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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

CRIMES LEGISLATION AMENDMENT BILL 1989

EXPLANATORY MEMORANDUM

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M.P. Deputy Prime Minister and Attorney-General)

This Memorandum takes account of amendments made by the House of Representatives to the Bill as introduced.

CRIMES LEGISLATION AMENDMENT BILL, 1989

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CRIMES LEGISLATION AMENDMENT BILL 1989

GENERAL OUTLINE

1. The purpose of the Bill is to amend various Acts concerned with crime, law enforcement and criminal justice.

Part 1 - Preliminary - Short Title and Commencement.

Part 2 - Amends the Acts Interpretation Act 1901 by inserting a new definition of 'record'.

Part 3 - Amends the Crimes Act 1914 to increase and standardise pecuniary penalties; to expand the scope of the Act to more adequately deal with computer crime; to clarify and improve the law with respect to pardons and quashed convictions and to provide for spent convictions.

The changes relating to penalties lay the basis for a new practice under which maximum fines, in general, will not be specified in offence provisions but will be determined by reference to section 4B of the Crimes Act. Also, in general, maximum fines are increased and fines are made able to be imposed additionally to an imprisonment penalty.

The new computer offences fall into 4 main categories:

- . obtaining unauthorised access to data in Commonwealth computers and related conduct;
- . deliberate conduct harmful to Commonwealth computers and data;
- . unauthorised access to computer data through Telecom or a similar facility;

4.

- . deliberate conduct harmful to computers and data through Telecom or a similar facility.

Proposed Part VIIC of the Crimes Act 1914 establishes a scheme which will prohibit the disclosure of, or discrimination against a person on the basis of a spent conviction, a quashed conviction or a conviction for which the person has received a pardon. The amendments also provide that where a person is pardoned after having been wrongly convicted, then the person shall be taken never to have been convicted of the offence. The amendments are designed to encourage and assist the rehabilitation of minor offenders who have not re-offended for 10 years (5 years where the person is a juvenile) or have had the benefit of a pardon or the quashing of their conviction.

Part 4 - Amends the Crimes (Aircraft) Act 1963 to ensure that airports owned by the Federal Airports Corporation are covered by Part IIIA of the Act, which creates various crimes affecting Commonwealth aerodromes.

Part 5 - Amends Part XIII Division 3 of the Customs Act 1901 in order to harmonize those provisions with the corresponding provisions of the Proceeds of Crime Act 1987.

Part 6 - Amends the Director of Public Prosecutions Act 1983 by conferring a new function of instituting a prosecution by way of ex officio indictment, and an enlarged power to grant indemnity from prosecution.

Part 7 - Amends the Judiciary Act 1903 consequential upon the amendment of the Director of Public Prosecutions Act 1983 conferring a function in relation to the issue of an ex officio indictment.

Part 8 - Amends the National Crime Authority Act 1984 to make the Chairman of the Authority clearly responsible for general management of the NCA and to streamline the Authority's day-to-day operations by reducing the need for meetings of the

5.

Authority wherever possible. Section 19A of the NCA Act is also to be amended by removing from its ambit certain Commonwealth agencies operating in the private sector so they become subject to the provisions of sections 28 and 29 of the Act, and to insert a clause into s.19A providing a requested agency with protection from liability for breach of confidentiality.

FINANCIAL IMPACT

2. Proposed Part VIIC of the Crimes Act 1914, dealing with spent convictions, will not occasion any more than a minor increase in costs to the Commonwealth.

3. The amendments to Part XIII Division 3 of the Customs Act 1901, proposed by Part 5 of the Bill, will not require additional resources. There is an expectation that the revision of Part XIII Division 3 will make the provisions more effective and so result in increased payments to the Commonwealth.

4. The other amendments proposed by the Bill have no financial impact.

ABBREVIATIONS

5. The following abbreviations are used in this explanatory memorandum:-

- . ACT : Australian Capital Territory
- . AFP : Australian Federal Police
- . Crimes Act : Crimes Act 1914
- . DPP : Director of Public Prosecutions
- . DPP Act : Director of Public Prosecutions Act 1983
- . NCA : National Crime Authority
- . NCA Act : National Crime Authority Act 1984
- . Privacy Act : the Privacy Act 1986
- . Proceeds Act : the Proceeds of Crime Act 1987
- . the Queensland Act : Criminal Law (Rehabilitation of Offenders) Act 1986 (Queensland)
- . SCAG : Standing Committee of Attorneys-General.

8.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short Title

6. This clause provides for the short title of this Bill.

Clause 2 - Commencement

7. This provides for various commencement times for different parts and clauses of the Bill.

8. Subclause (2) provides that Part VIIC of the Crimes Act 1914 will commence no later than 12 months after assent. This recognizes the need to provide time for the Privacy Commissioner to invite and consider applications for exemption from the spent convictions scheme.

9. The orderly introduction of the scheme depends upon an adequate settlement of all exemptions beforehand - though it will still be possible to obtain exemption at a later date. Clause 12 provides the Privacy Commissioner with authority to consider and advise on exemptions prior to commencement.

10. Subclause 4 provides that Part 8 will commence on 1 July 1989. This will allow the amended management arrangements to take effect at the same time as the appointment of the new Chairman and members of the Authority.

PART 2 - AMENDMENT OF THE ACTS INTERPRETATION ACT 1901

Clause 3 - Principal Act

11. This clause is a formal provision. It identifies the Acts Interpretation Act 1901 as the Principal Act amended by Part 2.

Clause 4 - References to writing, documents and records

12. This clause inserts a definition of 'record' in the Principal Act s.25. Unless the contrary intention appears, 'record' in Commonwealth legislation will include information stored or recorded by means of a computer. (This method of treating computer records was recommended by the committee reviewing Commonwealth criminal law (Gibbs Committee) in its report 'Computer Crime'.)

PART 3 - AMENDMENTS OF THE CRIMES ACT 1914

OUTLINE

13. The main purposes of this Part are to:-

- . introduce new offences relating to computers and data in computers.
- . up-date the level of pecuniary penalties (fines) in the Crimes Act, provide for the possibility of fines in addition to imprisonment, and provide a standard method of specifying penalties.
- . establish a scheme which will prohibit the disclosure of, or discrimination against a person on the basis of a spent conviction, a quashed conviction or a conviction for which the person has received a pardon. (Spent convictions scheme);
- . provide that where a person is pardoned after having been wrongly convicted, then the person shall be taken never to have been convicted of the offence.

Clause 5 - Principal Act

14. This clause is a formal provision, identifying the Crimes Act 1914 as the Principal Act amended by Part 3 of the Bill.

Clause 6 - Pecuniary penalties - natural persons and bodies corporate

15. Paragraph (a) of this clause makes a consequential drafting change.

16. Paragraph (b) of this clause enhances the sentencing options available to a court, in cases where subsection 4B(2) of the Principal Act applies, by enabling a pecuniary penalty (fine) up to the specified limit to be imposed in addition to a penalty of imprisonment as well as alternatively to a penalty of imprisonment.

17. Paragraph (c) makes two substantive changes to subsection 4B(2) of the Principal Act. First, it replaces the present table (providing for the maximum fine that may be imposed where imprisonment only is specified under a provision) with a simple formula under which there will be a direct proportionality between the specified maximum period of imprisonment and the maximum fine, i.e. the maximum fine is to be calculated at the rate of \$3,000 for each 6 months of the maximum imprisonment period.

18. Secondly, the effect of that formula on the present levels of maximum fines is to increase them. The size of the increase depends on a comparison between the present table and the effect of the formula e.g. the new maximum fine corresponding to 6 months imprisonment is \$3,000 (an increase of three times), for 18 months imprisonment it is \$9,000 (less than double the present level), for 5 years imprisonment it is \$30,000 (three times the present level), for 6 years it is \$36,000 (less than double), and for 20 years it is \$120,000 (an increase of six times). At the lower end of the scale these increases are justified by changes in the relative value of money since the relativities were last adjusted in 1982 and are prompted by the increases suggested in the discussion paper on 'Penalties' published by the Gibbs Committee. Further, the introduction of a direct formula is an improvement on the present tabular method considered by the

Committee and results in proportionally higher maximum fines at the upper end of the scale (beyond 10 years).

