

ARTHUR ROBINSON & HEDDERWICKS  
LONDON

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO. 3) 1992**

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments to be Moved on Behalf of the Government

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



## **LAW AND JUSTICE LEGISLATION AMENDMENT BILL (No.3) 1992**

### **AMENDMENTS TO BE MOVED ON BEHALF OF THE GOVERNMENT**

#### **OUTLINE**

The amendments to the Bill to be moved by the Government include the following amendments of a policy nature -

- provides a deferral for six months after the commencement of the operation of proposed section 27A of the Administrative Appeals Tribunal Act 1975 of that section in respect of decisions of the Australian Securities Commission or its delegates under the Corporations Law;
- inserts, in respect of decisions under the Corporation Law by the Australian Securities Commission to which section 27A should not apply, the provision of a regulation making power to exempt such decisions from the operation of the section;
- for the purposes of the legal practice arrangements section 55E is amended to define an Australian Government Solicitor lawyer; and
- inserts new subsection 55G in the Judiciary Act 1903 to ensure that all lawyers in the Attorney-General's Department who carry out work of a legal professional nature, and not just those lawyers performing work for the clients of the Australian Government Solicitor have the rights and obligations of a legal practitioner and may charge for legal services.

The other Government amendments are consequential changes to the Judiciary Act 1903.

#### **Financial Impact**

The amendment to the Administrative Appeals Tribunal Act 1975 has no financial impact. The amendments to the Judiciary Act 1903 will not have any significant financial impact. By facilitating the user pays system, the amendments will in fact lead to greater accountability and better resource control within the Government.

### Comments

#### (a) Government Amendments to the Administrative Appeals Tribunal Act 1975

Proposed section 27A of the Administrative Appeals Tribunal Act 1975 will require the notification of a decision to those affected by the decision and notification of the right to have the decision reviewed. The Government amendment is to allow a period for further consideration of the ramifications for the Australian Securities Commission of the introduction of the new legislative requirement. The Commission is, on occasion, provided with confidential information regarding takeovers and the proposed section 27A may require disclosure of this information earlier than it would otherwise have been required to do so. In addition, the Commission has concerns that many of its decisions affect a great number of minority shareholders and the Commission has said that compliance with the requirements may carry a serious financial cost.

To avoid any possible market distortions, and any adverse consequences on the operations of the Commission, the application of section 27A of the Administrative Appeals Tribunal Act 1975, to decisions under the Corporations Law, is being deferred for six months to enable the Attorney-General's Department, in conjunction with the Australian Securities Commission and the Administrative Review Council to undertake a thorough examination of all decisions of the Australian Securities Commission. This will enable an assessment of the extent to which permanent exemption from the notification of decision and review rights requirements may be justified. After that time, the Australian Securities Commission will be required to comply with those requirements unless the regulations provide that particular decisions should be exempt.

#### (b) Government Amendments to the Judiciary Act 1903

The amendments to the Judiciary Act 1903 which have been already introduced seek to make it clear that:

- (a) the Australian Government Solicitor and lawyers in the Attorney-General's Department performing work for clients of the Australian Government Solicitor (AGS lawyers) have the rights and privileges, and duties and obligations of a barrister, solicitor, or barrister and solicitor; and
- (b) the Australian Government Solicitor may charge for legal services.

The Government amendments to the Bill will further amend the Judiciary Act 1903 so as to:

- (a) confirm that all lawyers in the Attorney-General's Department who carry out work of a legal professional nature have the rights and privileges, and duties and obligations of a barrister, solicitor or barrister and solicitor; and
- (b) confirm the entitlement of the Department to charge its clients (where appropriate) for services provided by those lawyers.

This has been achieved by further amending section 55E and inserting a new section 55G.

On 1 July 1992 all the lawyers who carry out work of a legal professional nature within the Attorney-General's Department were drawn together to form the Attorney-General's Legal Practice (the Legal Practice) to deliver legal services under a user pays system.

These amendments represent the final legal underpinning to formalise the administrative arrangements which are already in place and to apply nationally practices which have existed in many States and Territories for many years.

There are several areas in the Legal Practice in which lawyers carry out work of a legal professional nature by giving legal advice and providing other legal services, but in so doing do not act in the name of the Australian Government Solicitor. These lawyers include, for example:

- the Chief General Counsel who appears frequently in the High Court for the Commonwealth;
- lawyers in the Office of General Counsel who advise clients on a range of legal issues;
- lawyers working in the Office of International Law who advise on the legal aspects of treaties and have the conduct of cases on behalf of Australia in the International Court of Justice;
- lawyers in the Civil Law Division who advise on administrative law, family law, freedom of information, human rights, anti-discrimination law, privacy law and enforcement of overseas judgements;
- lawyers in the Business Law Division who advise on commercial matters including the Corporations Law, trade practices law and intellectual property and international trade law; and
- lawyers in the Criminal and Security Law Division who advise on criminal law, extradition law, mutual assistance in criminal matters and matters concerning law enforcement and security agencies.

