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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

FEDERAL COURT OF AUSTRALIA AMENDMENT (CRIMINAL JURISDICTION) BILL 2008

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Hon Robert McClelland MP)

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OUTLINE

The Federal Court of Australia Amendment (Criminal Jurisdiction) Bill 2008 (the Bill) amends the *Federal Court of Australia Act 1976* (the Federal Court Act) and the *Judiciary Act 1903* (the Judiciary Act) and makes consequential changes to other Commonwealth Acts. The Bill provides a procedural framework which will allow the Federal Court to exercise the indictable criminal jurisdiction which it will be given to deal with serious cartel offences if the *Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008* is enacted.

At this stage there is no other legislation which gives the Court indictable criminal jurisdiction and no such legislation is currently planned or proposed.

The procedural provisions are modelled on the criminal procedures of the State and Territory Supreme Courts but are not a direct copy from any single procedure. They take the best features from State and Territory law.

The Federal Court will apply a uniform indictable criminal procedure across Australia.

The Bill addresses core issues that affect the rights and responsibilities of persons appearing before the Court. The provisions in the Bill will be supplemented by Federal Court Rules covering matters of detail. The Bill gives the Court expanded power to make Rules on procedural matters.

State and Territory procedural law will apply in the Federal Court only if a matter is not covered by either the Bill or the Rules. In that event the procedure of the State or Territory where the trial is being held will apply by operation of sub-section 68(1) of the Judiciary Act.

The Bill will give the Federal Court the full range of powers it will need to exercise indictable criminal jurisdiction for serious cartel offences and to conduct jury trials and deal with appeals for those offences. The Bill includes provisions dealing with pre-trial proceedings, bail, the empanelling of juries, conduct of trials, sentencing and appeals.

The Bill will not change the process for conducting committal proceedings in Commonwealth matters. They will continue to be heard in State/Territory courts applying State/Territory law.

The Bill will only change the procedures that apply to committal proceedings in two respects.

The first is if a magistrate conducting committal proceedings wants to refer a question of law for adjudication by a superior court and has power under State/Territory law to refer

a question of law to a superior court. When both the Federal Court and a State/Territory Supreme Court have indictable jurisdiction for the matter, the magistrate can choose whether to refer the question to the Federal Court or to a State/Territory superior court.

The second is if a question of whether the accused is fit to plead is raised in committal proceedings and the magistrate is required to refer the question to a superior court under Division 6 of Part 1B of the *Crimes Act 1914*. When both the Federal Court and a State/Territory Supreme Court have indictable jurisdiction for the matter, the magistrate can choose whether to refer the question to the Federal Court or to a State/Territory superior court.

These changes have been made because, in some cases, the question that is to be referred to a superior court will raises legal issues that fall within the expertise of the Federal Court.

If the Federal Court and a State/Territory Supreme Court both have jurisdiction to hear a trial on indictment, and a magistrate makes a committal order, the magistrate will have to determine which court should be named in the order. The magistrate will be required to consult the Director of Public Prosecutions (DPP) before making the decision but will not be bound to act on the DPP's views. At the end of the day, however, the DPP will make the final decision on which court an indictment should be filed in. This reflects the traditional principle that the choice of location for a trial rests with the prosecutor.

The DPP will have to ensure that an indictment is filed in a court which has jurisdiction to deal with the matter and that the choice of court complies with section 80 of the Constitution and sections 70 and 70A of the Judiciary Act to the extent they are applicable.

If an accused is committed to stand trial in the Federal Court, the jurisdiction of the Court will still only be enlivened if and when an indictment is filed in the Court, one or more of the parties appear before the Court, or one or more of the parties make an application for an order to the Court.

FINANCIAL IMPACT STATEMENT

The amendments are not expected to have any significant financial impact.

NOTES ON CLAUSES

Clause 1: Short title

1. Clause 1 is a formal clause which provides that the Bill will be cited as the *Federal Court of Australia Amendment (Criminal Jurisdiction) Act 2008* when it is enacted.

Clause 2: Commencement

2. Sections 1-3 of the Act will commence on the day on which the Act receives the Royal Assent. Schedule 1 of the Act will commence on the 28th day after the day on which the Act receives the Royal Assent.

Clause 3: Schedule(s)

3. This is a formal clause that enables the Schedule to amend Acts simply by including amendments under the title of the relevant Act.

Schedule 1 – Amendments

Part 1 – Main amendments

Director of Public Prosecutions Act 1983

Item 1: After subsection 6(2E)

4. This item inserts new subsections 6(2F) and 6(2G) to provide that the DPP may institute proceedings on indictment for a Commonwealth offence in another court different from the court to which the person was committed for trial. This may occur even if an indictment has already been filed in the court named in the committal order. The second court will, however, need to have jurisdiction to deal with the matter. If there is a change of venue for the trial, the initial prosecution must be discontinued.

5. This preserves the flexibility for the DPP to decide on an appropriate trial venue, within Constitutional limits, where more than one court has jurisdiction in a matter. A change of venue may occur where in the usual review of a case post committal it becomes apparent that circumstances have changed since the committal proceedings. For example it may become apparent that the accused should stand trial on both State/Territory and Commonwealth offences for which it may not be possible to run the trial in the Federal Court, or where it is decided to present an indictment covering a shorter period of time or a lesser number of events than those in the committal proceedings. There are other circumstances which may lead to a decision to change venue, which would be decided on a case by case basis.

6. Both the Federal Court and the State/Territory Supreme Courts will have inherent power to stay proceedings if the court considers that there has been an abuse of process or that the DPP has engaged in forum shopping.

Item 2: After Division 1 of Part III

Division 1A—Original jurisdiction (indictable offences)

7. This Division deals with the conduct of indictable primary proceedings. That is defined in subclause 23AB(2). It includes a trial on indictment, and sentencing proceedings that follow a trial on indictment or a committal for sentencing, for a serious cartel offence.

Subdivision A—Introduction

Clause 23AA Background and simplified outline

8. This clause provides a simplified outline of Division 1A for the assistance of those reading the Bill.

Clause 23AB Application of Division

9. Subclause (1) provides a list of events that, if they occur, will enliven the indictable criminal jurisdiction of the Court. The purpose is to ensure that there is a clearly definable point at which the Court begins to exercise jurisdiction. It also provides that "the accused" is a person to whom any of the listed events applies.

10. The list of events includes the appearance of the accused, the prosecutor or both before the Court following committal for a serious cartel offence; the filing of an indictment in the Court for a serious cartel offence either following a committal or by ex officio indictment; an application by the prosecutor for an extension of time to file an indictment for a serious cartel offence; an application by the accused in relation to a failure to file an indictment for a serious cartel offences within the prescribed time; and an appearance by the accused or the prosecutor, or both, in accordance with a bail order in relation to a serious cartel offence.

11. Subclause (2) provides that Divisions 1A applies to indictable primary proceedings. It also, in effect, defines "indictable primary proceedings". It means proceedings in the Court commenced by or including an event listed in subclause (1), any subsequent sentencing proceedings, and any proceedings that are ancillary to those already mentioned. Sentencing proceedings will include the hearing of an application for an order under section 19B of the *Crimes Act 1914*.

12. Subclause (3) clarifies that both the accused and the prosecutor are "parties" to the proceedings. In most Commonwealth cases the prosecutor is likely to be the DPP.

13. Subclause (4) clarifies that the Court does not have a general jurisdiction to deal with Commonwealth offences. Any reference to an offence in Division 1A must be read as limited to a serious cartel offence or another offence against Commonwealth law which is associated with that offence.

Subdivision B – Matters relating to indictments

Clause 23BA Indictment may include alternate counts

14. This clause provides that an indictment can include alternate counts against a single accused. This gives flexibility in a case where it is not clear what findings the jury will make but where more than one finding will support a conviction. The jury can be given the option of finding the accused guilty of one or other of the alternative counts. For example, an accused person may be charged as a principal to an alleged offence or, in the alternative, as a person who has aided and abetted the offence.

15. The trial judge will have inherent power to direct that one or more counts be removed from an indictment if he or she considers that it would be unfair for the trial to proceed on the indictment as filed.

Clause 23BB Single count can cover multiple accused

16. This clause provides that a single count in an indictment can cover more than one accused for the same indictable offence if the count is founded on the same or essentially the same alleged facts for each accused.

17. This is another common provision which gives flexibility to draft an indictment in a case where it is alleged that more than one person was party to an alleged offence. It is not necessary to have a lengthy indictment repeating the same allegations against each accused. This provision may be used if, for example, it is alleged that more than one accused was a party to the same criminal conspiracy. The prosecution will still need to prove its case separately against each accused and the jury will need to reach a separate verdict against each accused.

18. The provision ensures that, when appropriate, all relevant and related issues can be dealt with in one trial before one jury. The Court will have power under clause 23BC to prevent unfairness to the accused.

Clause 23BC Separating one or more accused from a single count

19. Subclause (1) gives the Court power to direct that one or more of the accused included in a single count in an indictment be tried separately, either in the same proceedings but on a different count in the indictment or in a separate trial, if satisfied that it is expedient to do so in the interest of justice.

20. Subclauses (2) and (3) give the Court power to make an order either before or after a trial has commenced and power to make any other orders that it considers appropriate in the circumstances.

Clause 23BD Single indictment can include multiple counts

21. Subclause (1) provides that an indictment may include counts for more than one indictable offence against a single accused if they are founded on the same alleged facts or they relate to a series of alleged indictable offences of the same or similar character or purpose.

22. Subclause (2) provides that an indictment may include counts against any number of accused for the same or different indictable offences if they are founded on the same or substantially the same alleged facts or they relate to a series of alleged indictable offences of the same or similar character or purpose.

23. These are common provisions which give flexibility to draft an indictment in a case where one or more persons are alleged to have engaged in a course of criminal conduct. They ensure that, when appropriate, all relevant and related issues can be dealt with in one trial before one jury. The Court will have power under clause 23BE to prevent unfairness to the accused.

Clause 23BE Separating one or more counts from a single indictment

24. Subclause (1) gives the Court power to direct that one or more of the counts in an indictment be tried separately in separate proceedings if satisfied that it is expedient to do so in the interest of justice. Any separate trial will have to take place under a new indictment.

25. Subclauses (2) and (3) give the Court power to make an order either before or after a trial has commenced and power to make any other orders that it considers appropriate in the circumstances.

26. This may occur if, for example, the Court considers that an indictment covers so many alleged offences, or so many accused persons, that it would be unfair to allow a matter to proceed as a single trial.

Clause 23BF Time within which indictments must be filed following committal order

27. This clause sets out the time limits within which an indictment must be filed if a person is committed to stand trial before the Court. Under subclause (2) the indictment must be filed as soon as practicable, but within three months after the committal order. The prosecutor may apply to the Court for an extension of time under subclause (6), but the application must be made within the three month period. The Court is unlikely to grant an extension unless the prosecution can provide an explanation for why it has not been able to prepare or file an indictment within the initial period.

28. There is an exception, under subclauses (3) and (4), if an indictment is filed in a case where the Court made an order for a separate trial. The rule is that the new indictment does not have to be filed until three months after the first trial has been completed, unless the Court makes an order to the contrary under subclause (5).

29. The purpose of these provisions is to ensure that the DPP is not under pressure to file a fresh indictment, and force a second trial, in a case where the public interest would be best served by allowing the DPP to complete the first trial before deciding whether there should be a second. That may be the case, for example, if the same person will be an accused in both trials and that person has limited resources. Subclause (5) gives the Court power to ensure that these provisions are not misused in a case where there is no public interest in allowing the DPP to complete the first trial before deciding whether there should be a second.

30. Subclause (8) ensures that the time limits under this clause only apply to proceedings before the Court. If an accused is committed for trial before a State/Territory Supreme Court, or an indictment is filed in a State/Territory Supreme Court, the appropriate time limits will be those, if any, which apply under State/Territory law.

Clause 23BG Consequences of not filing indictment within time

31. This clause sets out the consequences if the accused is committed for trial before the Court and an indictment is not filed within the time specified under clause 23BF. Under subclause (1) the court can discharge the accused and take other appropriate action. That may include making orders releasing the accused from custody or bail.

32. Subclause (3) makes it clear that the court cannot proceed with a trial as if an indictment has been filed and cannot acquit the accused.

33. Subclause (4) ensures that this clause does not apply if an indictment if filed in another court that has jurisdiction in relation to the offence. That will apply if an accused person is committed for trial before the Court but the DPP files an indictment in a State/Territory Supreme Court. The Court will not have power to discharge the person. The appropriate time limits will be those, if any, which apply under State/Territory law.

Clause 23BH Amending indictments

34. This clause sets out the rules for when the prosecution can amend an indictment that has been filed in the Court or replace an indictment.

35. Under subclause (1) the prosecutor can amend or replace an indictment at any time before a trial commences. The procedure for amending or replacing an indictment will be set out in the Rules. Subclause 23FA(2) provides that a trial starts when the accused is arraigned before a jury.

36. Subclause (2) provides that once a trial has commenced the prosecutor can only amend or replace an indictment with the leave of the Court.

37. Subclause (3) provides that if the prosecutor replaces an indictment the Court must dismiss the replaced indictment.

38. Subclause (4) provides that if an indictment is amended or replaced, the Court may make such orders as it thinks appropriate in the circumstances. For example, if an indictment is amended to remove a count against the accused, the Court could discharge the accused in relation to that count.

39. Subclause (5) makes it clear that this clause does not affect the amendment of an indictment under other provisions of Division 1A. Examples of such provisions are subclause 23CP(2) (the Court may amend an indictment to remove a defect objected to by the accused), clause 23FE (an indictment will be taken to have been amended if the prosecutor advises the Court that the accused has entered guilty pleas to some counts in satisfaction of others), subclause 23FF(2) (an indictment will be taken to have been amended if a plea is made under subclause 23FF(1)), and subclause 23FI(4) (an indictment can be taken to include an alternative count in some circumstances).

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

Clause 23CA Pre-trial hearings

40. Subclause (1) provides that, as soon as practicable after an indictment is filed in the Court, the Court must order the prosecutor and the accused to attend a pre-trial hearing before the Court and, at the hearing, must direct the accused to enter a plea to each count in the indictment that relates to the accused.

41. The purpose is to ensure that the Court is in a position to take control of the proceedings at an early stage and that it is made clear from that stage whether the accused pleads guilty or not. This is one of a set of provisions designed to ensure that pre-trial procedures can be used effectively to narrow the range of issues that will have to be dealt with at trial and to reduce the length of criminal trials.

42. Subclause (2) gives the Court power to order the parties to attend further pre-trial hearings. The Court will be able to use that power to explore the scope for narrowing the range of issues that will have to be dealt with at trial.

Clause 23CB Court may make orders during pre-trial hearings

43. This clause supports clause 23CA by providing power for the Court to make orders during a pre-trial hearing.

44. Subclause (2) sets out a non-exclusive list of the orders that can be made and is designed to avoid doubt about whether, for example, the Court can make orders at the pre-trial stage that will govern the conduct of the trial. Among other things, the Court can make orders in relation to the admissibility of evidence and on any legal issues which are likely to arise at trial. The Court will have power to move as much legal argument as possible to the pre-trial stage to save time and resources when the trial starts. The Court may, for example, hear and make rulings on arguments about the admissibility of business records and other formal material before a jury has been empanelled.

45. The Court will also have power to rule on an objection to the indictment or a submission that the trial should not proceed for any other reason. This would include a claim based on autrefois acquit, autrefois convict or a pardon.

46. Subclause (3) has the effect that any ruling made in the pre-trial process will be binding at a trial, irrespective of which judge has made the ruling, unless the trial judge is satisfied that applying the ruling would be contrary to the interests of justice.

Clause 23CC Matters that must be raised during pre-trial hearings

47. This clause has the effect that an accused who wants to object to an indictment or submit that the trial should not proceed for any other reason must normally raise their objection in the pre-trial process. The clause provides that if a matter covered by paragraph 23CB(2)(b) or (e) was not raised during the pre-trial hearings, it cannot be raised at trial unless the trial judge is satisfied that not to do so would be contrary to the interests of justice.

48. The clause is part of a set of provisions designed to ensure that, as far as possible, issues which can be dealt with in the pre-trial process are dealt with at that stage.

Clause 23CD Court may order pre-trial, and ongoing, disclosure

49. This clause gives the Court power to make orders for disclosure by the prosecution and the accused. The disclosure regime only applies if the Court makes an order under this clause.

50. If the Court makes an order for disclosure, subclause (1) provides for a three stage process: prosecution disclosure in accordance with clause 23CE; the accused's response in accordance with clause 23CF; and the prosecution's response to the accused's response in accordance with clause 23CG. Paragraph (1)(d) also imposes ongoing disclosure obligations on both parties in accordance with clause 23CH.

51. The pre-trial disclosure provisions have two purposes. The first is to ensure that the accused knows the case against them and has access to any unused material which is potentially relevant to responding to that case. The second is to ensure, as far as possible, that any matters and facts which are not in dispute are identified in advance of the trial so that the trial can concentrate on matters which are genuinely in dispute.

Clause 23CE Disclosure of case for the prosecution

52. This clause outlines what the prosecution must disclose if the Court makes an order under clause 23CD.

53. The prosecution must provide a notice of its case, which includes an outline that sets out the facts, matters and circumstances on which the case is based. The prosecution must provide copies or access to the material it intends to rely on. The prosecution must also disclose any material which it does not intend to use but which is potentially relevant to the case of the accused or that might adversely affect the reliability or credibility of a

prosecution witness. The prosecution can meet its obligations in relation to unused material by giving copies of the material to the accused or by giving the accused details of the material which are sufficient to enable the accused to determine if it wants to see the material. The latter procedure may be used if the relevant material is voluminous or sensitive. If the accused asks for access, a decision can be made on whether to allow access and, if so, in what form. If necessary, the prosecution can seek a direction from the Court.

54. The prosecution must also provide a list of any material that is not in its possession but which the prosecutor reasonably believes may be relevant to the accused's case. The prosecution must also provide a copy of any information, document or other thing that is adverse to the accused's credit or credibility.

55. This clause is designed both to ensure that as many issues a possible are resolved at the pre-trial stage and that the prosecution makes full and proper disclosure to the accused of material that it does not rely on but which has the potential to help the accused.

56. In most cases the prosecution will already have disclosed part or all of this material to the accused. Clause 23CK makes it clear that information which has already been disclosed does not have to be disclosed a second time.

57. This clause does not impose an obligation on the prosecution to speculate about what defences the accused may plan to run. The obligation in relation to unused material is to disclose information, documents or things in the prosecutor's possession that the prosecutor reasonably believes may be relevant to the accused's case. The clause does not require the prosecution to consider fanciful or unrealistic defences that the defence may want to run.

58. The list of matters is not exhaustive. The notice of the prosecution's case can include other matters.

Clause 23CF Accused's response

59. This clause outlines what the defence must disclose if the Court makes an order under clause 23CD.

60. The accused must provide a statement setting out, for each fact, matter and circumstance set out in the notice of the prosecution's case, whether the accused agrees or takes issue with it. If the accused takes issue, the accused must set out the basis for taking issue. This does not require the accused to disclose their defence. However, the accused must do more than make a blanket statement that all some or all matters alleged by the prosecution are in dispute.

61. The accused must also notify the prosecution if any of the prosecution statements can be tendered at the trial without calling the witness; whether the accused requires the prosecutor to call witnesses to corroborate surveillance evidence; whether the accused requires the prosecutor to prove the continuity of handling of specified exhibits or the

accuracy of any specified exhibits that are transcripts, summaries or charts; whether any expert report is agreed or not and whether it can be tendered at trial without the expert being called as a witness at the trial; and whether the accused gives consent to any matters under section 184 or 190 of the *Evidence Act 1995*.

62. The accused must give notice if he or she intends to raise a defence of alibi or adduce evidence that the accused was suffering from mental impairment. Provisions to this effect are common in State/Territory law and ensure that the prosecution gets notice of the relevant matter before trial so that the issue can be properly tested at trial. These are the only circumstances in which an accused is required to disclose details of a proposed defence.

63. The accused must also provide a copy of any export report the accused proposes to rely on at trial. This is designed to ensure that any issues that depend on expert evidence are resolved, to the extent possible, before trial. This is the only situation in which there is a requirement for the accused to provide copies of evidential material to the prosecution.

64. The list of matters is not exhaustive. The notice of the accused's case can include other matters. The more an accused is prepared to disclose at the pre-trial stage, the more likely it is that issues will be resolved at that stage with resultant saving of time and cost at the trial stage.

Clause 23CG Prosecutor's response to accused's response

65. This clause does two things.

66. The first is that it requires the prosecutor to respond to any matters contained in the accused's response which call for a response from the prosecutor. The accused's response may not contain any such matters but, if it does, this clause requires the prosecutor to respond, including giving notice on whether the prosecutor requires the accused to prove the continuity of exhibits or the accuracy of any exhibits that are transcripts, summaries or charts. It also requires the prosecutor to state whether any facts are admitted, whether the prosecutor accepts the opinions expressed in an expert report and whether an expert report, or any other evidence, can be tendered without a person being called as a witness.

67. The second is that the prosecutor must make additional disclosure if it becomes apparent, as a result of the accused's response, that material not previously disclosed may be relevant to the accused's case.

68. This clause, like clause 23CE, is designed both to ensure that as many issues as possible are resolved at the pre-trial stage and that the prosecution makes full and appropriate disclosure to the accused.

Clause 23CH Ongoing disclosure obligations

69. This clause sets out what ongoing disclosure obligations rest on the parties if the Court has made an order under clause 23CD.

70. Under subclause (2) the accused has an ongoing obligation to notify the prosecution if the accused changes position on whether to agree to a matter or give consent on a matter, or if the accused takes issue with a matter on an alternate or additional basis. The accused must also provide the prosecution with a copy of any expert report that the accused intends to rely on at the trial or give notice if the accused proposes to adduce evidence of an alibi or of a mental impairment.

71. Under subclauses (4) and (5), the prosecution has similar obligation but must also disclose any material that would have been disclosed under clause 23CE or 23CG, as appropriate, if the prosecution had possession of it, or appreciated its relevance, when those clauses applied.

72. This clause recognises that additional material can come into possession of the prosecution or the accused after formal disclosure has been completed and that a party may decide to alter the basis on which it will present its case. The disclosure regime should continue to operate notwithstanding that the formal process may have been completed.

73. Subclause (2) will apply if an accused holds an expert report but has not decided whether or not to rely on the report at trial. The accused does not have to provide a copy of the report to the prosecution unless and until the accused decides to rely on the report at trial. However, if the accused decides to rely on the report at trial, the effect of subclause (2) is that the accused must provide a copy of the relevant report to the prosecution as soon as practicable after that decision is made.

Clause 23CI Copies of things need not be provided if impracticable etc.

