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20 February 2009, no. 98, 2008–09, ISSN 1328-8091

Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008

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Law and Bills Digest Section

Contents

Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008

Date introduced: 3 December 2008

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 3 commence on the day the Act receives the Royal Assent. Schedule 1 of the Act commences on the 28th day after the day the Act receives the Royal Assent.

Links: The *relevant links* to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at http://www.aph.gov.au/Bills/. When Bills have been passed they can be found at ComLaw, which is at http://www.comlaw.gov.au/.

Purpose

The purpose of the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (the Bill) is to provide for the exercise of certain criminal jurisdiction by the Federal Court of Australia.

The Explanatory Memorandum notes that the Bill will provide a procedural framework allowing the Federal Court to exercise the indictable criminal jurisdiction which it will be given to deal with serious cartel offences if the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 is enacted.[1]

Background

The Federal Court of Australia (the Court) was established by the *Federal Court of Australia Act 1976* (Cth). The original jurisdiction of the court is set out in subsection 19(1) of that Act:

> The Court has such original jurisdiction as is vested in it by laws made by the Parliament[2].

1 Explanatory Memorandum, Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008, p. 1.

2 *Federal Court of Australia Act 1976* (Cth), sub section 19(1). This Act can be found electronically via ComLaw here.

The Court considers matters brought under a range of statutes including the *Trade Practices Act 1974*, the *Administrative Appeals Tribunal Act 1975*, the *Bankruptcy Act 1966*, the *Copyright Act 1968* and the *Admiralty Act 1988*. This also means that the Court has dealt with some criminal offences under federal law. However, they are summary offences and it is only the offences under the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 that will allow the Court to deal with indictable offences, that is, offences that carry with them a penalty of 12 months' imprisonment or more.

According to the Explanatory Memorandum, no legislation giving the Federal Court indictable criminal jurisdiction currently exists.[3] Once the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 is enacted, the Federal Court will be able to exercise its criminal jurisdiction over matters relating to serious cartel conduct. That Bill is before the current Parliament and the link to the Bill's homepage, including the Bills Digest, can be found here.

Commonwealth criminal law continues to expand and develop far beyond what the Fathers of Federation could have imagined. In the 1980s, drug crimes and financial crimes were catalysts to the creation of the Office of the Commonwealth Director of Public Prosecutions and the (now) Australian Crime Commission. Commonwealth criminal law continues to expand beyond borders and captures conduct such as terrorism, people trafficking and war crimes. Despite the enormous growth in Commonwealth criminal law, almost all federal offences are still dealt with by State and Territory Courts.

The Government believes that the Federal Court of Australia's jurisdiction should be expanded to allow it to deal with specific criminal offences. Initially, it is proposed that the Federal Court only deal with serious cartel conduct, as introduced in the *Trade Practices Amendment (Serious Cartel Conduct) Bill 2008*. There would be scope in the future to allow for other crimes such as terrorism or customs matters. At this point in time, the Government has specifically limited the criminal jurisdiction of the Federal Court to serious cartel offences.[4] During the Senate Legal and Constitutional Affairs Committee public hearing into the Bill, Mr Tim Game SC of the Law Council of Australia, said that 'overall, we see limited prospects for the Federal Court to be a trial court of federal crime'.[5]

The Bill does not address every conceivable procedural matter that may arise but does attempt to be as comprehensive as is reasonable. The Court will create its own Rules of Court (under section 59(1) of the *Federal Court of Australia Act* 1975) and if any gaps

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3 Explanatory Memorandum, p. 1.

4 There is no indication that the Government might expand the jurisdiction beyond serious cartel conduct at this stage.

5 Hansard, *Senate Legal and Constitutional Affairs Committee* Inquiry into the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008, per Mr Tim Game SC, at p. 24.

remain, section 68 of the *Judiciary Act* will allow the Court to apply the procedural rules of the State or Territory where the Court is sitting.

Why should the Federal Court have criminal jurisdiction?

There are arguments for and against expanding the Federal Court's jurisdiction to allow it to hear matters relating to serious cartel offences. The arguments are neatly summarised by the Hon Justice Mark Weinberg, formerly of the Federal Court:

> In principle, those charged with offences against federal law should all be accorded the same rights and protections when they come to trial. This does not happen at the moment. Federal charges are dealt with in State courts, under State rules of procedure which vary greatly from place to place. The rules of evidence which apply to criminal trails for such offences also vary, sometimes in significant ways.
>
> … the [Federal] Court is well-resourced. It has effective case management procedures which can be adapted to criminal trials, and which will facilitate the management of what are likely to be long, costly and extremely hard-fought cases.
>
> A number of Federal Court judges have previously served as State Supreme Court judges, and have significant experience in the conduct of jury trials. Many judges have a particular interest in competition law, and are familiar with the difficult concepts so elaborately developed in Pt IV of the *Trade Practices Act*. They also have a particular expertise in dealing with economic experts of the kind who evidence is likely to be adduced in trials of this nature.
>
> … There is [also] a greater likelihood of consistency of interpretation if the new offence provisions are dealt with predominantly within the one court, rather than working their way through a series of different courts with different appellate structures[6].

