

# Chapter 2

## Overview of the Bill

2.1 This chapter briefly outlines the main provisions of the Bill, being amendments to the:

- *Federal Court of Australia Act 1976*;
- *Judiciary Act 1903*; and
- *Director of Public Prosecutions Act 1983*.

### Federal Court of Australia Act

2.2 The Bill was introduced in Parliament together with the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008. That bill amends the *Trade Practices Act 1974* to create criminal penalties for serious cartel conduct, and it gives the Federal Court of Australia (Court) jurisdiction in relation to criminal proceedings for indictable offences under that Act.<sup>1</sup>

2.3 The Bill extensively amends the *Federal Court of Australia Act 1976* (Act), establishing a procedural framework to allow the Court to exercise an indictable criminal jurisdiction. The amendments insert new Divisions 1A and 2A, and new Parts VIA and VIB into the Act, all of which are described below.

#### *Division 1A – Original jurisdiction (indictable offences)*

2.4 The new Part III Division 1A deals with the conduct of indictable primary proceedings, as defined in the Bill.<sup>2</sup> The main provisions of each subdivision are as follows.

#### *Subdivision A - Introduction*

2.5 Proposed subsection 23AB specifies the events which will enliven the criminal jurisdiction of the Court. For example, the appearance of the Accused, the prosecutor or both before the Court following committal for a serious cartel offence; or the filing of an indictment in the Court for a serious cartel offence either following a committal or by ex officio indictment.

2.6 Subdivision A also states that while the Bill sets out some procedures to be followed by the Court, additional procedures are contained in the Rules of Court, state/territory laws and the Rules of Court of state/territory courts.<sup>3</sup>

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1 Schedule 1 item 117 of the Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008

2 Proposed subsection 23AB(2) of the *Federal Court of Australia Act 1976*

2.7 The procedures set out in the Bill include:

- preparing, amending and filing indictments (Subdivision B);
- pre-trial hearings and disclosure (Subdivision C);
- empanelling and discharging juries (Subdivisions D & E);
- pleas and verdicts (Subdivision F); and
- persons committed to the Court for sentencing (Subdivision G).

*Subdivision B – Matters relating to indictments*

2.8 This subdivision sets out general matters relating to indictments, for example: the prosecutor may include alternate counts in an indictment; a single count can include more than one Accused for the same indictable offence; the Court can separate one or more Accused from a single count; an indictment can include multiple counts against the Accused; the Court can separate one or more counts from an indictment; the time within which an indictment must be filed following a committal order; the consequences of not filing an indictment within time; and amending an indictment.<sup>4</sup>

*Subdivision C – Pre-trial matters (hearings, disclosure and quashing indictments)*

2.9 In the Second Reading Speech, the Hon. Robert McClelland MP, Attorney-General (Attorney-General) told the Parliament:

The pre-trial provisions are particularly important to the effective working of the bill. Trials for the serious cartel offences are likely to be long and hard fought. It is therefore important that as much as possible is done at the pre-trial stages to determine what matters are in issue and narrow down the issues which need to be considered by the jury.<sup>5</sup>

2.10 The Bill contains several provisions dealing with pre-trial matters, most of which concern pre-trial hearings and pre-trial disclosure. The Court must, for example, order the Accused and the prosecutor to attend a pre-trial hearing as soon as practicable after the filing of an indictment. At that hearing, the Accused will be required to enter a plea in relation to each count in the indictment that relates to the Accused. During a pre-trial hearing, the Court may make orders and determinations for the efficient management and disposal of a trial on the indictment, including making an order under proposed section 23CD.<sup>6</sup>

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3 Proposed section 23AA of the *Federal Court of Australia Act 1976*; and proposed sections 68A, 68B & 68C of the *Judiciary Act 1903*.

4 Proposed sections 23BA – 23BH of the *Federal Court of Australia Act 1976*

5 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, p. 12295. Also, see Explanatory Memorandum, p. 9.

6 Proposed subsection 23CA(1) and proposed section 23CB of the *Federal Court of Australia Act 1976*.

2.11 Proposed section 23CD enables the Court to make pre-trial disclosure orders for the prosecutor and the Accused, including the imposition of on-going disclosure obligations. The Bill establishes a three-step process modelled on section 6 of the *Crimes (Criminal Trials) Act 1999* (Vic) and section 137 of the *Criminal Procedure Act 1986* (NSW). The process requires:

- the prosecutor to provide notice of the prosecution case, including copies of or access to material;
- the Accused to provide a statement responding to each fact, matter or circumstance set out in the prosecution's notice, including whether the Accused takes issue, the basis for taking issue, and copies of any expert report on which the Accused intends to rely at trial; and
- the prosecutor to respond to any matters contained in the Accused's response which call for a response from the prosecution.<sup>7</sup>