74. This clause makes it clear that a party does not have to provide a copy of a thing under the disclosure regime if it is unlawful, impossible or impracticable to provide a copy. However, under subclause (2), the party must allow the other party a reasonable opportunity to inspect the thing.

75. This clause will apply if, for example, an exhibit cannot be easily copied or if it would be an offence for the other party to possess a copy.

Clause 23CJ Personal details need not be provided

76. This clause protects personal details of potential prosecution witnesses.

77. Subclause (1) provides that nothing in the disclosure regime requires the prosecutor to disclose the address or telephone number of a witness or other living person, unless that information is relevant to the issues in the trial or the Court makes an order directing disclosure. Subclause (2) provides that the Court cannot make an order

for disclosure unless it is satisfied that the accused has a legitimate need for the information and that, if the disclosure is likely to present a risk to a person's safety or welfare, the accused's need for the information outweighs that risk.

78. Subclause (4) gives the prosecution authority to delete these details, or render them illegible, before providing material to the accused.

79. This clause recognises that there may be cases where potential prosecution witnesses may be at risk of intimidation and that, in most cases, the accused does not need personal details of this kind to prepare for trial.

80. Subclause (3) provides that the clause does not prevent the disclosure of an address if the disclosure does not identify it as a particular person's address or if it could not reasonably be inferred from the matters disclosed that it is a particular person's address.

81. When a witness gives evidence at trial, the Court will have power under clause 23HC to make any orders that may be needed to protect the witness.

Clause 23CK Things need not be disclosed more than once

82. This clause makes it clear that a party does not have to disclose anything under the disclosure regime which has already been disclosed, either during the proceedings or any relevant committal proceedings.

Clause 23CL Effect on legal professional privilege and other privileges and duties etc.

83. This clause deals with the effect of the disclosure regime on legal professional privilege, other privileges, public interest immunity and the *National Security Information (Criminal and Civil Proceedings) Act 2004*. It also deals with the effect of the disclosure regime on investigative agencies. Subclause (5) makes it clear that legal professional privilege includes client legal privilege.

84. Under the pre-trial disclosure provisions, the prosecution **must** provide copies or access to the material it intends to rely on in the proceedings. The prosecution **must** also disclose any material which it does not intend to use but which is potentially relevant to the case of the accused or that might adversely affect the reliability or credibility of a prosecution witness. The accused **must** also provide a copy of any expert report the accused proposes to rely on at trial. This is the only situation in which there is a requirement for the accused to provide copies of evidential material to the prosecution, unless the accused intends to raise a defence of alibi or mental impairment.

85. This clause clarifies the relationship between these mandatory disclosure requirements and privileges such as legal professional privilege. For the purposes of pre-trial disclosure, legal professional privilege is automatically abrogated and the Court can order that other immunities, privileges or restrictions do not apply.

86. Criminal proceedings are routinely delayed by claims for legal professional privilege, some of which are eventually overruled after delaying proceedings for months or, in many cases, years. This provision balances the policy objectives underlying the disclosure regime of maximising disclosure of each party's case against the rationale for protecting privilege. The partial abrogation of privilege for pre-trial disclosure but not for the trial appropriately achieves this balance.

87. 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.

88. If material is adduced at trial, privilege will be waived. A policy decision has been taken that it is appropriate that material be disclosed earlier in the proceedings to ensure that the disclosure regime is effective. It is also recognised that material disclosed at the pre-trial stage, may not in fact be used in the proceedings. To ensure a party is not disadvantaged by the disclosure of this material, legal professional privilege is only abrogated at the pre-trial stage. The party's claim to legal professional privilege still exists at the trial.

Legal professional privilege

89. The clause provides that a party is not excused from disclosing material on the basis that the material is subject to legal professional privilege held by the party. The disclosure regime does not otherwise abrogate or affect the law relating to legal professional privilege.

90. These provisions make it clear, to avoid doubt, that if there is an obligation on a party to disclose material under the disclosure regime, that obligation overrides any claim for legal professional privilege in relation to the material that can be raised by the party. However, if the material is disclosed that will not amount to a waiver of privilege. It will not prevent the party from claiming legal professional privilege, if they wish to do so, at the trial or in any other proceedings.

91. These provisions will have minimal impact on the rights of an accused person given the limited nature of the material which an accused person is required to produce. The effect of clauses 23CF and 23CH is that the only documentary material an accused person can be ordered to disclose is any expert report they intend to rely on at trial.

92. The provisions may have more impact on the prosecution, given the wider range of material the prosecution can be ordered to disclose. However, even then, most of the material which the prosecution can be required to produce is unlikely to be covered by legal professional privilege except to the extent that material that came into existence for use in litigation normally attracts legal professional privilege.

93. The provisions do not override any claim for legal professional privilege that a third party has made in relation to material. In those circumstances, the claim of privilege should be resolved before the material can be disclosed by a party to the proceedings under the disclosure regime. If the claim is upheld, the material cannot be disclosed.

Other privileges

94. Subclause (1) gives the Court power to make an order about whether any other immunity, privilege or restriction should apply when material must otherwise be disclosed.

95. It is not possible to predict all the possible claims that may be made for immunity, privilege or restriction. This provision gives the Court power to determine whether or not a claim should be upheld. The Court will be able to balance any public interest in upholding the claim against the public interest in the effective operation of the disclosure regime.

96. If the claim is upheld, subclause (2) will operate. Disclosure of the material will not amount to a waiver of privilege or affect the law relating to any immunity or restriction. It will not prevent the party from claiming any immunity, privilege or restriction, if they wish to do so, at the trial or in any other proceedings.

Public interest immunity

97. Subclause (3) preserves the operation of public interest immunity. A party will be able to withhold material if there is a claim for public interest immunity. If there is such a claim, the Court will need to rule upon it applying normal principles.

National Security Information (Criminal and Civil Proceedings) Act

98. Subclause (3) also preserves the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004*. If that Act applies to particular material, the question whether the material should be disclosed and, if so, in what form, will be determined under the provisions of that Act.

Investigative agencies

99. Subclause (4) provides that the disclosure provisions do not abrogate or affect the law relating to any duty of a person investigating the accused to ensure that information and other things are disclosed to the prosecutor or the accused.

100. The provisions of this Bill do not impose any new obligations on an investigative agency, and it is not appropriate for it to do so given that the investigative agency will not be a party to the proceedings before the Court. However, the Bill will not detract from or alter the normal duties and obligations of an investigative agency to ensure that the prosecution is equipped to discharge its disclosure obligations, and will not affect the normal power of the Court to prevent a trial from proceeding if the Court considers that would be unfair unless further material is disclosed to the accused.

Clause 23CM Consequences of disclosure requirements

101. This clause deals with sanctions if a party fails to comply with its obligations under the disclosure regime. It provides an incentive for both parties to cooperate with the Court to resolve as many issues as possible at the pre-trial stage.

102. A disclosure regime is only likely to work effectively if the parties are prepared to cooperate and the trial judge is prepared to make orders to support compliance. The prosecution will normally have an incentive to comply with its disclosure obligations, because of the risk that the Court may not allow the trial to proceed, but the accused may not have the same incentive. The accused may, in fact, be concerned that complying even with limited obligations that are imposed on an accused has the potential to prejudice their position at trial. This clause gives the Court a range of powers to encourage compliance and imposes a range of potential sanctions that can be imposed if a party doe not comply.

103. Subclause (1) provides that the Court may make such other orders as it thinks appropriate in the circumstances in relation to a party's compliance, or failure to comply, with an order under clause 23CD.

104. Subclause (2) provides that, without limiting the range of options, the Court may make any or all of the following orders:

- that evidence not be admitted;
- that a party not be allowed to call an expert witness;
- that a party be allowed to tender a statement or other document as evidence of its contents;
- that the accused not be able to take issue with a fact, matter or circumstance;
- grant an adjournment to a party.

105. The Bill includes a note that the Court may think it inappropriate to do any of the above things if, for example, a party's failure to comply with an order under clause 23CD was due to an honest mistake. The Court must ensure that any orders it may make under this clause do not cause unfair prejudice to an accused.

106. It will not be open to the trial judge or a party to comment at trial on a failure by the accused to comply with a disclosure obligation. This could give the jury the impression that that accused failed to comply because of a consciousness of guilt, and that may be unfairly prejudicial.

107. In addition to this clause, subsection 16A(2) of the *Crimes Act 1914* is amended under item 21 to provide that one of the things a court must take into account when imposing a sentence on a person convicted of a Commonwealth offence is the extent to which the person has failed to comply with any order or other obligation about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence.

108. A person cannot get a discount at sentence for complying with their pre-trial obligations, since all they will have done is comply with a legal requirement. However, if convicted, there is a risk that they will receive a penalty higher than would have been imposed if they fail to comply with pre-trial obligations.

Clause 23CN Restricting further disclosure of disclosed material

109. This clause restricts the things that can be done with material that is disclosed under the disclosure regime. This is an important provision designed to protect persons whose rights and interests may be prejudiced by material released under the disclosure provisions.

110. The clause applies to material disclosed by either party. The clause refers to such material as "protected material".

111. Subclause (2) makes it an offence for a person who has access to protected material (described as an "entrusted person") to disclose the material to another person. The maximum penalty is imprisonment for 2 years.

112. Subclause (3) sets out a number of exceptions to the prohibition to ensure that the protected material can be used for appropriate purposes and that the protection does not apply too widely. They are that the disclosure is for the purposes of the proceedings; the Court has given leave for the disclosure; the disclosure happens for the purposes of, or in connection with, the performance of the duties of the entrusted person's official employment; or the material has been lawfully disclosed in open court by, for example, being adduced in evidence.

113. A defendant will bear an evidential burden in relation to a matter in subclause (3). That is appropriate given the practical difficulties that would face the prosecution if it was required to prove that none of the exceptions applied in a given case given the range of matters covered by the exceptions. The defendant will know why he or she made the relevant disclosure, and in what circumstances, and should have no difficulty in discharging an evidential burden if their conduct fell within one of the exceptions.

114. The term "official employment" is defined in subclause (5). It means employment as the DPP, a member of the staff of the Office of the DPP, a Special Prosecutor, the Attorney-General, a person appointed by the Governor-General in relation to the prosecution, a person performing services for any one of those persons, or a person exercising the powers or performing the functions of the DPP.

Clause 23CO Restricting admissibility of disclosed material as evidence in other proceedings

115. This clause limits the use which can be made of material that has been disclosed under the disclosure regime. It protects the position of an accused person who discloses prejudicial information and of a person whose rights may be affected if information disclosed by the prosecution can be used in evidence.

116. Subclause (1) gives the Court power to order that some or all of the material is not admissible in any court or before a person authorised to hear evidence. A party can apply for an order under subclause (1) at the time it discloses material or a later time.

117. Subclause (2) provides that a subclause (1) order will cease to have effect if, during the indictable primary proceedings, the material is lawfully disclosed in open court.

118. Subclause (3) modifies the operation of the clause. It gives the Court power to set aside or vary an order made under subclause (1), and allow material to be used in later proceedings, if the Court is satisfied that it is in the interests of justice to do so. An application for an order under subclause (3) can be made by any interested person. That term is not defined. It covers any person who can satisfy the Court that they have an interest in having the order set aside or varied. It may, for example, be the DPP who wants to use the material in a later prosecution, or it may be a party in civil proceedings who wants to use the material to establish a civil claim.

119. If there is an application under subclause (3) the Court will balance the public interest in allowing the material to be used in evidence against the public interest in ensuring that a person does not suffer undue prejudice because material that otherwise be confidential has been disclosed under the disclosure regime.

120. Subclause (4) provides that, before making an order under subclause (3), the Court may direct that notice of the application for the order be given to such persons as it thinks fit or be published in such manner as it thinks fit, or both. That provision is needed because an application for an order under subclause (3) may relate to material that affects the rights of a person who is not a party to the later proceedings.

121. It is possible, for example, that a party to a civil action may want to use material that was disclosed by the DPP in earlier criminal proceedings. The Court may consider that the DPP should be given an opportunity to make submissions before deciding whether to allow the material to be used in the civil proceedings.

Clause 23CP Objecting to indictments

122. Subclause (1) sets out the grounds on which an accused may object to a count in an indictment. They are a formal defect apparent on the face of the indictment, the Court lacks jurisdiction, autrefois acquit, autrefois convict, or a pardon.

123. The effect of clause 23CC is that the objection must be raised during a pre-trial hearing unless the Court allows otherwise.

124. Subclause (2) sets out the things the Court can do if it upholds an objection to a count in an indictment. They include quashing the count in relation to the accused, discharging the accused in relation to the count, and, if appropriate, quashing the indictment. The Court can also make such other orders as it thinks appropriate including, for example, orders in relation to bail and custody.

125. Subclause (2) also provides that the Court can make an order allowing the indictment to be amended if the objection relates only to a formal defect apparent on the face of the indictment.

Clause 23CQ Examining witnesses after committal in absence of the jury

126. This clause gives the Court power to direct that a prosecution witness appear for examination before the Court or a Judge, the Registrar, a Deputy Registrar, a District Registrar or a Deputy District Registrar. If a person is examined under this clause they will be examined in the absence of a jury but the Court can permit either or both of the parties to question the person.

127. Either party can apply for a direction under this clause but the witness must be a person who the prosecutor proposes to call as a witness at the trial and must be a person who has not already been examined in committal proceedings.

128. A procedure of this kind is often referred to as a Basha inquiry.

129. The applicant must satisfy the Court that it would be contrary to the interests of justice to proceed to trial without the witness being examined. Subclause (4) provides that the absence of committal proceedings does not, of itself, mean it will be contrary to the interests of justice to proceed to trial without the person being examined.

130. The purpose of the provision is to give the Court power to make an order for a preliminary examination of a witness if the Court considers that it would be unfair to proceed to trial without an examination. Alternatively the Court may consider that there is a realistic prospect of shortening the trial if the proposed witness is examined in advance of the trial.

131. The provision does not provide an alternative to a committal hearing in those jurisdictions where committal hearings have been abolished. The Court must be satisfied that there are reasons why it would be contrary to the interest of justice for the matter to proceed to trial without the particular witness being examined.

132. This provision can also potentially be used if an accused has been committed for sentencing without a committal hearing but is given leave to change the plea to not guilty by the Court. The Court will not have power to refer the matter back to the committal court for a committal hearing.

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

Clause 23DA Simplified Outline

133. This clause provides a simplified outline of Subdivision D for the assistance of those reading the Bill.

Clause 23DB Application to criminal proceedings

134. This clause makes it clear that Subdivision D applies to juries in criminal proceedings. The provision relating to juries in civil proceedings is section 41 of the Federal Court Act.

Clause 23DC Number of jurors on jury

135. This clause provides that the number of jurors is 12, which is the traditional number for a jury in a criminal matter, although the Court has power to empanel up to 15 jurors. This reflects there may be some wastage of jurors in a long running case. Only a maximum of 12 jurors can retire to consider a verdict.

Clause 23DD Continuation of the trial with a reduced jury

136. This clause provides that the number of jurors can drop as low as 10, either during the trial or after the jury has retired, without requiring that the trial be abandoned or invalidating the jury's verdict. This recognises that jurors may become unable to fulfil their duties due to illness or other unforseen events. A trial cannot proceed if there are fewer than 10 jurors.

Clause 23DE Ballot to reduce additional jurors

137. This clause applies if more than 12 jurors are empanelled, and there are still more than 12 jurors by the time the jury is required to retire to consider its verdict. The Court must hold a ballot to reduce the number of jurors to 12. The foreperson will not participate in the ballot. The 12 jurors who retire will be the foreperson and 11 others chosen by ballot. Any jurors not selected from the ballot are discharged at the end of the ballot by operation of clause 23EJ.

Clause 23DF Jury districts (establishment and boundaries)

138. This clause provides that the Sheriff can determine jury districts. There can be more than one district for a particular State or Territory. Subclause (3) makes it clear, for avoidance of doubt, that a determination is not a legislative instrument. A determination will not determine the law, but will apply the law in a particular case.

139. Under subsection 33(3) of the *Acts Interpretation Act 1901*, if an Act confers a power to make, grant or issue an instrument the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to

the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Clause 23DG Jury roll for a jury district

140. This clause has the effect that the jury roll for a jury district is the electoral roll for the federal electorates covered by that district, as given to the Registrar under item 4 of the table in subsection 90B(4) of the *Commonwealth Electoral Act 1918*. That remains the jury roll for the relevant jury district unless the Registrar is given an updated electoral roll or the jury roll is more than 12 months old.

Clause 23DH Qualification and liability for serving on jury

141. Subclause (1) provides that a person is qualified to serve as a juror if the person's name is on the jury roll for the applicable jury district and the person is entitled to vote at elections of Members of the House of Representatives in accordance with subsection 93(2) of the *Commonwealth Electoral Act 1918*.

142. Subclause (2) provides that a person who is qualified to serve as a juror is liable to serve as a juror unless they are excused from service under a provision of the Bill or discharged under a provision of the Bill.

143. Subclause (3) provides that anything done by a jury is not invalid merely because a juror was not qualified to serve as a juror. This provision ensures that the outcome of a trial cannot be set aside solely on the grounds that one of the jurors was not technically qualified to serve on the jury.

Clause 23DI Disqualification from serving on jury (convictions, charges, detention orders etc.)

144. Subclause (1) sets out the rules relating to jury qualification that apply when a person has been prosecuted for a criminal offence or is facing prosecution. Not everyone who has been convicted of an offence is disqualified from jury service. There is a balance between the need to protect the integrity of the jury process and a recognition that a jury should be drawn from as wide a range of the community as reasonably practicable.

145. A person is not qualified to serve as a juror if they have been convicted of an offence against a law of the Commonwealth, a State/Territory or foreign country and sentenced to imprisonment for life or more than 12 months or, in the case of a foreign country, sentenced to death.

146. A person is not qualified to serve as a juror if the person has been tried for an offence against a law of the Commonwealth, a State/Territory or foreign country and ordered to be detained for life, or for a period of more than 12 months, in a hospital, juvenile facility or other detention facility.

147. A person is not qualified to serve as a juror if they have within the last 10 years been convicted of an offence against a law of the Commonwealth, a State/Territory or foreign country and sentenced to serve a term of imprisonment (including by way of periodic detention).

148. A person is not qualified to serve as a juror if the person has, within the last 10 years, been tried for an offence against a law of the Commonwealth, a State/Territory or foreign country and ordered to be detained in a hospital, juvenile facility or other detention facility.

149. A person is not qualified to serve as a juror if the person is currently serving a term of imprisonment (including by way of periodic detention); being detained in a hospital, juvenile facility or other detention facility; or is subject to an order for periodic home detention or periodic detention in a hospital, juvenile facility or other detention facility.

150. A person is not qualified to serve as a juror if the person is currently subject to a good behaviour bond, community service order or similar order; is currently being held in custody; or has been charged with an offence against a law of the Commonwealth, a State/Territory or foreign country and is at liberty, including liberty on bail.

151. Subclause (2) gives an extended meeting to the concept of serving a term of imprisonment. It includes a suspended sentence and a person who has been released on parole or probation.

152. Subclause (3) makes it clear that a disqualification does not apply if a relevant conviction, sentence or order has been set aside on appeal or as a result of a pardon.

Clause 23DJ Disqualification from serving on jury (professional ineligibility)

153. This clause lists the persons who are not eligible to serve as a juror because of their employment or profession.

154. The clause recognises the need to preserve public confidence in the integrity of the jury process and avoid any possible perception that the outcome of a jury trial may have been affected by the composition of the jury.

155. Subclause (1) provides that a person is not qualified to serve as a juror if the person is the Governor or Administrator of a State or Territory; a judge or other judicial officer; a member of the Parliament or Legislative Assembly of a State or Territory; a qualified legal practitioner who holds a practising certificate; or a person whose duties or activities involve or are connected with the investigation or prosecution of criminal offences, the administration of justice or the punishment of offenders.

156. Subclause (1) also provides that a person is not qualified to serve as a juror if the person is excluded by State or Territory law from serving as a juror in a court of that State or Territory and is so excluded because the person's current duties or activities involve or are connected with public administration or emergency services.

157. This provision is designed to ensure that a person cannot be required to perform jury duty in a State or Territory if the Parliament or Legislative Assembly of that State or Territory has determined that the person cannot be spared for jury service because of the role they perform in the public administration or emergency services of that State or Territory.

158. Subclause (3) makes it clear that subclause (1) applies whether the position held by a person is paid or not.

159. Subclause (1) operates in addition to any other Commonwealth law that exempts or disqualifies a person or categories of persons from jury service. Those laws include section 147 of the *Navigation Act 1912* and the *Jury Exemption Act 1965*. Subclause (2) makes it clear that subclause (1) does not override other applicable Commonwealth laws.

Clause 23DK When Sheriff is to convene a jury panel

160. Subclause (1) provides that the Sheriff must convene a jury panel if the Court gives a written direction to do so. A written direction will normally be given at the point where the pre-trial procedures have been completed and the matter is ready to proceed to trial.

161. Under subclause (2), the direction must specify the place where the jury is to sit.

162. Subclause (3) provides that the Sheriff must comply with the direction.

Clause 23DL Sheriff to select the jury district for the proceedings

163. This clause applies if the Sheriff is directed to convene a jury panel.

164. Subclause (1) provides that the Sheriff must determine which jury district is to apply to the proceedings. This can be the jury district, if there is one, that includes the sitting place but it can be another jury district provided that jury district is in the same State or Territory as the sitting place and is near the sitting place.

165. In most cases it is likely that the Sheriff will select the jury district that includes the sitting place, since that will mean that jurors do not have to travel a long distance to attend court. However, subclause (1) gives the Sheriff flexibility to select another appropriate jury district if, for example, there is no jury district that includes the sitting place or there have been a number of recent trials at the relevant sitting place and it may be difficult to convene another jury from the jury district that includes the sitting place.

166. A determination under subclause (1) must be in writing but subclause (3) makes it clear, for the avoidance of doubt, that a determination is not a legislative instrument. A determination will not determine the law, but will apply the law in a particular case.

Clause 23DM Sheriff to prepare the jury list for the proceedings

167. This clause applies after the Sheriff has selected a jury district for the proceedings. The Sheriff must then prepare a jury list.

168. The jury list consists of names, addresses, dates of birth and sex of persons selected at random from the jury roll for the applicable jury district. The number of persons on the list must be the number the Sheriff thinks is adequate to allow a jury to be empanelled. The Sheriff will normally have regard to a range of matters in deciding how many persons to include on the jury list, including the likely length of the trial and the number of persons who are likely to be unable to perform jury service.

169. Subclause (5) gives the Sheriff power to add additional persons to the jury list if it becomes apparent that the number of persons initially on the list is not sufficient. That may happen if, for example, more persons are excused from jury service than expected.