To consider arguments against the creation of an indictable criminal jurisdiction on the Federal Court, Justice Weinberg acknowledges that it is indisputable that [full-time] State and Territory judges are likely to be more experienced in conducting jury trials [than Federal Court judges who have served as State Supreme Court judges].[7]

Other contrary arguments to the creation of the jurisdiction, such as applying various existing rules of procedure and evidence, are mostly resolved by this Bill. All the State and Territory courts have varying structures, law and Rules of Court relating to the conduct of a trial. The Government has stated that it has considered all of these models in developing this Bill and has taken what it considers to be the best provisions from each jurisdiction,

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6 Weinberg, J. *The Current and Proposed Jurisdiction of the Federal Court*, 5 September 2008. The text of this speech is available here.

7 ibid, at p. 16.

with some modifications to suit the Federal Court.[8] This includes proceedings for committals, which are administrative decisions carried out by State courts.[9] The Federal Court could not be given the power to make administrative decisions because it would be incompatible with its exercise of judicial power. Because the criminal procedure rules are different in each State and have their own recognised difficulties, this Bill too has attracted some negative attention about which models (mainly the NSW and Victorian models) the provisions are based on.[10] However, evidence brought before the Senate Legal and Constitutional Committee illustrated that this Bill has been through rigorous consultation on every provision and careful drafting.

Committee consideration

The Bill has been referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 26 February 2008. Details of the inquiry are at http://www.aph.gov.au/Senate/committee/legcon_ctte/criminal_jurisdiction/index.htm

Financial implications

The Explanatory Memorandum notes that the amendments are not expected to have any significant financial impact.[11]

However, there would likely be some administrative costs for the Federal Court to implement the new framework, including writing its new Rules of the Court for criminal practice. Justice Weinberg has noted that:

> …the court intends to develop new Rules of Court and procedures for the conduct of criminal proceedings. It also intends to promote further judicial education, acquire additional library and electronic resource, improve registry facilities and administrative arrangements, and implement changes to the court's electronic case management system.[12]

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8 The Hon R. McClelland MP, *Hansard*, Second Reading Speech, 10 February 2008, p. 12.

9 This Bill will only change committal procedures slightly, allowing a magistrate to choose whether to refer questions of law to the Federal Court or to a State/Territory superior court.

10 See, for example, submissions to the Senate Legal and Constitutional Committee's Inquiry into the, http://www.aph.gov.au/Senate/committee/legcon_ctte/criminal_jurisdiction/index.htm, accessed 8 February 2009. See in particular submissions from the Law Institute of Australia and the NSW Attorney-General.

11 Explanatory Memorandum, p. 2.

12 Justice Weinberg, M., 'The criminal jurisdiction of the Federal Court', *Bar News*, Summer 2008/09, p. 29.

Also, the Federal Court in most jurisdictions will have to sit in the State or Territory's Supreme Court to accommodate jurors. In time, this might be problematic and costly if lengthy Federal Court criminal trials encroach on State courts' accommodation. Additionally, the State and Territory would be able to charge rent for the use of the court and its facilities.

Key issues

The capacity of the Federal Court to deal with criminal matters

The existing legislative arrangements for the Federal Court do not give the Court any capacity to hear indictable criminal offences. Section 39B(1) of the *Judiciary Act* currently provides that:

> The original jurisdiction of the Federal Court of Australia also includes jurisdiction in any matter:
>
> (a) In which the Commonwealth is seeking an injunction or a declaration; or
>
> (b) Arising under the Constitution, or involving its interpretation; or
>
> (c) Arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

This Bill will add a note (**item 99** of the Bill) to clarify that paragraph (c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court of Australia.

The Federal Court will not have *exclusive* jurisdiction over serious cartel offences. The State and Territory courts will have concurrent jurisdiction. This will allow for some flexibility to ensure that cases are prosecuted efficiently and most appropriately. In the case of an offender being charged with both State and Commonwealth charges, it would not be possible to deal with the State charges in the Federal Court.[13] In *Re Wakim; Ex parte McNally,* the High Court held that it was invalid to confer State jurisdiction on federal courts. However, it is important to note the State Courts have had federal jurisdiction since the commencement of the *Judiciary Act 1903*.

Procedure, including pre-trial hearings and disclosure

The Bill will require strict adherence to provisions relating to pre-trial hearings and disclosure and the provisions have been met with some opposition by sections of the legal community. Under **proposed section 23CD**, the Court may order the parties to disclose

13 *Re Wakim (1999) 163 ALR 270.*

details of the case (including facts, matters, circumstances, witnesses, documents etc) and the accused may be required to respond to a statement of the prosecution. **Proposed section 23CF** may require the accused to 'take issue' with any matter or circumstance that the prosecution raises. Further, the accused must indicate the basis for taking issue. The purpose of these provisions is to sort out the wheat from the chaff so to speak so as to enure the trial can concentrate on matters which are genuinely in dispute. This is not an unusual idea and is common practice in other jurisdictions. It is of great importance for the types of matters that the Federal Court will be hearing, namely serious cartel offences, because they will be enormously complex and time consuming.

The second reading speech notes the justification for these provisions is to enable

> the Court to … have power to ensure that the accused knows the case against them (sic) and has access to any unused material which is potentially relevant to responding to that case. An accused person will not be required to disclose their proposed defence, unless they intend to raise an alibi or rely on mental impairment.[14]

As mentioned, this is not an unusual concept; however in submissions to the Senate Legal and Constitutional Inquiry into the Bill, persons representing the legal profession have been critical of this arrangement. The Law Council of Australia is concerned with **proposed section 23CF** in that it goes 'too far in requiring the defence to disclose the details of its case and not just the nature of the issues which are in dispute with the prosecution or the general nature of the defence.'[15]

The purpose of requiring the accused to enter a plea to each count in the indictment is to:

> Ensure that the Court is in a position to take control of the proceedings at an early stage and that it is made clear from that stage whether the accused pleads guilty or not. This [**proposed section 23CA]** is one of a set of provisions designed to ensure that pre-trail procedures can be used effectively to narrow the range of issues that will have to be dealt with at trial and to reduce the length of criminal trials.[16]

Also, the Law Institute of Victoria has noted:

> with concern that the consequences of not complying with disclosure requirements may lead to the court allowing statements to be tendered by the prosecution as evidence of the contents where it was not challenged prior to the commencement of the trial, or that the accused might be prevented from challenging a fact, matter or

14 *Hansard,* 5 February 2009, Second Reading Speech, p. 32.

