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1993

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

COPYRIGHT AMENDMENT (RE-ENACTMENT) BILL 1993

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Justice,
the Hon Duncan Kerr MP)

COPYRIGHT AMENDMENT (RE-ENACTMENT) BILL

GENERAL OUTLINE

The purpose of this Bill is to re-enact certain provisions of the *Copyright Amendment Act 1989* ('the Amending Act'). Legal advice to the Government by the Chief General Counsel is that the whole of the Amending Act has been invalidated as a result of the decision in *Australian Tape Manufacturers Association Ltd v The Commonwealth* (1993) 112 ALR 53; a decision handed down by the High Court in March 1993. This is due to the operation of s. 55 of the Constitution.

The Court held by majority that the royalty levied on vendors of blank audio tapes was a tax. The need for this Bill arises from the view of the Chief General Counsel that the effect of the first paragraph of s. 55 of the Constitution in this situation is that all the non-tax provisions of the entire Amending Act were thereby invalidated. Additionally, in this decision the Court held that the non-taxing and the taxing provisions (the royalty) were inextricably linked thus also invalidating the provisions imposing the royalty.

The Bill re-enacts the Amending Act in such a way as to re-enact all its provisions from the date of their purported commencement except for those related to the blank audio tape royalty scheme. Those provisions are not dealt with in this proposed legislation.

The effect of the passage of this Bill will be that all the changes to the *Copyright Act 1968* ('the Principal Act') purportedly made by the Amending Act will be re-enacted except those amendments made by sections 16 and 20 of the Amending Act. Those amendments related solely to the blank audio tape royalty. References in section 195B of the Principal Act to section 135ZZU will also be removed. The latter provision is one inserted by section 16 of the Amending Act and it would be misleading and pointless for reference to it in section 195B to remain.

FINANCIAL IMPACT STATEMENT

The amendments effected by this Bill will have no impact on Commonwealth expenditure.

NOTES ON CLAUSES

Clause 1 - Short title

1. This provision sets out the short title of the Bill. When enacted, it will be cited as the *Copyright Amendment (Re-enactment) Act 1993*.

Clause 2 - Commencement

2. This clause provides for the Bill to commence on Royal Assent. However, because it is re-enacting the Amending Act the clause also deems the commencement of the re-enacted provisions as from dates set out in the Schedule to the Bill. Provisions of the Amending Act were variously commenced on 1 October 1989, 29 January 1990, 1 July 1990, 2 July 1990, and 1 October 1990. The actual commencement of the Bill will therefore be when it receives the Royal Assent. However, once that Assent is given, certain of the provisions will be applied retrospectively from the dates of the commencement of the provisions being re-enacted.

Clause 3 - Interpretation

3. This is a machinery clause providing definitions of 'Amending Act' and 'Principal Act'. The two defined terms are short forms of, respectively, the *Copyright Amendment Act 1989* and the *Copyright Act 1968*.

Clause 4 - Re-enactment of certain provisions of Amending Act

4. This clause amends the Principal Act by reference to amendments made by the Amending Act. The provisions incorporated by reference are; sections 3 to 14, 17, 18, 21, 23, 24, 26 and 28 of the Amending Act and the Schedule to the Amending Act.

5. These provisions deal with such matters as the long title to the Principal Act, interpretation, amendment of the definition of 'performance' in section 27 of the Principal Act, fair dealing with copyright materials, copying of works in the Australian Archives, the mechanical licence provisions, amendment to the copyright provisions relating to the *Designs Act 1906* and unregistered designs by substituting new sections 74, 75 and 77 of the Principal Act, amendment of section 111 of the Principal Act in relation to filming or recording broadcasts for private use, the addition of new Part VA (Copying of Broadcasts by Educational and Other Institutions) and

the addition of new Part XIA providing for a regime of performers' rights. The Schedule to the Amending Act makes a substantial number of technical amendments to the Principal Act consequent upon the primary amendments.

Clause 5 - Insertion of new Part VB

6. Section 15 of the Amending Act inserted new Part VB in the Principal Act. Clause 5 of the Bill re-enacts this insertion of the new Part by reference to section 15 of the Amending Act. It does not re-enact the whole of section 15 of the Amending Act. Rather, it adopts the amendments made by section 15 of the Amending Act without being concerned about a now irrelevant conditional preamble related to the placement of the new Part.

