CAPITAL TERRITORY SELF-GOVERNMENT (CONSEQUENTIAL PROVISIONS) ACT 1988

Clause 10: Principal Act

27. In Part 3, the Principal Act is the *Australian Capital Territory Self-Government (Consequential Provisions) Act 1988* (the Consequential Provisions Act).

Clause 11: Title

28. The title of the Consequential Provisions Act is amended to read "Australian Capital Territory Self-Government (Consequential Provisions) Act 1988 and certain amendments made to that Act."

Clause 12: Judicial Officers of the Supreme Court-savings

29. New section 29A(1) provides that the Chief Justice, a Judge (including an additional Judge) and the Master of the Supreme Court on

1 July 1992 continue to hold their office after 1 July 1992 notwithstanding the fact that from 1 July 1992 the Supreme Court Act is an ACT enactment. The provision removes any doubt that might exist as to continuity of office.

30. New section 29A(2) provides that the Chief Justice and Judges (other than additional judges) continue to hold office on terms no less favourable than those of the Judges of the Federal Court of Australia.

31. New section 29A(3) establishes the basis for determining the seniority of Judges. For the purposes of determining seniority or precedence, the date on which a Judge's commission took effect is to be taken to be the date on which that Judge's commission took effect before 1 July 1992. New subsection 7AA of the ACT Supreme Court Act 1933 establishes seniority. New subsection 7AA(1) provides that the Chief Justice is the senior Judge of the Court. New subsection 7AA(2) provides that the other Judges (including the the additional Judges) have seniority as between themselves:

- (a) according to the dates on which their commissions (whether issued by the Governor-General or the Australian Capital Territory Executive) took effect; or,
- (b) where the commissions of 2 or more of them took effect on the same date, according to the precedence assigned to them by their commissions.

32. The effect of the new section, and the subsequent repeal of subsection 7(1B) of the *Australian Capital Territory Supreme Court Act 1933*, is that the resident Judges of the Court, ie, those appointed under subsection 7(1) of the ACT Supreme Court Act, are not senior to the additional Judges merely by reason of being appointed as a resident Judge: see paragraph 45.

New section 29B Proceedings etc in the Supreme Court - savings

33. New section 29B provides that all proceedings pending in the Supreme Court established before 1 July 1992, and a judgment or order

entered or made before 1 July 1992, are to be continued on and after that date as if they were proceedings instituted in the Court existing under the enactment. This provision is inserted for the avoidance of doubt about the fact that the Supreme Court will continue to exist as a court established under the Supreme Court Act 1933, and is not reconstituted by the conversion of that Act to an enactment of the Australian Capital Territory.

PART 4 - OTHER AMENDMENTS ETC

Clause 13: Amendments of the Australian Capital Territory Supreme Court Act 1933

34. This clause provides that the Australian Capital Territory Supreme Court Act 1933 is to be amended as set out in Schedule 1. Details are provided in paragraphs 35 to 39 and 40 to 80.

Clause 14: Renumbering of the *Australian Capital Territory Supreme Court Act 1933*

35. Subclause 14(1) provides that the amended Act means the *Australian Capital Territory Supreme Court Act 1933*, (the Supreme Court Act) as amended by this Act.

36. Subclauses 14(2),(3) and (4) provide for the renumbering of the amended Act in consecutive Arabic numerals.

Clause 15: Other consequential amendments

37. The *Federal Court of Australia Act 1976*, the *Judges (Long Leave Payments) Act 1979*, and the *Judges' Pensions Act 1968* are amended as set out in Schedule 2. Details are provided in paragraphs 82 to 84.

Clause 16: Cessation of certain modifications of Act

38. Clause 16 provides that modifications of the Supreme Court Act specified in Schedule 1 of the ACT Self-Government (Consequential Provisions) Regulations (SR 1989 Nos. 52 & 188), cease to have effect after 1 July 1992. These modifications provided for the addition of the word "enactment" in various sections of the Act, and also provided for the exercise of jurisdiction under subsections 46(4) and 48(2) of the *Administrative Appeals Tribunal Act 1989* of the Territory. Exercise of jurisdiction under the Administrative Appeals Tribunal Act is provided

for in amendments of the Supreme Court Act: see paragraphs 54 and 55.

