

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL CRIME AUTHORITY AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

(Circulated by the authority of the Attorney-General,
the Honourable Michael Duffy MP)

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OUTLINE

The National Crime Authority Amendment Bill amends the National Crime Authority Act 1984 ("the NCA Act").

The Bill will insert provisions which will enable the National Crime Authority ("the NCA") to prohibit in certain circumstances, the disclosure of the existence of, or any information about, summonses or notices issued under the NCA Act or any proceedings or matters connected with them.

The provisions are designed to prevent people whose activities are under investigation by the NCA from becoming aware of the investigation. This has happened in the past when, for example, financial institutions received summonses or notices relating to their clients affairs and felt legally obliged to inform their client. On being told of the receipt of such process, suspects have concealed or destroyed evidence or gone into hiding, thus frustrating NCA investigations. This amendment aims to prevent this happening in the future and clarifies the legal position of bodies such as financial institutions.

The amendment will also ensure that people's safety is not threatened, or their reputation or fair trial is not prejudiced by others revealing the existence of NCA process, or any information about it or proceedings connected with it.

The amendment contains a number of safeguards. Depending on the particular case, disclosure can be permitted in the circumstances specified in the notation restricting disclosure. Additionally, the amendment guarantees that disclosure can always be made to obtain legal advice, legal aid, or instructions in relation to waiving legal professional privilege or to comply with any legal duty of disclosure arising from the legal practitioner/ client relationship. Further, the prohibition on disclosure will only apply for

five years or until the investigation is concluded, whichever occurs first. In other words, if before the expiry of 5 years, if the investigation is concluded and the NCA has been advised by the prosecuting authority that no prosecution will be undertaken, or there is no evidence of an offence, or in other cases criminal proceedings arising from the investigation have been commenced, then the prohibition will no longer apply. Where this occurs, the NCA will be obliged to notify those to whom the summons or notice was addressed.

The provision has been designed in a way which is consistent with the NCA's desire to be more open and accountable. Instead of a blanket prohibition, this provision will only apply where a decision is made to restrict disclosure in a particular case.

The Bill also makes amendments which will enable the NCA to apply for a warrant of apprehension where a person fails or refuses to appear at an NCA hearing. This will correct a present anomaly under the Act that a warrant of apprehension can be issued where a person has absconded, is likely to abscond, or is otherwise likely to attempt to evade service of a summons, but not where a person fails or refuses to attend the actual hearing.

Finally, the proposed amendment will also allow the Chairman of the NCA, rather than the Attorney-General, to appoint counsel to the NCA, and will enable the NCA to pass information concerning its general investigations in a particular jurisdiction to the relevant member of the NCA Inter-Governmental Committee ("the IGC").

FINANCIAL IMPACT STATEMENT

It is not expected that these amendments will have any significant financial impact.

NOTES ON CLAUSES

Clause 1 - Short title etc.

1. This is a formal clause providing for the citation of the legislation and naming the Principal Act as the NCA Act.

Clause 2 - Disclosure of summons or notice etc. may be prohibited

2. This clause inserts a new section, s 29A into the NCA Act. Under this proposed section a member of the NCA can, in certain circumstances, prohibit recipients of summonses or notices issued under ss 28 and 29 from disclosing the existence of these documents, or any details about them or any official matter connected with them, to others.

3. Under s 29A(1), a member issuing a summons or notice will make a notation on individual process documents prohibiting the recipient from disclosing any information about the process or associated official matters, except in circumstances which may be specified by the member. This section, combined with the new s 29B(1), is designed to ensure that recipients of these documents are prohibited from disclosing not only any information about the summons or notice, but also from disclosing any information which would indicate the existence of the NCA reference or investigation or any proceedings connected with them.

4. Section 29A(2) prescribes the circumstances in which the member may make the notation prohibiting disclosure on summonses or notices. Members can only include such a notation if they are satisfied that disclosure would prejudice the safety, reputation or fair trial of a person or the effectiveness of an investigation, or that disclosure is otherwise contrary to the public interest.

5. Section 29A(3) provides that if the NCA has concluded an investigation and it has been advised by the prosecuting authority that no prosecution will be undertaken or that there is no evidence of an offence, then the notation is automatically cancelled and the prohibition will no longer apply. This also occurs in the same circumstances where criminal proceedings have been commenced. This provision operates where 5 years has not elapsed since the issue of the summons or notice. Section 29B(5) has the effect of ending the prohibition after 5 years.