Lawyers admitted to practice in the States and Territories are eligible to work in the Legal Practice. Just as their colleagues in private practice, they must satisfy a court as to their legal education, their practical legal training and their good fame and character. Professional bodies such as Law Societies may object to the admission of an applicant.

With the rights and privileges which are bestowed on lawyers upon admission come certain duties and obligations. If after admission doubts arise as to the personal professional probity of a lawyer (including an Attorney-General's lawyer), those rights and privileges can be reviewed. Attorney-General's lawyers always have been, and will continue to be, subject to the judicial control of the courts.

The Government amendments and those already introduced will confirm and make it clear that the Australian Government Solicitor and all the lawyers working in the Legal Practice may practise as, and have all the rights and privileges and duties and obligations of, a barrister, solicitor or barrister and solicitor in each State or Territory. This approach is consistent with the approach in sections 15 and 16 of the Director of Public Prosecutions Act 1983.

Although the Legal Practice has many characteristics of a private legal practice, it does differ in some respects. Of most relevance to these amendments is the public sector, national nature of the Practice. It is important for the Commonwealth to conduct its legal matters in a uniform way across Australia. It must be able to send its lawyers to all courts without having to be concerned with local practices which are more to do with status than with professional duties and obligations.

Another difference is that, unlike private practitioners, Attorney-General's lawyers are already subject to the Commonwealth's regulatory regimes namely:

- the Parliament <sup>4</sup> Parliamentary Committees, representations from Members of Parliament, Parliamentary Questions and annual reports to Parliament; the requirements for review of administrative action through the Federal Court, the Ombudsman and the Administrative Appeals Tribunal;

the requirements of the Audit Act 1901 and the Finance Directions made under that Act;  
the disciplinary procedures under the Public Service Act 1922; and  
the sanctions of the Crimes Act 1914.

Therefore, an instance of professional impropriety may result in an Attorney-General's lawyer facing both the sanctions of the court and the disciplinary procedures under the Public Service Act.

In the private sector, Law Societies exercise financial regulatory control to protect the public from defalcation by solicitors. One reason why Law Societies have been given these powers is to allow them to step in where a member of the public may lack the confidence, time or money required to take action. In the public sector, this form of control already exists. The Australian Audit Office examines the accounts of the Legal Practice as part of its audit of the Attorney-General's Department. The results are reported to Parliament.

The amendments to section 55E and the new section 55G are designed to ensure that the rights and privileges and duties and obligations given to Departmental lawyers apply when they are acting in the course of their legal professional duties for the Legal Practice and do not apply to them in any private capacity.

NOTES ON AMENDMENTS TO BE MOVED ON BEHALF OF THE GOVERNMENT  
TO THE LAW AND JUSTICE LEGISLATION AMENDMENT BILL (NO3) 1992

Amendment 1

The amendment will add two new paragraphs to proposed sub-section 27A (2).

2. New paragraph 27A (2) (d) will defer the effect of sub-section 27A (1) (requirement to notify persons affected that a decision has been made and the right to have the decision reviewed) for a period of six months in relation to decisions made by the Australian Securities Commission or its delegates under the Corporations Law.
3. New paragraph 27A (2) (e) will exempt any decision under the Corporations Law of the Australian Securities Commission or its delegates, made later than six months after the commencement of the section, from the requirements of sub-section 27A(1) where a regulation has been made declaring that the sub-section does not apply to the particular decision.

Amendments 2 and 3

- 4 Subsections 55E (10A), (10B), (10C) and (10D) in the introduced Bill are amended so as to now refer to an AGS lawyer, defined in the new subsection 55E (10E).

Amendment 4

5. Subsection 55E (10D) is reworded to make it more accurately mirror existing subsection 55E (9) so that all AGS lawyers are subject to similar duties and obligations to which they would be subject if they were private practitioners.

Amendment 5

6. This amendment inserts new subsection 55E (10E) to define an AGS lawyer. An AGS lawyer is a lawyer who ordinarily performs work for the clients of the Australian Government Solicitor under the supervision or control of a person who is authorised under subsection 55E (4) to act in the name of the Australian Government Solicitor.

Amendment 6

7. This amendment inserts new section 55G to make provision for Attorney-General's lawyers who are not AGS lawyers.
8. Attorney-General's lawyer is defined in proposed subsection 55G (1) and includes the Chief General Counsel and others mentioned earlier.
9. Under subsection 55G (2), Attorney-General's lawyers carrying out work of a legal professional nature within the Department are:
  - entitled to practise as a barrister, solicitor, or barrister and solicitor, in any court, or in any State or Territory;
  - entitled to all the rights and privileges of a barrister, solicitor or barrister and solicitor; and
  - subject to equivalent duties and obligations to AGS lawyers.
10. Under subsection 55G (4), the Commonwealth may charge for services rendered by an Attorney-General's lawyer and recover those costs.



