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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AMENDMENTS TO THE

JURISDICTION OF COURTS (CROSS-VESTING) BILL 1987

EXPLANATORY MEMORANDUM

(Circulated by authority of the Honourable Lionel Bowen M.P.,
Deputy Prime Minister and Attorney-General)

Outline

The purpose of these amendments is to make some adjustments to the proposals on cross-vesting of jurisdiction between Federal, State and Territory courts contained in the Jurisdiction of Courts (Cross-Vesting) Bill 1986. The adjustments follow consultations between the Commonwealth and States about comments received from the Law Council of Australia since the Bill was introduced into the House of Representatives in October 1986.

2. The amendments are designed to clarify, or overcome possible ambiguities in, a number of the provisions in the Bill, namely those relating to:

- . transfer of proceedings
- . entitlement of barristers and solicitors to practise where proceedings have been transferred
- . exercise of jurisdiction pursuant to cross-vesting laws
- . the laws which are to govern the conduct of proceedings.

3. The adjustments have no financial implications.

NOTES ON AMENDMENTS

Amendments (1)-(13) : Clause 5 - Transfer of Proceedings

Clause 5 of the Bill allows for the transfer of proceedings between courts in certain specified situations. The present amendments are designed to make clear that the power to transfer is not limited to circumstances in which the "relevant proceeding" (the proceeding to be transferred) arises out of, or is related to, a proceeding already commenced in the court to which the "relevant proceeding" is to be transferred.

Amendment (14): Sub-clause 5(8) - Right to Practise

2. Sub-clause 5(8) of the Bill provides for barristers and solicitors involved in proceedings which have been transferred to another court to have the same entitlement to practise as if the proceedings were in a federal court exercising federal jurisdiction. The sub-clause 5(8) as presently drafted would not apply to a related proceeding which is pending in the court to which the transfer is made.

3. The amendment is to ensure that the right to practise extends to any other proceeding that is related to or arises out of the transferred proceeding and that is to be heard together with the transferred proceedings.

Amendment (15): Paragraph 9(2)(a) - Exercise of Jurisdiction

4. This amendment clarifies the wording in paragraph 9(2)(a) by providing that the Federal Court, Family Court or Territory Supreme Court may exercise cross-vested jurisdiction conferred by a State law, as well as that conferred by the Bill.

Amendment (16): Sub-clauses 11(1) and (2) - Conduct of Proceedings

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

6. The amendments modify the existing paragraph 11(1)(a) to ensure that the choice of law rules of the State or Territory in which the court is sitting will apply. Secondly, the amendments include the existing sub-clause 11(2) as new paragraph 11(1)(b), which is now expressed in a positive form. The clause has been restructured to make it clear that the new paragraph 11(1)(b) is subject to the rule about evidence and procedure (new paragraph 11(1)(c)).

7. The new 11(1)(b) also incorporates an important further change to the Bill. The existing provision implicitly requires, in a case where a matter for determination in the proceeding arises under a written law of a State or Territory other than the one in which the proceeding is being heard, that the matter be determined in accordance with the law of that other State or Territory. The expression "matter arising under a written law" in the Bill is too wide. It might require a court to apply all the law of another jurisdiction to the exclusion of the law of the State or Territory where the court is sitting simply because a party raised a defence based on a statute of that other jurisdiction. The amendment narrows that expression so that the rule in paragraph 11(1)(a) is displaced only to the extent necessary to determine rights of action arising under the written law of another State or Territory. Apart from that situation, the question whether or not another jurisdiction's statutory defences would be taken into account would depend on the application of choice of law rules under 11(1)(a).

8. The new sub-clause 11(2) relates to the operation of paragraph 11(1)(a) in the case of a cross-vesting action in the Federal Court or Family Court. Since the Federal Court and the Family Court can for the purposes of determining any one matter conduct hearings in more than one State or Territory, it is necessary to fix one place for the purposes of paragraph 11(1)(a). The new provision fixes on the State or Territory in or to which any matter for determination in proceeding was first commenced or transferred. This will, of course, require counsel making applications 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.

