



DPP

Commonwealth Director of Public Prosecutions

Your reference:

Our reference:

14 January 2009

Mr Peter Hallahan
Committee Secretary
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Mr Hallahan

Inquiry into the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008

I refer to your letter of 10 December 2008 to the Commonwealth Director of Public Prosecutions, inviting a submission to the Committee's Inquiry into Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008.

Please find enclosed the submission of the Commonwealth Director of Public Prosecutions regarding the review. I am the author of the submission and my contact details are:

Ms Jaala Corinne Hinchcliffe
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Thank you for inviting the Commonwealth DPP to make a submission.

Yours sincerely

Jaala Hinchcliffe
A/g Senior Assistant Director

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Commonwealth Director of Public Prosecutions

SUBMISSION BY THE COMMONWEALTH DPP

THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE FEDERAL COURT OF AUSTRALIA AMENDMENT (CRIMINAL JURISDICTION) BILL 2008

Introduction

The Office of the Commonwealth Director of Public Prosecutions is responsible for the prosecution of criminal offences against the laws of the Commonwealth. The primary role of the CDPP is to prosecute offences against Commonwealth law and to recover the proceeds of Commonwealth crime. The CDPP is not an investigative agency and it has no investigative powers or functions. The Office prosecutes cases investigated by the Australian Federal Police or other investigative agencies, such as the Australian Competition and Consumer Commission. The CDPP regularly provides advice to these agencies during the investigative stage in large and complex matters.

Prosecution decisions are made in accordance with the guidelines set out in the Prosecution Policy of the Commonwealth. In general terms there is a two stage test that must be satisfied, namely there must be sufficient admissible evidence to prosecute the case, which requires not just that there be a prima facie case, but that there also be reasonable prospects of conviction, and that it must be clear from the facts of the case and all the surrounding circumstances, that prosecution would be in the public interest.

The factors briefly outlined above will apply to prosecutions of the proposed cartel offences, to which it is proposed the Federal Court will be given indictable jurisdiction.

The Federal Court of Australia Amendment (Criminal Jurisdiction) Amendment Bill 2008

The *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* (the Cartel Conduct Bill) reflects the policy decision to provide for the Federal Court of Australia (the Federal Court) to have criminal jurisdiction to hear the indictable cartel offences contained within that Bill. The *Federal Court of Australia Amendment (Criminal Jurisdiction) Amendment Bill 2008* (the Federal Court Bill) provides the procedural rules for the Federal Court to exercise that limited indictable criminal jurisdiction.

Currently, the CDPP prosecutes the majority of Commonwealth offences in State and Territory courts, which are invested with federal criminal jurisdiction through the *Judiciary Act 1903*. There are a small number of summary offences which are prosecuted in the Federal Court, for example offences under Part VC of the *Trade Practices Act 1974*.

If both the Cartel Conduct Bill and the Federal Court Bill, are passed and enacted, they will provide for the cartel offences to be heard on indictment in the Federal Court and the procedure for those offences to be heard, thus enabling a new forum for these prosecutions to proceed in.

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Importantly, the cartel offences would also be able to be heard on indictment in State or Territory superior courts. That is to say, neither the Cartel Conduct Bill nor the Federal Court Bill removes federal jurisdiction over the cartel offences from State or Territory superior courts. This will allow prosecutions which involve both Commonwealth cartel offences and State offences or other Commonwealth offences over which the Federal Court will not have indictable jurisdiction, to be heard together in a superior State court, which holds both State jurisdiction and Federal jurisdiction, rather than the offences being disjoined with the State/Commonwealth offence being heard separately in the State court and the cartel offence being heard in the Federal Court.

We note that the Explanatory Memorandum states at page 1 that at this stage there is no legislation other than the Cartel Conduct Bill planned or proposed to give further indictable criminal jurisdiction to the Federal Court.

Amendment to the *Director of Public Prosecutions Act 1983*

Clause 1 of the Federal Court Bill provides for the addition of subsection 6(2F) and 6(2G) to the *Director of Public Prosecutions Act 1983*. These amendments clarify that the CDPP may present an indictment in a court even though a person was committed to trial in a different court. If the CDPP were to indict a person in a court other than in the court to which they were committed, the proceedings in the court to which the person was committed would be discontinued by the CDPP. As the Explanatory Memorandum sets out on page 3, these provisions allow the CDPP the flexibility to indict in the most appropriate Court, given that changes may occur between committal and indictment as to the charges to be preferred, particularly if those charges are to include State offences or other Commonwealth offences over which the Federal Court does not have jurisdiction.

