

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COPYRIGHT (WORLD TRADE ORGANIZATION AMENDMENTS) BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,
the Hon. Duncan Kerr MP)



COPYRIGHT (WORLD TRADE ORGANIZATION AMENDMENTS) BILL 1994

REASONS

The Bill is one of a package of Bills that make changes to Australian law so as to enable Australia to meet its obligations under agreements negotiated in the Uruguay Round of the General Agreement of Tariffs and Trade (GATT). Australia signed the Final Act of the Uruguay Round on 15 April 1994.

Enactment of all the legislation will ensure that Australia can guarantee to meet the obligations it would accept on ratifying the Uruguay Round Final Act and, should it decide to do so, become a foundation member of the World Trade Organization (WTO). The WTO was agreed, in the Uruguay Round, to be the new body to administer the agreements comprising the Round, replacing the administrative structure of the GATT. The expected date for the establishment of the WTO is 1 January 1995.

This Bill will enable Australia to comply with the obligations in regard to copyright under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). TRIPS is an integral part of the Uruguay Round outcome. TRIPS provides standards and obligations in relation to copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits, protection of undisclosed information and control of anti-competitive practices in contractual licences.

GENERAL OUTLINE

The Bill will amend the *Copyright Act 1968* (the Act) to:

- introduce a right for copyright owners in relation to rental of sound recordings and computer programs;
- extend the term of protection, from 20 to 50 years, for performers against unauthorised sound recordings of their performances, and grant performers' protection in relation to commercial exploitation of existing unauthorised recordings made in the preceding 50 years; and
- extend copyright-owner initiated Customs seizure under s.135 of the Act from application only to printed works to the interception of unauthorised imports of all copyright materials including artistic works, sound recordings, computer disks, audio tapes, videotapes, disks, films, CD ROMs and other forms of storage of copies of works, films and sound recordings, and introduce new provisions relating to seizure procedures.

These changes, in conformity with the present structure of the Act, apply, as relevant, to Australian copyright owners and Australian performers. Extension of these rights and existing rights to foreigners, as required by the TRIPS Agreement, will be effected by changes to the *Copyright (International Protection) Regulations* under the existing regulation-making provisions of the Act.

In the past no copyright owners have had a right to control the rental of their copyright material. However, under TRIPS Australia is now obliged to introduce an exclusive commercial rental right in respect of sound recordings and computer programs

(Articles 11 and 14.4 of TRIPS). In accordance with Article 14.4, the Government has also decided to confer a rental right on the owners of copyright in the underlying works performed in a sound recording (ie, the right will extend to composers and lyricists in respect of the musical, dramatic and literary works embodied in a sound recording). Part 2 of the Bill amends the *Copyright Act 1968* to effect these changes.

The new rental rights will apply only to a commercial rental arrangements. Public lending and other non-commercial lending arrangements are explicitly excluded. Also excluded from the right is rental of computer programs where the rental of the program is not the essential object of the rental. This includes where it is not possible to copy the program in the normal use of the rented object provided the object is something other than a mere carrier, such as a CD or circuit chip.

TRIPS provides detailed requirements not only for border enforcement but also in relation to the types of action required to be available to copyright owners and applicable court procedures. Other than in relation to owner-initiated border enforcement no major changes are considered necessary to the procedural provisions in the Act, or generally, to comply with these requirements.

In conformity with the current provision in the Act, the new border interception provisions, in Part 3 of the Bill, do not distinguish between pirated copyright goods - that is, those made without the authority of the copyright owner - and unauthorised (or "parallel") imports - that is, copyright goods made with the licence of the owner in the country of manufacture but imported into Australia without the authority of the Australian copyright owner. An exception is made in the case of parallel importation of books in accordance with the 1991 amendments to the Act allowing such importation in specified circumstances. The amendments provide for the border interception measures to be copyright owner initiated and for this to be on a user pays basis.

The amendments in relation to performers' rights, in Part 4 of the Bill, build upon an existing scheme of performers' rights in Part XIA which was introduced in 1989. Protection against future commercial dealings with existing unauthorised recordings not subject to the existing provisions is effected by means of the application of criminal penalties to those dealings. The criminal penalties mirror those presently in Part XIA both as to form and quantum. The new provisions, however, refer to penalty units in conformity with current practice compared with the specified monetary amounts set out in the existing criminal provisions.

