

FIRST PRINT

**JURISDICTION OF COURTS (CROSS-VESTING)
AMENDMENT BILL 1992**

NEW SOUTH WALES



EXPLANATORY NOTE

(This Explanatory Note relates to this Bill as introduced into Parliament)

The object of this Bill is to amend the Jurisdiction of Courts (Cross-vesting) Act 1987 to change the provisions that govern the transfer of "special federal matters" from the Supreme Court to the Federal Court.

Currently under the Act the Supreme Court is required to transfer a proceeding that is a special federal matter to the Federal Court unless satisfied that it is not appropriate that the proceeding be transferred *and* that it is appropriate that the Supreme Court determine the proceeding. The Commonwealth Attorney-General is empowered to request that a proceeding be transferred to the Federal Court and the Supreme Court must comply with such a request.

Under the proposed amendments, the Supreme Court will be required to transfer the proceeding unless satisfied that there are special reasons (other than the convenience of the parties) in the particular circumstances of the case that justify the Supreme Court determining the proceeding. In deciding whether there are special reasons, the court will be required to have regard to the general rule that special federal matters should be transferred to the appropriate federal court. The power of the Commonwealth Attorney-General to request the transfer of proceedings is removed. Ancillary provisions are also inserted that require notice to be given to the State and Commonwealth Attorneys-General before the court orders that the proceeding not be transferred (so as to allow either Attorney to make submissions on the matter).

A consequential amendment is also made as a result of a proposed amendment of the parallel Commonwealth Act whereby certain adoption of children proceedings will be made special federal matters for transfer to the Family Court.

Clause 1 specifies the short title of the proposed Act.

Clause 2 provides that the proposed Act commences on a day to be appointed by proclamation.

Jurisdiction of Courts (Cross-vesting) Amendment 1992

Clause 3 makes the amendments described above.

Clause 4 is a transitional provision. It provides that the Act (as in force before the proposed amendments) continues to apply in respect of proceedings pending at the commencement of those amendments.

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AMENDMENT BILL 1992**

NEW SOUTH WALES

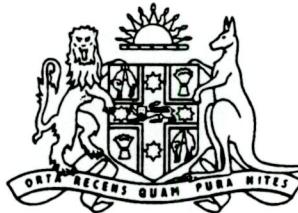


TABLE OF PROVISIONS

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 2. Commencement
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**JURISDICTION OF COURTS (CROSS-VESTING)
AMENDMENT BILL 1992**

NEW SOUTH WALES



No. , 1992

A BILL FOR

An Act to amend the Jurisdiction of Courts (Cross-vesting) Act 1987 to make further provision in relation to the transfer of special federal matters from the Supreme Court to federal courts; and for related purposes.

Jurisdiction of Courts (Cross-vesting) Amendment 1992

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Jurisdiction of Courts (Cross-vesting) Amendment Act 1992.

5 Commencement

2. This Act commences on a day to be appointed by proclamation.

Amendment of Jurisdiction of Courts (Cross-vesting) Act 1987 No. 125

3. The Jurisdiction of Courts (Cross-vesting) Act 1987 is amended by omitting section 6 and by inserting instead the following section:

Special federal matters

6. (1) If:

(a) a matter for determination in a proceeding that is pending in the Supreme Court is a special federal matter; and

15 (b) the court does not make an order under subsection (3) in respect of the matter,

the court must transfer the proceeding in accordance with this section to the Federal Court or a court mentioned in subsection (2) (b).

20 (2) If the court orders that a proceeding be transferred, the proceeding must be transferred:

25 (a) if the matter for determination in the proceeding is a matter mentioned in paragraph (a), (b), (c), (d) or (e) of the definition of "special federal matter" in section 3 (1) of the Jurisdiction of Courts (Cross-vesting) Act 1987 of the Commonwealth—to the Federal Court; or

30 (b) if the matter for determination in the proceeding is a matter mentioned in paragraph (ab) of that definition—to whichever of the Family Court, the Family Court of Western Australia or the Supreme Court of the Northern Territory, in the opinion of the court, is appropriate in the circumstances.

35 (3) The Supreme Court may order that the proceeding be determined by that court if it is satisfied that there are special reasons for doing so in the particular circumstances of the proceeding other than reasons relevant to the convenience of the parties.

