CRIMINAL PROCEEDS CONFISCATION BILL 2002 —AMENDMENTS IN COMMITTEE

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Amendment

The amendments have the following objectives:

- To amend the *Criminal Proceeds Confiscation Bill 2002* to ensure the provisions of that Bill are consistent with other Acts, to provide for legal representation at hearings conducted without notice, and to permit applications for monitoring orders to be made without notice;
- To amend the Criminal Code to validate the presentation of indictments by persons other than Crown Prosecutors;
- To amend the conditions for approved trustee companies which are contained in part 2 of schedule 2 of the *Trustee Companies Act 1968.*

Reasons for the objectives and how they will be achieved

Amendments to Criminal Code

The power for the Director of Public Prosecutions to present an indictment is in sections 560 (Presenting indictments) and 561 (Ex-officio informations) of the Criminal Code. Section 560 of the Criminal Code provides:

> *(a) When a person charged with an indictable offence has been committed for trial and it is intended to put the person on trial for the offence, the charge is to be reduced to writing in a document which is called an indictment.*

(b) The indictment is to be signed and presented to the court by a Crown Law Officer or some other person appointed in that behalf by the Governor in Council.

Section 561 of the Criminal Code provides:

(a) A Crown Law Officer may present an indictment in any court of criminal jurisdiction against any person for any indictable offence, whether the accused person has been committed for trial or not.

(b) *An officer appointed by the Governor in Council to present indictments in any court of criminal jurisdiction may present an indictment in that court against any person for any indictable offence within the jurisdiction of the court, whether the accused person has been committed for trial or not and against any person for an indictable offence who with the person's prior consent has been committed for trial or for sentence for an offence before that court.*

The people who are entitled to sign indictments are a Crown Law Officer (that is, the Attorney-General and the DPP), people holding a commission to prosecute from the Governor in Council and people appointed as Crown Prosecutors. (Under section 24 of the *Director of Public Prosecutions Act 1984*, a person appointed as a Crown Prosecutor is taken to be appointed by the Governor in Council).

It is the practice of the office of the Director of Public Prosecutions for indictments signed by a Crown Prosecutor to be presented to the Court by someone other than that particular Crown Prosecutor, including by an unadmitted clerk. This practice has occurred over many years and has been accepted by the courts and legal profession.

The assumption that this practice is a valid one is supported by the comments of Connolly J in *R v Bright and Others* (1980) 31 ALR 496. In that case, the defence challenged the validity of an indictment presented in the Supreme Court of Queensland by a barrister who was not appointed under the *Judiciary Act 1903* as a person in whose name indictable offences against the Commonwealth could be prosecuted. The indictment had been signed by a person who was so appointed.

The meaning of "signed and presented" under section 560 was discussed, although ultimately the case was decided on the basis of the meaning of section 69 of the *Judiciary Act 1903*, which provided for prosecution "by indictment in the name of the Attorney-General of the Commonwealth or of such other person as the Governor-General

appoints in that behalf". Section 69 does not refer to an indictment being "presented", although later sections refer to an indictment being "filed".

In the Court of Appeal Connolly J said of section 560, at page 504:

First it by no means follows that section 560 requires the presentation to the court by the designated officers in person. The indictment operates as the equivalent of the true bill found by the grand jury. For myself, I should have thought that if the indictment is authenticated as required by law and presented to the court either by manual delivery, as is the practice in Queensland, or by filing, as would appear to be the practice in Victoria, the requirements of section 560 would be satisfied. Thus section 353 of the Crimes Act 1958 (Vic) required presentment at the Supreme Court or County Court by a law officer or a prosecutor in the name of a law officer for any indictable offence recognisable by such courts. In R v Parker [1977] VR 22 at 29, Young CJ discussed the requirement of making presentment at the court. His Honour said: "Some public act whereby the formal accusation is brought to the attention of the court is, I think, required. On the other hand, I see no reason why a prosecutor should personally file a presentment or be present in court when a presentment signed by him is handed to the associate or otherwise filed in the court. He may authorize this part of the procedure to be performed on his behalf." [Emphasis added].

The validity of this practice has now been challenged in the Court of Appeal in a case in which judgment is to be delivered on or after Friday 6 December 2002.

If the challenge is successful the validity of criminal proceedings, including convictions and imprisonment, may be compromised. Such a result is unacceptable. Consequently, the Criminal Code is to be amended to reflect the practice of the courts over many years.

