



December 2023

Submission to the Inquiry into the Attorney-General's Portfolio Miscellaneous Measures Bill 2023 [provisions]

Senate Legal and Constitutional Affairs Legislation Committee

Introduction

The Attorney-General's Department (the department) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the provisions of the Attorney-General's Portfolio Miscellaneous Measures Bill 2023 (the Bill). The purpose of this submission is to provide an overview of the key provisions of the Bill, summarise the department's consultations on the Bill, and identify key changes that were made in response to stakeholder feedback prior to its introduction to Parliament. This submission provides further information to assist the Committee's consideration of the Bill and should be read alongside the Bill and its explanatory materials.

The Bill is an omnibus bill which would:

- confer jurisdiction on the Federal Court of Australia (Federal Court) to hear and determine corporate crime offences (Schedule 1);
- enable the Sheriff of the Federal Court (Sheriff) to request a State/Territory jury official to prepare and provide a jury panel for use by the Federal Court (Schedule 2);
- make minor amendments to the *Marriage Act 1961* (Marriage Act) to clarify and improve the operation of the Commonwealth Marriage Celebrants Program and provide greater accessibility for marrying couples (Schedule 3);
- remove an administrative burden on the Federal Circuit and Family Court of Australia (FCFCOA) in relation to processing arbitration applications in family law matters (Schedule 4, Part 1);
- repeal section 213A (Assistance from the Attorney-General) of the *Native Title Act 1993* (Native Title Act) (Schedule 4, Part 2); and
- correct typographical errors in the *Federal Circuit and Family Court of Australia Act 2021* (FCFCOA Act) and the *Federal Court of Australia Act 1976* (Federal Court Act) (Schedule 4, Part 3).

Provisions of the Bill

Schedule 1—Federal Court criminal jurisdiction

This schedule will confer jurisdiction on the Federal Court to hear and determine a range of indictable offences relating to conduct within the regulatory remit of the Australian Securities and Investments Commission (ASIC). This jurisdiction will operate concurrently with the existing criminal jurisdiction of State and Territory courts. This approach will enhance the capacity of Australia's court system and support ASIC to more efficiently prosecute corporate criminal conduct.

This schedule will also confer jurisdiction on the Federal Court to hear and determine summary offences which arise from substantially the same facts as primary indictable offences being heard in the Court. This will avoid the possibility of prosecutors having to commence new proceedings in a State or Territory court in relation to the related summary offence.

In the interests of effective and efficient administration of justice, the Bill will provide for proceedings in relation to corporate crime offences to be transferred to the most appropriate court in the Australian court system.

Schedule 2—Federal Court juries

This schedule will improve the efficiency of jury preparation processes for primary indictable proceedings in the Federal Court by enabling the Sheriff to request a State/Territory jury official, with the consent of the relevant State or Territory, to prepare and provide a jury panel to the Sheriff. This new approach will be in addition to the existing powers of the Sheriff to prepare a jury panel.

The Federal Court will continue to direct the Sheriff to arrange a jury panel for the purpose of a trial by indictment. The Sheriff will elect, in writing to the Chief Executive Officer of the Federal Court, which approach will be used to arrange a jury panel.

If the Sheriff elects to directly prepare a jury panel, they will prepare a jury panel using existing powers and procedures. If the Sheriff elects to request a State/Territory jury official to prepare and provide a jury panel, they will issue a direction to the relevant State/Territory jury official, providing the relevant State or Territory has consented. Where the State or Territory has not consented, or withdrawn consent, the Sheriff may not issue a direction to a State/Territory jury official. A State or Territory may withhold or withdraw consent for any reason.

State/Territory jury officials will be empowered to prepare a jury panels in accordance with their powers and procedures under the relevant State or Territory law. Once the jury panel is provided to the Sheriff, Commonwealth laws will apply. The Sheriff will then give the jury panel to the Federal Court to allow for the jury to be empanelled. The empanelment of a jury will occur using existing powers and procedures.

Schedule 3—Amendment of the Marriage Act

This schedule contains 7 parts:

- Part 1 will allow for the appointment of Deputy Registrars of Marriage Celebrants to provide greater regulatory efficiency for the Marriage Celebrants Program (the Program). This will allow the Program to be more responsive to community needs, including increased capacity for statutory decision making.

