

Constitution (Court of Appeal) Bill

EXPLANATORY MEMORANDUM

PART 1—PRELIMINARY

Clause 1 states the purpose of the Bill.

Clause 2 is a commencement provision.

- (a) Part 1 comes into operation on the day that the Act receives the Royal Assent.
- (b) The remaining provisions come into operation on a day or days to be proclaimed or, if they do not come into operation within 9 months of the day that the Act receives the Royal Assent, they come into operation on the first day after the end of that 9 months.

PART 2—AMENDMENTS TO THE CONSTITUTION ACT 1975

Clause 3 refers to the **Constitution Act 1975** as the Principal Act for the purposes of Part 2.

Clause 4 is the definition section:

- (a) It substitutes “Judge of the Court” for “puisne Judge” in the definition of “Chief Justice” in section 5 of the Principal Act.
- (b) It alters the definition of “Master” to mean a Master of the Court as defined in section 75 (4) of the Principal Act, to provide that a reference to a Master includes a reference to the Senior Master, other Masters appointed from time to time, the Registrar of the Court of Appeal, the Listing Master, the Registrar of Criminal Appeals and the Taxing Master.

Clause 5 replaces sections 75 (2) to (6) of the Principal Act.

- (a) The Supreme Court consists of the Judges of the Court and the Masters of the Court.
- (b) The Judges of the Court are the Chief Justice, the President of the Court of Appeal, Judges of Appeal and other Judges.
- (c) The Masters of the Court are the Senior Master, other Masters appointed from time to time, the Registrar of the Court of Appeal, the Listing Master, the Registrar of Criminal Appeals and the Taxing Master.

Clause 6

- (a) inserts a new section 75A in the Principal Act to divide the Supreme Court into two divisions: the Court of Appeal; and the Trial Division.

The Court of Appeal consists of the Chief Justice, the President of the Court of Appeal, other Judges of Appeal and additional judges appointed under section 80B of the Principal Act.

The Trial Division consists of the Chief Justice and the other Judges of the Court.

- (b) inserts a new section 75B in the Principal Act as the appointment provision which provides that the Governor with the advice of the Executive Council may appoint as a Judge a person who is a practitioner of the Supreme Court of not less than 8 years' standing.

Clause 7 inserts a new section 77 (3A) in the Principal Act to provide that existing members of the Supreme Court, who were appointed to the Supreme Court prior to the commencement of section 4 of the **Courts Amendment Act 1986**, and who may be subsequently appointed as President of the Court of Appeal or as a Judge of Appeal, have the right to remain in office until the age of 72.

Clause 8 amends section 78 of the Principal Act by substituting "The Chief Justice" for "One of the Judges" to provide that the Chief Justice is to have rank and precedence over all persons in Victoria, other than the Governor and the Lieutenant-Governor.

Clause 9

- (a) inserts a new section 78A in the Principal Act to provide that a Judge may be appointed as the Chief Justice, the President of the Court of Appeal or a Judge of Appeal either at the time of appointment as a Judge of the Court, or at any time after such appointment.
- (b) inserts a new section 78B in the Principal Act specifying the order of seniority of the Judges of the Court. The Chief Justice will be the most senior member of the Supreme Court, followed by the President of the Court of Appeal, the Judges of Appeal and finally, the Judges of the Court. Each Judge of Appeal will have seniority in relation to each other in accordance with their date of appointment. Similarly, each Judge of the Court will have seniority in relation to each other in accordance with their date of appointment. If two or more Judges of Appeal or Judges of the Court are appointed on the same day, seniority will be determined in accordance with the seniority specified in the instrument of appointment, or failing such specification, in accordance with the order of their being sworn.

Clause 10 makes a consequential amendment to the Principal Act to reflect the new definition of Judges of the Court inserted in the Principal Act by Clause 4. It amends both sections 79 (1) and (2) of the Principal Act by deleting the word "puisne".