(Subsection 4B(3), which provides for a multiplier of 5 to determine the maximum fine for a corporation, is not changed, so that that multiplier is to be applied to the new scale of maximum amounts to determine the maximum fine for a corporation.)

19. Paragraph (d) inserts a new subsection which makes provision for the first time for an alternative or additional fine in the case of a maximum penalty of life imprisonment. The maximum fine in such a case is \$200,000.

Clause 7 - What amounts to forgery

20. This clause inserts a new subsection in subsection 63 of the Principal Act to make it clear that the definition of forgery in the Principal Act encompasses a situation where a person makes a false document or other thing for use in relation to a computer or other machine, e.g. the alteration of a plastic card for use in an automatic cash-dispensing machine could fall within the definition of forgery if the required intent was present. This is one of the amendments recommended by the Gibbs Committee in its report on 'Computer Crime'.

Clause 8 - Forgery of Commonwealth documents etc

21. This clause reverses the order of the terms 'record' and 'document' in paragraph 67(e) of the Principal Act to avoid the suggestion that a record, as referred to in the Act, can only be a form of document. This amendment is complementary to the Acts Interpretation Act 1901 section 25, the intention being to use the term 'record' where it is intended to include computer records on the basis that the term 'document' does not necessarily include a computer record. This amendment gives effect to a recommendation of the Gibbs Committee.

Clause 9 - Insertion of New Part VIA - Offences Relating to Computers

22. This clause inserts a new part into the Principal Act:

'PART VIA - OFFENCES RELATING TO COMPUTERS'

23. Proposed section 76A sets out definitions of 'Commonwealth', 'Commonwealth computer', 'data', and elaborates the meaning of 'data stored in a computer', and 'data stored on behalf of the Commonwealth in a computer'. The definition of 'Commonwealth' is to be read with the definition of 'public authority under the Commonwealth' in section 3 of the Principal Act.

24. Proposed section 76B. Subsection (1) creates new offences of intentionally and without authority obtaining access to data in a Commonwealth computer or Commonwealth data in a non-Commonwealth computer. The maximum penalty, by operation of section 4B as amended, is 6 months imprisonment or a fine of \$3,000 or both.

25. Subsection (2) creates aggravated forms of the offence in subsection (1). These apply where access is obtained with intent to defraud a person or where the data relates to certain specified matters. The matters listed increase the seriousness of the unauthorised access. The maximum penalty, by operation of section 4B as amended, is two years imprisonment or a fine of \$12,000 or both.

26. Subsection (3) creates an offence closely related to that in subsection (2) where the same kind of data is involved but where the person obtaining access is not aware, immediately on obtaining access, of the nature of the data. In that event, the aggravated offence is committed if the person decides to continue to examine the data even though it relates to one of

the matters specified in paragraph (2)(b). The penalty is the same as for a breach of subsection (2).

27. Proposed section 76C creates a set of new offences relating to interference with data in Commonwealth computers or Commonwealth data in other computers or the unlawful use of Commonwealth computers. The prohibited acts are cast in a number of alternatives in order to encompass harmful conduct of various kinds including conduct carried out at long range through a telecommunications system, or interference with or creation of defective or problem-causing data-carrying devices. Such conduct could include the creation or transmission of a so-called 'computer virus' designed to cause the malfunction of a system either completely or in a particular respect. Apart from interference with data, the harmful conduct might be directed at the use of the computer itself, so paragraph (b) creates an offence of interfering with, interrupting, or obstructing lawful use. An example could be the deliberate overloading of a system, or interference with a power supply. The penalty provision, read with amended section 4B, provides for a maximum penalty of 10 years imprisonment or a fine of \$60,000 or both.

28. Proposed section 76D section provides for a set of offences corresponding in structure to those in new section 76B but with the restrictive element that the relevant conduct be carried out by means of a 'facility' operated or provided by the Commonwealth, and with the broad element that the conduct might be directed against data in any computer, whether a Commonwealth computer or not.

29. By virtue of the definition of 'Commonwealth' in new section 76A and the definition of 'public authority under the Commonwealth' in section 3, a 'facility' through which the offence is committed might be one provided by the Australian Telecommunications Commission (Telecom). Indeed the main purpose and practical effect of the offences in section 76D is to cover unlawful access or 'hacking' committed through use of

the telephone system. It must be borne in mind that computer users themselves routinely, and usually quite lawfully, make use of the telephone system to interconnect with other systems and services and that the telephone system is frequently used to link various elements within a single system. The section as drafted is broad enough to cover acts committed, intentionally and without authority, through use of any other communications facility provided by the Commonwealth or a Commonwealth 'public authority'.

30. Because the data involved in an offence against proposed section 76D might be Commonwealth data or data in a Commonwealth computer, there is some overlap with proposed section 76B in that the same conduct could be an offence against both sections. The reason for not making the two sections mutually exclusive (i.e. for not providing that the section 76D offences may only be committed in relation to non-Commonwealth computers or data) is because the relevant conduct, e.g. 'hacking', might not be directed specifically against a particular computer or particular data. If each section was confined to a particular kind of computer or data there would be a serious gap in cases where the particular target of the conduct could not be shown. Corresponding considerations apply to proposed section 76E (below).

31. Proposed section 76E section corresponds to section 76C in the same way that section 76D corresponds to section 76B. This section creates offences, in relation to any computer or computer data, of the kind provided in relation to Commonwealth computers and Commonwealth data in section 76C, but only where the relevant conduct is carried out 'by means of a facility operated or provided by the Commonwealth'. (See the explanatory note in relation to proposed section 76D.)

32. Proposed section 76F section preserves, so far as proposed section 76D and section 76E are concerned (offences committed by means of a Commonwealth 'facility'), the effect of State and Territory laws that might otherwise be excluded or limited (by operation of section 109 of the Constitution in

the case of a State). It is intended that the same conduct might be an offence under either of those sections and any applicable State/Territory law. An offender against the State/Territory law would not be liable to be punished twice because of the existence of the Commonwealth offence: subsection 4C(2).

Clause 10 - Insertion of new Part VIIC - Pardons, Quashed Convictions and Spent Convictions

33. This proposed Part of the Crimes Act establishes a spent convictions scheme and changes the effect of a pardon given on the basis of wrongful conviction.

34 Proposed section 85ZL is definitional. The definition of "Commonwealth law" ensures that Part VIIC does not apply to the Australian Capital Territory but will apply to the external Territories. The definition of "waiting period" determines how long a person has to wait before their conviction will be spent - in the case of a person dealt with as a child it will be 5 years. In the case of those dealt with as an adult (usually a person over 18 years of age) it will be 10 years.

35. Proposed section 85ZM defines the meaning of "conviction" and "spent" conviction. Subsection (1) provides that a person shall be taken to have been convicted of an offence if the person is convicted of the offence either summarily or on indictment, the person is found guilty, or the charge is proved but the offender is discharged without conviction, or where a Court takes an offence into account on sentence. The extended definition of "conviction" is designed to ensure that all persons who have been dealt with by a court for particular conduct are subject to the same benefits they would have been entitled to had they been convicted.

36. Subsection (2) provides that a conviction will become spent only if the person has been granted a pardon, other than for the reason that he or she was wrongly convicted, or the

person was not sentenced to imprisonment, or was not sentenced to imprisonment for more than 30 months and the waiting period has ended.

37. Proposed section 85ZN is definitional.

38. Proposed section 85ZP provides that Part VIIC applies to all convictions, whether they occurred before or after the commencement of the legislation. Subsection (2) limits the application of the part to natural persons and subsection (3) expressly, provides that the scheme does not authorize disclosure or taking into account of a conviction if to do so would contravene any other law.

39. Subsection (4) preserves actions taken lawfully prior to the granting of a pardon, the conviction becoming spent, or the quashing of a conviction.

40. Proposed section 85ZQ provides that Part VIIC binds the Crown in right of the Commonwealth, States and Territories.

41. Proposed section 85ZR provides that where a person is granted a complete pardon for a Commonwealth or external Territory offence because he or she has been wrongly convicted, then the person is to be taken never to have been convicted of the offence.

