

Act No. 125

## JURISDICTION OF COURTS (CROSS-VESTING) BILL 1987

NEW SOUTH WALES



### EXPLANATORY NOTE

**(This Explanatory Note relates to this Bill as introduced into Parliament)**

1. The object of this Bill is to establish a system of cross-vesting of jurisdiction between federal, State and Territory courts.
2. The Bill is the result of extensive consultations between the Commonwealth and the States in the Standing Committee of Attorneys-General. The Bill will be complemented by the enactment in the Commonwealth and each State and the Northern Territory of reciprocal legislation. The Commonwealth Bill was introduced in the House of Representatives on 22 October 1986.
3. The essence of the cross-vesting scheme, as provided for in the Commonwealth Jurisdiction of Courts (Cross-vesting) Bill 1987 and the proposed complementary State legislation, is that State and Territory Supreme Courts will be 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 will be vested with the full jurisdiction of the State and Territory Supreme Courts.
4. The reasons for the proposed 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.

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5. The primary objective of the cross-vesting scheme is to overcome these problems by vesting the federal courts with State jurisdiction and by vesting State 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.

6. The Jurisdiction of Courts (Cross-vesting) Bill 1987 seeks to cross-vest jurisdiction in such a way that federal and State courts will, by and large, keep within their "proper" jurisdictional fields. To achieve this end, the Commonwealth Bill, this Bill and the proposed legislation of other States 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 will 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 will depend very much upon courts approaching the legislation in accordance with its general purpose and intention as indicated in the preamble to the Commonwealth and State legislation. Courts will need to be ruthless in the exercise of their transferral powers to ensure that litigants do not engage in "forum-shopping" by commencing proceedings in inappropriate courts.

7. Under the cross-vesting scheme, no court will need to decide whether any particular matter is truly within federal or State jurisdiction since in either 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 or Territory jurisdiction, the powers and duties will be conferred and imposed by the Commonwealth Act, and in so far as the matters are not within federal or Territory jurisdiction, the powers and duties will be conferred by complementary State legislation.

8. 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.

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*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 a day to be appointed by the Governor-in-Council.

*Clause 3: Interpretation*

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

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“Full Court” will, in its application to the Supreme Court of New South Wales, mean the Court of Appeal. For consistency with the complementary legislation of the Commonwealth and the other States, the expression “Full Court” is retained in the Bill.

“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);
- (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 special federal matters in those cases where the relevant Supreme Court would have had jurisdiction apart from the proposed Commonwealth Act.

“State” is defined to include the Northern Territory.

“Territory” is defined not to include the Northern Territory.

Clause 3 (2) provides that a reference in the Act, other than a reference in section 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 3 (3) provides that a reference to a Commonwealth Act is a reference to the Act as amended and in force for the time being.

*Clause 4: Vesting of additional jurisdiction of certain courts*

Clause 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 State matters.

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

The Commonwealth Bill invests State and Territory Supreme Courts with the civil jurisdiction of the Federal Court and Family Court that is not already invested in the Supreme Court and invests the Federal Court, the Family Court and the State Supreme Courts with the civil jurisdiction of the Supreme Court of each Territory.

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The Commonwealth Bill (clause 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 clause 5 (1), where proceedings are pending the Supreme Court of the State and the Federal Court or the Family Court (“the federal court”) has jurisdiction with respect to any of the matters in the proceedings, the Supreme Court is required to transfer the whole proceeding to the federal court if it appears to the Supreme Court that—

- (a) the proceeding arises out of, or is related to, another proceeding in the federal court and it is more appropriate that the proceeding be determined by that court; or
- (b) the 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 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 federal court all proceedings that, because of the nature and extent of their “Commonwealth” content, ought to have been instituted in that court); and
  - (iii) the interests of justice; or
- (c) it is otherwise in the interests of justice that the proceeding be determined by the federal court.

The necessary federal jurisdiction is given by clause 4 (3) of the Commonwealth Bill 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 State Supreme Court to the Supreme Court of another State or Territory (clause 5 (2));
- from the Supreme Court of another State or Territory to the State Supreme Court (clause 5 (3));
- from the Federal Court or the Family Court to the State Supreme Court (clause 5 (4)); and
- from the Federal Court to the Family Court or vice versa (clause 5 (5)).