170. Subclause (6) makes it clear, for the avoidance of doubt, that a jury list is not a legislative instrument. A jury list will not determine the law, but will apply the law in a particular case.

Clause 23DN Investigation and questionnaires

171. This clause gives the Sheriff the power to make enquiries, before issuing summonses, to determine whether a person included on the jury list is not qualified to serve as a juror or should be excused from serving as a juror. The inquiries can take the form of a questionnaire to some or all of the persons included in the jury list but can take other forms.

172. Under subclause (3) a person who receives a questionnaire must complete the questionnaire in the manner specified and return it to the Sheriff within 14 days. It is an offence under clause 58AE if a person fails to return, or properly complete, a questionnaire. Sections 28A and 29 of the *Acts Interpretation Act 1901* explain how a questionnaire can be sent, and when it is taken to be received.

173. Subclause (4) provides that a failure to comply with subclause (3) does not affect the retention of the person's name on the jury list. This means that a person cannot avoid jury service simply by failing to respond to a questionnaire.

174. Subclause (5) gives the Sheriff power to obtain information from the Commissioner of the Australian Federal Police about the criminal history of any person included in the jury list. If a request is made, the Commissioner must give the relevant information to the Sheriff. This information must include details of any spent convictions (see the changes made to Division 6 of Part VII of the *Crimes Act 1914* under item 25).

175. Subclause (6) gives the Sheriff power to give to the Court any information that he or she obtains from the Australian Federal Police under this clause. If the information indicates that a person is not qualified, the Sheriff has power to remove the person's name from the jury list under clause 23DO and there will be no need to pass the

information on to the Court. However, there may be cases where the Sheriff considers that the Court should be aware of the relevant information even though it does not provide a basis for action under clause 23DO.

176. Subclause (7) restricts the use the Sheriff can make of information that he or she obtains from the Australian Federal Police. The Sheriff must not disclose the information except to the Court under subclause (6) or otherwise for the purposes of the Federal Court Act.

Clause 23DO Removing names from jury list

177. This clause gives the Sheriff power to remove a person's name from the jury list, without referring the matter to the Court. The Sheriff must do this if satisfied that the person is not qualified to be a juror; or if the Sheriff would excuse the person from jury service under clause 23DQ if the person applied to be excused; or if the Sheriff would excuse the person under clause 23DR if the person was summonsed and attended for jury service.

178. The provision ensures that the Sheriff is not required to send summonses to persons who are ineligible to perform jury service or who are likely to be excused from jury service in the process of jury selection.

Clause 23DP Jury summonses

179. Subclause (1) requires the Sheriff to issue summonses to a sufficient number of persons on the jury list to allow the empanelment of the jury. It is an offence under clause 58AA for a person who has been summonsed to fail to attend for jury service unless the person has been excused.

180. Subclause (2) provides that the persons to be summonsed are to be selected at random from the jury list. Subclause (3) provides that a summons must be in the form, and be served, as provided for in the Rules.

181. Subclause (4) gives the Sheriff power to withdraw a summons issued under this clause. That will apply if, for example, an accused person changes their plea to guilty after summonses have been served but before a jury has been empanelled. The Sheriff can withdraw the summonses and the persons in question do not commit an offence by failing to attend court.

Clause 23DQ Sheriff's power to excuse—on application

182. Subclause (1) gives the Sheriff power to excuse a person from jury service if there is an application by the potential juror or an interested person on the potential juror's behalf. The Sheriff can excuse the person at any time before the person is seated in the jury box under clause 23DU.

183. Under subclause (2) the Sheriff can only exercise this power if the Sheriff is satisfied that there is good cause to excuse the potential juror because of the health of the

potential juror; undue financial or other hardship to the potential juror or another person; recent service on a jury in any jurisdiction in Australia; substantial inconvenience to the public; or the potential juror's inability, in all the circumstances, to perform the duties of a juror to a reasonable standard.

184. If a person wants to be excused for any other reason they must make an application to the Court under clause 23DV.

185. If a person applies to be excused on grounds of disability the Sheriff must have regard to the *Disability Discrimination Act 1992* before making a decision and determine whether there are any ways the person can be assisted to perform jury service.

Clause 23DR Sheriff's power to excuse—on own initiative

186. Subclause (1) gives the Sheriff power to excuse a potential juror from serving on the jury, on his or her own initiative, if the Sheriff is satisfied either that the potential juror is not required for jury service or is unable to perform the duties of a juror to a reasonable standard. This power can be exercised at any time before the potential juror is seated in the jury box.

187. The Sheriff must have regard to the *Disability Discrimination Act 1992* before deciding that a person is able to perform there duties of a juror to a reasonable standard, including whether any action can be taken to allow the person to perform duties as a juror.

188. Subclause (2) places an obligation on the Sheriff to excuse a potential juror from serving on the jury if the Sheriff becomes aware that the person is not qualified to serve as a juror.

Clause 23DS Preparing the jury panel

189. Subclause (1) provides that the Sheriff must prepare a jury panel for the trial by listing the names, addresses and dates of birth of each potential juror who has attended in accordance with a jury summons or, if more potential jurors have attended than are needed, an adequate number of potential jurors selected at random from those who have attended.

190. Subclause (2) provides that only potential jurors who are qualified to serve as jurors and have not been excused from jury service can be included on the jury panel.

191. Subclause (3) provides that the Sheriff must assign a number to each potential juror who is included on the jury panel, indicating the number next to the person's name on the list prepared.

192. Subclause (4) provides that a potential juror, who is not excused by the Sheriff, remains liable to be included on the jury panel until the potential juror is discharged. This means that a person whose name is not included on the initial jury panel can be added to the panel if that becomes necessary.

193. A potential juror will be discharged if they are excused or successfully challenged (clause 23EI). A potential juror is taken to be excused if a jury is empanelled and either that jury is not discharged under subclause 23EL(1) or, if it is discharged under that subclause, no direction is made under subclause 23EM(3).

Clause 23DT Preparing to empanel the jury

194. Subclause (1) provides that, at the beginning of the trial, the Sheriff must give the Court the list of potential jurors on the jury panel prepared under subclause 23DS(1) and facilitate the attendance in court of those potential jurors.

195. Subclause (2) provides that, before the jury selection process begins, the Court must inform the parties to the trial that the potential jurors whose names and/or numbers are to be called may become jurors for the trial and if the party wishes to challenge any of them, the party must make the challenge before the potential juror sits in the jury box.

196. Subclause (3) provides that, before the jury selection process begins, the Court must inform the potential jurors of the nature of the trial in question, including the alleged offences, the identities of the parties and, to the extent known to the Court, the principal witnesses to be called during the trial. The Court will normally know what witnesses the prosecution proposes to call but may not know what witnesses the accused proposes to call. The Court must call on the potential jurors to apply to be excused if they consider that they are not able to give impartial consideration to the case or that they should be excused for any other reason.

Clause 23DU Empanelling the jury

197. Subclause (1) provides that the Court must ensure that an officer of the Court calls out the name or number of a potential juror selected at random from the jury panel. Normally the officer will call out the name of a potential juror but the Court has power under subclause 23EB(2) to direct that one or more potential jurors be called by number.

198. Subclause (2) provides that if two or more potential jurors have the same name and their name is required to be called under subclause (1) the officer of the Court must call their name and number.

199. Under subclause (3), if a potential juror's name and/or number is called, the potential juror must sit in the jury box unless, before the potential juror can do so, the potential juror is excused from serving on the jury, stood aside under clause 23DZA or discharged under subclause 23EI(2). A potential juror will be discharged under subclause 23EI(2) if they are successfully challenged.

200. Subclause (4) requires that the officer of the Court must continue to call out the names and/or numbers of potential jurors until the required number of jurors are seated in the jury box.

201. Subclause (5) provides that when the required number are seated in the jury box, those potential jurors must be sworn or make an affirmation.

202. Subclause (6) provides that when every potential juror seated in the jury box has been sworn, or has made an affirmation, those potential jurors are taken to have been empanelled as the jury for the trial.

Clause 23DV Court's power to excuse a person from serving on jury

203. Subclause (1) gives the Court power to excuse a potential juror from serving on a jury if the Court is satisfied that it is appropriate to do so in the circumstances. The power can be exercised at any time before the potential juror sits in the jury box and can be exercised at the Court's own initiative or at the request of the potential juror. The request can be made by giving a note to the judge if the juror does not want to state in public why they want to be excused.

204. This is a residual power designed to ensure that the trial judge can excuse a potential witness for sitting on the jury, even if neither party objects, if the judge is satisfied that the person should not be on the jury.

205. Subclause (2) provides that, once a jury has been empanelled for a trial, all the potential jurors who were not empanelled are taken to be excused by the Court from serving on the jury unless the jury is discharged under subclause 23EL(1) and a direction is given under subclause 23EM(3).

Clause 23DW Supplementary jurors

206. Subclause (1) gives the Court power to direct the Sheriff to supplement a jury panel if there is an insufficient number of potential jurors on the jury panel to allow a jury to be empanelled. That may happen if, for example, a greater number of potential jurors are excused under subclause 23DV(1) than was expected.

207. The Court can direct the Sheriff to supplement the jury panel by selecting additional potential jurors from those who attended in accordance with a jury summons; by causing additional summonses to be issued and selecting additional persons from those who attend court; or by selecting a sufficient number of persons in the vicinity of the Court who are qualified to serve on the jury.

208. Subclause (2) provides that, for the purposes of Division 1A, a person selected through the process of selecting persons in the vicinity of the Court is taken to be a potential juror included on the jury panel. This ensures that all the normal procedural provisions apply to the person, including the provisions dealing with excuses and challenges, even though the person has not been summonsed.

Clause 23DX Challenges to potential jurors—general

209. Subclause (1) notes that this clause and clauses 23DY and 23DZ set out each party's rights to challenge the inclusion of a potential juror in a jury.

210. Subclause (2) provides that if a party wishes to challenge the inclusion of a potential juror in the jury, the party must do so after the potential juror's name and/or number has been called and before the potential juror sits in the jury box.

211. Subclause (3) provides that if a potential juror is challenged and the challenge is upheld the potential juror must not be empanelled on the jury. The potential juror is taken to be discharged by operation of subclause 23EI(2).

212. A challenge is different from a request by the prosecutor for a potential juror to be stood aside. A potential juror who is stood aside may be called for a second time and be empanelled on the jury (see clause 23DZA). A potential juror who is successfully challenged cannot be empanelled on the jury.

Clause 23DY Challenges for cause

213. Subclause (1) provides that each party to the proceedings may exercise an unlimited number of challenges for cause. This means that the both the prosecutor and the accused have unrestricted rights to challenge a potential juror if they have grounds for objecting to the person being on the jury.

214. Subclause (2) provides that a challenge for cause must be tried by the judge before whom the jury is being empanelled. The trial judge will normally make a ruling on the spot on whether to uphold the objection.

Clause 23DZ Peremptory challenges

215. A peremptory challenge is a challenge made by a party without specifying grounds for the challenge. It is a traditional safeguard designed to ensure that an accused can have confidence in the final composition of the jury. A peremptory challenge must be accepted by the Court. A potential juror who is the subject of a peremptory challenge cannot sit on the jury.

216. This clause provides that the accused is entitled to a maximum of four peremptory challenges if 12 jurors are empanelled and an additional peremptory challenge if more than 12 jurors are to be empanelled.

217. If more than one accused is being tried, each accused is entitled to this number of challenges.

218. The prosecution is not entitled to any peremptory challenges, but can request that potential jurors be stood aside under clause 23DZA.

Clause 23DZA Prosecutor may request that potential jurors be stood aside

219. Standing aside a juror is a procedure under which the prosecution can ask that a potential juror stand to one side while other jurors are selected. If the jury panel is exhausted before a jury has been formed, the Court will return to consider any potential juror who has been asked to stand aside. If more than one potential juror has been asked

to stand aside, the names and/or numbers of those witnesses must be called at random. At that stage the prosecution can challenge for cause, if it has grounds for doing so. If not, the potential juror may be empanelled.

220. Subclause (1) notes that this clause sets out the prosecutor's right to request that a potential juror be stood aside.

221. Subclauses (2) to (4) set out the procedure that applies if the prosecutor requests that a potential juror be stood aside.

222. Subclause (5) provides that the prosecutor is entitled to a maximum of four requests that a potential juror be stood aside and an additional request if more than 12 jurors are to be empanelled.

Subdivision E—Other jury matters

Clause 23EA Appointing the jury foreperson

223. This clause provides that the jury must appoint a foreperson when directed by the Court or, if there is no such direction, as soon as practicable after being empanelled.

Clause 23EB Confidentiality directions

224. Subclause (1) gives the Court power to give such directions as the Court thinks necessary in order to protect the security of a juror or potential juror.

225. Subclause (2) provides a non-exclusive list of the directions the Court can give. They include that a potential juror be called under subclause 23DU(1) by number only and be referred to during the proceedings by number only.

226. Subclause (3) makes it clear that a direction may cover one or more juror or potential juror.

Clause 23EC Things to help jury understand issues

227. Subclause (1) gives the Court power to order that the jury can be given things that the Court considers appropriate to assist the jury understand issues during the trial. Those things can include copies of documents.

228. This is an avoidance of doubt provision which ensures that there can be no argument that the Court has power to ensure that the jury has all the material it reasonably requires in order to understand the issues that are before it.

229. Subclause (2) provides that the Court may specify when, and the manner in which, things are to be given to the jury.

Clause 23ED Recalling the jury for further directions or evidence

230. This clause gives the trial judge power to recall the jury after it has retired to consider its verdict so that the jury can be given further directions or can hear further evidence.

231. This power cannot be exercised after the jury has reached a verdict on the relevant count.

Clause 23EE When jury can separate

232. Subclause (1) provides that a jury can separate at any time before the jury retires to consider its verdict unless the Court orders that the jury not separate. However, it cannot separate after it has retired to consider its verdict unless there is an order that allows it to do so.

233. Subclause (2) provides that the Court may make an order allowing the jury to separate without the presence of the jury.

Clause 23EF Directions and potential jurors and jurors

234. Subclause (1) provides that each juror is subject to the direction of the Sheriff and the Court. Failing to comply with a direction is an offence under clause 58AC.

235. Subclause (2) provides that each potential juror who attends for jury service in accordance with a summons is subject to the direction of the Sheriff and the Court. Failing to comply with a direction is an offence against clause 58AB.

Clause 23EG Sheriff's powers

Investigations

236. Subclause (1) provides that the Sheriff must investigate whether the verdict of a jury is being, or has been, affected because of the improper conduct of a juror or jurors if the Sheriff has reason to suspect that the verdict is being, or has been, so affected, and the Court has consented to the investigation or the Court requests the investigation. During and after the investigation, the Court or the Sheriff can give a direction to a juror under clause 23EF.

237. Subclause (2) provides that the Sheriff must report the outcome of the investigation to the Court.

Disclosing information

238. The effect of subclauses (3) and (4) is that the Sheriff can disclose information identifying a juror or former juror to a person whose duties include convening juries for trials under State/Territory law if the purpose in doing so is to assist the person to consider who to summons for jury duty.

239. This provision will reduce the risk that a person who has recently performed jury service in the Federal Court will be summonsed to perform jury service under State/Territory law.

Clause 23EH Jurors' remuneration

240. This clause provides that the regulations can provide for remuneration and allowances to be payable to jurors and potential jurors who attend for jury service.

Clause 23EI Discharge of potential jurors

241. Subclause (1) provides a potential juror is discharged if the potential juror is excused from serving on the jury. There is no need for a formal direction or order to be made discharging the person.

242. Subclause (2) provides a potential juror is discharged if a challenge to the inclusion of the potential juror on the jury is upheld. Again there is no need for a formal direction or order to be made discharging the person.

Clause 23EJ Discharge of jurors—by law

243. Subclause (1) applies if there are more than 12 members on a jury when the jury retires to consider its verdict. If there is a ballot under clause 23DE, any juror who is not the foreperson and who is not selected in the ballot is discharged.

244. Subclause (2) provides that a juror is taken to be discharged if the juror dies. This is a technical provision which is required to ensure that other provisions of the Bill which come into play if a juror is discharged can operate if a juror dies.

Clause 23EK Discharge of jurors—by the Court

245. This clause gives the trial judge power to discharge a juror in the course of a trial if it appears to the Court that the juror is not impartial, is incapable of continuing to act as a juror, or should not continue to act as a juror for any other reason. The trial can proceed if the judge is satisfied there would be no unfairness and the number of jurors has not fallen below 10.

Clause 23EL Discharge of jury

Discharge if composition of jury unsatisfactory

246. Subclause (1) gives the Court power to discharge an entire jury immediately after it has been empanelled if the Court is satisfied that the exercise of challenges has resulted in a jury whose composition is such that the trial might be, or might appear to be, unfair. This power is not likely to be exercised frequently.

Discharge if each count relating to the accused is dealt with

247. Subclause (2) requires the Court to discharge the jury in relation to an accused if each count in the indictment that relates to the accused has been dealt with. That can occur if the jury is not able to reach a unanimous verdict; the jury delivers a verdict; the Court accepts a plea of guilty by the accused; the Court enters a judgment of acquittal on the count in relation to the accused; or the count is an alternate to a count covered by one of the above.

Discharge in the interests of justice

248. Subclause (3) gives the Court general power to discharge a jury in the course of a trial if the Court is satisfied that it is expedient to do so in the interests of justice.

Discharge if Judge incapable of proceeding

249. Subclause (4) applies if, during a trial, a Judge becomes incapable of proceeding with the trial or directing the discharge of the jury. In such cases another Judge must discharge the jury.

Discharge if number of jurors falls below 10

250. Subclause (5) provides that the Court must discharge the jury immediately if the number of jurors falls below 10.

Clause 23EM Consequences of discharging the jury

General rule

251. Subclause (1) provides that, as a general rule, the Court must order a new trial if the jury is discharged without delivering a unanimous verdict.

If Court thinks it appropriate to empanel a new jury from the same jury panel

252. Subclauses (2) and (3) provide an exception to the general rule in a case where a jury is discharged because the Court is satisfied that the exercise of challenges has resulted in a jury whose composition is such that the trial might be, or might appear to be, unfair. In such cases, as an alternative to ordering a fresh trial, the Court can direct an officer of the Court to start the process for empanelling a new jury from the same jury panel that supplied the first jury using members of that panel who have not been called on.

253. This option will only be feasible if there are sufficient members of the jury panel who have not been called on to make the exercise worthwhile or if the Sheriff is able to supplement the jury panel under clause 23DW. However, in some cases this process will enable the Court to proceed to trial without going back through the process of summonsing jurors.

254. Subclause (4) provides that, for the purposes of empanelling the new jury, Division 1A applies as if the first jury had not been empanelled. This has the effect of

resetting the limits on the number of challenges open to an accused and the number of requests that can be made by the prosecution to stand aside potential jurors.

255. Subclause (5) make it clear, for the avoidance of doubt, that the jurors on the first jury, and any potential jurors discharged before the empanelling of the first jury, cannot be empanelled on the new jury and remain discharged.

256. Subclause (5) also makes it clear, for the avoidance of doubt, that the Court does not have to apply the procedure under clause 23DT a second time. That clause sets out the information that must be given to the parties and potential jurors on the jury panel before a jury is empanelled from that panel.

Subdivision F—Matters relating to pleas, the trial and verdicts

Clause 23FA Accused to be arraigned before the jury

257. Subclause (1) provides that if the prosecution of an accused is to proceed to trial, the accused must be arraigned before a jury in accordance with the Rules of Court.

258. Subclause (2) provides that a trial starts when the accused is arraigned before the jury.

Clause 23FB Practice and procedure applicable to the trial

259. This clause provides that, unless the Court orders otherwise, the rules of practice and procedure that apply at trial are those in force at the time the indictment is filed.

260. The effect is that if a procedural rule changes after an indictment has been filed, the Court will apply the old procedure and not the new one at a trial unless it makes an order to the contrary. The Court may make an order to the contrary if, for example, a change to a procedural rule has the potential to benefit the accused or to shorten a trial in a way that does not significantly affect the accused.

261. This clause ensures that an accused person will not suffer prejudice if changes are made to a procedural rule after an indictment has been filed and criminal proceedings have commenced before the Federal Court.

Clause 23FC Admissibility of evidence given in committal proceedings

262. This clause gives the Court power to allow evidence given in committal proceedings to be admitted at trial. That can be done if, since the committal, the witness has died, a witness is too ill to travel or to give evidence without risk of endangering their life, a witness is absent from Australia, or the Court is satisfied that there are other valid reasons for doing so.

263. In accordance with normal principles, the Court would need to be satisfied that it was in the interests of justice to allow the evidence to be admitted and that it would not result in the trial being unfair.

264. This is a common provision in State and Territory law and ensures that evidence that has been given once, in committal proceedings, can be used at trial if it is not possible or practicable to call the witness at trial and the trial judge is satisfied that it would not be unfair to allow the evidence to be adduced at the trial.

Clause 23FD Entering pleas

265. Subclause (1) provides that the accused may enter a plea of guilty, or not guilty, to a count in the indictment.

266. The effect of subclause (2) is that the accused is taken to have entered a plea of not guilty if the accused fails to enter a plea when directed by the Court. An accused who says nothing will have failed to enter a plea.

267. Subclause (3) makes it clear that an accused may both enter a plea to a count and object to the count. The fact that an accused pleads not guilty to a count in an indictment does not mean the accused is taken to have accepted that the count is legally valid or effective.

Clause 23FE Pleading to some counts in satisfaction of other counts

268. This clause provides that it is open to the prosecution and the accused to agree that the accused will plead guilty to some counts in the indictment and the prosecutor will accept the plea in satisfaction of all counts in the indictment. In that situation, the indictment is taken to be amended so that no other count in the indictment covers the accused.

269. The effect is that the plea of guilty can be accepted by the Court without need to amend the indictment and, if the plea is accepted, the Court will not have to make any orders in relation to the outstanding counts in the indictment.

Clause 23FF Pleading to different offences capable of being supported by indictment

270. Subclause (1) ensures that it is open to the prosecution and the accused to agree that the accused will plead guilty to an offence that is not specified in the indictment and the prosecutor will accept the plea in satisfaction of the indictment. That can be done without amending the indictment if the matters alleged in the indictment can support an allegation that the accused committed the other offence. The Federal Court will also need to have jurisdiction to try the person for the other offence.

271. Subclause (2) provides that, for the purposes of the Federal Court Act the indictment is taken to have always included a count against the accused for the offence.

272. If the accused proposes to enter a plea of guilty to an offence that cannot be supported by the matters alleged in the indictment, the prosecutor will need to amend the indictment under clause 23BH to include a count for the offence.

