

1991

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

SERVICE AND EXECUTION OF PROCESS AMENDMENT BILL 1991

EXPLANATORY MEMORANDUM

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

SERVICE AND EXECUTION OF PROCESS AMENDMENT BILL 1991

OUTLINE

This Bill amends the Service and Execution of Process Act 1901 to provide for interstate service of subpoenas issued by investigative tribunals.

2. An investigative tribunal, for the purposes of the Bill, will be persons appointed by a State Governor or under a State law, and bodies established under a State law, for the purpose of inquiring into and reporting on matters where those persons or bodies have the power to take evidence on oath or affirmation.

3. The Bill will enable the Supreme Court of a State or Territory to -

- . give leave to serve interstate a subpoena requiring attendance at, or provision of documents or things to, an investigative tribunal; and
- . authorise the interstate apprehension of a person who has failed to comply with such a subpoena.

FINANCIAL IMPACT

4. The Bill is expected to have no impact on Commonwealth expenditure or revenue.

NOTES ON CLAUSES

Division 1: Preliminary

Clause 1: Short title

5. This clause provides for the short title of the Act and defines 'Principal Act' to mean the Service and Execution of Process Act 1901.

Clause 2: Commencement

6. The Act is to commence on the day on which it receives the Royal Assent.

Clause 3: Mode of proof of service

7. This clause provides that the method of proof of service of process for the purposes of new Part 3A is not governed by section 17 of the Principal Act.

Clause 4: Backing of warrant for execution out of the State or part of the Commonwealth in which it was issued.

8. This clause ensures that a warrant to which Division 4 of new Part 3A applies does not have to be endorsed before being executed interstate.

Clause 5:

9. Clause 5 inserts new Part 3A after section 19C of the Principal Act.

New section 19D: Interpretation

10. This clause defines certain words and expressions used in the Bill. The principal definitions are:

'evidence that relates to matters of state' broadly includes matters that, in a court, could be the subject of a claim of public interest privilege at common law.

'investigative tribunal' is defined to mean persons appointed by a Governor of a State (or Administrator of a Territory) or under State (or Territory) law, or a body established under a State (or Territory) law, for the purpose of inquiring into and reporting on any matter, where the person or body is authorised to take evidence on oath or affirmation. The definition excludes a court and any person exercising a power as a judge, magistrate, coroner or officer of a court.

New section 19E: Copies

11. Several new provisions allow a copy of a document to be served or produced. This section defines a copy to mean a completely legible facsimile or photocopy, that is identical with the original in all material respects.

New section 19F: Territories regarded as States

12. This section has the effect that references in the new Part to States include the Territories.

New section 19G: Crown to be bound

13. This section provides for the Crown in all its capacities to be bound by the new Part.

New section 19H: Extension to external Territories

14. This section extends the new Part to all external Territories.

New section 19J: Limitations on power of court to give leave etc

15. This section requires that a court must be satisfied, before giving leave for a subpoena to be served interstate, making an order for production of a prisoner or making an order authorising the apprehension of a person, that the evidence sought is relevant and, except in relation to expert evidence, cannot reasonably be obtained from a person within the State. The court must be satisfied, where the evidence may relate to matters of state, that the public interest in having the evidence available to the tribunal outweighs the public interest in preserving its secrecy or confidentiality. The court is to have regard to the purpose and subject matter of the function being performed by the tribunal.

New section 19K: Proof of service

16. This section provides that service of process under the Part may be proved by affidavit or any means of proof available with respect to service in the State of issue of the process.

Division 2 - Service of subpoenas generally

New section 19L: Application of Division

17. This section provides that Division 2 applies to a subpoena to give oral evidence before, or to produce a document or thing to, an investigative tribunal, that is addressed to a person who is not in prison, or to a person in prison who is required only to provide documents or things.

New section 19M: Order for leave

18. This section enables a State Supreme Court to give leave for service outside the State of a subpoena issued in that State. In granting leave, the Court must impose a condition that it not be served after a specified day, and may impose other conditions.

New section 19N: Service of subpoena

19. This section provides that interstate service of a subpoena may be effected and has the same force and effect as if it had been served in the State in which the subpoena was issued. It also requires that a notice in accordance with Form 1 in the Fifth Schedule be served with the subpoena.

New section 19P: Expenses

20. This section provides that service of a subpoena is not effective unless there is paid or tendered to the person served, not later than a reasonable time before the time for compliance with the subpoena, money or money and vouchers sufficient to meet the person's reasonable expenses of complying with the subpoena.

New section 19Q: Obligation to meet expenses

21. This section requires the State in which the tribunal is established to pay the expenses reasonably incurred by a person in complying with a subpoena. The amount of these expenses is the amount determined under State law or, if no provision is made by State law, the amount the witness would be entitled to if subpoenaed to give evidence in the Supreme Court of that State.

New section 19R: Subpoenas not requiring attendance

22. This section enables a person subpoenaed only to produce documents or things to comply with the subpoena by delivering them to the secretary of the tribunal not less than 24 hours before the date for compliance.

Division 3 - Service of subpoenas
addressed to persons in prison

New section 19S: Application of Division

23. This section provides that Division 3 applies to a subpoena, other than one only requiring production of documents or things, addressed to a person in prison.

New section 19T: Order for production

24. Under this section, where a subpoena has been issued the Supreme Court of the State of issue may order the custodian (that is, the person in charge of the place where the prisoner is detained) to produce the prisoner at the time and place specified for compliance with the subpoena.