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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 clause 5 (1)–(5) inclusive might not themselves satisfy the criteria for transfer under those subclauses.

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.

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 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.

Clause 6 provides for the compulsory transfer by the State Supreme Court to the Federal Court of any proceeding involving a special federal matter unless it appears to the Supreme Court that, by reason of the particular circumstances of the case, it is both inappropriate for the proceeding to be transferred and appropriate for the Supreme Court to determine the proceeding.

Where the State Supreme Court orders under clause 6 (1) that it should itself determine a proceeding involving a special federal matter, it is obliged by clause 6 (3) not to proceed further, except in urgent interlocutory matters (clause 6 (5)), until written notice has been given to the Commonwealth Attorney-General and a reasonable time has elapsed for the Attorney-General to consider whether a request should be made under clause 6 (6) for transfer to the Federal Court. If the Attorney-General makes such a request, the matter must be transferred to the Federal Court (clause 6 (6)). An adjournment may be ordered for these purposes (clause 6 (4)), and, under clause 6 (5) of the Commonwealth Bill, the Attorney-General of the Commonwealth may authorise payment by the Commonwealth of amounts in respect of costs arising out of such an adjournment. These provisions do not apply to appellate proceedings in the State Full Supreme Court if the court below has made an order under clause 6 (1) and the Attorney-General of the Commonwealth has not requested a transfer (clause 6 (8)). If the Supreme Court proceeds through inadvertence to determine a proceeding to which clause 6 (1) applies, its decision in the proceeding is not invalidated by the failure to comply with clause 6 (clause 6 (7)).

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*Clause 7: Institution and hearing of appeals*

But for clause 7, the full cross-vesting of federal and State jurisdiction 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 the 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 the 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 a State Supreme Court is a matter arising under a Commonwealth Act specified in the Schedule to the Commonwealth Bill. 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 1919, 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 State other than the Supreme Court, or pending in a tribunal of the State, 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 of a 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 and State exercise and requires for its operation both Commonwealth and State 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 Bill also provides that nothing in the Commonwealth Act is intended to override or limit the operation of State 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 the State other than the Supreme Court.

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The Trade Practices Act is being amended by the Commonwealth Jurisdiction of Courts (Miscellaneous Amendments) Act 1987 to vest State and Territory courts with jurisdiction concurrent with that of the Federal Court in relation to civil proceedings under Divisions I 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 will enable 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.

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). 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 (clause 11 (1) (b)). Both clause 11 (1) (a) and clause 11 (1) (b) are subject to 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.

Clause 11 (2) relates to the operation of 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 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.

*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 jurisdiction may be enforced by the federal court in the State 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 State as if it were a judgment in the exercise of the Supreme Court's own non-cross-vested State jurisdiction.

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

*Clause 15: Construction of Act to be subject to legislative power of State*

Clause 15 provides that the Act is to be read and construed so as not to exceed the legislative power of the State. The clause has a "savings" provision to ensure the validity of the Act to the extent that it is not in excess of the legislative power of the State. The Commonwealth Bill contains a corresponding "reading down" clause. The effect is that the Commonwealth and State Acts will operate in relation to their respective jurisdictions so that the combined operation of the Commonwealth and State legislation will enable courts to exercise jurisdiction without needing to decide definitively whether any particular matter is truly within federal, State or Territory jurisdiction.

*Clause 16: Suspension or cessation of operation of Act*

Clause 16 (1) and (2) of the Bill provide that the Governor-in-Council, after at least 6 months' notice to the Commonwealth and each other State, may by proclamation suspend the operation of the State Act from a day not earlier than 3 years after its commencement. Clause 16 (3) provides for the revocation of any such proclamation.

Clause 16 (4) of the Bill 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 proclamation, if the Governor-in-Council is satisfied that any of the cross-vesting legislation is ineffective to confer jurisdiction on the relevant courts.

Clause 16 (5) of the Bill provides for the Act to cease to be in force in relation to the Commonwealth or a State, on a day specified in a proclamation, if the Governor-in-Council is satisfied that the Commonwealth's or State's cross-vesting legislation has been repealed, rendered inoperative, suspended or altered in a substantial manner. Clause 16 (6) empowers the Governor-in-Council to "revive" the Act if the Governor-in-Council is satisfied that a substantially corresponding Act of the Commonwealth or other State is again in force.

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