Jurisdiction of Courts (Cross-vesting) Amendment 1992

- (4) Before making an order under subsection (3), the court must be satisfied that:
- (a) a written notice specifying the nature of the special federal matter has been given to the Attorney-General of the Commonwealth and the Attorney-General of the State; and 5
 - (b) a reasonable time has elapsed since the giving of the notice for the Attorneys-General to consider whether submissions to the court should be made in relation to the proceeding.
- (5) For the purposes of subsection (4), the court:
- (a) may adjourn the proceeding for such time as the court thinks necessary and may make such order as to costs in relation to an adjournment as it thinks fit; and 10
 - (b) may direct a party to the proceeding to give a notice in accordance with that subsection.
- (6) In considering whether there are special reasons for the purposes of subsection (3), the court must: 15
- (a) have regard to the general rule that special federal matters should be heard by the Federal Court or a court mentioned in subsection (2) (b), whichever is appropriate in the particular case; and 20
 - (b) take into account any submission made in relation to the proceeding by an Attorney-General mentioned in subsection (4).
- (7) Nothing in this section prevents the court granting urgent relief of an interlocutory nature if it is in the interests of justice to do so. 25
- (8) If, through inadvertence, the Supreme Court determines a proceeding of the kind mentioned in subsection (1) without:
- (a) the court making an order under subsection (3) that the proceeding be determined by that court; or
 - (b) a notice mentioned in subsection (4) being given, 30
- nothing in this section invalidates the decision of that court.
- (9) This section does not apply to a proceeding by way of an appeal that is instituted in the Full Court of the Supreme Court if the court the decision of which is the subject of the appeal had made an order under subsection (3), or under section 6 (1) as in force before the commencement of the Jurisdiction of Courts (Cross-vesting) Amendment Act 1992, in relation to the special federal matter. 35

Jurisdiction of Courts (Cross-vesting) Amendment 1992

Application

4. Despite the amendments of the Jurisdiction of Courts (Cross-vesting) Act 1987 made by this Act, that Act as in force immediately before the commencement of those amendments continues to apply in relation to a proceeding pending in a court to which section 6 of that Act applied before that commencement.
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JURISDICTION OF COURTS (CROSS - VESTING) AMENDMENT
BILL 1992

SECOND READING SPEECH

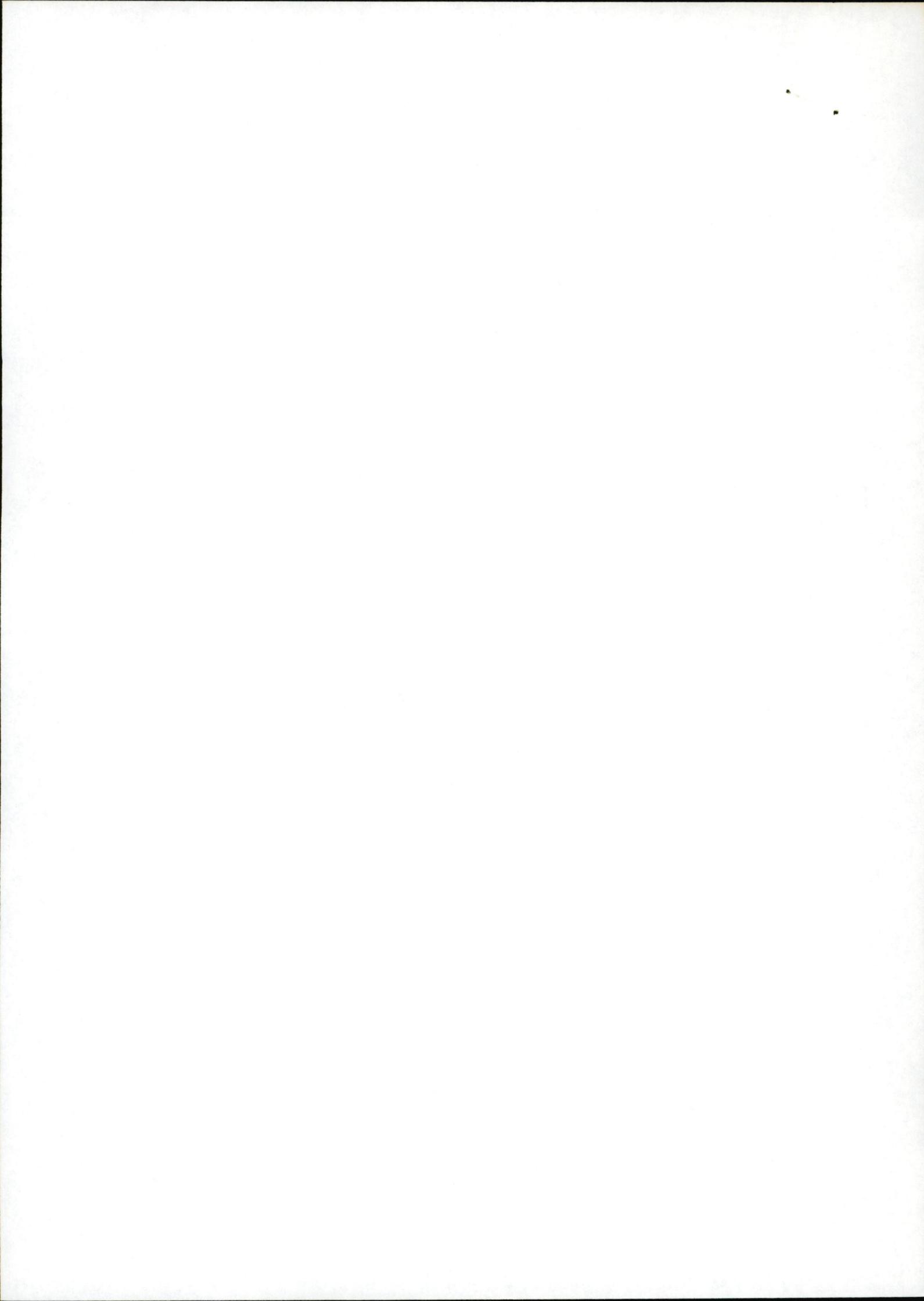
LEGISLATIVE COUNCIL

(PRESIDENT CALLS NOTICE OF MOTION IN NAME OF THE
ATTORNEY GENERAL)

MR HANNAFORD TO SAY:

MR PRESIDENT,

I MOVE TO INCORPORATE THE SECOND READING SPEECH
INTO HANSARD.



