

Attorney-General's Department Submission

Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021

Introduction

The Attorney-General's Department (the Department) provides the following submission to aid the Senate Legal and Constitutional Affairs Legislation Committee in its consideration of the Courts and Tribunals Legislation Amendment (2021 Measures No. 1) Bill 2021 (the Bill). This submission is provided in response to the Committee's invitation, dated 28 June 2021, to provide a submission.

On 23 June 2021, the Bill was introduced in the Senate. The measures contained in the Bill are sensible changes that will both improve the operation of the Administrative Appeals Tribunal (AAT) and the federal courts and clarify how existing provisions should operate. The measures do not seek to introduce fundamental changes to the operation of Australia's legal system, but rather make small changes that will streamline and clarify existing processes. The ultimate beneficiaries of these changes will be users of Australia's legal system.

The Bill makes amendments in six key areas, which are contained in Schedule 1 to Schedule 3 of the Bill. These key areas are analysed in detail below. To effectively achieve the policy intention across the six key areas, the Bill amends the following Acts:

- *Administrative Appeals Tribunal Act 1975*
- *Admiralty Act 1988*
- *A New Tax System (Family Assistance) (Administration) Act 1999*
- *Child Support (Registration and Collection) Act 1988*
- *Commonwealth Electoral Act 1918*
- *Family Law Act 1975*
- *Federal Circuit and Family Court of Australia Act 2021*
- *Federal Circuit Court of Australia Act 1999*
- *Federal Court of Australia Act 1976*
- *Foreign Judgments Act 1901*
- *Foreign States Immunities Act 1985*
- *International Arbitration Act 1974*
- *Judiciary Act 1903*
- *Military Rehabilitation and Compensation Act 2004*
- *Nauru (High Court Appeals) Act 1976*
- *Paid Parental Leave Act 2010*
- *Social Security (Administration) Act 1999*

In developing the measures in the Bill, the Department consulted closely with the Administrative Appeals Tribunal, High Court of Australia, Federal Court of Australia, Family Court of Australia, Federal Circuit Court of Australia, Department of Social Services, Department of Finance and the Department for Veterans' Affairs.

1. Amendments to the *Administrative Appeals Tribunal Act 1975* (AAT Act)

Parts 1 – 12 of Schedule 1 of the Bill will implement technical changes to enhance the efficiency of the AAT and improve existing processes without requiring structural changes or increased funding. The proposed

measures enhance the AAT's operation so it can continue to provide a fair, economical, informal and quick mechanism for merits review. This submission will not examine all the Parts in detail, as the Explanatory Memorandum to the Bill provides a sounds analysis of the need for the measures in each Part.

The measures in Part 1 – 12 of Schedule 1 will allow the AAT to work with greater flexibility to achieve efficiencies in the management of its caseload, and provide for greater harmonisation of powers across the AAT. For example, the measures contained in Part 1, which amend the *Administrative Appeals Tribunal Act 1975* and legislation within the social services portfolio, provide for a single set of powers that the AAT can use in the Social Services and Child Support Division (SSCSD) to require that parties provide information to the AAT or otherwise to give evidence or produce documents. The provision of a single set of powers will mean that the legislation is easier to understand and apply.

The measures contained in Part 3 of Schedule 1 of the Bill will introduce alternative dispute resolution processes in the SSCSD. Currently, the SSCSD cannot use these types of processes to assist in resolving matters. Extending alternative dispute resolution processes to the SSCSD will allow the AAT to provide greater assistance to parties by providing an opportunity to participate in conferencing. This will assist to identify and narrow the issues in dispute, explore whether an application can be resolved by agreement, and otherwise clarify the steps required to prepare for a hearing.

The Bill will provide the AAT with greater flexibility to manage its administration. In particular, Parts 4 to 7 of the Bill will update provisions relating to the constitution and reconstitution of the AAT, introduce dismissal powers for authorised officers, update provisions relating to the reinstatement of proceedings, and allow for greater flexibility in the correction of errors in the text of a decision.

2. Amendments relating to the High Court of Australia and Federal Court of Australia

The terminology regarding the jurisdiction of a single Justice is currently inconsistent between the *Judiciary Act 1903* (Judiciary Act) and the *High Court Rules 2004* (High Court Rules). While the Judiciary Act refers to a Justice sitting 'in Chambers,' the High Court Rules refer to a Justice 'other than in open court.' Part 15 of Schedule 1 of the Bill will amend this inconsistency by removing the reference to 'in Chambers.' While the Supreme Court in some jurisdictions retains the concept of 'in Chambers', the amendments cover those jurisdictions in which the distinction has been abolished, thereby reflecting modern practices. This Part will also clarify the power of the Court to prescribe forms other than in the Rules of Court and to prescribe the forms instead by practice direction. This approach has already been adopted by the other Commonwealth Courts where the Rules of Court provide for forms to be used as approved by the Chief Justice (or Chief Judge).