42. Subsection (2) provides that where a pardon is granted in corresponding circumstances under State or foreign law, the pardon is to receive the same recognition from a Commonwealth authority and within a Territory as a pardon for a Commonwealth offence.

43. Proposed section 85ZS provides for the consequences of pardons for persons wrongly convicted. The person is not required to disclose the fact that he or she was charged or convicted of the offence. It is to be lawful to claim (whether on oath or otherwise) that he or she was not charged with, or convicted of, the offence. Where the pardon relates

to a Commonwealth or Territory offence, the person is not to be subject to any legal duty or disability which would have arisen from being convicted. Anyone else who knows, or could reasonably be expected to know, that the person has been pardoned on the basis of being wrongly convicted, is also required not to disclose the fact that the person was charged or convicted, unless the person consents. In any circumstances the pardon must not be taken into account. This provision is designed to put the person who has been wrongly convicted and then pardoned in the same position as if they had not been convicted at all.

44. Proposed section 85ZT provides that where a person's conviction of a Commonwealth or Territory offence has been quashed, the person is not required to disclose the fact that he or she was charged with, or convicted of, the offence.

45. Subsection (2) provides that where a person's conviction of a State or foreign offence has been quashed, the person is not required in any Territory to disclose to any person the fact that he or she was charged or convicted. In a State or foreign country, the person is not required to disclose the charge or conviction to any Commonwealth authority in that State or country.

46. Proposed section 85ZU provides that where a person is not required to disclose a quashed conviction the person is also permitted to claim on oath or otherwise that he or she was not charged with, or convicted of, the offence. Anyone who knows, or could reasonably be expected to know, that the person has had the conviction quashed is prohibited from disclosing those matters unless the person consents. There is a general prohibition on taking into account the fact that the person was charged with, or convicted of, the offence.

47. Proposed section 85ZV provides that, subject to the exemptions at Division 6, if a person's conviction of a Commonwealth or Territory offence is spent, the person is not required in any State or Territory or to Commonwealth or State

authorities located in a foreign country to disclose the fact that he or she was charged or convicted of the offence.

48. Subsection (2) provides that, subject to the same exemptions, if a person's conviction of a State or foreign offence is spent, the person is not required in any Territory to disclose to any person the fact that he or she was charged or convicted. In a State or foreign country the person is not required to disclose the charge or conviction to any Commonwealth authority in that State or country. Effectively for the purposes of spent convictions, offences under State or foreign law will be treated the same as Commonwealth offences.

49. Subsection (3) provides that, subject to the exemptions, where a person is convicted of a State offence they would benefit from a spent convictions scheme in their State under State law, the person is not required to disclose to any person in a Territory that he or she was charged or convicted. Furthermore, in a State or foreign country, the person would not be required to disclose the charge or conviction to any Commonwealth authority in that State or country. The purpose of the provision is to ensure that where a State has a spent convictions scheme which is more beneficial to offenders than the Commonwealth scheme the conviction will be treated as spent for the purposes of the Commonwealth scheme.

50. Proposed section 85ZW outlines the consequences of having a spent conviction. Where the conviction is spent it is lawful to claim (whether on oath or otherwise) that he or she was not charged with, or convicted of, the offence. Anyone else who knows, or could reasonably be expected to know, that the conviction is spent is prohibited from disclosing the fact that the person was charged or convicted, or from taking those facts into account.

51. Proposed section 85ZX provides that before a person can benefit from the scheme, he or she must be of good behaviour during the waiting period.

52. Subsection (1) provides that where a conviction would be spent under Division 3 and the person is summarily convicted of another offence committed during the waiting period, the Court may order that the first conviction not become spent until the waiting period for the second offence elapses. That is, the Court has a discretion in deciding whether a conviction for a minor offence should affect the waiting period for a previous conviction that would otherwise become spent. If the court makes no order the subsequent conviction does not affect the waiting period.

53. Subsection (2) provides that where a person is convicted on indictment of another offence committed during the waiting the first conviction does not become spent until the waiting period for the later offence has ended. Indictable offences, prosecuted on indictment, are sufficiently serious to warrant automatic re-commencement of the waiting period.

54. Proposed section 85ZY provides that the effect of a conviction for a State or foreign offence committed during the waiting period is that the waiting period automatically recommences. Where a State has a spent convictions scheme, subsection 85ZV(3) applies. It effectively provides that, if a State scheme is more beneficial to the person than the Commonwealth scheme, its effect on a conviction recorded in that State will be recognised by the Commonwealth and Territories.

55. Proposed section 85ZZ provides that the Privacy Commissioner (appointed under the Privacy Act) has functions under this legislation to investigate alleged breaches of the scheme and to examine written requests for complete or partial exemption from the operation of Division 3 (concerning spent convictions) and to advise the Minister as to whether an exemption should be granted. Where the Minister accepts the Privacy Commissioner's recommendations, the exemption can be prescribed by Regulation.

56. Subsection (2) provides that in performing the functions the Privacy Commissioner is required to balance the need to ensure proper protection from interference in privacy against the requirements of government and private sector bodies to achieve their objectives in an efficient manner having regard to the nature of the offence concerned.

57. Proposed section 85ZZA provides that an individual may complain to the Privacy Commissioner about an act or practice by another person or by a Commonwealth or State authority that may be in breach of the legislation. While the complaint is required to be in writing, staff of the Human Rights and Equal Opportunity Commission are required to assist a person in formulating a complaint.

58. Proposed section 85ZZB sets out who is to be regarded as the respondent for the purposes of investigations and proceedings relating to a complaint.

59. Proposed section 85ZZC provides that the Commissioner is required to consider complaints and investigate acts or practices complained of if the conduct may be in breach of the legislation.

60. Subsection (2) sets out the grounds on which the Commissioner may decide not to conduct an investigation or not to continue an investigation.

61. Proposed section 85ZZD specifies the types of determinations the Privacy Commissioner may make following an investigation of a complaint. Subsection (2) empowers the Privacy Commissioner to require attendance for counselling. Subsection (4) empowers the Privacy Commissioner to make declarations with respect to the complainant's expenses.

62. Proposed section 85ZZE provides that if the complaint relates to a Commonwealth or State authority and a declaration has been made concerning compensation or expenses under the previous provision, then the complainant is entitled to receive the amount from the Commonwealth or State.

63. Proposed section 85ZZF provides that the Privacy Commissioner or the complainant can institute proceedings in the Federal Court for an order to enforce a determination made under proposed section 85ZZD. The Federal Court is empowered to make such orders as it sees fit to give effect to a determination.

64. Proposed section 85ZZG provides the Privacy Commissioner with the same procedural and enforcement powers in respect of spent convictions as he has under the Privacy Act. They include powers to hold preliminary inquiries, to obtain information and documents, to call compulsory conferences and offences for failure to attend before the Privacy Commissioner or refuse to answer questions.

65. Proposed section 85ZZH provides that the prohibitions on disclosure of, and taking into account spent convictions do not apply in particular circumstances to particular persons or bodies. As well as these statutory exemptions the Privacy Commissioner may examine requests for exemption and advise the Minister on whether an exemption should be granted and prescribed in Regulations.

66. Proposed section 85ZZJ provides that the prohibitions on disclosure of spent convictions do not apply to the disclosure of information between or within law enforcement agencies if it is made in the discharge of duties by an employee or member of the law enforcement agency. The exemption extends to the filing or recording of information by employees or members of a law enforcement agency. The exemption also applies to the use by a law enforcement agency of information relating to the investigation of or prevention of crime, where the investigation or prevention of crime is a function of the agency.

67. Proposed section 85ZZK allows the publication of fair and accurate reports of the circumstances in which a person is granted a pardon or a person's conviction is quashed. It is clearly in the public interest that the media be able to

report the granting of pardons or the quashing of convictions. However, it is not intended that the provision extend protection to the publication of reports that are likely to cause harm to the person granted the pardon or whose conviction is quashed.

Clause 11 - Amendment relating to penalties

Clause 11 and Schedule 1

68. This clause and Schedule 1 update certain provisions dealing with fines in conformity with the changes made to s.4B. Where for some reason it is necessary for the maximum fine to be specified, the amount is increased in accordance with the new scale (Principal Act ss.4J(3)(a), 4J(3)(b), 4J(5) and 20(5)(b)). Where the maximum fine does not need to be specified in the offence provision the fine may be deleted so that the amount may, as a matter of standard practice, be determined by reference to s.4B(2) (ss.7A, 24E(3), 46, 47, 47B, 47C and 48). (It is not proposed to change the higher-than-standard fines in ss.29D and 86A.)

