

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No. 2) 1994

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Michael Lavarch, M.P.)

THIS MEMORANDUM TAKES ACCOUNT OF THE AMENDMENTS MADE
BY THE SENATE TO THE BILL AS INTRODUCED

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LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No. 2) 1994

GENERAL OUTLINE

This Bill makes amendments of both a minor policy nature and a minor technical nature, including removing gender-specific language, to legislation within the Attorney-General's portfolio.

The Bill will

- i) amend the *Crimes Act 1914* to clarify the nature of the functions to be performed by magistrates under sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZW of the *Crimes Act 1914* and grant those judicial officers certain protections in respect of the exercise of those functions;
- ii) amend the *Law Officers Act 1964* to allow the Governor-General to appoint a person qualified to act as Solicitor-General during all periods in which the Solicitor-General is ill or absent or is, for any other reason, unable to perform the duties of Solicitor-General. This will allow a qualified person to be given a 'standing acting' appointment for a fixed term in which that person would automatically act as Solicitor-General during any absences from duty without the need for an appointment by the Governor-General each time that the Solicitor-General is absent from duty. The proposed amendment is based on similar provisions in relation to acting appointments of Secretaries to Departments under the *Public Service Act 1922*;
- iii) amend the *Service and Execution of Process Act 1992* to
 - clarify the provisions of the Act relating to interstate service of process at an address for service in proceedings;
 - provide for notification requirements once a person is arrested under an interstate warrant under Part 5 of the Act;
 - provide that a warrant of apprehension for non-payment of a lower court fine must be directed to police in only one State or Territory; and
 - strengthen the existing provisions relating to withdrawal of a warrant issued under Part 7 when a fine has been paid;

iv) amend the *Trade Practices Act 1974* to

increase the penalties for breaches of the product safety and information provisions of the Act;

- include a power to make regulations to allow the use of penalty infringement notices as an alternative to prosecution for failure to notify the Minister of a voluntary recall of unsafe goods;
- bring the procedure for effecting entry to premises under a warrant issued under section 65Q(5) of the Act into line with Commonwealth criminal law policy; and
- include a power for the Secretary to the Department responsible for the enforcement of the product safety and information provisions of the Act to accept, and apply to the Court to enforce, written undertakings in connection with a matter in which he or she has powers or functions under the Act; and

v) make minor technical amendments to

- remove gender-specific language from the *Copyright Act 1968*, the *Judiciary Act 1903* and the *Law Officers Act 1964*; and
- retrospectively correct an error, made in the *Copyright Amendment Act 1991*, in sections 38 and 103 of the *Copyright Act 1968*. The retrospective amendment of these sections will not affect any judicial determination made in relation to those sections and does not affect the actions of persons who relied on these sections in their unamended form in circumstances where the amended sections would give rise to a copyright infringement by them.

FINANCIAL IMPACT STATEMENT

The proposed amendments will not have any significant financial impact. The proposed amendments to the *Trade Practices Act 1974* will have minimal impact on Government expenditure. There are no plans at this stage to augment the staff or resources of the Commonwealth Attorney-General's Department as a consequence of the additional powers to issue infringement notices or accept written undertakings. Savings on litigation costs may be made by the use of infringement notices and enforceable undertakings. The amendments will not significantly require industry to change the way it operates. However, revenue may be expected to increase as a result of the increased penalties for breaches of the product safety and information provisions.

NOTES ON CLAUSES

Clause 1 - Short title

1. Clause 1 provides for the Act to be cited as the *Law and Justice Legislation Amendment Act (No. 2) 1994*.

Clause 2 - Commencement

2. Clause 2 provides for the commencement of the Act. Subclause 2(1) provides that, subject to subclauses 2(2), 2(3) and 2(4), the Act will commence on the date of Royal Assent.
3. Subclause 2(2) provides in effect that the amendments to the *Crimes Act 1914* commence when the *Law and Justice Legislation Act (No. 2) 1994* receives Royal Assent or immediately after commencement of the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994*, whichever is the later.
4. Subclause 2(3) provides that Items 17 to 20 of Schedule 1 will commence 28 days after Royal Assent. This will allow a period for regulations to be made prescribing a new form of a warrant of apprehension for the purpose of Part 7 and for the States and Territories to inform their officers about the new notification requirements in relation to Part 5 warrants.
5. Subclause 2(4) provides that Items 14 and 31 of Schedule 2, which correct a minor drafting error in the *Copyright Amendment Act 1991*, are taken to have commenced on 23 December 1991, immediately after the commencement of the *Copyright Amendment Act 1991*.

