

JUDICIARY AMENDMENT BILL 1976 -
PROPOSED AMENDMENTS AND NEW CLAUSES

Notes on Proposed Amendments and New Clauses
(to be moved by the Attorney-General)

Amendment No. (1)

Proposed new clause 2A substitutes a new section 3A in the Principal Act, extending the whole of the provisions of the Principal Act to the Territories.

Proposed new clause 2B amends section 18 of the Principal Act by omitting the provision for a Judge of a State Supreme Court exercising federal jurisdiction to state a case or reserve a question for consideration by the Full Court of the High Court. This amendment is consistent with the other amendments made by the Judiciary Amendment Bill, removing appeals as of right from the High Court from single Judges of State Supreme Courts.

Proposed new clause 2C amends section 21 of the Principal Act, to provide that an application for leave or special leave to appeal to the High Court from another court may be dealt with by either the Full Court or a single Justice. At present, section 21 of the Judiciary Act applies only to applications for leave or special leave to appeal from State courts, and requires that these applications be heard and determined by a Full Court. Proposed new clause 2C would also permit applications for leave or special leave to be dealt with without an oral hearing.

Amendment No. (2)

The purpose of this amendment is to provide that there is no appeal as of right to the High Court on the question of quantum of damages for death or personal injury. Proposed new

sub-section 35(4) would have permitted an appeal as of right on quantum of damages if there were other grounds of appeal. The intention is that, whether or not there are other grounds of appeal entitling a person to appeal as of right from a State Full Court to the High Court, there is to be no appeal as of right on quantum of damages.

Amendment No. (3)

The purpose of the amendment of section 48 of the Principal Act, to be made by new clause 7A, is to extend the special appropriation contained in section 48 to the travelling allowances of the Justices of the High Court as well as to their salaries and annual allowances.

Amendments Nos. (4) and (5)

Clause 8 of the Judiciary Amendment Bill would give a barrister and solicitor entitled to practise in a federal court a right of audience in any State court exercising federal jurisdiction. The purpose of these amendments is to provide a means whereby a practitioner, appearing before a court of a State in which he is not admitted to practise under State law, can be dealt with in that State for breaches of discipline. The amendments would empower a State Supreme Court to establish a Register of Practitioners, on which a practitioner entitled to practise in a federal court would be entitled to have his name entered. That registration might be cancelled or suspended by the Supreme Court of the State concerned if it finds the practitioner guilty of misconduct.

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Amendment No. (6)

The purpose of the proposed new clauses to be added by this amendment is twofold -

- (a) The existing provisions of section 68 of the Judiciary Act, providing for the application of State laws to persons charged with Commonwealth offences and conferring jurisdiction on State courts with respect to such persons, are extended to apply Territory laws and extend the jurisdiction of Territory courts to offenders against Commonwealth laws in the Territories.
- (b) The provisions of section 56 of the Judiciary Act, conferring jurisdiction on State and Territory courts, to hear claims against the Commonwealth in contract or tort, and of section 68 are extended to cover matters arising or offences committed otherwise than in a State or Territory. The principal purpose of these amendments is to deal with matters arising or offences committed in the territorial sea.

Amendment No. (7)

The purpose of this amendment is to limit the application of proposed new section 78A, giving Commonwealth and State Attorneys-General the right to intervene in proceedings in the High Court, in a federal court, or State or Territory courts, to proceedings that relate to a matter arising under the Constitution or where a question of interpretation of the Constitution is involved. The provision in the Bill, that there may also be an

intervention in proceedings that relate to a matter in which a question of interpretation of the Constitution is involved or arises, has been criticised as too broad.

Amendment No. (8)

Proposed new section 78B, to be inserted by clause 10 of the Judiciary Amendment Bill, would require notice to be given to each Attorney-General where proceedings in a court other than the High Court relate to a matter arising under the Constitution or involving its interpretation. The purpose of this amendment is to limit the requirement to notify Attorneys-General to a requirement to give notice to the Commonwealth Attorney-General and, if the matter in question is pending in a State court or is pending in a federal court and was instituted in a State, to the Attorney-General of the State concerned.