Clause 23FG Changing pleas

Accused may change plea

273. Subclause (1) provides that an accused may change his or her plea in accordance with this clause.

Changing plea to guilty

274. Under subclause (2), an accused who has entered a plea of not guilty in relation to a count in the indictment, can change the plea to guilty. The Court has power under subclause 23FJ(1) to reject the change of plea in the interests of justice.

Changing plea to not guilty

275. Under subclause (3) an accused who has entered a plea of guilty in relation to a count in the indictment, can only change the plea to not guilty if the Court gives leave. The Court will need to be satisfied that there are good reasons why the accused should be allowed to change a plea from guilty to not guilty. However, there may be a basis for changing a plea if, for example, a court delivers judgment in another case which shows that the accused pleaded guilty on the basis of a mistaken view of the law. The Court can grant leave at any time before the Court imposes a sentence on the accused in relation to an offence.

276. Subclause (4) applies if the accused is given leave to change a plea from guilty to not guilty. The Court must direct that the accused be put on trial in relation to the count and can make such orders as to pre-trial matters as it Court thinks appropriate.

277. The Court will not have power to stay the prosecution. It will be matter for the prosecutor to decide whether to proceed to trial.

278. The Court will not have power to remit the matter back to a committal court but it will be able, if appropriate, to make orders under Subdivision C to ensure that there is a pre-trial process before the matter goes to trial.

Clause 23FH Court's verdict if no case to answer

279. This clause gives the Court power to rule that there is no case to answer for a count in the indictment after the close of the prosecutor's case and before the jury delivers its verdict for the count. If the Court finds the accused has no case to answer in relation to a count the Court must enter a judgment of acquittal and discharge the accused in relation to that count. The Court cannot direct the jury to deliver a verdict.

Clause 23FI Jury's verdict

Verdict must be unanimous

280. Subclause (1) provides that the jury's verdict on each count in the indictment must be unanimous. If the indictment includes alternate counts, the jury need only reach a verdict on one of those counts. In *Cheatle v the Queen* (1993) 177 CLR 541, the High

Court ruled that section 80 of the Constitution has the effect that in Commonwealth cases a jury verdict must be unanimous.

281. Subclause (2) requires that, before the jury retires to consider its verdict on a count in the indictment, the Court must inform the jury that its verdict must be unanimous.

Jury may deliver alternative verdicts

282. Subclause (3) applies if an offence specified in a count in the indictment is an offence for which another Act allows the jury to find the accused not guilty of the offence but guilty of another offence. An example is section 313.3 of the Commonwealth Criminal Code.

283. If there is a statutory alternative the Court may inform the jury of the alternative. If the jury finds the accused not guilty of an offence specified in a count in the indictment but guilty of a statutory alternative the indictment is taken to have always included a count against the accused for the alternative offence. This ensures that the accused can be convicted of the alternative offences without a need to amend the indictment.

Foreperson is to deliver the verdict

284. Subclause (5) provides that jury's verdict is to be delivered by the jury foreperson.

285. There is no provision in this clause which deems a count in an indictment to include ancillary offences relevant to that count. If the prosecution wants to be able to ask the jury to consider an ancillary offence such as attempt as an alternative to a substantive offence, the prosecution will have to include a count for the ancillary offence in the indictment.

Clause 23FJ Consequences of guilty pleas and guilty verdicts

Guilty pleas

286. Subclause (1) provides that if the accused pleads guilty, either from the outset or by way of change of plea, the Court must accept the plea unless either it gives leave to the accused to change the plea to not guilty or it would be contrary to the interests of justice to accept the plea of guilty. The latter situation may arise if, for example, the Court is satisfied that the accused does not understand the consequences of the plea.

287. Subclause (2) provides that if the Court does not accept a plea of guilty the plea has no further effect and the accused is taken to have entered a plea of not guilty to the count.

Guilty verdicts

288. Subclause (3) provides that if the jury delivers a unanimous verdict of guilty for a count in the indictment, the Court must accept the verdict unless it would be contrary to the interests of justice to do so. That may occur if, for example, it appears that there has been some irregularity in the jury process.

Consequences of accepting a guilty plea or guilty verdict

289. Subclause (4) applies if the Court accepts a plea of guilty or a verdict of guilty for a count in the indictment. The Court is taken to have found the count proven in relation to the accused and the accused is taken to be convicted of the offence covered by the count. There is no need for the Court to formally announce that the accused has been convicted. The Court must proceed to sentence the accused in relation to the offence, although it can adjourn the proceedings before doing so. If the count has an alternate included in the indictment in relation to the accused, the Court must discharge the accused in relation to the alternate count.

290. Subclause (5) applies if the accused is subsequently given leave to change a plea of guilty to a plea of not guilty. The count is taken not to have been found proven and the accused is taken not to have been convicted. The Court must cease any relevant sentencing proceedings to the extent that those proceedings relate to the plea of guilty and any alternative counts on the indictment will be taken not to have been discharged.

291. Subclause (6) applies if, when sentencing an accused, the Court makes an order under section 19B of the *Crimes Act 1914* which provides that, in appropriate circumstances, a sentencing court can deal with a matter without proceeding to conviction. In that situation, the accused is deemed not to have been convicted of the offences despite subclause (4).

Clause 23FK Consequences of not guilty verdicts

292. This clause provides that, if the jury delivers a unanimous verdict of not guilty for a count in the indictment, the Court must acquit and discharge the accused in relation to the count.

Subdivision G—Procedure on committal for sentencing

Clause 23GA When Subdivision applies

293. This clause provides that Subdivision G applies if a committal court makes an order committing the accused for sentencing before the Federal Court.

294. The effect of Subdivision G is that the committal order has the same effect as an order committing the accused for trial except that, if the prosecutor files an indictment in the Federal Court, the accused is treated as if he or she had pleaded guilty to the indictment.

295. This means that the prosecutor must file an indictment in the Federal Court but that, if an indictment is filed, the accused is not called upon to plead to the indictment. The accused is treated as if he or she has pleaded guilty before the Federal Court.

296. 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.

297. Those rules and procedures include the time limits that apply to the filing of an indictment (under clause 23BF) and the rules about when a plea of guilty must be accepted (under clause 23FJ) and when it can be changed (under clause 23FG).

298. This means, for example, that the Court may discharge the accused if an indictment is not filed in the Court within the time required by clause 23BF (see subclause 23BG(1)).

Clause 23GB Accused taken to have been committed for trial etc.

299. Subclause (1) provides that if a person is committed to the Court for sentence, the committal court is taken to have made an order committing the accused for trial before the Court. The order is taken to have been made on the day the committal order was made.

300. This subclause is also relevant to working out the laws that will apply when the accused appears before the Court (see the proposed new section 68C of the Judiciary Act).

301. Subclause (2) provides that, if an indictment is filed in the Federal Court, Division 1A applies as if the accused entered a plea of guilty immediately after that filing and paragraph 23CA(1)(b) were omitted. That paragraph provides that an accused must normally be required to enter a plea if an indictment is filed in the Court.

302. Under subclause 23FJ(1) the Court must accept a plea of guilty unless either the Court gives leave to the accused to change the plea to a plea of not guilty, or it would be contrary to the interests of justice to accept the plea.

Subdivision H—Custodial and other matters

Clause 23HA Remanding in custody when proceedings adjourned

303. Subclause (1) gives the Court power to remand an accused in custody during an adjournment in the proceedings. That can be done if there is no bail order or, if there is a bail order, the accused cannot be released on bail by operation of subclause 58DE(1).

304. There are no other provisions in the Bill dealing with custody. If a custody issue is not covered by the Rules, State or Territory law will apply through the operation of section 68 and the new section 68B of the Judiciary Act.

305. If an accused is remanded in custody it must be by way of a warrant of commitment. Subclause (2) provides that a warrant of commitment may be signed by any Judge, the Registrar or any Deputy Registrar, District Registrar or Deputy District Registrar of the Court.

306. If an accused has been committed for trial or sentencing before the Court, the person may be subject to custody or bail orders under the law of a State or Territory applied by subsection 68(1) of the Judiciary Act. The responsibility for dealing with

custody and bail will pass to the Federal Court from the time the person first appears before that Court.

Clause 23HB Oaths and affirmations

307. Subclause (1) provides that a person required to make an oath or affirmation under Division 1A must make the oath or affirmation in the form provided for in the Rules of Court.

308. Subclause (2) provides that the Court may require a person to make an oath or affirmation for the purposes of Division 1A if the Court thinks this is reasonably necessary.

Clause 23HC Protecting witnesses etc.

309. Subclause (1) gives the Court power to make such orders as it thinks appropriate to protect a witnesses called or proposed to be called or information, documents and other things admitted or proposed to be admitted. This is an addition to the existing power of the Court to restrict or prohibit the publication of information about witnesses and evidence under section 50 of the Federal Court Act.

310. Subclause (2) provides that, among other things, the Court may order the exclusion of the public, or of persons specified by the Court, from a sitting of the Court or direct how a witness may give evidence.

Clause 23HD Accused cannot make unsworn statements

311. This clause makes it clear that an accused cannot make an unsworn statement in indictable primary proceedings before the Federal Court.

312. The unsworn statement has generally been abolished in Australian jurisdictions.

Clause 23HE Costs

313. This clause makes it clear that the Court cannot award costs in indictable primary proceedings.

314. This reflects the traditional position that the Crown neither pays not recovers costs in indictable criminal proceedings. The provision does not affect the operation of legal aid provisions in Commonwealth or State/Territory law.

Item 3 After Division 2 of Part III

Insert:

Division 2A—Appellate and related jurisdiction (criminal proceedings)

315. The Federal Court Act is amended under items 58 and 59 to limit Division 2 of the Act so that it only applies to appeals in civil proceedings. The Court had some limited powers to hear appeals in criminal proceedings under Division 2. Those powers have been moved to Division 2A which will contain all the provisions dealing with appeals in criminal cases.

Subdivision A—Bringing appeals

Clause 30AA Appellate jurisdiction—allowable appeals

Appeals about indictable offences

316. Subclause (1) lists all situations in which the Court has jurisdiction to hear and determine an appeal from a judgment of an eligible primary court. That term is defined in item 33 and includes a single judge in indictable primary proceedings, and the Supreme Court of a Territory (other than the Australian Capital Territory or the Northern Territory). It also includes a court nominated in another Act (other than a Full Court of a Supreme Court). There are no such nominations at this time.

317. The Court has jurisdiction to hear and determine an appeal from a judgment of an eligible primary court that:

- 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 judgment 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*.

318. A judgment that convicts the accused of a count in an indictment includes a judgment convicting an accused following the accused's committal to the Court for sentencing.

319. A judgment that sentences the accused in relation to a count in an indictment includes a judgment sentencing an accused following the accused's committal to the Court for sentencing (clause 23GB).

320. A judgment that sentences the accused in relation to a count in an indictment includes a judgment in which one or more orders under section 19B of the *Crimes Act 1914* were made (subsection 19B(3) of that Act).

321. The prosecution can appeal against an acquittal if the acquittal results from the court, rather than a jury, finding that the accused had no case to answer. If the appeal is upheld the appeal court will have power to order a new trial under clause 30BD. However, the appeal court will have a discretion about whether to order a new trial and will normally only do so if satisfied that it is in the interests of justice.

322. An appeal against an acquittal on grounds of mental illness can only be brought by an accused person (subclause 30AC(2)). The prosecution cannot appeal against an acquittal on grounds of mental illness. A finding that an accused was not guilty by reason of mental illness can have consequences for the accused under Division 7 of Part 1B of the *Crimes Act 1914* and it is appropriate that the accused have a right of appeal. However, traditionally the prosecutor has not been able to appeal against an acquittal that results from a jury verdict. That principle in reflected in the Bill.

Appeals against summary judgments

323. Subclause (2) gives the Court jurisdiction to hear and determine an appeal from a judgment in summary criminal proceedings made by:

- the Court constituted by a single Judge;
- the Supreme Court of a Territory (other than the Australian Capital Territory or the Northern Territory); or
- a court nominated in another Act (other than a Full Court of a Supreme Court). There are no such nominations at this time.

Appeals about bail and forfeiture of bail security

324. Subclause (3) gives the Court has jurisdiction to hear and determine an appeal from a judgment of the Court under Part VIB, which deals with bail.

Appeals against interim judgments and decisions

325. Subclause (4) gives the Court jurisdiction to hear and determine an appeal from an interim judgment or decision made by a single Judge in the course of indictable primary proceedings. However this does not apply to a judgment under Part VIB, which deals with bail, or an order discharging a jury or a juror. Appeals against bail orders are dealt with under subclause (3) and there is no power for the Court to hear an appeal against an order to discharge a jury or a juror. An appeal against an interim judgment or decision can only be brought with leave from the judge who made the judgment or decision (subclause 30AB(2)).

326. This subclause gives jurisdiction to, for example, hear appeals from decisions remanding the accused in custody under clause 23HA or decisions and rulings made in the pre-trial process. The requirement for leave restricts the scope for a party to delay

proceedings by bringing repeated appeals against interim judgments and decisions. If the Court hears an appeal against an interim judgment or decision it will also have power, if appropriate, to defer judgment on the appeal until the substantive proceedings have been completed.

Relationship to other Acts

327. Subclause (5) makes it clear that this clause has effect subject to any other Act which gives or restricts rights of appeal in Commonwealth criminal cases.

Clause 30AB Leave needed unless question of law or about bail

328. Subclause (1) provides that an appeal cannot be brought from a judgment referred to in subclause 30AA(1) or (2) unless the Court or a Judge gives leave to appeal or the appeal involves a question of law alone.

329. The requirement for leave to appeal is designed to ensure that the time of the Court is not taken up by unmeritorious appeals. An appeal that involves a question of law alone does not normally take as long to resolve as one that requires the Court to consider matters of fact and to review evidence.

330. Subclause (2) provides that an appeal cannot be brought from a judgment or decision referred to in subclause 30AA(4) (an interim judgment or decision) unless the Judge who made the judgment or decision gives leave to appeal. There is a potential for an appeal brought against an interim judgment or decision to delay the trial process. The requirement to obtain leave from the trial judge will ensure that an appeal is only brought if, in effect, the trial judge certifies that there is a genuine issue that should be resolved despite the potential delay. There will be no scope for delay while a party applies to another judge for leave.

Clause 30AC Who may appeal

331. This clause provides that, with one exception, either the accused or the prosecutor can apply for leave to appeal or appeal, as appropriate. The exception, under subclause (2), is that only the accused can appeal, or apply for leave to appeal, against an acquittal on grounds of mental illness.

Clause 30AD Appellate jurisdiction—further appeal if Attorney-General consents

332. Subclause (1) gives the Attorney-General power to consent in writing for an accused to appeal if the accused applies for this consent and the accused satisfies the Attorney-General that there is a doubt or question about the accused's conviction by an eligible primary court or the sentence imposed by an eligible primary court.

333. The provision is designed to give the Attorney-General power to refer a matter to the Court if the Attorney-General is satisfied, on the basis of representations made by the accused person, that there is a proper basis for doing so.

334. 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.

335. Subclause (2) provides that if the Attorney-General consents under subclause (1), the Court has jurisdiction to hear and determine an appeal against a conviction or an appeal against sentence or both. The time limits which apply to appeals under clause 30AF do not apply to an appeal under this clause.

336. Subclause (3) makes it clear that this clause has effect subject to any other Act which gives or restricts rights of appeal in Commonwealth criminal cases.

Clause 30AE Exercise of appellate jurisdiction

337. Subclause (1) provides that, subject to any other Act, an appeal must be heard by a Full Court.

338. Subclause (2) applies to an application for leave to appeal, an extension of time to appeal, leave to amend grounds of appeal, or for the stay of an order made by a Full Court. With one exception, any of these applications must be heard an determined by a single judge unless the Judge directs that the application be heard and determined by a Full Court; or the application is made in a proceeding that has already been assigned to a Full Court, and the Full Court considers it is appropriate for it to hear and determine the application.

339. The exception relates to an application for leave to appeal against an interim judgment or decision. These are dealt with under subclause (3).

340. Subclause (3) provides that an application for leave to appeal against an interim judgment or decision or for an extension of time within which to apply for leave to appeal must be heard and determined by the Judge who made the judgment or decision.

341. Subclause (4) deals with applications for a range of ancillary orders including a order to join or remove a party to an appeal; a consent order disposing of an appeal; an order that an appeal be dismissed for want of prosecution or failure to comply with a direction of the Court; or an order for directions about the conduct of an appeal. Subclause (4) provides that any of these applications must be heard an determined by a single Judge unless the Judge directs that the application be heard and determined by a Full Court; or the application is made in a proceeding that has already been assigned to a Full Court, and the Full Court considers it is appropriate for it to hear and determine the application.

342. Subclause (5) provides that the Rules may make provision enabling applications to be dealt with without an oral hearing.

343. Subclause (6) provides that the Court constituted by a single Judge may state a case or reserve a question concerning a matter with respect to which an appeal would lie to a Full Court for the consideration of a Full Court. The Full Court has jurisdiction to hear and determine the case or question.

344. This subclause gives a trial Judge power to get guidance from a Full Court in advance of making a judgement or decision if the judge considers that the matter raises an issue that should be considered by a Full Court and there is a potential for a party to appeal to a Full Court when the judgement or decision is made.

345. Subclause (7) picks up subsections 25(3) and (4) of the Federal Court Act. This means that if the Court is hearing an appeal from a judgment of the Supreme Court of a of a Territory, the Full Court that hears the appeal must, if practicable, include at least one Judge who holds office as a Judge of the Supreme Court of that Territory. It also means that if the Court is hearing an appeal from a judgment of the Supreme Court of a Territory that was constituted by two or more Judges, the appeal must be heard by a Full Court constituted by not less than five Judges.

Clause 30AF Time for appealing

346. This clause set the time limits in which a notice of appeal or a notice of an application for leave to appeal must be filed.

347. It applies to all the appeal provisions except clause 30AD. There are no time limits for an appeal under clause 30AD.

348. The basic principle is that a party has 28 days in which to apply for leave to appeal, or to appeal if they do not need leave. However, in the case of appeal against conviction, the effect of subclause (2) is that the 28 days does not start running until the completion of the sentencing proceedings. This recognises that an accused who has been convicted may want to focus on the sentencing proceedings before they focus on whether there are grounds to appeal against conviction. In the case of an appeal against acquittal, in the limited cases where an appeal is possible, the 28 days starts running from the day the accused is discharged.

349. Subclause (3) gives the Court power to extend time if satisfied that it is in the interests of justice to do so.

Clause 30AG Right to attend

350. This clause gives a party to an appeal, including the accused, a right to be present at the hearing of the appeal unless the Court orders otherwise; or the Court makes a direction that directs or allows the party to appear by way of video link, audio link or other appropriate means. This clause recognises that there may be problems in allowing an accused to attend a court hearing in person if, for example, the appeal is an appeal against inadequate sentence and the accused is in custody.

Clause 30AH Practice and procedure applicable to the appeal

351. This clause provides that, unless the Court orders otherwise, the rules of practice and procedure that apply during an appeal are those in force at the time the application for leave to appeal was filed or, if there is no need for leave, those in force when the notice of appeal was filed.

352. The effect is that if a procedural rule changes after the appeal process has commenced, the Court will apply the old procedure and not the new one during the appeal unless it makes an order to the contrary. The Court may make a order to the contrary if, for example, a change to a procedural rule has the potential to benefit the accused.

353. This clause ensures that an accused person will not suffer prejudice if changes are made to a procedural rule after the appeal process has commenced.

Clause 30AI Evidence on appeal

354. Subclause (1) provides that, when considering an appeal, the Court must have regard to the evidence given in the proceedings out of which the appeal arose and may draw inferences of fact from that evidence.

355. Subclause (1) also provides that the Court can receive further evidence if satisfied that it is in the interests of justice to do so and can receive that further evidence on affidavit; by video link, audio link or other appropriate means permitted under Commonwealth law; by oral examination before the Court or a Judge; or section 46 of the Federal Court Act (which deals with taking evidence on commission). This does not compel the Court to receive further evidence in a matter. The Court may decline to receive further evidence if, for example, the failure to adduce the evidence during the trial is not satisfactorily explained.

356. Subclause (2) provides that if a Full Court decides to receive further evidence by oral examination, the Court can direct that the evidence be taken by a single Judge and can have regard to the findings of that Judge in relation to that evidence.

Clause 30AJ When to allow appeals

357. This clause sets out the criteria that must be satisfied before the Court can uphold different types of appeal.

Appeals against conviction

358. Subclause (1) provides that the Court must allow an appeal against conviction if the Court is satisfied that the verdict of the jury (if any) is unreasonable or cannot be supported having regard to the evidence; or that there was a wrong decision of any question of law; or that there has been a substantial miscarriage of justice.

359. However, subsection (2) provides that the Court may dismiss an appeal on the first two of these grounds if the Court is satisfied that there has not been a substantial miscarriage of justice. This ensures that a conviction cannot be set aside on the basis of an error or irregularity which did not result in a substantial miscarriage of justice.

Appeals against sentence

360. Subclause (3) provides that the Court must allow an appeal against a judgment sentencing the accused if the Court is satisfied that some other sentence (whether more or less severe) is warranted in law. This means that the Court can either decrease or increase a sentence if a party appeals and the Court is satisfied that some other sentence was warranted in law. The Court has power, in an appropriate case, to increase a sentence even if the accused has appealed but the prosecution has not. Similarly, the Court has power, in an appropriate case, to decrease a sentence even if the prosecution has appealed but the accused has not.

Other appeals under section 30AA

361. Subclause (4) provides that the Court may allow any other appeal if the Court is satisfied it is in the interests of justice to do so.

Final appeals

362. Subclause (5) provides that the Court may allow an appeal covered by clause 30AD (which deals with further appeals with consent from the Attorney-General) if the Court is satisfied that it would be a miscarriage of justice not to allow the appeal.

Clause 30AK Stay or suspension of orders pending appeal

363. Subclause (1) gives power to the Court or a Judge to make an order to stay or otherwise affect the operation or implementation of an order arising from a decision which is the subject of an appeal, The order can be made on such conditions, if any, as the Court or Judge thinks fit.

364. Subclause (2) makes it clear that this clause does not affect the operation of any other Act or the Rules of Court in relation to the stay or suspension of orders.

Clause 30AL Prison sentence not to include time on bail

365. This clause makes it clear, for the avoidance of doubt, that if person who has been convicted and sentenced to a term of imprisonment appeals and is released on bail pending the determination of the appeal, time spent on bail does not count as part of the term of imprisonment to which the person has been sentenced.

Subdivision B—Form of judgment on appeal

Clause 30BA Court may give such judgment as is appropriate

366. This clause gives the Court general power to dismiss or allow an appeal and to take such other action as it thinks appropriate in the circumstances.

367. Clauses 30BB to 30BG provide examples of orders the Court can make when it upholds an appeal. Those examples are included to avoid doubt that the orders which can be made do not restrict the general power of the Court under this clause.