15 Law Council of Australia, Submission No.5 to the Senate Inquiry into the Bill, p. 4.

16 Explanatory Memorandum, para 41, p. 8.

circumstance during the trial which was not challenged during a pre-trial hearing (s23CM)[17].

Even though it is the current view to contain the Federal Court's indictable jurisdiction to cover the serious cartel offences, it is of concern that the **proposed section 23CF** requires the accused to indicate whether it 'takes issue' with the prosecution's statement at pre-trial disclosure and on what basis it takes issue. It will be up to the Court to interpret the meaning of 'take issue' by deciding how much detail is required by the accused to fulfil the requirement to 'take issue'. If the Court does consider other criminal matters in the future, such as terrorism matters, this provision seemingly has the potential to abrogate the right to silence, particularly because of the sanctions for non-compliance. However, it would depend on how the notices are drafted as to what 'takes issue' could mean to a Court. Given that the provisions are modelled on existing Victorian criminal procedures that seem to be effective and that the intention of the pre-trial regime would be undermined or lost if the words 'takes issue' were removed, the provisions should remain as drafted.

Evidence published by the Law Reform Commission of New South Wales in 2000 shows that, during the pre-trial disclosure period:

- The defence did not generally voluntarily disclose substantial information about the defence case to the prosecution before the hearing or trial.
- Where voluntary defence disclosure occurred, it improved the efficiency of the criminal justice system.
- Where defence disclosure was given, prosecutors tended to be more co-operative about bail and sentencing issues.
- It was rare for an accused person to remain silent at their hearing or trial.[18]

Based on this sort of evidence, it seems that in practice the right to silence will not be of concern. Furthermore, given the volume and complexity of evidence that would likely be presented in a serious cartel offences case, the efficiency and effectiveness justification for pre-trial disclosure is a strong one. However, the NSW Attorney-General is strongly opposed to pre-trial disclosure, stating that the Court should not be allowed to order pre-trial disclosure in all matters as it will create inequities with State jurisdictions that limit pre-trial disclosure to complex matters.[19] The reasons for the strong opposition to the

17 Law Institute of Victoria, Submission No.2, Senate Legal and Constitutional Inquiry into the Bill, p. 2.

18 Law Reform Commission of New South Wales, *The Right to Silence and Pre-trial Disclosure in New South Wales*, Research Report 10, 2000, available at http://www.lawlink.nsw.gov.au/lrc.nsf/pages/rr10chp1 accessed 5 February 2009.

19 NSW Attorney-General, *Submission No.6,* Senate Legal and Constitutional Affairs Committee, p. 2,

proposed pre-trial regime do not seem to outweigh the need and effectiveness for the Federal Court's indictable criminal jurisdiction.

Legal Professional Privilege

The legal professional privilege rule is defined as:

> In civil and criminal cases, confidential communications passing between a client and a legal adviser need not be given in evidence or otherwise disclosed by the client and, without the client's consent, may not be given in evidence or otherwise disclosed by the legal adviser if made either
>
> (1) to enable the client to obtain, or the adviser to give, legal advice or
>
> (2) with reference to litigation that is actually taking place or was in the contemplation of the client.

Further,

> Documents prepared by or communications passing between the legal adviser or client and third parties need not be given in evidence or otherwise disclosed by the client, and without the consent of the client, may not be given in evidence or otherwise disclosed by the legal adviser if they come within (2) above.

This covers communication between; lawyer and client, lawyer and client's agent, lawyer and third party for contemplated litigation, client (or agent) and third party for contemplated litigation.[20] The consequence of the application of this rule is that the document or communication cannot be used as evidence in proceedings unless the privilege is abolished or modified by legislation, or waived by the person in question.

Usually, in cases involving documents, it 'is the communication and not the document that needs and is given protection' by legal professional privilege.[21] However, legal professional privilege can apply to a document that was created about the commission of the offence for use in court proceedings.

The Bill will require, under **proposed section 23CL** that a party cannot refuse to disclose a document on the grounds of legal professional privilege:

> Provisions in the Bill put it beyond doubt that there is an obligation on a party to disclose material without excuse at the pre-trial disclosure stage. Legal professional privilege does not override this obligation. It would be unusual that either party would

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http://www.aph.gov.au/Senate/committee/legcon_ctte/criminal_jurisdiction/submissions.htm accessed 12 February 2009.

20 Halsbury's Law of Australia

21 Carter v Managing Partner, Northmore Hale Davey & Leake (1995) 183 CLR 12, per McHugh J at 166.

> be required to disclose legal advice or opinions because that material would not normally be evidentiary and thus be subject to the disclosure regime[22].