JURISDICTION OF COURTS (CROSS - VESTING) AMENDMENT

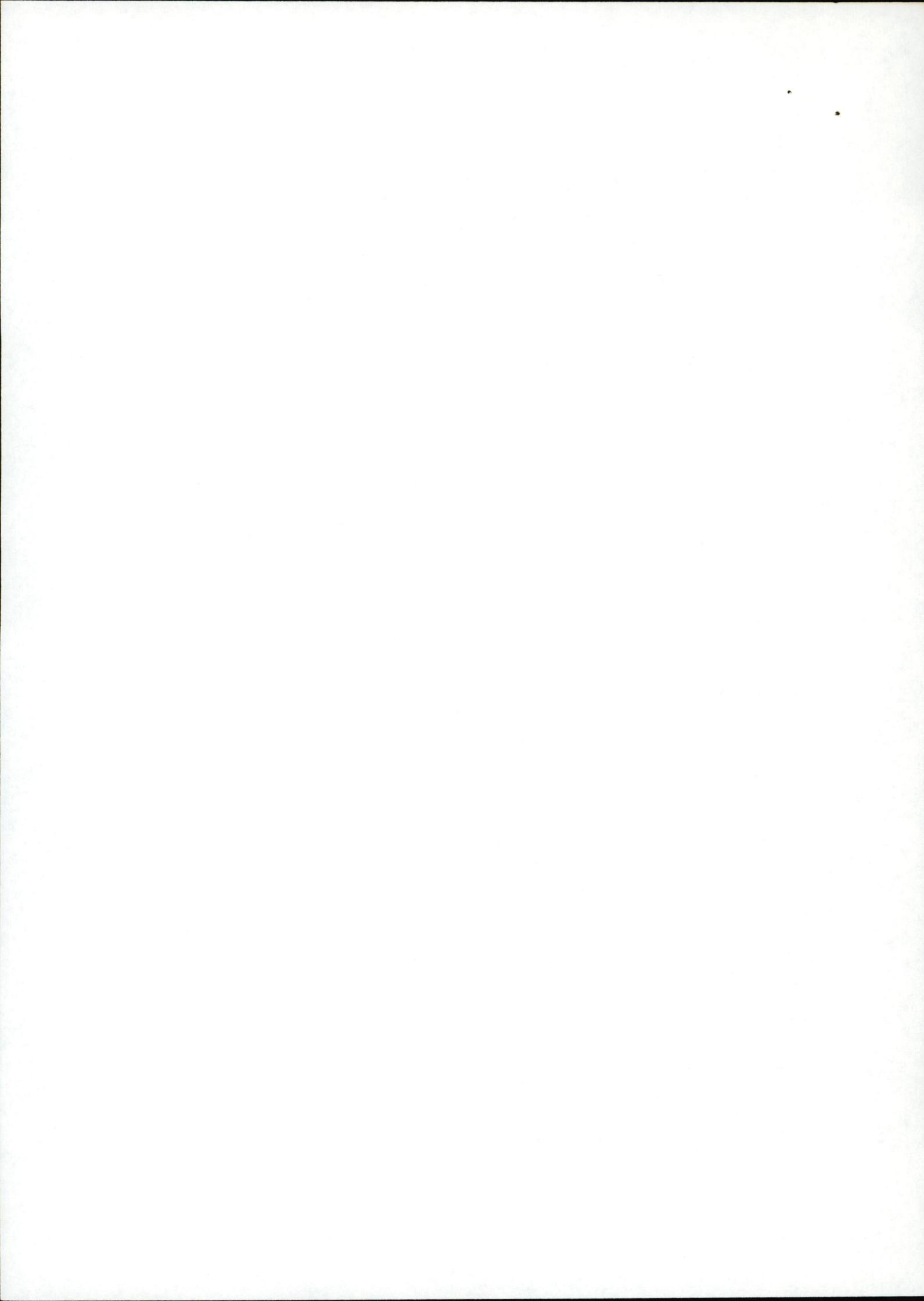
BILL 1992.

MR PRESIDENT,

WHEN THE CROSS VESTING ACT WAS FIRST INTRODUCED IN 1987, THE THEN ATTORNEY GENERAL HERALDED THE BILL AS "WHAT MAY WELL BE THE MOST SIGNIFICANT COURT LEGISLATION SINCE THE SUPREME COURT ACT 1970".

AS HONOURABLE MEMBERS MAY BE AWARE, THE ACT HAS HAD FAR-REACHING EFFECTS FOR CASES WHERE IT IS NOT CLEAR WHETHER THE MATTERS FALL WITHIN THE JURISDICTION OF A FEDERAL COURT OR MAY BE DEALT WITH BY A STATE COURT.