Clauses 12 - Transition

69. Clause 12 will ensure that the Privacy Commissioner has authority to consider and advise on exemptions prior to the commencement of the legislation.

PART 4 - AMENDMENTS OF THE CRIMES (AIRCRAFT) ACT 1963

Clause 13 - Principal Act

70. This clause identifies the Crimes (Aircraft) Act 1963 as the principal Act amended by Part 4 of the Bill.

Clause 14 - Interpretation

71. This is a definitional amendment. A definition of "Air Navigation Regulations" is necessary for section 18 of the principal Act.

Clause 15 - Taking or sending dangerous goods on aircraft

72. This amendment is consequential upon the amendment to section 3 proposed by clause 14. A reference to the Air Navigation Regulations is included in subsection 18(a) of the principal Act to make it clear that, if a person carries firearms on an aircraft in accordance with permission given under those Regulations, no offence under subsection 18(1) is committed.

Clause 16 - Interpretation

73. The definition of "Commonwealth aerodrome" in section 20A is amended to ensure that the offences created by Part IIIA of the Act apply to aerodromes owned by the Federal Airports Corporation under the Federal Airports Corporation Act 1986 as well as to those owned by the Commonwealth.

PART 5 - AMENDMENTS OF THE CUSTOMS ACT 1901

Clause 17 - Principal Act

74. This clause is a formal provision. It identifies the Customs Act 1901 as the principal Act amended by Part 5 of the Bill.

Clause 18 - Interpretation

75. Section 243A of the Customs Act defines a number of terms and expressions for the purposes of Division 3 of Part XIII of the Customs Act ("Recovery of Pecuniary Penalties for Dealings in Narcotic Goods"). Clause 18 proposes to amend section 243A by replacing an existing definition and inserting eight new defined terms. The existing definition of "property" is repealed and replaced by a definition in identical terms to that contained in subsection 4(1) of the Proceeds Act. It should be noted that the term "interest", which is used in the

definition, is separately defined. The definition of "interest" is discussed below.

Clause 18(b)

76. The new definitions are as follows:

'benefit' The term "benefit" is used in section 243C ("Assessment of pecuniary penalty"), which prescribes the method for calculating the amount of a pecuniary penalty to be imposed pursuant to section 243B. The assessment procedure involves valuing "the benefits derived by the defendant by reason of his having engaged in" dealings in narcotics. The proposed definition will make clear that "benefit" includes the intangible returns of a service or advantage. (A corresponding definition appears in subsection 4(1) of the Proceeds Act). The definition should be read in conjunction with the new subsection 243A(4) to be inserted by clause 18(c).

'dealing' Section 243E (as amended by this Bill) empowers the Court to make an order directing that property is not to be disposed of "or otherwise dealt with" by any person. Section 243K, as amended by this Bill, provides a criminal sanction for breach of such an order. The definition of "dealing" will ensure that the term has a wide meaning. The definition corresponds to the expression "dealing with property" which is defined by section 9 of the Proceeds Act.

'effective control' This expression is used in proposed sections 243AB ("Effective control of property"), 243CA ("Court may lift corporate veil etc.") and proposed subsections 243E(2A) and 243F(2A). The insertion of these provisions is a response to the difficulty presented by persons engaged in the trade in illegal drugs disguising their assets through the use of corporations, trusts or other individuals. The meaning of the expression is discussed more fully in the commentary on proposed section 243AB.

'interest' The term "property" is defined to include any interest in property. The separate definition of "interest" will ensure that the expression includes not only a legal or equitable interest in property (paragraph (a)), but also a right, power or privilege in connection with the property (paragraph (b)).

'penalty amount' This expression is a shorthand term for the amount of the pecuniary penalty which is imposed upon a person pursuant to section 243B.

'police officer' At present in Part XIII Division 3 of the Customs Act reliance is placed upon members of the Australian Federal Police ("AFP"). For example, at present subsection 243E(2) requires that an application for a restraining order shall be supported by an affidavit of an AFP member or an officer of Customs concerning certain matters. The language of this subsection precludes the use of affidavit material from a state or territory police officer. This Bill proposes to replace references in the Division to an AFP member with references to "police officer". The definition of the expression will include both AFP members and special members and members of a state or territory police force. The definition is in similar terms to that in subsection 4(1) of the Proceeds Act.

'restraining order' This expression is a shorthand expression for an order by the Court under paragraph 243E(2)(c) restraining property or directing the Official Trustee to take custody and control of property. The expression corresponds with the expression "restraining order" in the Proceeds Act.

'trustee in bankruptcy' The expression "trustee in bankruptcy" is used in proposed subsection 243C(8), to be inserted by clause 21(i)(j) of the Bill. The definition of the expression is based upon the definition of "the trustee" in subsection 5(1) of the Bankruptcy Act 1966.

It will ensure that the expression embraces a reference to each of the forms of insolvency administration which are provided for under the Bankruptcy Act.

Clause 18(c)

77. Clause 18(c) proposes to omit the existing subsection 243A(4) and to insert new subsections 243A(4) and (4A). The new subsection 243A(4) is based upon subsection 4(3) of the Proceeds Act. It will ensure that when the Court is required to value the benefits derived by a defendant from dealing in narcotics, the Court is able to have regard to benefits derived by another person at the request or direction of the defendant. The new subsection 243A(4) should be read in conjunction with the proposed definition of "benefit", to be inserted by clause 18(b) of the Bill. Proposed subsection 243A(4) will replace the existing subsection 243A(7), which is repealed by clause 18(f) of the Bill.

78. At present this Division of the Customs Act enables orders to be made in relation to property of a person who has engaged in dealings in narcotics. Existing subsection 243A(4) has the effect that only property in which a person has a beneficial interest may be seized and applied in satisfaction of a pecuniary penalty order. This is very limiting as it is not uncommon for persons engaged in the drug trade to retain control over property whilst having no legal or beneficial interest in the property. This Bill proposes to amend the Customs Act to extend its application to property which is "effectively controlled" by a defendant - see proposed sections 243AB and 243CA. As a result of this extension of the reach of this Division of the Act it is necessary to repeal subsection 243A(4) (which is exhaustive in its language) and replace it with a new subsection 243A(4A) (which is inclusive in its language).

79. The clause also makes two minor amendments to subsection 243A(5). The defined expression "police officer" is substituted for "member of the Australian Federal Police".

The defined expression "a restraining order against" is substituted for the words "an order under that section directing the Official Trustee to take control of".

Clause 19 - Insertion of new section 243AB - Effective control of property

80. Proposed section 243AB is modelled on section 9A of the Proceeds Act. The proposed section interprets the expression "effective control" for the purposes of proposed section 243CA and proposed subsections 243E(2A) and 243F(2A). The purpose of Part XIII Division 3 of the Customs Act is to deprive a person of the proceeds of, and benefits derived from, the trade in illegal drugs. The concept of "effective control" will ensure that such persons are not able to avoid the impact of Part XIII Division 3 by disguising or concealing their interest in property by the use of trusts, companies, partnerships or other individuals. Notwithstanding that a person has no legal or equitable estate or interest in property, if the person has effective control of the property in terms of proposed section 243AB then, applying proposed section 243CA, that property may be made available to satisfy a pecuniary penalty order against the person.

81. Proposed subsection 243AB(1) makes clear that a person may have effective control over property even though the person has no legal or equitable interest or estate in the property. The person may have no formal relationship with the property, eg as a director, shareholder, partner, beneficiary under a trust, or employee, and still be found to have effective control of the property. The provision is also directed at the subtle methods of exerting effective control, such as the use of nominees, who may own or control property at law but who act as the alter ego of the person.

82. Proposed subsection 243AB(2) indicates some of the matters to which the Court may have regard in determining whether a person has "effective control" over property or an interest in property. The factors listed at paragraphs 243AB(2)(c) to (e) are not exhaustive and do not limit the

generality of matters to which regard may be had in examining the question of "effective control".