Amendment No. (9)

The purpose of this amendment is to make it clear that -

- (a) sufficient notice under new section 78B is given to an Attorney-General if reasonable steps have been taken to bring the matter to his attention; and
- (b) notice is not required to be given to an Attorney-General if the Commonwealth or State concerned, or the Attorney-General concerned, is a party to the proceedings.

Amendment No. (10)

This makes a formal amendment to the Judiciary Act.

JUDICIARY ACT AMENDMENT BILL - FURTHER AMENDMENT
TO BE MOVED BY ATTORNEY-GENERAL

(9A) Clause 10, Page 6, at the end of proposed section 78B
add the following proposed sub-section:-

" (4) Nothing in sub-section (1) prevents a
court from proceeding without delay to hear and
determine proceedings, so far as they relate to the
grant of urgent relief of an interlocutory nature,
where the court thinks it necessary in the interests
of justice to do so.".

1976

HOUSE OF REPRESENTATIVES

JUDICIARY AMENDMENT BILL 1976

(Amendments to be moved by the Honourable L.F. Bowen)

- (1) (consequential on amendment No. 2)

Clause 3, page 2, line 30, omit "This section has effect", substitute "The foregoing provisions of this section have effect".

- (2) Clause 3, page 2, after sub-section (5) of proposed section 35 insert the following sub-sections:-

"(5A) Notwithstanding any other Act, an appeal may be brought as of right from a final judgment of a Full Court of the Supreme Court of a State where the ground of appeal, or one of the grounds of appeal, involves the interpretation of the Constitution.

'(5B) Where -

- (a) an appeal from a judgment purports to have been instituted by a party in accordance with sub-section (5A);

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(b) an appeal as of right from the judgment could not have been brought by that party in accordance with sub-section (3); and

(c) it appears to the High Court, at any time after the institution of the appeal, that no ground on which the appeal is brought requires the decision of a substantial question of interpretation of the Constitution,

the High Court may, without prejudice to any application for special leave of appeal, decline to hear the appeal further and strike out the appeal as incompetent, with such order as to costs as it thinks just."

1976

COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

JUDICIARY AMENDMENT BILL 1976

EXPLANATORY MEMORANDUM

(Circulated by the Attorney-General,
the Honourable R. J. Ellicott, Q.C., M.P.)

Judiciary Amendment Bill 1976Clause 1

Clause 1 provides for the short title for the Judiciary Bill and the citation of the principal Act, the Judiciary Act 1903-1973, as it will be amended by this Bill.

Clause 2

2. Clause 2 provides that clauses 1 and 2, clause 7 - which relates to the salaries of the Justices of the High Court - and clause 11 - which makes formal amendments - are to come into operation on assent. The remaining provisions of the Bill will come into operation on such dates as are fixed by proclamation.

Clause 3

3. This clause relates to the jurisdiction of the High Court to hear appeals from State Supreme Courts and from other State Courts exercising federal jurisdiction.

4. The appellate jurisdiction of the High Court is defined by section 73 of the Constitution. That section gives the High Court power inter alia to hear and determine appeals from -

- (a) any federal court
- (b) any State court exercising federal jurisdiction
- (c) a State Supreme Court.

Section 73 gives the Parliament power to make exceptions to the jurisdiction thus conferred on the High Court and also to make regulations to which the exercise of that appellate jurisdiction shall be subject. The purpose of the new section 35, to be inserted in the Judiciary Act by clause 3 of the Bill, is to make exceptions to and to provide for the regulation of the appellate

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jurisdiction conferred on the High Court by section 73 of the Constitution, so far as it relates to State Supreme Courts and to other State courts exercising federal jurisdiction.

5. The new section 35 deals with matters presently dealt with in section 35 and section 39 of the Judiciary Act. Section 35 of the Judiciary Act relates to appeals to the High Court from State Supreme Courts, whether exercising State jurisdiction or federal jurisdiction. Paragraphs (b) and (c) of section 39(2) of the Judiciary Act relate to appeals to the High Court from other State Courts exercising federal jurisdiction.