THE ORIGINAL LEGISLATION WAS DEVELOPED BY THE SPECIAL COMMITTEE OF SOLICITORS GENERAL AND APPROVED BY THE STANDING COMMITTEE OF ATTORNEYS GENERAL AS THE MOST REALIZABLE AND EFFECTIVE MEANS OF REMOVING JURISDICTIONAL DISPUTES ACROSS AUSTRALIA.



THE LEGISLATION WAS IMPORTANT BECAUSE IT REMOVED UNCERTAINTIES AS TO THE JURISDICTIONAL LIMITS OF STATE AND FEDERAL COURTS, PARTICULARLY IN THE AREAS OF TRADE PRACTICES AND FAMILY LAW. THE LACK OF POWER IN THE COURTS TO ENSURE THAT PROCEEDINGS WHICH ARE INSTITUTED IN DIFFERENT COURTS, BUT WHICH OUGHT TO BE TRIED TOGETHER, WAS REMEDIED, SO THAT ALL RELATED PROCEEDINGS ARE NOW HEARD AND DETERMINED IN ONE COURT.

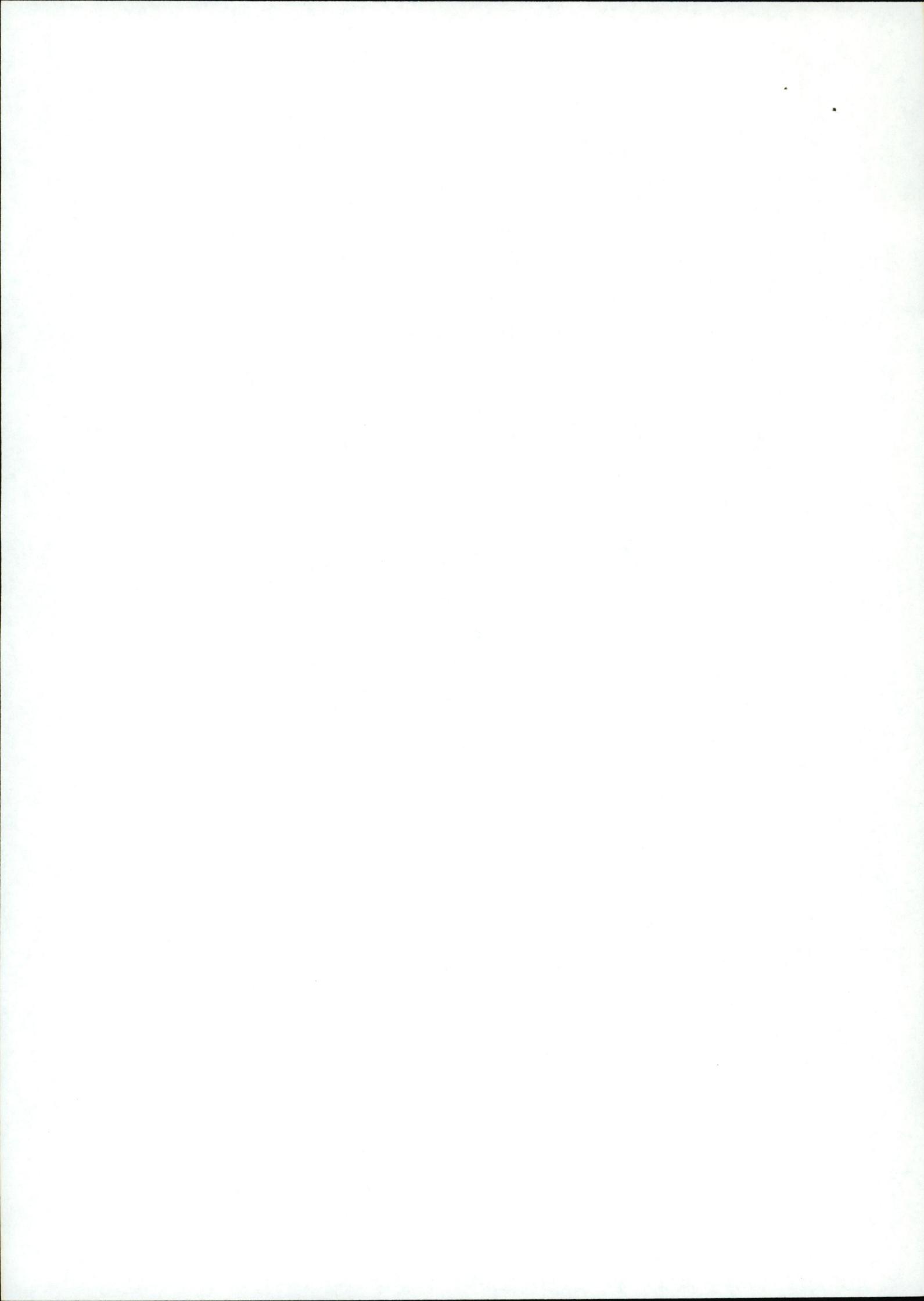
MR PRESIDENT, UNDER THE SCHEME, IF PROCEEDINGS ARE COMMENCED IN AN INAPPROPRIATE COURT, OR IF RELATED PROCEEDINGS ARE BEGUN IN SEPARATE COURTS, THE COURTS HAVE THE POWER TO TRANSFER PROCEEDINGS TO THE MOST APPROPRIATE COURT, HAVING REGARD TO THE NATURE OF THE DISPUTE, THE LAWS TO BE APPLIED AND THE INTERESTS OF JUSTICE.