The commencement of the rental right is delayed for one year after the coming into force of the WTO Agreement to enable rental operators a period of transition since it is likely that copyright owners will not permit the rental of new stock. The Bill provides that existing stock will be able to be rented without payment to, or limitation by, the copyright owners.

The new performers' rights and the changes to the border interception measures will commence on 1 July 1995 if, by then, the WTO Agreement has come into force for Australia or, if not, on such later date of the coming into force of the Agreement for Australia. This again provides a suitable period of transition for affected interests, including Customs.

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FINANCIAL IMPACT STATEMENT

It is possible that the border interception measures may result in some additional operating expenses for the Australian Customs Service that cannot be recouped from copyright owners. The quantum of such possible costs cannot be predicted as they will be dependent on the extent of copyright owners' use of the provisions.

It is likely that the Bill will have an adverse impact on outlets that rent sound recordings and companies that sell unauthorised sound recordings.

NOTES ON CLAUSES

Clause 1 – Short title etc

1. When enacted, this Bill will be cited as the *Copyright (World Trade Organization Amendments) Act 1994*.

Clause 2 – Commencement

2. Commencement of the substantive provisions of this Bill is tied to the coming into force of the Agreement Establishing the World Trade Organization (the WTO Agreement). The WTO Agreement is the result of the Uruguay Round of negotiations concerning the GATT and was settled at Marrakesh on 15 April 1994.
3. The expected date of entry into force of the WTO Agreement is 1 January 1995. However, that date is subject to negotiation and necessary legislative changes and authorisation in a number of countries. If the major members of the Uruguay Round trade negotiations, such as the United States of America and the European Union, have not implemented the necessary legislation to become members of the WTO by 1 January 1995, it is likely that the date for the entry into force of the WTO Agreement will be delayed.
4. If the WTO Agreement does not come into force for unforeseen reasons the operative provisions of this Bill will not be commenced unless by amendment of this clause.
5. Subclause 2(3) of the Bill provides that Part 2 of the Bill, which will introduce a rental right in sound recordings and computer software, commences one year after the WTO Agreement comes into force. This delay, to enable affected businesses to make necessary adjustments, is provided for under Article 65 of TRIPS that allows developed country Members up to 12 months after the WTO Agreement commences to comply with the requirements of the TRIPS provisions. The TRIPS Agreement is annexed to, and forms part of, the WTO Agreement.
6. Subclause 2(4) of the Bill provides that the commencement date for Parts 3 and 4 of the Bill, which deal with border enforcement and extended performers' protection, is 1 July 1995 or, if the WTO Agreement has not come into force by 1 July 1995, on the day that the WTO Agreement comes into force for Australia.
7. To provide for certainty in the date of commencement subclause (5) provides for the date of the coming into force of the WTO Agreement to be declared by the Governor-General, by Proclamation. The subclause provides similarly for the declaration of the date the Agreement comes into force for Australia. These are expected to be the same date as the Government has always intended to be a foundation member of the WTO.
8. The difference in the commencement dates reflects the Government's views as to the needs and nature of the various industries affected.

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PART 2 - AMENDMENTS RELATING TO COMMERCIAL RENTAL OF SOUND RECORDING AND COMPUTER PROGRAMS

Clause 3 – Commercial rental arrangement

9. Clause 3 of the Bill inserts new s.30A into the Act. New s.30A defines “commercial rental arrangement” in relation to a work reproduced in a sound recording (subsection (1)) and in relation to a sound recording or a computer program (subsection (2)).

10. New s.30A(3) and (4) ensure that the definition would not include an activity which amounts to no more than *lending*, eg, where a school requires students to pay a deposit which is refunded in full when the copy of the sound recording is returned.