6. Proposed s.29A(4) provides that where the notation is cancelled under s.29A(3), the NCA must serve a notice on each person who was served with or given the summons or notice

7. Proposed s 29A(5) ensures that, in the event of any inconsistency with a direction given under s 25(9), the notation made under s 29A(5) has no effect to the extent of the inconsistency. S.25(9) allows the NCA to make directions at NCA hearings restricting or prohibiting the publication of evidence, the contents of documents, or information provided to it to which might identify a person giving evidence or about to give evidence. Sections 29A and 29B are designed to restrict disclosure of the existence of process issued prior to the hearing.

Clause 3 - Offences of Disclosure

8. Clause 3 inserts a new s 29B into the NCA Act. This clause prohibits disclosure except in certain specified circumstances which provide safeguards for people served with NCA process.

9. Under the proposed new s 29B(1), disclosure of any information about the summons or notice or any official matter connected with them is prohibited. This is designed to ensure that no information which might even suggest the existence of the NCA investigation can be communicated to others unless this is permitted under these provisions.

10. Section 29B(2) provides for disclosure in certain circumstances. Under this section, a person receiving NCA process containing a non-disclosure notation may disclose the existence of the process where it is:

- . in accordance with the circumstances, if any, specified in the notation;
- . to a legal practitioner to obtain legal advice or representation;
- . to a legal aid officer to obtain legal or financial assistance under s 27;
- . to an officer or agent of a body corporate to enable compliance with the process; or
- . if the person is a legal practitioner, to allow compliance with a legal duty of disclosure arising from the practitioner's professional relationship with the client or to enable the legal practitioner to obtain instructions in relation to waiving legal professional privilege.

11. These people to whom disclosure can be made are, in turn, prohibited from disclosing the existence of the process under s 29B(3). Under s 29A(4), however, they may make disclosures for the following purposes:

- . officers or agents of a body corporate may make disclosures to ensure compliance with the process or obtain legal advice or legal aid;
- . legal practitioners may make disclosures to give legal advice or make representations;
- . legal aid officers may make disclosures to obtain legal advice or representation.

This provision is designed to ensure that people receiving NCA process are able to comply with that process and are not denied their legal rights.

12. The safeguards contained in ss 29B(3) and (4) are consistent with similar provisions contained in s 74 of the Proceeds of Crime Act 1987. Section 74 provides for a prohibition on the disclosure of monitoring orders by financial institutions except for the purpose of obtaining legal advice, providing information under the order and ensuring compliance with it.

13. Under s 29B(5), the section ceases to apply to NCA process when the Authority issues a notation is cancelled under s.29A(3) or when 5 years lapse after the issue of the process, whichever occurs first. This has the effect of making the prohibition inapplicable after that time.

14. The proposed s 29B(6) is designed to ensure that the notation preventing disclosure is interpreted as widely as possible so no information at all about the process, the investigation or any proceedings connected with it, or anything that might imply that an investigation is being conducted, can be disclosed (except as permitted).

15. Section 29B(7) contains the definitions of "legal aid officer" and "official matter". "Official matter" defines the range of NCA activity covered by the prohibition. It includes information relating to references, investigations, NCA hearings and court proceedings.

16. Proposed ss 29A and 29B are intended to clarify the position of those receiving summonses or notices (such as financial institutions) who may feel bound to notify their client of receipt of the document. The amendment will help to

prevent people under investigation by the NCA from being alerted and concealing or destroying evidence or going into hiding as has happened in the past when people were informed of the existence of such process. It will also help to protect people's safety and reputation and their right to a fair trial.

Clause 4 - Warrant for arrest of witness

17. Clause 4 amends s 31 of the NCA Act to enable the NCA to apply for the issue of a warrant of apprehension to secure the attendance of a witness at an NCA hearing where the person fails or refuses to appear. This corrects an anomaly under the NCA Act whereby the NCA has power to apply for a warrant of apprehension under s 31 where a summons has been issued and the person has absconded, is likely to abscond, or is otherwise likely to attempt to evade service of a summons, but not where the person fails or refuses to appear at a hearing.

Clause 5 - Counsel assisting Authority

18. Clause 5 of the Bill amends s 50 of the NCA Act to allow the Chairman of the NCA, instead of the Attorney-General, to appoint counsel to assist the Authority. This amendment is consistent with recent moves to devolve similar powers to authority heads to improve efficiency.

Clause 6 - Furnishing of reports and information

19. Clause 6 of the Bill inserts a new s 59(1A) into the NCA Act which authorises the NCA to pass information concerning its general investigations in a State or Territory directly to the relevant State or Territory Minister who is a member of the IGC. This overcomes the present anomaly that information on general investigations in a State or Territory can be provided directly to the relevant State or Territory law enforcement agencies, but only information concerning a specific investigation initiated by a State reference may be

provided to the State or Territory Minister. Technically, under the provision as it stands, law enforcement officers could know the details of general investigation, but the Ministers they serve would not.