6. The scheme of present section 35(1) is as follows:-

- (a) an appeal as of right lies to the High Court from a final judgment of a State Supreme Court in certain cases. There are three kinds of cases referred to in paragraph (a) of section 35(1). The first two of these are defined in money terms. The amount of money or the value of the interest involved must be at least \$3,000. The third class relates to judgments that affect the status of any person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency.
- (b) in the case of an interlocutory judgment of a kind mentioned in sub-paragraph (a) above, an appeal lies to the High Court by leave of the High Court or of the Supreme Court.
- (c) the High Court may give special leave to appeal to the

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High Court from a State Supreme Court in any other matter.

- (d) there is a right of appeal to the High Court from any judgment of a State Supreme Court given or pronounced in the exercise of federal jurisdiction in a matter pending in the High Court. It is not clear to what matters this provision relates, but it would seem to relate at least to those matters specified in section 17 of the Judiciary Act, which confers jurisdiction on a State Supreme Court to hear and determine any applications that might be made to a Justice of the High Court sitting in Chambers in relation to any matter pending in the High Court.

7. With regard to appeals from other State courts exercising federal jurisdiction, section 39(2) of the Judiciary Act provides the following scheme:-

- (a) If an appeal lies from the court in question to the Supreme Court of the State, there is an appeal as of right from a decision of the court to the High Court.
- (b) The High Court may grant special leave to appeal from any other decision, notwithstanding that under the State law there may be no right of appeal from that decision.

8. The money value for the purposes of section 35 of the Judiciary Act was last fixed at \$3,000 in 1955. This means that there can be an appeal as of right from a State Supreme Court in matters of lesser importance, as, for example, where a State Supreme Court makes an award of damages of \$3,000.

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9. The provisions in section 39 for appeal from other State courts exercising federal jurisdiction also lead to cases coming to the High Court on appeal irrespective of the value of the subject-matter or the merits of any point of law involved in the appeal.

10. The proposed new section 35 will effect the following changes:-

- (a) The one section will deal with appeals from State Supreme Courts, whether exercising State jurisdiction or federal jurisdiction, and from other State courts exercising federal jurisdiction. This will involve the repeal of paragraph (b) of section 39(2) of the Judiciary Act - see clause 5 below.
- (b) There is to be no appeal as of right under the Judiciary Act from a State court other than the Full Court of the Supreme Court.
- (c) The money value by which an appeal as of right to the High Court from a Full Court of a State Supreme Court is defined is to be increased from \$3,000 to \$20,000.
- (d) There is to be no appeal as of right to the High Court, no matter what money value is involved, if the only ground of appeal is as to the quantum of damages in an action for damages for death or personal injury.
- (e) The present provision for an appeal as of right from a judgment of a State Supreme Court that affects the status of a person under the laws relating to aliens, marriage, divorce, bankruptcy or insolvency is to be repealed. These matters are adequately dealt with, so far as is required, under other legislation -

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- . the Family Law Act provides for appeals to the High Court in matters affecting status so far as marriage and divorce is concerned
- . the Bankruptcy Act provides for appeals to the High Court from judgments of State Supreme Courts affecting the status of a person under the bankruptcy law
- . there does not appear to be any case where a judgment of a Supreme Court may affect the status of a person under the laws relating to aliens - if such a case did arise, an appeal would still lie to the High Court if the Court gave special leave to appeal.
- (f) The provision for an appeal by leave of the Supreme Court or of the High Court from certain interlocutory judgments of a State Supreme Court is to be repealed.
- (g) The provision for appeals as of right from judgments of State Supreme Courts given or pronounced in the exercise of federal jurisdiction in a matter pending in the High Court is repealed.

11. In any case in which an appeal does not lie as of right to the High Court from a judgment of a State Supreme Court or of another court of a State exercising federal jurisdiction, an appeal will lie to the High Court if the High Court gives special leave to appeal. Special provisions relating to appeals in other legislation are to remain unaffected.

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12. Sub-section 35(1) provides that the jurisdiction of the High Court to hear and determine appeals from the Supreme Court of a State, or from another court of a State exercising federal jurisdiction, is subject to the exceptions and regulations prescribed by section 35 - this provision derives from section 73 of the Constitution (see paragraph 4 above).

13. Sub-section 35(2) makes a general provision that, except in accordance with the succeeding provisions of new section 35, an appeal does not lie to the High Court from a State Supreme Court or from any other State court exercising federal jurisdiction except by special leave of the High Court.