Clause 30BB Allowing appeals against convictions on indictment

368. The effect of subclauses (1) and (2) is that, if the Court allows an appeal against conviction on indictment it can, among other things, set aside the conviction, order a new trial, or acquit the accused. The Court does not have to order a new trial if it allows an appeal against conviction.

369. Subclause (3) applies if there was a statutory alternative available to the jury at trial. The Court has power to substitute a guilty verdict for the alternative offence if it is satisfied that the guilty verdict cannot stand but that the jury must have been satisfied of facts that prove the accused guilty of the alternative offence. The Court must also have jurisdiction to deal with the alternative offence.

370. Subclause (4) applies if there was an alternative count in the indictment for an offence which has the same or a lesser penalty as the offence for which the accused was convicted. The Court has power to substitute a guilty verdict for the alternative offence if it is satisfied that the guilty verdict cannot stand but that the jury must have been satisfied of facts that prove the accused guilty of the alternative offence. The Court must also have jurisdiction to deal with the alternative offence.

371. Subclause (5) provides that, if the Court substitutes a guilty verdict under subclause (3) or (4), the Court may sentence the accused in relation to the substituted offence and set aside the conviction and sentence relating to the appealed offence. The accused is taken to be convicted of the substituted offence unless, when sentencing the accused for the substituted offence, the Court makes an order under section 19B of the *Crimes Act 1914*.

Clause 30BC Allowing appeals against sentence

372. The effect of this clauses is that, if the Court allows an appeal against sentence it can, among other things, increase or decrease the sentence or substitute a different sentence. If the appeal is against a judgment in which one or more orders were made under subsection 19B(1) of the *Crimes Act 1914*, the Court can vary or set aside any or all of the orders or set aside the orders, record a conviction and sentence the accused.

Clause 30BD Allowing appeals for certain acquittals

373. This clause applies if the Court upholds an appeal against an acquittal as a result of the Court finding that there was no case to answer or an acquittal on grounds of mental illness. If the Court allows the appeal it can, among other things, set aside the acquittal and order that there be, or not be, a new trial. The Court will have a discretion whether to order a new trial. The fact that the Court upholds an appeal against an acquittal does not mean that there must be a new trial.

Clause 30BE Allowing appeals involving unfitness, mental illness etc.

374. This clause applies if the Court allows an appeal in the case of a judgment of the Court constituted by a single Judge that consists of one or more orders, determinations or findings under Division 6 or 9 of Part IB of the *Crimes Act 1914*. These deal with issues relating to fitness for trial and sentencing alternatives for persons suffering from a mental illness or intellectual disability. If the Court allows the appeal it can, among other things, vary or set aside the order, determination or finding and any related orders, determinations or findings.

Clause 30BF Allowing appeals from summary proceedings

375. This clause applies if the Court allows an appeal against a judgment in summary criminal proceedings.

376. Under subclause (2), if the Court allows an appeal against conviction, it can set aside the conviction and record an acquittal or remit the matter to the Judge for further hearing (with or without directions), or remit the matter to a different Judge for a new hearing (with or without directions). This would ensure that the Court has similar appellate powers relating to convictions for summary offences that it has for indictable offences under subclause 30BB(2).

377. Under subclause (3), the Court can also increase, decrease or substitute a sentence imposed by a lower court in summary proceedings. This would ensure that the Court has the same appellate powers relating to sentences for summary offences that it has for indictable offences under subclause 30BC(2).

378. Under subclause (4), if the appeal is against a judgment in which one or more orders were made under Division 8 of Part IB or subsection 19B(1) of the *Crimes Act 1914*, the Court can vary or set aside any or all of the orders and, if it sets aside an order, record a conviction and/or sentence the accused. Division 8 of Part IB relates to the summary disposition of persons suffering from a mental illness or intellectual disability.

379. If the Court allows an appeal against acquittal, it may record an conviction or remit the matter to the Judge for further hearing (with or without directions), or remit the matter to a different Judge for a new hearing (with or without directions).

Clause 30BG Allowing appeals against bail, bail forfeiture or interim judgments and decisions (including about custody)

380. This clause applies if the Court allows an appeal against a judgment in relation to bail or against an interim judgment or decision. If the Court allows the appeal it can, among other things, set aside the judgment or decision, vary the appealed decision, substitute a new judgment or decision, or make orders about custody or bail. A bail judgment can be varied by, for example, imposing, removing or varying conditions on which bail was granted.

381. Subclause (3) also provides that, if the Court allows an appeal against an interim judgment or decision, the Court may order the continuation or cessation of the proceedings in which the judgment or decision was made.

Clause 30BH Matters relevant to form of judgment on appeal

382. Subclause (1) provides that the powers in Subdivision B may be exercised even though the notice of appeal asks that only part of the judgment or decision be reversed or varied.

383. Subclause (2) provides that, for the purposes of sentencing an accused under Subdivision B, including by way of substituting a different sentence, the Court's powers are taken to include those of the court from which the appeal was made. This means that the Court could, for example, sentence the accused by making an order under section 19B of the *Crimes Act 1914* even if, on the face of the sentencing provisions, a relevant order cannot be made by an appeal court.

384. Subclause provides that Subdivision B has effect subject to section 80 of the Constitution and to any other Act. The powers given to the Court to enter verdicts after allowing an appeal must be exercised in accordance with section 80 of the Constitution and any applicable Commonwealth Act.

Subdivision C—References

Clause 30CA Cases stated and questions reserved

Cases/questions from proceedings other than committal proceedings

385. Subclause (1) applies when a single judge of the Court is dealing with a criminal matter or when another court is dealing with a criminal matter in circumstances where there is a right of appeal to the Federal Court. The subclause gives the judge or court power to get a ruling on a legal issue before making a judgment or decision. The judge or court can get a ruling by stating a case or referring a question. Subclause (4) sets out how the case or question must be determined.

386. In some cases that process may be a useful way of resolving a point that is in dispute and may result in a significant overall saving of court time.

Cases/questions from committal proceedings

387. Subclause (2) applies if a legal issue arises at the committal stage before a magistrate of a State or Territory court in proceedings where the magistrate has power to commit the accused for trial or sentencing before either the Federal Court or a superior court of the relevant State or Territory. That will be the case in relation to the serious cartel offences.

388. If the magistrate wants to get a ruling on a legal issue, subclause (2) allows the magistrate to state a case or refer a question either to the Federal Court or to a superior

court of the relevant State or Territory. However, that power can only be exercised if the magistrate has power under the State or Territory law applying to the committal proceedings to state a case or refer a question to a superior court. Subclause (2) does not give a magistrate any additional powers to state a case or refer a question. It only gives power to decide which court to state a case or refer a question to if a power to state a case already exists.

General rules

389. Subclause (3) gives the Court jurisdiction to hear and determine a case or question it receives under subclause (1) or (2).

390. Subclause (4) provides that, subject to any other Act, if the court that has stated a case or reserved a question is not a court of summary jurisdiction, the jurisdiction must be exercised by a Full Court. Otherwise, the jurisdiction may be exercised by a single Judge or by a Full Court. That means, for example, that if a magistrate in committal proceedings refers a case or states a question to the Federal Court, the matter can be dealt with by a single Judge or by a Full Court as determined by the Court.

391. Subclause (5) provides that a court that has power to state a case or refer a question to the Court under subclause (1) cannot state a case or refer a question to any court other than the Federal Court.

Clause 30CB Questions referred after trial

392. This clause gives the prosecution power to bring a precedent appeal where an accused person has been acquitted on the basis of a ruling of law which the prosecutor wants to test on appeal. The Full Court has jurisdiction to hear the appeal, and rule on the legal issue. The ruling will not affect the position of the accused but will clarify the legal issue for future cases. In *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, the High Court held that there is no Constitutional impediment to a federal court hearing a precedent appeal despite the fact that the outcome of the appeal will not affect the position of the acquitted person.

393. Subclause (1) provides that the prosecutor may apply to the Court or a Judge for leave to refer a question of law to a Full Court for its determination if a judgment of the Court acquits a person following a trial on indictment.

394. Subclause (2) provides that, if leave is granted, both the prosecutor and the acquitted person may make submissions to the Full Court. In some cases, the acquitted person may take no interest in the proceedings but in others the person may want to make submissions because they consider that the rulings made at the trial were correct.

395. Subclause (3) makes it clear that a determination made by the Court on the question of law does not affect the person's acquittal.

396. Subclause (4) provides that the Court may make orders to ensure each party to the proceedings under this clause is adequately represented in those proceedings. This

subclause has effect despite clause 30DA, with deals with costs in appeal cases. The Court could, for example, decline to deal with a referred question until arrangements have been made to meet the legal costs of an acquitted person who wants to make submissions but who is impecunious.

Subdivision D—Other

Clause 30DA Costs

397. This clause provides that nothing in the Federal Court Act gives the Court power to award costs in criminal appeal proceedings, or in proceedings before the Court under clause 30CA (which deals with cases stated and questions referred) or clause 30CB (which deals with questions referred after trial). The clause also provides that there is no power to award costs in proceedings referred to the Court under section 20B of the *Crimes Act 1914* (which deals with fitness to plead).

398. This reflects the traditional position that the Crown neither pays not recovers costs in indictable criminal proceedings. The provision does not affect the operation of legal aid provisions in Commonwealth or State/Territory law.

Item 4 After Part VI

Insert:

Part VIA—Offences relating to juries

Division 1—Offences

399. The offences in Division 1 apply to juries in both civil and criminal matters. That avoids the possibility that the same conduct by a juror, or a person who deals with a juror, may be a criminal offence in some situations but not in others.

Clause 58AA Failing to attend for jury service

400. Subclause (1) makes it an offence for a person who has been served with a summons for jury duty to fail to attend for service as a juror if the summons has not been withdrawn and the person has not been excused from serving as a juror in the proceedings to which the summons relates. The maximum penalty is a fine of 30 penalty units.

401. Subclause (2) provides that this offence is one of strict liability. Subclause (3) provides that the offence does not apply if the person has a reasonable excuse.

402. The prosecution will have to prove the physical elements of the offence but will not have to show that the defendant acted intentionally or recklessly. The defendant will, however, have a defence if they can show that they had a reasonable excuse.

403. This is appropriate given the potential range of reasons why a person may fail to attend for jury service. It is possible, for example, that the defendant failed to receive a summons even if service was effective at law, or the defendant may have misread the summons. It would be impractical to require the prosecution to prove that the defendant acted intentionally or recklessly given that it would rarely have information about why the person failed to attend for jury service. The person who will have that information is the defendant and it would not place an unreasonable burden on the defendant to provide a reason to the Court if they had reasonable grounds for not answering a summons. The offence is punishable by a relatively modest fine and does not attract imprisonment.

Clause 58AB Failing to comply with directions—persons attending for jury service

404. This clause makes it an offence for a person who is a potential juror and who attends for service as a juror to fail to comply with a direction given the Sheriff or the Court.

405. There are two separate offences, one under subclause (1) which applies to criminal trials and one under subclause (2) which applies to civil trials. In both cases, the maximum penalty is a fine of 30 penalty units.

406. Subclause (3) provides that these are offences of strict liability. Subclause (4) provides that these offences do not apply if the person has a reasonable excuse.

407. The prosecution will have to prove the physical elements of these offences but will not have to show that the defendant acted intentionally or recklessly. The defendant will, however, have a defence if they can show that they had a reasonable excuse.

408. This is appropriate given the potential range of reasons why a potential juror may fail to comply with a direction. It is possible, for example, that the defendant failed to understand the direction. It would be impractical to require the prosecution to prove that the defendant acted intentionally or recklessly given that it would rarely have information about why the person failed to comply with a direction. The person who will have that information is the defendant and it would not place an unreasonable burden on the defendant to provide a reason to the Court if they had reasonable grounds for not complying with a direction. These offences are punishable by a relatively modest fine and do not attract imprisonment.

Clause 58AC Failing to comply with directions—jurors

409. Subclause (1) makes it an offence for a person who is a juror, and who has not been discharged, to fail to comply with a direction given by the Sheriff or the Court. The maximum penalty is a fine of 30 penalty units.

410. Subclause (2) provides that this offence is one of strict liability. Subclause (3) provides that the offence does not apply if the person has a reasonable excuse.

411. The prosecution will have to prove the physical elements of the offence but will not have to show that the defendant acted intentionally or recklessly. The defendant will, however, have a defence if they can show that they had a reasonable excuse.

412. This is appropriate given the potential range of reasons why a juror may fail to comply with a direction. It is possible, for example, that the defendant failed to understand the direction. It would be impractical to require the prosecution to prove that the defendant acted intentionally or recklessly given that it would rarely have information about why the person failed to comply with a direction. The person who will have that information is the defendant and it would not place an unreasonable burden on the defendant to provide a reason to the Court if they had reasonable grounds for not complying with a direction. The offence is punishable by a relatively modest fine and does not attract imprisonment.

Clause 58AD Impersonating a juror or potential juror

413. Subclause (1) makes it an offence for a person to impersonate another person with the intention of being empanelled as a juror or causing the other person to be excused from serving as a juror. The maximum penalty is imprisonment for 2 years.

414. Subclause (2) makes it an offence for a person to impersonate another person with the intention of acting as a juror or causing the other person to be discharged from serving as a juror. The maximum penalty is imprisonment for 2 years.

Clause 58AE Failing to complete and return a questionnaire

415. Subclause (1) makes it an offence for a person who is sent a jury questionnaire under subclause 23DN(2) to either fail to return it or to fail to complete it. The maximum penalty is a fine of 30 penalty units.

416. Subclause (2) provides that this offence is one of strict liability. Subclause (3) provides that the offence does not apply if the person has a reasonable excuse.

417. The prosecution will have to prove the physical elements of the offence but will not have to show that the defendant acted intentionally or recklessly. The defendant will, however, have a defence if they can show that they had a reasonable excuse.

418. This is appropriate given the potential range of reasons why a person may fail to complete and return a questionnaire. It would be impractical to require the prosecution to prove that the defendant acted intentionally or recklessly given that it would rarely have information about why the person failed to complete and return a questionnaire. The person who will have that information is the defendant and it would not place an unreasonable burden on the defendant to provide a reason to the Court if they had reasonable grounds for not completing and returning a questionnaire. The offence is punishable by a relatively modest fine and does not attract imprisonment.

Clause 58AF False or misleading information to avoid jury service

419. Subclause (1) makes it an offence for a person to give false or misleading information to the Court, the Sheriff or another officer of the Court with the intent of avoiding service as a juror. The maximum penalty is a fine of 60 penalty units.

420. The effect of subclause (2) is that it is a defence if the relevant information was not false or misleading in a material particular. A defendant will bear an evidential burden in relation to the defence.

421. A person should not commit a criminal offence by making a false or misleading statement on a matter which is immaterial, but it can be difficult to determine whether a matter is material or not without knowing the full circumstances of the case including the personal circumstances of the accused. A false or misleading statement may appear, on its face, to be material but may turn out to be immaterial when the true position is known. The person best placed to give evidence on these matters, if required, is the defendant. The offence is not punishable by imprisonment.

Clause 58AG Bribery of jurors or potential jurors

Giving a bribe

422. Subclause (1) makes it an offence for a person to dishonestly provide, or offer or promise to provide, a benefit to another person with the intent of influencing a juror or a potential juror. It is also an offence for a person to dishonestly cause a benefit, or an offer or promise for a benefit, to be provided to another person, with the intent of influencing a juror or a potential juror. A payment, offer or promise does not have to be made directly to the juror or potential juror. The maximum penalty is imprisonment for 10 years.

Receiving a bribe

423. Subclause (2) makes it an offence for a juror or potential juror to dishonestly ask for, receive or obtain, or agree to receive or obtain a benefit for himself, herself or another person with the intent that the exercise of the person's duties as a juror or potential juror will be influenced or of giving the impression that the exercise of the person's duties as a juror or potential juror will be influenced. The maximum penalty is imprisonment for 10 years.

Determination of dishonesty to be a matter for the trier of fact

424. The requirement to prove dishonest ensures that these offences do not cover benign conduct such as the payment or receipt of a jury allowance or wages.

425. Subclause (3) makes it clear that the determination of dishonesty is a matter for the trier of fact. If there is a jury, the trier of fact will be the jury.

Expressions have Criminal Code meaning

426. Subclause (4) provides that an expression used in this clause that is also used in Chapter 7 of the Criminal Code (which deals with the proper administration of government) has the same meaning as it has in that Chapter. That avoids the need to define terms that are already defined in Chapter 7 of the Criminal Code.

Clause 58AH Causing or threatening harm to jurors, potential jurors or former jurors

Causing harm

427. Subclause (1) makes it an offence for a person to intentionally cause harm to another person, without consent of that person, if the conduct is targeted at a juror or potential juror. The offence is committed irrespective of whether harm is inflicted on a juror or potential juror or on another person, such as a member of a juror's family. The offence is also committed irrespective of whether the conduct is designed to influence a juror/potential juror or to punish a juror/potential juror. The maximum penalty is imprisonment for 10 years.

Threatening to cause harm

428. Subclause (2) makes it an offence for a person to threaten to cause harm to another person if the conduct is targeted at a juror or potential juror and the person intends the other person to fear that the threat will be carried out or is reckless as to that matter. The offence is committed irrespective of whether the threat is directed at a juror or potential juror or at another person, such as a member of a juror's family. The offence is also committed irrespective of whether the threat is designed to influence a juror/potential juror or to punish a juror/potential juror. The maximum penalty is imprisonment for 7 years.

When conduct causes harm

429. Subclause (3) provides that, for the purposes of this clause, a person's conduct is taken to cause harm if it substantially contributes to harm.

Unnecessary to prove that a threatened person actually feared harm

430. Subclause (4) provides that, in a prosecution for an offence against this clause, it is not necessary to prove that a person who was threatened actually feared that the threat would be carried out.

Expressions have Criminal Code meaning

431. Subclause (5) provides that an expression used in this clause that is also used in Part 7.8 of the Criminal Code (that deals with causing harm to, and impersonation and obstruction of, Commonwealth public officials) has the same meaning as it has in that

Part. That avoids the need to define terms that are already defined in Part 7.8 of the Criminal Code.

Clause 58AI Obstructing jurors or potential jurors

432. This clause makes it an offence for a person who knows that another person is a juror or potential juror to obstruct, hinder, intimidate or resist the other person in the performance of the other person's duties, or functions, as a juror or potential juror. The maximum penalty is imprisonment for 12 months.

Clause 58AJ Publishing or broadcasting information identifying jurors, potential jurors or former jurors

433. This clause is designed to protect the anonymity of jurors and potential jurors.

434. Subclause (1) makes it an offence for a person to publish or broadcast information to the public if the information identifies another person as a juror, potential juror or former juror or a member of the public could reasonably be expected to identify the other person as a juror, potential juror or former juror either on the basis of the information or on the basis of the information in conjunction with other publicly-available information. The maximum penalty is a fine of 50 penalty units.

435. Subclause (2) makes it an offence for a person to publish or broadcast information to a section of the public if the information identifies another person as a juror, potential juror or former juror or a member of that section of the public could reasonably be expected to identify the other person as a juror, potential juror or former juror either on the basis of the information or on the basis of the information in conjunction with other information available to that section of the public. The maximum penalty is a fine of 50 penalty units.

436. The second offence will cover the situation where information is published or broadcast in a form that is not available to the general public such as a newspaper or magazine that is distributed only to subscribers.

437. Neither offence will cover a disclosure of information by the person who is the relevant juror, potential juror or former juror. That disclosure will not have identified another person as a juror, potential juror or former juror. This means, for example, that it is not an offence for a person to tell their family or workmates that they have been summonsed for jury service or empanelled on a jury.

438. Subclause (3) provides that the offences will not apply to a publication or broadcast that occurs in circumstances specified in regulations made for the purposes of this section. A defendant bears an evidential burden in relation to that matter.

439. The purpose of subclause (3) is to ensure that the offences do not operate unfairly if circumstances arise where there is clear social utility in allowing a person to publish information that identifies another person as a juror or former juror. It may be appropriate, for example, to permit a researcher to publish the names of former jurors in

the course of a legitimate research project. It is not possible to predict what circumstances may arise but, if they do, it will be a simpler process to enact a regulation than to amend legislation. The offences are not punishable by imprisonment.

Clause 58AK Soliciting information from jurors

440. Subclause (1) makes it an offence for a person to solicit information from a juror or former juror if the information identifies a juror or former juror, provides a basis for identifying a juror or former juror, or relates to the deliberations of the jury. The maximum penalty is a fine of 60 penalty units.

441. Subclause (2) provides for an aggravated offence if the offender provides, or offers or promises to provide, a benefit to the juror/former juror, or causes a benefit, or an offer or promise of a benefit, to be provided to the juror/former juror. The maximum penalty is imprisonment for 6 months.

442. Subclause (3) sets out a list of exemptions which ensure that the offences do not apply if information is solicited for a valid reason. They include a Judge or officer of the Court soliciting information because of a suspicion that a juror or former juror is or was biased; an investigating official soliciting information because of a suspicion that a juror or former juror committed an offence in the performance of their duty; a solicitation that takes place in accordance with the performance of a function under the Federal Court Act; and a solicitation in accordance with an authority granted by the Attorney-General for the conduct of a research project into matters relating to juries or jurors. There is also an exemption which allows a health professional to solicit information from the former juror when treating the former juror in relation to issues arising out of the former juror's service on the jury. This recognises that the performance of jury service can be stressful and that, on some occasions, a former juror can require assistance from a health professional.

443. Subclause (4) defines the terms "benefit" and "investigating official" for the purpose of the clause. "Benefit" has the same meaning as in the Criminal Code. "Investigating official" means the Attorney-General, the DPP, a member of the Australian Federal Police or of the police force or police service of a State or Territory, or a Judge or officer of the Court.

Clause 58AL Disclosing information about a jury

444. Subclause (1) makes it an offence for a juror or former juror to disclose information that identifies a person as a juror or former juror, enables a person to be identified as a juror or former juror, or relates to the deliberations of the jury. The maximum penalty is a fine of 60 penalty units.

445. Subclause (2) provides for an aggravated offence if the juror or former juror acts for a reward or the expectation of a reward, to be paid either for himself, herself or another person. The maximum penalty is imprisonment for 6 months.

446. Subclause (3) sets out a list of exemptions which ensure that the offences do not apply if information is disclosed for a valid reason. They include disclosure to a Judge or officer of the Court because of a suspicion that a juror or former juror is or was biased; disclosure to an investigating official because of a suspicion that a juror or former juror committed an offence in the performance of their duty; a disclosure that takes place in accordance with the performance of a function under the Federal Court Act; and a disclosure in accordance with an authority granted by the Attorney-General for the conduct of a research project into matters relating to juries or jurors. There is also an exemption which allows a former juror to disclose information to a health professional who is treating the former juror in relation to issues arising out of the former juror's service on the jury. This recognises that the performance of jury service can be stressful and that, on some occasions, a former juror can require assistance from a health professional.