Clause 17: Repeal of Ordinance

39. The *Sheriff Ordinance 1934* provided for the appointment of persons to assist the Sheriff. The ordinance is redundant, as appointment of officers to assist the Sheriff is provided in new subsection 37B of the Supreme Court Act. (See clauses 76 to 78).

SCHEDULE 1

AMENDMENTS OF THE AUSTRALIAN CAPITAL TERRITORY
SUPREME COURT ACT 1933**Section 1**

40. 'Australian Capital Territory' is omitted from section 1 of the Act. The short title of the Act will be 'The Supreme Court Act 1933'.

Section 3

41. Section 3, the commencement provision, is repealed.

Section 5

42. A new definition, of 'President', is inserted in section 5. 'President' means the President of the Australian Capital Territory Administrative Appeals Tribunal, who is appointed under the *Administrative Appeals Tribunals Act 1989* of the Territory.

Subsection 7(1)

43. Subsection 7(1) is amended to provide that the Chief Justice and other Judges of the Court are to be appointed by the Australian Capital Territory Executive, rather than by the Governor-General.

Subsection 7(1A)

44. Subsection 7(1A) is amended to provide that a person shall not be appointed Chief Justice or a Judge of the Court if he or she has attained the age of 70 years and a person shall not be so appointed unless he or she is or has been a Judge of a court created by the Commonwealth Parliament or of a court of a State or Territory or has been enrolled as a legal practitioner of the High Court or of the Supreme Court of a State or Territory for not less than 5 years. The effect of the amendment is that Judges or former Judges of Territory courts may be appointed to the

Supreme Court. Judges of federal or State courts may be appointed under the existing provisions.

Subsection 7(1B)

45. Section 7(1B), providing for the seniority of the Chief Justice and the other Judges, is omitted. The former subsection 7(1B) provided that the resident Judges, ie those appointed under subsection 7(1) of the Supreme Court Act, were senior to the additional Judges. New section 7AA provides that seniority and precedence is to be determined as between both the sitting Judges and the additional Judges, according to their dates of appointment: see paragraphs 31 and 32, 47 and 51 and 52.

Subsection 7(2)

46. Subsection 7(2) is amended to provide that the Executive may appoint as additional judges of the Court persons who are Judges of another Court created by the Commonwealth Parliament or of a superior court of record of a State or Territory. This provision has an effect similar to the amendment of subsection 7(1) which is referred to in paragraph 43.

Subsection 7(3)

47. Subsection 7(3), providing for seniority of Judges, is omitted. The former subsection 7(3) provided that the additional Judges had seniority among themselves according to their dates of appointment. New section 7AA provides that seniority and precedence is determined as between both the resident Judges and the additional Judges according to their dates of appointment and, accordingly, subsection 7(3) is redundant.

Subsection 7(5)

48. New subsection 7(5) provides that an additional judge ceases to hold office if he or she no longer holds office as a judge (other than an additional judge) of court created by the Commonwealth Parliament or

of a superior court of record of a State or Territory; ie, if he or she ceases to hold a primary judicial appointment.

Subsection 7(6)

49. Subsection 7(6) is amended to provide that a Judge may be removed from office by the Executive on an address from the Assembly praying for his or her removal on the ground of proved misbehaviour or incapacity, but shall not otherwise be removed from office. The requirements for the procedure for removal are provided in new section 48D of the *Australian Capital Territory (Self-Government) Act 1988*, which provides for removal by the ACT Executive, but only at the request, by resolution, of the ACT Assembly acting on a report of a Judicial Commission, in which the Judicial Commission has concluded that the behaviour or physical or mental capacity of the judicial officer or member of the tribunal concerned could amount to proved misbehaviour or incapacity warranting removal from office. See clauses 18 to 22.

Subsection 7(7)

50. Subsection 7(7) is amended to provide that a Judge may, by writing under his hand delivered to the ACT Attorney-General, rather than the Governor-General, resign his office.

New Section 7AA: Seniority of Judges

51. Section 7AA is repealed and replaced by a new provision. New subsection 7AA(1) provides that the Chief Justice is the senior Judge of the Court.