14. Sub-section 35(3) provides for a right of appeal to the High Court from a judgment of the Full Court of a State Supreme Court. The judgment concerned must be one which is given or pronounced -

- (a) for the sum of \$20,000 or upward; or
- (b) in any proceedings in which the matter in issue amounts to or is of the value of \$20,000 or upwards or which involve directly or indirectly any claim, demand or question to or respecting any property or any civil right amounting to or of the value of \$20,000 or upwards.

15. So far as the money value is concerned, the only change that would be made is an increase from \$3,000 to \$20,000. Apart from that, it is not intended to make any change in the existing criteria for deciding whether an appeal lies as of right.

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16. Sub-section 35(4) provides that there is to be no right of appeal to the High Court if all that is involved in the appeal is a question as to quantum of damages in an action for damages for death or personal injury. There will still be, of course, provision for an appeal by special leave on a question as to quantum of damages in these actions - see paragraph 13 above.

17. Sub-section 35(5) is intended to preserve the effect of particular provisions relating to appeals to the High Court in other legislation, for example, the provisions of the Bankruptcy Act providing for appeals to the High Court from State courts exercising bankruptcy jurisdiction.

18. Sub-section 35(6) is an interpretation provision, intended to ensure that a reference in the section to the Full Court of the Supreme Court of a State includes the case where, as in New South Wales, the Full Court of the Supreme Court sits as the Court of Appeal.

Sub-clause 3(2)

19. Sub-clause 3(2) is a transitional provision, providing that the amendments made by sub-clause (1) do not affect existing appeals or appeals instituted pursuant to leave or special leave granted before the date on which the new provisions come into effect.

Clause 4

20. This clause repeals section 38A of the Judiciary Act.

21. Section 38A gives the High Court jurisdiction exclusive of State Supreme Courts in matters involving questions as to the limits inter se of the constitutional powers of the Commonwealth and the States. The majority of constitutional issues that arise

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involve these so-called inter se questions. Section 38A, together with section 40A, forms a legislative scheme intended, when first enacted in 1907, to prevent appeals being taken directly to the Privy Council from State Supreme Courts in inter se matters. That purpose no longer requires the continued existence of these two sections, following the 1968 amendments to the Judiciary Act. Section 39(2)(a) of the Act now prohibits appeals to the Privy Council from State courts exercising federal jurisdiction.

Clause 5

22. Clause 5 provides for the omission of paragraph (b) of section 39(2) of the Judiciary Act. Paragraph (b) gives a right of appeal to the High Court from a decision of a State court, other than a State Supreme Court, exercising federal jurisdiction if an appeal lies from that decision to the State Supreme Court. This right of appeal is to be abolished - see paragraph 10 above.

Clause 6

23. Clause 6 provides for the repeal of Part VII of the Judiciary Act and the substitution of a new Part VII. The present Part VII provides for the following matters:-

- (a) Removal of proceedings involving constitutional questions from State Courts into the High Court - section 40.
- (b) Automatic removal of proceedings involving inter se questions from State Courts into the High Court - section 40A.

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- (c) The conduct of proceedings that have been removed into the High Court - section 41.
 - (d) The remitting to the State Court in question of any proceedings removed into the High Court and found not to involve a constitutional matter - section 42.
 - (e) The procedure for removal of a matter into the High Court - section 43.
 - (f) The effect of orders and undertakings made in removed proceedings before the removal took place - section 44.
 - (g) The remitter for trial before a State court of any matter pending in the High Court on the application of any party to the proceedings - section 45.
 - (h) A provision that, in proceedings removed to the High Court, a defendant might set up any defence which he would have had if the proceedings had been originally commenced in the High Court - section 46.
24. The new Part VII, to be substituted by sub-clause 6(1) of the Bill, would bring about the following changes:-
- (a) The provisions of existing sections 40A and 43 would be omitted entirely. As to the omission of present section 40A, see paragraph 21 above relating to the repeal of section 38A of the Act. The provisions of present section 43 are not considered to be necessary.
 - (b) The provision in present section 40 for the removal into the High Court of proceedings involving constitutional issues at present applies only to proceedings pending before a State Court. It is

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intended that the removal provisions should be extended to proceedings involving constitutional questions pending before federal courts and Territory courts.

