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No. 158 2001–02

Jurisdiction of Courts Legislation Amendment Bill  
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No. 158 2001–02

Jurisdiction of Courts Legislation Amendment Bill 2002

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# Jurisdiction of Courts Legislation Amendment Bill 2002

**Date Introduced:** 13 March 2002

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The amendments proposed by Schedule 1 commence on Proclamation. The amendments proposed by Schedule 2 commence on Proclamation or alternatively within 6 months of the Bill receiving Royal Assent.

## Purpose

The major amendments proposed by this Bill:

- exclude the Federal Court of Australia from hearing appeals from judgments of the Supreme Court of the Australian Capital Territory
- allow the Chief Justice of the Federal Court of Australia to refer part of a matter to the Full Court of the Federal Court
- extends the appellant jurisdictional powers of the Federal Court of Australia to provide a single judge or Full Court with power to make an order that an appeal to the Federal Court be dismissed for want of prosecution, or make an order that an appeal to the Federal Court be dismissed for failure to comply with a direction to the Federal Court, and
- provide for the use of video, audio and other appropriate means for the taking of submissions and evidence in the Federal Court of Australia.

## Background

### The Supreme Court of the Australian Capital Territory<sup>1</sup>

The Supreme Court has civil, criminal and appellate jurisdiction. Generally, the jurisdiction of the Court is exercisable by a single Judge. Criminal trials may be heard before a Judge and jury or by Judge alone. In civil matters the Court has an unlimited

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monetary jurisdiction. An appeal lies to the Supreme Court from the Magistrates Court, Children's Court, Small Claims Court and various ACT tribunals (including the ACT Administrative Appeals Tribunal).

The Supreme Court comprises a Chief Justice, three resident Judges, nine additional Judges and a Master.

Appeals from the Supreme Court lie to the Federal Court of Australia except from the Masters decisions which lie with the ACT Appeals Court.

### **History of the Supreme Court of the Australian Capital Territory<sup>2</sup>**

The Supreme Court of the Australian Capital Territory was established as a superior court of record by the *Seat of Government Supreme Court Act 1933* which commenced on 1 January 1934. The principal reason behind the establishment of a Supreme Court was to relieve the High Court of its original jurisdiction in respect to the Australian Capital Territory and to provide an intermediate court of appeal between the Court of Petty Sessions (est. 1930).

When the Supreme Court was constituted in 1933, the Supreme Court Act provided for one Judge only; in 1958, provision was made for "additional Judges" of other federal courts to assist with the caseload; in 1971, the Act was amended to allow for the appointment of a second resident Judge.

The *ACT Supreme Court (Transfer) Act 1992* commenced on 1 July 1992, on which date the Supreme Court transferred from Commonwealth to Territory administration.

The first judicial appointment to the Court by the ACT administration was Kenneth John Crispin on 26 September 1997, resulting in the Supreme Court having four resident Judges, including the Chief Justice. Justice Crispin was not given a concurrent commission as Judge of the Federal Court of Australia. This represented a departure from previous practice whereby the Commonwealth had previously (before self-government) appointed ACT Supreme Court Judges to also be Judges of the Federal Court of Australia since the establishment of that Court in 1976. Appeals to the Federal Court are currently to the ACT Supreme Court.

### **Appeals from the ACT Supreme Court**

Before the Federal Court was established in 1976, the High Court of Australia heard all appeals from the Supreme Court of the ACT. When the Federal Court was established it became the intermediate appellate court for the ACT in an effort to alleviate the burden on the High Court.<sup>3</sup>

The *Federal Court of Australia Act 1976* confers jurisdiction on the Federal Court to hear appeals from judgments of the Supreme Court of a Territory, other than the Northern Territory.<sup>4</sup> A decision of the Federal Court exercising appellate jurisdiction may in turn be appealed to the High Court with special leave.<sup>5</sup>

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When the Federal Court hears an appeal from a judgment of the ACT Supreme Court, the Chief Justice of the Federal Court allocates Federal Court judges to sit on the appeal, in accordance with his statutory responsibility to ensure the orderly and expeditious discharge of the business of the Court.<sup>6</sup>

In 1999-2000, 44 appeals were filed in the Federal Court from the ACT Supreme Court out of a total of 407 appellate filings in that year from all sources. This represents a little under 11% of the Federal Court's appellate workload.<sup>7</sup>

### **Problems with current law and practice**

In January 2000 the Attorney-General asked the Australian Law Reform Commission to consider whether the *Judiciary Act 1903* (Cth) ensures the most appropriate arrangements are in place for the efficient administration of law and justice in the federal jurisdiction.<sup>8</sup>