- Part 2 will extend the timeframes to assess an application to become a marriage celebrant from three to six months to allow sufficient time to assess more complex matters, or for an applicant to provide further information to the department (if required), in support of their application. It seeks to assist applicants who may require greater support through the application process and provides certainty about the maximum timeframe for assessment of an application. This will also apply to authorised celebrants under Subdivision A of the Marriage Act.
- Part 3 will provide for authority to refund an application fee in very limited circumstances ie, where an applicant does not hold the mandatory qualifications for registration – either a Certificate IV in Celebrancy or celebrancy skills. This will ensure the application fee (which is currently \$400) can be refunded where essentially an application has been made in error.
- Part 4 will clarify that marriages must be solemnised in the ‘physical’ presence of an authorised celebrant. The word ‘presence’ is not defined in the Marriage Act and has evolved significantly over time to include, in some contexts, an online presence.
- Part 5 will clarify the identity requirements for a Notice of Intended Marriage (NOIM), in terms of what is acceptable as evidence of date and place of birth. That is, if it is impracticable for a person to obtain an official (birth) certificate and they do not have a passport, they can provide a Commonwealth Statutory Declaration to the authorised celebrant.
- Part 6 will:
 - make permanent the option of witnessing a NOIM via audio-visual facilities in order to provide greater convenience for marrying couples, especially those in regional and rural areas
 - insert a requirement for celebrants to meet separately in-person with each party to a marriage before the marriage is solemnised to ensure safeguards for real consent are maintained; and
 - clarify reasons for transferring a NOIM between celebrants to include transfers at the request of the marrying couple.
- Part 7 will specify celebrants may only be registered under one subdivision of the Marriage Act at any one time i.e. Subdivision A (ministers of religion of a recognised denomination), Subdivision B (authorised State and Territory officers) and Subdivision C (civil and religious marriage celebrants). This is intended to ensure celebrants and regulators have clear and unambiguous obligations to better support a legal marriage. This amendment will remove the risks, administrative complexity and costs associated with individual celebrants being authorised under multiple regulatory regimes.

Schedule 4, Part 1—Arbitration

This Part will make technical amendments to the arbitration framework in the *Family Law Act 1975*. The amendments will allow parties and arbitrators to make applications for review of an arbitral award or to determine a question of law in an arbitration to both Divisions of the FCFCOA instead of only to Division 2. Currently, the court transfers these applications from Division 2 to Division 1 for determination, when they relate to substantive proceedings that are pending in Division 1. The amendments will remove the administrative burden on the court in processing these transfers and address delays for parties and arbitrators arising from these transfers.

Schedule 4, Part 2—Assistance from Attorney-General

This part will repeal section 213A of the Native Title Act to give full effect to the Government’s election commitment to abolish the Native Title Respondents Scheme (NTRS). Consistent with its election commitment, the Government ceased funding the NTRS in the October 2022 Budget.

Under the scheme, funding for legal representation and disbursement costs incurred in native title proceedings was provided to some native title respondents, up to a cap of \$10,000 per six-month period. The entire budget for the Native Title Respondents Scheme before its abolition was approximately \$1.7 million per year.

This measure reflects the fact that many native title law questions and issues have now been settled, and that many native title respondents are commercially viable or sound entities with the capacity to deal with native title matters as part of their ordinary business costs.

Schedule 4, Part 3—Corrections

This part will correct typographical errors:

- in the FCFCOA Act, to correctly refer to regulations made under section 285 where appropriate throughout that Act; and
- in the Federal Court Act, to correct cross references to the *Competition and Consumer Act 2010* which were renumbered by the *Competition and Consumer Amendment (Competition Policy Review) Act 2017*.

Consultation and stakeholder views

Schedules 1 and 2—Federal Court criminal jurisdiction and juries

The department worked closely with key stakeholders, including consulting the Legislative and Governance Forum on Corporations, in developing Schedules 1 and 2. The department also released a public exposure draft of Schedules 1 and 2 (then titled the Federal Court of Australia Amendment (Extending Criminal Jurisdiction and Other Measures) Bill) in October 2022 to identify any improvements that could be made to the operational effectiveness of the proposed amendments. Eight submissions were received. Several amendments were made to the schedules in response to stakeholder views:

- The institution of Federal Court proceedings in relation to certain offences against the *Criminal Code* will now be limited to ASIC or other specified persons, consistent with other conferral provisions in schedule 1 or existing laws. In addition, relevant provisions were amended to make it clear that such limitations would not impact the CDP's powers under the *Director of Public Prosecutions Act 1983*.
- Proposed subsections 243A(3)–(4) of the *Australian Securities and Investments Commission Act 2001* (as they were in the exposure draft) were redrafted as proposed subsection 243A(3), to be consistent with the drafting of existing subsection 12HC(3).
- Proposed paragraph 23L(1)(a) of the Federal Court Act, which (at the time of exposure) would have allowed evidence disclosed during pre-trial processes to be admitted by the Federal Court in related summary offence proceedings, was removed to avoid any risk of infringing on the right to a fair trial.

Schedule 3—Amendment of the Marriage Act

A targeted confidential consultation outlining the proposed changes was conducted with key stakeholders, including the State and Territory Registries of Births, Deaths and Marriages and marriage celebrant associations in October 2023. Stakeholders were generally supportive of the proposed amendments.

Schedule 4, Part 1—Arbitration

This procedural measure was developed in consultation with the FCFCOA, and is supported by key legal bodies including family law arbitrators.

Schedule 4, Part 2—Assistance from Attorney-General

Abolition of the scheme was an election commitment of the current government. Subsequent to the election, abolition of the NTRS was communicated to existing grantees and publicised on the AGD website. It was confirmed and further communicated to the public via the October 2022–23 Budget Paper No. 2. To ensure a smooth transition, grants for the period 1 May to 31 October 2022 were extended to 30 April 2023, where there was a remaining balance of funding. This provided respondents with additional time to access those funds.

Schedule 4, Part 3—Corrections

No consultation was undertaken in relation to the minor and typographical corrections in this part.