11. On the other hand, the definition as set out in s.30A(1), is broad enough to cover schemes which technically involve the buying and selling of copies of sound recordings or computer program but which in substance may be characterised as commercial rental, eg, schemes where copies are “sold” and then “bought back” by the “vendor” at a lower price. In these cases the difference between the prices at which the copy is sold and bought is effectively the “rent” for the CD. Such “buy-back” schemes are covered by the definition of commercial rental arrangement.

Clause 4 – Nature of copyright in original works

12. This clause amends s.31 of the Act by adding new paragraphs (c) and (d) to s.31(1) and by adding new s.31(3), (4), (5), (6) and (7). Section 31 sets out the exclusive rights making up the copyright in relation to literary, dramatic, musical and artistic works. The effect of new paragraph (c) is to expand the exclusive rights in relation to a musical work, a dramatic work and a literary work, other than a computer program, to include a right to enter into a commercial rental arrangement in respect of a work reproduced in a sound recording.

13. The provision is so worded that the owner of copyright in the musical, dramatic or literary work would not be able to control rental of sheet music etc, ie, the owner of copyright in any underlying work embodied in a sound recording would only be entitled to control rental of the copy of the sound recording. However, consistently with the rights accorded to owners of copyright in the sound recording under TRIPS, an owner of copyright in a literary or dramatic work would be able to control rental of a copy of a sound recording of the work which was merely in the form of the spoken word (eg, a “talking book”).

14. New s.31(1)(d) expands the rights in relation to computer programs to include the entering into a commercial rental arrangement in relation to the computer program.

15. However, new s.31(3) ensures that the copyright owner does not have the right to control rental of a copy of a computer program embodied in a machine or device if the program is not able to be copied in the course of the ordinary use of the machine or device. This would mean, for instance, that the copyright owner could not control the rental of a motor vehicle where a computer program is embodied in its engine control system. New s.31(5) provides an overarching exception to the rental right and mirrors the wording of Article 11 of TRIPS which allows an exception to the rental right for computer programs where “the program itself is not the essential object of the rental”. “Object” in the sense used in subsection 31(5) would not include media normally used

for storage of computer programs, eg, a floppy disc, a CD Rom or an integrated circuit, by virtue of new s.31(4).

16. New s.31(6) provides that 31(1)(c) does not extend to entry into a commercial rental arrangement in relation to a copy of a sound recording, if the copy was purchased before the commencement of Part 2 of the *Copyright (World Trade Organization Amendments) Act 1994* and the commercial rental arrangement is entered into by the record owner as part of the ordinary course of a commercial rental business conducted by the record owner.

17. New s.31(7) makes similar provision in relation to the rental of computer programs.

18. These reforms mean that there is no commercial rental right in relation to copies of sound recordings that are purchased by rental operators prior to the commencement date of Part 2 (ie, the first day after the end of the period of one year beginning on the day on which the WTO Agreement enters into force for Australia). This provides, in accordance with Article 70.5 of TRIPS, the maximum permitted time possible before rental businesses become subject to the new rental right.

Clause 5 – Nature of copyright in sound recordings

19. Clause 5 amends s.85 of the Principal Act by adding new paragraph 85(1)(d) and new subsection (2).

20. New paragraph 85(1)(d) expands the rights in relation to sound recordings to include the entering into a commercial rental arrangement. In accordance with Australia's obligations under TRIPS the right extends to all sound recordings including, eg, talking books, and not just those embodying a musical work.

21. New s.85(2) provides that s.85(d) does not extend to entry into a commercial rental arrangement in relation to a sound recording, if the copy of the sound recording was purchased before commencement of Part 2 of the *Copyright (World Trade Organization Amendments) Act 1994* and the rental is entered into by the record owner as part of the ordinary course of a commercial rental business conducted by the record owner. This is consistent with the application of the rental right in relation to works (see paragraphs 16 & 17) above.

PART 3 - AMENDMENTS RELATING TO ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Clause 6 – Affidavit evidence

22. The amendment to s.134A of the *Copyright Act* effected by this clause extends the existing terms of the section so that affidavit evidence may be given of the non-ownership of copyright by a particular person or that an act was done without the licence of the owner or exclusive licensee of the copyright. The existing provisions of s.134A already provide that affidavit evidence of subsistence and ownership of copyright may be given. The provisions remain subject to the provisions of s.134A(2) that the deponent is to be subject to cross-examination if the defendant, in good faith, requires it unless the court otherwise allows the affidavit to be used.