SECTION 6 OF THE ACT PRESENTLY PROVIDES FOR THE COMPULSORY TRANSFER BY THE STATE SUPREME COURT TO THE FEDERAL COURT OF ANY SPECIAL FEDERAL MATTER UNLESS IT APPEARS TO THE SUPREME COURT THAT, BY REASON OF THE PARTICULAR CIRCUMSTANCES OF THE CASE, IT IS BOTH INAPPROPRIATE FOR THE MATTER TO BE TRANSFERRED AND APPROPRIATE FOR THE SUPREME COURT TO DETERMINE THE PROCEEDINGS.

THE EXPRESSION "SPECIAL FEDERAL MATTERS" REFERS TO MATTERS OF SPECIAL COMMONWEALTH CONCERN, GENERALLY WITHIN THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURT. THE INTENTION BEHIND THE SECTION WAS THAT THESE MATTERS SHOULD CONTINUE TO BE HEARD IN THE FEDERAL COURT BUT IN AN EXCEPTIONAL CASE WHERE THAT IS NOT WARRANTED, THE STATE COURT WOULD HAVE JURISDICTION TO DETERMINE THE MATTER IF THE COMMONWEALTH ATTORNEY GENERAL DID NOT REQUEST THAT THE MATTER BE TRANSFERRED.

MR PRESIDENT, UNDER THE PROPOSED AMENDMENTS THE SUPREME COURT WILL BE REQUIRED TO TRANSFER SUCH PROCEEDINGS UNLESS SATISFIED THAT THERE ARE PARTICULAR REASONS, OTHER THAN THE CONVENIENCE OF THE PARTIES IN THE PARTICULAR CIRCUMSTANCES OF THE CASE, THAT JUSTIFY THE SUPREME COURT DETERMINING THE PROCEEDING.

IN DECIDING WHETHER THERE ARE SUCH PARTICULAR REASONS, THE COURT WILL BE REQUIRED TO HAVE REGARD TO THE GENERAL RULE THAT "SPECIAL FEDERAL MATTERS" SHOULD BE TRANSFERRED TO THE APPROPRIATE FEDERAL COURT. THE POWER OF THE COMMONWEALTH ATTORNEY-GENERAL TO REQUEST THE TRANSFER OF PROCEEDINGS IS REMOVED.



THE BILL ALSO INCLUDES ANCILLARY PROVISIONS THAT REQUIRE NOTICE TO BE GIVEN TO THE STATE AND COMMONWEALTH ATTORNEY-GENERAL BEFORE THE COURT ORDERS THAT THE PROCEEDINGS NOT BE TRANSFERRED, SO AS TO ALLOW EITHER ATTORNEY TO MAKE SUBMISSIONS ON THE MATTER.

HONOURABLE MEMBERS, UNFORTUNATELY THE PRESENT PROVISIONS HAVE NOT WORKED SATISFACTORILY IN THE THREE OR FOUR CASES WHERE STATE OR TERRITORY JUDGES HAVE ORDERED THAT MATTERS NOT BE TRANSFERRED. IN THE ABSENCE OF DISSENTING PARTIES, COURTS HAVE TENDED TO MAKE ORDERS THAT MATTERS NOT BE TRANSFERRED WITHOUT REGARD TO THE STRONG POLICY CONSIDERATIONS THAT PROCEEDINGS SHOULD BE TRANSFERRED TO THE FEDERAL COURT WHERE "SPECIAL FEDERAL MATTERS" ARISE FOR DETERMINATION.

