

1983

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE SENATE

JUDICIARY AMENDMENT BILL (NO. 2) 1984

EXPLANATORY MEMORANDUM

(Circulated by authority of
Senator the Honourable Gareth Evans)

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OUTLINE

The purpose of this Bill is two-fold -

- (a) to relieve the High Court of some of its existing workload by -
 - (i) removing existing provisions for appeal as of right to the High Court from the Federal Court and from State Supreme Courts; and
 - (ii) empowering the Court to remit certain matters now within its exclusive jurisdiction to the Federal Court or to State or Territory courts; and
- (b) to provide for the establishment of the Australian Government Solicitor in place of the present office of Crown Solicitor.

Relieving the High Court of Workload

(a) Restriction of Right of Appeal

2. The Bill will remove the existing right of appeal to the High Court from State Full Courts in respect of appeals involving matters where the value of the subject matter is \$20,000 or more or involving the interpretation of the Constitution. The effect will be that no appeal will lie from a State Supreme Court to the High Court otherwise than by special leave of the High Court.

3. As the appeal provisions now stand, a matter involving \$20,000 or more can go on appeal as of right from a State Full Court to the High Court regardless of the merits of the

matter. Constitutional issues may also go as of right from State Full Courts to the High Court whether or not the constitutional point is of real substance. The purpose of the amendments is to allow the High Court the power to deal with only those matters of sufficient consequence, whether of law or fact, to justify consideration by the High Court as the ultimate court of appeal (as it will be when appeals to the Privy Council are eventually abolished).

(b) Remitter of Matters

4. The High Court is already empowered by section 44 of the Judiciary Act to remit to a federal court or to a State or Territory court matters that are pending in the High Court. This power of remitter extends, however, only to those matters where the court to which it is proposed to remit the matter already has jurisdiction with respect to the subject matter and the parties involved. Thus, section 44 does not empower remitter of matters in respect of which the High Court has exclusive jurisdiction by virtue of section 38 of the Judiciary Act.

5. It is now proposed that the High Court should be empowered to remit to the Federal Court of Australia, or to a State or Territory court, a matter commenced in the High Court by virtue of its exclusive jurisdiction under paragraphs (a) to (d) of section 38. These matters are as follows -

"(a) matters arising directly under any treaty;

(b) suits between States, or between persons suing or being sued on behalf of different States, or between a State and a person suing or being sued on behalf of another State;

- (c) suits by the Commonwealth, or any person suing on behalf of the Commonwealth, against a State, or any person being sued on behalf of a State;
- (d) suits by a State, or any person suing on behalf of a State, against the Commonwealth or any person being sued on behalf of the Commonwealth."

6. This provision would not empower the High Court to remit matters mentioned in paragraph 38(e) of the Judiciary Act, that is, matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a federal court, except in so far as the Federal Court already has jurisdiction in certain of these matters. Where the Federal Court already has jurisdiction, existing section 44 would empower remitter by the High Court.

Establishment of Australian Government Solicitor

7. The Bill provides, in place of the personal office of the Crown Solicitor, for the establishment of a statutory corporate entity to be known as the Australian Government Solicitor -

- . The Australian Government Solicitor will perform the function of solicitor for the Commonwealth and its authorities and certain other bodies and persons.
- . The Australian Government Solicitor will be, in effect, the "firm name" under which the legal services functions of the Attorney-General's Department, which would ordinarily be performed by a solicitor for his client, will be carried out.
- . The members of the "firm" will be, in effect, the Secretary to the Department and legally qualified officers of the Department authorised by the Secretary to

act in the name of the Australian Government Solicitor. The Secretary and the authorised officers will have the ordinary responsibility of a solicitor to the courts in respect of acts done in the name of the Australian Government Solicitor to ensure judicial control over those responsible for handling matters before the court.

- . The Australian Government Solicitor will not be a separate authority constituted by a person or body of persons, nor will it have its own staff.

NOTES ON CLAUSES

Clauses 1 and 2

8. Sections 1 and 2 are to come into effect on the date of Assent and the remaining provisions will come into effect on dates to be fixed by proclamation.

Clause 3: Appeals from Courts of States

9. This clause amends section 35 of the Judiciary Act 1903 to remove those provisions which provide for appeals as of right from State Full Courts in cases where the value of the subject matter is \$20,000 or more or involving the interpretation of the Constitution. Sub-clause (2) is a transitional provision, to provide that appeals instituted before the date of commencement of the section or instituted in respect of leave or special leave granted before that date are not affected by the amendment.

