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JURISDICTION OF COURTS (CROSS-VESTING) BILL 1986

Date introduced: 22 October 1986
House: House of Representatives
Presented by: Hon. Lionel Bowen, M.P.,
Attorney-General

DIGEST OF BILL

Purpose

To establish a system of cross-vesting of jurisdiction between federal, State and Territory courts without reducing the existing jurisdiction of any court.

Background

There has, for some time, been a growing concern in the legal community about the incidence of jurisdictional conflict between the courts. For example, one party to the contract for the purchase of real property may bring an action in a State Supreme Court seeking its enforcement, while the other party cross-claims in the Federal Court, seeking an order that the contract be set aside.

Continuing conflict between the Family Court of Australia and the State Supreme Courts over the jurisdiction of each to deal with disputes concerning children and disputes concerning property reflects a fragmentation which has been described by at least one judge as "appalling"[1].

Referring to the problems which a duality of courts has caused, the then Chief Justice of the High Court of Australia, Sir Harry Gibbs, remarked in an address entitled, "The State of the Australian Judicature", delivered at the 23rd Australian Legal Convention in Melbourne in August 1985,

The number of cases in which these doubts and conflicts as to jurisdiction arise may be comparatively small but it is a defect in the system that there should be any such cases. Where a dual system of tribunals exists, quite unexpected anomalies are likely to arise[2].

As a means for overcoming jurisdictional conflict, the Judicature Sub-Committee of the Australian Constitutional Convention recommended, in October 1984, a cross-vesting of jurisdiction at trial level between the federal courts (the Federal Court and the Family Court) and the Supreme Courts of the States and Territories[3]. This Bill, developed by the Special Committee of Solicitors-General, will implement that recommendation.

Main Provisions

The purpose of the Bill is expressed in the Preamble.

Clause 3 contains the interpretation and application provisions. The more important ones are: "proceeding" which will exclude a criminal proceeding; "special federal matter" which will be a matter that, apart from the cross-vesting legislation, would be within the exclusive jurisdiction of the Federal Court; "State" which will include the Northern Territory, which, except in sub-clause 4(1), will be excluded from the meaning of "Territory".

Clause 4 will provide for additional jurisdiction of certain courts. Each State and Territory Supreme Court will be invested with the civil jurisdiction of the Federal Court and the Family Court (sub-clause 4(1)). The Federal and Family Courts and each State Supreme Court will be invested with the civil jurisdiction of each Territory Supreme Court and each Territory Supreme Court will be invested with the civil jurisdiction of each other Territory Supreme Court (sub-clause 4(2)). This clause will not apply to matters arising under the Conciliation and Arbitration Act 1904 or sections 45D or 45E of the Trade Practices Act 1974.

Where a proceeding is pending in a State or Territory Supreme Court, sub-clause 5(1) will require the Supreme Court to transfer the proceeding to the Federal or Family Court ('federal court') if it appears to the Supreme Court that:-

- . the proceeding arises out of, or is related to another proceeding pending in the federal court and it is more appropriate that it be determined by the federal court; or

- . the federal court is the more appropriate court, having regard to specified jurisdictional questions which exist apart from the cross-vesting legislation, as well as the interests of justice; or
- . it is otherwise in the interests of justice that the proceeding be determined by the federal court.

Similar circumstances, with appropriate modifications, will require the transfer of proceedings between other courts. Sub-clause 5(6) will provide for the transfer of related proceedings. A proceeding may be transferred on the application of a party, of the court's own motion or on application by an Attorney-General (sub-clause 5(7)).

Where a special federal matter is the matter for determination in a proceeding pending in a State or Territory Supreme Court, clause 6 will generally require the transfer of the proceeding to the Federal Court.

Clause 7 will prevent the cross-vesting legislation from enabling appeals to courts which would not otherwise have had the jurisdiction to determine those appeals. The exception will be appeals from a decision of a single judge of a State or Territory Supreme Court on matters arising under a Commonwealth Act specified in the Schedule to the Bill. Generally, these will be instituted in and determined only by the Full Court of the Federal or Family Court, or with special leave, the High Court (sub-clause 7(5)).

The Bill is to be read and construed subject to the Constitutional limitations imposed on the legislative power of the Commonwealth (clause 15).

Clause 16 will provide that the Governor-General may, by proclamation

- . suspend the operation of the Bill from no earlier than 3 years after its commencement, after at least 6 months' notice to each State;
- . declare that it shall cease to be in force if satisfied that
 - . the cross-vesting legislation is ineffective to invest or confer jurisdiction on the relevant courts; or

- . in the case of a State, the State's cross-vesting legislation has been repealed, made inoperative, suspended or altered in a substantial manner.

For further information, if required, contact the Law and Government Group.

19 February 1987

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References

1. Hinchen v. Hinchen (1984) 53 ALR 121 at 128 per Mahoney JA.
2. (1985) 59 ALJ 522 at 525.
3. Proceedings of the Australian Constitutional Convention, 1985, Vol.II.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

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