The New South Wales Attorney-General does not support this provision and has said it:

> is both unnecessary and inappropriate to prevent claims of privilege during pre-trial disclosure in criminal matters… 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.[23]

The New South Wales Attorney-General noted in his submission that **proposed paragraph 23CL(1)(b)** also raises technical concerns:

> That clause 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.[24]

The Explanatory Memorandum notes that if material is disclosed, that will not amount to a waiver of the privilege. Further, it will not prevent the party from claiming legal professional privilege, if they wish to do so at the trial or in any other proceedings[25].

However, this is problematic, particularly in light of a recent decision of the Federal Court that was handed down subsequent to the introduction of this Bill. *AWB Limited v Australian Securities and Investments Commission [2008] FCA 1877 (*11 December 2008) held that ASIC was entitled to make use of such information during trial proceedings, notwithstanding the possible privilege claim. In applying the common law principles, the court quoted *Cowell v British American Tobacco Australia Services Ltd* [2007] VSCA 301 who in turn referenced Heydon in *Cross on Evidence:*

> …once information in a privileged document has come into the hands of a party to litigation even as a result of compulsive process which is later reversed, the fact that the document was and remains privileged does not of itself prevent that party from making use of the information.[26]

The Explanatory Memorandum emphasises that the Bill does not detract from or alter the normal duties and obligations of an investigative agency to ensure that the prosecution is

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22 Explanatory Memorandum, p. 14.

23 NSW Attorney-General, Submission No.6, Senate Legal and Constitutional Inquiry into the Bill, p. 3.

24 op. cit, p. 14.

25 op. cit, p. 14.

26 AWB Limited v Australian Securities and Investments Commission [2008] FCA 1877 (11 December 2008), at 14.

equipped to discharge its disclosure obligations, and will not affect the normal powers of the Court to prevent a trial from proceeding.[27]

Bail

Proposed section 58DB will allow the Court to grant or refuse bail as soon as the accused person appears before the Court[28] and it sets out various matters the court must consider in deciding whether to grant bail. There is no explicit presumption in favour of bail.[29] Even though States such as Victoria legislatively provide for a presumption in favour of bail, it is not necessary to explicitly provide for it in criminal procedure rules. A witness from the Attorney-General's Department to the Senate Legal and Constitutional Affairs Committee's Inquiry reasoned that there is no presumption of bail in this Bill because:

> These are serious offences, 10 years imprisonment, about to be enacted. There is the need to control white-collar crim. To then put a provision in saying 'but there is a presumption of bail' seemed to be slightly contrary to that message. On the other hand, of course, it has been pointed out that these are going to be long trials; people have got ties to the community. The position we came to was, 'This the Federal Court. These bail provisions are designed to be applied by Federal Court judges.' State bail laws are applied by the whole range, from bail sergeants up to Supreme Court and Court of Appeal judges. There is not the same need for prescription and guidance. We can trust the Federal Court judges to consider those matters and to make appropriate orders. So the decision was to not have a presumption for or against bail. … [T]hat is the policy that was underpinning that decision.[30]

Some of the bail provisions in the Bill are fairly restrictive, possibly because of the gravity of the offences that they relate to. For example, **proposed subsection 58DA(2)** will only allow for a subsequent application for bail when there is a 'significant change' in circumstances following a previous refusal of bail. While the provisions do differ from state and territory provisions, they are not excessively prescriptive. It would be useful if the Government was able to provide more detail on whether there is a possibility of any problematic inconsistency in the application of bail provisions across the various state and territory jurisdictions in which they may be heard.

Indeed, the Bill does not include provisions allowing the Court to take into account a matter agreed by the prosecution and the accused during the consideration of bail

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27 Explanatory Memorandum, p. 15.

28 Up until that point, the question of bail will be dealt with by the committal court applying bail and custody rules under State and Territory laws that are picked up by section 68(1) of the Judiciary Act.

29 Note though that **proposed section 58DB(3)** requires that 'exceptional circumstances' must exist before bail can be granted.

30 Hansard, *Senate Legal and Constitutional Affairs Committee* Inquiry into the Bill, per Mr Geoff Gray at p. 32, 6 February 2009

applications. The Law Council of Australia submitted that the Bill should include further explanation of what must be considered in a bail application (in addition to what is proposed by **subsection 58DB(2)**, covering:

> The character, antecedents, background and/or community ties of the accused;
>
> The strength of the evidence against the accused
>
> The period that the person may be obliged to spend in custody if bail is refused;
>
> The accused's previous failure to appear
>
> The nature and seriousness of the offence.[31]

Proposed subsection 58DB(3) allows the Court to grant bail during criminal appeal proceedings if it can be satisfied that there are exceptional circumstances that justify granting bail. This provision is based on section 15AA of the *Crimes Act 1914*.

Rules about the jury

The Bill will allow for the empanelment of a jury to sit on matters that invoke the indictable criminal jurisdiction.

There are a number of jury offences that are outlined in the Main Provisions section of this Bills Digest. The only concern is whether or not the penalty imposed on an offending juror is proportionate to the inconvenience to the Court hearing a long and complex serious cartel offences matter.

An offence against the jury offence provisions will be prosecuted in State and Territory courts which exercise federal jurisdiction under section 68 of the *Judiciary Act 1903*. The jury offences do not raise any special issues that would justify not giving criminal jurisdiction to the Federal Court.

Main provisions

Schedule 1

Part 1

Director of Public Prosecutions Act 1983

Item 1 inserts two new subsections to section 6 of the *Director of Public Prosecutions Act 1983* (DPP Act).

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31 Law Council of Australia, *op cit*.p. 7.