Amendments to the Trustee Companies Act 1968

On 13 August 2002, Trust Company of Australia Limited (TCA) and Permanent Trustee Company Limited (Permanent) announced their intention to merge. Following the merger, Permanent will become the wholly owned subsidiary of TCA.

To enable the merger to proceed some of the conditions contained in part 2 of schedule 2 of the *Trustee Companies Act* 1968 are to be amended or omitted. In addition, to ensure consistency some conditions attached to other approved trustee companies are to be removed.

Administrative cost to Government of implementation

The amendments will not have any cost implication to Government.

Consistency with Fundamental Legislative Principles

Amendments to the Criminal Code

The legislation will have retrospective effect in order to validate past prosecutions, assuming those prosecutions have otherwise been conducted fairly. The courts and the legal profession for many years without challenge have accepted the practice in question.

The validating clause does not validate any other procedural irregularities, only the presentation of indictments and the consequences of these indictments. An offender does not lose any rights in relation to challenging any other aspect of the trial process.

The legislation will also affect the appellant in the pending Court of Appeal decision, in that effectively a potentially successful ground of appeal will be addressed after argument but before the Court's decision. However, as is discussed above, the clauses will validate an existing accepted practice and only if the trial was otherwise fair.

Trustee Companies Act 1968

The amendments are consistent with fundamental legislative principles.

CONSULTATION

Amendments to the Criminal Code

The proposed provisions were released generally for consultation on 6 November 2002. However, because of the pending Court of Appeal decision no results of consultation are available.

The Director of Public Prosecutions has been consulted about the provisions.

Amendments to the Trustee Companies Act 1968

Queensland Treasury and the Department of the Premier and Cabinet were consulted about the proposed amendments.

Permanent, TCA, ANZ Executors & Trustee Company Limited, Perpetual Trustees Australia Limited and Perpetual Trustees Queensland Limited have been consulted about the amendments.

NOTES ON AMENDMENT

Amendment1 amends the commencement provision of the Bill.

Amendment 2 amends clause 30 to allow a lawyer to represent a person permitted to be present at an application for a restraining order under Chapter 2 which is made without notice. The amendment will allow lawyers employed by the Queensland Police Service or other law enforcement agencies to be present when an application is made for a restraining order. It will also permit the State to brief members of the private bar to appear for the State in such applications.

Amendment 3 amends clause 121 to allow a lawyer to represent a person permitted to be present at an application for a restraining order under Chapter 3 which is made without notice. The amendment will allow lawyers employed by the Queensland Police Service or other law enforcement agencies to be present when an application is made for a restraining order. It will also permit the State to brief members of the private bar to appear for the State in such applications.

Amendment 4 amends clause 296 so that section 119C of the *Crime and Misconduct Act 2001* will provide that applications for a monitoring order by an authorised commission officer may be made without notice.

Amendment 5 amends clause 300 so that the definitions of "confiscation related evidence" and "forfeiture proceeding" in the *Crime and Misconduct Act 2001* are the same as the definitions of the terms in the *Police Powers and Responsibilities Act 2000.*

Amendment 6 inserts a new Part 3A into the Bill.

The new Part 3A amends the Criminal Code by providing for the presentation of indictments by a 'DPP presenter'.

A 'DPP presenter' is defined in the new section 559A to mean a person, other than a Crown Prosecutor, appointed or employed in, or engaged by, the Office of the Director of Public Prosecutions who is authorised in writing by the Director of Public Prosecutions to present an indictment for the director'.

New clause 300D provides for the amendment of section 560 (Presenting indictments). Section 560 provides for the presentation of indictments after committal. There are two changes in section 560. Firstly, the language of the section has been amended to clearly state that Crown Prosecutors may sign and present indictments.

Section 560 (3) provides that an indictment may be signed and presented in the Supreme or District Court by the Director of Public Prosecutions and Crown Prosecutors. The Attorney-General has also a specific power to present indictments (section 7(1)(a) of the *Attorney-General Act 1999*). Section 560(3) and (4) have been amended to clarify that both the Attorney-General and the Director of Public Prosecutions have the power to present indictments in both the Supreme and District Courts. Previously, section 560(3) and (4) only referred to the Director of Public Prosecutions.

A new sub-section (5) will allow a DPP presenter to present indictments signed in accordance with 560 (1) and (2). However, this person will have no power to initiate a prosecution by signing an indictment.

New clause 300E amends section 561 (Ex officio informations).