- (c) Provision is to be made for the removal, on application to the High Court by a party or by the Attorney-General of the Commonwealth, into the High Court of matters pending before a federal court, a State court or a Territory court in which the High Court has original jurisdiction or can have original jurisdiction conferred on it.
- (d) Provision is to be made for a matter pending in the original jurisdiction of the High Court to be remitted to a State court, a federal court or a Territory court by the High Court of its own motion.

These changes are more fully explained in paragraphs 25-35 below.

25. New sub-section 40(1) would empower the High Court to order matters pending in a federal court other than the High Court or in a State or Territory court and involving constitutional issues to be removed into the High Court. Where a party to those proceedings applies for removal, the High Court is to have a discretion whether to order removal or not. Where an application for removal is made by the Attorney-General of the Commonwealth or of a State, the High Court is to make an order for removal.

26. New sub-section 40(2) deals with the removal into the High Court of proceedings in any matter in which the High Court has original jurisdiction or may have original jurisdiction conferred on it. Matters in which the High Court has original

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jurisdiction or may have original jurisdiction conferred on it are those matters specified in sections 75 and 76 of the Constitution. The High Court would be empowered to make an order for removal under this sub-section on the application of a party to the proceedings or of the Attorney-General of the Commonwealth. The purpose of the provision is to enable a decision of the High Court to be obtained directly upon an important issue, especially of federal law, without having to go through the process of trial in the court in which the proceedings are pending and then an appeal to the High Court.

27. New sub-section 40(3) is a provision ancillary to new sub-section 40(2). Original jurisdiction has not been conferred on the High Court in all matters in respect of which original jurisdiction may be conferred on the High Court under section 76 of the Constitution. The effect of this sub-section is to provide that, if an order for removal is sought under sub-section 40(2) and is granted, the High Court will have original jurisdiction to deal with the matter so removed, even though it relates to a class of matters under which original jurisdiction has not been generally conferred on the High Court. The sub-section is made subject to the Constitution, so that it does not purport to confer on the High Court a wider jurisdiction than the Constitution permits.

28. For example, the High Court does not have original jurisdiction in matters arising under the Trade Practices Act. If a matter under the Trade Practices Act were pending in the Industrial Court or in a State court, and involved a question of interpretation of a fundamental provision of the

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Act, it would be open to the Commonwealth Attorney-General, under the provisions of new sub-section 40(2), to apply to the High Court to have those proceedings removed into the High Court. Sub-section 40(3) would then operate, upon such an order being made, to confer original jurisdiction on the High Court in respect of those proceedings, notwithstanding that the High Court does not generally have original jurisdiction in proceedings under the Trade Practices Act.

29. New sub-section 40(4) provides that the High Court shall not make an order for removal of a matter of federal jurisdiction into the High Court unless -

- (a) all parties to the proceedings consent to the making of the order; or
- (b) the Court is satisfied that it is appropriate to make the order.

30. New sub-section 40(5) provides for the documents that have been filed in the proceedings to be transmitted to the Registrar of the High Court in a case where an order for the removal of the proceedings has been made. Where only part of a cause is ordered to be removed, then a certified copy of the documents filed in respect of the proceedings thus removed are to be transmitted to the Registrar of the High Court.

31. New section 41 provides that the procedure in the High Court in respect of proceedings removed into the High Court shall be as the High Court directs.

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32. New section 42 empowers the High Court to remit to the court from which it was removed the whole or part of any cause or part of a cause that was removed into the High Court under an order of the High Court. Sub-section (2) of new section 42 relates to the case where proceedings are removed into the High Court under new sub-section 42(1) and it is then found that the proceedings relate to a matter in respect of which the High Court cannot have original jurisdiction conferred on it. This might occur, for example, where the element of federal jurisdiction disappeared as a result of some compromise between the parties to the action. In such a case, the High Court is not empowered to proceed further but must remit the matter to the court from which it was removed.

33. New section 43 preserves the effect of orders made and other things done in the proceedings before their removal to the High Court.