2.12 Both the Attorney-General and the Explanatory Memorandum emphatically stated that proposed section 23CF does not require the Accused to disclose his or her defence, unless it is proposed at trial to adduce supporting evidence of an alibi or supporting evidence of mental impairment within the meaning of section 7.3 of the *Criminal Code*.<sup>8</sup>

2.13 For the purposes of pre-trial disclosure, the Bill automatically abrogates legal professional privilege, and the Court can order that other immunities, privileges or restrictions do not apply.<sup>9</sup> Proposed subsections 23CL(2)–(3) state that legal professional and other privileges, immunities and restrictions are not otherwise affected, nor is the law relating to public interest immunity or privilege claimed under the *National Security Information (Criminal and Civil Proceedings) Act 2004*. The Explanatory Memorandum states that these provisions appropriately balance the policy objectives of the disclosure regime against the rationale for protecting privilege:

This clause ensures that there is no potential for the disclosure regime to be frustrated by claims for legal professional privilege. That is necessary given that any document that was brought into existence for use in litigation normally attracts legal professional privilege. That means that things such as witness statements and expert reports are privileged documents and a party could potentially withhold material of that kind from production if legal professional privilege applied under the disclosure regime.<sup>10</sup>

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7 Proposed sections 23CE – 23CH of the *Federal Court of Australia Act 1976*

8 Explanatory Memorandum, pp 10-11 and the Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, p. 12295.

9 Proposed section 23CL of the *Federal Court of Australia Act 1976*

10 Explanatory Memorandum, p. 14.

2.14 The following provision, proposed section 23CM, allows the Court to sanction a party which fails to comply with its pre-trial disclosure obligations, including, for example, ordering:

(a) that particular evidence that was not disclosed to another party in accordance with the order under section 23CD not be admitted in evidence in the proceedings;

(b) that the party not be allowed to call an expert witness at the trial if the party failed to give the other party a copy of a report by the expert in accordance with the order under section 23CD;

(c) that a party be allowed to tender a statement or other document as evidence of its contents if:

(i) the document was disclosed to the other party; and

(ii) the other party did not disclose an intention to contest or require proof of the document's contents as required by the order under section 23CD;

(d) that the accused not be able, during the trial, to take issue with a fact, matter or circumstance if:

(i) the fact, matter or circumstance was set out in the notice of the prosecution's case; and

(ii) the notice of the accused's response did not both take issue with the fact, matter or circumstance, and set out a basis for taking issue.<sup>11</sup>

2.15 The Bill prohibits the further disclosure of material provided for pre-trial purposes, and the Court may order that such material is not admissible in any other proceedings, court or before a person authorised to hear evidence.<sup>12</sup>

#### *Subdivision D – Pre-trial matters (empanelling the jury)*

2.16 This subdivision sets out pre-trial matters relating to the empanelment of the jury, for example: the number of jurors on a jury; determination of the constitution of a jury district; the jury roll for a jury district; qualification and liability for serving on a jury; the selection of the jury district and preparation of a jury list for the proceedings; summoning a sufficient number of persons on the jury list to allow the empanelment of the jury; random empanelment of the jury; and challenges to potential jurors, including challenges for cause and peremptory challenges.<sup>13</sup>

#### *Subdivision E – Other jury matters*

2.17 The new Division 1A Subdivision E sets out miscellaneous jury matters, including: the appointment of a jury foreperson; confidentiality directions which can

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11 Proposed paragraphs 23CM(2)(a)-(d) of the *Federal Court of Australia Act 1976*

12 Proposed sections 23CN & 23CO of the *Federal Court of Australia Act 1976*

13 Proposed sections 23DA – 23DZA of the *Federal Court of Australia Act 1976*

be given to protect the security of a potential or actual juror; things that may be given to the jury to assist it to understand issues during the trial; remuneration and allowances payable to jurors; discharge of potential and actual jurors; discharge of the jury; and consequences of discharging the jury.<sup>14</sup>

*Subdivision F – Matters relating to pleas, the trial and verdicts*

2.18 This subdivision contains provisions relating to pleas, conduct of the trial and verdicts, including: the Accused's arraignment before the jury; admissibility of evidence given in committal proceedings; entering a plea to a count in the indictment; pleading to some counts in satisfaction of other counts in the indictment; pleading to an offence not specified in the indictment but supported by the matters alleged; changing pleas; a Court verdict of 'no case to answer'; jury verdicts on each count in the indictment; the consequences of guilty pleas and guilty verdicts; and the consequences of not guilty verdicts.<sup>15</sup>

