RACIAL DISCRIMINATION AMENDMENT BILL 1983

Date Introduced: 25 May 1983
House: House of Representatives
Presented by: Hon. L.F. Bowen, M.P., Minister Representing the Attorney-General

Purpose

To preserve the operation of State racial discrimination legislation, following a recent High Court decision to the effect that the terms of Commonwealth racial discrimination legislation made state legislation inoperative.

Background

Section 109 of the Constitution provides that in cases of inconsistency between State and Commonwealth law, the Commonwealth law prevails and the State law is, to the extent of the consistency, invalid.

There are several possible tests for inconsistency, such as whether it is possible to simultaneously obey both laws. That test might imply that two taxing laws are not inconsistent because it is possible to pay both the State tax and the Commonwealth tax. An alternative test is whether the Commonwealth law is intended to cover the field, in which case State laws can have no operation in relation to that subject matter.

The case of Viskauskas v. Niland arose from an incident in a Kempsey hotel owned by the plaintiff, in which it was alleged three persons were refused service on the ground of their race. A complaint was lodged under provisions of the New South Wales Anti-Discrimination Act 1977. The proceedings were removed to the High Court on the question of validity of the State legislation.

The High Court in a joint judgment delivered by Gibb C.J., Mason, Murphy, Wilson and Brennan J.J. on 19 May 1983 held that the State Act was inconsistent, on grounds including that the Commonwealth racial anti-discrimination legislation was to operate equally in all the States and was expressed in terms of complete generality. With regard to
rational discrimination in the provision of goods and services, Commonwealth sanctions, though similar to the State sanctions, were not the same.

The decision has important consequences for legal proceedings instituted by the New South Wales authority and now in progress. The cases number over a hundred. The President of the NSW Anti-Discrimination Board, Ms. Carmel Niland, said that the decision had "the most devastating consequences for human rights in NSW" (Australian, 20 May 1983, p.3.)

The Bill would restore jurisdiction for cases under the NSW legislation to proceed.

**Main Provisions**

The Bill would commence on the date of Royal Assent (clause 2).

Clause 3 inserts section 6A in the Racial Discrimination Act 1975. The section applies to laws of a State or Territory which further the objects of the International Convention on the Elimination of all forms of Racial Discrimination.

Under subsection 6A(1), the Commonwealth Act is not intended, and is deemed never to have been intended to include or limit the operation of State or Territory laws capable of concurrent operation. The subsection may be aided by section 15AA of the Acts Interpretation Act 1901 which requires that an interpretation giving effect to the object of the Act be favoured.

The prospect of concurrent operation for the Commonwealth and State Acts motivates restriction of the Commonwealth Act's operation - with respect to proceedings or other action taken or in progress under State or Territory legislation, subsection 6A(2) prevents the Commonwealth Act being availed of.

With respect to acts or omissions constituting an offence under both the Commonwealth Act and State or Territory legislation, subsection 6A(3) provides that in the future, proceedings and conviction may ensue under either law.

For further information, if required, contact:

Law & Government Group

LEGISLATIVE RESEARCH SERVICE

27 May 1983