23. The border enforcement provisions in the Bill are similar to those proposed in the *Copyright Amendment Bill 1992* which lapsed with the calling of the 1993 Federal

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election. Comments on the Bill identified the provision of a power to depose as to the absence of licence or absence of ownership of copyright as an important procedural aid lacking in the Act. This provision therefore assists in the effective operation of the border enforcement provisions. At the same time, since the person who gave the affidavit is potentially subject to cross-examination at the defendant's initiative, there is no detriment to potential defendants.

Clause 7 – Interpretation

24. Clause 7 of the Bill inserts a new heading and Division, Division 7, in Part V of the Act (after new s.134A). New s.134B is an interpretation provision for the new Division, on seizure of imported articles.

25. In particular, the new s.134B sets out that in the Division 'copyright materials' means a work, a sound recording, a film a recording of a broadcast or a published edition of a work, in other words, the full range of copyright materials.

Clause 8 – Restriction of importation of copies of works etc.

(a) Background

26. The Act provides in s.135 that Customs seizure of published printed works (books) imported for a commercial purpose may occur on objection lodged with the Comptroller-General of Customs by the copyright owners of those published works.

27. Under the present section where a notice has been given, the commercial importation of copies of the relevant work is prohibited and any such copies, if so imported, may be seized as forfeited to the Commonwealth.

28. Article 51 of the TRIPS Agreement provides that Members shall extend border enforcement measures to the full range of copyright material covered by TRIPS. There is no limitation in the TRIPS Agreement that the copyright material referred to in Article 51 of TRIPS is to be printed and published.

29. In accordance with the TRIPS provisions the amendments under clause 8 of the Bill extend the border seizure provisions to all copyright works whether published or not but do so within the context of a new scheme which places the onus on copyright owners to commence proceedings in court for infringement of copyright by importation of copies so seized.

30. By contrast with the existing provision under which seizure is determinative, and which is understood to have never been utilised, customs seizure under amended s.135 will operate as merely a means of holding the copies pending a decision of a court. If no proceedings are instituted and there is no other reason to hold the copies they will be released after the seizure period.

(b) The new provisions to be substituted in s.135

31. Clause 8 amends s.135 by omitting ss.135(2)-(7) and inserting six new sub-sections. The new provisions permit a copyright owner "the objector" to give to the Comptroller-General of Customs written notice of objection to the importation of copyright material (s.135(2)). The notice of objection will subsist for 2 years or until the expiry of the copyright whichever is sooner (s.135(5)). The Customs Service may well require additional information establishing that the objector is the copyright

owner and other information in order to identify copyright material that could be subject to seizure. New subsection (3) provides for this by setting out that the notice of objection must be accompanied by any prescribed document.

32. The new provisions do not provide for the copies to be forfeited to the Commonwealth but merely give power to the Comptroller-General to seize the copies (s.135(7)). General delegations of power for the Comptroller-General are provided for in the *Customs Act 1901*. This power of seizure is limited to seizure of copyright material imported for a commercial purpose.

33. New s.135(10) makes it plain that the seizure provisions do not apply to the seizure of books imported without the licence of the copyright owner under the provisions of the Act (ss.44A and 112A) that allow unlicensed commercial importation of books which were not published in Australia within 30 days of first publication overseas or which were unavailable upon request from the Australian copyright owner.

Clause 9 – Insertion of New Sections Relating to Customs Seizure

34. Clause 9 of the Bill inserts new ss.135AA-135AK. These new sections specify the procedures and other related matters in respect of seizure of imported copyright material.

35. These provisions are very similar to those in the *Trade Marks Act 1955* and in the amendments proposed for that Act relating to seizure of counterfeit and unlicensed trademark imports.

36. New s.135AA provides that the Comptroller-General may refuse to take action to seize copies the subject of an objection notice if security to meet the Comptroller-General's estimate of the Commonwealth's reasonable costs of seizure is not given by the objector. The scheme to be established in Division 7 is intended to be on a user-pays basis.