Clause 4: Matters in which the High Court has exclusive jurisdiction

10. This makes an amendment to section 38 of the Judiciary Act which is consequential upon the amendment made by clause 5 of the Bill.

Clause 5: Remittal of matters by High Court to other Courts

11. This clause amends section 44 of the Judiciary Act to empower the High Court to remit to the Federal Court of Australia or to any court of a State or Territory a matter referred to in paragraphs (a) to (d) of section 38 of the Act or any part of such a matter. The effect of proposed new sub-section 44(3) is to confer jurisdiction on the Court to which the matter is remitted and to provide that proceedings in the Court to which the matter or part of the matter is remitted are to be as directed by the High Court or, in the absence of a direction by the High Court, as directed by that Court.

Clause 6: Creation of Australian Government Solicitor

12. Section 55E of the Judiciary Act 1903 is repealed to make way for the establishment of the Australian Government Solicitor. A new section 55E is substituted dealing with the creation of the Australian Government Solicitor.

Proposed new Sub-sections 55E(1) and (2)

13. These two proposed sub-sections provide for the establishment of a statutory corporate entity to be known as the Australian Government Solicitor.

Proposed new Sub-section 55E(3)

14. The Australian Government Solicitor may act as solicitor for those persons and entities specified in sub-section 55E(3). The list of persons and entities so specified is the same as the list of persons and entities for whom the Crown Solicitor may act contained in the existing section 55E.

15. For the purpose of acting as solicitor for the persons and entities specified, the Australian Government Solicitor is

entitled to practise as a solicitor in any court and entitled to the same rights and privileges of a solicitor in each of the States or Territories. These entitlements will enable the Australian Government Solicitor to carry out the function of solicitor in the various States and Territories.

Proposed new Sub-section 55E(4)

16. Under the legislation the body corporate will act through the Secretary or those officers of the Attorney-General's Department who are authorised by the Secretary to act on behalf of the Australian Government Solicitor. Those officers who are authorised by the Secretary to act on behalf of the Australian Government Solicitor must be persons whose names are on either -

- (a) the roll of barristers and solicitors of the High Court;
or
- (b) the roll of barristers, of solicitors, of barristers and solicitors or of legal practitioners of the Supreme Court of a State or Territory.

Proposed new Sub-section 55E(5)

17. This proposed sub-section deems acts etc. done in the name of the Australian Government Solicitor by or under the direction or authority of the Secretary or an authorised officer to have been done by the Australian Government Solicitor. To continue the analogy of the firm of solicitors, the sub-section will ensure that the acts done by or under the direction or authority of the "partners" of the firm are attributed to the firm, i.e. the Australian Government Solicitor. The proposed sub-section needs to be read in conjunction with sub-sections (7) and (9).

Proposed new Sub-section 55E(6)

18. This proposed sub-section preserves the usual lines of authority in the Department. It ensures that authorised officers remain responsible to the Secretary and the Attorney-General for the acts done in the name of the Australian Government Solicitor.

19. Authorised officers will remain responsible for acts done by them in the name of the Australian Government Solicitor. However, they will be answerable for the consequences of doing those acts to the Secretary and, through him, to the Attorney-General.

Proposed new Sub-section 55E(7)

20. The sub-section deems acts done in the name of the Australian Government Solicitor by persons at the direction of the Secretary to have been done by the Secretary personally.

21. This preserves the Public Service Act authority of the Secretary over his officers and attributes the professional responsibility to him where he exercises that authority to give directions as to the handling of a matter.

Proposed new Sub-section 55E(8)

22. This proposed sub-section will enable the Secretary and the authorised officers to do all those things necessary and convenient for the purpose of acting in the name of the Australian Government Solicitor. The sub-section will allow the Secretary and authorised officers to act in the name of the Australian Government Solicitor whether or not the

Secretary and those officers hold current practising certificates.

Proposed new Sub-section 55E(9)

23. This proposed sub-section preserves judicial control over the Secretary and authorised officers in respect of acts or omissions done by them, or at their direction or under their authority, in the name of the Australian Government Solicitor. The duties and obligations cast upon the Secretary and authorised officers in respect of those acts or omissions are the same as the duties and obligations imposed upon persons in practice as a solicitor in the State or Territory concerned.

Proposed new Sub-section 55E(10)

24. This proposed sub-section requires all authorisations by the Secretary pursuant to sub-section (4) to be published in the Commonwealth Gazette.

Proposed new Sub-section 55E(11)

25. This proposed transitional provision provides that existing references to the Crown Solicitor or Deputy Crown Solicitor for the Commonwealth are, except for matters occurring before the commencement of the proposed legislation, to be construed as including a reference to the Australian Government Solicitor.