7. Part VB contains provisions for a licence for the copying of works, etc, by educational and other institutions.

Clause 6 - Insertion of new sections 153C and 153D

8. This clause re-enacts the insertion of new sections 153C and 153D in the Principal Act, by reference to section 19 of the Amending Act. This clause adopts the amendments to the Principal Act made by section 19 of the Amending Act without being concerned about a now irrelevant conditional preamble related to the placement of the new sections.

9. Sections 153C and 153D deal with the procedures for application to the Copyright Tribunal in respect of records notices and sampling notices (dealt with in section 135ZV and subsection 135ZW(1) respectively of the Principal Act - provisions inserted as part of new Part VB).

Clause 7 - Review of certain decisions.

10. This clause adds new section 195B to the Principal Act. It re-enacts the substantive terms of section 22 of the Amending Act, except that the new section 195B inserted does not include references to section 135ZZU. The latter section was purportedly inserted in the Principal Act by section 16 of the Amending Act. Section 16 of the Amending Act is not proposed to be re-enacted by this Bill since all the provisions added under that section relate to the blank tape royalty.

Clause 8 - Application and repeal of section 200A

11. This clause re-enacts the operative provisions of section 25 of the Amending Act that were to apply if (as, in fact, occurred) new Part VA was commenced prior to new

Part VB. Section 25 of the Amending Act dealt with certain transitional arrangements. It made an amendment to section 200A of the Principal Act that applied until both new Parts VA and VB had been commenced.

Clause 9 - Inspection of records and declarations retained by libraries, archives or institutions

12. Subclause 9(1) will re-enact the terms of paragraphs 27(1)(a) to (p) of the Amending Act. These clauses were to apply if (as, in fact, occurred) new Part VA was commenced prior to new Part VB.
13. The provisions in subsection 27(2) of the Amending Act were to apply if Part VB were commenced first. As they were never operative they are not re-enacted.
14. Subclause 9(2) will re-enact the terms of paragraphs 27(3)(d) to (f) of the Amending Act by reference to those provisions. The amendments were stated as applying whether Part VA or Part VB commenced first or whether they were commenced on the same day. These possible alternatives were set out in paragraphs (a) to (c). Those paragraphs are now irrelevant and are not re-enacted.
15. The amendments in paragraphs 27(1)(a) to (p) of the Amending Act made changes to section 203E of the Principal Act consequent upon the new statutory licensing schemes established by the amendments elsewhere in the Amending Act.
16. Paragraphs 27(3)(d) to (f) made changes to section 203E of the Principal Act by omitting some provisions and providing for a defence to an offence.

Clause 10 - Savings

17. This clause re-enacts the amendment to the Principal Act made by section 29 of the Amending Act. This was a technical amendment associated with copying under arrangements displaced by the changes in the Amending Act.
18. The amendment set out in section 29 of the Amending Act provided that the Principal Act as in force prior to 29 January 1990 continues to apply in relation to a copy of a television broadcast made in reliance on section 200A of the Principal Act. It also provided and that the Principal Act in force prior to 1 July 1990 continued to apply in relation to a copy of a work or other subject matter made in reliance on various provisions of the Act repealed by various of the provisions of the Amending Act.

19. The provisions referred to are set out as continuing to apply for a period of four years after the day on which the relevant copy was made.

20. It is proposed to re-enact the amendments made by section 29 of the Amending Act as a matter of caution, and consistently with the objective of re-enacting the effect of the Amending Act (other than the blank audio tape royalty).

Clause 11 - Regulations

21. Following the enactment of the Amending Act a number of Regulations have been made. This clause provides that any Regulations made under any provision purported to have been amended by the Amending Act or made under the authority of a provision purported to have been added by the Amending Act, is to be taken as having been made under the authority of this legislation. The provision thereby removes any doubt there might be as to the validity of Regulations so made.

Clause 12 - Repeal of Amending Act

22. This clause repeals the Amending Act. The provision is included for greater caution since opinions as to the effect of a judicial decision may vary, and, as a guide to those without a detailed knowledge of the reason for the Bill.

The Schedule

23. The Schedule to the Bill sets out a table of, respectively, the provision of the Amending Act setting out the terms of the amendment, the provision of the Bill enacting the amendment and the date of deemed commencement of those provisions. The dates shown in the table are the same as the dates on which the respective provisions of the Amending Act were, under that Act, proclaimed to commence.



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