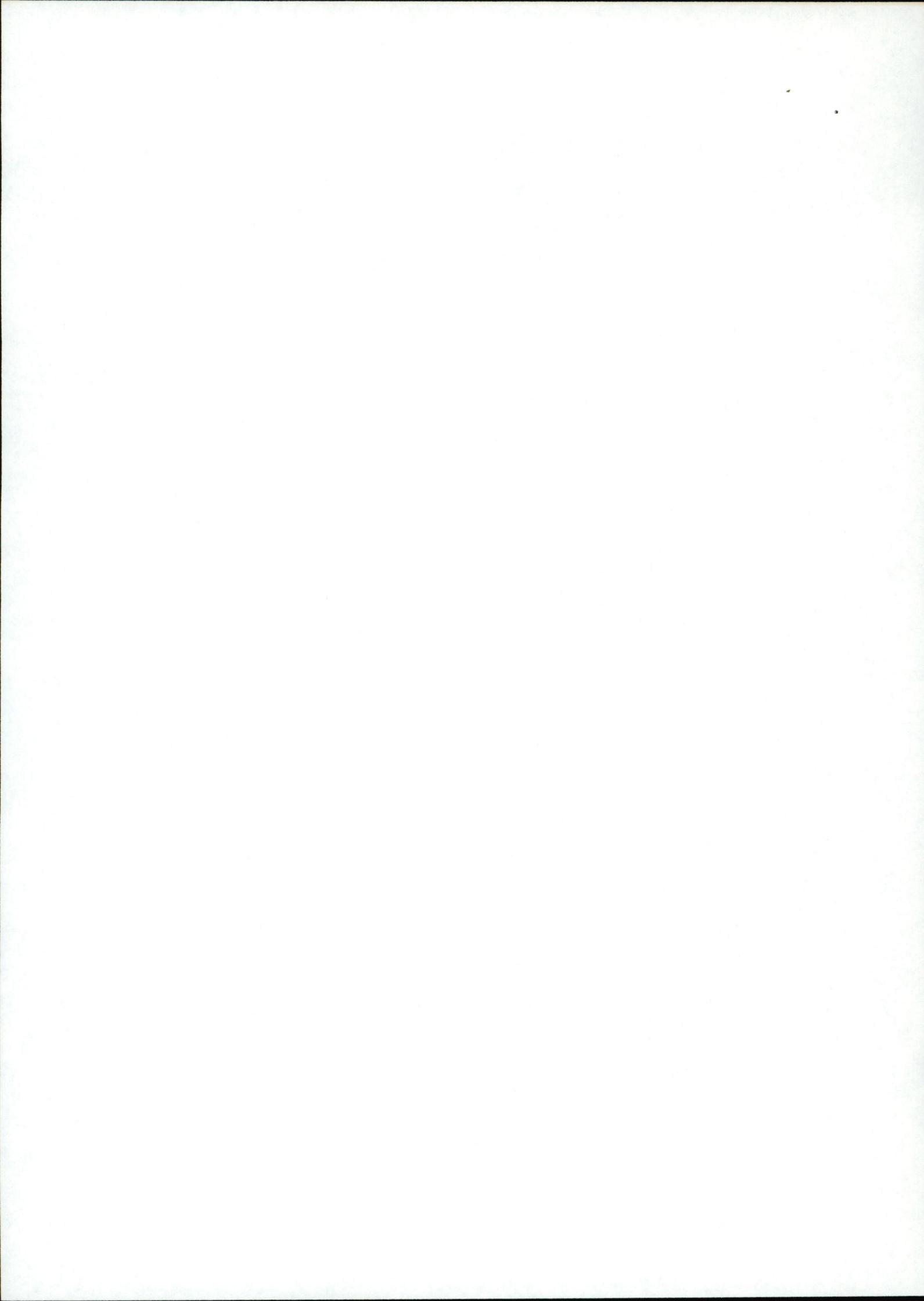
EXCEPTIONAL CIRCUMSTANCES ARE NOT CONSTITUTED BY THE CONSENT, OR MERE CONVENIENCE, OF THE PARTIES. FURTHERMORE, THE COMMONWEALTH ATTORNEY GENERAL IS UNDERSTOOD TO BE UNCOMFORTABLE IN HIS POSITION UNDER SECTION 6(6) TO REVIEW AND, IN EFFECT, TO OVERRULE THE DECISION OF THE STATE OR TERRITORY JUDGE NOT TO TRANSFER A "SPECIAL FEDERAL MATTER".

AMENDMENT OF SECTION 6 WILL AVOID THE PRESENT UNSATISFACTORY SITUATION WHEREBY STATE OR TERRITORY JUDGES' ORDERS ARE IN EFFECT SUBJECT TO APPEAL TO THE COMMONWEALTH ATTORNEY GENERAL.

A CONSEQUENTIAL AMENDMENT IS ALSO MADE WHICH WILL ADD "STEP PARENT ADOPTIONS" TO THE LIST OF "SPECIAL FEDERAL MATTERS" IN SECTION 6.

THIS AMENDMENT DOES TRESPASS UPON THE JURISDICTION OF STATE COURTS UNDER THE STATES' RESPECTIVE ADOPTION LAWS. IT IS MERELY AN AMENDMENT TO ENSURE THAT THE FAMILY COURT WILL DETERMINE WHETHER A CUSTODY OR GUARDIANSHIP ORDER MADE UNDER THE FAMILY LAW ACT SHOULD CEASE TO HAVE EFFECT BY OPERATION OF AN ORDER FOR ADOPTION UNDER STATE OR TERRITORY LAW.

THIS PARTICIPATION BY THE FAMILY COURT WILL ENABLE PARTICULAR CONSIDERATION OF THE POSITION OF THE PARENT WHOSE RIGHTS IN RESPECT OF THE CHILD WOULD BE TERMINATED BY THE MAKING OF AN ORDER FOR ADOPTION BY THE OTHER PARENT AND THE STEP PARENT. THE AMENDMENT IS PRECIPITATED BY THE ISSUE RAISED BY THE DECISION OF THE HIGH COURT IN RE LSH; EX PARTE RTF (1987) 164 CLR 91.



THE POINT OF THE NEW PROVISION IS TO PRESERVE THE JURISDICTION OF THE FAMILY COURT IN RESPECT OF A CHILD ADOPTED BY A STEP PARENT UNLESS THE FAMILY COURT HAS ITSELF AGREED THAT THE ADOPTION SHOULD HAVE THE EFFECT OF DENYING THE FAMILY COURT JURISDICTION. THE SOLICITORS GENERAL ACCEPT IT IS APPROPRIATE THAT AN ORDER FOR LEAVE FOR ADOPTION SHOULD BE MADE A "SPECIAL FEDERAL MATTER" UNDER THE CROSS VESTING ACTS.