The Australian Law Reform Commission identified a number of problems associated with the ACT being the only State or mainland Territory in which a first appeal lies to a Full Court of the Federal Court rather than to a Full Court or Court of Appeal of a Supreme Court, including:

- In the past, all ACT Supreme Court judges were appointed with dual commissions on the Federal Court. Where an appeal was taken from a judgment of an ACT Supreme Court judge, a Full Court of the Federal Court would generally include one resident ACT Supreme Court judge among its members. The practice of dual commission ceased in 1997, leaving just two ACT judges as members of the Federal Court.
- Section 25(3) of the *Federal Court of Australia Act 1976* (Cth) requires a Full Court of the Federal Court, when hearing an appeal from the ACT Supreme Court, to include at least one judge of the ACT Supreme Court unless the Chief Justice of the Federal Court considers it impracticable to do so. One consequence of this is that an appeal from a decision of Chief Justice Miles is generally heard by a bench including Justice Higgins, while an appeal from a decision of Justice Higgins is generally heard by a bench including Chief Justice Miles. In consultations and submissions, this was widely regarded as unsatisfactory. This structural problem was thought to encourage litigants to view the outcome of an appeal as unduly dependent on the composition of the appellate bench.
- In 1997, the ACT government released a discussion paper, which listed the following additional disadvantages of the present system of appeals from the ACT Supreme Court:

Under the present system, the ACT government has no control over the appeals process. Remedies for any problems in the system can only be provided by the 'cumbersome and time consuming' process of achieving Commonwealth legislative amendment. This situation is contrary to the concept of the ACT as 'a separate body politic responsible to its own electors'.<sup>9</sup>

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The ACT government has no control over the selection of judges who hear appeals as all judges who sit on Full Federal Court appeals from the ACT are allocated to such appeals by the Chief Justice of the Federal Court.<sup>10</sup>

The Federal Court has a different focus from the ACT Supreme Court and many judges sitting on appeals may have little familiarity with the issues arising on appeal. For example, Federal Court judges may lack the judicial experience needed to exercise discretions to ensure fairness in jury trials and sentencing in criminal appeals.<sup>11</sup>

Lack of experience and familiarity of Federal Court judges with ACT appeals could create the perception on the part of litigants and lawyers that the resident ACT judge who sits on an appeal has disproportionate influence over his less experienced colleagues. Appeals are thus seen to lie from one resident judge to another, and the prospects of success are seen as dependent upon the tendencies of the resident judge on appeal.<sup>12</sup>

There is an anomaly in the availability of appeals from some decisions of a Full Court of the Supreme Court to a Full Court of the Federal Court, which may protract an already expensive and lengthy appellate process. For example, an appeal from a Master of the ACT Supreme Court lies to the Full Court of the ACT Supreme Court and then to the Full Court of the Federal Court constituted by a panel of five judges, before progressing to the High Court.

In its Report, the Australian Law Reform Commission stated that an agreement had been reached between the Commonwealth and the ACT government regarding the establishment of a Court of Appeal for the ACT.<sup>13</sup> The Australian Law Reform Commission supported the Commonwealth and ACT governments initiative and recommended:

- The ACT legislature should consider establishing an intermediate appellate court for the ACT with jurisdiction to hear appeals from a single judge of the Supreme Court of the ACT
- Once established, section 24 of the *Federal Court of Australia Act 1976* (Cth) should be amended to preclude appeals being taken to the Federal Court from the Supreme Court of the ACT, and
- Section 35AA of the *Judiciary Act 1903* (Cth) should be amended to provide that appeals from a decision of a single judge of the Supreme Court of the ACT may be made only to the ACT Court of Appeal, and then by special leave to the High Court.<sup>14</sup>

### **ACT Appeals Court**

In 2001 the ACT Legislative Assembly passed the *Supreme Court Amendment Act 2001* (ACT). The Act established an ACT Court of Appeal to hear appeals from the ACT Supreme Court. The court operates as a division of the existing Supreme Court. The court

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itself comprises all ACT Supreme Court judges-resident, additional and acting. The president of the Court of Appeal is responsible for the orderly and expeditious discharge of the business of the court. There is scope under the legislation to appoint interstate judges or retired judges to the Supreme Court and they are able to sit on the Court of Appeal.

The Act sets out the way in which the court operates. The court is constituted by three judges with, ordinarily, at least one resident judge on the bench and the most senior resident judge presiding. A single judge is able to exercise the jurisdiction of the court in preliminary and procedural matters. A judge is not able to hear an appeal about a decision the judge gave.