New section 19U: Service of orders for production

25. This section provides for service of copies of the order for production, the subpoena and a notice on the custodian and the prisoner. Once served the custodian must comply with the order for production unless the prisoner ceases to be in prison before the time for compliance. A prisoner who is released from prison in sufficient time before the time for compliance with the subpoena to be able reasonably to comply with the subpoena must comply with it subject to paragraph 19V(2)(b) (which relates to expenses).

New section 19V: Expenses

26. This section provides that service of an order for production is not effective unless there are paid or tendered to the custodian the money and money or vouchers for the expenses the prisoner would incur in complying with the subpoena if he or she were not a prisoner. The custodian must pay or tender the money and vouchers received to the prisoner if before the time for compliance with the order for production he or she ceases to be in prison. If they are not paid or tendered within a reasonable time, the person is not required to comply with the subpoena.

27. The section also requires the State in which the order was made to pay the expenses reasonably incurred by the custodian or escort arranged by the custodian, or any person keeping the prisoner in custody in connection with compliance with the order.

New section 19W: Custody of prisoner

28. This section provides that the custodian, and any escort arranged by the custodian, have custody of the prisoner and the necessary powers to ensure compliance with the order and the subsequent return of the prisoner to his or her imprisonment.

29. Under this section the law of the State in which the person is in prison relating to the liability of a person who escapes from lawful custody applies to a prisoner (other than a Commonwealth prisoner) while outside the State for the purposes of compliance with the order for production.

30. Escape of a Commonwealth prisoner is governed by Commonwealth law. While a prisoner is outside the State in which he or she is serving a sentence in prison, he or she is deemed to be serving that sentence so long as the person remains in the custody of, or custody arranged by, the custodian or escort.

Division 4 - Execution of Warrants

New section 19X: Warrants issued by tribunals

31. This section provides that Division 4 applies to warrants that have been issued because of non-compliance with a subpoena served interstate, and to warrants issued because of non-compliance with a subpoena served intrastate where the Supreme Court of the State or Territory of issue of the warrant makes an order authorising the apprehension of the person named in the warrant.

32. No order is needed in relation to warrants relating to interstate subpoenas because there was Supreme Court scrutiny at the time of granting leave for interstate service of the subpoena.

New section 19Y: Person subject to warrant may be apprehended

33. This section provides that a person named in a warrant may be apprehended in another State or Territory.

New section 19Z: Procedure after apprehension

34. This section provides that the person apprehended must be taken before a magistrate in the State where the person was apprehended as soon as practicable after apprehension.

35. The magistrate may remand the person on bail to appear in the State of issue of the warrant, order that the person be taken in custody to that State, or release the person. The effect of orders may be suspended.

New section 19ZA: Procedure on remand on bail

36. This section provides for the making of an instrument setting out the conditions to which the grant of bail is subject, and for revocation of bail for refusal on the part of the person bailed to sign the instrument or failure to comply with a condition of bail.

New section 19ZB: Review

37. This section enables either the apprehended person or a person to whom the warrant was directed to apply to the Supreme Court of the State in which an order has been made by a magistrate under clause 19Z for a review of the order. The review is to be by way of rehearing.

New section 192C: Custody of person etc

38. This section enables a person who has the custody of a person ('the apprehended person') under a court order to require a person in charge of a prison to receive and keep the apprehended person in custody, and to surrender custody of that person as required.

39. The section also provides that the law of the State of issue of the warrant relating to escape from lawful custody applies to a person being taken to that State under a court order.

New section 192D: Release of persons unnecessarily detained

40. This section enables a person taken in custody pursuant to an order under this Division to apply to the Supreme Court of the State of issue of the warrant for release from custody. If the court is satisfied that it is not necessary to hold the person in custody to secure his or her attendance to give evidence or to produce the document or thing required by the subpoena, it may order that the person be released from custody, and remand the person on bail to appear before the tribunal.

New section 192E: Laws applicable to grant of bail etc

41. This section provides that the law of a State in which a person has been apprehended, or has applied for an order under new section 192D (which relates to release from custody) applies with respect to the granting of bail under this Division. The laws with respect to bail of the State where bail is granted apply with respect to the person bailed.

42. The section also provides that money received in proceedings for the enforcement of bail may be retained by the State or Territory where the bail condition which was breached was imposed.

Division 5 - Miscellaneous

New section 19ZF: Matters of state

43. This section applies in applications for leave to serve a subpoena interstate, for an order for production of a prisoner or for an order authorising the apprehension of a person, where the evidence, document or thing sought by the subpoena or order may contain evidence relating to matters of state (as defined in new section 19D).

44. Before the court can give the leave or make the order sought, the applicant must have given at least 14 days notice of the proceedings, and the issue of the subpoena, to the Attorneys-General for the Commonwealth, the State in which the tribunal is established and the State in which the person concerned is located. The Commonwealth and any State whose Attorney-General was notified are entitled to intervene in the proceedings. The court may direct that such proceedings be held in camera.

New section 19ZG: Claim of public interest not precluded

45. This section provides that the fact that leave has been granted or an order made under this Part does not affect any claim in proceedings before the tribunal that certain evidence is subject to public interest privilege.

New section 19ZH: Effect on other provisions of this Act

46. This section provides that the new Part does not affect the interpretation of other Parts of the Principal Act.

Fifth Schedule

47. The Fifth Schedule contains notices, required to be served with a subpoena served interstate, setting out the rights and obligations of the person served.

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