

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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.)



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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 *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*;
- ii) 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;

iii) 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;
- clarify the basis upon which an officer may exercise his or her powers of entry without warrant to inspect 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

iv) make minor technical amendments, including removing gender-specific language to the *Copyright Act 1968*, the *Judiciary Act 1903* and the *Law Officers Act 1964*.

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) and (3), the Act will commence on the date of Royal Assent.
3. Subclause 2 (2) provides that Items 7 to 10 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.
4. Subclause 2(3) 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

5. 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

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

Clause 5 - Transitional provisions - warrants of apprehension

7. Clause 5 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.

SCHEDULE 1 - AMENDMENTS OF ACTS

Law Officers Act 1964

Acting Solicitor-General

Item 1 - Section 11

8. Item 1 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.
9. 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.
10. New subsection 11(2) provides 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.
11. New subsection 11(3) provides that the Governor-General may determine the terms and conditions of an acting appointment and may terminate the acting appointment at any time.
12. New subsection 11(4) validates 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 certain other difficulties arise such as that the appointment has ceased to have effect.
13. 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.

14. 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 2 - After subsection 9(8)

15. Item 2 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 3 - Section 10

16. Item 3 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 4 - Paragraph 11(3)(a)

17. Item 4 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 5 - Paragraph 11(4)(a)

18. Item 5 of Schedule 1 amends paragraph 11(4)(a) consequentially upon the inclusion of new paragraph 11(4)(ab).

Item 6 - After paragraph 11(4)(a)

19. Item 6 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 7 - After section 85

20. Item 7 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.
21. 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.
22. 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 8 - Before paragraph 92(3)(a)

23. Item 8 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 9 - Subsections 112(3) and (4)

24. Item 9 of Schedule 1 omits existing 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.
25. 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 10 - Subsection 113(1)

26. Item 10 of Schedule 1 omits existing 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 11 - Subsection 65F(9)

27. 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.
28. Item 11 of Schedule 1 will omit existing subsection 65F(9) and insert 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.

Power to obtain information, documents and evidence

Item 12 - Paragraph 65Q(3)(b)

29. Section 65Q provides for the power to obtain information, documents and evidence. Paragraph 65Q(3)(b) allows an officer to exercise powers of entry and search without a warrant in circumstances where it is required without delay in order to protect life or public safety.
30. Item 12 of Schedule 1 will amend paragraph 65Q(3)(b) to provide that, in addition to believing that entry is required without delay in order to protect life or public safety, an officer must also believe that immediate entry is required in order to prevent the goods in question from being concealed, lost or destroyed.
31. This amendment accords with Commonwealth criminal law policy.

Item 13 - After subsection 65Q(7)

32. 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.
33. Item 13 of Schedule 1 will amend section 65Q to insert new subsections 65Q(7A) and (7B) which will provide for a new procedure for effecting entry to premises under a warrant.
34. 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.
35. 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.
36. This amendment accords with Commonwealth criminal law policy.

Item 14 - Subsections 65Q(9) and (10)

37. 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.
38. Because of the added element of fraudulent behaviour involved in knowingly providing false information, Item 14 of Schedule 1 will omit existing subsections 65Q(9) and 65Q(10) and insert new subsections 65Q(9), (9A) and (10) which will differentiate the penalties for the first two offences and update the penalties for all three.
39. 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.

40. New subsection 65Q(9A) imposes 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.
41. New subsection 65Q(10) imposes 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 15 - Subsection 65R(2)

42. Under subsection 65R(1) a corporation must notify the Minister in writing of any voluntary recall that it undertakes.
43. Item 15 of Schedule 1 will omit existing subsection 65R(2) and insert new subsection 65R(2). New subsection 65R(2) increases 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 is also removed.

Enforcement of undertakings - Secretary to the Department

Item 16 - After section 87B

44. 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.
45. Item 16 of Schedule 1 will insert 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 17 - After subsection 172(1)

46. Section 172 provides that the Governor-General may make regulations under the Act. Item 17 of Schedule 1 will insert 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.
47. 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

48. Items 1 - 13, 15 - 33, 35 - 53 and 55 - 112 of Schedule 2 remove gender-specific language in the *Copyright Act 1968*.
49. Items 14 and 34 correct a minor drafting error in the *Copyright Amendment Act 1991*.
50. Item 54 changes the reference to the *Remuneration Tribunals Act 1973* to the *Remuneration Tribunal Act 1973*.

Judiciary Act 1903

Items 113 - 150

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

Law Officers Act 1964

Items 151 - 173

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

