NEW SOUTH WALES

ATTORNEY GENERAL

Mr Peter Hallahan
Committee Secretary
Senate Legal and Constitutional Affairs Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hallahan,

I am writing in relation to the *Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008* (**the Bill**).

I am concerned with the expansion of the jurisdiction of the Federal Court to include an indictable criminal jurisdiction. This expansion coincides with the introduction of cartel offences and is ostensibly to allow the prosecution to elect to have such matters dealt with by the Federal Court. It is unclear however why this is necessary given that State Courts have for many years borne the burden of similarly complex federal matters arising from taxation and terrorism charges. State Courts should continue to hear indictable federal criminal matters for the following reasons:

- As already noted State/Territory judges are experienced in dealing with Commonwealth offences and complex federal criminal charges.
- State/Territory judges are experienced in criminal law generally and the conduct of jury trials.
- Committal proceedings will still be heard in State/Territory Courts and be subject to the different procedures of each jurisdiction.
- Problems with 'dual jurisdiction' may arise where conduct is criminal under both State and Federal law. The choice of charges will affect where the offender is dealt with and under which set of procedural rules. In some matters the offender may also be charged with both State and Commonwealth charges. In such cases the Federal Court would not have jurisdiction to hear the State offences. This would significantly affect both the defendant and the State in terms of the cost of the trial and the delays in resolving all charges.
- Allowing Commonwealth matters to be dealt with in a separate Court has the potential to create division, inconsistencies and inequalities between two categories of offenders: Commonwealth and State. Offenders should not be distinguished on this basis. Dealing with all offenders within the State jurisdiction would overcome this problem.

Postal: GPO Box 5341 Sydney NSW 2001 Telephone: (02) 9228 4977 Facsimile: (02) 9228 3600

- The legislation allows a prosecutor to choose to bring a case in either the Federal Court or the relevant State/Territory Court. This has the potential to produce inconsistencies. It allows the prosecutor to select the jurisdiction based on some perception of benefit. It may also result in inconsistencies between offenders depending on the State in which they reside. In some states the Prosecution may choose to proceed in the State Court, whereas in another it may go to the Federal Court.

- Allowing proceedings to be brought in State/Territory Courts as well as the Federal Court does not promote consistency of interpretation. It simply adds an additional jurisdiction to the number already considering Commonwealth offences.

In addition, I have a number of concerns about the Bill itself, which are both substantive and technical in nature.

Original Jurisdiction – Indictable Offences

Pre-trial matters (hearings, disclosure and quashing indictments)

The pre-trial provisions of the Bill are just one aspect where there are significant differences between NSW law and the proposed Commonwealth approach, as well as technical issues. Whilst the technical issues may be addressed by amending the Bill, the substantive issues simply underline the issues noted above, i.e. that the existence of a separate Commonwealth jurisdiction has the potential to produce real inconsistencies and inequities between offenders.

The first issue in respect of this Part is that Court ordered disclosure may be made in any matter. This is not the case in NSW, where such orders are limited to complex matters. This issue was recently considered by the NSW Trial Efficiency Working Group. That Group was of the view that Court ordered disclosure should not be made in all matters but only where it is in the interests of justice to do so. It is accepted that the nature of cartel prosecutions is such that the efficient disposition of such matters may require pre trial disclosure. The disparity between the NSW and Commonwealth procedures however may affect the decision to proceed in either jurisdiction and would produce inequities should defendants be dealt with under different regimes.

Second, the pre trial regime set out in the Bill requires the Court to manage the pre-trial process. This can be a costly and time-consuming approach. The Bill does not encourage or provide for any alternative way of managing the process such as exchange of notices and pre trial conferences between the parties. Again this issue has recently been considered in NSW by the Trial Efficiency Working Group and party managed pre-trial procedures are seen as a means of reducing Court time in more complex matters. Again, it may be that the Federal Court has the capacity to manage these matters, however, this underlines the differences between the State and Federal jurisdictions.

I also note some specific issues with the pre trial provisions.

Clause 23CL of the Bill is one example that has both substantive and technical problems. Clause 23CL abrogates legal professional privilege (**LPP**). The clause abrogates legal professional privilege for the purposes of inter-party disclosure before trial. The apparent intention is to facilitate the trial and narrow the issues in dispute.

The substantive concerns raised by the provision include:

- Pre-trial disclosure of key arguments is achieved in civil proceedings without abrogating LPP. It is both unnecessary and inappropriate to prevent claims of privilege during pretrial disclosure in criminal matters;

- The section purports to reinstate privilege over the disclosed information for purposes other than disclosure i.e. the trial itself. It is difficult to see how this reinstatement can be effective, given that the 'privileged' information will be known to the prosecution team that conducts the trial; and

- The abrogation of privilege may result in reduced disclosure in practice, by discouraging defendants from making full and frank disclosures to their lawyers in the first place.