37. New s.135AB provides for the copies to be held in a secure place, as directed by the Comptroller-General.

38. New s.135AC provides for the Comptroller-General, as soon as practicable, to notify both the importer and the objector after a seizure has been made. The notice is required to advise that the copies will be released to the importer unless an action for infringement relating to the copies is instituted by the objector and notified to the Comptroller-General within a period (the retention period) to be prescribed by regulation.

39. New s.135AC enables that retention period to be extended by a further prescribed period upon application to the Comptroller-General by the objector subject to a number of requirements. These requirements are that the application is made in writing within the initial retention period, that a decision on the application be made within 24 hours of the request and that the Comptroller-General is satisfied that the request is reasonable. New s.135AD(7) provides that a decision to extend the retention period cannot be made after the expiry of the initial period.

40. The TRIPS obligations are quite detailed in their requirements in this respect. The maximum initial retention period permitted under TRIPS is ten working days from the date of the notice of seizure. The extension may be for a further ten working

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days. These will be therefore the maximum periods which may be prescribed for the purposes of the new section. Given these short time frames, and the exemption from liability in respect of seizure in new s.135AK, merits review of a decision to seize or not to seize copies, or to extend the retention period would not be practical and has not been included.

41. New s.134AD grants the Comptroller-General power to permit inspection of the seized copies by the objector (ie, the copyright owner or exclusive licensee) and by the importer. The provision also empowers the Comptroller-General to allow each of the objector and importer to take one sample of the copies subject to requisite undertakings being given. These undertakings, set out in the new section, are to return the sample at a specified time and to take reasonable care to prevent damage to the sample. The provision is facultative.

42. The Commonwealth will not be liable for any loss or damage to the seized copies occurring during an inspection (s.135AD(5)).

43. New s.135AE permits the importer to give the Comptroller-General a notice agreeing to forfeiture of the seized copies to the Commonwealth. The notice will not be effective unless given before any infringement proceedings have been commenced against the importer by the objector. When the notice has been validly given the copies are forfeited and are to be disposed of as prescribed or, if not prescribed, as the Comptroller-General directs. The intention of the provision is to provide a means of quickly disposing of cases where the importer decides at an early stage not to contest the claim of copyright breach.

44. New s.135AF contains a critical part of the scheme. It provides that, subject to Comptroller-General's power to hold the copies for some other reason (see new s.135AH), seized copies must be released by the Comptroller-General to the importer either at the expiration of the retention period (the initial period or as extended - see paragraphs 38-9 above) or at the expiration of 3 weeks from the institution within that period of legal proceedings if there is no order of the court restraining such release. The objector may consent to the release of the copies and the Comptroller-General will then be obliged to release the copies to the importer.

45. The key feature of s.135AF is the mandatory direction to the Comptroller-General to release the copies in the circumstances specified. It places the onus on copyright owners to institute proceedings and then to seek orders for the continued retention of the copies by Customs. If the copyright owner or exclusive licensee is not vigilant in pursuing the importer for infringement, then Customs will release the copies to the importer. A decision not to institute proceedings does not, of course, preclude the possibility of court action by the objector at a later stage.

46. New s.135AG permits the Comptroller-General to appear and be heard at any proceedings for copyright infringement in respect of seized copies. The main purpose of the provision is to enable Customs to apprise the court of any matters it considers will be relevant to the exercise of the court's power. The Comptroller-General is not given power to appear as a party to the proceedings. Any other person having a sufficient interest in such proceedings may, on application, be joined as a defendant. The court is empowered, apart from any other power it may have, to order the copies be released to the importer or alternatively that they not be so released for a specified period, or that they be forfeited to the Commonwealth. Release may not be ordered if the court is aware of any other Commonwealth law which would require or permit the Comptroller-General to retain control of the seized copies.

47. Where no release or forfeiture order has been made under new s.135AG(4) new s.135AH empowers the Comptroller-General to retain seized copies if that is required or permitted under any other law of the Commonwealth.

48. New s.135AI provides that where a court orders seized copies to be forfeited they must be disposed of as prescribed or, if not prescribed, as the Comptroller-General directs.