Clause 3 - Amendments of Acts

6. Clause 3 provides that the Acts referred to in Schedule 1 are amended as set out in that Schedule.

Clause 4 - Minor amendments of Acts

7. Clause 4 provides that the Acts referred to in Schedule 2 are amended as set out in that Schedule.

Clause 5 - Savings provision - amendment of section 11 of the *Law Officers Act 1964*

8. Clause 5 will ensure that any appointment to act as Solicitor-General that is in force before the commencement of the Act will continue to be effective.

Clause 6 - Transitional provision - warrants of apprehension

9. Clause 6 provides that the amendment to paragraph 112(3)(b) of the *Service and Execution of Process Act 1992* (which changes the content of a warrant of apprehension under Part 7 of that Act) does not apply to a warrant issued before the amendment commenced.

Clause 7 - Savings provision - amendments of sections 38 and 103 of the *Copyright Act 1968*

10. Clause 7 ensures that the retrospective amendment of sections 38 and 103 of the *Copyright Act 1968* provided by subclause 2(4) of the Bill does not affect any judicial determinations made in relation to those sections and also does not affect the actions of persons who relied on these sections in their unamended form in circumstances where the amended sections would give rise to a copyright infringement by them.
11. The subject of sections 38 and 103 of the *Copyright Act 1968* is the selling of, or other commercial dealing with, articles containing copyright subject matter. Clause 7 does not remove the possible liability to an action for infringement of such a person under the terms of the provisions in their unamended form. It would not be fair that they be freed from any liability for their acts rather they are to be freed only from a liability to an action for infringement which would arise from the retrospective amendments.
12. Amendments to these sections made by the *Copyright Amendment Act 1991* incorrectly ascribed the knowledge element for a copyright infringement provided in the provisions to 'the importer' rather than to the person selling or hiring or undertaking other commercial dealings with articles containing copyright subject matter.
13. The amendments in the Bill to sections 38 and 103 of the *Copyright Act* are correct this error and are expressed to have commenced from 23 December 1991, which was immediately after the commencement of the *Copyright Amendment Act 1991*.
14. New subclause 7(1) of the Bill expressly provides that judicial determination (there has been at least one) based on the current wording of sections 38 and

103 are unaffected by the amendment. It does so by making a general declaration that judicial determinations are unaffected by the amendments.

15. New subclause 7(2) of the Bill provides that in the case where, during the period covered by the retrospective element of the amendment, a person whose actions would be a breach of the amended provisions, was aware that their knowledge in relation to copyright infringement, as provided in the respective sections, was not relevant to whether there was an infringement of copyright, (this being the effect of the existing provision), the unamended provision is to continue to apply to them. The subclause will thus provide that the provisions in their unamended form will continue to apply to those persons who relied upon their terms in acting as they did and could, in an appropriate case, lead to a finding of liability against them.

SCHEDULE 1 - AMENDMENTS OF ACTS

Crimes Act 1914

Item 1 - Subsection 3C(1)

16. Item 1 of Schedule 1 inserts in subsection 3C(1) of the *Crimes Act 1914* a definition of 'magistrate'. The definition will provide that in sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZW 'magistrate' has a meaning affected by section 3CA.

Nature of functions of magistrate

Item 2 - After section 3C

17. Item 2 of Schedule 1 inserts a new section 3CA. This section is intended to make it clear that magistrates are being conferred individually with non-judicial powers as *personae designatae*, and the fact that the person is required to act judicially when exercising those powers does not alter that status.
18. New subsection 3CA(1) will provide that the function of making an order under section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZW is conferred on the magistrate in a personal capacity and not as a court or a member of a court.
19. New subsection 3CA(2) will provide that an order made by a magistrate under section 3ZI, 3ZJ, 3ZK, 3ZN or 3ZW has effect only by virtue of the *Crimes Act 1914* and is not to be taken by implication to be made by a court.
20. New subsection 3CA(3) will provide that a magistrate performing a function of, or connected with, giving an order under sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZW has the same protection and immunity as if he or she was performing that function as a court or a member of a court: that

is, the same protections and immunity as are available to members of his or her particular court when exercising judicial power.