These subsections will allow the DPP to institute proceedings against a person in a court that has jurisdiction over the matter other than the one in which that person was committed for trial. **Proposed subsection 6(2F)** of the DPP Act will allow the Director to institute a prosecution for any of all of the offences. **Proposed subsection 6(2G)** adds clarification to **new subsection 6(2F)** by stating that even if the Director instituted the initial proceedings, the Director is able to institute proceedings in another court provide that the initial prosecution is discontinued.

The Explanatory Memorandum explains fully why these provisions are necessary and clarifies that both the Federal Court and State/Territory Supreme Courts will have the inherent power to stay proceedings if the court considers that there has been any abuse of process or 'that the DPP has engaged in forum shopping'.[32]

Federal Court of Australia Act 1976

Jurisdiction

Item 2 inserts a **new Division 1A** that establishes the new procedures for the Federal Court when it hears indictable offences. It is not intended to be comprehensive and the simplified outline **(proposed section 23AA)** notes that it is supplemented by Rules of Court and procedures set out in State and Territory laws and Rules of Court of the State and Territory Courts.

New subsection 23AB(4) is of particular importance in that it defines which offences the Division applies to. **New paragraph 23(4)(a)** specifically notes proposed sections 44ZZRF and 44ZZRG of the *Trade Practices Act 1974*[33]. **New paragraph 23(4)(b)** also confers jurisdiction on the Court to hear matters that arise under any laws made by the Parliament; and

- are not otherwise within the Court's jurisdiction;
- and relate to one or more indictable offences that are associated with an indictable offence matter in which the jurisdiction of the court is invoked.[34]

Subdivision B addresses matters relating to indictments. These are non-controversial provisions (**proposed sections 23BA-23BH)** and deal with time limits to file indictments, the consequences of failing to file the indictment within that time and the procedure for amending indictments.

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32 Explanatory Memorandum, p. 4.

33 These provisions are contained in the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008. At the date of publication of this Digest, those provisions have not been passed in Parliament.

34 See also **item 72, new subsection 32(4)** of the *Federal Court of Australia Act 1976*.

Subdivision C contains provisions (**proposed provisions 23CA-23CQ)** relating to pre-trial matters including hearings, disclosure and quashing indictments.

Pre-trial hearings

Proposed sections 23CA-23CC requires that following the filing of an indictment, the Court must order a pre-trial hearing to take place as soon as practicable. At that hearing, the Court must direct the accused to enter a plea to each count in the indictment (**proposed paragraph 23CA(1)(b**)).

Under **proposed section 23CD,** the court may make orders for disclosure by the prosecution and the accused.

Proposed section 23CE outlines the requirements for disclosure by the prosecution. The prosecution must:

- provide a notice of its case, including facts, matters and circumstances: **(a)**.
- provide copies or access to the material it intends to rely on: **(d) and (e)**,
- disclose any material which it does not intend to use but which is potentially relevant to the case of the accused or that might adversely affect the reliability or credibility of a prosecution witness: **(g).**
- provide a list that is not in its possession but which the prosecutor reasonably believes may be relevant to the accused's case: **(j).**
- provide a cope of any information, document or other thing that is adverse to the accused's credit or credibility: **(k)**.

The list is not exhaustive.

The accused must then respond to this notice under **proposed section 23CF** by stating whether the accused agrees or takes issue with it. It does appear then, that the accused is not required to disclose their defence unless he or she intends to raise a defence of alibi or propose to adduce supporting evidence that he or she was suffering from a mental impairment (**23CE(i) and (j)**).[35] **Proposed section 23CG** then allows the prosecutor to respond to the accused's response and **proposed section 23CH** sets out ongoing disclosure obligations for both parties.

Legal professional privilege

Proposed subsection 23CL(1) makes it clear the requirement to disclose material under a section 23CD order includes both material to which legal professional privilege is claimed, and material that is subject to a court order in respect to an immunity, privilege or

35 Explanatory Memorandum, p. 11.

restriction. However, the operation of these sections, and others in **proposed subdivision B** is subject both to both legislative national security information restrictions and the law on public interest immunity.[36]

Notwithstanding that certain classes of privileged, immune or restricted material may be required to be disclosed under **proposed section 23D, proposed paragraph 23CL(2)(a)** states that the disclosure provisions does not abrogate any immunity, privilege or restriction that applies to the disclosure of any information or other thing. This includes legal professional privilege.

Failure to disclose

To facilitate cooperation at the pre-trial disclosure stage, **proposed section 23CM** will allow the Court to make certain orders if a party fails to comply with its obligations under the disclosure regime. It may order, for example, that material not disclosed at the pre-trial stage cannot be admitted as evidence.

A consequential amendment to subsection 16A(2) of the *Crimes Act 1914* is necessary to provide that the Court must take into account the extent to which the person has failed to comply with any order or other obligation about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence (**item 21 Part 2**).

The remaining provisions in this subdivision (**proposed subsections 23CN, 23CO and 23CP)** are procedural, relating to the restriction of further disclosure in other proceedings, admissibility of disclosed material in other proceedings and formal objections to indictments.

Proposed section 23CQ allows the Court to direct that a prosecution witness appear before a judicial official to preliminarily examine a witness if the Court considers that it would be unfair to proceed to trial without an examination. In practice, this is known as a Basha inquiry. A Basha inquiry can also be used if the Court considers that there is a realistic prospect of shortening the trial if the proposed witness is examined before the trial.