Clause 20 - Pecuniary penalties

83. Section 243B of the Act provides that application may be made for an order that a person pay a pecuniary penalty to the Commonwealth in respect of a dealing or dealings in narcotics engaged in by the person. At present, application may be made by the Minister, the Commissioner of Police or the Comptroller-General of Customs. [Pursuant to paragraph 17(i) of the Acts Interpretation Act 1901 the reference to "the Minister" means the Minister for the time being administering the relevant aspect of the Act. Under current administrative arrangements Part XIII Division 3 of the Customs Act is administered by the Attorney-General].

84. Clause 20 amends subsection 243B(1) by conferring a right of application upon the Director of Public Prosecutions, in addition to those currently having right of application. This confirms the existing practice in that all applications since 1983 have been originated by the DPP, and have been brought by the DPP on behalf of the Commissioner of the AFP.

Clause 21 - Assessment of pecuniary penalty

85. Section 243C prescribes the method for calculating the amount of a pecuniary penalty to be imposed upon a person. Essentially, the amount of the pecuniary penalty is calculated by reference to the value of the benefits derived by a person by reason of having engaged in a dealing or dealings in narcotics.

Clause 21(1)(d)

86. When assessing the value of the benefits derived by the person the Court may have regard to evidence adduced concerning the various matters specified in subsection 243C(2). At present, five matters are specified in the

subsection. Clause 21(1)(d) will amend subsection 243C(2) by adding a sixth matter, proposed paragraph 243C(2)(f), which is relevant in assessing the value of the benefits derived by the person as a result of having engaged in the narcotics dealing or dealings. Proposed paragraph (2)(f) will enable the Court to have regard to evidence adduced concerning the person's income and expenditure before, during and after he or she engaged in that dealing or dealings. This proposed paragraph corresponds with paragraph 27(2)(e) of the Proceeds Act.

Clause 21(1)(j)

87. It is proposed by clause 21(1)(j) to insert two new subsections, 243C(7) and 243C(8). Proposed subsection 243C(7) corresponds with subsection 27(3) of the Proceeds Act. Under the Customs Act, a limitation period of six years applies : see subsection 243B(7). Needless to say, the value of a benefit derived, say, six years prior to the date of the Court hearing, may be considerably lower in dollar terms than the corresponding benefit may be worth at the date of the hearing, as a result of inflation and other factors.

88. Proposed subsection 243C(7) enables the Court to treat as the value of the benefit the value it would have if the benefit was derived at the time the valuation is being made.

89. Proposed subsection 243C(8) corresponds with subsection 27(9) of the Proceeds Act. Amongst the factors which may be considered by the Court in assessing the value of the benefit derived by the person is the value of the defendant's property before, during and after the dealing or dealings in narcotics: paragraph 243C(2)(e) as amended by this Bill. This provision is a betterment test - evidence of an increase in the value of property during or over the period may be an indicator of the value of the benefit derived.

90. However, if the person were to become bankrupt, or enter into some other administration under the Bankruptcy Act, prior to the end of the period then the person's property may vest

in the trustee of the insolvency administration. At law, it would cease to be the property of the person. Proposed subsection 243C(8) ensures that a person is not able to use the device of an insolvency administration as a method for defeating the betterment test procedure in paragraph 243C(2)(e).

Clause 22 – Insertion of new section 243CA – Court may lift corporate veil etc.

91. Clause 22 proposes the insertion of new section 243CA, which corresponds with section 28 of the Proceeds Act.

92. As discussed earlier, the process of quantifying a pecuniary penalty to be imposed upon a person involves an assessment of the benefit derived by the person by reason of the dealing or dealings in narcotics (section 243C). In turn, this entails consideration of the value of the person's property. (See in particular paragraph 243C(2)(e)). Proposed subsection 243CA(1) will extend the ambit of the expression "the property of the defendant" by enabling the Court to treat any property which is subject to the effective control of the defendant as being property of the defendant. (It will be recalled that "effective control" is interpreted by proposed section 243AB). This will enlarge the scope of the exercise of valuing the defendant's property by including property which the defendant has endeavoured to disguise as the property of another person or company. Accordingly the pecuniary penalty will be assessed at an amount which more truly reflects the proceeds or benefits derived from the dealing or dealings in narcotics.

93. Pursuant to proposed subsection (1) the Court may have regard to "controlled property" when quantifying the penalty. Proposed subsection 243CA(2) takes the process one step further. Pursuant to proposed subsection (2) the Court may declare that the whole or a part of that "controlled property" is available to satisfy the pecuniary penalty order. This will enable the seizure and sale of the property to satisfy the pecuniary penalty order.

94. Proposed subsection 243CA(3) then provides that the pecuniary penalty order may be enforced against the property which has been declared to be "effectively controlled" by the defendant and to be available to satisfy the pecuniary penalty order.

95. Proposed subsection 243CA(4) requires that, when an application is made for an order that "controlled" property is available to satisfy a pecuniary penalty order, the applicant shall give notice to the defendant and to any person who the applicant believes may have an interest in the property. This requirement is in addition to any other notice which may be directed by the Court or required by the regulations, pursuant to section 243Q ("Notices").

Clause 23 - Court may make restraining order against property

96. Section 243E presently empowers the Court to direct the Official Trustee to take control of property. This power ensures that the property by reference to which the penalty is quantified and which will need to be realized in order to satisfy the penalty, is not dissipated or removed before the pecuniary penalty order is made.

97. A number of amendments are proposed to section 243E with a view to bringing it into conformity with the corresponding provision of the Proceeds Act (section 43, "Restraining orders"). Clause 21(1)(a) amends subsection (1) by conferring a right of application upon the Director of Public Prosecutions, in addition to those currently having a right of application.

Clause 23(1)(b)

98. Clause 23(1)(b) further amends subsection 243E(1) by enlarging the range of orders which may be made by the Court. At present the Court may direct the Official Trustee to take control of specified property (known as a specific order) or of all the property of the defendant (known as a global

order). This provision differs from the corresponding provision of the Proceeds Act in the following respects:

- . the Proceeds Act enables the making of a restraining order which directs that property not be disposed of, or otherwise dealt with, but which does not require the involvement of the Official Trustee. (See paragraph 43(2)(a) of the Proceeds Act). At present, any restraining order under the Customs Act must involve the Official Trustee as controller;
- . the Proceeds Act, by paragraph 43(1)(d), specifically makes provision for after acquired property. (That is, property acquired after the date of the restraining order). The effect of a global order under paragraph 43(1)(d) of the Proceeds Act is that it is ambulatory, in that it applies to all the property of the defendant from time to time. The Customs Act makes no provision for after acquired property;
- . the Proceeds Act, by paragraph 43(1)(da), specifically provides for the making of an order both against specified property and against all other property of the defendant (known as a composite order);
- . the Proceeds Act, by paragraph 43(1)(e), provides for the making of a global order but subject to specific exclusions; and
- . the Proceeds Act, by paragraph 43(1)(f), provides for the making of an order against specified property of a person other than the defendant.

99. Clause 23(1)(b) amends subsection 243E(1) by conferring upon the Court the same range of options that is available to the Court under the Proceeds Act.

Clause 23(1)(c)

100. Clause 23(1)(c) also proposes the insertion of a new subsection 243E(1A). The new subsection will clarify the relationship between an application under section 243B for a pecuniary penalty order and an application under section 243E for a restraining order. At present, under section 243E, an application for a restraining order is made in conjunction with an application under section 243B. Effectively, an application under section 243E is in the nature of an interlocutory application connected with the proceedings for principal relief under section 243B.

101. This structure contrasts with that under the Proceeds Act. In that Act the application for a pecuniary penalty order (under section 26) and the application for a restraining order (under section 43) are separate applications which are not necessarily connected with one another.

102. A consequence of the relationship between the two applications under the Customs Act is that in order to seek a restraining order there must be on foot a current application under section 243B. Accordingly, it is arguable that once a pecuniary penalty order is made the application under section 243B is exhausted, and a restraining order may no longer be sought. Such an interpretation would preclude the restraining of property, even though it is acquired from the proceeds of dealing in narcotics, if the property is discovered only after the pecuniary penalty order is made. Proposed subsection 243E(1A) will ensure that a restraining order may be sought at any time after the application under section 243B is made and until the pecuniary penalty order is satisfied.