21. New subsection 3CA(4) will provide the formal machinery by which the Commonwealth may enter into an agreement with the States, the Australian Capital Territory, the Northern Territory and Norfolk Island in relation to the granting of powers under sections 3ZI, 3ZJ, 3ZK, 3ZN and 3ZW.

Items 3 - 10

22. These amendments are minor technical amendments replacing references to 'court' or 'court of summary jurisdiction' with 'magistrate'. Item 6 omits subsection 3ZK(4) as a consequence of the insertion of new subsection 3CA(1).

Law Officers Act 1964

Acting Solicitor-General

Item 11 - Section 11

23. Item 11 of Schedule 1 amends the *Law Officers Act 1964* to omit existing section 11 which provides for the appointment of an acting Solicitor-General and to substitute a new section 11.
24. New subsection 11(1) will provide that the Governor-General may appoint a person to act as Solicitor-General during a vacancy in office or during any period or all periods when the Solicitor-General is absent from duty or from Australia or is, for any reason, unable to perform the duties of office of Solicitor-General.
25. New subsection 11(2) will provide that a person appointed to act as Solicitor-General must be eligible for appointment as Solicitor-General. Subsection 6(2) of the Act provides that a person is not eligible for appointment as Solicitor-General unless that person is or has been a legal practitioner for at least 5 years.
26. New subsection 11(3) will provide that the Governor-General may determine the terms and conditions of an acting appointment and may terminate the acting appointment at any time.
27. New subsection 11(4) will validate acts done by or in relation to a person purporting to act as Solicitor-General under subsection 11(1) notwithstanding that there may be a defect in relation to the

appointment or other difficulties such as the appointment has ceased to have effect.

28. The note after section 11 refers to section 33A of the *Acts Interpretation Act 1901* which contains additional provisions in relation to acting appointments. Paragraph 33A(ba) provides that where an appointment is to act in a vacant office the appointee must not continue to act in the office for more than 12 months. Paragraph 33A(c) provides that where the appointee is acting in an office which subsequently becomes vacant, the appointee may continue to act for a maximum of 12 months from the start of the vacancy or until the appointer otherwise directs or the vacancy is filled, whichever occurs first.
29. The effect of these provisions is to adopt, as far as practicable, the same standards established in relation to acting appointments of Secretaries to Departments.

Service and Execution of Process Act 1992

Service on companies and registered bodies

Item 12 - After subsection 9(8)

30. Item 12 of Schedule 1 inserts new subsection 9(8A). New subsection 9(8A) will provide that service of a process, order or document, other than an initiating process or subpoena, may be effected at the address for service of the company or registered body in the proceedings concerned in accordance with any applicable rules of court. The new subsection makes it clear that the section does not prevent service of process at an address for service.

Service on other bodies corporate

Item 13 - Section 10

31. Item 13 of Schedule 1 inserts new subsection 10(4). New subsection 10(4) will provide that service of a process, order or document, other than an initiating process or subpoena, may be effected at the address for service of the body corporate in the proceedings concerned in accordance with any applicable rules of court. The new subsection makes it clear that the section does not prevent service of process at an address for service.

Proof of service

Item 14 - Paragraph 11(3)(a)

32. Item 14 of Schedule 1 omits existing paragraph 11(3)(a) and inserts new paragraphs 11(3)(a) and (ab). New paragraphs 11(3)(a) and (ab) will provide for proof of service of a process, order or document on an individual where service was effected by post. Under the paragraphs, proof will be required that the process, order or document was sent to the person's last known address, or the person's address for service in the proceedings concerned, and that it was addressed to the person or, if it was sent to an address for service that is the office of a solicitor, to that solicitor.

Item 15 - Paragraph 11(4)(a)

33. Item 15 of Schedule 1 amends paragraph 11(4)(a) consequentially upon the inclusion of new paragraph 11(4)(ab).

Item 16 - After paragraph 11(4)(a)

34. Item 16 of Schedule 1 inserts new paragraph 11(4)(ab). New paragraph 11(4)(ab) will provide, in relation to the requirements for proof of service where service on a company, registered body or other body corporate is effected by post, that the process, order or document was sent addressed to the company, registered body or other body corporate, or if sent to an address for service that is the office of a solicitor, was addressed to that solicitor.

