

2004

**LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL
TERRITORY**

**JUSTICE AND COMMUNITY SAFETY LEGISLATION AMENDMENT
BILL 2004 (NO 2)**

EXPLANATORY STATEMENT

Circulated with the authority of
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Overview of Bill

The Justice and Community Safety Legislation Amendment Bill 2004 (No 2) (the Bill) amends a number of laws administered by the ACT Department of Justice and Community Safety. The laws amended include:

- *Agents Act 2003*;
- *Bail Act 1992*;
- *Civil Law (Wrongs) Act 2003*;
- *Confiscation of Criminal Assets Act 2003*;
- *Drugs of Dependence Act 1989*;
- *Legislation Act 2001*;
- *Magistrates Court Act 1930*;
- *Security Industry Act 2003*;
- Security Industry Regulations 2003; and
- *Smoking (Prohibition in Enclosed Public Places) Act 2003*.

The proposed amendments are detailed below.

Agents Act 2003

This amendment corrects a mistaken reference to the 1st business day of the month in section 109 of the Act. The reference is amended to the 10th business day of the month.

Bail Act 1992

The *Bail Amendment Act 2004* amended existing provisions that enabled the Magistrates Court and the Supreme Court to review bail decisions. The intent of the amendments was to prevent successive requests for reconsiderations when there was no basis for a reconsideration, while also providing an avenue for reconsideration of a decision rather than going to appeal. The amendments limited applications for review on the basis of: a significant change in circumstances; or new evidence or information significant to a bail decision.

The amending Bill was edited to ensure that section 43 dealing with the power of the Supreme Court to review decisions contemplated decisions made by any Justice of the court, as opposed to the Justice who first reviewed, or made, a decision. These editorial changes should have removed a reference to a singular judge. The Bill corrects this error by replacing any such references in sections 42 and 43.

Civil Law (Wrongs) Act 2002

Members of the legal profession have identified two provisions in the *Civil Law (Wrongs) Act 2002* where a claimant may be inadvertently disadvantaged by the operation of the sections in their current form.

Section 51 sets out the time period for a claimant to give a respondent a written notice of claim. As currently drafted the provision provides that the notice period ends on the earlier of two specified days. One of these is the day four months after the day the claimant first consults a lawyer. This has the effect that any advice sought, including free preliminary advice provided by Legal Aid or the Law Society duty solicitor, or an informal inquiry to a legally trained acquaintance, may set time running for giving a notice of claim. The Bill amends the section to provide that the time period ends on the day one month after the claimant first instructs a lawyer to act on their behalf. This amendment is consistent with amendments in other jurisdictions.

Section 188 states that a lawyer must not sign a pleading in relation to a claim unless they have filed a certificate stating that the claim has a reasonable prospect of success. The effect of this is that a lawyer must first file the certificate and then later separately sign and file the pleading. In practice, lawyers have construed this strictly, requiring a client to pay the costs of two separate filings of documents. The Bill amends the provision to provide that a lawyer must not lodge or file a pleading unless they have lodged or filed a certificate or the pleading is accompanied by a certificate.

Confiscation of Criminal Assets Act 2003

The *Confiscation of Criminal Assets Act 2003* enables ACT courts to restrain property, income, or assets that form the benefits of crime, or are used to commit crime. Section 29 of the Act sets out the matters to be included in an affidavit made by a police officer that must support an application for a restraining order.

The Bill amends section 29 to clarify that for an affidavit obtained under the section, the police officer is required to state whether they suspect the property is tainted or subject to the alleged offender's effective control.

An issue has been raised in relation to the use of the word "indictment" in the Act. It has been suggested that the use of indictment in the Act is not synonymous with an "information". The *Legislation Act 2001* and the *Crimes Act 1900* define information and indictment synonymously. The Bill removes any doubt that in the context of the *Confiscation of Criminal Assets Act 2003* indictment also means an information.