Clause 11 inserts a new section 79A in the Principal Act to provide that the Governor in Council may appoint a Judge of Appeal to be Acting President for a period in which the President is temporarily absent, or unable to perform the duties of the office. A Judge of Appeal so appointed has the same powers and jurisdiction as the President for the duration of the appointment.

Clause 12

- (a) inserts a new section 80A (2) (c) in the Principal Act to provide that the period of service in the Court of Appeal, Trial Division or Supreme Court is included as service in the office of a Judge of the Court for the purpose of determining when a Judge of the Court may elect to retire.
- (b) amends section 80A (4) and (5) (b) of the Principal Act to make consequential amendments to reflect the new definition of Judges of the Court inserted in the Principal Act by Clause 4.

Clause 13 inserts a new section 80B in the Principal Act to provide for the temporary appointment by the Governor in Council of additional Judges of Appeal from the Judges of the Court in specified circumstances. The specified circumstances include periods when the President or a Judge of Appeal is unavailable to sit on the Court of Appeal because of illness, or leave of absence, or for any other reason. In these circumstances, the appointment must not exceed 6 months' duration. Judges of the Court so appointed will have the same powers and jurisdiction as a Judge of Appeal for the duration of the appointment, and thereafter, if required to complete a matter which commenced during the duration of the appointment.

In addition, new section 80B (2) provides that the President with the concurrence of the Chief Justice may request additional Judges of Appeal to be appointed for a period not exceeding 6 months' duration. Judges of the Court appointed in these circumstances will have the same powers and jurisdiction as a Judge of Appeal for the duration of the appointment, and thereafter, if required to complete a matter which commenced during the duration of the appointment.

New section 80B (3) provides that the President with the concurrence of the Chief Justice may determine that a particular Judge of the Court act as an additional Judge of Appeal in a specified proceeding before the Court of Appeal. A Judge of the Court so appointed will have the same powers and jurisdiction as a Judge of Appeal for the duration of the appointment, and thereafter, if required to complete a matter which commenced during the duration of the appointment.

Clause 14 amends section 81 of the Principal Act to provide that in the circumstances specified in such section, where a qualified person is temporarily appointed as a Judge of the Court, such appointment will not exceed six months duration.

It also makes a consequential amendment to reflect the new definition of Judges of the Court inserted in the Principal Act by Clause 4.

Clause 15 amends section 82 (1) of the Principal Act to detail the salaries of the President of the Court of Appeal and the Judges of Appeal. The President will be paid \$167 455 per annum and each Judge of Appeal will receive \$162 334 per annum. The clause also confirms that the procedure in the Principal Act relating to the implementation of increases in the salaries of holders of judicial offices including the Chief Justice, is applicable to the President, Judges of Appeal and the other Judges of the Court.

It also makes consequential amendments to section 82 of the Principal Act to reflect the new definition of Judges of the Court inserted in the Principal Act by Clause 4.

Clause 16 replaces section 83 (2) of the Principal Act, and inserts a new section 85 (6) in the Principal Act, to detail the pension entitlements of any spouse of a Judge of the Court upon the death of the latter.

PART 3—AMENDMENTS TO THE SUPREME COURT ACT 1986

Clause 17 refers to the **Supreme Court Act 1986** as the Principal Act for the purposes of Part 3.

Clause 18 is the definition section and provides definitions for Court of Appeal, Judge of Appeal, President and Trial Division. It also amends the definitions of Chief Justice and

Master in accordance with Clause 4 and repeals the definition of Full Court in the Principal Act.

Clause 19 repeals sections 8 and 9 of the Principal Act which sections concern the operation of the Full Court.

Clause 20 substitutes New Divisions 2 and 2A for Division 2 of Part 2 of the Principal Act, thereby dividing the Court into the Court of Appeal and the Trial Division.

The new Division 2 is entitled “Division 2—Court of Appeal”.