Notification when persons are released or remanded on bail

Item 17 - After section 85

35. Item 17 of Schedule 1 inserts new section 85A. New subsection 85A(1) will provide that when a person apprehended under a warrant (to which Part 5 applies, that is it is a warrant other than one for non-payment of a lower court fine issued under the law of a State) has been taken before a magistrate, and has been released or remanded on bail, the Commissioner of the police force of which the police officer who apprehended the person is a member must cause the clerk of the court that issued the warrant, or the authority that issued the warrant, to be notified without delay of the release or remand.
36. New subsection 85A(2) will require the clerk or the authority, as soon as practicable after being so notified, to notify the police force of each other State that was notified of the issue of the warrant, that if the person has

been released because of non-production of a copy of the warrant, that the person has been released and can only be re-apprehended if the warrant or a copy of the warrant is produced when the person is re-apprehended or, in any other case, that the warrant has been executed.

37. The amendments are intended to ensure police officers in another State or Territory will not re-apprehend the person if the warrant has been executed or, if it has not been executed, re-apprehend the person other than in accordance with the Act.

Application of Division 1 to certain warrants issued by tribunals

Item 18 - Before paragraph 92(3)(a)

38. Item 18 of Schedule 1 inserts new paragraph 92(3)(aa). New paragraph 92(3)(aa) is consequential upon the inclusion of new section 85A. It will adapt that section in its application to warrants issued by tribunals.

Issue of warrants of apprehension

Item 19 - Subsections 112(3) and (4)

39. Item 19 of Schedule 1 omits existing subsections 112(3) and (4) and inserts new subsections 112(3) and (4). New subsection 112(3) will require that a warrant of apprehension must be in accordance with the prescribed form and must be addressed to all police officers in the State in which it is believed the person may be. This will have the effect of requiring that a warrant of apprehension issued in accordance with Part 7 must be addressed to police officers in only one State or Territory.
40. New subsection 112(4) will require that, if the liability of a person named in a warrant of apprehension issued under Part 7 to pay a fine has been discharged after the warrant is issued but before it is executed, the clerk of the court by which the fine was imposed must, as soon as practicable, take such steps as are reasonable to withdraw the warrant. Under the present subsection the clerk may take such steps as he or she considers necessary to withdraw the warrant.

Execution of warrants of apprehension

Item 20 - Subsection 113(1)

41. Item 20 of Schedule 1 omits existing subsection 113(1) and inserts new subsection 113(1). New subsection 113(1) will provide that the person named in a warrant of apprehension issued under Part 7 may be

apprehended by a police officer to whom the warrant is addressed. The amendment is consequential upon the amendment to section 112.

Trade Practices Act 1974

Compulsory Product Recall

Item 21 - Subsection 65F(9)

42. Section 65F provides for compulsory product recall. Subsection 65F(7) requires a corporation to give written notice of a recall of goods to persons outside Australia to whom recalled goods have been supplied. In addition, subsection 65F(8) requires the corporation to send a copy of that notice to the Minister within 10 days. Subsection 65F(9) currently provides that a person who contravenes subsection 65(8) is guilty of an offence and punishable on conviction. Existing penalties for failure to supply the Minister with copies of the notice are a fine of up to \$2,000 or imprisonment for up to 12 months for individuals and a fine of up to \$10,000 for bodies corporate.
43. Item 21 of Schedule 1 omits existing subsection 65F(9) and inserts new subsection 65F(9). New subsection 65F(9) will increase the maximum fine for the offence for individuals to \$3,000, calculated on the present value of 30 penalty units, and remove the liability to imprisonment. It will also, increase the maximum fine for bodies corporate to \$15,000, calculated on the present value of 150 penalty units.

Item 22 - After subsection 65Q(7)

44. Under subsection 65Q(5) an officer may obtain a warrant to enter premises, by force if necessary, to inspect and obtain information about goods suspected of causing, or likely to cause, injury.
45. Item 22 of Schedule 1 inserts new subsections 65Q(7A) and (7B) which will provide for a new procedure for effecting entry to premises under a warrant.
46. New subsection 65Q(7A) will provide that before entry an officer, or a person assisting that officer, must announce that he or she is authorised to enter the premises and give any person at the premises an opportunity to allow them entry to the premises.
47. New subsection 65Q(7B) will provide that an officer need not comply with the procedure if he or she reasonably believes that immediate entry

is necessary to ensure either his or her safety or that of another person or the effective execution of the warrant.