52. New subsection 7AA(2) provides that the other Judges (including the additional Judges) have seniority as between themselves:

- (a) according to the dates on which their commissions (whether issued by the Governor-General or the Australian Capital Territory Executive) took effect; or,

- (b) where the commissions of 2 or more of them took effect on the same date, according to the precedence assigned to them by their commissions.

Subsection 8(1)

53. After section 8AA, new section 8AABA is inserted.

Exercise of jurisdiction under subsections 46(4) and 48(2) of the *Administrative Appeals Tribunal Act 1989* of the Territory

54. New subsection 8AABA provides for the Supreme Court to exercise jurisdiction in matter arising under the *Administrative Appeals Tribunal Act 1989* of the Territory. The provisions replace the repealed provisions of the ACT Self-Government (Consequential Provisions) Regulations (Amendment) (SR 1989 No 188): see paragraph 38.

55. New subsection 8AABA(1) (a) provides that the jurisdiction conferred by subsections 46(4) and 48(2) of the *Administrative Appeals Tribunal Act 1989* (ACT) may be exercised by the Court constituted by not less than 3 Judges.

56. New subsection 8AABA(1)(b) provides that the Supreme Court's jurisdiction must be exercised by a court of at least 3 Judges if,

- (i) the Tribunal's decision was given by the Tribunal constituted by a member who is a presidential member or a Judge, or
- (ii) after consulting the President of the ACT Administrative Appeals Tribunal, the Chief Justice considers that it is appropriate for the appeal from the decision to be heard and determined by the Court constituted by not less than 3 Judges.

Section 8AC

55. After section 8AA, new section 8AABA is inserted.

Section 8A

56. Section 8A is amended to provide that a resident Judge of the Court may accept appointment to another judicial office established under a law of the Commonwealth, a State or another Territory.

57. New subsection 8A(2) provides that the holding of another office is to be with the written approval of the ACT Executive.

58. New subsection 8A(3) provides that the ACT Executive shall consult with the Chief Justice about the proposed appointment.

59. New subsection 8A(4) excludes an additional Judge from the provisions of subsection 8A(2), because his or her position as additional Judge is secondary to his or her position as a member of another court.

Subsection 8B(1)

60. New subsection 8B(1) provides that the Chief Justice and the other Judges are to receive salary and allowances that are to be determined by the Remuneration Tribunal under section 73 of the *Australian Capital Territory (Self-Government) Act 1988*.

Subsection 8B(2)

61. Subsection 8B(2) provides that the salary and annual allowance to which a Judge is entitled accrue from day to day and are payable monthly. The amendment made by omitting the words 'under this section' is for drafting purposes only.

Subsection 9(1)

62. Subsection 9(1) is amended to provide that the Chief Justice may determine, by notice in the Gazette, where and when the Court may sit.

Section 10

63. Section 10, relating to the taking of an oath or affirmation of office by a Judge of the Court, is amended to by omitting 'Governor-General'. The new section provides that a Judge shall take an oath or affirmation before another Judge of the Supreme Court, a Justice of the High Court or a Judge of the Federal Court of Australia.

Jurisdiction and powers of the Supreme Court

64. Section 11 is repealed and replaced. The effect of new subsection 11(1)(a) is to confer a general jurisdiction to administer justice in the Territory on the Supreme Court in respect of the exercise of its jurisdiction subject to any Act or law of the Territory.

65. New subsection 11(2) provides that, unless required to do so by a Commonwealth Act or a law of the Territory, the Court is not bound to exercise its powers where it has concurrent jurisdiction with another court or tribunal created by an enactment of the Assembly.

Subsection 28(1)

66. Section 28(1) is amended to provide that the resident Judges may make Rules of Court not inconsistent with the Supreme Court Act or any other Act, and not inconsistent with regulations under the Supreme Court Act or any other Act or with any ordinance or enactment.

Subsection 28(3)

67. Subsection 28(3) is omitted so that sections 48, 49 and 50 of the *Commonwealth Acts Interpretation Act 1901* no longer apply in relation to Rules of Court of the Australian Capital Territory Supreme Court.