Drugs of Dependence Act 1989

The Bill makes minor amendments to the *Drugs of Dependence Act 1989* to allow the regulations developed for the *Criminal Code (Serious Drugs Offences) Amendment Act 2004* (Chapter 6) to be the regulations for both the DDA and the Code. This will ensure that the same list applies for the drugs of dependence that may be prescribed by doctors and dispensed by pharmacists and those drugs and plants for which an illicit market exists.

It is proposed to substitute the specific references to the Drugs of Dependence Regulations in the Drugs of Dependence Act with the Criminal Code regulations that will be made early in 2005.

Legislation Act 2001

Section 192 of the *Legislation Act 2001* deals with the question of when a prosecution may begin and provides at paragraph (1)(d) that a prosecution for an offence against section 90 (minor theft) of the *Crimes Act 1900* may begin at any time. The provision is no longer required, given the provisions of section 321 of the Criminal Code 2002 and the decision of the full Federal Court in *Lawson v Gault* [2002] FCAFC 191.

Paragraph 192(1)(d) was inserted into the Legislation Act before the Federal Court decision in *Lawson v Gault*. At that time, there was no offence which a person could be charged with who had stolen less than \$1,000 but whose theft was not discovered for a year or more. Both *Lawson v Gault* and subsection 321(3) of the Criminal Code resolve this difficulty and accordingly, paragraph 192(1)(d) is now redundant. The provision being repealed will continue to apply to offences committed prior to the commencement of the Criminal Code provisions.

As a consequence of the amendment to the word “indictment” in the *Confiscation of Criminal Assets Act 2003*, amendments to the *Legislation Act 2001* have also been prepared to clarify that an indictment presenting a charge of an indictable criminal offence against an accused to the Supreme Court also contemplates an information about any offence against an accused presented to the Magistrates Court.

An amendment was recently made to section 192 of the *Legislation Act 2001*, which intended to place the three categories covered by the section on an equal footing, however it is still the case after the amendment that a prosecution at any time of an offence with a penalty of 100 penalty units is statute-barred against a corporation and an individual who aids and abets a corporation but not against an individual. To ensure that each category under the section is treated equally, section 192 is amended by substituting “more than 100 penalty units” with “100 penalty units or more” at paragraphs (1)(b) and (1)(c).

Section 81 of the Legislation Act is frequently relied on to support transitional administrative arrangements between old and new legislative schemes. However, there is some doubt about the operation of the section in relation to the performance of anticipatory administrative functions to be carried out in relation to entities (such as statutory corporations) that are not yet technically in existence because the establishing legislation has not yet commenced. To remove any doubt, section 81 is amended to expressly extend its operation to cases where powers are to be exercised in relation to entities established under laws that are notified but not yet commenced.

Magistrates Court Act 1930

The Bill amends the *Magistrates Court Act 1930* to increase the statutory time allowed for appeals from 21 days to 28 days and, to allow the Attorney General and the Director of Public Prosecutions to initiate appeals from the Magistrates Court to the Supreme Court on questions of law. The amendment provides for a reference appeal similar to that which exists for the indictable jurisdiction under section 37S of the *Supreme Court Act 1933*.

Security Industry Act 2003

The Bill amends current section 42 of the *Security Industry Act 2003* to state that the requirement to wear a licence does not apply where the regulations require an employee to wear some other form of identification. This amendment is designed to reduce the security risk that may be faced by crowd controllers should their licence, which contains the crowd controller's name and photograph, be pulled off during a confrontation with a disgruntled patron who has been ejected from premises due to inappropriate behaviour or intoxication.

As a consequence of the amendment to section 42, section 41 of the Act, which makes it an offence for a licensee to fail to produce their licence on demand, has been amended. It would be impossible for a person who is wearing another form of identification rather than their licence to produce a licence on demand. The Bill amends section 41 to provide that the offence will only apply where a person is required to wear a licence under section 42.