49. New s.135AJ places liability on the objector, or objectors jointly and severally, for meeting the reasonable costs incurred by the Commonwealth in relation to an action taken by the Comptroller-General under new Division 7 insofar as they are not recoverable from the security required to be given (para 36 above). This provision ensures that the user pays approach implemented in the scheme is able to be adequately implemented. In relation to any recovery action, it will need to be established that the costs incurred were reasonable.

50. New s.135AK provides an immunity for the Commonwealth arising out of the seizure of copies, the failure to seize copies or the release of seized copies. This will not prevent action being taken against relevant officials who exceed their authority or who act in bad faith.

Clause 10 – Review of certain decisions

51. Clause 10 amends s.195B of the Act. Section 195B provides for administrative review of certain decisions. Subsection 135(6) in the Act contains provision for the Comptroller-General to permit re-export of copies forfeited to the Commonwealth.

52. Consequent upon the amendments in clause 9 of this Bill this power will no longer be available to the Comptroller-General. Clause 10 will make the necessary consequential changes to s.195B in that regard.

53. Clause 10 further amends s.195B, to provide for administrative review by the Administrative Appeals Tribunal of a refusal by the Comptroller-General under new s.135AA to refuse to refuse to seize copies because of inadequate security given by the objector and a refusal by the Comptroller-General under new s.135AD(1) to permit seized copies to be inspected. Of the actions under new Division 7 in respect of which the Comptroller-General has a discretion these are the only two for which merits review could be of any practical application given the time frames involved.

PART 4 AMENDMENTS RELATING TO THE PROTECTION OF PERFORMERS

Clause 11 – Interpretation

54. Clause 11 is the first of the clauses of the Bill which amend provisions in Part XIA of the Act. Part XIA deals with performers' protection. Clause 11 will make two amendments to the definitions in s.248A(1). The amendment to the definition of "performance" will result in an extension in the range of performances protected. At present to attract protection a performance must have been not only given by a national (or resident) of Australia (or the USA or other Rome Convention Country as provided by the regulations) but also given in Australia (or such other country as provided by the regulations). Under the amendment a performance satisfying either of those requirements would attract protection. This is consistent with the TRIPS obligations. The other amendment replaces the current definition of "protection period" so that it refers the reader to new s.248CA.

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Clause 12 – Protection Period

55. Under the Act at present the protection period in relation to performers ends 20 years after the calendar year in which the performance was given. In addition to the protection granted in Part XIA of the Act, the TRIPS Agreement requires a 50 year protection period for performers applicable to unauthorised sound recordings but not to broadcasting or other communication to the public of such recordings. Protection is also to be granted in the case of existing unauthorised recordings.

56. New s.248CA achieves this by specifying a general 20 year protection period (s.248CA(1)) which is subject to the application of the 50 year term to those rights inextricably linked to the TRIPS requirements. Subsection 248CA(2) prescribes the 50 year term applicable to the protection of performers against further dealings with existing unauthorised recordings. The relevant criminal offences are found in new s.248QA. Subsection 248CA(3) specifies a 50 year protection period in relation to future unauthorised sound recordings. Subsection 248CA(4) lists the unauthorised uses and offences to which the 50 year term in s.248CA(3) is applicable. This split in the protection periods reflects the fact that the TRIPS obligations do not extend to broadcasts and transmissions to the public by wire of recorded performances and in regard to the acts against which protection is required to be given to performers, other than live transmissions to the public, TRIPS is expressly limited in its application to sound recordings.

Clause 13 – Application

57. Clause 13 of the Bill amends s.248F which deals with the application of Part XIA of the Act. Currently, under s.248F(1) the Part applies to performances given after the commencement of Part XIA (1 October 1989). Clause 13 will amend s.248F to make provision for that time restriction to be subject to the proposed new s.248QA(see para 61 below).