Section 10 of that Division sets out the jurisdiction of the Court of Appeal and provides that the Court of Appeal may hear and determine all appeals from the Trial Division constituted by a Judge, all applications for new trials, all appeals from the County Court constituted by a Judge, and all appeals, applications and other matters which were formerly required to be heard by the Full Court or which have been referred to the Court of Appeal. The section also provides that the Court of Appeal has such additional jurisdiction as is conferred on it by the Principal Act, another Act or a Commonwealth Act.

Section 11 of the new Division 2 sets out the way in which the Court of Appeal may be constituted and provides that subject to the Principal Act, any 3 or more Judges of Appeal may constitute the Court of Appeal. However, the President is empowered to determine that, in a particular case, only 2 Judges of Appeal constitute the Court of Appeal. The section further states that more than one Court of Appeal may sit at the same time, and that the rules may provide that in particular kinds of proceedings, a single Judge of Appeal may exercise the jurisdiction and powers of the Court of Appeal. It further provides that the Court of Appeal may discharge or vary a judgment given by a Judge of Appeal, or an order made or direction given by a Judge of Appeal.

Section 12 sets out the procedure to be followed where the opinions of the Judges of Appeal are equally divided. It provides that where a matter has been heard by the Court of Appeal constituted by 2 Judges, and the Judges differ in opinion, then the matter must be re-heard before the Court of Appeal constituted by more than 2 Judges. If the matter has been heard by more than 2 Judges who are equally divided in opinion, then judgment of the Court must be given in accordance with the opinion of the senior Judge of Appeal then present.

Section 13 of the new Division 2 provides that Judges must not sit on appeal from their own judgments except where otherwise expressly enacted.

Section 14 sets out the power of the Court of Appeal on civil appeals and provides that in hearing and determining an appeal of a trial by jury, the Court of Appeal may, notwithstanding any enactment, rule of law, or practice to the contrary, give any judgment that it might have given had the proceeding been tried without a jury and the findings or verdict of the jury had been the findings of the Judge. An order for a new trial of a proceeding may be limited to the question of damages only, or to the question of liability only.

Section 15 sets out the procedure to be adopted if one of the Judges of the Court of Appeal is unable to continue as a member of the Court for the purposes of a hearing which has commenced but has not yet been determined. In such case the proceeding

may be finished by the remaining Judges constituting the Court of Appeal if at least 2 such Judges remain and the parties consent.

Section 16 of the new Division 2 states that the President is responsible for ensuring the orderly and expeditious exercise of the jurisdiction and powers of the Court of Appeal.

The new Division 2A is entitled “Division 2A—Trial Division”.

Section 17 of the new Division 2A provides that the Trial Division constituted by a Judge, may hear and determine all matters whether criminal or civil, which are not required to be heard and determined by the Court of Appeal. The section further states that unless otherwise expressly enacted, an appeal from any determination of the Trial Division constituted by a Judge, lies to the Court of Appeal.

Section 17A of Division 2A sets out restrictions on appeals.

Sub-section (1) provides that an order of the Trial Division constituted by a Judge, which is an order made by consent of the parties or which is an order as to costs within the discretion of the Trial Division, is not subject to appeal to the Court of Appeal except by leave of the Court of Appeal, or the Trial Division judge who made the order.

Sub-section (2) provides that an order of the Trial Division constituted otherwise than by a Judge, which is an order made by consent of the parties or which is an order as to costs within the discretion of the Trial Division, is not subject to appeal to the Trial Division constituted by a Judge, except by leave of the Trial Division constituted by a Judge, or by leave of the person constituting the Trial Division who made the order.

Sub-section (3) states that except as provided for in Part VI of the **Crimes Act 1958**, an appeal does not lie from a determination of the Trial Division constituted by a Judge where such determination is made on or in relation to the trial or proposed trial of a person on indictment or presentment.