Security Industry Regulations 2003

Currently, where a security industry provider is granted an exemption under current subsection 42 (3) of the *Security Industry Act 2003* from the requirement to wear their licence, regulation 12 (1) requires that the master licensee (the employer) allocate a unique identification number to their employees who are crowd controllers

To facilitate the efficient identification of individual crowd controllers in the event of a consumer complaint, the Bill amends the regulation 12 to provide that the Commissioner for Fair Trading will issue the identifying number to crowd controllers.

Smoking (Prohibition in Enclosed Public Places) Act 2003

The *Smoking (Prohibition in Enclosed Public Places) Act 2003*, which commences on 1 December 2006, inserts a number of new provisions into the *Liquor Act 1975*. These provisions amend the disciplinary regime set out in the *Liquor Act 1975* so that offences against the *Smoking (Prohibition in Enclosed Public Places) Act 2003* are a ground for the taking of disciplinary action against a liquor licensee.

Sections 31 and 34 (new sections 93A and 116A in the *Liquor Act 1975*) provide for the automatic cancellation of a liquor licence or liquor permit where a licensee or permit holder is convicted of an offence under section 8 of the *Smoking (Prohibition in Enclosed Public Places) Act 2003*. These provisions by-pass the existing disciplinary regime operating under the *Liquor Act 1975* and effectively result in a double penalty being imposed upon a licensee or permit holder for one offence. An automatic cancellation without the benefit of a hearing before the Liquor Board may result in a denial of natural justice for the licensee.

In addition, the penalty of an automatic cancellation of a licence or permit is disproportionate to the offence under the *Smoking (Prohibition in Enclosed Public Places) Act 2003* that triggers the cancellation, which only carries a maximum penalty of 10 penalty units (\$1000). The amendment repeals sections 31 and 34. Licensees

and permit holders will, however, still be subject to the current disciplinary regime if they breach the *Smoking (Prohibition in Enclosed Public Places) Act 2003*.

Outline of Provisions

Part 1 Preliminary

Clause 1 Name of Act

This clause provides that the name of the Act is the Justice and Community Safety Legislation Amendment Act 2004 (No 2).

Clause 2 Commencement

This clause provides that the Act commences on the day after it is notified.

Part 2 Agents Act 2003

Clause 3 Legislation amended – pt 2

Clause 3 provides that Part 2 of the Bill amends the *Agents Act 2003*.

Clause 4 Interest on trust accounts - Section 109(1)

This clause replaces the reference to the “1st” business day of the month with a reference to “10th” business day of the month in subsection 109(1) of the *Agents Act*.

Part 3 Bail Act 1992

Clause 5 Legislation amended – pt 3

Clause 5 provides that Part 3 of the Bill amends the *Bail Act 1992*.

Clause 6 Section 42

This clause substitutes a new section 42 in which references to a “magistrate” are replaced with references to “the Magistrates Court”. The amendment also inserts a new subsection 42 (3) which provides that the power of the Magistrates Court to review a decision under section 42 may be exercised whether or not a power to review the decision under section 38 has been exercised or been sought to be exercised.

Clause 7 Power of Supreme Court to review – Section 43 (2)

Clause 7 replaces the word “court” with the words “Supreme Court” in subsection 43 (2) of the Act.

Clause 8 Power of Supreme Court to review - Section 43 (2) (b)

This clause replaces the words “application to the judge” with “application in relation to bail” in section 43 (2) (b).

Part 4 Civil Law (Wrongs) Act 2002

Clause 9 Legislation amended – pt 4

Clause 9 provides that Part 4 of the Bill amends the *Civil Law (Wrongs) Act 2002*.

Clause 10 Notice of claim Section - 51 (3) (b)

This clause amends paragraph 51 (3) (b) of the Act to provide that the period of time for giving a respondent a notice of claim under the Act ends on the day one month after the claimant first instructs a lawyer to act on their behalf in seeking damages for the personal injury and the respondent is identified.

Clause 11 Certificate of claim or defence has reasonable prospects of success - Section 188 (2)

This clause amends subsection 188 (2) to provide that a lawyer must not lodge or file a pleading in a court in relation to a claim unless the lawyer has lodged or filed, or the pleading is accompanied by, a certificate stating that the lawyer believes, on the basis of provable facts or a reasonably arguable view of the law, that the claim or defence has a reasonable prospect of success.