Proposed sections 23DB-23DZA covers preliminary administrative matters relating to the empanelment of a jury. These provisions are not controversial and include the number of jurors (12 or no more than 15, **proposed section 23DC**). There is flexibility to have a slightly larger jury so that in the circumstance of a lengthy trial, there is no mistrial due to a juror's illness or other absence. No more than 12 jurors can consider the verdict (**proposed section 23DE**). Other provisions in this subdivision address qualification and disqualification from serving on a jury (**23DI**), the Sheriff's power to excuse and duty to

36 For more information on public interest immunity, see pp. 3-4 of the Digest on the National Security Information (Criminal Proceedings) Bill 2004, Digest 59-60 2004-05.

prepare the empanelment of the jury (**23DR-23DT**), and the process when a party seeks to challenge potential jurors (**23DX)**.

Subdivision E outlines procedural matters relating to juries including giving juries directions (**proposed section 23ED**) and when and how a jury can be discharged (**proposed section 23EL**). There does not appear to be a provision for the jury to ask for further guidance from the Judge but perhaps this detail is to be addressed by the Federal Court's Rules.

Subdivision F contains procedural matters relating to pleas, trial procedure and verdicts. It allows for the changing of pleas (**section 23FG**) and prescribes that the jury's verdict must be unanimous (**section 23FI).** This subdivision also outlines the consequences of guilty pleas and verdicts (**23FJ**). **Proposed section 23FJ** notes that the Court must accept a guilty plea unless the accused seeks leave to change the plea or it would be contrary to the interests of justice to accept the plea.

Subdivision G deals with what happens when a person who has pleased guilty at committal is committed to the Court for sentencing. **Proposed section 23GB** requires that the order be taken to have been made on the day the committal order was made.

Subdivision H (**proposed sections 23HA-23HE)** details the procedural requirements for custody, taking oaths and affirmations, protecting witnesses, unsworn statements and costs.

Division 2A – Appellate and related jurisdiction (criminal proceedings)

Proposed section 30AA addresses appeals about indictable offences, against summary judgments, about bail and forfeiture of bail security and against interim judgments and decisions. 30AA only allows certain appeals and the Director of Public Prosecutions cannot generally appeal an acquittal.

Further, an appeal against an acquittal on grounds of mental illness cannot be brought by the prosecutor (**proposed subsection 30AC(2)**).

Proposed section 30AB clarifies that an appeal can only be brought when the court or a judge gives leave to appeal or the appeal involves a question of law alone. **Proposed section 30AC** further clarifies that only the accused and the prosecutor may appeal.

Furthermore, in the appellate jurisdiction, the Attorney-General may consent for the accused to appeal (**proposed subsection 30AD**). This gives an additional power to the Attorney-General to deal with cases where there may have been a miscarriage of justice.[37]

37 Explanatory Memorandum, p. 44.

Exercise of appellate jurisdiction

Proposed section 30AE lists the applications that can be heard on appeal, exercised by a Full Court. These include:

- leave to appeal under proposed subsections 30AA(1) or (2) (**proposed paragraph 30AE(2)(a))**
- for an extension of time within which to file prescribed notices (**proposed paragraph 30AE(2)(b))**
- to stay an order of a Full Court (**proposed paragraph 30AE(2)(d))**

Notably, **proposed subsection 30AE(5)** provides that the Rules of Court may make provision enabling matter of the kind mentioned above to be dealt with without an oral hearing. **Proposed section 30AF** requires that filing of certain notice must be filed before the end of 28 days after sentencing, judgment, decision or discharge of the accused. However, the court can extend (under **proposed subsection 30AF(3)**) the time if satisfied that to do so is in the interests of justice

To remove any doubt, **proposed section 30AH** details the laws that apply at the time of the appeal. Unless the Court orders otherwise, the laws of the Commonwealth and the laws of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903* and the Rules of Court relating to the practice and procedure to be followed during criminal appeal proceedings are to be those in force at the time the prescribed notices are filed in the Court.

Proposed section 30AI addresses the issue of fresh evidence on appeal and allows for the Court to receive further evidence if it is in the interests of justice to do so. This evidence may de taken on affidavit, by videolink or similar, by oral examination.

Under **proposed section 30AJ**, the Court must allow a **proposed section 30AA** appeal against a conviction if it is satisfied that the verdict was unreasonable, unsupported by the evidence or there had been a substantial miscarriage of justice, or that it should be set aside due to a wrong decision on a question of law. However, if the court decides the verdict of the jury was unreasonable or not supported by the evidence, it may nonetheless dismiss the appeal if it is satisfied there has been no substantial miscarriage of justice.[38] In respect of this, the Explanatory Memorandum comments:

38 Note that the phrase 'substantial miscarriage of justice' is not a new concept and has been considered in cases concerning appeals such as *Gassy v The Queen* [2008] HCA 18 and *AK v Western Australia* [2008] HCA 8.

> This ensures that a conviction cannot be set aside on the basis of an error or irregularity which did not result in a substantial miscarriage of justice.[39]

The Court can also allow an appeal on the sentence, and substitute a greater or lesser sentence.

If an appeal has been instituted in relation to a judgment or decision, the Court may stay or otherwise suspend any order arising from the appealed decision (**proposed section 30AK**).

If a person is convicted of an indictable offence and sentenced to a term of imprisonment and the person appeals against the conviction or sentence (or both), **proposed section 30AL** notes that any time during which the person is released on bail pending the determination of the appeal does not count as part of the term of imprisonment to which the person has been sentenced.