Clause 23(1)(e)

103. Clause 23(1)(e) repeals and replaces subparagraph 243E(2)(a)(ii). The new subparagraph takes account of the proposed power to make a restraining order which does not involve control by the Official Trustee. The new subparagraph

will also permit the use of affidavit evidence by a state or territory police officer, in addition to an AFP member or special member or a Customs officer. This is achieved by use of the expression "police officer", which is defined by subsection 243A(1).

Clause 23(1)(f)

104. An important limitation of section 243E as it stands at present is that the freezing of property may be effected only by way of a direction to the Official Trustee to take control of the property. By contrast, the freezing of property under the Proceeds Act may be effected either by way of a direction to the Official Trustee (paragraph 43(2)(b)) or by way of an order, attaching to the property itself, which directs that it not be disposed of or dealt with by any person (paragraph 43(2)(a)). Clause 23(1)(f) amends section 243E by proposing the insertion of a new paragraph 243E(2)(c) which corresponds with subsection 43(2) of the Proceeds Act.

Clause 23(1)(g)

105. Proposed subsection 243E(2A), inserted by clause 23(1)(g), enlarges upon the new power to restrain specified property of a person other than the defendant (proposed paragraph 243E(1)(e)). The proposed subsection corresponds with subsection 44(7A) of the Proceeds Act.

Clause 23(1)(k)

106. Clauses 23(1)(k) proposes the insertion of a new subsection 243E(4A), which will correspond with subsection 43(4) of the Proceeds Act.

Clause 23(1)(o)

107. Proposed subsections 243E(8), (9) and (10) clarify the powers which are exercisable by the Official Trustee pursuant to a direction that the Official Trustee take custody and

control of property. The new subsections correspond with subsection 43(6), (6A) and (6B) respectively of the Proceeds Act. The powers so specified are exercisable at the discretion of the Official Trustee without the necessity of approaching the Court for specific directions. Of course, pursuant to section 243F, the Court may be approached for specific further orders, where the general discretionary power conferred upon the Official Trustee may be inadequate or doubtful.

108. Proposed subsection 243E(11) corresponds with subsection 43(7) of the Proceeds Act. Since proceedings under Part XIII Division 3 of the Customs Act derive from a person having engaged in dealing in narcotics, it may be that a separate criminal investigation is proceeding at the same time as the pecuniary penalty proceedings. Proposed subsection 243E(11) ensures that, for example, a criminal investigation is not compromised through the defendant being able to cross-examine witnesses or obtain access to documents during the pecuniary penalty proceedings.

Clause 24 - Court may make further orders

109. Section 243F corresponds with section 48 of the Proceeds Act. It empowers the Court to make further orders where the Court makes, or has made, a restraining order.

110. Clauses 24(b) and 24(c) alter references to "the defendant" to be references to "the owner". Since a restraining order may be obtained against a person other than the defendant it is appropriate to alter the references in section 243F.

Clause 24(d)

111. Paragraph 243F(1)(d) empowers the Court to make an order directing the defendant to furnish a sworn statement setting out particulars of his or her property. The corresponding provision in the Proceeds Act is subparagraph 48(1)(e)(iii).

Clause 24(d) proposes to replace existing paragraph 243F(1)(d) with a provision modelled upon that in the Proceeds Act.

112. The new provision is superior in a number of respects. It will enable the Court to direct the supply of a statement by a third person, not merely by the defendant to the proceedings. It takes account of the possibility that the person required to supply the statement may be a corporation, rather than a natural person. In such a case, the statement shall be furnished by a director specified by the Court. Also, the new paragraph enables the Court to direct that the statement contain particulars of the property "or dealings with the property". This extends the power contained in the existing paragraph.

Clause 24(e)

113. Clause 24(e) replaces paragraph 243F(1)(e) with a provision more closely modelled upon paragraph 48(1)(c) of the Proceeds Act. The new provision extends the ambit of the examination to include "the affairs of the owner", as well as "the nature and location of the owner's property".

Clause 24(f)

114. Clause 24(f) inserts a new paragraph 243F(1)(ea). This new provision will empower the Court to direct that a person do any act or thing necessary or convenient to be done to enable the Official Trustee to take custody and control of the property. It is not uncommon, bearing in mind the large sums of money generated by the trade in illegal drugs and the criminal nature of the trade, that the financial affairs of the defendant involve very complex structures of companies and trusts. Frequently assets are located in, or are controlled by companies located in, a foreign jurisdiction. In such circumstances it may be necessary to seek an order directing a person, e.g. an accountant or bank manager, to deliver up financial records. The new power conferred by paragraph 243F(1)(ea) will assist the Official Trustee in controlling property in those circumstances.

Clause 24(j)

115. Proposed subsection 243F(2A), inserted by clause 24(j), is modelled upon paragraph 48(3)(fa) of the Proceeds Act. It will provide a mechanism whereby a person, other than the defendant, who has an interest in the property may apply to the Court for an order excluding the person's interest in the property from the restraining order. The Court shall grant the application if it is satisfied that the applicant's interest in the property is not subject to the effective control of the defendant.

Clause 25 - Official Trustee to discharge pecuniary penalty

116. Section 243G of the Customs Act performs a function similar to section 49 of the Proceeds Act. Clause 25 proposes the repeal and replacement of section 243G. The new section corresponds more closely with section 49 of the Proceeds Act. The purpose of the section is to provide the machinery for the satisfaction of a pecuniary penalty out of the property which is restrained pursuant to an order under section 243E.

117. Proposed subsection 243G(1) applies where, at the time a pecuniary penalty order is made under section 243B, a restraining order has already been made under section 243E. In such circumstances, when the Court makes the second order (the pecuniary penalty order) the Court may include a direction that the Official Trustee pay to the Commonwealth an amount equal to the penalty amount out of the restrained property.

118. Proposed subsection 243G(2) applies where, at the time a pecuniary penalty order is made, a restraining order has not yet been made. In such circumstances, the Court may make a restraining order and may include in that second order (the restraining order) a direction that the Official Trustee pay to the Commonwealth an amount equal to the penalty amount out of the restrained property.

119. Proposed subsections 243G(3) and (4) are machinery provisions which facilitate giving effect to a direction to the Official Trustee under subsection 243G(1) or (2). Proposed subsection 243G(3) will enable the Court to direct the sale of restrained property, and to appoint an officer of the Court to execute documents relating to the sale in an appropriate case. Proposed subsection 243G(4) ensures that a document executed by a Court officer pursuant to an order of the Court has the same force and validity as if the document had been executed by the person who owned the property. This will facilitate the registration of transfer documents for real estate and the like.

120. Proposed subsection 243G(5) provides that where the Official Trustee is given a direction under subsection 243G(1) or (2) the Official Trustee shall not sell the property or pay money to the Commonwealth until the end of the appeal period. The "appeal period" is defined by proposed subsection 243G(9). It means the end of the period provided for the lodgment of an appeal (where no appeal is lodged), or the determination of the appeal itself (where an appeal is lodged). Under this Division of the Customs Act jurisdiction is exercised by the Federal Court. (See the definition of "Court" in section 243A). At present, under the Federal Court Rules, a period of 21 days is generally allowed for the filing and service of a notice of appeal. (052 r.15 Federal Court Rules).

121. Proposed subsection 243G(6) sets forth the order in which money is to be applied by the Official Trustee. In the first instance the restrained property is to be converted to money and then applied in satisfaction of the Official Trustee's remuneration and out of pocket expenses. (The remuneration of the Official Trustee is provided for by section 243P of the Customs Act). Thereafter the money is applied in satisfaction or reduction of the pecuniary penalty. In the event that there may be a surplus of funds, proposed subsection 243G(7) applies. In such an event the surplus is paid to the person whose property was subject to the restraining order.

Clause 26 - Contravention of restraining orders

122. Clause 26 repeals and replaces section 243K. The new provision is closely modelled upon section 52 of the Proceeds Act. It creates a criminal sanction for the knowing contravention of a restraining order (proposed subsection 243K(1)).

