JUDICIARY AMENDMENT BILL (NO.2) 1984

Date Introduced: 8 March 1984
House: Senate
Presented by: The Attorney-General, Senator the Hon. Gareth Evans, Q.C.

Short Digest of Bill

Purpose

The Bill deals with two distinct issues. It seeks to reduce the work-load of the High Court of Australia by abolishing appeals as of right and requiring that all appeals to that Court from the Federal Court and from State and Territory Courts shall be by special leave only. In a further attempt to alleviate the burden of trying lengthy issues of fact the Bill makes provision for the High Court to remit certain matters now within its exclusive jurisdiction to the Federal Court or to State or Territory courts.

The second purpose of the Bill is to provide for the establishment of the Australian Government Solicitor in place of the present office of Crown Solicitor.

Background

(i) Appeals as of Right

Section 73 of the Constitution confers an appellate jurisdiction on the High Court with such exceptions and subject to such regulations as the Parliament prescribes. The original Judiciary Act of 1903 provided for an appeal as of right from State Supreme Courts in respect of judgments the value of which amounted to three hundred pounds or more. This monetary test was progressively extended over the years until the last amendment in 1976 when it was increased from three thousand dollars to twenty thousand dollars. It has been contended that a financial test is not really the proper basis for determining whether there should be an appeal as of right to the High Court and in the absence of an appropriate alternative test the Government by this Bill
seeks to adopt an approach, stated by the Attorney-General in his Second Reading Speech as emanating from the Justices of the High Court, that all appeals to the High Court from the Federal Court and from State and Territory Courts should be by special leave only.

(ii) Remitter of Matters

Section 38 of the Judiciary Act 1903 currently confers upon the High Court exclusive jurisdiction in respect of matters arising directly under any treaty or in suits between the States or between the Commonwealth and a State or States. The section also confers exclusive jurisdiction in matters in which a writ of mandamus or prohibition is sought against an officer of the Commonwealth or a Federal Court (except to the extent that the Federal Court already has jurisdiction in certain matters).

(iii) The Australian Government Solicitor

Section 55E of the Judiciary Act 1903 details the persons and entities for whom the Commonwealth Crown Solicitor may act. As a result of a review of the structure and organisation of the Attorney-General's Department undertaken in 1983 the Government has decided to replace the personal office of the Crown Solicitor by a statutory corporate entity to be known as the Australian Government Solicitor.

Main Provisions

By Clause 2(2) it is provided that the substantive provisions of the legislation shall come into operation on a date to be fixed by Proclamation.

Clause 3(1) amends section 35 of the Principal Act by deleting the clauses relating to appeals as of right and leaving a truncated section whereby special leave is required in respect of all appeals from Courts of States. Clause 3(2) contains transitional provisions preserving appeals instituted prior to the date of commencement of the new section.

The provision in respect of the exclusive jurisdiction of the High Court contained in section 38 of the Principal Act is amended by Clause 4 of the Bill which provides that the section shall be subject to Section 44 of the Act.

Clause 5 amends section 44 of the Principal Act and adds new sub-sections (2) and (3) which enables the High
Court 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 Section 38, with the exception of matters in which a writ of mandamus of Prohibition is sought against an officer of the Commonwealth or a Federal Court. However, where the Federal Court already has jurisdiction in respect of these latter matters the existing Section 44 would empower remitter by the High Court. The provision for the conduct of the remitted action to be subject to any direction of the High Court is the same as that employed in the existing Section 44 in respect of remitted actions where there is concurrent jurisdiction.

The establishment of the Office of Australian Government Solicitor is provided for by clause 6 of the Bill which inserts a new section 55E in the Principal Act. Sub-clauses (1) and (2) provide for the establishment of a statutory corporate entity to be known as the Australian Government Solicitor. Sub-clause (3) specifies the persons and entities for whom the Australian Government Solicitor may act. These are identical with those persons and entities for whom the Crown Solicitor may act under the existing legislation.

The proposed new sub-section (4) to (10) inclusive of the new Section 55E deal with the intended administrative structure of the Australian Government Solicitor which is outlined in some detail in the Attorney-General's Second Reading Speech and also at pages 6-8 of the Explanatory Memorandum accompanying the Bill. The proposed new sub-section 55E(11) contains transitional provisions providing 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.

For further information, if required, contact:

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