Part 15 of Schedule 1 of the Bill will also amend the *Federal Court of Australia Act 1976* (Federal Court Act) to produce significant efficiencies in the Federal Court's management of appeals in civil proceedings. Amendments to the Federal Court Act will allow the Federal Court to give reasons in short form for a decision dismissing an appeal if the Court is unanimously of the opinion that the appeal does not raise any question of general principle. This amendment would reflect similar practices already in place in the High Court of Australia, the Family Court of Australia, and the NSW Court of Appeal. This measure will reduce delays in the Federal Court's hearing of matters without limiting the Court's ability to provide comprehensive reasons when required.

3. Amendments relating to the federal courts of Australia

The Government is committed to ensuring the improvement of Australia's federal courts consistent with community expectations and to ensure the ongoing, timely, and efficient administration of justice. Schedule 2 of the Bill amends the *Federal Court Act*, *Family Law Act 1975*, *Federal Circuit Court of Australia Act 1999*, and the *Federal Circuit and Family Court of Australia Act 2021* to clarify that a judge can sit in an undisclosed location that is not a courtroom or Chambers to conduct a hearing remotely (e.g. using Microsoft Teams technology). It also amends the *Judiciary Act* to clarify that the exercise of federal jurisdiction is considered to take place in the State or Territory in which a proceeding is commenced or remitted.

The proposed amendments are necessary to put beyond doubt any potential for inconsistency with the open court requirement (i.e. a public/physical courtroom) in each of the constituent Acts of the federal courts and ambiguity surrounding the place of the exercise of federal jurisdiction in a remote hearings context.

The amendments are retrospective to eliminate any potential uncertainty about whether the courts' remote hearings practices are consistent with the enabling legislation.

Further, the federal courts recognise that rapid advances in the courts' remote access technology and the willingness of judges, the profession and other participants to adapt, and adopt changes, is an opportunity for the community, the legal system and the legal profession. As such, the federal courts have expressed the view that remote hearings should continue to be considered and used, where appropriate. These amendments ensure that the federal courts can continue to respond proactively to technological changes to ensure that all Australians can access the Australian federal courts.

4. Amendments to the *Foreign State Immunities Act 1985* (FSI Act)

Part 14 of Schedule 1 of the Bill will clarify the application of the FSI Act to *ex parte* proceedings to ensure that foreign States are afforded appropriate procedural protections. Those procedural protections ensure that Australian courts can enter a judgment (other than an interlocutory judgment), register a foreign judgment and recognise or enforce a foreign award against a foreign State, consistently with Australia's obligations under international law to afford that foreign State immunity in certain circumstances. These amendments are proposed following the High Court of Australia's decision in *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31.

For interlocutory proceedings, the effect of the amendments will be that the Australian court seized of the matter will have the discretion to determine whether a particular proceeding should be conducted on an *ex parte* basis. Such discretion would include consideration of whether a foreign State, or a separate entity of the foreign State, might be immune in respect of the interlocutory order sought in the *ex parte* proceedings.

Part 14 also proposes minor technical amendments to Forms 1 and 2 of the FSI Act. Minor consequential amendments would also be made to the *Foreign Judgments Act 1991* and the *International Arbitration Act 1974*.

5. Amendments to the *Admiralty Act 1988* (Admiralty Act)

Part 13 of the Bill will amend the *Admiralty Act* to apply the *Legislation Act 2003* (the *Legislation Act*) to the *Admiralty Rules 1988* (Admiralty Rules), except sunset and certain other provisions. The application of the *Legislation Act* to the Admiralty Rules will ensure that the Admiralty Rules are registered and published in accordance with the processes set out in the *Legislation Act*. It is appropriate that the Admiralty Rules be published and registered for reasons of transparency, accessibility and accountability.

The amendments will also ensure that, as rules of court, there is no doubt that the Admiralty Rules do not sunset. It is appropriate that the Admiralty Rules not be subject to sunset since they are made by the Admiralty Rules Committee, which is established under section 42 of the Admiralty Act. The Admiralty Rules Committee advises the Attorney-General with respect to the Admiralty Rules and is comprised of judges of the Federal Court and State or Territory Supreme Courts and senior legal practitioners of admiralty law. Separation of powers considerations support the position that rules of court should be exempted from sunset.

The Legislation Act applies to the rules of the federal courts (pursuant to the *Legislation Amendment (Sunsetting and Other Measures) Act 2018*), and as such, these amendments to the Admiralty Act will align the Admiralty Rules with this practice.

6. Repeal of the *Nauru (High Court Appeals) Act 1976 (Nauru Act)*

Schedule 3 of the Bill will repeal the Nauru Act, which was enacted to give effect to the *Agreement between the Government of Australia and the Government of the Republic of Nauru relating to Appeals to the High Court of Australia from the Supreme Court of Nauru* (the Agreement). It provided for appeals to the High Court of Australia from certain classes of decisions of the Supreme Court of Nauru. This Agreement was terminated on 13 March 2018 following the Government of Nauru providing formal notification of its intention to withdraw from the Agreement on 12 December 2017. The Agreement's termination meant that the High Court was no longer able to hear appeals from the Supreme Court of Nauru, except for appeals and applications for leave instituted before the date the Agreement was terminated. The High Court has confirmed that all relevant appeals and applications for leave instituted before the Agreement's termination have concluded.