MR PRESIDENT, IT MIGHT BE NOTED THAT IN CLAUSE 3 OF THE BILL REFERENCE IS MADE, IN THE NEW SECTION 6(2)(b), TO PARAGRAPH (ab) OF THE DEFINITION OF "SPECIAL FEDERAL MATTER" IN SECTION 3(1) OF THE COMMONWEALTH JURISDICTION OF COURTS (CROSS-VESTING) ACT 1987.

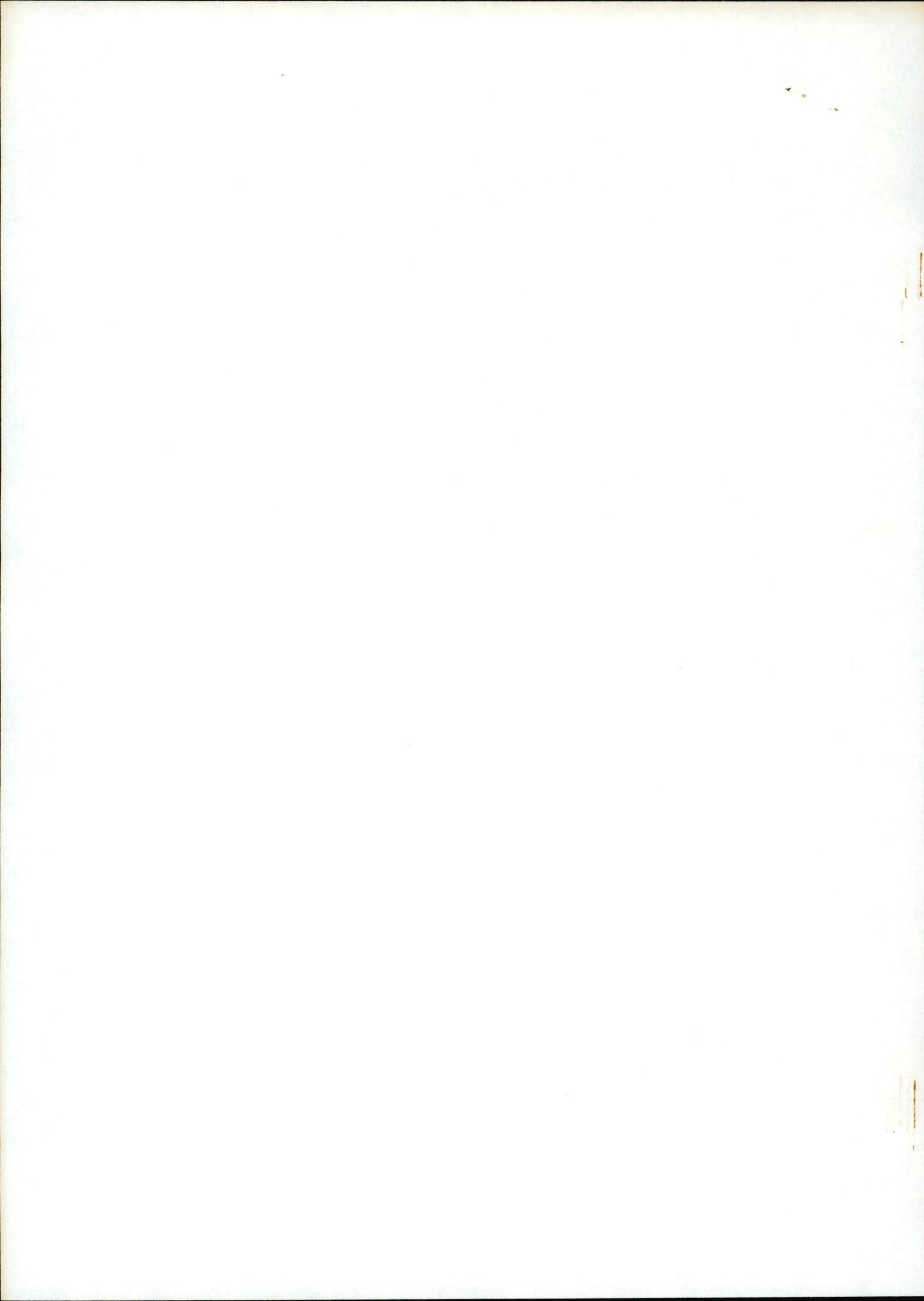
THAT PARAGRAPH OF THE COMMONWEALTH ACT IS TO BE INSERTED UPON COMMENCEMENT OF THE COMMONWEALTH LAW AND JUSTICE AMENDMENT ACT (NO 3) 1992. A BILL FOR THAT ACT WAS INTRODUCED IN THE SENATE ON 25 JUNE 1992 AND PASSED IN THAT HOUSE ON 13 OCTOBER 1992.

MR PRESIDENT IT IS THE INTENTION OF THE GOVERNMENT NOT TO PROCLAIM THE LEGISLATION NOW BEFORE THE HOUSE UNLESS AND UNTIL THAT RELATED COMMONWEALTH LEGISLATION IS IN PLACE AND THE RELEVANT PROVISION CONFORMS, IN CONTENT, WITH THE CURRENT COMMONWEALTH BILL.