The *Interpretation Act 1967* (ACT) will apply to the Supreme Court Act from 1 July 1992.

Subsection 32(1)

68. Subsection 32(1) is amended to provide that the Master shall be appointed by the Executive rather than the Governor-General.

Subsection 33B

69. Subsection 33B, providing for the remuneration of the Master under the *Remuneration Tribunals Act 1973*, is repealed. The terms and conditions of the Master are provided for by proposed amendments of section 73 of the Self-Government Act (see clauses 23 - 26) and new section 33F of the Supreme Court Act (see clauses 72 to 74).

Section 33C

70. Section 33C is amended to provide that the Master may resign by writing delivered to the Executive rather than the Governor-General.

Section 33E

71. Section 33E, relating to terms and conditions of the Master, is repealed. Terms and conditions of the Master are provided for by proposed amendments of section 73 of the Self-Government Act (see clauses 23 - 26) and new section 33F of the Supreme Court Act (see clauses 72 to 74).

Subsection 33F(1)

72. Subsection 33F(1) is amended to provide that the Executive, rather than the Governor-General, may appoint a person who is eligible to be appointed as Master of the Supreme Court.

Subsection 33F(4)

73. Subsection 33F(4) is amended to provide that a person acting as Master has all the powers and duties of the Master, and the laws of the Territory (rather than the laws of the Commonwealth and the Territory) apply in relation to the person as if the person were the Master.

Subsection 33F(5)

74. Subsection 33F(5) is amended to provide that the Executive, rather than a Commonwealth Minister, may determine the terms and conditions of appointment, including remuneration and allowances, of a person acting as Master.

Oath or affirmation of office

75. New subsection 35AA provides for the Registrar to take an oath or affirmation of office before undertaking the duties of the office. The form of the oath is set out in the subsection.

Appointment of officers to assist the Sheriff

76. New subsection 37B(1) provides that the ACT Attorney-General may appoint persons to assist the Sheriff in his duties. The *Sheriff Ordinance 1934* previously provided that the Attorney-General of the Commonwealth could appoint persons to assist the Sheriff. The ordinance is repealed by this Bill (see clause 39) and appointment provisions are inserted in the Supreme Court Act.

77. New subsection 37B(2) provides that an act done by such a person is taken to be an act done by the Sheriff and is valid and effectual as if done by the Sheriff.

78. New subsection 37B(3) provides that the person so appointed may exercise all powers and has the same rights and privileges as the Sheriff.

Section 50

79. Section 50 provides that the forms of oath used in proceedings in the Supreme Court shall be the same, or nearly, as those which are used in the Supreme Court of New South Wales. Subsection (2) of that section provides that a person who is entitled to make an affirmation instead of taking an oath under a law of New South Wales, may do so in the Supreme Court. Such an affirmation shall be in accordance with the law of New South Wales.

Subsections 53(3A) and 53(7)

80. Subsections 53(3A) and 53(7), providing for the Commonwealth Director of Public Prosecutions and Commonwealth Special Prosecutor to prosecute by information in his or her own name in the ACT Supreme Court, are omitted.

Section 55

81. New section 55 provides that a Judge, or if three or more Judges are sitting together for the purpose of exercising jurisdiction of the Court that is exercisable by not less than three Judges, those Judges, shall have authority to hold to security of the peace and for good behaviour in matters arising under the laws of the Territory. The section is amended to reflect the nature of the power as being a power of the Territory, rather than a power inherited from New South Wales.

SCHEDULE 2**OTHER CONSEQUENTIAL AMENDMENTS****Federal Court of Australia Act 1976**

82. New subsection 6(7) includes the ACT Supreme Court as a prescribed court for the purposes of subsection 6(6), because the court can no longer be described as a court created by the Commonwealth Parliament.

Judges (Long Leave Payments) Act 1979

83. New subsection 3(c) ensures that the Judges (Long Leave Payments) Act does not apply to any Judge of the Australian Capital Territory Supreme Court who is appointed after 1 July 1992.

Judges' Pensions Act 1968

84. New subsection 4(1)(ba) ensures that the Judges' Pensions Act does not apply to any Judge of the Australian Capital Territory Supreme Court who is appointed after 1 July 1992.

