

Bills Digest  
No. 122 2003–04

## Law and Justice Legislation Amendment Bill 2004

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No. 122 2003–04

Law and Justice Legislation Amendment Bill 2004

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# Law and Justice Legislation Amendment Bill 2004

**Date Introduced:** 24 March 2004

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The main provisions mentioned below commence the day after the Act receives the Royal Assent, except item 1, which commences on a day to be fixed by proclamation or otherwise 6 months after the Act receives Royal Assent. Items, 2, 13 and 39 have retrospective operation, and so warranted attention from the Senate Standing Committee for the Scrutiny of Bills.<sup>1</sup> The effect of the retrospective provisions is, however, minor and procedural. Other minor and procedural provisions commence as outlined in section 2 of the Bill.

## Purpose

This is an omnibus piece of legislation which contains amendments to 22 different Acts. A large number of provisions in the Bill are minor and technical amendments. The more substantive amendments are directed toward achieving the following purposes:

- placing responsibility for making fees for court proceedings under the *Aboriginal and Torres Strait Islander Commission Act 1989* in the hands of the executive rather than the judges of the Federal Court of Australia
- to address a recommendation in the report of the Senate Foreign Affairs, Defence and Trade References Committee entitled *Helping Australians abroad – A review of the Australian Government’s consular services*, that ‘the Department of Foreign Affairs and Trade examine options to enable locally engaged staff in Australian posts to undertake notarial acts’<sup>2</sup>
- to add a circumstance – failure of an applicant or appellant to attend a hearing – in which a single judge of the Federal Court of Australia or the Full Court, may make an order dismissing a matter, and to add a provision allowing a single judge or the Full Court to set aside orders dismissing an application or appeal
- to give to the Commonwealth Solicitor-General in his or her official capacity the right of appearance and ‘all the rights and privileges of a barrister’ in State courts (whether exercising federal jurisdiction or not), and

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- to clarify the definition of ‘court premises’ in the *Public Order (Protection of Persons and Property) Act 1971*.

## Background

As there is no central theme to the Bill, the background to each substantial amendment will be explained where relevant in the Main Provisions section below.

## Main provisions

### Schedule 1

#### **Item 1 – Amendment of the *Aboriginal and Torres Strait Islander Commission Act 1989***

Schedule 4 of the *Aboriginal and Torres Strait Islander Commission Act 1989* has the effect of making the Federal Court of Australia the court of disputed returns for the purposes of elections conducted under the Act. Currently subclause 28(1) of schedule 4 allows for judges of the court to make rules for regulating the practice and procedure of the court, the forms to be used and *the fees to be paid by the parties*.

The proposed amendment removes the power of the judges to regulate the fees and in effect gives that power to the executive (in the form of the Governor-General). This is the model by which fees for proceedings in the Federal Court are generally determined (section 60 of the *Federal Court of Australia Act 1976* is the general source of the Governor-General’s power in this regard).

The explanatory memorandum to the original Bill (Aboriginal and Torres Strait Islander Commission Bill 1989) discloses no particular policy consideration which would make it necessary or desirable that the regulation of fees for these matters be the responsibility of the judiciary rather than the executive.

#### **Items 11 and 12 – Amendments to the *Bankruptcy Act 1966***

These amendments are expressed, in the explanatory memorandum, to address the report of the Senate Foreign Affairs, Defence and Trade References Committee entitled *Helping Australians abroad – A review of the Australian Government’s consular services*. The committee did indeed recommend that ‘the Department of Foreign Affairs and Trade examine options to enable locally engaged staff in Australian posts to undertake notarial acts.’<sup>3</sup>

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The explanatory memorandum fails to mention, however, that the committee also noted some obstacles to that end. The committee noted, for instance, that locally engaged staff (LES) are not always Australian nationals and that the Vienna Convention on Consular Relations (the 'Vienna Convention'),<sup>4</sup> required that the permission of receiving countries would be needed prior to the appointment of non-Australian nationals to undertake notarial acts.<sup>5</sup>

The government tabled its response to the Committee's report on 26 November 1997. In relation to the Committee's recommendation noted above the government's response included these comments:

Currently, domestic and international law precludes LES from performing notarial acts. As a first step towards implementing this recommendation, the Consular Fees Act 1955 has been amended to provide for the appointment of LES for the purposes of charging prescribed fees. Appointments will be made under authority of the Secretary of the Department of Foreign Affairs and Trade. Further, in most cases, the Department will only appoint LES for these purposes who are Australian nationals to avoid potential complications under the Vienna Convention on Consular Relations.

Further steps to implement the recommendation will require consultation with State and Territory Governments to examine options to appoint LES to perform notarial acts under relevant State and Territory legislation.<sup>6</sup>

The explanatory memorandum is silent as to whether the foreshadowed consultations with State and Territory governments have occurred, and as to the outcome thereof. As to the complications under the Vienna Convention, the amendments do not, on their face, address those.

#### **Item 17 – Amendments to the *Evidence Act 1995***

These amendments allow for locally engaged staff at Australian diplomatic and consular missions to give evidence, by written statement or affidavit, in relation to such matters as the proof of the content of documents and business records. Like items 11 & 12 above, they are also directed at implementing the recommendations of the Senate Foreign Affairs, Defence and Trade References Committee entitled *Helping Australians abroad – A review of the Australian Government's consular services*, insofar as they seek to reduce the administrative burden on diplomatic and consular staff. Because the giving of evidence in this regard probably comes within the definition of 'consular functions' under the Vienna Convention,<sup>7</sup> however, the same issue regarding the potential inconsistency with that Convention applies.