The clause also raises serious technical concerns. Subclause 23CL(1)(b) refers to an order of the Court, which can override privileges and immunities other than legal professional privilege. However, the Act as presently drafted does not empower the Court to make such orders. Meanwhile, the note to subclause 23CL(1) says that the Court may not make orders overriding public interest immunity, but subclause 23CL(3) does not appear to be drafted in a way that prevents the Court from overriding this immunity.

The drafting of clause 23CD of the Bill is not clear. It allows the Court to order the disclosure of the prosecutor's case, the accused's response, the prosecutor's response, and ongoing disclosures. It does not stipulate that the Court must order all of these disclosures; therefore it would technically be possible for the Court to only order disclosure from one party.

Subclauses 23CF(a) and (b) of the Bill permit a court to order the accused to disclose not only whether the accused "takes issue" with a fact, matter or circumstance set out in the notice of the prosecution's case, but also disclose "the basis for taking issue" with the fact, matter, or circumstance. This would require the accused to agree to the fact or allege a contrary fact, matter or circumstance – this would be disclosing the nature of the defence case. This is not presently required in NSW and any defendant facing charges in the Federal Court would therefore be dealt with differently to one being dealt with on the same charges in a State court.

Section 136(4) of the *Criminal Procedure Act 1986* (NSW) only allows Court ordered defence disclosure to be made if the Court is satisfied that the accused will be or is represented by an Australian legal practitioner. The Bill does not contain an equivalent provision. Given the significant requirements of this Part it would seem appropriate to include such a provision.

Pre-trial matters (empanelling the jury)

Clause 23DU of the Bill allows an officer of the Court to call the name of a potential juror in Court. Clause 23EB of the Bill allows the Court to order that a juror be called by number only (rather than name) in order to protect the security of a potential juror. Any juror called by name may be put at risk of being investigated by the accused or other people in Court. Given the importance of the anonymity of jurors, and the fact that clause 23EB provides for their anonymity, it is problematic that the Bill allows an officer of the Court to call any juror by name.

Clause 23DZA allows the Prosecutor to request that potential jurors be stood aside but does not allow the Prosecution any peremptory challenges. The availability of the peremptory challenge and the role it plays in jury selection was recently reviewed in

NSW by the Law Reform Commission[1] and given its general support, retained. It is unclear why the Prosecution's peremptory challenges have been removed in this Bill.

Subclause 23DW(1)(c) allows the Sheriff to supplement jurors from persons within the vicinity of the Court who are qualified to serve on the jury. This approach would not require the potential juror to be summonsed or given sufficient notice. In addition, it is unlikely the people you would find in the vicinity of the Court would be representative of the broader population.

Custodial and other matters

Subclause 23HC(1) of the Bill allows the Court to make orders as it thinks appropriate in the circumstances to protect witnesses called or proposed to be called or information, documents or other things admitted or proposed to be admitted. Subclause 23HC(2) allows the Court to order the exclusion of the public or specific persons from the Court and direct how a witness may give evidence. There are a number of problems with this provision:

- It does not contain a clear test as to when the Court can make orders to protect a witness. It is recommended that a test allowing the Court to make orders to protect witnesses, if it is in the interests of justice be included in the provision.
- Allowing any witnesses (rather than just vulnerable witnesses) to be protected is very broad.
- There is no indication of the orders a Court may give as to how a witness may give evidence i.e. not under oath, via their home telephone.

Appellate and related jurisdiction (criminal proceedings)

Subclause 30AA(1)(d) allows an appeal on the basis that the accused was acquitted because of mental illness. This should not be appealable. There is no difference between a jury finding in fact that a person was mentally ill at the relevant time and any other fact they might find.

Offences relating to juries

Subclauses 58AB(1)(d) and (2)(d) and 58AC(1)(c) make it an offence for a person not to comply with a direction given by the Sheriff or the Court. There should be a requirement that the direction given by the Sheriff or Court be reasonable.

I would like to again reiterate that the above is not an exhaustive list of the problems in the Bill, but merely examples of some of the problems.

Given the concurrent jurisdiction that the Federal Court will have with State and Territory Supreme Courts for the Cartel provisions, it would have been appropriate for an Exposure Bill to have been circulated prior to introduction. The SCAG Harmonisation of Criminal Procedures Working Group has now been established and it would also have been appropriate for that Group to consider the Bill. Thank you however, for the opportunity to make a submission to this inquiry.

Yours faithfully

(John Hatzistergos)

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[1] Report 117 (2007) - Jury selection, Law Reform Commission of NSW