34. New section 44 will empower the High Court to remit to a State court, a federal court or a Territory court, any matter pending in the original jurisdiction of the High Court and in respect of which the State court, federal court or Territory court would have jurisdiction. Proposed new section 44 differs from existing section 45 in the following respects:-

- (a) it would empower the High Court to remit a matter pending in the High Court to a federal court or a Territory court, so long as that court had jurisdiction in respect of the matter.
- (b) it would empower the High Court to remit a matter pending in the original jurisdiction of the High Court

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to a State court, federal court or Territory court of its own motion.

Present section 45 only empowers the High Court to remit a matter pending before it in its original jurisdiction to a State court and then only on the application of a party to the proceedings.

35. The purpose of the provision is to enable the High Court to divest itself of matters that are commenced before it but which, whether because of the complexity of issues of fact to be tried or because the issues of law involved are reasonably clear, should not proceed in the High Court and take up the time of the Court. In particular, this provision will enable the High Court to remit to a State Supreme Court for trial matters that have no special element of federal law. Such matters might be those that come before the High Court only because the Commonwealth is a party to the suit or because the parties to the suit are residents of different States. Such matters may be brought in the original jurisdiction of the High Court by virtue of section 75 of the Constitution, but do not otherwise necessarily involve any special federal element. Because this jurisdiction is given to the High Court directly by section 75 of the Constitution, it is not possible to take the jurisdiction away by statute. It is, however, believed that it would be constitutionally valid to confer on the High Court a power to divest itself of such a matter by remitting it to another court for trial.

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36. New section 45 provides that, in a cause removed into the High Court, a party may set up any defence that he would have had if the matter had been originally commenced in the High Court - this is equivalent to present section 46 of the Act.

Sub-clauses 6(2) and 6(3)

37. These sub-clauses are transitional provisions. The effect of sub-clause 6(2) is that the new provisions dealing with procedures after a cause has been removed apply in relation to a cause removed prior to the commencement of these new provisions.

Clause 7

38. Present section 47 of the Act makes provision for the salary and allowances of the Justices of the High Court. This provision is now out of date, provision being made each year in the Remuneration and Allowances Act following recommendations by the Remuneration Tribunal.

Clause 8

39. The purpose of clause 8 is to give a legal practitioner enrolled in the High Court Register of Practitioners and being entitled to practise in a federal court a right to appear before any State court in the exercise of federal jurisdiction by that court. Such a legal practitioner would not have to comply with the admission requirements of the particular State in order to appear in the State court in a matter of federal jurisdiction.

Clause 9

40. The amendment made by this clause is consequential upon the amendment made by clause 8. Section 78 of the Judiciary Act provides that right of appearance in a court exercising

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federal jurisdiction is governed by the laws and rules regulating the practice of that court. The effect of the amendment is that that section will provide that the right of appearance in a court exercising federal jurisdiction derives from the Judiciary Act or the laws and rules regulating the practice of that court.

Clause 10

41. This clause inserts a new Division 1A into the Act.

42. New section 78A would confer a right on the Attorney-General of the Commonwealth or of a State to intervene in proceedings in any court which involve constitutional questions. At present, an Attorney-General may intervene in proceedings only by leave of the court concerned. Leave may not always be given. The provision will ensure that the Commonwealth or a State is entitled to put its views to any court on any constitutional issue arising in proceedings in that court.

43. Sub-section (2) of proposed new section 78A would empower the court before which an Attorney-General intervenes to order the Commonwealth or the State, as the case may be, to pay any additional costs of the parties resulting from that intervention.

44. New section 78B provides a procedure by which the Attorneys-General of the Commonwealth and the States are to be notified of proceedings in a federal court other than the High Court or in a State or Territory court in respect of which an Attorney-General would be entitled to seek an order for removal under section 40 of the Act or to intervene under new section 78A. Sub-clause (3) of new section 78B empowers the Attorney-General to authorise payment by the Commonwealth of additional costs incurred by the parties as the result of an adjournment of proceedings to enable the required notice to be given.

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Clause 11

45. This clause provides for the principal Act to be amended as set out in the Schedule.

The Schedule

46. The Schedule would make formal amendments and amendments of a drafting character.