48. This amendment accords with Commonwealth criminal law policy.

Item 23 - Subsections 65Q(9) and (10)

49. Subsections 65Q(9) and (10) prescribe penalties for the offences of:

refusing or failing to comply with a notice requiring a person to give information, produce documents or give evidence to an authorised officer issued under section 65Q;

knowingly providing false or misleading information under such a notice; and

obstructing an officer in the performance of his or her duties under section 65Q.

50. Because of the added element of fraudulent behaviour involved in knowingly providing false information, Item 23 of Schedule 1 omits existing subsections 65Q(9) and 65Q(10) and inserts new subsections 65Q(9), (9A) and (10) which will differentiate the penalties for the first two offences and update the penalties for all three.
51. New subsection 65Q(9) will increase the maximum penalty for individuals for the offence of failing to comply with a notice from \$2,000 to \$4,000, calculated on the present value of 40 penalty units, and remove the liability for imprisonment. For bodies corporate, the maximum penalty, calculated on the present value of 200 penalty units, will be increased to \$20,000.
52. New subsection 65Q(9A) will impose a maximum penalty of 12 months' imprisonment for the offence of knowingly providing false or misleading information. No monetary penalty is specified. However, under the *Crimes Act 1914*, the court is allowed to impose an appropriate fine instead of, or in addition to, a term of imprisonment.
53. New subsection 65Q(10) will impose a maximum penalty of 2 years' imprisonment for the offence of refusing or failing to reasonably assist an officer to effectively exercise his or her powers of entry and inspection. No monetary penalty is specified. However, as noted above, the *Crimes Act 1914* applies.

Notification of voluntary recall

Item 24 - Subsection 65R(2)

54. Under subsection 65R(1) a corporation must notify the Minister in writing of any voluntary recall that it undertakes.
55. Item 24 of Schedule 1 omits existing subsection 65R(2) and inserts new subsection 65R(2). New subsection 65R(2) will increase the maximum penalty for failure to so notify the Minister to \$3,000 for an individual, calculated on the present value of 30 penalty units, and for bodies corporate, the maximum penalty calculated, on the present value of 150 penalty units, will be increased to \$15,000. Liability for imprisonment also removed.

Enforcement of undertakings - Secretary to the Department

Item 25 - After section 87B

56. Section 87B of the Act gives the Trade Practices Commission power to accept written undertakings from a person in relation to the Commission's powers or functions under the Act. If the undertaking is breached the Commission may apply to the court for appropriate orders, including directing compliance with the undertaking, directing the payment of any financial benefit obtained, and directing compensation for any person who has suffered loss or damage.
57. Item 25 of Schedule 1 inserts new section 87C. New section 87C will give the Secretary to any Department responsible for enforcing a power or function under the Act, a similar power to accept, and apply to the Court to enforce, written undertakings in relation to his or her powers or functions under the Act.

Regulations

Item 26 - After subsection 172(1)

58. Section 172 provides that the Governor-General may make regulations under the Act. Item 26 of Schedule 1 inserts new subsection 172(1A). New subsection 172(1A) will provide that the regulation making power includes the power to make regulations to enable the issue of a notice for payment of an amount of not more than one fifth of the penalty provided for in section 65R.
59. A significant proportion of corporations fail to notify the Minister of voluntary recalls of unsafe goods as required by section 65R of the Act.

As the offence is of a minor regulatory nature, any penalty awarded by the Court may not justify the cost of litigation. A procedure allowing for the issue of penalty infringement notices as an alternative to prosecution will assist in the enforcement of section 65R.

SCHEDULE 2 - MINOR AMENDMENTS OF ACTS

Copyright Act 1968

Items 1 - 112

60. Items 1 - 13, 15 - 30, 32 - 53 and 55 - 112 of Schedule 2 remove gender-specific language in the *Copyright Act 1968*.
61. Items 14 and 31 of Schedule 2 correct a minor drafting error in the *Copyright Amendment Act 1991*.
62. Item 54 of Schedule 2 changes the reference to the *Remuneration Tribunals Act 1973* to the *Remuneration Tribunal Act 1973*.

Judiciary Act 1903

Items 113 - 150

63. Items 113 - 150 of Schedule 2 remove gender-specific language in the *Judiciary Act 1903*.

Law Officers Act 1964

Items 151 - 173

64. Items 151 - 152 and 154 - 173 of Schedule 2 remove gender-specific language in the *Law Officers Act 1964*.
65. Item 153 of Schedule 2 changes the reference to the *Remuneration Tribunals Act 1973* to the *Remuneration Tribunal Act 1973*.



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