Clause 14 – What constitutes unauthorised use

58. Section 248G sets out what constitutes an unauthorised use of a performance. Possession of an unauthorised recording is an unauthorised use (s.248G(2)(d)). Clause 14 will amend s.248G so that possession will only be an unauthorised use if the possession is for a commercial purpose. The various commercial uses that could be made of the recording are set out. These are, essentially, sale or hire or distribution for the purpose of trade or any other purpose that will affect prejudicially the financial interests of the performer or performers in the performance.

59. This will bring the section into line with the provisions in the rest of the Act dealing with copyright infringement constituted by possession of infringing copies. The width of the provision in its present form is such that it is theoretically possible, even if extremely unlikely, that a person who buys an unauthorised recording overseas for their own use could be subject to an action for damages by the performer.

Clause 15 – Other offences in relation to performances

60. This clause omits the existing s.248Q(4) relating to the offence of possession of unauthorised recordings and substitute a more restricted offence limited to possession for a commercial purpose. The possession offence, restricted to possession for a commercial purpose in the manner indicated in paragraph 58, will be included as new

paragraph (4)(c); the existing provisions of s.248Q(5) being omitted and re-enacted as paragraphs (4)(a), (b) and (d).

Clause 16 – Further offences relating to sound recordings of certain performances

61. Clause 16 inserts a new section after s.248Q. New s.248QA provides criminal offences in relation to commercial dealings, after the commencement of this Part of the amending Act, with unauthorised recordings of performances given prior to this amendment. The only limitation on this new protection of these past performances is that they must have been given within the 50 year protection period.

62. These offences are a combination of relevant offences that mirror those in ss.248P and 248Q. As the section is restricted to performances that were given prior to the commencement of Part 4 of what will be, if passed, the *Copyright (World Trade Organization Amendments) Act 1994* it is only necessary to deal with those offences involving copies of, or copying of, existing unauthorised recordings.

63. New s.248QA(2), which largely repeats the offence in s.248P(6), makes it an offence to have any plate or recording equipment that the person knows or ought reasonably to know is to be used for making a copy of an unauthorised recording of a performance. This offence will, of course, be applicable to existing unauthorised sound recordings for up to 50 years after the year in which the recording was made.

64. New s.248QA(3) provides for the offence of copying an unauthorised sound recording. This mirrors the existing offence in s.248Q(1) in relation to unauthorised recordings of performances given after 1 October 1989.

65. New s.248QA(4) provides for offences for commercially dealing with unauthorised recordings or importing unauthorised recordings for the purpose of commercial dealing with them. This provision is in the same form as new s.248Q(4).

66. New s.248QA(5) provides that it will be an offence to exhibit in public an unauthorised sound recording by way of trade or to import an unauthorised sound recording for that purpose. The new section corresponds to existing s.248Q(6).

67. All these offences require that the person knew or ought reasonably to have known that the recordings were unauthorised sound recordings.

68. New s.248QB provides that an act done in relation to a performance which is in breach of both s.248QA and existing s.248P or 248Q can only be prosecuted under one of the provisions. It is included to ensure that in those cases involving recordings of performances already protected under Part XIA, ie, performances given after 1 October 1989 and up to the commencement of these amendments, there is no risk of being subject to prosecution under two different provisions for what would be the same offence.

Clause 17 – Penalties

69. Clause 17 amends s.248R of the Act, which deals with the penalties that apply to the offences under Part XIA of the Act, so as to include those offences added in new section 248QA. Clause 17 of the Bill inserts new s.248R(3A) and (3B). The expression of the penalties is a combination of current drafting practice and retention of consistency with the existing penalties in the Act.

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70. In consequence, the provisions refer to penalty units rather than the monetary figures in the existing penalty provisions. The current value of 1 penalty unit is \$100. As such, the penalties are exactly the same as for the correlative offences.

71. There is no reference to first offences as current criminal law policy is not to fetter the discretion of the court in that way but the relationship between maximum fines for individual and corporate persons is specifically referred to consistently with the existing penalty provisions. Additionally, in conformity with the existing manner of expression of the penalties in the Act and the relationship between them, reference is made to both the penalty units and the term of imprisonment applicable.

72. Comprehensive amendment of all the penalty provisions in the Act to bring it into conformity with current criminal law policy is expected to be undertaken in a future bill to amend the Principal Act.