The Act also provides that, where a judge is no longer able to continue hearing an appeal, two judges may continue to hear the appeal as long as the parties consent. It also allows the rules of court to deal with the time of initiating appeals and how they are instituted.

The Act while receiving bi-partisan support in the ACT Assembly, did provide a vehicle for criticism of the Commonwealth's stance with respect to the issue of the appointment of resident judges to the Federal Court of Australia. For example, in the debates on the Supreme Court Amendment Bill 2001, the then leader of the Opposition, John Stanhope, stated:

The need for a separate court of appeal has arisen through the refusal of the Commonwealth to appoint new resident judges, most specifically Justices Crispin and Gray, to the Federal Court. The ACT Law Reform Commission recommended in a report signed by Justice Crispin that the ACT establish a separate court of appeal.

As a digression, I continue to regret, as I think we all do, that the Commonwealth has taken the attitude it has in relation to the Federal Court. I still struggle to understand why the Commonwealth felt the need to take that action, given the impact it has on the administration of justice in the ACT.

There should be no need for new judges to be appointed to the ACT Supreme Court, apart from the president, if that role is not to be performed by a current judge. I do not know what the Attorney's views on that are, but if he wishes to express a view on it in this debate I would be quite interested.<sup>15</sup>

The sentiments of the then Opposition leader were also echoed in remarks made by the then Attorney-General and Minister for Education, Bill Stefaniak who stated:

... in reply: I thank Mr Stanhope for his comments and support. I agree with his comments in relation to the Commonwealth's action in not appointing our two most recent judges as members of the Federal Court and their clear action in indicating that such appointments will not happen again. That has precipitated the need for us to establish our own Court of Appeal.

One of the benefits is that we will have our own court of appeal. Most of the matters which are appealed from the Supreme Court to the Federal Court are related to issues

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which normally do not go before the Federal Court in the rest of Australia-state-type issues like commercial law and criminal law, not bankruptcy and things which are totally the prerogative of the Federal Court in other jurisdictions in the Commonwealth of Australia.

I think there are positives. Mr Stanhope is quite right. Had the federal government not gone down the path of not appointing more recent judges as members of the Federal Court, we would not necessarily have taken this legislative step.

I do not think reference appeals occur very often. I have a short note here saying that there are two cases the DPP can remember in the immediate past. That accords with my recollections over the last 10 years.

I do not think it is possible to overestimate the importance of a respected and authoritative appellate court in the ACT. I certainly hope the arrangements we are setting in place will serve to instil even greater confidence than already exists in our judicial system in the ACT.

In agreeing with Mr Stanhope about what the federal government has done with the Federal Court, I do not wish to belittle the competent service that has been extended to the people of the ACT by the Federal Court over past decades. However, that court does serve broader and different purposes, and the respected and learned judges of that court have discharged, and I understand will continue to discharge as additional judges of the ACT Supreme Court, an onerous burden with distinction.<sup>16</sup>

## Main Provisions

Note: This Bill is the same in substance as the Jurisdiction of Courts Legislation Amendment Bill 2001 which was introduced into the House of Representatives on 27 September 2001. That Bill lapsed when Parliament was prorogued.

### Schedule 1—Amendments relating to appeals from the Supreme Court of a Territory

Paragraph 24(1)(b) of the *Federal Court of Australia Act 1976* (Cth) provides that the Federal Court has jurisdiction to hear appeals from judgments of the Supreme Court of a Territory. The effect of **item 1** of **Schedule 1** is to exclude the Federal Court from hearing appeals from judgments of the Supreme Court of the Australian Capital Territory.

Paragraph 24(1)(c) of the *Federal Court of Australia Act 1976* (Cth) provides that the Federal Court has jurisdiction to hear appeals from judgments of a court of a State, other than a Full Court of the Supreme Court of a State, exercising federal jurisdiction in such cases as are provided by any other Act. The effect of **item 2** of **Schedule 1** is to ensure that the Federal Court can hear appeals from the Supreme Court of the Australian Capital Territory or the Northern Territory exercising federal jurisdiction, other than Full Courts of the two Territories.

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Subsection 32A(1) of the *Federal Court of Australia Act 1976* (Cth) provides that in any matter pending in the Federal Court, the Supreme Court of a State is invested with federal jurisdiction, and, to the extent that the Constitution permits, jurisdiction is conferred on the Supreme Court of the Northern Territory, to hear and determine any application that may be made to a Judge of the first-mentioned court sitting in Chambers. **Item 7 of Schedule 1** of the Bill amends subsection 32A(1) to include the Supreme Court of the Australian Capital Territory.