447. Subclause (4) provides that an expression used in subclause (2) that is also used in Chapter 7 of the Criminal Code (which deals with the proper administration of government) has the same meaning as it has in that Chapter. That avoids the need to define terms that are already defined in Chapter 7 of the Criminal Code.

448. Subclause (4) defines the terms "investigating official" for the purpose of the clause. It means the Attorney-General, the DPP, a member of the Australian Federal Police or of the police force or police service of a State or Territory, or a Judge or officer of the Court.

Clause 58AM Making improper inquiries as a juror or potential juror

449. This clause makes it an offence for a juror or potential juror to make an inquiry for the purposes of obtaining information relating to an accused or a matter relevant to the trial if the inquiry is not directed to the presiding Judge, the Sheriff or a fellow juror or fellow potential juror. The maximum penalty is a fine of 60 penalty units.

450. This will ensure that jurors consider the issues that are before the jury on the basis of evidence and directions by the trial judge, and not make their own inquiries.

Division 2—Infringement notices

451. Division 2 sets up an infringement notice scheme that applies to two of the jury offences: an offence against clause 58AA (failing to attend for jury service) or an offence against clause 58AE (failing to complete and return a questionnaire). These are both offences of strict liability, punishable only by a modest fine, which makes it appropriate for them to be dealt under an infringement notice scheme.

452. An infringement notice scheme provides an effective method for dealing with relatively minor offences where there is potentially a large number of cases, where persons rarely contest guilt, and where the maximum penalty is a relatively modest fine. An infringement notice scheme gives a person who does not deny guilt an opportunity to pay an administrative penalty and avoid the risk of prosecution. If the person denies guilt

or otherwise wants to contest the matter, they can decline to pay the administrative penalty and allow the matter to proceed in accordance with the normal procedures that apply to alleged offences.

453. The infringement notice scheme is in the same form as similar schemes in other Commonwealth Acts except subclause 58BF(3), the effect of which is considered below. This is a new provision for a Commonwealth infringement notice scheme.

Clause 58BA When an infringement notice can be given

454. Subclause (1) gives the Sheriff power to give a person an infringement notice relating to an alleged offence against clause 58AA or clause 58AE if the Sheriff has reasonable grounds to believe that the person has committed an offence against either of those clauses.

455. Subclause (2) provides that an infringement notice must be given within 12 months after the day on which the offence is alleged to have been committed. The alleged offender may still be liable to prosecution, but cannot be given an infringement notice after 12 months has passed.

Clause 58BB Matters to be included in an infringement notice

456. This clause sets out the matters that must be included in an infringement notice, to ensure that the recipient of the notice fully understands the purpose of the notice and their rights under the infringement notice scheme. The matters are:

- a unique identifying number;
- the name of the person to whom the notice is given;
- the name of the person who gave the notice;
- brief details of the alleged offence including relevant dates and the maximum penalty a court could impose;
- a statement to the effect that criminal proceedings will not be brought in relation to the matter if the penalty specified in the notice is paid to the Sheriff, on behalf of the Commonwealth, within 28 days after the notice is given or, if the Sheriff allows a longer period, that longer period;
- a statement that payment of the penalty is not an admission of guilt or liability;
- an explanation of how payment of the penalty is to be made;
- invite the recipient to, within 28 days after the notice is given, notify the Sheriff in the manner set out in the notice of any reason why the Sheriff should withdraw the infringement notice;
- a statement to the effect that the time period will be extended if the Sheriff is given a notice of any reason why the Sheriff should withdraw the notice; and
- such other matters (if any) as are specified in the regulations.

Clause 58BC Amount of penalty

457. This clause provides that the penalty to be specified in an infringement notice relating to an alleged offence must be a pecuniary penalty equal to one-fifth of the maximum penalty that a court could impose for the offence. This is a standard feature in Commonwealth infringement notice schemes and provides an incentive for a person to pay the penalty rather than require that the matter be taken to court.

Clause 58BD Withdrawal of an infringement notice

458. This is a standard feature in Commonwealth infringement notice schemes and provides a mechanism under which a notice that has been given can be withdrawn if the recipient provides an acceptable explanation for their conduct or the Sheriff decides, within 28 days, that the notice should not have been issued because, for example, the Sheriff now considers that the matter should be dealt with by way of prosecution.

Sheriff may withdraw an infringement notice

459. Subclauses (1) and (2) give the Sheriff power to withdraw an infringement notice that has been given to a person. That power can be exercised on the Sheriff's own initiative, subject to subclause (3), or after the person has notified the Sheriff of a reason why the Sheriff should withdraw the infringement notice.

460. The Sheriff may decide to withdraw an infringement notice of his or her own initiative if, for example, the Sheriff decides after giving the notice that the matter should more properly be dealt with by way of prosecution.

Withdrawal can only occur after first 28 days if Sheriff notified of reasons

461. Subclause (3) provides that the Sheriff cannot withdraw an infringement notice after 28 days have passed unless the person has notified the Sheriff of a reason why the Sheriff should withdraw the infringement notice.

If person notifies Sheriff of reasons to withdraw

462. Subclause (4) applies if the person notifies the Sheriff of a reason why the Sheriff should withdraw the infringement notice. The Sheriff must decide whether to withdraw the infringement notice and, if the Sheriff decides not to withdraw the infringement notice, the Sheriff must give the person a written notice of that decision.

463. Subclause (5) requires that the refusal notice must contain a statement to the effect that criminal proceedings will not be brought in relation to the matter if the penalty specified in the infringement notice is paid to the Sheriff, on behalf of the Commonwealth, within 28 days after the refusal notice is given.

Refund of penalty if infringement notice withdrawn

464. Subclause (6) applies if the penalty specified in the infringement notice is paid and the infringement notice is withdrawn after the penalty is paid. The Commonwealth is liable to refund the penalty.

Clause 58BE What happens if the penalty is paid

465. This clause applies if an infringement notice is given to a person and the penalty is paid, either in response to the notice or after the person has notified the Sheriff of a reason why the Sheriff should withdraw the infringement notice and the Sheriff has decide not to withdraw the notice.

466. Subclause (2) provides that any liability of the person for the alleged offence is discharged. Subclause (3) confirms, for the avoidance of doubt, that criminal proceedings may not be brought against the person for the alleged offence. Subclause (3) also means, among other things, that the person cannot be given a further infringement notice for the alleged offence.

467. Subclause (4) provides that the person is not regarded as having been convicted of the offence specified in the infringement notice.

Clause 58BF Effect of this Division on criminal proceedings

468. Subclause (1) makes it clear, for the avoidance of doubt, that Division 2:

- does not require an infringement notice to be given in relation to an alleged offence against clause 58AA or clause 58AE;
- does not affect the liability of a person to be prosecuted for an offence against one of those clauses if the person does not pay the infringement penalty, or the person is not given an infringement notice, or an infringement notice is withdrawn; and
- does not limit a court's discretion to determine the amount of a penalty to be imposed on a person convicted of an offence.

469. Subclause (2) provides that evidence of an admission made by a person in notifying the Sheriff of a reason why the Sheriff should withdraw the infringement notice is inadmissible in proceedings against the person for the alleged offence concerned. However, subclause (3) provides that subclause (2) does not apply if the person gives evidence in the proceedings that is inconsistent with the admission.

470. The effect of these subclauses is 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 give evidence in criminal proceedings which is inconsistent with the admission. In that situation, the person will either have given false information to the court or will have given false information to the Sheriff. In either event, it should be open to the prosecutor to ensure that the court is aware of the inconsistency.

Clause 58BG Regulations

471. This clause gives power to enact regulations to make further provision in relation to infringement notices and refusal notices given under subclause 58BD(4).

Part VIB—Bail

472. The bail provisions apply in indictable primary proceedings and criminal appeal proceedings. They do not apply in summary criminal proceedings. In summary criminal proceedings, State/Territory bail laws will continue to apply through the operation of subsection 68(1) of the Judiciary Act.

473. The Federal Court will have power to grant bail from the point when an accused person first appears before the Court. The Court will have no role prior to that. If a magistrate commits an accused for trial before the Federal Court, the magistrate will need to make orders for bail or custody. Subsection 68A(4) of the Judiciary Act will give the magistrate power to grant bail to the person to appear before the Federal Court.

474. If a party wants to appeal against a bail or custody order made by a committing magistrate, they will need to do so in a State or Territory court using appeal rights, if there are any, under State/Territory law.

475. There is no provision for a bail order made by a committing magistrate to continue after an accused person has appeared before the Federal Court. If the accused applies for bail, the Court will have to consider the issue afresh and, if it decides to grant bail, make a fresh order.

476. There is no provision for the Court to make an order dispensing with bail. That can be done under the laws of some Australian jurisdictions but the same result can be reached by the Court granting bail but not imposing conditions other than a condition to appear.

Division 1—Introduction

Clause 58CA Simplified outline

477. This clause provides a simplified outline of Part VIB for the assistance of those reading the Bill.

Division 2—Granting bail

Clause 58DA Applying for bail

478. Subclause (1) provides that at any stage during indictable primary proceedings or criminal appeal proceedings, the accused can apply to the Court for bail for one or more offences.

479. Subclause (2) provides that if the Court refuses to grant bail to the accused for an offence, the accused cannot apply again for bail for the offence unless there has been a significant change in circumstances since the refusal. This means that an accused who is not satisfied with a decision refusing bail can appeal against that decision but cannot make a fresh application for bail unless there has been a significant change in circumstances since the refusal.

Clause 58DB Granting bail

480. Subclause (1) gives the Court power, by order, to grant bail to the accused for one or more of the offences. A bail order will normally be for a period specified in the order. It may, for example, require the accused to appear before the Court on a specified day or on the occurrence of a specified event such as the day notified by the Court as the day when a trial has been listed to commence.

481. Subclause (2) sets out the matters the Court must consider when deciding whether to grant bail. They are:

- whether the accused will appear in court if bail is granted;
- the interests of the accused;
- the protection of any other person;
- the protection and welfare of the community, including whether there is a risk that the accused will commit offences if bail were granted; and
- whether there is a risk that the accused will approach witnesses or attempt to destroy evidence.

482. Subclause (3) applies if there is an application for bail during criminal appeal proceedings. There is an additional requirement in such circumstances which is that the Court must also be satisfied that there are exceptional circumstances that justify granting bail.

483. Subclause (4) provides that this clause has effect subject to any other Act. This has been inserted to ensure that the clause does not override provisions like sections 15AA and 15AB of the *Crimes Act 1914* if the Federal Court is ever conferred jurisdiction to hear an offence covered by subsection 15AA(2) of that Act (eg a terrorism offence).

Clause 58DC Bail may be granted subject to conditions

484. Subclause (1) provides that a bail order may be made unconditionally or subject to one or more specified conditions.

485. Subclause (2) sets out a non-exclusive list of conditions that can be imposed. They are:

- the accused reside at a specified place;

- the accused report to a specified person at a specified place at a specified time or times;
- the accused surrender any passport held by the accused and agree not to approach a point of international departure;
- the accused provide security in the form of money, or other property, for forfeiture if the accused fails to appear before the Court in accordance with the accused's bail undertaking;
- one or more other specified persons provide security in the form of money, or other property, for forfeiture if the accused fails to appear before the Court in accordance with the accused's bail undertaking.

486. Subclause (3) provides that money or other property deposited with the Court or otherwise provided as security must be dealt with by the Court in accordance with the Rules of Court.

Clause 58DD Bail to be stayed pending appeal

487. Subclause (1) applies if the Court makes a bail order and the prosecutor requests the Court to stay the bail order pending appeal. The Court must stay the bail order and, by warrant of commitment, remand the accused in custody. The order will cease to operate, and the accused can be released on bail, if the prosecutor fails to file a notice of appeal within 48 hours. Otherwise, unless set aside, the order will remain in force until the appeal is finally disposed of.

488. This provision ensures that there is a mechanism under which the status quo can be preserved if there is a flight risk and there is a genuine question about whether bail should have been granted. The DPP is likely to use this provision sparingly.

489. Subclause (2) provides that a warrant of commitment under subclause (1) may be signed by any Judge, the Registrar or any Deputy Registrar, District Registrar or Deputy District Registrar of the Court.

Clause 58DE Bail undertakings etc.

490. Subclause (1) provides, for the avoidance of doubt, that if the Court grants bail to the accused, the accused can only be released on bail if the accused has signed a bail undertaking in the required form, any third party surety has signed an undertaking in the required form, and any security that is required to be deposited has been deposited.

491. Subclause (2) sets out the things that must be included in a bail undertaking given by an accused. They are:

- an undertaking by the accused to appear in person before the Court in accordance with the bail order and to promptly notify the Court if the accused changes his or her residential address; and
- an undertaking by the accused to comply with the specified conditions, if any, on which bail has been granted.

492. Subclause (3) provides that a bail undertaking, and any third party security undertaking, must be expressed to cover the period for which bail was granted and each period for which bail may be continued under subclause 58GA(1). The second part of this provisions ensures that, if bail is continued under subclause 58GA(1), all relevant undertakings will continue in force even if one or more of them is expressed to apply for a limited time and that time has expired.

493. Subclause (4) provides that the Registrar must cause the parties to be given a copy of the accused's bail undertaking and any third party security undertaking made in relation to the accused's bail. This provision resolves any doubt about whether the prosecution is entitled to a copy of the relevant undertakings.

Clause 58DF Effect of granting bail

494. Subclause (1) provides that if an accused is released on bail under Part VIB, the accused is entitled to be at liberty in respect of the offence in accordance with the accused's bail undertaking. However, this does mean the accused must be released if he or she is being held in custody for some other offence.

495. Subclause (2) notes that subclause (1) is subject to a stay under clause 58DD. If an order is made under clause 58DD that stays a bail order pending appeal, the accused is not entitled to be released on bail while that order is in force.

Clause 58DG Seeking discharge from undertaking to give security

496. Subclause (1) gives a person who has provided a third party security undertaking the right to apply to the Court to be discharged from liability under the undertaking.

497. Subclause (2) provides that, if there is an application and the accused has not already failed to appear before the Court in accordance with the accused's bail undertaking, the Court must direct that the person be discharged from this liability, unless satisfied it would be contrary to the interests of justice to do so. This reflects the fact that a person who has provided a third party security undertaking should normally be able to withdraw it if, for example, they are no longer confident that the accused will answer bail.

498. If the accused has already failed to appear before the Court in accordance with the accused's bail undertaking, it will be too late for third party to apply to be released from their security.

499. If the Court releases a third party from their security this will trigger a reconsideration of the accused's bail under Division 3, in which event the accused must be brought before the Court.

Clause 58DH Dealings with property given as security for bail

500. This clause makes it an offence for a person who has signed a bail undertaking or a third party security undertaking, and who has undertaken to forfeit security other than

money if the accused does not appear before the Court, to dispose of or otherwise deal with that security with the intention of preventing the forfeiture of the security, or to destroy the security, or to reduce its value. The maximum penalty is imprisonment for 2 years.

Division 3—Reconsidering bail orders

Clause 58EA Reconsidering bail—discharge of security or accused fails to comply with the accused's bail undertaking

501. This clause applies if the Court gives a direction under subclause 58DG(2) that releases a third party from a security undertaking or if the prosecutor applies for a bail order to be varied or revoked on the basis that the accused has failed to comply with a bail undertaking.

502. Subclause (2) provides that the Court must cause the accused to be brought before the Court in accordance with the Rules of Court.

503. In a case where the accused failed to appear before the Court in accordance with the accused's bail undertaking, the prosecution may also be able to commence forfeiture proceedings under clause 58FB.

504. Subclause (3) gives the Court power to vary or revoke the bail order.

505. Subclause (4) requires that, in deciding whether to vary or revoke the bail order, the Court must consider the matters set out in subclause 58DB(2) and, if the decision is to be made during criminal appeal proceedings, the principle that exceptional circumstances must exist for the accused to be released on bail. This means that, if the Court is deciding whether to vary or revoke bail, it must consider the same matters it would be required to consider if it was deciding whether to grant bail.

Clause 58EB Reconsidering bail—change in circumstances

506. Subclause (1) gives the Court power to vary or revoke an accused's bail order if the Court is satisfied that there has been a sufficient change in circumstances since the making of the bail order. The Court must consider the matters set out in subclause 58DB(2) and, if the decision is to be made during criminal appeal proceedings, the principle that exceptional circumstances must exist for the accused to be released on bail. This means that, if the Court is deciding whether to vary or revoke bail, it must consider the same matters it would be required to consider if it was deciding whether to grant bail.

507. Subclause (2) gives the Court power to refuse to hear an application for an order to vary or revoke bail without a hearing if the Court is satisfied that the application is frivolous or vexatious. That may be the case if, for example, an accused who has been granted bail but is dissatisfied with the conditions of bail makes repeated applications for an order varying the conditions which the Court is satisfied is unlikely to succeed.

Clause 58EC Consequences if bail is varied or revoked

508. Subclause (1) provides, for the avoidance of doubt, that if the Court varies the accused's bail, the accused can only be released on bail if the accused has signed a new bail undertaking in the required form, any third party surety has signed a new undertaking in the required form, and any security that is required to be deposited has been deposited. Subclause (1) would not require someone to sign a new security undertaking if, under the order as varied, it is no longer a condition of bail for that person to provide security.

509. Subclause (2) provides that if the Court revokes the accused's bail, the Court has power to cause the accused to be committed to prison in accordance with the Rules of Court.

Division 4—Further consequences if accused fails to appear in accordance with bail undertaking

Clause 58FA Offence for failing to appear before the Court

510. Subclause (1) makes it an offence for an accused who gives the Court a bail undertaking and subsequently fails to appear before the Court in accordance with the bail undertaking. The maximum penalty is imprisonment for 2 years. If an accused fails to answer bail, their bail will also potentially be reconsidered under Division 3.

511. Subclause (2) provides a defence if the person has a reasonable excuse. A defendant bears an evidential burden in relation to that matter. A defence of reasonable excuse is appropriate in these circumstances because of the potential range of reasons why a person might fail to answer bail. It is not possible to foresee all the reasons that might arise or to predict which of those reasons might turn out, on examination, to provide a valid reason for not answering bail.

512. It will not be an offence against this clause for an accused to breach any other condition of bail other than the requirement to appear before the Court when required to do so under a bail undertaking.

Clause 58FB Notice of proposed forfeiture

513. This clause applies if the prosecutor alleges that an accused failed to appear before the Court in accordance with the accused's bail undertaking and bail security has been given in the matter. The prosecutor can apply to the Court for a direction that the Registrar give one or more notices inviting a person to show cause why a security should not be forfeited.

514. Subclause (1) gives the prosecutor power to apply to the Court for a direction under subsection (2) if the accused allegedly fails to appear before the Court in accordance with the accused's bail undertaking.

515. Subclause (2) provides that the Court may direct the Registrar to give a notice to each person who provided security for the accused's bail and any other person who the

Court considers may have an interest in security provided for the accused's bail. However, a failure to give notice to a person does not invalidate a forfeiture order if the Registrar made reasonable efforts to serve notice.

516. Subclause (3) provides that the notice must invite the person to show cause, by filing an objection, why the security should not be forfeited and must contain the particulars set out in the Rules of Court. Presumptions about when things have been served are set out in section 29 of the *Acts Interpretation Act 1901* and section 160 of the *Evidence Act 1995*, depending on what type of post is used. There are also provisions dealing with the service of documents in section 28A of the Acts Interpretation Act.

517. Subclause (4) provides that an application under subclause (1) cannot be made more than 6 months after the alleged failure to appear before the Court. This means that, if the prosecutor wants to apply for a forfeiture order on the basis of an alleged failure to answer bail, the proceedings must commence within 6 months.

Clause 58FC Ordering forfeiture

518. Subclause (1) provides that the Court must order the forfeiture of all specified security provided by a particular person for the accused's bail if the Court is satisfied that the accused failed to appear before the Court in accordance with the accused's bail undertaking.

519. However, under subclause (2) the Court may decide not to make a forfeiture order or reduce the amount of the security to be forfeited if satisfied that the accused had a reasonable excuse for failing to appear or it is in the interests of justice to do so. The burden of proving these matters, to the civil standard, will rest on the person contesting forfeiture.

520. Subclause (3) requires that, in deciding whether to make a forfeiture order, the Court must consider any objection filed by a person who the Court is satisfied either provided security for the accused's bail or has an interest in such security, provided the objection was filed within 28 days after the person was given a notice under subclause 58FB(2) or, if the person was not given notice, within 28 days of a notice being given to any person under subclause 58FB(2). The objection must contain the particulars set out in the Rules of Court.

521. The Court may also invite a person who filed an objection to make submissions before deciding whether to make a forfeiture order.

522. If more than one person has provided a bail security, the Court will need to make separate forfeiture orders.

523. The Court is likely to make a forfeiture order unless an objector can identify good reasons why one should not be made. Bail securities will tend to lose value if the Court routinely declines to order forfeiture when an accused has failed to answer bail.

524. A dissatisfied party can appeal against a forfeiture order, or a refusal to make one, under subclause 30AA(3).

Clause 58FD When forfeiture orders take effect

525. Subclauses (1) and (2) have the effect that, unless it is set aside on appeal, a forfeiture order takes effect at the end of the time for filing a notice of appeal under clause 30AF or, if there is an appeal, when the appeal is finally disposed of. If a forfeiture order is varied on appeal, it will take effect as varied.

526. Subclause (3) provides that if a forfeiture order takes effect, the Registrar must give written notice that it has taken effect to the person who provided the security forfeited by the order and each other person, if any, who objected to the making of the order in relation to that security.

Clause 58FE Effect of forfeiture orders

Security is money held by the Court or property other than registrable property

527. Subclause (1) applies if security specified in a forfeiture order is money deposited with the Court or otherwise provided to the Court or is property which is not money or registrable property. In such cases, the security vests absolutely in the Commonwealth at the time the order takes effect.

Security is money not held by the Court

528. Subclause (2) applies if security specified in a forfeiture order is an amount of money that has not been deposited with or otherwise provided to the Court. In such cases, the amount is taken to be a civil debt payable by the person who provided the security to the Commonwealth at the time the order takes effect. The Commonwealth may enforce the forfeiture order as if it were an order made in civil proceedings against the provider to recover a debt due by the provider and the debt arising from the order is taken to be a judgment debt. If the undertaking also specified property to secure payment of the amount, the Commonwealth may also enforce the undertaking in respect of that property.

