

1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

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

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and new clause to be moved on behalf of the Government

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

**AMENDMENTS OF THE LAW AND JUSTICE LEGISLATION
AMENDMENT BILL (No. 2) 1994**

OUTLINE OF THE AMENDMENTS AND NEW CLAUSE

Amendment 1 will provide for the commencement of the amendments to the *Crimes Act 1914* introduced by Amendment 3.

Amendment 2 will insert a savings provision in relation to the amendment to the *Law Officers Act 1964*.

Amendment 3 will ensure that the retrospective amendment of sections 38 and 103 of the *Copyright Act 1968* provided by subclause 2(3) of the Bill does not affect any judicial determinations made in relation to those sections and that it 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.

Amendment 4 will 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.

Amendment 5 will delete Item 12 in Schedule 1.

FINANCIAL IMPACT STATEMENT

The amendments to the Bill have no financial impact.

NOTES ON AMENDMENTS AND NEW CLAUSES

AMENDMENT 1

1. This amendment inserts new subclause 2(1A) into the Bill to provide for the commencement of the Bill's amendments to the *Crimes Act 1914*. Subclause 2(1A) provides in effect that the amendments to the *Crimes (Search Warrants and Powers of Arrest) Amendment Act 1994* 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.

AMENDMENT 2

2. This amendment inserts new subclause 4(A) into the Bill. This provision 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.

AMENDMENT 3

3. This amendment inserts new clause 6 into the Bill. It is a technical amendment to ensure that the retrospective amendment of sections 38 and 103 of the *Copyright Act 1968* provided by subclause 2(3) of the Bill does not affect any judicial determinations made in relation to those sections. The amendment 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. 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. This amendment 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.
4. 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.
5. The amendments in the Bill to sections 38 and 103 of the Copyright Act are to 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*.

Clause 6 - Savings Provisions - amendments of sections 38 and 103 of the *Copyright Act 1968*

6. New subclause 6(1) of the Bill will expressly provide that judicial determinations (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.

7. New subclause 6(2) of the Bill will provide 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.

AMENDMENT 4

8. This amendment inserts Items 1A to 1K into Schedule 1.

Crimes Act 1914

Item 1A - Subsection 3C(1)

9. Item 1A 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.

Item 1B - After section 3C

10. Item 1B 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 that fact that the person is required to act judicially does not alter that status.
11. 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.
12. 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.
13. New subsection 3CA(3) provides 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.
14. New subsection 3CA(4) provides 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 1C - 1K

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

AMENDMENT 5

16. This amendment deletes Item 12 of Schedule 1 from the Bill.
17. Legal advice has been received that the effect of amending subsection 65Q(3)(b) by further fettering the exercise of the power of authorised officers to enter premises without a warrant would be, in this instance, to make that power superfluous, as the prerequisites to its use would be incapable of being met.

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