In the heading to section 561 the term 'information' is changed to 'indictment'. The original difference between the terms was that an indictment resulted from a proceeding from a grand jury and informations were initiated by law officers of the Crown or by private prosecutions with the leave of the court. (*R v Slator (1881) 8 QBD 267)*

The other variation on the term was a presentment that was based on the situation where a grand jury returns a document making formal accusation of a crime not on the basis of evidence found by a grand jury to be credible (an indictment) but upon the grand jury's personal knowledge of the facts (a presentment) (see *R v Nicola* 79 ALR 469).

The distinction is no longer valid in Queensland especially since the heading of 561 (information) is not reflected in the body of the section (indictment). The High Court noted in 1938 that the term indictment in the case of Australia had always been used in the wider sense (*R v Federal Court of Bankruptcy; ex parte Lowenstein* (1938) 59 CLR 556).

Section 561 provides the power for Crown Law Officers (the Attorney-General and the Director of Public Prosecutions) to present indictments where the accused person may not have been committed for trial. The language in section 561(2) has been amended to conform to the terms used in section 560. A new sub-section (3) provides for authorised DPP presenters to present indictments signed by a person under section 561(1) and (2).

New clause 300F amends section 562 (Arrest of person charged in ex-officio information) to insert 'indictment' in the heading.

New clause 300G amends 563 (Nolle prosequi) to ensure the terms used conform to section 560 and 561.

New clause 300H amends section 695 (Practice to be applied on ex officio information) to insert 'indictment' in the heading.

New clause 300J inserts a transitional provision for the *Criminal Proceeds Confiscation Bill 2002*. New section 715 provides retrospective validation for all indictments presented by a person appointed or employed or engaged by the Office of the Director of Public Prosecutions who was not authorised under an Act to present indictments. The indictment was taken to have been presented by the Director of Public Prosecutions and the proceedings taken or done in relation to the indictment were take to be done to an indictment presented by the director.

Amendment 7 inserts a new clause 322A in the Bill which amends section 116 of the *Police Powers and Responsibilities Act 2000* to make it clear that an application for a monitoring order by a police officer may be made without notice. Such applications have always been made covertly in the past although the legislation did not contain a specific provision to ensure a closed court.

Amendment 8 amends clause 327 of the Bill to include the omission of the current definition of "property-tracking document" in the amendments made by that clause.

Amendment 9 inserts amendments to the *Trustee Companies Act 1968* in schedule 4 of the Criminal Proceeds Confiscation Bill 2002 which amend part 2 of schedule 2 of the *Trustee Companies Act 1968* by removing conditions attaching to the approval of ANZ Executors & Trustee Company Limited, Perpetual Trustees Australia Limited, Perpetual Trustees Queensland Limited and Trust Company of Australia Limited (TCA) and Permanent Trustee Company Limited (Permanent).

For ANZ Executors & Trustee Company Limited, Perpetual Trustees Australia Limited and Trust Company of Australia Limited (TCA) the amendments remove the following conditions:

- restrictions preventing minors from owning shares;
- requirements that the companies must have local boards of directors; and
- provisions that provide for the automatic cessation of approval to operate as trustee companies and unlimited members' liability if the companies breach certain conditions.

For Perpetual Trustees Queensland Limited the following conditions in schedule 2 part 2 of the Act are removed:

- the restriction preventing minors from owning shares; and
- the requirement that the companies must have local boards of directors.

The amendments also remove the condition attaching to Permanent's approval as a trustee company in paragraph (a) of Part 2 of Schedule 2 which prohibits a member of Permanent from holding more than 15% of the issued capital of the company and reduce the minimum paid up capital requirement for Permanent from $5,000,000 to $2,000,000.

In addition, the amendments to the *Trustee Companies Act 1968* change the shareholding restriction in paragraph (a) of Part 2 of Schedule 2 of the Act for TCA to provide that a member cannot be the beneficial holder of more than 15% of the share capital for TCA.

Amendment 10 inserts a new Schedule 4A in the Bill which contains a definition of "de facto partner" consistent with the definition proposed in the *Discrimination Law Amendment Bill 2002*. Once the *Discrimination Law Amendment Bill 2002* commences the definition of "de facto partner" will be removed and the *Acts Interpretation Act 1954* will be able to be relied on for interpreting the meaning of the term.

Amendment 11 makes consequential amendments to Schedule 5 of the Bill which contains the Dictionary to amend the definition of "de facto partner" and omit the definition "related by family" as a result of the inclusion of the definition of "de facto partner" in Schedule 4A. A consequential amendment to the definition of "spouse" is also made to make it clear that for the purposes of the Bill the term "spouse" includes persons who have previously lived in that relationship with a defendant and persons who are or have been de facto partners.