Security is registrable property

529. Subclause (3) applies if the security specified in a forfeiture order is registrable property. In such cases, the property vests in equity in the Commonwealth but does not vest in the Commonwealth at law until the applicable registration requirements have been complied with. The prosecutor may, on behalf of the Commonwealth, do anything necessary or convenient to give notice of, or otherwise protect, the Commonwealth's equitable interest in the property, for example, registering a caveat. The Commonwealth is entitled to be registered as the owner of that property and the Court may, by order, authorise a person to do, or authorise the doing of, anything necessary or convenient to obtain the registration of the Commonwealth as the owner.

530. Subclause (4) makes it clear that an order under subclause (3) can authorise a person to execute any instrument required to be executed by a person transferring an interest in registrable property.

Meaning of registrable property

531. Subclause (5) defines "registrable property" for the purpose of the clause. It means property, title to which is passed by registration on a register kept pursuant to a provision of any law of the Commonwealth or of a State or Territory.

Division 5—When bail ends

Clause 58GA Continuing bail orders

532. Subclause (1) gives the Court power to direct that a bail order previously granted continues to have effect. This is an alternative to requiring an accused person to make a fresh bail application if the accused has answered bail and the prosecutor does not oppose a continuation of bail.

533. A direction that bail continues will normally specify a period for which bail continues.

534. Under subclause 58DE(3), a bail undertaking, and any third party security undertaking, must be expressed to cover the period for which bail was granted and each period for which bail may be continued under subclause (1).

535. Subclause (2) applies if an accused appears in accordance with a bail undertaking and the matter is not completed but the Court makes no order as to bail. The Court is taken to have made a direction under subclause (1) that the bail order continue to have effect until the accused's next scheduled appearance before the Court.

536. This ensures that there is no gap in bail if, either deliberately or through error, the Court fails to make an order for bail. Otherwise the accused may have no right to be at liberty and may be at risk of arrest.

537. Subclause (3) provides that, if the Court gives a direction for bail to continue, each of the following continues to have effect, subject to any contrary intention in the undertaking and to any variation ordered by the Court:

- the accused's bail undertaking; and
- each third party security undertaking made in relation to the accused's bail.

Clause 58GB Bail discharged if the Court discharges the accused

538. This clause provides that a bail order ceases to have effect if the Court discharges the accused in relation to all the offences for which bail was granted. There is no need in such cases for the Court to formally release the accused from the bail conditions.

Clause 58GC Continuing security undertakings when bail ends

539. This clause applies if security was provided for the accused's bail and the accused's bail order is revoked under clause 58EA because of a failure by the accused to appear in accordance with the accused's bail undertaking.

540. Subclause (2) provides that, despite the revocation, the accused's bail undertaking and each third party security undertaking made in relation to the accused's bail continue to have effect to the extent to which they relate to the security provided for the accused's bail. This provision is needed to ensure that a bail security does not lapse the moment bail is revoked but remains in force for the time needed to resolve whether the security should be forfeited.

541. Subclause (3) provides that the continuation of an undertaking to provide security ceases if a forfeiture order cannot take effect in relation to the security and the failure or the Court orders the continuation to cease.

542. A forfeiture order cannot be made unless an application is made within 6 months of the relevant breach of bail (subclause 58FB(4)). Clause 58FE sets out when a forfeiture order takes effect.

Clause 58GD Returning security when bail ends

543. This clause provides that the Court must return a security which has been lodged with the Court if the accused's bail order ceases to have effect and the security is not still in force through the operation of subclause 58GC(3). This does not apply if the security has been forfeited under Division 4 or is being held as security in relation to another bail order.

Division 6—Other matters

Clause 58HA Admissibility of certain matters

544. This clause facilitates the proof of certain formal matters relating to bail. The provisions apply to proceedings in all courts and proceedings including criminal proceedings for offences relating to bail and proceedings for the forfeiture of security.

545. Subclause (1) makes the following documents admissible as prima facie evidence of their contents:

- a bail order;
- a bail undertaking;
- a third party security undertaking; and
- a notice about change of address given by the accused to the Court.

546. Subclause (2) has the effect that a document referred to in subclause (1) can be proved by tendering a copy of the document certified by an officer of the Court without

further proof or production of the original. A certified copy is to be received in all courts and proceedings as prima facie evidence of the original's contents.

547. Subclause (3) has the effect that the following matters can be proved on the basis of a written certificate issued by an officer of the Court:

- a condition specified in a bail order has not been varied or has been varied in a specified way;
- a notice was given under subclause 58FB(2) to a specified person in a specified way on a specified day;
- an accused did not appear in person before the Court at a specified place or on a specified day or during a specified period;
- the accused did not notify the Court of a change in the accused's residential address; and
- the accused notified the Court of a change in the accused's residential address to a specified address and on a specified day.

548. Subclause (4) provides that a certificate under subclause (3) is to be received in all courts and proceedings as prima facie evidence of the statements in the certificate.

549. Subclause (5) provides that a document purporting to be a certificate under subclause (3) is taken to be such a certificate and to have been duly given, unless the contrary is established.

Clause 58HB Indemnifying a person providing security

550. Subclause (1) makes it an offence for a person who has provided security as a condition of bail, either as an accused or as a third party, to agree to be indemnified by another person against any forfeiture of that security. The maximum penalty is imprisonment for 2 years.

551. Subclause (2) makes it an offence for a person to agree to indemnify another person against any forfeiture of security provided by that other person as a condition of bail. The maximum penalty is imprisonment for 2 years.

Item 5 At the end of subsection 59(2)

552. This item amends section 59 of the Federal Court Act which gives the Court power to make Rules of Court and, in subsection 59(2), provides non-exhaustive examples of the matters on which Rules can be made. Subsection 59(2) is amended to add 14 matters to the list of matters to ensure that there is no doubt that the Court has power to make Rules on all the matters necessary to enable the Court to effectively conduct indictable primary proceedings, criminal appeal proceedings and other relevant proceedings.

Judiciary Act 1903

Item 6 After section 68

68A Committals jurisdiction if both Federal Court of Australia and State or Territory court have jurisdiction in relation to indictable offence

553. Item 6 inserts a new section 68A into the Judiciary Act dealing with committal jurisdiction if both the Federal Court of Australia and a State or Territory court have jurisdiction in relation to an indictable offence.

554. Subsection (1) provides that the new section applies if both the Federal Court and a superior court of a State or Territory have jurisdiction to try a person on indictment for an indictable offence against a law of the Commonwealth.

555. Subsection (2) provides that a State or Territory committal court that has jurisdiction can commit the person for trial or sentence, as appropriate, to either the Federal Court or the superior court of the State or Territory.

556. Subsection (3) provides that the committal court must invite the DPP to suggest which court should be named in the committal order. The committal court must consider specifying the court suggested by the DPP in the committal order, but is not bound to comply with the suggestion.

557. The committal court must invite the DPP to suggest a court even if the DPP is not a party to the committal proceedings and even if there is reason to believe that the trial, if there is one, will be conducted by someone other than the DPP.

558. The DPP will have power to file an indictment in a different court from that nominated in the committal order if the DPP considers that to be appropriate, and that other court has jurisdiction for the alleged offences. However, any court in which an indictment is filed will have power to stay proceedings before the court if it considers that there has been an abuse of the processes of the court.

559. Subsection (5) provides that, if a State or Territory committal court commits a person for trial or sentence before the Federal Court, and that court has power under State/Territory to grant bail to an accused to appear before a superior court of the State or Territory, the court also has power to grant bail to the accused to appear before the Federal Court.

560. If a party wants to appeal against a grant or refusal of bail by a committal court, they will have to appeal under the laws of the relevant State or Territory as they apply to Commonwealth matters under subsection 68(1). Bail will be dealt with under Part VIB of the Federal Court Act only when indictable primary proceedings (within the meaning of that Act) commence for the person.

561. Subsection (6) has the effect that if a question about a person's fitness to be tried is raised at the committal stage, and the committal court is required to refer the question

to superior court under subsection 20B(1) of the *Crimes Act 1914*, the committal court can refer the question either to the Federal Court or the superior court of the relevant State or Territory court. Subsection (6) does this by applying subsection 20B(1) of the Crimes Act as if the reference in that subsection to the court to which the proceedings would have been referred had the person been committed for trial were a reference to a court to which the proceedings could have been referred had the person been committed for trial.

562. This means the committal court may choose whether to refer a question of the person's fitness to be tried to either the Federal Court or the superior State or Territory court. This means that, among other things, the committal court can consider what issues will need to be considered by the court that receives the referral and which court is best equipped is deal with those issues.

68B Application of State and Territory laws if Federal Court of Australia and State or Territory court both have jurisdiction in relation to an offence

563. Item 6 also inserts a new section 68B into the Judiciary Act that deals with the application of State and Territory laws if the Federal Court and a State or Territory court both have jurisdiction in relation to an offence.

564. Subsection (1) provides that, for the avoidance of doubt, subsection 68(1) applies to a person who is charged with an offence against a law of the Commonwealth and in respect of whom jurisdiction is conferred on a court of a State or Territory by section 68 even if jurisdiction in relation to that person and that offence is also conferred on the Federal Court by another law of the Commonwealth. Subsection 68(1) applies to the person and the offence in relation to any proceedings in relation to the offence that are brought before a court of the State or Territory and any proceedings in relation to the offence that are brought before the Federal Court of Australia.

565. This makes it clear that State and Territory procedural rules that are picked up for Commonwealth matters under subsection 68(1) of the Judiciary Act are picked up in cases where both the Federal Court and a State/Territory superior court have indictable criminal jurisdiction and are picked up for proceedings before either court. However, if proceedings are before the Federal Court, State and Territory procedural rules will only apply if an issue is not addressed under the Federal Court Act or Regulations, the Rules of Court or other Commonwealth legislation.

566. Subsection (2) provides that paragraph (1)(b) has effect subject to new section 68C of the Judiciary Act. That section makes adjustments to State and Territory laws applying to proceedings before Federal Court.

68C Adjustments to State and Territory laws applying to proceedings before Federal Court of Australia

567. Subsection (1) sets out when section 68C applies. It applies if an offence referred to in subsection 68(1) is an indictable offence, the Federal Court has jurisdiction to try a

person on indictment for the offence, and proceedings commence in the Federal Court in relation to the offence.

The State or Territory in which trial proceedings must be heard

568. Subsection (2) has the effect that if a person is to stand trial before the Federal Court, the trial must be heard in the State or Territory where the committal order was made, or where an ex officio indictment was filed, unless the Court orders otherwise.

569. Subsection (3) gives the Court power to order that a trial be heard in a different State or Territory at any time before the jury is empanelled.

570. These provisions ensure that there will be certainty for all parties about where a trial is to be heard but also give the Court flexibility to ensure that the trial is held in an appropriate place.

571. Subclause (4) notes that subsections (2) and (3) have effect subject to section 80 of the Constitution and sections 70 and 70A of the Judiciary Act. Those provisions collectively set out the rules about where a trial for a Commonwealth offence must be held. The Court must ensure that the trial is held in a place that complies with those rules.

572. It is a matter for the Court to determine the place in which any other proceedings are to be heard. That includes, for example, appeal proceedings.

Which State's or Territory's laws are to apply?

573. Subclause (5) includes a table which sets out which State or Territory laws are to be applied under subsection 68(1) in proceedings before the Federal Court.

574. Under item 1 of the table, if the proceedings are primary proceedings other than sentencing proceedings (for example a trial or a pre-trial hearing) the laws to be applied are the laws of the State or Territory in which the Court hears the proceedings.

575. Under item 2 of the table, if the proceedings are primary proceedings for the sentencing of a person following a trial, the laws to be applied are the laws of the State or Territory that applied to the trial as at the end of the trial. This means that if the Court deals with sentencing in a different State or Territory from where the trial was held, the laws to be applied are the laws of the State or Territory where the trial was held, not where the sentencing proceedings are held. It also means if laws changed in their application to the trial during the course of the trial, it is the laws that applied at the end of the trial which will apply to the sentencing proceedings.

576. Under item 3 of the table, if the proceedings are criminal appeal proceedings that relate to primary proceedings, the laws to be applied are the laws of the State or Territory that applied to the primary proceedings as at the end of those proceedings. This means that if the Court hears an appeal in a different State or Territory from where the appealed decision was made, the laws to be applied are the laws of the State or Territory where the

decision was made, not where the appeal is being held. It also means if laws changed in their application during the course of a trial or other primary proceedings, it is the laws that applied at the end of the trial or other proceedings which will apply to the appeal hearing.

577. Under item 4 of the table, if the proceedings relate to a case stated or question reserved by a court, the laws to be applied are the laws of the State or Territory applying in the proceedings during which the court stated the case or reserved the question. This means, for example, that if a case is stated or question is reserved by a single judge in the court of the trial, the Court will apply the laws that applied to the trial even if the matter is dealt with in a different State or Territory.

578. Under item 5 of the table, if the proceedings are under proposed section 30CB of the Federal Court Act (questions referred after trial) and they relate to primary proceedings, the laws to be applied are the laws of the State or Territory that applied in the primary proceedings at the end of those proceedings.

579. Under item 6 of the table, if the proceedings are referred to the Court by another court under section 20B of the *Crimes Act 1914* (fitness to plead), the laws to be applied are the laws of the State or Territory applying in the proceedings during which the other court made the referral.

What those laws include

580. Subsection (6) provides that the laws of that State or Territory that apply to proceedings before the Federal Court include the Rules of the Supreme Court of that State or Territory that apply in relation to criminal proceedings but are not to include the Rules of any other court of that State or Territory. That means, for example, that the Rules of a District or County Court of a State or Territory do not apply to proceedings before the Federal Court.

How those laws apply

581. Subsection (7) provides that the laws of that State or Territory apply as if any reference in those laws to the Supreme Court of that State or Territory, and any reference to a court that includes a reference to the Supreme Court of that State or Territory, were a reference to the Federal Court.

582. Subsection (8) makes it clear that the laws of that State or Territory apply to proceedings before the Federal Court only to the extent to which they are not inconsistent with a law of the Commonwealth or the Rules of the Federal Court.

Part 2—Consequential and other amendments

Bankruptcy Act 1966

Item 7 Subsection 273(4)

583. This amendment clarifies the operation of subsection 273(4) of the Bankruptcy Act to avoid a potential argument that the subsection gives summary criminal jurisdiction to deal with offences against that Act to the Federal Magistrates Court, the Family Court or the Family Court of Western Australia.

584. Subsection 273(4) provides that "the Court" has jurisdiction to try summarily any offence against the Bankruptcy Act.

585. The amendment will make it clear, by adding the word "Federal" that "the Court" referred to in subsection 273(4) is the Federal Court and not every court which has jurisdiction in bankruptcy under the Bankruptcy Act.

Item 8 At the end of subsection 273(4)

586. This amendment adds a note at the end of subsection 273(4) of the Bankruptcy Act to make it clear that a State or Territory court which has jurisdiction under section 68 of the Judiciary Act to deal with alleged offences against the Bankruptcy Act does not have bankruptcy jurisdiction for the purpose of that Act. This removes scope for a possible argument that State and Territory criminal courts can make orders under that Act, and not just deal with prosecutions for offences against the Act.

Item 9 Subsection 273(5)

587. This amendment clarifies subsection 273(5) to make it clear that it only applies to the Federal Court. The Federal Court has summary criminal jurisdiction to deal with offences against the Bankruptcy Act but does not have indictable criminal jurisdiction. Subsection 273 applies when proceedings are brought in the Federal Court for an offence against the Bankruptcy Act that is punishable by imprisonment. The Court can either determine the proceedings or commit the defendant for trial before a court of competent jurisdiction, but shall not, if it determines the proceedings impose a period of imprisonment exceeding 1 year in respect of the offence.

588. Subsection 273(5) currently refers to "the Court". That was intended to be limited to the Federal Court but the term "the Court" is defined in section 5(1) to mean any court with jurisdiction in bankruptcy. This problem is resolved by changing subsection 273(5) so it now refers to the Federal Court, rather than "the Court".

Crimes Act 1914

Item 10 Subsection 3(1)

589. This item adds a definition of "federal court" to subsection 3(1) of the Crimes Act. The phrase "federal court" is currently defined in section 16 for the purpose of Part 1B but the amendment will ensure that the definition applies to all Parts of the Crimes Act.

590. The term "federal court" is defined to mean "the High Court or a court created by the Parliament, other than a court of a Territory". That accords with the current definition of the term in section 16.

Items 11 and 12 Paragraph 3Y(4)(c) and (d)

591. These changes will ensure that section 3Y can apply when bail has been granted to a person by the Federal Court.

592. Section 3Y gives a constable power to arrest, without warrant, a person who has been released on bail and has breached or is about to breach a condition of bail. The person must be taken before a magistrate as soon as possible. Subsection (4) applies if a person is arrested in a State or Territory different from the one where bail was granted. One of the things a magistrate can do, under paragraph 3Y(4)(d), is remand the person in custody for a reasonable time pending the obtaining of a warrant for the apprehension of the person from the State or Territory in which the condition was imposed. That will arguably not work if bail was granted by the Federal Court since a warrant will not be issued by a State or Territory but by the Federal Court.

593. Paragraph 3Y(4)(c) is amended, so it only applies in cases where bail was not granted by the Federal Court. If bail was granted by the Federal Court, and a magistrate remands the person in custody, new paragraph 3Y(4)(d) requires the magistrate to remand the person in custody for a reasonable time pending the obtaining of a warrant for the apprehension of the person from the Federal Court.

Items 13, 15 and 16 Subsections 15A(1A) and (1AD)

594. These amendments ensure that subsection 15A(1AD) of the Crimes Act applies to fines imposed by all federal courts and not just those imposed by the Federal Court and the Family Court.

595. Section 15A deals with the enforcement of fines imposed in respect of Commonwealth offences and, specifically, with the use of State and Territory enforcement regimes. The section allows for State and Territory enforcement regimes to apply, with modifications, to a fine imposed in a Commonwealth matter, including a fine imposed by the Federal Court or the Family Court.

596. There are other federal courts which have power to impose fines, including fines imposed for contempt of court. The amendments will change references in section 15A to the Federal Court and Family Court to cover all federal courts.

Items 14 and 17 Subsection 15A(1A)

597. These amendments specify how section 15A of the Crimes Act applies to fines imposed by a federal court.

598. Section 15A deals with the enforcement of fines imposed in respect of Commonwealth offences and, specifically, with the use of State and Territory enforcement regimes. The section allows for State and Territory enforcement regimes to apply, with modifications, to a fine imposed in a Commonwealth matter, including a fine imposed by the Federal Court or the Family Court. Until now subsection 15A(1A) has had the effect that a State or Territory fine enforcement regime that applies to summary convictions will apply if a person is convicted before a federal court. That is not appropriate if the Federal Court has indictable criminal jurisdiction for some offences.

599. The amendments ensure that a State or Territory fine enforcement regime that applies to summary convictions will still apply if a person is convicted summarily before a federal court but that a State or Territory enforcement regime that applies if a person who has been convicted on indictment will apply if a person is convicted on indictment before a federal court.

Items 18 and 19 Subsection 15A(2) and (5)

600. This amendment deletes the phrase "federal offenders" and replaces it with "a person convicted of a federal offence". The term "federal offenders" is not defined and is potentially ambiguous. "Federal offence" is defined in new subsection 15A(5) to mean an offence against a law of the Commonwealth.

Item 20 Subsection 16(1) (definition of federal court)

601. This amendments repeals the definition of "federal court" in subsection 16(1). That change is consequential on the amendment made under item 10.

Item 21 After paragraph 16A(2)(f)

602. This will amend subsection 16A(2), which sets out the things a court must take into account when imposing a sentence on a person convicted of a Commonwealth offence. It will add, as a factor, the extent to which the person has failed to comply with any order or other obligation about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence.

603. This ensures that the accused person in a prosecution for a Commonwealth offence has an incentive to comply with any pre-trial obligations that apply to them. A person cannot get a discount at sentence for complying with their pre-trial obligations, since all they will have done is comply with a legal requirement. However, if convicted,

there is a risk that they will receive a penalty higher than would have been imposed if they fail to comply with pre-trial obligations.

604. In many cases, sentence proceedings are conducted by the same judge who conducts pre-trial proceedings. That judge will be well placed to determine whether the accused person made a genuine attempt to comply with pre-trial obligations.

Item 22 Paragraph 23WA(8)(b)

605. This amendment deletes the phrase "a federal offence" and replaces it with "an offence against the law of the Commonwealth". The term "federal offence" is not defined and is potentially ambiguous.

Item 23 At the end of subsection 85ZP(3)

606. This amendment adds a note at the end of subsection 85ZP(3) to note that there is an exception to the spent conviction scheme under the Crimes Act that allows for the disclosure of spent convictions to the Federal Court for the purposes of indictable primary proceedings, criminal appeal proceedings or related matters.

Item 24 Section 85ZZF

607. This amendment changes references to "the Federal Court" in section 85ZZF to "the Federal Court of Australia" to achieve greater accuracy. Section 85ZZF gives the Court power to makes orders to enforce certain determinations made by the Privacy Commissioner.

Item 25 At the end of Division 6 of Part VIIC

608. This will amend the spent convictions scheme under the Crimes Act to add an exception (in the new section 85ZZL) to the scheme to allow the Federal Court to require a person to disclose all convictions, and to use that information, for the purposes of indictable primary proceedings, criminal appeal proceedings or matters relating to either such proceedings.

609. This ensures that the Court can, where appropriate, require a person to disclose full details of their criminal history for the purposes of the Court, including the purposes of jury selection and sentencing. It avoids any doubt about whether a person can be required to disclose details of a conviction that has become spent under Commonwealth law, State law, Territory law or foreign law.

610. Subsection (4) gives an extended meaning to "foreign country" for the purposes of references in the section to foreign law or a foreign offence. A foreign country includes a region where:

- the region is a colony, territory or protectorate of a foreign country;
- the region is part of a foreign country;
- the region is under the protection of a foreign country;

- a foreign country exercises jurisdiction or control over the region; or
- a foreign country is responsible for the region's international relations.

611. Information that is provided to the Court for administrative purposes, including jury selection, will be protected under the *Privacy Act 1988*. Information that is given in evidence by a witness can be protected, if the Court considers it appropriate, by an order under section 50 of the Federal Court Act or proposed section 23HC of that Act. Information that is included in a judgment of the Court, or in sentencing comments, will normally become part of the public record of the Court. That is appropriate if the information formed part of the reasons for a decision made by the decision.