Part 5 Confiscation of Criminal Assets Act 2003**Clause 12 Legislation amended – pt 5**

Clause 11 provides that Part 5 of the Bill amends the *Confiscation of Criminal Assets Act 2003*.

Clause 13 Key concepts – Part 3 heading, new note 3

Clause 13 inserts a new note into Part 3 that signals to the reader of the legislation that other important concepts are defined in the dictionary to the *Legislation Act 2001*.

Clause 14 Meaning of convicted and quashed – Section 15 (1), notes 1 and 2

This clause replaces notes 1 and 2 to subsection 15 (1) and provides a reference to the definition of the words “indictment” and “found guilty” in the *Legislation Act 2001*.

Note 1 makes clear that an “indictment” includes an information and Note 2 provides that “found guilty” of an offence is defined as including having an offence taken into account under section 357 of the *Crimes Act 1900* and having an order made in relation to the offence under section 402 of the *Crimes Act 1900* or section 96 of the *Children and Young People Act 1999*.

Clause 15 Restraining orders – time for making certain applications – Section 27 (2), notes 1 and 2

This clause replaces notes 1 and 2 to subsection 27 (1) and provides a reference to the definitions for the words “in relation to” and “indictment”.

Note 1 makes a reference to the definition of “in relation to” that is contained in the dictionary to the Act and Note 2 makes clear that an “indictment” includes an information.

Clause 16 Restraining orders over other property – affidavit supporting application - Section 29 (5) (b) (i) and (ii)

Clause 16 amends section 29 by replacing subparagraphs 29 (5) (b) (i) and (ii). The new provisions require that an officer suspects that property is tainted or suspects that the property is subject to the offender’s effective control when making an application for a restraining order over property.

Clause 17 Dictionary, note 2

Clause 17 inserts the word “present” into Note 2 in the Dictionary to the Act.

Clause 18 Dictionary, definition of *present*

Clause 18 omits the definition of the word present in the Dictionary to the Act.

Clause 19 Further amendments, new note

This clause inserts a new note, which makes a reference to the definition of the word “indictment” in the *Legislation Act 2001* and clarifies that an indictment includes an information into sections 16 (1), 17, 29 (1), 31 (2), 47 (6), 48 (5), 67 (5), and 85 (3) of the Act.

Part 6 *Drugs of Dependence Act 1989***Clause 20 Legislation amended – pt 6**

Clause 20 provides that Part 6 of the Bill amends the *Drugs of Dependence Act 1989*.

Clause 21 Interpretation for Act - Section 3 (1), definition of *drug of dependence*

This clause provides a new definition of the term “drug of dependence”. Drug of dependence is defined as a substance prescribed by regulation as a drug of dependence for this definition.

Clause 22 Section 3 (1), definition of *prohibited substance*

This clause provides a new definition of the term “prohibited substance”. Prohibited substance is defined as a substance prescribed by regulation as a prohibited substance for this definition.

Clause 23 Definitions for pt 2 - Section 4, definition of *drug of dependence*

This clause provides a new definition of the term “drug of dependence”. Drug of dependence is defined as a substance prescribed by regulation as a drug of dependence for this definition.

Part 7 *Legislation Act 2001***Clause 24 Legislation amended – pt 7**

Clause 24 provides that Part 7 of the Bill amends the *Legislation Act 2001*.

Clause 25 Exercise of powers between notification and commencement – Section 81 (2)

Clause 25 replaces existing subsection 81 (2) and inserts new subsections 81 (2A) and 81 (2B). The new subsection 81 (2) expressly extends the application of the section to the exercise of anticipatory powers in relation to entities that are not yet established.

New subsection 81 (2A) restates existing s 81 (2) in substantially the same form. New subsection 81 (2B) further clarifies the operation of section 81 by providing that in order to work out the way in which an anticipatory power may be exercised, the un-commenced law is taken to have commenced.