Subdivision B (**proposed sections 30BA-30BH)** outlines the options for the Court when allowing appeals in certain circumstances. These are not controversial and not complex.

Subdivision C contains a useful provision from a time-saving perspective. When a single judge or another court is dealing with a criminal matter in circumstances where there is a right of appeal to the Federal Court (serious cartel offences), **proposed section 30CA** gives the judge or court power to get a ruling on a legal issues before making a judgment or decision.

Proposed section 30CB gives the prosecution power to bring a precedent appeal where an accused person has been acquitted on the basis of a ruling of law which the prosecutor wants to test on appeal. The Explanatory Memorandum explains that the Full Court has jurisdiction to hear the appeal and rule on the legal issue. The ruling will not affect the position of the accused but will clarify the legal issue for future cases – thus there is no possibility a person's acquittal could be reversed, although a successful appeal by the prosecution under this section might potentially expose the acquitted person to further proceedings if, for example, a ruling on the admissibility of certain evidence was overturned on appeal.

In relation to costs, **proposed section 30DA** provides that the Court does not have power to award costs in criminal appeal proceedings, proceedings before the Court under sections 30CA or 30 CB, or proceedings referred to the Court under section 20B of the *Crimes Act 1914*.

39 Explanatory Memorandum, p. 47.

Part VIA – Offences relating to Juries

The penalties for the more minor offences relating to juries are reasonable – in fact they may be relatively low considering the length of time that a jury trial in the Federal Court would take. It could take months or years to gather the evidence and empanel the jury (even if it contains up to 15 members). To penalise a person (30 Penalty Units[40]) for failing to attend, failing to comply with directions, failing to complete questionnaires and providing false or misleading information (60 Penalty Units) (**proposed sections 58AA-58AF)** seems a low penalty compared to the costs the court would have to bear to empanel a new juror. However, they are consistent with similar provisions in the State jurisdictions and, being strict liability offences, the penalties are reasonable.[41]

Proposed sections 58AG-58AM outlines more serious offences relating to the interference with the course of justice. The offences carry varying penalties of imprisonment from 12 months to 10 years. The offences include:

- bribing jurors or potential jurors (**proposed section 58AG**)
- causing or threatening harm to jurors, potential jurors or former jurors (**proposed section 58AH)**
- obstructing jurors or potential jurors (**proposed section 58AI**)
- publishing or broadcasting information identifying jurors, potential jurors or former jurors (**proposed section 58AJ**)
- soliciting information from jurors (**proposed section 58K)**
- disclosing information about a jury (**proposed section 58AL**)
- making improper inquiries as a juror or potential juror (**proposed section 58AM**)

Infringement notices

Division 2 provides for a Sheriff to issue infringement notices if the Sheriff has reasonable grounds to believe that a person has committed an offence against section 58AA (fail to attend for service) or 58AE (fail to complete and return a questionnaire).

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40 Section 4AA of the *Crimes Act 1914* defines a Penalty Unit as $110.

41 Where strict liability applies to an offence, the prosecution does not need to prove any fault on the part of the defendant, for example, recklessness, negligence, or in the case of this Bill, that the defendant had the required knowledge of the applicable fuel standard as determined by the Minister. Strict liability offences are those which do not require guilty intent for their commission, but for which there is a defence if the wrongful action was based on a reasonable mistake of fact.

Proposed section 58BA requires that the infringement notice must be given within 12 months after the day on which the offence is alleged to have been committed.

Matters to be included in an infringement notice are listed in **proposed section 58BB** and **proposed section 58BC** specifies that the pecuniary penalty in the infringement notice must be equal to one-fifth of the maximum penalty that a court could impose for the offence.

Proposed sections 58BD – 58BG address other administrative matters relating to the issuing of infringement notices including specifying that the regulations may make further provisions in relation to infringement notices and refusal notices given under **proposed subsection 58BD(4)**.

Part VIB Bail

Division 2 (proposed sections 58DA-58EA) contains provisions relating to the application for and the granting of bail, noting that the accused can apply to the court for bail for one or more offences but if the court refuses to grant bail, the accused cannot apply again for bail unless there has been a significant change in circumstances since the refusal. There is a right of appeal, without leave, under **proposed subsection 30AA(3). Proposed subsection 58DB(4)** notes that the bail provisions are also subject to other Acts.

Bail conditions include that:

- the accused reside at a specified place (**proposed paragraph 58DC(2)(a)**)
- the accused report to a specified person at a specified place at a specified time (**proposed paragraph 58DC(2)(b)**)
- that the accused surrender any passport and agree not to approach a point of international departure (**proposed paragraph 58DC(2)(c)**)
- that the accused provide security in the form of money, or other property, for forfeiture if the accused fails to appear before the Court in accordance with the accused's bail undertaking (**proposed paragraph 58DC(2)(d)**)
- one or more other specified persons provide security in the form of money, or other property, for forfeiture if the accused fails to appear before the Court in accordance with the accused's bail undertaking (**proposed paragraph 58DC(2)(e)**).

Other administrative matters relating to bail are contained in **proposed sections 58DD-58DH**.

Division 3 addresses circumstances and consequences where bail arrangements are sought to be varied or revoked (**proposed sections 58EA, 58EB and 58EC**).

Division 4 creates an offence provision for a person failing to appear before the Court whilst on bail. **Proposed section 58FA** creates a penalty of imprisonment for 2 years if the person cannot show reasonable excuse as to why they failed to appear before the Court.