123. Proposed subsections 243K(2) and (3) confer upon the Court a power to set aside, in certain circumstances, a disposition which is in contravention of a restraining order. The disposition may be set aside if it was either not for "sufficient consideration" or was in favour of a person who did not act in good faith. It should be noted that the proposed section uses the expression "sufficient consideration" and not consideration simpliciter. As a result the provision requires consideration in the sense of an adequate quid pro quo, rather than merely the consideration necessary to support a contract.

Clause 27 - Costs etc payable to Official Trustee

124. Clause 27 repeals and replaces section 243P. The new provision is similar to section 55 of the Proceeds Act, conferring a power to make regulations as to the remuneration of the Official Trustee. However, if no regulations are made under section 243P, the remuneration of the Official Trustee will be calculated by reference to the regulations under section 55 of the Proceeds Act. The functions of the Official Trustee under the two pieces of legislation are essentially the same. Also the device of referring to the regulations under section 55 of the Proceeds Act will facilitate the amendment of the rate of remuneration by amending only one regulation, rather than two.

Clause 28 - Notices

125. Clause 28 repeals and replaces section 243Q. Proposed subsection 243Q(1) generally requires the giving of notice to

a person where an order is made under subsection 243E(2) (a restraining order), or under section 243CA ("Court may lift corporate veil etc") or section 243F ("Court may make further orders"). The general requirement to give notice is subject to the power of the Court to make a suppression order under proposed subsection 243Q(2). Of course, if it proved difficult or impossible to give notice as required by proposed subsection 243Q(1), then the general powers of the Federal Court (which is the court exercising jurisdiction under this Division of the Act) to order substituted service would apply. (Federal Court Rules Order 7 r.9).

126. Proposed subsection 243Q(2) is modelled upon subsection 47(2) of the Proceeds Act. The provision will empower the Court to make a suppression order delaying the giving of notice where it would be in the public interest to do so.

Clause 29 - Minor and consequential amendments

127. Clause 29 proposes a number of minor amendments, set out in detail in schedule 2. For the most part the minor amendments are consequential upon the insertion of new defined terms in section 243A.

PART 6 - AMENDMENTS OF THE DIRECTOR OF PUBLIC PROSECUTIONS ACT 1983

Clause 30 - Principal Act

128. This clause is a formal provision. It identifies the Director of Public Prosecutions Act 1983 (hereafter "the DPP Act") as the principal Act amended by Part 6 of the Bill.

Clause 31 - Functions of Director

129. Section 6 of the DPP Act details the functions of the Director of Public Prosecutions. Subsections 6(2A), 6(2B) and 6(2C) confer upon the Director a limited right to issue an ex

officio indictment. The Director may issue an ex officio indictment with the consent of the person concerned (subsection 6(2A)) and, where the person has been committed for trial in respect of certain offences, the Director may issue an ex officio indictment in relation to other offences (subsection 6(2B)). Those other offences specified in the ex officio indictment may be either offences for which the person was examined but not committed (paragraph 6(2B)(a)) or offences founded on facts or evidence disclosed in the course of the committal proceedings (paragraph 6(2B)(b)). The Director may issue an ex officio indictment under subsection 6(2C) where the person has been committed for trial in respect of a State or Territory offence and the evidence supporting that commitment also discloses an offence against a law of the Commonwealth upon which the person could have been committed for trial if it had been sought. However, apart from the limited circumstances described above, the Director has no general power to issue an ex officio indictment.

130. Proposed subsection 6(2D) will confer upon the Director, subject to one qualification, a general power to issue an ex officio indictment. Subsection 6(2A) is replaced by a new subsection 6(2A) which will restate the Director's existing power to issue an ex officio indictment with the consent of the person concerned. The other specific power to issues an ex officio indictment, in subsections 6(2B) and 6(2C) are also retained. The existing specific powers are retained, rather than being subsumed in the new general power provided by subsection 6(2D), since the specific powers will continue to be delegable by the Director pursuant to section 31 of the DPP Act. However, the new general power contained in proposed subsection 6(2D) will not be delegable (see the consequential amendment of section 31 by clause 33). As a result, all decisions to issue an ex officio indictment will be required to be made personally by the Director except, as at present, where the specific powers provided by subsections 6(2A), 6(2B) and 6(2C) apply. Proposed subsection 6(2D) will be subject to one qualification, contained in subsection 6(2E). Pursuant to proposed subsection 6(2E) the Director will be unable to use the ex officio procedure in relation to a prosecution under the War Crimes Act 1945.

Clause 32 - Powers of Director

131. Section 9 of the DPP Act details the powers of the Director. In particular, subsection 9(6) confers upon the Director a power to give a person an undertaking that evidence given by him or her in the course of a proceeding will not be used as evidence in proceedings against the witness. This form of undertaking is known as a "use indemnity".

132. It should be noted that the existing power to provide a use indemnity is limited to evidence to be given by the person in certain proceedings under a law of the Commonwealth. A use indemnity may not be given where the person is to give evidence in a State prosecution even though the person may need to be indemnified in respect of the anticipated disclosure of involvement in a related Commonwealth matter.

Clause 32(b)

133. Clause 32(b) of the Bill inserts a new paragraph (ba) into subsection 9(6) of the Act. Paragraphs 9(6)(a), (b) and now (ba) set out the permissible ambit of an instrument of indemnity under the subsection. At present, the subsection is limited to indemnification against the use of the evidence given by the person concerned. The provision does not presently extend to derivative evidence, that is to any further evidence that may be obtained as a direct or indirect consequence of the evidence given by the person indemnified. Proposed paragraph 9(6)(ba) extends the ambit of the indemnity under subsection 9(6) to be a full use/derivative use indemnity. This adopts a recommendation made by the Senate Committee on Legal and Constitutional Affairs in its report on the National Crime Authority Bill.

Clause 32(e)

134. Clause 32(e) of the Bill inserts a new paragraph 9(6)(e) into the Act. This paragraph is consequential upon the insertion of new paragraph 9(6)(ba), and gives statutory

effect to a use/derivative use indemnity given under subsection 9(6).

135. It should be noted that the expression "specified proceeding", wherever used in subsection 9(6), is a defined expression. The definition is contained in proposed subsection 9(6A), to be inserted by clause 32(f) of the Bill.

Clause 32(f)

136. Clause 32(f) of the Bill proposes the insertion of a new subsection 9(6A), which is a definitional provision. Where the expression "specified proceedings" is used in subsection 9(6) it shall have the meaning given to it by proposed subsection 9(6A).

137. Clause 32(f) of the Bill also proposes the insertion of new subsections 9(6B), 9(6C), 9(6D), 9(6E) and 9 (6F). Proposed subsection 9(6B) will supplement the existing power conferred by subsection 9(6) by empowering the Director to provide a use use/derivative use indemnity in relation to evidence to be given by a person in proceedings for an offence against, or for the recovery of a pecuniary penalty or in relation to a forfeiture order under, a law of a State or Territory.

138. Both in subsection 9(6) and proposed subsection 9(6B), the indemnity extends to an answer, statement or disclosure that is given or made by the person (paragraph 9(6)(a) and proposed paragraph 9(6B)(a)). This form of words will enable the indemnity to extend to 'any answer, statement or disclosure' that may be given or made by the person during the specified proceedings, or it may be limited to extend only to a particular answer or answers (or statements or disclosures) which may be designated in the instrument of indemnity. A similar degree of flexibility will apply to documents produced or disclosed within paragraph 9(6)(b) and proposed paragraph 9(6B)(b), and therefore to derivative information, documents or other things obtained within paragraph 9(6)(c) and proposed paragraph 9(6B)(c).

139. This degree of flexibility will overcome the problem exposed by the Victorian Supreme Court matter of R v Georgiadis [1984] V.R. 1030. In that matter, Georgiadis was given an indemnity by the Victorian DPP in relation to evidence to be given at a trial of certain drug offenders for conspiring to import heroin. During cross examination by counsel for the defendants Georgiadis made admissions of an unrelated matter, namely unlawful wounding. Upon his subsequent trial for that offence, Ormiston J held that Georgiadis's admission was covered by the indemnity, even though it was not relevant to the charges of conspiracy to import heroin against Georgiadis's accomplices, and was therefore inadmissible. The proposed provision will enable the DPP to limit the indemnity to evidence designated in the instrument of indemnity.