Amendment to the *Federal Court of Australia Act 1976*

Division 1A of Part III

The Bill provides for a new Division 1A of Part III of the *Federal Court of Australia Act 1976* (the Federal Court Act). This Division sets out various procedural rules for the Federal Court in exercising its criminal indictable jurisdiction. In particular, provision is made for:

- Issues concerning indictments, including alternative counts (cl 23BA), joinder and separation of trials (cl 23BB to 23BE), timing for filing indictments (cl 23BF and 23BG), amending indictments (cl 23BH) and objecting to indictments (cl 23CP);
- Provision for pre-trial hearings (cl 23CA to 23CC), to enable the defendant to enter a plea and deal with any pre-trial issues (see in particular cl 23CB(2));
- A disclosure regime (cl 23CD to 23CO);
- Examining witnesses before the trial commences, which is commonly known as a Basha inquiry (cl 23CQ). Clause 23CQ(4) notes that the absence of a committal proceedings does not necessarily mean that it will be contrary to the interests of justice to proceed to trial without the witness being examined. This is particularly important for matters which have been committed in jurisdictions which no longer have committal hearings, such as Western Australia, which now has a stringent disclosure regime instead;
- Jury issues, including jury selection, qualification for jury duty, empanelment of the jury and discharge of the jury. There is provision for a jury to be made up of up to 15 members (see clause 23DC). As the trials of cartel offences are likely to be complex and lengthy, there is the possibility that jurors may become sick or unable to continue. In providing for a jury to consist of 15 members, the procedure enables up to 5 members of

jury to be discharged before a trial must be abandoned (cl 23DD provides that a trial must not continue with less than 10 members); and

- Issues concerning pleas (cl 23FD to 23FG), verdicts (cl 23FH to 23FK), sentencing on a guilty plea at committal (cl 23GA to 23GB), remanding in custody (cl 23HA), oaths and affirmations (cl 23HB) and the protection of witnesses giving evidence (cl 23HC). The bill also provides that the accused cannot make an unsworn statement (cl 23HD).

Division 2A of Part III

The proposed Division 2A of Part III of the Federal Court Act provides for appeals. Clause 30AA sets out the Federal Court's jurisdiction in relation to appeals, which includes appeals against conviction, sentence, bail decisions and interim decisions. Leave is required by the Court or a Judge to appeal a decision under cl 30AA unless it relates to bail or a question of law (cl 30AB). The prosecution or accused can appeal a decision provided for in clause 30AA, however the prosecution cannot appeal a decision to acquit a defendant because of mental illness (see cl 30AC). There is a further jurisdiction for the accused to appeal if consent is given by the Attorney General (cl 30AD). The appellate jurisdiction of the Federal Court set out in cl 30AA and cl 30AD is exercised by a Full Court (cl 30AE(1)).

Division 2A also provides for the following procedures in relation to appeals:

- the application for leave to appeal, extensions of time and amendment to appeal grounds (cl 30AE);
- time limits for appeals (cl 30AF);
- right to attend the appeal (cl 30AG);
- when to allow appeals (30AJ); and
- the form of judgement to be given on appeal (cl 30BA to 30BH)

Stated cases and referred questions of law are provided for in clauses 30CA and 30CB. If both a State/Territory superior court and the Federal Court have jurisdiction to hear an indictable matter, the committal court can refer a stated case or reserve a question to either the State/Territory superior court or the Federal Court for determination (cl 30CA(2)). Stated cases or reserved questions can also be referred from a single judge of the Federal Court to a full court of the Federal Court during a trial (cl 30AC(1) and (4)).

Part VIA

The proposed Part VIA of the Federal Court Act provides for offences relating to juries and jury service. The offences range from failing to attend jury service or failing to comply with a direction (cl 58 AA and 58AB), through to bribery or causing harm to jurors (cl 58AG and 58AH). There are also offences for publishing information which identifies jurors (cl 58AJ) or soliciting information from jurors (cl 58AK). There is an infringement notice scheme in relation to the offences of failing to attend jury service or failure to complete and return a jury questionnaire (cl 58BA to 58BG).

Part VIB

The proposed Part VIB of the Federal Court Act provides for issues relating to bail, including the granting of bail, bail undertakings (cl 58DE), varying bail (cl 58EA to 58EC), a scheme for the forfeiture of security (cl 58FB to cl 58FE) and the continuation and ending of bail (cl 58GA to

58GD). There is an offence for failing to appear in accordance with a bail undertaking, which has a maximum penalty of 2 years (cl 58FA).

Amendments to the Judiciary Act 1903

The proposed cl 68A of the *Judiciary Act 1903* (the Judiciary Act) provides for the committal of matters where both a State/Territory superior court and the Federal Court have indictable jurisdiction. Clause 68A(2) provides that the committal court can commit a person in such circumstances to either the State/Territory Court or the Federal Court. The court must invite the CDPP to suggest which court the person should be committed to (cl 68A(3)). The CDPP will be aware of issues including whether it is proposed that the indictment will include offences over which the Federal Court does not have jurisdiction in making that suggestion. The court must take that suggestion into account in making the decision (cl 68A(4)). Clause 68A(5) allows for the committal court to grant bail to appear in the Federal Court if the person is committed to the Federal Court.

The decision as to which court a person will be committed will not be made until the committal court makes the committal order. However the procedure for determining fitness for trial issues in subsection 20B(1) of the *Crimes Act 1914* provide for a question of fitness to be referred to the superior court for determination prior to committal. A policy decision has been made for the committal court to be able to refer such matters to either the State/Territory superior court or the Federal Court where both courts have jurisdiction (cl 68A(6)).

Cl 68B clarifies that section 68 of the Judiciary Act provides for the application of State/Territory procedure to the conduct of proceedings for Commonwealth offences even if the proceedings are heard by the Federal Court or if the Federal Court also has jurisdiction. However, if the proceedings are being heard by the Federal Court, State/Territory procedure law picked up by section 68 of the Judiciary Act applies only to the extent to which it is not inconsistent with Commonwealth law (for example the procedure set out in the Federal Court Act) or the Rules of the Federal Court (see cl 68C).