*Subdivision G – Procedure on committal for sentencing*

2.19 If a committal court makes an order committing the Accused for sentencing before the Court, proposed section 23GA deems the committal court to have made an order 'to the effect of committing the accused for trial before the Court for the indictable offence'.<sup>16</sup> Proposed subsection 23GA(2) then requires the prosecutor to file an indictment in the Court, but the Accused is treated as if he or she has already pleaded guilty to the indictment:

The advantage of this mechanism is that all the rules and procedures that apply when an accused has been committed for trial also apply to an accused who has been committed for sentencing and do not have to be set out again...This means, for example, that the Court may discharge the accused if an indictment is not filed in the Court within the time required.<sup>17</sup>

*Subdivision H – Custodial and other matters*

2.20 This subdivision sets out general matters relating to when the Accused can be remanded in custody; the requisite form of a witness's oath or affirmation; orders the Court can make for the protection of potential or actual witnesses, or potential or actual evidence; and a prohibition against the Accused making unsworn statements.<sup>18</sup>

2.21 Subdivision H concludes the provisions establishing procedures for the Court's conduct of indictable primary proceedings. The Bill then sets out the

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14 Proposed sections 23EA – 23EM of the *Federal Court of Australia Act 1976*

15 Proposed sections 23FA – 23FK of the *Federal Court of Australia Act 1976*

16 Proposed paragraph 23GB(1)(b) of the *Federal Court of Australia Act 1976*

17 Explanatory Memorandum, pp 38-39.

18 Proposed sections 23HA – 23HE of the *Federal Court of Australia Act 1976*

procedures to be followed by the Court exercising its appellate jurisdiction in criminal proceedings.

***Division 2A – Appellate and related jurisdiction (criminal proceedings)***

2.22 The new Part III Division 2A deals with the Court's powers to hear appeals in criminal proceedings.<sup>19</sup> Its main provisions are described below, including:

- bringing appeals (Subdivision A);
- form of judgement on appeal (Subdivision B); and
- references (Subdivision C).

***Subdivision A – Bringing appeals***

2.23 Subdivision A deals with the Court's jurisdiction to hear and determine appeals in criminal proceedings, for example, appeals against:

- indictable offences;
- summary judgements;
- bail and forfeiture of bail security; and
- interim judgements and decisions.

2.24 The Bill specifies the circumstances in which the Court has jurisdiction. For example, an appeal from a judgement of an eligible primary court, as defined in Schedule 1 item 33, to the extent that that judgement:

- convicts the Accused of a count in an indictment;
- sentences the Accused in relation to a count in an indictment;
- acquits the Accused of a count in an indictment as a result of the Court (rather than a jury) finding that the Accused had no case to answer;
- acquits the Accused because of mental illness in relation to a count in an indictment; or
- in the case of a judgement of the Court constituted by a single judge - consists of one or more orders, determinations or findings under Division 6 or 9 of Part IB of the *Crimes Act 1914*.<sup>20</sup>

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19 The Bill also amends Part III Division 2 of the Act, limiting the application of that division to appeals in civil proceedings only. The Court's limited power to hear appeals in criminal proceedings under Division 2 will be moved to Division 2A: Schedule 1 items 58 & 59 of the Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008.

20 Proposed subsection 30AA(1) of the *Federal Court of Australia Act 1976*. Also, see proposed subsections 30AA(2)-(4) of the *Federal Court of Australia Act 1976*. Part IB Divisions 6 & 9 of the *Crimes Act 1914* relate to persons who are not fit to be tried and sentencing alternatives for persons suffering from mental illness or intellectual disability.

2.25 In certain circumstances, the Attorney-General can consent in writing to an appeal by the Accused, including applications out of time. The Explanatory Memorandum explains that:

This provision operates in addition to normal laws dealing with pardons and the prerogative of mercy. It gives an additional power to the Attorney-General to deal with cases where there may have been a miscarriage of justice. The Attorney-General is only likely to consent to an accused appealing under this clause if the Attorney-General believes that all other rights of appeal have been exhausted.<sup>21</sup>

2.26 Other provisions within Subdivision A set out how the Court must exercise its appellate jurisdiction; the time within which a notice of appeal, or notice of application for leave to appeal, must be filed; the right of a party to an appeal to be present at the hearing of the appeal; the practice and procedure to be followed during criminal appeal proceedings; the Court's treatment of evidence on appeal; and when the Court must allow an appeal. In relation to an appeal against conviction, for example, the Court must allow the appeal if satisfied:

- (a) that the verdict of the jury (if any) should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
- (b) that the judgment should be set aside on the ground of a wrong decision of any question of law; or
- (c) that there has been a substantial miscarriage of justice.<sup>22</sup>

2.27 Regardless of these matters, however, the Court may dismiss an appeal if satisfied that there has not been a substantial miscarriage of justice.<sup>23</sup>

#### *Subdivision B – Form of judgement on appeal*

2.28 Subdivision B deals with the Court's power to give judgement when exercising its appellate jurisdiction under Division 2A, including dismissing or allowing an appeal, and taking such other action as is considered appropriate in the circumstances.<sup>24</sup>

2.29 Specific action that may be taken by the Court is specified in the Bill. For example, if the Court allows an appeal against sentence, it may increase or decrease the sentence, substitute a different sentence, or in the case of an appeal against a judgement in which orders were made under subsection 19B(1) of the *Crimes Act*

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21 Explanatory Memorandum, p. 44.

22 Paragraphs (a)-(c) of proposed subsection 30AJ(1) of the *Federal Court of Australia Act 1976*. Also, see proposed sections 30AA-30AL of the *Federal Court of Australia Act 1976*

23 Proposed subsection 30AJ(1) of the *Federal Court of Australia Act 1976*

24 Proposed sections 30BA of the *Federal Court of Australia Act 1976*

1914, vary or set aside any or all of the orders, or set aside the orders, record a conviction, and sentence the Accused.<sup>25</sup>

### *Subdivision C – References*

2.30 In criminal matters, a single judge of the Court, or another court from which lies a right of appeal to the Court, may state any case or reserve any question, that is, get a ruling on any legal issue before making its own judgement or decision. This power extends to legal issues arising in committal proceedings before a magistrate with the power to commit an Accused to either the Court or a superior court.<sup>26</sup>

2.31 Following an acquittal on indictment, the prosecutor may also apply to either the Court or a Judge for leave to refer a question of law arising from the judgement to a Full Court for its determination. As noted in the Explanatory Memorandum, that ruling would not affect the position of an Accused, merely clarify the issue for future cases.<sup>27</sup>

2.32 Amendments to the new Part III Divisions 1A and 2A are followed by the new Parts VIA and VIB.

### *Part VIA – Offences relating to juries*

2.33 The new Part VIA applies to juries in civil and criminal proceedings: Division 1 creates a variety of jury offences; and Division 2 establishes an infringement notice scheme for two of these offences - failing to attend for jury service, and failing to complete and return a questionnaire.<sup>28</sup> The Explanatory Memorandum considers these two strict liability offences, punishable by a fine, appropriate for action under the scheme.<sup>29</sup>

2.34 The Explanatory Memorandum states that the infringement notice scheme mirrors similar schemes in other Commonwealth Acts, except for proposed subsection 58BF(3).<sup>30</sup> These provisions have the effect that:

...a person who, for example, admits in a notice to the Sheriff that he or she committed conduct that amounts to the relevant offence cannot have that admission used against them if they are subsequently prosecuted for the offence. However, the person will lose the benefit of that protection if they

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25 Proposed section 30BC of the *Federal Court of Australia Act 1976*. Subsection 19B(1) of the *Crimes Act 1914* relates to the discharge of offenders without proceeding to conviction.

26 Proposed sections 30CA & 30CB of the *Federal Court of Australia Act 1976*

27 Explanatory Memorandum, p. 51.

28 Proposed sections 58AA & 58AE of the *Federal Court of Australia Act 1976*

29 Explanatory Memorandum, p. 59.

30 Explanatory Memorandum, p. 60.

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give evidence in criminal proceedings which is inconsistent with the admission.<sup>31</sup>

### ***Part VIB – Bail***

2.35 The new Part VIB comprises bail provisions applicable to indictable primary proceedings or criminal appeal proceedings only.<sup>32</sup> For example: the granting of bail to an Accused; the Court's reconsideration of bail orders; the consequences of an Accused failing to appear in accordance with a bail undertaking; and the continuation or discharge of a bail order.

### **Judiciary Act**

2.36 The second Act to be amended by the Bill is the *Judiciary Act 1903*. The Bill proposes to insert three new provisions regarding situations in which both the Court and a state/territory court share jurisdiction. These provisions are described below.

#### ***Committals jurisdiction***

2.37 Proposed section 68A deals with committals jurisdiction when both the Court and a state/territory court have jurisdiction to try a person on indictment for an indictable offence against a law of the Commonwealth.

2.38 In that situation, a state/territory committal court can commit the person to trial on indictment, or sentencing, in either the Court or a superior state/territory court. A Director of Public Prosecutions can suggest the court before which the person is to be tried or sentenced however, the committal court is not bound to comply with this suggestion.