Federal Court of Australia Act 1976

Items 26 to 51 Section 4

612. These items amend section 4 to add, or amend, definitions for the following terms:

- "accused" is defined to mean, in relation to indictable primary proceedings, the meaning given by subclause 23AB(1), and in relation to criminal appeal proceedings—means the person who was the accused in the proceedings appealed from;
- "applicable jury district" has the meaning given by clause 23DL (the jury district determined by the Sheriff for the proceedings);
- "bail order" is defined to mean an order given by a Court under subclause 58DB(1) to grant bail to the accused for one or more of the offences;
- "bail undertaking" is defined to mean an undertaking signed by the accused under paragraph 58DE(1)(a) which contains certain matters (eg undertaking to appear in court) and is made in accordance with the Rules of Court;
- "criminal appeal proceedings" is defined to mean proceedings relating to an appeal referred to in clauses 30AA or 30AD or relating to the seeking of leave to file such an appeal, or ancillary to these proceedings;
- "electoral Division" is defined to have the same meaning as "Division" has in the *Commonwealth Electoral Act 1918* (ie "an Electoral Division for the election of a member of the House of Representatives");
- "electoral roll" is defined to have the same meaning as "roll" has in the *Commonwealth Electoral Act 1918* (ie an Electoral Roll under that Act);
- "eligible primary court" is defined to mean the Court constituted by a single Judge in indictable primary proceedings, the Supreme Court of a Territory (other than the Australian Capital Territory or the Northern Territory), and a court nominated in another Act (other than a Full Court of a Supreme Court);
- "examination and commitment" for trial on indictment is defined to include commitment for trial on indictment;
- "foreign country" is defined to include a region that is:
  - a colony, territory or protectorate of a foreign country
  - part of a foreign country

- under the protection of a foreign country, and
- under the jurisdiction or control of a foreign country or where the latter has responsibility for the region's international relations;

- "forfeiture order" means an order under subclause 58FC(1) where the Court orders the forfeiture of all specified security provided by a particular person for the accused's bail if the Court is satisfied that the accused failed to appear before the Court in accordance with the accused's bail undertaking;
- "former juror" means a person who has ceased to be a juror;
- "Full Court of the Supreme Court of a State or Territory" means the Supreme Court of the State or Territory when constituted by 2 or more judges, and includes the Supreme Court of the State or Territory when so constituted for the purpose of sitting as the Court of Appeal of the State or Territory;
- "indictable offence matter" is defined to have the same meaning given by new subsection 32(6), ie where a proceeding in relation to the matter would be an indictable primary proceeding;
- "indictable primary proceedings" is defined to have the same meaning given by subclause 23AB(2), which provides that the provisions in Division 1A apply to certain proceedings relating to indictable offences (eg proceedings in the Court commenced as a result of the accused being committed to stand trial);
- "infringement notice" is defined to mean a notice issued to a person by the Sheriff under clause 58BA for an alleged offence against certain jury related offences in clauses 58AA or 58AE;
- "judgment (which includes a sentence and a conviction)" is defined to mean a judgment, decree or order (whether final or interlocutory and including a conviction) or a sentence;
- "juror" is defined to mean a person serving as a juror in proceedings before the Court;
- "jury district" is defined to mean a jury district for a particular State or Territory determined by the Sheriff under clause 23DF;
- "jury service" is defined to mean service as a juror;
- "party" in relation to indictable primary proceedings is defined to have the same meaning given by subclause 23AB(3), ie the accused and the prosecutor;
- "potential juror" is defined to mean a person who has been summonsed to attend for service as a juror in proceedings before the Court and not empanelled or been discharged from serving on the jury;
- "relevant to the accused's case" is defined in the following terms: if an accused is prosecuted on indictment, evidence is "relevant to the accused's case" if it is capable of either undermining the prosecution's case or assisting the accused's case or both;
- "sitting place" in relation to indictable primary proceedings has the same meaning given by subclause 23DK(2), ie the place specified in the direction given by the Court to the Sheriff to convene a jury panel;
- the definition of "suit", is amended to limit it to a civil action or original civil proceeding; and

- "third party security undertaking" is defined to mean an undertaking under paragraph 58DE(1)(b), ie where another person, who as a condition of bail has agreed to provide security, has signed an undertaking made in accordance with the Rules of Court.

Item 52 Subsection 18P(1)

613. This amendment makes it clear, for the avoidance of doubt, that the Registrar is responsible for the service and execution of warrants issue by the Court. That includes warrants of arrest.

Item 53 After subsection 18P(2)

614. This amendment adds a new subsection to make it clear that the Sheriff is responsible for matters under Division 1A of Part III directed to the Sheriff. These provisions of Part III are mainly about juries in criminal proceedings.

Item 54 Division 1 of Part III (heading)

615. This amendment changes the heading of Division 1 of Part III to make sure there is a clear distinction between that Division and the new Division IA of Part III which deals with original jurisdiction (indictable offences).

Item 55 After subsection 20(1A)

616. This amendment ensures that subsection 20(1A) of the Federal Court Act does not apply to criminal proceedings on indictment. Subsection 20(1A) gives the Chief Justice power to direct that a matter before the Court be heard by a Full Court if the matter is of sufficient importance. It would not be appropriate for criminal proceedings on indictment to be heard before a Full Court.

Item 56 Subsection 21(1)

617. This amendment restricts the operation of subsection 21(1) to civil proceedings. Subsection 21(1) gives the Court power to make binding declarations of right. That is not an appropriate power to exercise in a criminal proceeding.

Item 57 Division 2 of Part III (heading)

618. This amendment changes the heading of Division 2 of Part III to make it clear that it now only applies to appeals in civil matters.

Item 58 Before section 24

619. This amendment adds a new section to Division 2 of Part III to provide that the Division only applies to the Court's appellate jurisdiction in relation to civil matters.

Item 59 Subsection 24(5)

620. Subsection 24(5) is repealed. It deals with the meaning of "Full Court of a Supreme Court of a State or Territory". That term is now defined in section 4.

Items 60 to 63 Subsections 25(2) and 25(2B)

621. These subsections have been amended to resolve doubt about whether it is a matter for the Court or an applicant to decide whether an application for an order under one of those provisions should be brought before a single judge or a Full Court. The subsections deal with applications for procedural orders relating to an appeal in a civil matter.

622. These subsections now provide that an application must be heard and determined by a single Judge unless a Judge directs that the application be heard and determined by a Full Court or the application is made in a proceeding that has already been assigned to a Full Court, and the Full Court considers it is appropriate for it to hear and determine the application.

Item 64 Paragraph 28(1)(d)

623. This amendment removes words in paragraph 28(1)(d) which limit its operation to civil proceedings. Those words are not needed now that section 28 appears in a Division that only applies to civil proceedings.

Item 65 Paragraph 28(1)(e)

624. This amendment repeals paragraph 28(1)(e) which deals with a topic (appeal following a trial on indictment) which is now covered by the criminal appeal provisions.

Item 66 Subsection 28(5)

625. This amendment repeals subsection 28(5) which deals with a topic (powers when dealing with an appeal against sentence) which is now covered by the criminal appeal provisions.

Item 67 Section 29A

626. This amendment repeals section 29A which deals with a topic (prison sentence not to include time on bail) which is now covered by the criminal appeal provisions.

Item 68 At the end of section 31A

627. This amendment ensures that section 31A, which gives the Court power to give summary judgment in a matter, does not apply to criminal proceedings. It is not appropriate for this power to be exercised in a criminal case.

Item 69 After section 31A

628. This amendment adds a new section to confirm that nothing in Part III abrogates or affects the prerogative of mercy.

Items 70 to 72 Section 32

629. These items amend section 32 of the Federal Court Act, which gives the Court extended jurisdiction to deal with matters that are associated with a matter that is before the court. The amendments ensure that the existing provisions in section 32 do not apply in indictable criminal matters. They also add new provisions that deal with the jurisdiction to deal with associated matters in indictable criminal matters.

630. New subsections 32(4) and (5) are the provisions that apply if a core matter is an indictable criminal matter. New subsection 32(4) gives the Court jurisdiction, to the extent that the Constitution permits, in respect of any matter that is associated with an indictable offence matter if the associated matter:

- arises under Commonwealth law;
- is not otherwise within the Court's jurisdiction; and
- relates to one or more indictable offences.

631. The effect is that the Court has jurisdiction, to the extent permissible under the Constitution, to deal with any matter that arises under Commonwealth law, relates to an indictable offence, and that is associated with an indictable offence matter that is before the court. This gives the Court power, to the extent possible under the Constitution, to deal with associated matters in criminal cases.

632. This means, among other things, that if the Court is dealing with a serious cartel offence on indictment it will also have jurisdiction to deal with another Commonwealth offence which is associated with the serious cartel offence.

633. However, in *Re Wakim* (1999) 163 ALR 270, the High Court ruled that a federal court cannot be vested with State jurisdiction even if State jurisdiction is vested in the Court under a law of that State. This means the Federal Court cannot conduct proceedings for an offence against State law, even if those proceedings are associated with a prosecution for a Commonwealth offence.

634. New subsection 32(5) provides that the jurisdiction conferred by subsection 32(4) extends to jurisdiction to hear and determine an appeal from a judgment so far as it relates to a related matter that is associated with an indictable offence matter in respect of which an appeal from that judgment, or another judgment of that court, is brought.

Item 73 After subsection 32AB(9)

635. This amendment ensures that section 32AB does not apply to criminal proceedings. Subsection 32AB(1) gives the Court power to transfer a proceeding that is pending in the Court to the Federal Magistrates Court. That power should not be

available in a criminal case since the Federal Magistrates Court does not have criminal jurisdiction.

Item 74 Subsection 32A(4)

636. This amendment ensures that section 32A does not apply in indictable primary proceedings. Section 32A gives State and Territory Supreme Courts jurisdiction to hear and determine some types of application that can be made to the Court. At present, the jurisdiction does not apply to "an Australian proceeding" within the meaning of Part IIIA. The amendment will ensure that section 32A also does not apply in indictable primary proceedings. In indictable primary proceedings, the responsibility for the matter should remain with the trial judge.

Item 75 Paragraph 41(1)(c)

637. "Impanelling" is changed to "empanelling" to correct an error.

Items 76, 80, 82, 83, 84, 86, 87 and 88 Sections 41, 45 and 46

These items change references to "sworn" to include "affirm" and references to "oath" to include "affirmation". This reflects the policy that a person required to take an oath should have the option of making an affirmation.

Item 77 Subsection 41(2)

638. This item will amend subsection 41(2) which deals with juries in civil matters. The amendment will ensure that there is no doubt that subsection 41(2), which deals with precepts for juries, only applies to juries in civil matters.

Item 78 Section 42

639. This amendment repeals section 42 which deals with a topic (jury offences) that is covered by the new provisions.

Item 79 Subsection 43(1)

640. This amendment ensures that section 43, which gives the Court general power to award costs, does not override the new sections (clauses 23HE and 30DA) which specifically provides that the Court cannot award costs in indictable primary proceedings or criminal appeal proceedings.

Item 81 Paragraph 45(1)(a)

641. This amendment removes an outdated reference to "commissioner for affidavits" from subsection 45(1), which deals with the swearing of affidavits. There is no such office at Commonwealth level.

Item 85 Paragraph 45(2)(b)

642. This amendment repeals paragraph 45(2)(b) to remove an outdated reference to a "commissioner of the Supreme Court of a State or Territory for taking affidavits" from subsection 45(2), which deals with the swearing of affidavits at places outside Australia.

Items 89 and 90 Section 47

643. These amendments ensure that the existing provisions in section 47 are limited to civil cases. They also add a new subsection that applies in criminal proceedings.

644. Section 47 deals with the taking of evidence. Subsection (8) provides that testimony in criminal proceedings must be given orally unless:

- the testimony is given in another form agreed between the parties to which the Court does not object; or
- the testimony is given in accordance with the Federal Court Act or any other Act, or with any law applying under subsection 68(1) of the Judiciary Act in relation to the proceedings.

645. Testimony by video link, audio link or other appropriate means is dealt with in sections 47A to 47D of the Federal Court Act.

Item 91 Subsection 47A(3)

646. Subsection 47A(3) will be amended and replaced so that it only applies in proceedings where there is not a jury.

647. Section 47A deals with taking evidence by video link, audio link or other appropriate means and it applies in criminal proceedings. The current subsection 47A(3) provides that, if such evidence is given otherwise than on oath or affirmation, the Court or the Judge is to give the testimony such weight as the Court or the Judge thinks fit in the circumstances.

648. That is not appropriate in a case where there is a jury. The tribunal of fact will be the jury, not the trial judge or the Court. It will be a matter for the jury to determine what weight to give the testimony and subsection 47A(3) should not apply in that case.

649. There is no need to put an equivalent provision in the Federal Court Act to deal with a case where there is a jury. The trial judge will have power under section 165 of the *Evidence Act 1995* to give an appropriate warning to the jury if particular evidence may be unreliable which may be the position if, for example, testimony is not given on oath or affirmation.

Items 92 and 93 Section 48

650. These amendments ensure that section 48 applies in criminal matters, but provides that it applies subject to section 80 of the Constitution and to sections 70 and 70A of the Judiciary Act.

651. Section 48 gives the Court power to order a change of venue at any stage of proceedings. It is important that this power is available in criminal matters, to give the Court power to manage the conduct of the proceedings. However, in criminal matters the power must be exercised in accordance with section 80 of the Constitution and sections 70 and 70A of the Judiciary Act which set out the rules about which State or Territory a trial can be held in for a Commonwealth offence.

Item 94 and 95 Section 50

652. These amendments ensure that section 50 applies in criminal matters but does not limit the operation of new section 23HC. Section 50 gives the Court power to make orders prohibiting the publication of evidence. New section 23HC gives the Court power to make orders to protect a witness in indictable criminal proceedings. These are cumulative powers which are both available in appropriate cases.

Item 96 At the end of section 53A

653. This amendment ensures that section 53A does not apply in criminal proceedings. Section 53A deals with mediation and arbitration, which have no application in criminal proceedings.

Item 97 Subsection 56(1)

654. This amendment ensures that section 56 does not apply to an appellant in a criminal matter. The current section 56 gives the Court power to order a person who commences appeal proceedings to provide security for costs that may be awarded against them. That is not appropriate in the case of an appeal in criminal proceedings since new section 30DA provides that the Court cannot award costs in relation to a criminal appeal.

Judiciary Act 1903

Item 98 Section 2

655. This amendment adds a definition of "examination and commitment for trial on indictment" to section 2 of the Judiciary Act to make it clear that the phrase includes a committal for trial in a case where there has been no examination before a committal court.

656. That avoids any potential for uncertainty about whether the phrase "examination and commitment for trial on indictment", where it appears in the Judiciary Act, includes a committal order made under a State or Territory if the committal court has not examined

evidence. That may be the provision if, for example, committal proceedings took place in a jurisdiction which has abolished committal hearings.

99 At the end of subsection 39B(1A)

657. This amendment adds a note noting that paragraph 39B(1A)(c) does not prevent other laws of the Commonwealth conferring criminal jurisdiction on the Federal Court.

658. Subsection 39B(1A) provides that the Federal Court has original jurisdiction in any matter:

- in which the Commonwealth is seeking an injunction or a declaration;
- arising under the Constitution, or involving its interpretation; or
- arising under any laws made by the Parliament, other than a matter in respect of which a criminal prosecution is instituted or any other criminal matter.

659. The note will make it clear, for the avoidance of doubt, that paragraph 39B(1A)(c) does not mean that other laws of the Commonwealth cannot confer criminal jurisdiction on the Federal Court.

Items 100 and 101 Section 70

660. This amendment adds a new subsection to section 70 to make it clear that section 70 has effect subject to section 68C.

661. Section 70 applies if a Commonwealth indictable offence was committed in more than one State. If the offence began in one State and completed in another, the offender can be dealt with in either State.

662. Section 68C provides, in effect, that if a person is committed for trial before the Federal Court, or an ex officio indictment is filed in the Federal Court, the trial must take place in the place where the committal order was made, or the indictment was filed, unless the Court makes an order specifying a different venue for the trial.

Items 102 and 103 Section 70A

663. This amendment adds a new subsection to section 70A to make it clear that section 70A has effect subject to section 68C.

664. Section 70A applies if a Commonwealth indictable offence was not committed in a State. It provides that a trial on indictment can be held in any State or Territory.

665. Section 68C provides, in effect, that if a person is committed for trial before the Federal Court, or an ex officio indictment is filed in the Federal Court, the trial must take place in the place where the committal order was made, or the indictment was filed, unless the Court makes an order specifying a different venue for the trial.

Item 104 Subsection 71A(1)

666. This item will repeal subsection 71A(1) of the Judiciary Act and replace it with a new subsection.

667. The current subsection 71A(1) gives the Attorney-General power to file an indictment for an indictable Commonwealth offence in the High Court or the Supreme Court of a State or Territory, without examination or commitment for trial.

668. The new subsection 71A(1) will also give the Attorney-General power to file an indictment for an indictable Commonwealth offence in the Federal Court, without examination or commitment for trial, if the Court has jurisdiction in the matter.

Item 105 Subsection 72(1)

669. This amendment repeals subsection 72(1) of the Judiciary Act and replaces it with two new subsections.

670. Subsection 72(1) currently gives a judge who is presiding at a criminal trial in a Commonwealth matter power to reserve a question of law for a ruling by a higher court. If the trial is being held before a court of a State, the question must be reserved for consideration by a Full Court of the Supreme Court of that State. In any other case, the question must be reserved for consideration by the Full Court of the High Court.

671. That procedure is not appropriate if a trial is being held before the Federal Court. If the trial judge wants to reserve a question of law, the appropriate court to consider the matter is the Full Court of the Federal Court. New section 30BA of the Federal Court Act gives a trial judge of the Federal Court power to state a case or reserve a question for the consideration of a Full Court.

672. New subsection 72(1), provides that section 72 does not apply to indictable proceedings before the Federal Court.

673. New subsection 72(1A), re-enacts the old subsection 72(1) in a simplified form.

Item 106 Subsection 76(1)

674. This item amends section 76(1) so that it will not apply where a person has been convicted following a trial before the Federal Court.

675. Subsection 76(1) deals with a process known as arrest of judgment and gives the prosecution power to require a trial judge to state a case for the consideration of a Full Court if an accused person has been convicted for a Commonwealth offence and the trial court arrests judgment. If the trial was held before a court of a State, the stated case must be reserved for consideration by a Full Court of the Supreme Court of that State. In any other case, the stated case must be reserved for consideration by the Full Court of the High Court.

676. This procedure is not appropriate when a person has been convicted following a trial before the Federal Court. In such cases, the rights of appeal and review are set out in Division 2A of Part III of the Federal Court Act.

677. New subsection 76(1A) provides that section 76 only applies if the Court which has convicted a person is not the Federal Court.

Item 107 Subsection 76(2)

678. This item corrects an outdated provision in subsection 76(2).

679. Subsection 76(2) currently gives power to "any Justice of the Peace" to issue a warrant for the arrest of a person in certain circumstances. It is Commonwealth policy that Justices of the Peace should not have power to issue arrest warrants.

680. The amendment replaces the reference to any Justice of the Peace with a reference to "an issuing officer (within the meaning of Part IAA of the *Crimes Act 1914*)".

Item 108 Section 81

681. This item amends section 81 to add a reference to Judges of the Federal Court.

682. Section 81 deals with security of the peace and for good behaviour. It currently gives power to the Justices of the High Court and, in certain circumstances, Judges and magistrates of State and Territory courts, to hold to security of the peace and for good behaviour in matters arising under the laws of the Commonwealth. Section 81 will be amended to give the same power to Judges of the Federal Court.

683. It is appropriate for Judges of the Federal Court to hold this power as an incident of the exercise of indictable criminal jurisdiction.

Mutual Assistance in Criminal Matters Act 1987

Items 109 and 110 Subsections 39(1) and (1A)

684. These items amend subsection 39A(1) of the *Mutual Assistance in Criminal Matters Act 1987* to replace a reference to the Supreme Court of a State or Territory with a reference to the "relevant court". "Relevant court" is defined in subsection 39A(1A) to mean the Federal Court if the proceedings are being brought in that Court, or the Supreme Court of the State or Territory in which the proceeding is being heard.

685. Subsection 39A(1) gives the accused in criminal proceedings a right to apply to a court for a certificate that it would be in the interests of justice for the Attorney-General to make a request to a foreign country for assistance on behalf of the defendant. If the court issues a certificate, the court must send a copy to the Attorney-General and the Attorney-General must make a request on behalf of the defendant to the foreign country unless he or she is of the opinion, having regard to the special circumstances of the case, that the request should not be made.

686. As subsection 39A(1) currently stands, an application for a certificate must be made to the Supreme Court of the State or Territory in which the criminal proceeding is being heard. Subsection 39A(1) is amended to ensure that, if criminal proceedings are being heard before the Federal Court, the application for a certificate can be made to the Federal Court.

Proceeds of Crime Act 2002

Item 111 At the end of section 335

687. Section 335 of the *Proceeds of Crime Act 2002* is amended to add new subsection (5), to provide that if the Federal Court has jurisdiction to try a person, whether on indictment or summarily, for an indictable offence, the Court has proceeds jurisdiction for an order if the order would, if made, be an order made on the basis of:

- a proposal that the person be charged with the offence;
- the person having been charged with the offence; or
- the person's conviction of the offence.

688. That would, of course, be only one of the bases for the proposed order. The Court would also have to be satisfied that other preconditions for the relevant order have been satisfied.

689. New subsection 335(8) will make it clear, for the avoidance of doubt, that subsection 335(7) does not prevent other courts from having proceeds jurisdiction for the order under another subsection of section 335.

690. The effect of these provisions is that Federal Court has jurisdiction under the Act to make pre-charge, charge and conviction-based restraining orders, conviction-based confiscation orders, and related orders in any case where the relevant offence is an indictable offence that the Court has jurisdiction to try. This will ensure that the DPP does not have to commence fresh proceedings in another court to apply for charge based and conviction based orders in a case where the criminal proceedings are being run before the Federal Court.

691. The Federal Court has that jurisdiction, and can make those orders, even if the Court is not dealing with the relevant offence or if the Court only has power to deal with the relevant offence summarily. However, the Federal Court does not have exclusive jurisdiction and will be able to decline to make an order under the Proceeds of Crime Act if it considers that the application for an order should more properly have been made in another court.

692. The amendments do not give the Federal Court jurisdiction to make civil based restraining orders or civil based confiscation orders under the Proceeds of Crime Act.

Transfer of Prisoners Act 1983

Item 112 Subsection 16(1)

693. This item amends subsection 16(1) of the *Transfer of Prisoners Act 1983* to ensure that it applies to the Federal Court as well as to State and Territory courts.

694. Subsection 16(1) applies if an appeal court in one State or Territory considers it necessary to bring before the court a person who is undergoing a sentence of imprisonment and who has been transferred to another State or Territory. Subsection 16(1) gives the court or a judge power to issue an order directed to the officer in charge of the gaol where the person is undergoing imprisonment requiring them to produce the person at the time and place specified in the order.

695. Subsection 16(1) currently only applies if the appeal proceedings are before a court of a State or Territory. The amendments will ensure that subsection 16(1) applies to appeal proceedings before any court sitting in a Sate or Territory.