140. Proposed subsection 9(6C) is definitional. It defines "State or Territory proceedings" for the purposes of proposed subsection 9(6B).

141. Proposed subsection 9(6D) will confer upon the Director a new power to give an undertaking that a person will not be prosecuted (either on indictment or summarily) for a specified offence against a law of the Commonwealth or for specified acts or omissions that may constitute an offence against a law of the Commonwealth. Such an undertaking is known as a transactional indemnity. It should be noted that, in light of the sensitive nature of such transactional indemnities, it will be necessary that any such decision be made by the Director personally. This is achieved by a consequential amendment of section 31 by clause 33 which provides that the power to give a transactional indemnity under subsection 9(6D) is not delegable.

142. Proposed subsection 9(6E) will give statutory effect to any transactional indemnity given by the Director pursuant to proposed subsection 9(6D).

143. Proposed subsection 9(6F) will enable the Director to impose conditions as part of a transactional indemnity under proposed subsection 9(6D). For example an indemnity may be subject to the condition that the person give full and truthful testimony in particular proceedings. It is not necessary to have a power to impose such a condition in relation to a use/derivative use indemnity since, by their nature, such indemnities are necessarily conditional upon the giving of evidence, and the indemnity then operates in relation to the evidence given. By contrast, a transactional indemnity has effect immediately it is executed.

Clause 33 - Delegation by Director

144. Section 31 of the DPP Act enables the Director to delegate to a member of the staff of the Office all or any of his or her powers under the DPP Act, except the power under subsection 9(2) (the power to sign, or to authorize the signing of, indictments) and the power of delegation itself.

145. Clause 33 makes a consequential amendment to section 31 in order that the Director's new powers under proposed subsection 6(2D) (the general power to issue an ex officio indictment) and proposed subsection 9(6D) (to give a transactional indemnity) shall also not be delegable. It is felt that these new powers are sufficiently sensitive to warrant the personal attention of the Director.

PART 7 - AMENDMENT OF THE JUDICIARY ACT 1903

Clause 34 - Principal Act

146. This clause is a formal provision. It identifies the Judiciary Act 1903 as the principal Act amended by Part 7 of the Bill.

Clause 35 - Trial of indictable offence without preliminary examination

147. Section 71A of the Judiciary Act confers on the Attorney-General a general power to issue an ex officio indictment for any Commonwealth indictable offence. Clause 35 makes an amendment to section 71A, consequential upon insertion of the proposed subsection 6(2D) in the DPP Act by clause 31 of the Bill, to ensure that the Attorney-General's power under subsection 71A(1) does not affect the new power conferred upon the Director of Public Prosecutions.

PART 8 - AMENDMENTS OF THE NATIONAL CRIME AUTHORITY ACT 1984

OUTLINE

148. The main purposes of this part are to:

- . give the Chairman of the National Crime Authority clear responsibility for management decisions;
- . reduce the need for meetings of the Authority wherever possible so as to streamline the operations of the Authority;
- . remove those agencies operating in the commercial sector from the ambit of section 19A of the Act; and to
- . provide for the protection of persons who provide information to the Authority under section 19A from liability for breach of confidentiality.

Clause 36 - Principal Act

149. This clause is a formal provision identifying the National Crime Authority Act 1984 as the Principal Act amended by Part 8 of the Bill.

Clause 37 - Authority may request information from Commonwealth agencies

150. Paragraph (a) of this clause inserts a new subsection (7A) into section 19A of the NCA Act to ensure that persons who comply with a request from the NCA to provide information shall not be liable for action, suit or proceedings for so doing.

151. Paragraph (b) of the clause removes the bodies specified in proposed Schedule 2 (see Clause 42) from the definition of "exempt agency" in subsection 19A(8) of the NCA Act.

Clause 38 - Hearings

152. Paragraph (a) of the clause removes subsection 25(3) of the Act under which the provisions of section 46 apply at a hearing before the Authority, as if the hearing were a meeting, and substitutes proposed subsections (3), (3A), (3B), (3C) and (3D) establishing the procedures for conducting a hearing before the Authority. This amendment is consequential upon the proposed amendment to section 46 of the Act in clause 39.

153. Paragraph (b) of the clause inserts after subsection 25(9) proposed subsections (9A) and (9B) to enable a direction made by the Authority to be varied or revoked at a later date by the Chairman. The purpose of this amendment is to remove the need for meetings of the Authority to review directions made under subsection 25(9).

Clause 39 - Meetings of the Authority

154. This clause amends section 46 of the NCA Act to ensure that the Chairman of the NCA supports any decision made by the Authority.

155. Paragraph (a) of this clause amends subsection 46(3) to provide for a quorum to be constituted by the Chairman and one other member.

156. Paragraph (b) amends subsection 46(4) to limit the person presiding at meetings of the Authority to the Chairman.

157. Paragraph (c) removes subsection 46(5), under which members other than the Chairman may preside at meetings of the Authority.

158. Paragraph (d) amends subsection 46(6) to provide that any decision made by the Authority is supported by the Chairman.

159. Paragraph (e) amends subsection 46(7) and inserts a new subsection 46(7) to provide for the Chairman to have a deliberative vote and, if necessary, the casting vote. This amendment is consequent upon the amendments in paragraphs (a) and (b) above.

Clause 40 – Chairman to be responsible for management of the Authority

160. This clause inserts proposed section 46A establishing that the Chairman is responsible for the day-to-day management of Authority, in accordance with policy guidelines laid down by the Authority.

Clause 41 – Public sittings and bulletin

161. This clause removes subsection (3) of the Act under which public sittings of the Authority are to be conducted as if they were meetings of the Authority under section 46, and inserts in its place proposed subsections (3), (3A), (3B), (3C) and (3D), which establish the procedures for conducting a public sitting of the Authority.

Clause 42 - Schedule 2

162. This clause adds proposed schedule 2 to the Act which list bodies which are to be excluded from the definition of "exempt agency" in subsection 19A(8) of the NCA Act, as detailed above at paragraph (b) to clause 37. These agencies are those which operate in the private sector and are to be subject to the provisions of sections 28 and 29 of the NCA Act.

Clause 43 - Amendments of the National Crime Authority Act 1984 relating to members and Chairman

163. This clause includes various amendments which are intended to streamline the Authority's day-to-day operations by reducing the need for meetings of the Authority and to remove unnecessary references in the Act to "acting member", as set out in Schedule 3.

164. The amendments which are intended to streamline the Authority's operations by reducing the need for meetings are those in which references to "the Authority" are to be changed to references to member or Chairman, or are otherwise amended as appropriate. These are:

- Subsection 22(1)
- Paragraph 22(1)(a)
- Paragraph 22(1)(b)
- Paragraph 22(8)(b)
- Subparagraph 22(8)(b)(ii)
- Subsection 22(9)
- Subsection 23(1)
- Subsection 24(1)
- Subsection 24(4)
- Subsection 24(5)
- Subsection 26(1)
- Subsection 26(2)
- Subsection 28(3)
- Subsection 32(8A)
- Subsection 59(7)

- Subsection 59(8)
- Subsection 59(11)
- Subsection 59A
- Paragraph 61(2)(d)

165. The Act is to be amended to omit all references to "acting member". These references are no longer necessary because:

- sections 44 and 45 of the Act authorise acting appointments to the office of Chairman and member and provide that a person acting in such an office has all the powers and functions of the holder of the office; and
- section 20 of the Acts Interpretation Act 1901 provides that in any Act references to the holder of an office include (subject to any contrary intention) references to all persons who perform for the time being the duties of the office.

166. The amendments which are to remove references to an "acting member" are the following:

- Subsection 4(1)
- Subsection 19A(1) and (2)
- Subsection 20(1) and (2)
- Subsection 25(2)
- Subsection 25(7)
- Subsection 28(1)
- Subsection 28(4) and (5)
- Subsection 28(6)
- Subsection 29(1)
- Paragraph 30(1)(b)
- Subsections 30(2) and (3)
- Sections 34, 35, 36, 39 and 42
- Subsection 51(1)
- Section 59A.
- Section 60(2)