Forfeiture notices and orders

Proposed sections 58FB-58FE cover forfeiture arrangements if the accused fails to appear before the Court in accordance with the accused's bail undertaking. The Registrar of the Court may be directed to give a notice to show cause to each person who provided security for the accused's bail; and any other person who may have an interest in security provided for the accused's bail. This application cannot be made more than 6 months after the alleged failure to appear before the Court.

The Court must order the forfeiture of all specified security provided by a particular person for the accused's bail if the Court is satisfied that the accused failed to appear before the Court in accordance with the accused's bail undertaking. (**Proposed section 58FC**). The Court may take into account whether the accused had a reasonable excuse for failing to appear, whether it is in the interests of justice to do so and whether there are any objections to be considered (**proposed section 58FC**). A forfeiture order takes effect at the end of the time for filing such a notice under section 30AF.

The effect of a forfeiture order is outlined in **proposed section 58FE** by differentiating between the various types of security (whether money or registrable property) that might have been placed over the accused's bail.

Division 5 allows for the Court to direct that a bail order continue to have effect and that a bail order ceases to have effect if the Court discharges the accused in relation to all the offences for which bail was granted (**proposed sections 58GA** and **58GB)**. These bail provisions are self-explanatory and accord with other bail regimes in the States and Territories.

Division 6 contains **proposed section 58HA** which outlines the documents which are to be received as prima facie evidence of their contents. The Explanatory Memorandum explains that this clause facilitates the proof of certain formal matters relating to bail[42]. **Proposed subsection 58HA(3)** will allow that the following matters can be proved on the basis of a written certificate issues by an officer of the Court:

- a condition specified in a bail order has not been varied or has been varied in a specified way (**proposed paragraph 58HA(3)(a))**
- a notice was given under subsection 58FB(2) to a specified person in a specified way on a specified day (**proposed paragraph 58HA(3**)(**b))**

42 Explanatory Memorandum, p. 72.

- an accused did not appear in person before the Court at a specified place or on a specified day or during a specified period (**proposed paragraph 58HA(3)(c**))
- the accused did not notify the Court of a change in the accused's residential address to a specified address and on a specified day (**proposed paragraph 58HA(3)(d**))
- and the accused notified the Court of a change in the accused's residential address to a specified address and on a specific day (**proposed paragraph 58HA(3)(e)).**

Judiciary Act 1903

The *Judiciary Act 1903* allows for the exercise of judicial power of the Commonwealth.

The amendments to the *Judiciary Act 1903* by **proposed section 68A** deal with matters relating to committals if both the Federal Court and a State or Territory Court have jurisdiction in relation to indictable offences. Jurisdiction is provided by:

- **proposed subsection 68A(1)** provides that section 68A applies if both the Federal Court and a superior court of a State or Territory have jurisdiction to try a person on indictment for an indictable offence against a law of the Commonwealth.
- **proposed subsection 68(2)** provides that a State or Territory committal court that has jurisdiction can commit the person for trial or sentence, as appropriate, to either the Federal Court or the superior court of the State or Territory.
- **proposed subsection 68(3)** provides that the committal court must invite the DPP to suggest which court should be named in the committal order. The committal court must consider specifying the court suggested by the DPP in the committal order, but is not bound to comply with the suggestion[43]. This is a considerable power for the DPP because, according to the Explanatory Memorandum, the committal court must invite the DPP to suggest a court even if the DPP is not a party to the committal proceedings and even if there is reason to believe that the trial, if there is one, will be conducted by someone other than the DPP[44].

Proposed section 68B will remove any doubt about which laws apply if both the Federal Court and a State or Territory court have jurisdiction in relation to an offence. For example, if a person is charged with a Commonwealth offence, the person's committal proceedings and preliminary proceedings will be dealt with under the applicable State or Territory laws.

Proposed section 68C provides a useful table to illustrate which laws are to be applied depending on what proceedings are before the Court. For example, if the proceedings are primary proceedings but not sentencing proceedings then the laws of the State or Territory in which the Federal Court hears the proceedings is to apply. Importantly, the laws include

43 Explanatory Memorandum, p. 74.

44 Explanatory Memorandum, p. 74.

the Rules of the Supreme Court of that particular court that apply in criminal proceedings (**proposed paragraph 68C(6)(a))**.

Part 2 – Consequential and other amendments

Part 2 of the Bill makes consequential amendments arising out of Part 1 of the Bill to the following Acts:

- *Bankruptcy Act 1966*
- *Crimes Act 1914*
- *Federal Court of Australia Act 1976*
- *Judiciary Act 1903*
- *Mutual Assistance in Criminal Matters Act 1987*
- *Proceeds of Crime Act 2002*
- *Transfer of Prisoners Act 1983*

For an explanation of the amendments, see pages 78-99 of the Explanatory Memorandum.

Concluding comments

The rigour in the detail of this Bill suggests that the Government is taking a cautious approach to giving the Federal Court indictable criminal jurisdiction. Much of the detail of the Bill contains prescriptive rules of procedure that might normally be found in the Rules of Court. The Federal Court is being tested to see how it responds to the new jurisdiction, both legally and administratively. This is a significant step in judicial practice in that there will remain a capacity to expand the Court's criminal jurisdiction to existing Commonwealth criminal offences such as terrorism offences, although this would require additional legislation. Even though the present Government has not indicated any further plans to add to the criminal jurisdiction of the Federal Court, the Court's procedural rules will be flexible enough to accommodate this if future Parliaments desire it.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2430.