#### **Items 18-20 – Amendments to the *Federal Court of Australia Act 1976***

The explanatory memorandum claims that these items ensure that a single judge is able to deal with 'ancillary and interlocutory' matters without the need to constitute a Full Court. It is further stated, in the memorandum, that 'all powers extended to single judges are

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existing powers exercised by the Full Court.’ In truth, however, the amendments simply add a circumstance – failure of an applicant or appellant to attend a hearing – in which a single judge or a Full Court, may make an order dismissing a matter, and add a provision allowing a single judge or the Full Court to set aside orders dismissing an application or an appeal. Both single judges and the Full Court already have power to dismiss applications for failure to comply with a direction of the court.<sup>8</sup>

The amendments are expressed to be entirely prospective, in that they apply only to proceedings or appeals commenced after the commencement of the amendments.

#### **Item 44 – Amendments to the *Law Officers Act 1964***

The purpose behind this amendment is to ensure that the Commonwealth Solicitor-General has rights of appearance in State courts even where those courts are exercising State, and not Federal, jurisdiction. The explanatory memorandum cites the High Court’s decision in *Re Wakim; ex parte McNally* (1999) 198 CLR 511, as giving rise to the possibility that an instance could occur where the Commonwealth wished to instruct the Solicitor-General to appear on its behalf in a State court where that court was exercising state jurisdiction.

The amendment is framed quite broadly, giving the Solicitor-General not only rights of appearance, but all rights and entitlements of a practitioner in state courts (as well as federal and territory courts). The breadth of the provision raises a question as to source of the Commonwealth’s power to confer upon one of its officers, rights and entitlements in state courts exercising state jurisdiction. Generally speaking, legislation conferring such rights might be thought to be a matter for state legislatures. The power of the Commonwealth to legislate in respect of courts is confined to the matters contained in Chapter III of the Constitution. Chapter III does not extend to the exercise of state jurisdiction.<sup>9</sup> The provision is confined, however, to the Commonwealth Solicitor-General *acting in his or her official capacity*. That probably has the effect of limiting the operation of the provision to instances where the Commonwealth has a legitimate interest in a matter and consequently in having the Solicitor-General appear on its behalf. As such it may be that the provision falls within the general executive power of the Commonwealth sourced in section 61 of the Constitution, and extended to incidental matters by section 51(xxxix).

#### **Item 54 – Amendment of the *Public Order (Protection of Persons and Property) Act 1971***

Part IIA of the *Public Order (Protection of Persons and Property) Act 1971* contains various provisions relating to the security of court premises. The current definition of ‘court premises’ refers to premises occupied in connection with the operations of the court.’ The amendment, in effect, simply expands the definition by adding ‘or used (whether permanently or temporarily or under lease or otherwise) in connection with the sittings, or any other operations, of the court.’

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### Item 57 – Amendment of the *Workplace Relations Act 1996*

Section 415 of the Workplace Relations Act requires that the jurisdiction of the Federal Court be exercised by a Full Court where writs of mandamus or prohibition are sought against Presidential members of the Australian Industrial Relations Tribunal. The amendment adds to section 415 the proviso that jurisdiction need not be exercised by a Full Court in such cases where all that is sought is a consent order, an order dismissing for want of prosecution, directions for the conduct of the proceeding, or similar matters outlined in the proposed new subsection.

## Concluding comments

In the main this Bill appears to be consistent with its purpose. In relation to items 11, 12 and 17, a question arises as to whether the problems identified in the government's response to the report of the Senate Foreign Affairs, Defence and Trade References Committee entitled *Helping Australians abroad – A review of the Australian Government's consular services*, have been adequately dealt with. Item 44 is potentially controversial in that it raises an issue of Commonwealth / State legislative power, but, because it is confined in scope to the Commonwealth Solicitor-General acting in his or her capacity as such, it is probably within or incidental to the executive power of the Commonwealth provided for in section 61 of the Constitution.

## Endnotes

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- 1 Senate Standing Committee for the Scrutiny of Bills *Alert Digest*, No. 5 of 2004, Senate Standing Committee for the Scrutiny of Bills, Canberra, 31 March 2004, at p. 14.
- 2 Senate Foreign Affairs, Defence and Trade References Committee, *Helping Australians abroad – A review of the Australian Government's consular services*, Senate Foreign Affairs, Defence and Trade References Committee, Canberra, June 1997, p.30.
- 3 *ibid.*
- 4 Signed and ratified by Australia in 1964 and 1973 respectively.
- 5 Article 1 of the Vienna Convention defines 'consular officer' to mean 'any person entrusted in that capacity with the exercise of consular functions.' Consular functions include, by article 5(f), 'acting as notary and civil registrar and in capacities of a similar kind...' Article 22 provides that consular officers should, in principle, be nationals of the sending state [in this context Australia] and also that consular officers may not be appointed from among persons having the nationality of the receiving state except with the express consent of that state.

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- 6 Senator Minchin, 'Committees: Foreign Affairs, Defence and Trade References Committee: Report: Government Response', *Debates*, 26 November 1997, p. 9521.
- 7 Article 5(j) – 'transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State...'
- 8 Section 20(5)(d).
- 9 *Re Wakim* at p. 562.

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