2.39 If the state/territory committal court commits a person for trial or sentence before the Court, and has power to grant bail to the Accused in relation to superior state/territory courts, then the committal court will have power to grant bail to the Accused to appear before the Court.<sup>33</sup> As indicated earlier in this chapter, the new Part VIB of the *Federal Court of Australia Act 1976* provides for bail before the Court only when its indictable criminal jurisdiction has been enlivened.

#### ***Application of state/territory laws***

2.40 Proposed section 68B deals with the application of state/territory laws when both the Court and a state/territory court have jurisdiction in relation to an offence against a law of the Commonwealth. Subsection 68(1) of the *Judiciary Act 1903*

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31 Explanatory Memorandum, p. 62.

32 In summary criminal proceedings, state/territory laws relating to bail will apply through the operation of subsection 68(1) of the *Judiciary Act 1903*.

33 Proposed subsection 68A(5) of the *Judiciary Act 1903*

continues to apply, the effect being that state/territory laws apply to proceedings before the Court. However, this provision will be subject to proposed section 68C.

### ***Adjustments to state/territory laws***

2.41 Proposed section 68C modifies the application of state/territory laws when the indictable criminal jurisdiction of the Court is enlivened or its appellate jurisdiction is invoked, that is, when proceedings are brought before the Court.

2.42 The provision first establishes that the Court must hear trial proceedings in the state/territory where the committal order was made, or where an *ex officio* indictment was filed, unless otherwise ordered by the Court.<sup>34</sup> The Explanatory Memorandum states that this:

...ensures that there will be certainty for all parties about where a trial is to be heard but also gives[s] the Court flexibility to ensure that the trial is held in an appropriate place.<sup>35</sup>

2.43 The Court's discretion is subject to sections 70 and 70A of the *Judiciary Act 1903*, which concern offences committed in several states and indictable offences not committed in a state, and section 80 of the Constitution which provides:

#### **Trial by jury**

80. The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.<sup>36</sup>

2.44 Proposed section 68C then sets forth a table indicating when state/territory laws, including the relevant state/territory's Supreme Court Rules of Court, are to apply in proceedings before the Court. However, proposed subsection 68C(8) of the *Judiciary Act 1903* states:

(8) The laws of that State or Territory apply to the proceedings only to the extent to which they are:

- (a) not inconsistent with the laws of the Commonwealth; and
- (b) not inconsistent with the Rules of the Federal Court.<sup>37</sup>

2.45 Effectively, the Bill establishes a single set of procedures applicable to all trials before the Court irrespective of the hearing venue. The rules of evidence applied

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34 Proposed subsections 68C(2)-(3) of the *Judiciary Act 1903*

35 Explanatory Memorandum, p. 76.

36 Section 80 of the *Australian Constitution*

37 Proposed subsection 68C(8) of the *Judiciary Act 1903*

by the Court in its Rules of Court are those contained in the *Evidence Act 1995*. According to the Attorney-General:

The alternative of picking up state procedures and rules of evidence is not workable. It would mean that the Federal Court could be required to apply different procedures for the same conduct depending on where the trial was being held. As a result, it would require the Federal Court and its judges to become familiar with the procedures and rules of evidence of eight state and territory jurisdictions.<sup>38</sup>

### **Director of Public Prosecutions Act**

2.46 The third Commonwealth Act to be amended by the Bill is the *Director of Public Prosecutions Act 1983*. The amendment enables the Director of Public Prosecutions to institute proceedings on indictment for a Commonwealth offence in a court different from that in which the person was committed for trial.<sup>39</sup> The Explanatory Memorandum states that this preserves flexibility for the Director of Public Prosecutions in its selection of an appropriate trial venue and anticipates exercise of the discretion where 'it becomes apparent that circumstances have changed since the committal proceedings'.<sup>40</sup>

### **Consequential and other amendments**

2.47 The Bill makes a number of consequential and other amendments to the following Commonwealth Acts:

- *Bankruptcy Act 1966*;
- *Crimes Act 1914*;
- *Federal Court of Australia Act 1976*;
- *Mutual Assistance in Criminal Matters Act 1987*;
- *Proceeds of Crime Act 2002*; and
- *Transfer of Prisoners Act 1983*.

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38 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 3 December 2008, p. 12295.

39 Proposed subsection 6(2F) of the *Director of Public Prosecutions Act 1983*

40 Explanatory Memorandum, p. 3. Some examples of changed circumstances are provided.

2.48 These amendments are not discussed in this report as they are ancillary to the purposes of the Bill.