Sub-section (4) states that an appeal does not lie to the Court of Appeal—

- (a) from an order extending the time within which to appeal a judgment;
- (b) from a judgment or order in an interlocutory application given by a Trial Division Judge, without leave of the Trial Division Judge or the Court of Appeal, except:
 - (i) when the liberty of the subject or the custody of minors is concerned;
 - (ii) in cases of granting or refusing an injunction or appointing a receiver;
 - (iii) from a decision determining the claim of a creditor, or the liability of a contributory, director or other officer under the Corporations Law or the Companies (Victoria) Code in respect of misfeasance or otherwise;
 - (iv) in such cases prescribed by the Rules which are in the opinion of the Judges making the Rules, of the nature of final decisions.

Sub-section (5) states that an order refusing unconditional leave to defend a proceeding is not to be considered an interlocutory judgment within the meaning of

this section, while sub-section (6) states that no appeal lies to the Court of Appeal from an order giving unconditional leave to defend a proceeding.

Sub-section (7) provides that an application for leave to appeal may be made without notice to any other party except where the Court of Appeal or the Trial Division Judge who gave the judgment otherwise directs.

A new section 17B is also inserted into the Principal Act.

Sub-section (1) of that section provides that any case or question in a case where deemed fit to be re-argued or re-heard before decision or final judgement, may be re-argued or re-heard before the Court of Appeal if the Trial Division so directs. Sub-section (2) provides that the Trial Division constituted by a Judge may, at the request of a party but not otherwise (unless the contrary is expressly enacted), reserve any proceeding or question in a proceeding for the consideration of the Court of Appeal, or direct that any proceeding or question in a proceeding be argued before the Court of Appeal.

Sub-section (3) provides that if a proceeding or question is reserved for the consideration of the Court of Appeal, or is directed to be argued before it, the Court of Appeal may give leave for such proceeding or question to be considered by or argued before it. Alternatively, the Court of Appeal may refuse to determine such proceeding or question and the matter is then remitted to the Trial Division for determination.

Clause 21 inserts a new section 20A into the Principal Act which section provides that a Judge or officer of the Court is not incapable of acting in a proceeding by reason of being one of a class of ratepayers or a person liable to contribute to or be benefited by any rate or tax which may be affected by that proceeding.

Clause 22 makes technical amendments to the Principal Act.

Clause 23 inserts a new section 111A into the Principal Act which specifies the functions of the Registrar of the Court of Appeal. The Registrar is to be subject to the direction and control of the President and is to be responsible for the preliminary examination of all applications made to the Court of Appeal. The Registrar is also to be responsible for ensuring the efficient and expeditious dispatch of those applications to the Court of Appeal, and performing such other duties as are required by the President, or the Rules.

Clause 24 makes further technical amendments to the Principal Act.

PART 4—AMENDMENT OF CRIMES ACT 1958

Clauses 25 to 28 provide for amendments to the **Crimes Act 1958** made necessary by dividing the Supreme Court into two divisions: the Court of Appeal; and the Trial Division.

PART 5—TRANSITIONAL

Clauses 29 to 30 inserts transitional provisions into the **Constitution Act 1975**, **Supreme Court Act 1986**, **Crimes Act 1958** and any other Act amended by this Bill.

PART 6—AMENDMENTS TO OTHER ACTS

Clause 31 provides for an amendment to the **Interpretation of Legislation Act 1984** made necessary by the establishment of a Court of Appeal division of the Supreme Court.

Clause 32 provides for amendments to the **County Court Act 1984** made necessary by dividing the Supreme Court into two divisions: the Court of Appeal; and the Trial Division.

Clause 33 provides for amendments to the **Magistrates' Court Act 1989** made necessary by the establishment of a Court of Appeal division of the Supreme Court.

Clause 34 makes consequential amendments to the **Accident Compensation Act 1985, Administrative Appeals Tribunal Act 1984, Administrative Law Act 1975, Attorney-General and Solicitor-General Act 1972, Casino Control Act 1991, Children and Young Persons Act 1989, Credit (Administration) Act 1984, Employee Relations Act 1992, Judgment Debt Recovery Act 1984, Legal Profession Practice Act 1958, Local Government Act 1989, Market Court Act 1978, Public Prosecutions Act 1994, Sale of Land Act 1962** and the **Sentencing Act 1991**.