Clause 26 Section 81

This clause provides for the renumbering of subsections when the Act is next republished.

Clause 27 When must prosecutions begin? - Section 192 (1) (c) and (d)

Clause 27 repeals paragraph at 192 (1) (d) as it is now redundant and inserts a full stop at the end of paragraph 192 (1) (c). The clause also amends section 192 by substituting the words “more than 100 penalty units” with “100 penalty units or more” at paragraphs (1)(b) and (1)(c).

Clause 28 Dictionary, part 1, new definition of *present*

Clause 28 inserts a definition of “present” into the dictionary to the Act. The definition clarifies that to present an indictment includes to lay an information.

Part 8 Magistrates Court Act 1930**Clause 29 Legislation amended – pt 8**

Clause 29 provides that Part 8 of the Bill amends the *Magistrates Court Act 1930*.

Clause 30 Jurisdiction of Supreme Court - Section 207 (1) (a) and (b)

This clause provides that the appellate jurisdiction of the Supreme Court with respect to decisions of the Magistrates Court under the *Magistrates Court Act 1930* extends to the hearing and determination of appeals to which Divisions 3.10.2 (Appeals in criminal matters) and 3.10.2A (Reference appeals in criminal matters) apply, and appeals from decisions of the Magistrates Court by way of order to review under Division 3.10.3 (Orders to review in criminal matters).

Clause 31 Institution of appeal - Section 209 (1)

This clause replaces the phrase “21 days” with phrase “28 days”.

Clause 32 New division 3.10.2A

Clause 32 inserts a new division 3.10.2A into the Act to provide for reference appeals in criminal matters.

New section 219A defines what constitutes a reference appeal by reference to new section 219AB (2). New section 219AB provides that where a person has been tried on indictment and acquitted, the Supreme Court may hear and decide any question of law arising at or in relation to the trial. An application can be made by the Attorney General or the Director of Public Prosecutions and must be made within six weeks after the end of the trial.

New section 219AC provides that a person charged at trial or affected by a decision in a trial may be heard in a reference appeal. New section 219AD provides that the decision on a reference appeal does not invalidate or effect any verdict or decision given at the trial.

Clause 33 Grant of order nisi to review - Section 219C (1)

This clause replaces the phrase “21 days” with phrase “28 days”.

Clause 34 Dictionary, new definition of *reference appeal*

This clause inserts a definition of the words “reference appeal” into the dictionary to the Act.

Part 9 Security Industry Act 2003

Clause 35 Legislation amended – pt 9

Clause 35 provides that Part 9 of the Bill amends the *Security Industry Act 2003*.

Clause 36 Sections 41 and 42

Clause 36 inserts redrafted sections 41 and 42 into the Act.

The redrafted section 41 provides that the offence under subsection 41 (1) (a) (iii) (of failing to produce a licence on request) does not apply to a person who wears another form of identification provided for under subsection 42 (3) (a).

The redrafted section 42 provides that subsection 42 (1) does not apply to a person who wears another form of identification provided for under subsection 42 (3) (a).

Part 10 Security Industry Regulations 2003

Clause 37 Legislation amended – pt 10

Clause 37 provides that Part 10 of the Bill amends the Security Industry Regulations 2003.

Clause 38 Definitions for pt 4 - Section 10, definition of *identification number*

Clause 38 inserts a new definition of “identification number” into section 10 of the Regulation.

Clause 39 Section 12

Clause 39 inserts a redrafted section 12 into the regulation, which provides that the Commissioner for Fair Trading must allocate a unique identification number to a crowd controller.

Part 11 Smoking (Prohibition in Enclosed Public Places) Act 2003

Clause 40 Legislation amended – pt 11

Clause 40 provides that Part 11 of the Bill amends the *Smoking (Prohibition in Enclosed Public Places) Act 2003*.

Clause 41 Section 31 and 35

Clause 41 repeals sections 31 and 35 of the Act.