Subsection 35AA(1) of the *Judiciary Act 1903* (Cth) provides that the High Court has jurisdiction to hear and determine appeals and judgments from the Supreme Court of the Northern Territory. The effect of **item 9 of Schedule 1** of the Bill is to provide the High Court with jurisdiction to hear and determine appeals and judgments from both the Supreme Court of the Northern Territory and the Australian Capital Territory.

A **new subsection 35AA(2)** is inserted in the *Judiciary Act 1903* (Cth) by **item 10 of Schedule 1** that will prevent an appeal being brought to the High Court from a judgment of the Supreme Court of the Australian Capital Territory when that Court is known as the Court of Disputed Elections under the *Electoral Act 1992* (Act).

#### **Schedule 2—Amendments relating to the Federal Court**

Subsection 21(1A) of the *Federal Court of Australia Act 1976* (Cth) provides that where the Chief Justice considers that a matter coming before the Court in the original jurisdiction of the Court is of sufficient importance to justify the giving of a direction he/she may direct that the jurisdiction of the Court in that matter shall be exercised by a Full Court. The effect of **item 6 of Schedule 2** of the Bill is to ensure that the Chief Justice of the Federal Court has the power to refer part of a matter, in addition to a whole matter, to the Full Court of the Federal Court.

**New subsections 20(3)-20(6)** are inserted in the *Federal Court of Australia Act 1976* (Cth) by **item 9 of Schedule 2** of the Bill. The proposed provisions relate to the original jurisdiction of the Court. The effect of **new subsection 20(3)** is to provide that a single Judge or the Full Court may hear or determine an application:

- for leave or special leave to institute proceedings in the Court
- for an extension of time within which to institute proceedings in the Court
- for leave to amend the grounds of an application or appeal to the Court, or
- to stay a decision of a tribunal or authority mentioned in subsection 20(2).

**New subsection 20(4)** provides that the Federal Court Rules of Court may provide for applications of the kind mentioned in subsection 20(3) to be dealt with, subject to conditions prescribed by the Rules, without an oral briefing.

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**New subsection 20(5)** provides that in matters coming before the Federal Court under subsection 20(2) (ie. from a Tribunal or Authority), a single Judge or the Full Court may:

- join or remove a party
- make an order (including for costs) by consent disposing of the matter
- make an order that the matter be dismissed for want of prosecution
- make an order that the matter be dismissed for failure to comply with a direction of the Court, and
- give directions about the conduct of the matter, including directions about the use of written submissions and limiting the time for oral argument.

Section 25 of the *Federal Court of Australia Act 1975* (Cth) deals with the appellant jurisdiction of the Federal Court. The effect of **item 11** of **Schedule 2** of the Bill extends the appellant jurisdictional powers of the Federal Court to provide a single judge or Full Court with power to:

- make an order that an appeal to the Federal Court be dismissed for want of prosecution, or
- make an order that an appeal to the Federal Court be dismissed for failure to comply with a direction of the Federal Court.

**Item 22** of **Schedule 2** of the Bill inserts **new sections 47A-47G** in the Federal Court of Australia Act relating to the use of video, audio and other appropriate means for the taking of submissions and evidence. As noted in the Explanatory Memorandum to the Bill, the provisions are modelled on sections 66-73 of the *Federal Magistrates Act 1999* (Cth).

## Endnotes

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- 1 The following outline of the Supreme Court of the Australian Capital Territory is drawn from: [http://www.supremecourt.act.gov.au/content/about\\_us\\_history.asp?textonly=no](http://www.supremecourt.act.gov.au/content/about_us_history.asp?textonly=no)
- 2 The following outline of the history of the Supreme Court of the Australian Capital Territory is drawn from [http://www.supremecourt.act.gov.au/content/about\\_us\\_history.asp?textonly=no](http://www.supremecourt.act.gov.au/content/about_us_history.asp?textonly=no)
- 3 Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Report 92, October 2001, p. 659.
- 4 *ibid.*
- 5 *ibid.*
- 6 *ibid.*

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- 7 *ibid.*, at p. 660.
- 8 'Improving the operation of the Federal Judicial System', Attorney-General, *News Release* No. 1063, 3 October 2001
- 9 Australian Law Reform Commission, *The Judicial Power of the Commonwealth*, Report 92, October 2001, pp. 664 and 665.
- 10 *Ibid.*
- 11 *ibid.*
- 12 *ibid.*
- 13 *ibid.*, at p. 668.
- 14 *ibid.*, at p. 670.
- 15 <http://www.hansard.act.gov.au/hansard/2001/week08/2758.htm>
- 16 <http://www.hansard.act.gov.au/hansard/2001/week08/2759.htm>

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