MR PRESIDENT, IN THE UNLIKELY EVENT THAT THE DEFINITION OF "SPECIAL FEDERAL MATTER" IS NOT AMENDED AS PROPOSED IN THE COMMONWEALTH BILL IT WOULD BE MY INTENTION NOT TO PROCLAIM THAT PART OF THE BILL NOW BEFORE THIS HOUSE THAT REFERS TO THAT PARAGRAPH OF THE DEFINITION.

MR PRESIDENT,

I COMMEND THE BILL TO THE HOUSE.



**JURISDICTION OF COURTS (CROSS-VESTING)
AMENDMENT ACT 1992 No. 62**

NEW SOUTH WALES



TABLE OF PROVISIONS

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**JURISDICTION OF COURTS (CROSS-VESTING)
AMENDMENT ACT 1992 No. 62**

NEW SOUTH WALES



Act No. 62, 1992

An Act to amend the Jurisdiction of Courts (Cross-vesting) Act 1987 to make further provision in relation to the transfer of special federal matters from the Supreme Court to federal courts; and for related purposes.
[Assented to 3 November 1992]

Jurisdiction of Courts (Cross-vesting) Amendment Act 1992 No. 62

The Legislature of New South Wales enacts:

Short title

1. This Act may be cited as the Jurisdiction of Courts (Cross-vesting) Amendment Act 1992.

Commencement

2. This Act commences on a day to be appointed by proclamation.

Amendment of Jurisdiction of Courts (Cross-vesting) Act 1987 No. 125

3. The Jurisdiction of Courts (Cross-vesting) Act 1987 is amended by omitting section 6 and by inserting instead the following section:

Special federal matters

6. (1) If:

- (a) a matter for determination in a proceeding that is pending in the Supreme Court is a special federal matter; and
- (b) the court does not make an order under subsection (3) in respect of the matter,

the court must transfer the proceeding in accordance with this section to the Federal Court or a court mentioned in subsection (2) (b).

(2) If the court orders that a proceeding be transferred, the proceeding must be transferred:

- (a) if the matter for determination in the proceeding is a matter mentioned in paragraph (a), (b), (c), (d) or (e) of the definition of "special federal matter" in section 3 (1) of the Jurisdiction of Courts (Cross-vesting) Act 1987 of the Commonwealth—to the Federal Court; or
- (b) if the matter for determination in the proceeding is a matter mentioned in paragraph (ab) of that definition—to whichever of the Family Court, the Family Court of Western Australia or the Supreme Court of the Northern Territory, in the opinion of the court, is appropriate in the circumstances.

(3) The Supreme Court may order that the proceeding be determined by that court if it is satisfied that there are special reasons for doing so in the particular circumstances of the proceeding other than reasons relevant to the convenience of the parties.

Jurisdiction of Courts (Cross-vesting) Amendment Act 1992 No. 62

(4) Before making an order under subsection (3), the court must be satisfied that:

- (a) a written notice specifying the nature of the special federal matter has been given to the Attorney-General of the Commonwealth and the Attorney-General of the State; and
- (b) a reasonable time has elapsed since the giving of the notice for the Attorneys-General to consider whether submissions to the court should be made in relation to the proceeding.

(5) For the purposes of subsection (4), the court:

- (a) may adjourn the proceeding for such time as the court thinks necessary and may make such order as to costs in relation to an adjournment as it thinks fit; and
- (b) may direct a party to the proceeding to give a notice in accordance with that subsection.

(6) In considering whether there are special reasons for the purposes of subsection (3), the court must:

- (a) have regard to the general rule that special federal matters should be heard by the Federal Court or a court mentioned in subsection (2) (b), whichever is appropriate in the particular case; and
- (b) take into account any submission made in relation to the proceeding by an Attorney-General mentioned in subsection (4).

(7) Nothing in this section prevents the court granting urgent relief of an interlocutory nature if it is in the interests of justice to do so.

(8) If, through inadvertence, the Supreme Court determines a proceeding of the kind mentioned in subsection (1) without:

- (a) the court making an order under subsection (3) that the proceeding be determined by that court; or
- (b) a notice mentioned in subsection (4) being given,

nothing in this section invalidates the decision of that court.

(9) This section does not apply to a proceeding by way of an appeal that is instituted in the Full Court of the Supreme Court if the court the decision of which is the subject of the appeal had made an order under subsection (3), or under section 6 (1) as in force before the commencement of the Jurisdiction of Courts (Cross-vesting) Amendment Act 1992, in relation to the special federal matter.

Jurisdiction of Courts (Cross-vesting) Amendment Act 1992 No. 62

Application

4. Despite the amendments of the Jurisdiction of Courts (Cross-vesting) Act 1987 made by this Act, that Act as in force immediately before the commencement of those amendments continues to apply in relation to a proceeding pending in a court to which section 6 of that Act applied before that commencement.

*[Minister's second reading speech made in—
Legislative Assembly on 3 September 1992
Legislative Council on 27 October 1992]*